

**COLOMBIA – INDICATIVE PRICES AND RESTRICTIONS
ON PORTS OF ENTRY**

Report of the Panel

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<i>Canada – Periodicals</i>	Appellate Body Report, <i>Canada – Certain Measures Concerning Periodicals</i> , WT/DS31/AB/R, adopted 30 July 1997, DSR 1997:I, 449

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<i>Canada – Periodicals</i>	Panel Report, <i>Canada – Certain Measures Concerning Periodicals</i> , WT/DS31/R and Corr.1, adopted 30 July 1997, as modified by Appellate Body Report, WT/DS31/AB/R, DSR 1997:I, 481
<i>Canada – Wheat Exports and Grain Imports</i>	Appellate Body Report, <i>Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain</i> , WT/DS276/AB/R, adopted 27 September 2004, DSR 2004:VI, 2739
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<i>Chile – Alcoholic Beverages</i>	Appellate Body Report, <i>Chile – Taxes on Alcoholic Beverages</i> , WT/DS87/AB/R, WT/DS110/AB/R, adopted 12 January 2000, DSR 2000:I, 281
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<i>Chile – Price Band System (Article 21.5 – Argentina)</i>	Appellate Body Report, <i>Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products – Recourse to Article 21.5 of the DSU by Argentina</i> , WT/DS207/AB/RW, adopted 22 May 2007
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<i>Dominican Republic – Import and Sale of Cigarettes</i>	Appellate Body Report, <i>Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes</i> , WT/DS302/AB/R, adopted 19 May 2005, DSR 2005:XV, 7367
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<i>EC – Bananas III</i>	Appellate Body Report, <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas</i> , WT/DS27/AB/R, adopted 25 September 1997, DSR 1997:II, 591
<i>EC – Bananas III (Ecuador)</i>	Panel Report, <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas, Complaint by Ecuador</i> , WT/DS27/R/ECU, adopted 25 September 1997, as modified by Appellate Body Report, WT/DS27/AB/R, DSR 1997:III, 1085
<i>EC – Bananas III (Guatemala and Honduras)</i>	Panel Report, <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas, Complaint by Guatemala and Honduras</i> , WT/DS27/R/GTM, WT/DS27/R/HND, adopted 25 September 1997, as modified by Appellate Body Report, WT/DS27/AB/R, DSR 1997:II, 695

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<i>EC – Bananas III (US)</i>	Panel Report, <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas, Complaint by the United States</i> , WT/DS27/R/USA, adopted 25 September 1997, as modified by Appellate Body Report, WT/DS27/AB/R, DSR 1997:II, 943
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<i>EC – Hormones (Canada)</i>	Panel Report, <i>EC Measures Concerning Meat and Meat Products (Hormones), Complaint by Canada</i> , WT/DS48/R/CAN, adopted 13 February 1998, as modified by Appellate Body Report, WT/DS26/AB/R, WT/DS48/AB/R, DSR 1998:II, 235
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<i>Guatemala – Cement I</i>	Appellate Body Report, <i>Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico</i> , WT/DS60/AB/R, adopted 25 November 1998, DSR 1998:IX, 3767
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<i>India – Autos</i>	Appellate Body Report, <i>India – Measures Affecting the Automotive Sector</i> , WT/DS146/AB/R, WT/DS175/AB/R, adopted 5 April 2002, DSR 2002:V, 1821

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<i>India – Patents (US)</i>	Appellate Body Report, <i>India – Patent Protection for Pharmaceutical and Agricultural Chemical Products</i> , WT/DS50/AB/R, adopted 16 January 1998, DSR 1998:I, 9
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<i>Japan – Apples</i>	Appellate Body Report, <i>Japan – Measures Affecting the Importation of Apples</i> , WT/DS245/AB/R, adopted 10 December 2003, DSR 2003:IX, 4391
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<i>Japan – Film</i>	Panel Report, <i>Japan – Measures Affecting Consumer Photographic Film and Paper</i> , WT/DS44/R, adopted 22 April 1998, DSR 1998:IV, 1179
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<i>Korea – Dairy</i>	Appellate Body Report, <i>Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products</i> , WT/DS98/AB/R, adopted 12 January 2000, DSR 2000:I, 3
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<i>Turkey – Rice</i>	Panel Report, <i>Turkey – Measures Affecting the Importation of Rice</i> , WT/DS334/R, adopted 22 October 2007
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<i>US – 1916 Act (Japan)</i>	Panel Report, <i>United States – Anti-Dumping Act of 1916, Complaint by Japan</i> , WT/DS162/R and Add.1, adopted 26 September 2000, upheld by Appellate Body Report, WT/DS136/AB/R, WT/DS162/AB/R, DSR 2000:X, 4831
<i>US – Carbon Steel</i>	Appellate Body Report, <i>United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany</i> , WT/DS213/AB/R and Corr.1, adopted 19 December 2002, DSR 2002:IX, 3779
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<i>US – Certain EC Products</i>	Appellate Body Report, <i>United States – Import Measures on Certain Products from the European Communities</i> , WT/DS165/AB/R, adopted 10 January 2001, DSR 2001:I, 373

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<i>US – Corrosion-Resistant Steel Sunset Review</i>	Appellate Body Report, <i>United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan</i> , WT/DS244/AB/R, adopted 9 January 2004, DSR 2004:I, 3
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<i>US – Section 301 Trade Act</i>	Panel Report, <i>United States – Sections 301-310 of the Trade Act of 1974</i> , WT/DS152/R, adopted 27 January 2000, DSR 2000:II, 815
<i>US – Shrimp (Article 21.5 – Malaysia)</i>	Appellate Body Report, <i>United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 of the DSU by Malaysia</i> , WT/DS58/AB/RW, adopted 21 November 2001, DSR 2001:XIII, 6481
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<i>US – Shrimp (Thailand) / US – Customs Bond Directive</i>	Appellate Body Report, <i>United States – Measures Relating to Shrimp from Thailand / United States – Customs Bond Directive for Merchandise Subject to Anti-Dumping/Countervailing Duties</i> , WT/DS343/AB/R, WT/DS345/AB/R, adopted 1 August 2008

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<i>US – Superfund</i>	Panel Report, <i>United States – Taxes on Petroleum and Certain Imported Substances</i> , adopted 17 June 1987, BISD 34S/136

I. INTRODUCTION

1.1 On 12 July 2007, Panama requested consultations with Colombia pursuant to Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU"), Article XXII:1 of the General Agreement on Tariffs and Trade 1994 ("*GATT 1994*") and Article 19.1 and 19.2 of the Agreement on Implementation of Article VII of the *GATT 1994* ("*Customs Valuation Agreement*") with respect to enacted Colombian customs regulations on the importation of certain textiles, apparel and footwear classifiable under HS Chapters 50-64 of Colombia's Tariff Schedule and arriving from Panama.¹ Panama and Colombia held consultations on the measures on 31 July 2007. However, no mutually agreed solution was found.

1.2 On 14 September 2007, Panama requested the establishment of a panel pursuant to Article 19.1 of the *Customs Valuation Agreement*, and Article 6.2 of the DSU.

1.3 At its meeting on 22 October 2007, the DSB established a panel pursuant to the request of Panama in document WT/DS366/6, in accordance with Article 6 of the DSU.

1.4 The Panel's terms of reference are the following:

"To examine, in the light of the relevant provisions of the covered agreements cited by Panama in document WT/DS366/6, the matter referred to the DSB by Panama in that document, and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements."²

1.5 The parties agreed to the following composition of the Panel effective as of 8 February 2008:

Chairman: Mr Gary Horlick

Members: Mr Gonzalo Biggs
Mr Miguel Rodriguez Mendoza

1.6 China, Ecuador, the European Communities, Guatemala, Honduras, India, Chinese Taipei, Turkey and the United States reserved their rights to participate in the Panel proceedings as third parties.

1.7 The Panel held its first substantive meeting with the parties on 21 and 22 May 2008. The session with the third parties was held on 22 May 2008. The second substantive meeting was held on 29 July 2008.

1.8 On 10 October 2008, the Panel issued the descriptive part of its Panel report to the parties in both English and Spanish. The Panel issued its interim report to the parties on 4 March 2009. The Panel issued its final report to parties on 15 April 2009.

II. FACTUAL ASPECTS

A. BACKGROUND

2.1 This dispute concerns several Colombian customs measures affecting certain textiles, apparel and footwear classifiable under HS Chapters 50–64 of Colombia's Tariff Schedule that are exported and re-exported from the Colon Free Zone ("CFZ") and Panama to Colombia.³ These measures

¹ WT/DS366/1.

² WT/DS366/7.

³ The CFZ, which is located at the Caribbean entrance to the Panama Canal nearest the Atlantic Ocean, plays a central role in the re-export of goods to markets in Central and South America and the Caribbean region.

include the use of indicative prices in customs procedures and restrictions on ports of entry available to subject textiles, apparel and footwear.

2.2 On 29 June 2005, Colombia's customs authority, the Dirección de Impuestos y Aduanas Nacionales de Colombia ("DIAN"), issued the first of several resolutions establishing indicative Free On Board ("f.o.b.") prices for a number of products, including certain textiles, apparel and footwear classifiable under HS Chapters 50–64, and arriving from Panama, China and other countries.⁴ Shortly thereafter, on 12 July 2005, Colombia introduced a measure requiring those subject textiles, apparel and footwear originating in or arriving from Panama and China to enter only at Bogota airport or Barranquilla seaport.⁵

2.3 On 20 July 2006, Panama requested consultations under the DSU with Colombia concerning the use of indicative prices and restrictions on ports of entry.⁶ On 1 December 2006, Panama notified the DSB that it had reached a Mutually Agreed Solution with Colombia in accordance with Article 3.6 of the DSU⁷, under which Colombia repealed the measures at issue and the parties concluded a customs cooperation agreement, entitled the "Protocol of Procedure for Cooperation and Exchange of Customs Information between Customs Authorities of the Republic of Panama and the Republic of Colombia" ("Customs Cooperation Protocol").⁸ Under the Customs Cooperation Protocol, which entered into force in November 2006⁹, the parties agreed to launch a programme of cooperation and mutual assistance for the purpose of investigating and preventing customs law infringements in both countries. Additionally, officials agreed to hold periodic meetings to assess the effectiveness of the Customs Cooperation Protocol.

2.4 On 26 June 2007, Colombia enacted several customs measures similar in nature to those enacted previously in June and July of 2005, despite the earlier enactment of the Customs Cooperation Protocol. These measures also established indicative prices for textiles, apparel and footwear arriving into Colombia from all countries, except those with which Colombia had signed free trade agreements, as well as port restrictions on importation of textiles, apparel and footwear arriving from the CFZ and Panama. On 12 July 2007, Panama requested consultations with Colombia concerning the latest application of indicative prices and restrictions on entry of textiles, apparel and footwear arriving from Panama and the CFZ. Panama also requested consultations concerning a requirement that importers provide an advance declaration and clear customs for all textiles, apparel and footwear arriving from Panama prior to their arrival in Colombia.¹⁰ These measures are the subject of the present dispute and are discussed in further detail below.

The CFZ is considered the largest duty-free zone in the Americas, and by Panamanian estimates, it generates more than US\$15 billion annually (see Panama's first written submission, para. 2).

⁴ See Resolution No. 05474 of 29 June 2005 (footwear); Resolution No. 08628 of 20 September 2005 (stockings and socks); Resolution No. 08743 of 22 September 2005 (textiles); and Resolution No. 11439 of 29 November 2005 (textile articles). Indicative prices were also applied to other categories of imports via the following resolutions: Resolution No.07908 of 1 September 2005 (balls); Resolution No. 09477 of 12 October 2005 (electrical and gas domestic appliances); Resolution No. 10760 of 15 November 2005 (matches and lighters); Resolution No. 10953 of 18 November 2005 (blankets and travelling rugs); Resolution No. 11285 of 25 November 2005 (exercise books); Resolution No. 3218 of 6 April 2006 (paper); and Resolution No. 4953 of 18 May 2006 (toys of pile fabrics, stuffed or unstuffed).

⁵ Resolution No. 05796 of 7 July 2005, Resolution No. 12465 of 21 December 2005 and Resolution No. 06691 of 22 June 2006.

⁶ WT/DS348/1.

⁷ WT/DS348/10.

⁸ Exhibit PAN-1.

⁹ Exhibit PAN-1.

¹⁰ Resolution No. 7373 of 2007.

2.5 Textiles, apparel and footwear imported from the CFZ and Panama into Colombia are significant both in terms of volume and value.¹¹ Colombia has reported significant ongoing problems with under-invoicing and smuggling in relation to these products, with particular emphasis placed on those arriving from the CFZ and Panama.¹² The Colombian Unidad de Información y Análisis Financiero (UIAF)¹³ has established links between money-laundering, contraband and under-invoicing in Colombia arising from the introduction of goods into Colombia purchased in the CFZ with illicit US currency.¹⁴ The United Nations, International Monetary Fund and other Member countries have also assessed the relationship between the CFZ and the Colombian Black Market Peso Exchange, a trade-based laundering mechanism.¹⁵

B. THE USE OF INDICATIVE PRICES IN RELATION TO TEXTILE, APPAREL AND FOOTWEAR

2.6 Colombia amended its Customs Statute and introduced indicative prices as a subcategory of reference prices on 30 December 2004.¹⁶ On 29 June 2005 and subsequently, on 26 June 2007, Colombia enacted a number of resolutions mandating the use of indicative prices with respect to certain textile, apparel and footwear imports originating in all countries, except those with which Colombia had signed free trade agreements.¹⁷

¹¹ However, both parties disagree as to the value of these imports. For instance, Panama reports that re-exports of subject goods from the CFZ to Colombia reached US\$413,290 millions (60,792 tonnes) in 2005 and US\$483,587 million (67,486 tonnes) in 2006 (see Exhibit PAN-56). Colombia, in turn, reports imports of subject goods from Panama of US\$104,926 million (47,226 tonnes) in 2005 and US\$132,584 million (38,486 tonnes) in 2006 (see Exhibit COL-45).

¹² Colombia cites the wide discrepancies between Panama's reported volume and value of bilateral trade with Colombia in comparison to Colombian figures. Colombia considers this discrepancy, which it terms as "distortions", as evidence of the existence of the under-invoicing and smuggling pertaining to goods arriving from the CFZ and Panama into Colombia. In this regard, Colombia reports US\$381 million for the whole universe of products from Panama in 2005 and US\$415 million in 2006 (see Exhibit COL-38). Colombia notes that Panama has reported exports to Colombia of almost three times this value (US\$1,055 million and US\$1,241 million, respectively) during this same period (see Exhibit PAN-56). Based on these discrepancies, Colombia reports that, while exports arriving from Panama account for approximately 2.1 per cent of the total imports into Colombia, these exports represent 10 per cent of the total distortions of the value of imports that entered Colombia in 2006. Colombia reports that exports from the United States represented 32.2 per cent of distortions, goods from ALADI, 27.7 per cent, goods from Europe, 20.4 per cent and goods from Asia, 9.7 per cent (see Exhibit COL-48, pp. 15-16). Data referred to in footnote 11 above shows a similar phenomenon in relation to textiles, apparel and footwear. For instance, in 2006 the reported value of Panamanian exports of these goods to Colombia was almost four times higher than the reported value of Colombian imports from Panama for the same period (see Exhibits COL-38, COL-16 and Exhibit PAN-56). Generally, Colombia has claimed that 84.27 per cent of the total trade with Panama and the CFZ in the course of 2006, was contraband trade, and that that figure rises to 89 per cent in the case of textiles (see Colombia's first written submission, para. 196).

¹³ The UIAF is the "Unidad de Información y Análisis Financiero," an entity of the Colombian Government created by Ley 526 of 1999 for the purpose of preventing, detecting and fighting money laundering and financial terrorism (See Colombia's first written submission, para. 200, footnote 172).

¹⁴ Colombia's first written submission, para. 203; Exhibit COL-21.

¹⁵ See United Nations, Office on Drugs and Crime, *Crime and Development in Central America*, p. 69 (May 2007), quoted in Colombia's first written submission, para. 192, footnote 162; International Monetary Fund, Panama: Detailed Assessments of Observance of Standards and Codes for Banking Supervision, Insurance Supervision, and Securities Regulation, *IMF Country Report No 07/67*, at 198-9 (Feb. 2007); International Narcotics Control Strategy Report, 2008, US Bureau of International Narcotics and Law Enforcement Affairs, Volume 2, Money Laundering and Law Enforcement Affairs.

¹⁶ See Article 2 of Decree No. 4431 of 30 December 2004, that modified Article 128.5 of Decree No. 2685 of 1999 (Exhibit COL-1).

¹⁷ Colombia has implemented indicative prices with respect to fabrics classifiable under Chapters 52, 54, 55, 56, 58, 59, 60, under Resolution No. 7510 of 26 June 2007, as modified by Resolution No. 11412 of 28 September 2007 (Exhibit PAN-9); garments classifiable under Chapters 61, 62, 63, under Resolution No. 7511 of 26 June 2007 (Exhibit PAN-10); footwear classifiable under Chapter 64, under

2.7 Colombian legislation defines an indicative price as a reference price¹⁸ established by administrative act for use as a control mechanism on the declared f.o.b. value of imported goods.¹⁹ Indicative prices are applied according to the type of goods and are calculated based on the average production costs of the imported goods, when available, or otherwise, on the lowest price actually negotiated or offered for importation of the good into Colombia. Indicative prices may be imposed (i) upon petition by domestic producers or importers of like products that are affected by unfair competition; (ii) when customs authorities identify unfair competition practices; or (iii) when the DIAN or the Directorate for Customs determines that indicative prices are necessary, based on sectoral studies, risk profiles or in pursuance of a particular policy.²⁰

2.8 Indicative prices are used at the time of presentation of the customs declaration. Pursuant to Colombian customs law, foreign goods imported into Colombia must remain in customs custody, and thus will not be released, until an importer presents an import declaration and pays customs duties, sales tax and penalties.²¹ Under Colombian tax law, sales tax on imported goods is calculated based on the same value used to determine customs duties.²² Sales tax for domestic goods is based on the transaction value.²³ Upon presentation of the import declaration for goods subject to indicative prices, if the declared f.o.b. value is lower than the indicative price, release of the goods will not be authorized unless the importer corrects the value on the declaration on the basis of the indicative price and pays customs duties and sales tax on this basis.²⁴

2.9 An importer is allotted a maximum of five days to correct the declared value and pay customs duties and sales tax, and is not given any opportunity at this time to submit evidence to demonstrate that the declared value represents the actual transaction value of the goods.²⁵ If the importer does not

Resolution No. 7509 of 26 June 2007, as modified by Resolution No. 11414 of 28 September 2007 (Exhibit PAN-8); and sports footwear classifiable under Chapter 64, under Resolution No. 7512 of 26 June 2007, as modified by Resolution No. 11415. Indicative prices are also applied to other products, including paper and cartons, under Resolution No. 7513 of 26 June 2007 (Exhibit PAN-12); tyres under Resolution No. 2671 of 18 March 2008 (Exhibit COL-48, pg. 5); jet-skies, under Resolution No. 2672 of 18 March 2008 (Exhibit COL-48); polyethylene and polypropylene, under Resolution No. 4449 of 20 May 2008 (Exhibit COL-48, p. 5); electrical appliances, under Resolution No. 11413 of 28 September 2007 (Exhibit COL-48); and automobile piston rings, under Resolution No. 2820 of 28 March 2006 (Exhibit COL-48).

¹⁸ "Reference prices", in turn, are defined in Article 237 of Decree No. 2685 of 1999 as "the prices established by the Customs Directorate taken with an indicative character in order to control the value declared for identical or similar goods during the inspection process" (Exhibit COL-1).

¹⁹ See Article 237 of Decree No. 2685 of 1999 (Exhibit COL-1).

²⁰ See Methodology for the Determination of Reference Prices, sections 2.1, 2.2, 2.3 and 3.1 (Exhibit PAN-18).

²¹ See Articles 112 and 120-124 of Decree No. 2685 of 1999 (Exhibit COL-1). The definition of the term release ("levante") is set forth in Article 1 of that Decree as the act by the customs authority that allows the interested parties to dispose of the goods, once that the legal requirements have been met or, if so required, the guarantee has been paid.

²² Article 459 of Colombia's Tax Statute (Exhibit COL-3).

²³ Article 447 of Colombia's Tax Statute (Exhibit COL-3). An exception to that general rule is established in Article 453. According to this provision, in the cases in which there is no invoice or equivalent document, or the invoice or equivalent document shows a price lower than the market price, the taxable base shall be determined on the basis of the market price, unless proven otherwise.

²⁴ See Article 128.5 e) of Decree No. 2685 of 1999 (Exhibit COL-1) and Article 172.7 of Resolution No. 4240 of 2000 (Exhibit COL-2).

²⁵ See Article 128.5 e) of Decree No. 2685 of 1999 (Exhibit COL-1) and Article 172.7 of Resolution No. 4240 of 2000 (Exhibit COL-2). In cases of goods not subject to indicative prices, an importer may have the opportunity to present additional documents to support the declared value, post a guarantee or correct the import declaration, in order to obtain the release of the goods (see, e.g., Article 128.5(a), (b) and (c) of Decree No. 2685 of 1999 (Exhibit COL-1) and Article 172.3, 172.4 and 172.5 of Resolution No. 4240 of 2000 (Exhibit COL-2); see also Colombia's response to Panel question No. 26). As explained, in the case of

correct the declared value or pay customs duties and sales tax based on the indicative price, the importer will need to reshipe the goods in question within a period of one month or the goods will be considered "legally abandoned".²⁶ Whenever an importer opts to correct the import declaration and pays customs duties and sales tax based on indicative prices, the goods will be released and the relevant documents are submitted to the División de Fiscalización Aduanera.²⁷ This initiates the "control posterior" process.²⁸

2.10 The declared purpose of the "*control posterior*" process is to verify, after the release of the goods, the customs value declared by the importer, in order to determine the correct dutiable base.²⁹ Upon receipt of the declaration and documentation, the *División de Fiscalización* will conduct the "*estudio de valor*" in order to assess the declared customs value of the imported goods.³⁰ According to Colombian legislation, this assessment is based on the value at the time of physical inspection or presentation of the import declaration³¹ and is conducted in accordance with the principles set forth in Articles 1 to 8 of the *Customs Valuation Agreement*.³² The conclusions of the "*estudio de valor*" are presented in a report which includes, *inter alia*, the "definitive" customs value resulting from that assessment and an explanation of the methods applied in determining such customs value.³³

2.11 The "*control posterior*" process allows for two possible outcomes. If the División de Fiscalización determines through the estudio de valor that the final customs value corresponds to the value originally declared by the importer, the importer will be entitled to a refund of the payment in excess made at the time of the release.³⁴ The importer must file a request for reimbursement.³⁵ No timeline is provided for provision of the refund, although in three specific cases presented in this

goods subject to indicative prices, when the importer has declared a price lower than the indicative price, the only option available is to correct the import declaration when a controversy arises.

²⁶ See Article 115 of Decree No. 2685 of 1999 (Exhibit COL-1) as modified by Article 10 of Decree No. 2557 of 6 July 2007 (Exhibit PAN-30). Under Article 115 of Decree No. 2685 of 1999 (Exhibit COL-1), as modified, goods which arrive in Colombia for importation may remain in storage for up to one month during completion of customs procedures, or for two months in exceptional cases authorized by customs authorities. Upon expiry of this period, goods that are not removed are considered to be legally abandoned. One month after the goods are deemed to be legally abandoned, DIAN is authorized to dispose of the goods in question. See also Colombia's response to question No. 4(a)(ii) from Panama; Exhibit PAN-66.

²⁷ Article 128.5 e) of Decree No. 2685 of 1999 (Exhibit PAN-6).

²⁸ Paragraph 3 of Article 172 of Resolution No. 4240 of 2000 (Exhibit COL-2). This provision indicates that the "control posterior" starts automatically. This automatic nature of the control posterior is reflected in an example submitted by Colombia, where the Grupo Importaciones de la Administración Local de Aduanas de Medellín sent *ex officio* the importer's file to the División de Fiscalización (see Exhibit COL-9). However, in two separate cases submitted to the Panel by the parties, the "control posterior" was initiated upon request of the importer (see Exhibit COL-8 and PAN-53).

²⁹ Article 3.1. of the Manual de Valoración – Orden Administrativa 0005 (Exhibit COL-36); see also Colombia's response to Panel question No. 28.

³⁰ See paragraph 3 of Article 172 of Resolution No. 4240 of 2000 (Exhibit COL-2); Article 3.6 of the Manual de Valoración – Orden Administrativa 0005 (Exhibit COL-36); see also Exhibit COL-41.

³¹ Article 222 of Resolution No. 4240 of 2000 (Exhibit PAN-21).

³² See Articles 3.6.4 and 3.6.5 of the Manual de Valoración – Orden Administrativa 0005 (Exhibit COL-36). Articles 237, 247 and 259 of Decree No. 2685 of 1999 and Articles 174-217 of Resolution No. 4240 of 2000 also make direct reference to the methods provided for in the *Customs Valuation Agreement* (see Exhibit COL-1 and Exhibit COL-2). Furthermore, the valuation methods provided for in the *Customs Valuation Agreement* are explicitly referenced in Articles 1-5 of Andean Community ("CAN") Decision 571 (Exhibit COL-5) and Articles 3-47 of CAN Resolution 846 (Exhibit COL-6).

³³ Article 3.8 of the Manual de Valoración – Orden Administrativa 0005 (Exhibit COL-36).

³⁴ Article 548(a) of Decree No. 2685 of 1999 (Exhibit COL-1). It is worth noting, as Colombia acknowledged, the customs value determined during the control posterior will in almost all cases be different from the indicative price. This is so because indicative prices are established for broad categories of products and do not take into account all factors determining the customs value, such as transportation charges (see Colombia's response to question No. 4 from Panama).

³⁵ Article 548(a) of Decree No. 2685 of 1999 (Exhibit COL-1).

dispute, importers did not receive refunds for more than two years since the initiation of the *control posterior*.³⁶ Alternatively, if the *División de Fiscalización* determines that the final customs value is higher than the value originally declared by the importer, it will issue a "*Requerimiento Especial Aduanero*"³⁷ including a proposed "*Liquidación Oficial*".³⁸ At this time, the importer may dispute the proposed liquidation and provide further evidence supporting the value originally declared.³⁹ If the importer successfully disputes the proposed liquidation, the importer is entitled to a refund of the sums paid in excess during the initial presentation of the import declaration.⁴⁰ However, if the importer does not respond to the *Requerimiento*, or the response is considered to be unsatisfactory, the Customs Administration will issue a "*Liquidación Oficial de Revisión de Valor*", which contains the final determination of the customs value.⁴¹ To the extent that the importer is not satisfied with the Customs Administration's determination as published in the "*Liquidación Oficial de Revisión de Valor*", the importer may challenge this administrative act before the administrative authorities through a "*Recurso de Reconsideración*".⁴²

C. RESTRICTION ON PORTS OF ENTRY AND INTERNATIONAL TRANSIT RULES APPLICABLE TO TEXTILES, APPAREL AND FOOTWEAR ARRIVING FROM PANAMA

2.12 Colombian customs law permits customs authorities to limit access to ports of entry whenever authorities are not satisfied of their ability to fully exercise their powers of control and verification.⁴³ On these grounds, although Colombia has 26 ports of entry for international trade⁴⁴, it has limited imports of textile and apparel imports to 11 ports of entry.⁴⁵

2.13 Textiles, apparel and footwear classifiable under Chapters 50-64 of the Colombian Tariff Schedule originating in or arriving from Panama and the CFZ, which are imported into Colombia, are subject to additional temporary limitations. Under Article 2 of Resolution No. 7373 of 22 June 2007⁴⁶, as modified by Resolution No. 7637 of 28 June 2007⁴⁷, subject textiles, apparel and footwear may only be entered at Bogota airport or Barranquilla seaport.⁴⁸ However, the general

³⁶ In Exhibit COL-8, the importer requested initiation of the control posterior in 28 April 2006, which concluded on 22 February 2008. In a separate case, discussed in Exhibit PAN-53 and Exhibit COL-49, the importer requested initiation of the control posterior on 10 July 2005 and concluded on 18 December 2007.

³⁷ Article 3.10 of the Manual de Valoración – Orden Administrativa 0005 (Exhibit COL-36).

³⁸ Article 509 of Decree No. 2685 of 1999 (Exhibit COL-1).

³⁹ Articles 510-511 of Decree No. 2685 of 1999 (Exhibit COL-1).

⁴⁰ Article 548(a) of Decree No. 2685 of 1999 (Exhibit COL-1).

⁴¹ Article 129 of Decree No. 2685 of 1999 (Exhibit COL-1) and Article 173 of Resolution No. 4240 of 2000 (Exhibit COL-2). According to Article 514 of Decree No. 2685 of 1999, the "*Liquidación Oficial de Revisión de Valor*" act proceeds in cases of "errors" in aspects of the Import Declaration such as f.o.b. value and customs value or "when the declared value does not correspond to the value of the goods as established by customs authorities".

⁴² Articles 515-518 Decree No. 2685 of 1999 (Exhibit COL-1).

⁴³ Article 41 of the Customs Statute (Exhibit COL-1).

⁴⁴ Colombia's first written submission, para. 185.

⁴⁵ See Article 39 of Resolution No. 4240 of 2000 (Exhibit PAN-38). These ports are: Barranquilla, Bucaramanga, Buenaventura, Cali, Cartagena, Cúcuta, Ipiales, Leticia, Medellín, San Andrés and Bogota.

⁴⁶ See Exhibit PAN-34.

⁴⁷ See Exhibit PAN-36.

⁴⁸ Exhibit PAN-34. The parties originally disagreed on the application of the ports of entry measure to footwear classifiable under Chapter 64. Under Resolution No. 8603 of 24 July 2007, goods classifiable under heading 64.06 of Colombia's Customs Tariff Schedule are declared exempt from the ports of entry restrictions (see Exhibit PAN-35). In its request for establishment of panel, Panama submitted that Resolution No. 7373 of 22 June 2007, as modified by Resolution No. 7637 of 28 June 2007, covered all goods classifiable under Chapters 50 to 64 of Colombia's Tariff Schedule. Panama noted, however, in para. 62, footnote 64 of its first written submission that Article 4 of Resolution No. 7373 of 2007 exempted goods classifiable under headings 64.01 to 64.05, and Resolution 8603 of 2007 exempted products falling under heading 64.06. In light of these provisions, Panama argued that the port of entry measure only applied to textile products falling under

restriction on ports of entry under Article 2 is subject to several exceptions. In relation to goods with a destination outside of Colombia, Article 4 of Resolution No. 7373 provides that goods in transit from Panama, which are submitted for trans-shipment and do not have Colombia as their final destination may enter at any of the 11 authorized ports open for textile, apparel and footwear imports.⁴⁹ Additionally, Article 4 further exempts goods consigned or endorsed to the State⁵⁰; goods imported for specific state or emergency uses: goods arriving by travellers or postal traffic, or in route to Leticia, San Andrés or Santa Catalina⁵¹; goods consigned to industrial users of free trade zones⁵²; and goods classifiable under subheadings 64.01 to 64.05 of Colombia's Tariff Schedule that arrive at any of the 11 ports designated in Article 39, paragraph 1 of Resolution No. 4240.⁵³ Resolution No. 8603 of 24 July 2007⁵⁴ establishes an additional exemption for footwear classifiable under sections 6406 of Colombia's Customs Schedule, and Resolution No. 7637 of 28 June 2007⁵⁵ further exempts goods consigned to "Highly Exporting Users" and "Permanent Customs Users".⁵⁶

2.14 The stated aim of Resolution No. 7373, as amended, is to strengthen and improve customs controls related to the importation of certain textile, apparel and footwear goods, which are described as constituting an important national industry in Colombia.⁵⁷ Non-compliance with the obligation to enter and import goods from Panama and the CFZ exclusively at those ports, will subject the goods to seizure and forfeiture.⁵⁸

2.15 Resolution No. 7373, as amended, supersedes the regular transit regime under Colombian law, which permits the transportation of merchandise of national or foreign origin from one customs office to another located within the national territory of Colombia.⁵⁹ Resolution No. 7373 was originally implemented for a period of approximately six months beginning 1 July 2007.⁶⁰ However, the period of application of the measure has been extended on two occasions at the time of this writing⁶¹, and is currently set to expire on 31 December 2008.

Chapters 50 to 63 and not to footwear classifiable under Chapter 64. Subsequently, however, Colombia stated in its answer to Panel question 46, that Resolution No. 7373 of 2007 does not provide for a general exception for footwear products and thus, products classifiable under headings 64.01–64.05 can only enter Colombia at the ports of Barranquilla and Bogota, as well as through the points of entry listed in subparagraphs 5 and 6 of paragraph 1 of Article 39 of Resolution No. 4240 (Exhibit COL-12). In light of Colombia's clarification that it applied the ports of entry restrictions to footwear, Panama confirmed that it was challenging the application of the measure to *all* footwear goods which are deemed to fall within the scope of the measure (see Panama's Answer to First Set of Panel Questions, answer to question 45; Panama's second written submission, para. 109, footnote 80).

⁴⁹ Resolution No. 7373, Article 4, para. 3, (Exhibit PAN-34).

⁵⁰ Resolution No. 7373, Article 4, para. 1, (Exhibit PAN-34).

⁵¹ Resolution No. 7373, Article 4, para. 2, (Exhibit PAN-34).

⁵² Resolution No. 7373, Article 4, para. 3, (Exhibit PAN-34).

⁵³ Resolution No. 7373, Article 4, para. 4, (Exhibit PAN-34).

⁵⁴ Exhibit COL-35.

⁵⁵ Exhibit COL-36.

⁵⁶ Exhibit PAN-36.

⁵⁷ See Resolution No. 7373 (Exhibit PAN-36).

⁵⁸ See Article 5 of Resolution No. 7373 of 2007 and Article 502.1.2 of Decree No. 2685 of 1999 (Exhibit PAN-41).

⁵⁹ Article 1 of Decree No. 2685 of 1999 (Exhibit PAN-20).

⁶⁰ Exhibit COL-34, para. Article 8.

⁶¹ Resolution No. 16100 of 27 December 2007; Colombia's response to Panel question No. 122; Resolution No. 5542 of 2008.

D. THE REQUIREMENT TO PRESENT AN ADVANCE IMPORT DECLARATION AND PAY CUSTOMS DUTIES AND SALES TAX ON THE BASIS OF THE ADVANCE DECLARATION APPLICABLE TO IMPORTS OF TEXTILES, APPAREL AND FOOTWEAR ARRIVING FROM PANAMA

2.16 Under Article 119 of Decree No. 2685 of 1999, applicable to imported goods of all origins, an importer may present an import declaration as early as 15 days prior to arrival of the goods, or may delay presentation of the import declaration until one month after the goods' arrival into Colombia or up to two months following arrival, subject to authorization by Colombia's customs authority.⁶² In combination with the requirement to present an import declaration, importers of goods are required to pay customs duties and sales tax at the time an import declaration is presented.⁶³ Under this regime, importers therefore are generally not required to present an import declaration in advance of arrival of the goods, and as such, are not required to pay customs duties and taxes prior to the goods' release from customs, although the option exists to do so.⁶⁴

2.17 In the case of textile, apparel and footwear imports arriving from Panama, Resolution No. 7373 of 22 June 2007, as modified by Resolution No. 7637 of 28 June 2007, requires importers of textile, apparel and footwear goods classifiable under Chapter 50–64 of Colombia's Tariff Schedule and arriving from Panama or the CFZ to present an advance import declaration not more than 15 days prior to the goods' arrival in Colombia⁶⁵ and accordingly pay customs duties and taxes in advance.⁶⁶ Article 1 of Resolution No. 9859 of 23 August 2007 additionally requires importers of all goods from Panama or the CFZ that are subject to the 15-day advance import declaration requirement to declare the goods not less than five days prior to the arrival of the goods in Colombia.⁶⁷ Since all importers must pay customs duties and sales tax at the time an import declaration is presented, importers of subject goods from Panama and the CFZ, which are required to present an import declaration in advance, therefore, must also pay customs duties and sales tax in advance.

2.18 An importer of textile, apparel and footwear goods arriving from Panama or the CFZ that fails to present an advance import declaration upon entry at Bogota or Barranquilla may only proceed with importation if he or she submits a legalization declaration and pays a fee for the "rescate" of the goods in addition to all customs duties and any accrued warehouse storage charges. Otherwise, the importer may elect to re-ship the goods from Colombian territory.^{68 69} If the importer does not submit a legalization declaration and pay a fee, or does not re-ship the goods in question, the goods will be considered as legally abandoned and subject to seizure within a one month period.⁷⁰ An importer may

⁶² Article 119 of Decree No. 2685 of 1999 (Exhibit COL-1); Article 115 of Decree No. 2685 of 1999 (Exhibit COL-1).

⁶³ Article 119 of Decree No. 2685 (Exhibit COL-1).

⁶⁴ In its answers to question 154 by the Panel, Colombia confirmed that this advanced declaration requirement is an option for all other goods

⁶⁵ Article 1 of Resolution No. 7373 of 2007 (Exhibit PAN-34). Article 1 of Resolution No. 7637 of 28 June 2007 (Exhibit PAN-36) extends the scope of this obligation to all listed textile, apparel and footwear goods from Panama, and not only to those from the CFZ. Under Article 119 of Decree No. 2685, paragraph 3 (Exhibit COL-1), Colombia's DIAN may require importers to present an advance import declaration taking into account criteria of, *inter alia*, the origin of the good.

⁶⁶ In its responses to Panel questions Nos. 73, 74 and 154, Colombia has confirmed that the requirement to present an import advance declaration only applies to textile, apparel and footwear goods classifiable under Chapters 50-64 of Colombia's Tariff Schedule and arriving from Panama.

⁶⁷ Article 1 of Resolution No. 9859 of 23 August 2007 (Exhibit PAN-46).

⁶⁸ Article 6 of Resolution No. 7373 (Exhibit PAN-34); Article 231 of Decree No. 2685 (Exhibit PAN-32).

⁶⁹ Article 231 of Decree No. 2685 (Exhibit PAN-32).

⁷⁰ Article 115 of Decree No. 2685 of 1999 (Exhibit PAN-1).

pay a "rescate" fee equal to 15 per cent of the value of the goods to recover goods that are classified as legally abandoned.⁷¹

E. THE REQUIREMENT TO PAY A FEE TO RECTIFY AN IMPORT DECLARATION APPLICABLE TO TEXTILE IMPORTS ARRIVING FROM PANAMA

2.19 In addition to the requirement to present an advance import declaration, importers of textiles classifiable under Chapters 50-60 of Colombia's Tariff Schedule that arrive from Panama, are also required to pay a fee to correct certain errors appearing in the advance import declaration. In particular, under Article 3 of Resolution No. 7373, importers of subject goods must pay a fee to correct an import declaration in situations where differences in the weight per square metre or width of the textile exceed 7 and 10 per cent, respectively.⁷² Article 128.7 of Decree No. 2685 of 1999, as modified by Decree No. 1232 of 2001, generally established a fee of three per cent of the value of the goods to correct errors in the description of the goods, within a period of five days after a declaration is presented.⁷³ Under Article 153 of Resolution No. 4240 of 2000, as modified by Article 1 of Resolution No. 8038 of 2005, all imports classifiable under Chapters 50-60 of Colombia's Tariff Schedule for which an advance import declaration is submitted, are subject to the same legalization requirement (and are similarly exempt in cases where differences in the weight per square metre or width of the textile do not exceed 7 and 10 per cent, respectively).⁷⁴ However, as noted in paragraphs 2.16 and 2.17 above, only importers of subject textiles arriving from Panama are required to submit and advance import declaration. All other importers of subject textiles retain the option to submit an advance declaration.

III. PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

3.1 Panama requests the Panel to find that:

- (a) Colombia's determination of the customs value of textiles, footwear and other products on the basis of indicative prices is inconsistent with Articles 1, 2, 3, 5, 6 and 7.2 (b), (f) and (g) of the *Customs Valuation Agreement*;
- (b) Colombia's use of indicative prices to determine the tax base for the purpose of levying the sales tax on imported textiles, footwear and other products, when the transaction value is used to determine the tax base of like domestic products for the same purpose, is inconsistent with Article III:2, first sentence, or, alternatively, with Article III:4 of the *GATT 1994*⁷⁵;
- (c) Colombia's prohibition of the importation of textiles, footwear and apparel from Panama except at the ports of Bogota and Barranquilla is inconsistent with Article XI:1 of the *GATT 1994*;
- (d) Colombia's prohibition of the importation of textiles, footwear and apparel from Panama except at the ports of Bogota and Barranquilla, while the importation of like products from other countries is not similarly restricted, is inconsistent with

⁷¹ Article 231 of Decree No. 2685 (Exhibit PAN-32).

⁷² Article 3 of Resolution No. 7373 of 22 June 2007 (Exhibit PAN-34).

⁷³ Article 128.7 of Decree No. 2685 of 1999 (Exhibit COL-1), as modified by Decree No. 1232 of 2001.

⁷⁴ Article 153 of Resolution No. 4240 of 2000 (Exhibit COL-2), as modified by Article 1 of Resolution No. 8038 of 2005.

⁷⁵ Panama first formally requested a finding under Article III:4 in its second written submission, para. 226. In its first written submission, footnote 110, and in its request for establishment of a Panel, Panama expressed its view that Colombia's use of indicative prices to determine the tax base for imported products was inconsistent with Article III:4.

Article XIII:1 of the *GATT 1994*⁷⁶, or alternatively, with Article I:1 of the *GATT 1994*⁷⁷;

- (e) Colombia's suspension of the transit regime for textiles, footwear and apparel coming from Panama is inconsistent with Article V:2 of the *GATT 1994*;
- (f) Colombia's imposition of ports of entry and transit restrictions to textiles, footwear and apparel that have been in transit through Panama, while no such restrictions are imposed on these products when transported from their country of origin to Colombia without going through Panama, is inconsistent with Article V:6 of the *GATT 1994*;
- (g) The requirements that importers of textiles, footwear and apparel originating in Panama submit an advance import declaration and pay customs duties before the arrival of the products at customs and the limited options available for the presentation of the legalization declaration without payment of a fee, when no such requirements or limitations are imposed on importers of like products originating in other countries, are inconsistent with Article I:1 of the *GATT 1994*;

3.2 Colombia requests that the Panel reject all of Panama's claims for the reasons provided in its submissions.⁷⁸

3.3 In the event that the Panel were to uphold some or all of Panama's claims under Articles I:1, V:2, V:6, XI:1 or XIII:1 of the *GATT 1994*, Colombia requests the Panel to find that the measure is justified under the general defence of GATT Article XX(d).

[Parties' and Third Parties' arguments in Sections IV and V deleted from this version.]

⁷⁶ Although Panama did not formally request findings in relation to Article XIII:1 of the *GATT 1994* in its first written submission, Panama attributed this omission to a clerical error, and subsequently requested a finding of violation of Article XIII:1 in its second written submission, para. 226 (see Panama's response to Panel question No. 10).

⁷⁷ Panama first requested findings that Colombia's restriction on the entry of textiles, apparel and footwear violates Article I:1 of the *GATT 1994* in its first oral statement, paras. 52-53. In its request for establishment, Panama also referred to Article I:1 of the *GATT 1994* in relation to the ports of entry measure. Colombia has challenged this claim as falling outside the Panel's mandate (see Colombia's second written submission, paras. 148-172).

⁷⁸ Colombia's second written submission, para. 325.

VI. INTERIM REVIEW

6.1 On 4 March 2009, the Panel issued its Interim Report to the parties. On 18 March 2009, both parties submitted written requests for the review of precise aspects of the Interim Report. The parties submitted written comments on the other party's comments on 25 March 2009. Neither party requested an interim review meeting.

6.2 In accordance with Article 15.3 of the *DSU*, this section of the Panel's Report sets out the Panel's response to the arguments made at the interim review stage, wherever the Panel felt that explanations were necessary. The Panel has also modified certain aspects of its Report in light of the parties' comments wherever it considered appropriate. Finally, the Panel has made a limited number of editorial corrections to the Interim Report for the purposes of clarity and accuracy. References to sections, paragraph numbers and footnotes in this Section VI relate to the Interim Report. Where appropriate, references to paragraphs and footnotes to the Final Report are included.

A. PANAMA'S COMMENTS ON THE INTERIM REPORT

1. Descriptive part

6.3 Regarding paragraph 2.5 of the Interim Report, Panama requests the Panel to include additional statements by the United States Drug Enforcement Agency describing the Black Market Peso Exchange operations to more fully reflect its arguments. The Panel considers the Panel's description within this section is adequate and thus declines to do so. In addition, the Panel notes that Panama had a previous opportunity to request changes to the Descriptive Part of the report.

6.4 Regarding footnote 14 of the Interim Report, Panama requests the Panel to delete text discussing findings by the *Colombian Unidad de Información y Análisis Financiero* (UIAF) regarding participants in contraband activities. The Panel does not consider this deletion appropriate.

2. Panama's claims under the *Customs Valuation Agreement*

6.5 Regarding paragraph 7.9 of the Interim Report, Panama suggests replacing in the second line "to the best of its ability" with "as well as the legislation and regulatory framework giving effect to the indicative prices." The Panel does not consider this change appropriate.

6.6 Regarding paragraph 7.10 of the Interim Report, Panama suggests adding the following sentence: "In particular, Panama refers to *Thailand – H-Beams* that clarified the fundamental issue in a claim of prejudice is whether the defendant party was made aware of the claims presented by the complainant party sufficient to allow it to defend itself". Panama also suggests adding a footnote to include the relevant reference. The Panel does not consider this change appropriate.

6.7 Regarding paragraph 7.88 of the Interim Report, Panama suggests At the beginning of the paragraph, add "Panama argued that without any textual basis in Article 128.5 e), Colombia equates the notion of a payment with that of a guarantee or deposit." Panama further suggests to insert at the end of this sentence a footnote with the text: "Panama's second written submission, para. 43." The Panel does not consider these changes appropriate.

6.8 Regarding paragraph 7.128 of the Interim Report, Panama requests the Panel to replace "there is a review mechanism in which Colombian customs authorities determine a customs value" with "there is a review mechanism in which Colombian customs authorities determine a revised customs value". Colombia however rejects characterization of the review mechanism as a revision. The Panel declines to make the requested changes as it considers the statement adequate.

3. Panama's claim under Article III:2 of the GATT 1994

6.9 Panama has commented on the Panel's decision not to make findings under Article III:2 on the grounds that its finding that the use of indicative prices to determine the customs value is a prohibited method, has a direct impact on the Article III:2 claim. Without a specific ruling by the Panel that indicative prices may not be used to determine the taxable base for textile, apparel and footwear products, Panama considers that it would be possible for Colombia to amend its legislation to allow indicative prices to be used to determine the taxable base for such products. Panama notes that the Panel has already considered *arguendo* that both tests establishing a violation of Article III:2, first sentence, have been met. Thus, Panama requests the Panel to consider completing its analysis by making a finding that the use of indicative prices, rather than the transaction value, as the basis for assessing the sales tax results in the imposition of tax in excess of that levied on like domestic products, violates Article III:2, first sentence.

6.10 In response, Colombia considers it inappropriate for the Panel to make the requested findings given that Panama's challenge was limited to the particular provisions of Decree No. 2685 and Resolution No. 4240. In Colombia's view, Panama's concern at this late stage with the application of Article 459 of the Tax Code falls outside of the Panel's mandate. Taking issue with the Panel's decision to apply judicial economy is inappropriate since Panama did not challenge this provision of Colombia's Tax Code. Colombia further considers that Panama's argument relating to implementation is speculative in nature and fails to recognize the well-established principle that it is for each Member to decide the most appropriate way to bring its measure into conformity with the relevant Agreement. If Panama considers that Colombia has failed to bring its measure into conformity, Colombia argues that Panama must request an implementation Panel to examine the matter.

6.11 Having considered the comments of both parties, the Panel declines Panama's request to make findings under Article III:2. As explained in the Interim Report (paragraph 7.169), the Panel's findings pertaining to the WTO-inconsistency "as such" of the legal provisions imposing the use of indicative prices provide a positive solution to the dispute and thus the Panel considers it unnecessary to continue its analysis and make specific findings on the consistency "as such" of Article 128.5 e) of Decree No. 2685 and Article 172.7 of Resolution No. 4240 with Article III:2 of the GATT 1994. As noted, Panama did not challenge Article 459 of the Tax Code or any other tax provision, but instead referred to the provisions as relevant context for the interpretation of the indicative prices provisions. In line with the concerns expressed by Colombia, the Panel considers that, having found that indicative prices are a prohibited method of customs valuation, additional findings under Article III:2 would be tantamount to ruling on future contingencies.

4. Panama's claim under Article XI:1 of the GATT 1994

6.12 Regarding paragraph 7.210 of the Interim Report, Panama suggests adding at the beginning of the paragraph: "Panama notes that in GATT and WTO jurisprudence, panels have interpreted Article XI:I as a comprehensive ban of all types of limitations on the importation of products, other than duties, taxes and other charges". Panama further requests the Panel to add at the end of the paragraph: "Panama considers that Colombia's argument that Article XI is limited to quantitative restrictions does not find any support in GATT/WTO jurisprudence. There have been several cases in which panels have found a non-quantitative restriction to be a violation of Article XI." The Panel does not consider these changes appropriate.

6.13 Regarding paragraph 7.230 of the Interim Report, Panama commented that the Panel may wish to cite more fully to Panama's detailed arguments that were set out in Panama's second written submission, paragraphs 113-126 and Panama's second oral statement, paragraphs 30-34. The Panel considers that Panama's argumentation is sufficiently reflected in its report and thus declines to consider Panama's suggestion.

6.14 Regarding paragraph 7.250 of the Interim Report, Panama suggests replacing in the last sentence, "in response to Colombia's allegation that Panama's challenge is necessarily *de facto* in nature" with "if the Panel were to consider otherwise". The Panel does not consider this change appropriate.

6.15 Regarding paragraph 7.252 of the Interim Report, Panama suggests adding at the beginning of the paragraph, "Panama considers that Colombia's reference to *Argentina – Hides and Leather* is misplaced. In that case, the EC challenged the measure at issue on a *de facto* basis whereas Panama is challenging the measure on the basis of the text of the law." The Panel does not consider these changes appropriate.

5. Colombia's defence under Article XX(d) of the GATT 1994

6.16 Regarding the Panel's Article XX(d) analysis, Panama requests the Panel to modify its finding that Colombia has met its burden to identify the laws and regulations with which its ports of entry measure seeks to ensure compliance, namely, Decree No. 2685, including Article 41 and Article 87 and Resolution No. 4240 (paragraph 7.524 of the Interim Report). In Panama's view, a careful reading of Colombia's response to question No. 145 from the Panel reveals that Colombia did not initially refer to Article 87 as constituting legislation for which the ports of entry measure seeks to ensure compliance. Panama considers that Colombia merely referred to this provision *as an example* of a law that sets forth a customs obligation. Therefore, Panama submits that Colombia has failed to discharge its burden to identify the laws and regulations. In light of this view, Panama requests the Panel to refrain from making positive findings on the question of whether Colombia has properly identified the laws and regulations, but instead assume *arguendo* that Colombia has done so in order to proceed with its analysis under Article XX(d).

6.17 Panama additionally notes in the section of the Interim Report on whether the laws or regulations are not themselves WTO-inconsistent, the Panel states "the Appellate Body has stressed that a responding Member's law will be treated as WTO-consistent until proven otherwise" (paragraph 7.531). While acknowledging the correctness of the statement, Panama argues it is applicable only in those cases where a complaining party claims that a responding party's measures are WTO-inconsistent. Panama considers that the burden of proof is on the complaining party asserting the inconsistency to introduce evidence to substantiate that assertion. Thus, the disputes referred to in footnote 852, in particular, *US – Carbon Steel*, refer to the type of evidence a complaining party must adduce in order to prove its assertion that a responding party's measure is inconsistent. In Panama's view, it is not possible to apply this reasoning by the Appellate Body in a situation involving an affirmative defence, such as Article XX(d). When a responding party invokes an exception, it bears the burden of proof to demonstrate that the laws or regulations it seeks to secure compliance with are not themselves GATT-inconsistent. It cannot seek to benefit from a presumption of consistency in this regard. As the Appellate Body stated in *India – Wool Shirts and Blouses*, "Article XX ... [is] in the nature of an affirmative defence. It is only reasonable that the burden of establishing such a defence should rest on the party asserting it." (para. 16).

6.18 In this case, Panama argues that Colombia has not met its burden of proof as the respondent to present a *prima facie* case that its laws and regulations are not themselves inconsistent with the GATT. Once again, Panama requests the Panel to assume *arguendo* that Colombia has done so in order to proceed with its analysis of whether the ports of entry measure is "necessary" to secure compliance with Colombia's customs laws and regulations.

6.19 Colombia submits that Panama is re-arguing the same points it made in the course of the proceedings based on identical arguments that were rejected by the Panel. Colombia contends that it is well established that the purpose of the interim review stage is not for parties to re-argue their

case.¹²³ Colombia therefore requests that the Panel decline to make the requested changes to its report in respect of its findings.

6.20 The Panel considers it has already adequately addressed the issue of whether Colombia properly identified the relevant laws and regulations for which compliance was sought, and whether these laws and regulations are themselves WTO-consistent. In particular, the Panel referred to a statement by the Appellate Body explained in *US – Shrimp (Thailand)* that a panel is free to use the various arguments made and provisions cited by the parties in order to assess objectively which laws and regulations were relevant to the defendant's defence.¹²⁴ As explained in paragraphs 7.516-7.521 of the Interim Report, the Panel is of the view that Colombia identified laws and regulations, including Article 41 and Article 87 of Decree No. 2685 and Resolution No. 4240, which together set forth rules on the designation of ports for importation and clearance of goods, and the requirement to present an import declaration and pay duties and fees. With respect to whether the laws and regulations identified by Colombia are themselves WTO-consistent, the Panel explained in paragraphs 7.529-7.532 of the Interim Report that it does not consider that Panama has challenged the whole of Colombia's right to enforce its customs laws and obligations contained in Decree No. 2685 or Resolution No. 4240. Nor does the Panel consider the specific provisions referred to by Colombia to be WTO-inconsistent. Accordingly, the Panel declines to modify its findings under Article XX(d) of the *GATT 1994*, which would not affect the Panel's overall conclusions regarding Article XX(d) in any case.

6.21 Regarding footnote 836 of the Interim Report, Panama requests the Panel to include arguments pertaining to the inclusion of Colombia's reference to Article 319 of its *Código Penal*, when addressing Colombia's identification of laws and regulations for which the ports of entry measure seeks to secure compliance. Colombia requests the Panel to reject Panama's proposed text. The Panel declines to make changes, noting that footnote 836 serves to provide background to the Panel's question 145 to the parties. The Panel did not consider Article 319 of Colombia's *Código Penal* as a relevant law or regulation for purposes of its Article XX(d) analysis.

6.22 Regarding footnote 868 of the Interim Report, Panama suggests deleting the sentence "For instance, a UIAF study claims that 89 firms incorporated in the Colon Free Zone were identified by Colombian intelligence as regularly participants in the purchase of goods with contraband US dollars." The Panel does not consider this change appropriate.

6. Miscellaneous

6.23 In addition to the substantive comments presented above, Panama offered a number of typographical and stylistic suggestions, further requesting the Panel to make conforming changes to the Spanish version of the interim report. The Panel has accommodated and commented on Panama's suggestions where appropriate. Parallel changes to the translation into Spanish of the Panel Report have similarly been introduced.

¹²³ Colombia refers to the Panel Report, *Japan – DRAMS (Korea)*, para. 6.2: "In addressing Korea's comments, we note that Korea has sought to re-argue many of the points that it made during its submissions. This is not necessarily the purpose of the interim review mechanism set forth at Article 15.2 of the *DSU*. In particular, we do not consider that Article 15.2 of the *DSU* requires us to provide a defence of our findings at the Interim Review stage".

¹²⁴ Panama refers to footnote 844 of the Interim Report, citing Appellate Body Report, *US – Shrimp (Thailand)*, para. 302.

A. COLOMBIA'S COMMENTS ON THE INTERIM REPORT

1. Descriptive part

6.24 Regarding paragraph 2.4 of the Interim Report, Colombia requests the Panel to refer to the "failed cooperation" under the Customs Cooperation Protocol, and to characterize the measures at issue as "similar in nature" to earlier enacted measures. The Panel considers that the wording of the paragraph accurately reflects the facts as presented to it but has nevertheless amended the text of paragraph 2.4 of the Final Report to take the Colombia's comments into account.

2. Panama's claims under the *Customs Valuation Agreement*

6.25 Regarding paragraph 7.63 of the Interim Report, Colombia disagrees with the following characterization of Panama's argument by the Panel: "In Panama's view, Colombia has failed to demonstrate that customs valuation takes place during the 'control posterior' or '*estudio de valor*'." In Colombia's view, Panama argued that customs valuation takes place for the first time at the time of the release of the goods subject to indicative prices. Panama however agrees with the Panel's characterization of its argument and correctly refers Colombia to paragraphs 16-21 of its second written submission to that effect. The Panel declines to amend the wording in paragraph 7.63.

6.26 Regarding paragraph 7.71 of the Interim Report, Colombia considers that the last sentence of this paragraph does not clearly state why Colombia considers the GATT Panel's *US – Tobacco* ruling to be relevant and requests the Panel to replace this sentence following paragraph 42 of Colombia's second written submission. The Panel has amended the text of paragraph 7.71 of the Final Report accordingly.

6.27 Regarding paragraph 7.76 of the Interim Report, Colombia has requested the Panel to add the text of paragraph 3 of Article 172 of Resolution No. 4240. The Panel has done so in paragraph 7.76 of its Final Report.

6.28 Regarding footnote 270 of the Interim Report, Colombia requests the Panel to complete its quote of Article 128.5 e) of Decree No. 2685. The Panel has accordingly completed the text of the corresponding footnote 274 in the Final Report.

6.29 Regarding paragraph 7.91 of the Interim Report, Colombia requests that the Panel add the word "textual" before "context" as the arguments that Colombia presented are all based on the text of Colombian law as such. Colombia further requests the Panel to replace some of the language in that paragraph for some additional text. After careful consideration, the Panel has added the word "textual" to qualify the word "context" in paragraph 7.91 of the Final Report, as requested by Colombia. The Panel, however, declines to further amend the text of paragraph since it considers that the existing text does reflect Colombia's arguments adequately.

6.30 Regarding paragraph 7.113 of the Interim Report, Colombia requests the Panel to replace the term "determinative" in the first sentence of that paragraph with "significant". The Panel has made the suggested change in paragraph 7.113 of the Final Report.

3. Panama's claim under Article III:2 of the *GATT 1994*

6.31 Regarding paragraph 7.196 of the Interim Report, Colombia requests the Panel to delete the second part of that paragraph as, in its view, it reaches a conclusion which is not in any way based on an argument presented by Panama. For Colombia, the Panel would be making Panama's case by addressing the issue of the greater tax burden on imported goods resulting from the additional financial cost that the importer must incur in the interval between the collection of sales tax based on the indicative price, and the reimbursement of the taxes paid in excess during the post-importation

control. On this issue the Panel disagrees with Colombia. In paragraph 7.196, the Panel has explained its conclusion in paragraph 7.195, that Colombia taxes imported products in excess of the like domestic products each time that the factual conditions set out in paragraph 7.175 are met, regardless of the amount of the difference between the declared and indicative prices. This conclusion is not affected by the fact that the importer may obtain a reimbursement during the so-called post-importation process of the taxes paid in excess of that which would have been paid absent the use of indicative prices,. The Panel does not consider it has made the case for Panama but rather, has been conscientious in considering whether the existence of the post-importation process would affect such a conclusion.

6.32 Also in respect of paragraph 7.196 of the Interim Report, Colombia objects to the Panel's characterization of the post-importation control process as occurring as many as two years or more following entry of the goods. Colombia notes that it has also presented evidence of a case in which post-importation control terminated only three months after entry. Panama considers that Colombia's objection is baseless. In Panama's view, the Panel merely stated that the post-importation control process "may take more than two years" (underlining added). For Panama, the fact that in one case that process was shorter does not undermine the validity of the Panel's appreciation of the timing evidenced in other cases of post-importation control. The Panel agrees with the views expressed by Panama in this respect and thus declines to make the change requested by Colombia.

4. Panama's claim under Article XI:1 of the GATT 1994

6.33 Colombia argues that paragraph 7.210 of the Interim Report does not reflect the paragraphs cited in the relevant citations. Panama notes that footnote should refer to paragraphs 18-22 of Panama's second oral statement. The Panel has corrected the typographical error in the footnote of paragraph 7.210 of the Final Report to accurately reflect Panama's argument.

6.34 Regarding paragraph 7.212 of the Interim Report, Colombia requests the Panel to cite to paragraph 10 of its second written submission in summarizing its arguments as presented in paragraph 10 of its second written submissions. The Panel considers that Colombia's arguments are accurately reflected and declines to modify the text. The Panel notes additionally that Colombia has provided its own summary of arguments in the Descriptive part.

6.35 Regarding paragraph 7.217 of the Interim Report, Colombia considers that the Panel has not accurately reflected its argument that Panama does not meet the burden of proof under Article XI:1 because it does not refer to any alleged low levels of imports or to the causal link between the specific measure challenged and such low level of exports. Panama considers the paragraph to accurately reflect Colombia's views. The Panel has clarified the language in paragraph 7.217 of its Final Report and corrected its reference to Colombia's first written submission, paragraph 254, to reflect the parties' arguments.

6.36 Regarding paragraph 7.258 of the Interim Report, Colombia argues that it is not aware of arguments by Panama that additional costs arising from the imposition of the ports of entry measure create disincentives and uncertainty in connection with importation to various markets in Colombia. Panama has referred to paragraphs 160-162 of its first written submission, and paragraphs 132-134 of its second written submission. The Panel has updated its citations accordingly.

5. Panama's claim under Article I:1 of the GATT 1994

6.37 Regarding paragraphs 7.295-7.296 of the Interim Report, Colombia requests the Panel to clarify its position regarding Panama's claim under Article I:1 as concerns the ports of entry measure. In addition to other changes to language, Colombia asks the Panel to include the language, "Colombia submits that the way Panama developed its claim under Article I:1 in respect of the advanced import declaration aspect of the ports measures, implies that the claim of violation of Article I:1 by the

restriction of the number of ports of entry was not part of Panama's request ...". The Panel considers the paragraph and citations in their present form reflect Colombia's argument as originally stated in its submissions, and therefore declines to modify the text.

6. Panama's claim under Article V:6 of the GATT 1994

6.38 Regarding paragraphs 7.314 and 7.318 of the Interim Report, Colombia requests the Panel to use the phrase "arriving from" in place of "imports from other origins" for the sake of consistency. The Panel has modified the language in paragraphs 7.314 and 7.318 of the Final Report consistently.

6.39 Regarding paragraph 7.451 of the Interim Report, Colombia requests the Panel to clarify the language summarizing its arguments related to Article V:6. The Panel has corrected a typographical error by adding "do not" in paragraph 7.451 of the Final Report.

7. Colombia's defence under Article XX(d) of the GATT 1994

6.40 Regarding paragraph 7.488 of the Interim Report, Colombia requests the Panel reflect the full extent of its arguments as to how the ports of entry measures makes a material contribution to the prevention of smuggling and underinvoicing, not simply through specialization of customs officials. The Panel has corrected a typographical error in paragraph 7.488 of the Final Report to reflect that the measures contribute in more ways than by strictly allowing for specialization of customs officials.

6.41 Regarding paragraph 7.500 of the Interim Report, Colombia argues that it presented a common defence to all aspects of the ports of entry measure due to the fact that Panama challenged aspects of the measure as one single measure. Colombia cites to Panama's request for establishment, p. 2 in support of its argument. Thus, Colombia requests the Panel to deem Panama's challenge as a "common challenge". Panama argues that it has made separate and distinct claims in its submissions, which Colombia should have rebutted separately. In light of the language in the request for establishment, which refers to importation "exclusively through the two designated ports", the fact that the requirement "does not apply to goods arriving in Colombia directly from third countries", and reference to the requirement to present and import declaration "in advance of [the goods'] arrival in Colombia", the Panel does not agree with Colombia's position. Additionally, the Panel notes that Panama made separate claims under various GATT provisions with respect to the ports of entry measure. The Panel accordingly declines Colombia's request.

6.42 Regarding paragraph 7.556 and footnote 890 of the Interim Report, Colombia requests the Panel to modify the text to more accurately reflect the data available in the exhibits. Colombia contends that the basis for this paragraph (Colombia's first written submission, paragraph 194) was not presented "as clear as could be". In addition, Colombia requests the Panel to delete footnote 890 in its entirety, stating that terminology used in different exhibits submitted to the panel was not prepared for these WTO proceedings but for other purposes and thus, may have lead to confusion. Based on Colombia's argument as presented in its first submission, and the presentation of data in the relevant exhibits, including Exhibit COL-15, the Panel concludes there is no basis for the changes proposed by Colombia. The Panel therefore declines to make any changes.

6.43 Regarding paragraph 7.568 and footnote 913 of the Interim Report, Colombia requests the Panel to cite to paragraph 232 of its second written submission, and Exhibit COL-18, instead of the original citations. The Panel acknowledges this citation error and has made the correct changes in paragraph 7.568 and footnote 939 of the Final Report.

6.44 Colombia requests the Panel to modify language appearing in paragraph 7.577 of the Interim Report to reflect that Colombia did not suggest that the implicit price was the "primary way" of measuring effectiveness, but instead served as a "good indicator" of effectiveness. In light of

paragraph 235 of Colombia's second written submission, the Panel has made minor modifications to paragraph 7.577 of the Final Report to reflect Colombia's position.

6.45 Regarding paragraph 7.602 of the Interim Report, Colombia argues that the Panel has not accurately reflected its arguments in relation to the choice of ports in the period between the imposition of the first and second ports of entry measures. Colombia submits that it referred to the general positive aspects of the modern state of the ports chosen, and the ports' significance in terms of trade in general in 2006 and 2007. Colombia thus requests the Panel to remove the language that data "bluntly contradict[s] Colombia's proposition". The Panel notes that its reference to Colombia's "proposition" referred to Colombia's broad argument that the ports of entry measure has not had a significant negative impact on legitimate trade, as opposed to its own specific arguments regarding the time period between implementation of two separate measures. In making its findings, the Panel considers it is not limited to the parties' arguments, but may reach its findings in light of the evidence presented by both parties. The Panel has reflected Colombia's proposition that the ports of entry measure has not had a significant negative impact on legitimate trade within paragraph 7.602 of the Final Report.

VII. FINDINGS

A. PRELIMINARY ISSUES

1. Colombia's request for a preliminary ruling

(a) Background

7.1 In its first written submission¹²⁵, Colombia requested the Panel to issue a preliminary ruling regarding the scope of its mandate on the grounds that Panama's request for establishment failed to meet the criteria set forth in Article 6.2 of the *DSU*. Colombia asked the Panel to "exclude such claims that are not set forth in a sufficiently clear manner in the request for establishment" and/or "for which no consultations were held". Further to paragraph 11 of the Working Procedures, the Panel accorded Panama a ten-day deadline to respond to Colombia's request and informed the parties that they would be heard on this issue at the first substantive meeting. Having heard the parties, the Panel decided to withhold ruling on matters until issuance of the Interim Report.

7.2 Colombia has raised two issues relating to the scope of the Panel's mandate in relation to the claims concerning the use of indicative prices. The first issue regards the scope of the statutory and regulatory provisions challenged by Panama. With respect to the second issue, Colombia alleges that Panama has not sufficiently identified specific cases of application of the challenged provisions in the context of its "as applied" claims. Panama contests Colombia's allegations as well as the timing of Colombia's request.¹²⁶

(b) Main arguments of the parties

(i) *Timing of the preliminary ruling request*

7.3 Panama has requested the Panel to dismiss Colombia's request for a preliminary ruling on the grounds that it had not been submitted in a timely manner, i.e. at the earliest possible opportunity.¹²⁷ Supporting this statement, Panama refers to the Appellate Body's findings in *US – FSC* where the Appellate Body stated that:

¹²⁵ Colombia's first written submission, paras. 26-41.

¹²⁶ Panama's submission on the Request for a Preliminary Ruling by Colombia, paras. 3-8.

¹²⁷ Panama's submission on the Request for a Preliminary Ruling by Colombia, para. 8.

"The ... principle of good faith requires that the responding Members seasonably and promptly bring claimed procedural deficiencies to the attention of the complaining Member, and to the DSB or the Panel, so that corrections, if needed, can be made to resolve disputes. The procedural rules of WTO dispute settlement are designed to promote, not the development of litigation techniques, but simply the fair, prompt and effective resolution of trade disputes."¹²⁸

7.4 According to Panama, the Appellate Body's jurisprudence leaves no doubt that a party must communicate its objections at the earliest opportunity and certainly before filing its first written submission, if it is in a position to do so. In its view, Colombia's concerns relate exclusively to the wording of Panama's request for establishment rather than to any discrepancy between the request for establishment and Panama's first written submission. Panama thus considers that Colombia did not need to wait until filing its first written submission to submit its request for a preliminary ruling.

7.5 As Panama notes, paragraph 11 of this Panel's Working Procedures provides that "[a] party shall submit any request for a preliminary ruling not later than its first submission to the Panel". For Panama, this deadline is the outer time-limit under which a party may submit a request for a preliminary ruling. According to Panama, this deadline applies in situations where a respondent raises objections based on a discrepancy between the complainant's first written submission and the terms of reference set out in the request for establishment.¹²⁹ Since Colombia's objection is based on grounds that were known prior to the filing of its first submission, Panama contends that Colombia should have submitted its request for a preliminary ruling at the earliest possible opportunity, i.e. sometime before filing its first written submission. In support of its view, Panama refers to the Appellate Body Report on *Canada – Wheat Exports and Grain Imports*, in which the Appellate Body explained that the timeliness of an objection raised under Article 6.2 must be examined in the light of the particular circumstances of the grounds for the objection.¹³⁰

7.6 Colombia contests Panama's objection to the timing of its request for a preliminary ruling, citing to WTO jurisprudence that preliminary issues should be addressed "promptly", but not necessarily "as soon as possible". Colombia indicates that a request for a preliminary ruling should not be used as a litigation tactic to delay panel proceedings.¹³¹ Moreover, Colombia disputes Panama's interpretation of the Appellate Body's findings in *Canada – Wheat Exports and Grain Imports*. According to Colombia, the Appellate Body clearly established that it is up to each panel to decide whether a request for preliminary ruling was submitted in a timely manner, especially considering the fact that panels set their own timetables. In this respect, Colombia notes that the Panel had decided that requests for preliminary rulings should be submitted at the latest, at the first written submission. Colombia points out that its request was presented within that time-frame.¹³²

(ii) *Scope of the measures*

7.7 Regarding the scope of the measures, Colombia claims that Panama's request for establishment fails to identify the specific measures at issue, as the request refers to indicative prices established and applied in accordance with framework legislation such as Colombia's Customs Statute (Decree No. 2685 of 1999, in particular, Titles V and VI), Resolution No. 4240 and Colombia's Tax Code (Decree No. 624 of 1989), which, together, cover hundreds of pages and of which their relationship with indicative prices is not obvious. Colombia requests that the Panel limit its examination to Resolutions No. 07509, No. 07510, No. 07511, No. 07512, No. 07513, and No. 07530 of 26 June 2007 of the DIAN, Article 128.5 e) of Colombia's Customs Statute and Article 172.7 of

¹²⁸ Appellate Body Report, *US – FSC*, para. 166.

¹²⁹ Panama's submission on the Request for a Preliminary Ruling by Colombia, para. 7.

¹³⁰ Appellate Body Report, *Canada – Wheat Export and Grain Imports*, para. 206.

¹³¹ Colombia's first oral statement, para. 14.

¹³² Colombia's first oral statement, para. 16.

Resolution No. 4240 of 2000, Article 115 of Colombia's Customs Statute and Articles 447 and 459 of Colombia's Tax Code. Colombia claims that only these provisions are identified with the level of clarity required by Article 6.2 of the *DSU*.¹³³

7.8 Moreover, Colombia contends that Panama has failed to identify any specific legal provision that it considers to be in violation of Article III:2, and did not provide for any specific application of this alleged difference in tax bases.¹³⁴ According to Colombia, there seems to be a "clear disconnect" between the various measures that are being challenged by Panama in its Article III:2 claim.¹³⁵

7.9 Contrary to Colombia's allegations, Panama argues that it has clearly identified the measure at issue "to the best of its ability".¹³⁶ Panama submits that its request for establishment makes clear that the measure at issue is the use of "indicative prices", which "apply to specific goods from all countries except those with which Colombia has signed free trade agreements" for the purpose of determining the value of those goods to be used as the basis for levying (a) import duties and (b) sales tax. Panama submits that it identified the regulatory scheme used by the DIAN to establish the mechanism of indicative prices to the best of its ability, including Resolutions Nos. 07509, 07510, 07511, 07512, 07513, and 07530. Thus, Panama argues that it identified not just the measure at issue, but also the legislative and regulatory framework giving effect to the indicative prices. Panama notes that under Article 6.2, it is required simply to "identify" the measure at issue, not to explain in detail its operation.¹³⁷ In this respect, Panama recalls that it has specified its intention "to include within the measure at issue any other related act, amendments, or extensions, or any related practices". According to Panama, this language has been found to provide a sufficient basis to include additional unlisted acts in a panel's terms of reference.¹³⁸

7.10 In any case, Panama considers that even if the request were to be considered "insufficient on its face", Colombia has failed to demonstrate that it has suffered a "prejudice" as a result of this allegedly unsound formulation of the claims.¹³⁹ Panama draws the Panel's attention to the fact that, as evidenced by its extensive written submission, Colombia appears to have been able to identify the precise measure at issue and, thus, Colombia's ability to defend itself was not curtailed.¹⁴⁰

(iii) *Type of claims: "as such" and/or "as applied"*

7.11 Colombia argues that, while Panama's request for establishment refers to the legal provisions at issue, it does not refer to one single specific application of indicative prices to subject imports at issue. Colombia thus submits that Panama's case in respect of the use of indicative prices should be limited to an "as such" challenge of Colombia's laws and regulations.

7.12 Panama contests Colombia's allegations and argues that it is not required to list any individual importation in its request for establishment. Panama submits that, since it has challenged the application of the system of indicative prices to all subject imports, it is not necessary to identify individual transactions.¹⁴¹ Moreover, Panama disputes Colombia's interpretation of the concepts of "as applied" and "as such". In a view that Panama considers is supported by the practice of WTO

¹³³ Colombia's first written submission, para. 37.

¹³⁴ Colombia's first written submission, para. 140.

¹³⁵ Colombia's first written submission, para. 141.

¹³⁶ Panama's submission on the Request for a Preliminary Ruling by Colombia, para. 11.

¹³⁷ Panama's submission on the Request for a Preliminary Ruling by Colombia, paras. 10-12.

¹³⁸ Panama refers to the Appellate Body Report in *Chile – Price Band System*, para. 135. Panama's submission on the Request for a Preliminary Ruling by Colombia, paras. 13 and 17.

¹³⁹ Panama refers to the Appellate Body Report in *Thailand – H-Beams* and the Panel Report on *EC – Bed Linen*.

¹⁴⁰ Panama's submission on the Request for a Preliminary Ruling by Colombia, paras. 18-20.

¹⁴¹ Panama's submission on the Request for a Preliminary Ruling by Colombia, para. 22.

Members¹⁴², a complainant is not required to list particular imports subject to a measure when presenting an "as applied" challenge.¹⁴³

(c) Consideration by the Panel

(i) *General considerations*

7.13 While the *DSU* does not expressly envision preliminary rulings by panels, it has become an occurrence in the past few years. The Appellate Body has commented that panel working procedures should allow for the possibility of requests for preliminary rulings.¹⁴⁴ Paragraph 11 of this Panel's Working Procedures has therefore been included to address such a possibility. This paragraph reads as follows:

"A party shall submit any request for preliminary ruling not later than its first submission to the Panel. If the complaining party requests such a ruling, the respondent shall submit its response to the request in its first submission. If the respondent requests such a ruling, the complaining party shall submit its response to the request prior to the first substantive meeting of the Panel, at a time to be determined by the Panel in light of the request. Exceptions to this procedure will be granted upon a showing of good cause."

7.14 The Panel notes that there is no established jurisprudence nor is there any established practice on whether panels need to rule on the scope of their mandate on a preliminary basis, i.e. before the issuance of its Interim Report to the parties. Numerous panels have reserved ruling on preliminary issues until issuing a Final Report.¹⁴⁵ Accordingly, the Panel concludes that it may exercise its own discretion on to how to proceed in addressing Colombia's preliminary ruling request, while taking into consideration the due process rights of the parties. Having heard the parties' views on Colombia's request for a preliminary ruling, the Panel thus decided not to rule on a preliminary basis and withhold ruling on matters until issuance of the Interim Report. As the Appellate Body ruled in *US – Carbon Steel*, "in considering the sufficiency of a panel request, submissions and statements made during the course of the panel proceedings, in particular the first written submission of the complaining party, may be consulted in order to confirm the meaning of the words used in the panel request and as part of the assessment of whether the ability of the respondent to defend itself was prejudiced."^{146,147} The Panel therefore considered that the scope of Panama's request for establishment could be clarified through appropriate questioning during and further to the first substantive meeting.

7.15 Having withheld issuing a preliminary ruling, the Panel will now consider Panama's objection pertaining to the admissibility of Colombia's preliminary ruling request due to its alleged late submission. If the Panel decides to dismiss Panama's objection, the Panel will then address the substance of Colombia's request.

(ii) *Timing of the preliminary ruling request*

7.16 The Panel will first consider whether Colombia's request for a preliminary ruling was raised in a timely manner. The Panel notes that paragraph 11 of the Panel's Working Procedures, which is reproduced in paragraph 7.13 above, specifically provides for a deadline for preliminary ruling

¹⁴² Panama refers to the Appellate Body Report in *EC – Computer Equipment*.

¹⁴³ Panama's submission on the Request for a Preliminary Ruling by Colombia, paras. 23-27 and 29.

¹⁴⁴ Appellate Body Report, *EC – Bananas III*, para. 144.

¹⁴⁵ See, for example, Panel Report, *Canada – Aircraft*, para. 9.15; Panel Report, *India – Autos*, para. 7.7; Panel Report, *EC – Bananas III*; Panel Report, *EC – Computer Equipment*.

¹⁴⁶ (*footnote original*) See, for example, Appellate Body Report, *Korea – Dairy*, para. 127, Appellate Body Report, *Thailand – H-Beams*, para. 95.

¹⁴⁷ Appellate Body Report, *US – Carbon Steel*, para. 127.

requests: "A party shall submit any request for preliminary ruling *not later than* its first submission to the Panel" (emphasis added). As noted by Colombia, Article 12 of the *DSU* allows panels to determine their working procedures and timetable. To be precise, the Appellate Body stated, "under Article 12 of the *DSU*, it is the panel that sets the timetable for the panel proceedings and, therefore, it is the panel that is in the best position to determine whether, under the particular circumstances of each case, an objection is raised in a timely manner."¹⁴⁸ As indicated above, the Appellate Body has further recommended panels to foresee the possibility of requests for preliminary rulings in their working procedures.¹⁴⁹ The Panel has done so by way of including paragraph 11 in its Working Procedures. The Panel is also of the view that, where the Panel has specified a given deadline in its Working Procedures, that deadline should prevail. The wording of paragraph 11 is clear: the request for a preliminary ruling has to be filed *not later than* the first written submission. This could be interpreted as meaning that such a request can be filed before or at the time of the first written submission. The Panel considers that Colombia has abided by that deadline since Colombia's request for a preliminary ruling was submitted to the Panel as part of its first written submission.¹⁵⁰

7.17 The Panel is not persuaded by Panama's argument to dismiss Colombia's request for a preliminary ruling on the basis that Colombia's concerns relate exclusively to the wording of Panama's Request for the establishment of a panel rather than to any discrepancy between that Request and Panama's first written submission. Since Colombia's concerns are exclusively related to the text of the Request, Panama argues that no need existed for Colombia to wait until the filing of its first written submission to submit its request. The Panel acknowledges that the Appellate Body has ruled that "[w]hen a Member wishes to raise an objection in dispute settlement proceedings, it is always incumbent on that Member to do so promptly. A Member that fails to raise its objections in a timely manner, notwithstanding one or more opportunities to do so, may be deemed to have waived its right to have a panel consider such objections."¹⁵¹ The Panel does not consider this to be the case with Colombia's request.

7.18 As a general rule, the Appellate Body has granted panels broad discretion to conduct Panel proceedings as appropriate, subject to the following considerations: (i) the Panel must respect the wording of the *DSU* unless the parties mutually agree to derogate from it and (ii) the Panel must fully take into account the due process rights of the parties. Panama was given the opportunity to present its response in writing before the first substantive meeting and was also given the opportunity to comment on Colombia's request at the first substantive meeting. In the Panel's view, it has not impaired Panama's due process rights or its right to a defence. The Panel will therefore address the substance of Colombia's request.

(iii) *Adequacy to Article 6.2 requirements*

7.19 The Panel will now consider Colombia's objections pertaining to the adequacy of Panama's request for establishment to the requirements of Article 6.2 of the *DSU*. According to Colombia, Panama's request for establishment fails to identify the specific measure at issue in two respects. First, Colombia argues that Panama's broad reference to "framework legislation" is not sufficiently precise, as the legislation covers hundreds of pages and a wide range of legal provisions whose relationship with indicative prices is not always clear. Second, Colombia contends that Panama has failed to identify any individual applications of the challenged provisions to imports arriving from Panama. According to Colombia, this specific application of a provision constitutes a legally distinct measure, which must be identified separately in the context of Panama's "as applied" claim.¹⁵²

¹⁴⁸ Appellate Body Report, *US – Wheat Exports and Grain Imports*, para. 206.

¹⁴⁹ Appellate Body Report, *EC – Bananas III*, para. 144. See para. 7.13.

¹⁵⁰ Colombia's first written submission, pp.12-15.

¹⁵¹ Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 50.

¹⁵² Colombia's first written submission, paras. 36-38.

7.20 The Panel understands, as argued by Panama¹⁵³, that Colombia's concerns appear to relate exclusively to the wording of Panama's request for establishment rather than to any discrepancy between that Request and Panama's first written submission.

7.21 Article 6.2 reads as follows:

"The request for the establishment of a panel shall be made in writing. It shall indicate whether consultations were held, *identify the specific measures at issue* and provide a *brief summary of the legal basis of the complaint sufficient to present the problem clearly*. In case the applicant requests the establishment of a panel with other than standard terms of reference, the written request shall include the proposed text of special terms of reference." (emphasis added)

7.22 Therefore, Article 6.2 provides *inter alia* that a request for establishment must identify the *specific* measures at issue and provide a brief summary of the legal basis of the complaint *sufficient* to present the problem clearly. In *US – Carbon Steel*, the Appellate Body summarized its previous jurisprudence on the requirements of Article 6.2 and noted the importance of the two distinct requirements, namely, identification of the specific measures at issue, and the inclusion of a brief summary of the claims. Referring to *Guatemala – Cement I*¹⁵⁴, the Appellate Body concluded that both requirements "together ... comprise the 'matter referred to the DSB', which forms the basis for a panel's terms of reference under Article 7.1 of the DSU".

7.23 The Panel recalls that, in *EC – Bananas III*, the Appellate Body explained why a panel request must be "sufficiently precise": "first, it often forms the basis for the terms of reference of the panel pursuant to Article 7 of the DSU; and, second, it informs the defending party and the third parties of the legal basis of the complaint."¹⁵⁵ In *US – Carbon Steel*, the Appellate Body reiterated that the underlying requirements of Article 6.2 are first, to define the scope of a dispute, and second, to "serve the *due process* objective of notifying the parties and third parties of the nature of a complainant's case."¹⁵⁶

Identification of the specific measures at issue concerning the use of indicative prices

7.24 Colombia argues *inter alia* that Panama's request for establishment fails to identify the specific measures at issue as required in Article 6.2 of the *DSU*, in respect of the use of indicative prices by Colombia's customs authorities. According to Panama, its request for establishment makes clear that the measure at issue is the use of "indicative prices", which "apply to specific goods from all countries except those with which Colombia has signed free trade agreements" for the purpose of determining the value of those goods to be used as the basis for levying (a) import duties and (b) sales tax.¹⁵⁷

7.25 The Appellate Body has found that the degree of specification required in identifying the measure at issue must be assessed on a case-by-case basis.¹⁵⁸ Whether the specific measure at issue has been sufficiently identified in the request for establishment will depend upon the ability of the respondent to defend itself given the description of the measure in the Request.¹⁵⁹

7.26 Panama contends that it has not just identified the measures at issue, but also the legislative and regulatory framework giving effect to the indicative prices. Specifically, Panama cited to

¹⁵³ Panama's submission on the Request for a Preliminary Ruling by Colombia, para. 6

¹⁵⁴ Appellate Body Report, *Guatemala – Cement I*, paras. 69-76.

¹⁵⁵ Appellate Body Report, *EC – Bananas III*, para. 142.

¹⁵⁶ Appellate Body Report, *US – Carbon Steel*, para. 126.

¹⁵⁷ Panama's submission on the Request for a Preliminary Ruling by Colombia, paras. 10-12.

¹⁵⁸ Appellate Body Report, *US – Carbon Steel*, para. 127.

¹⁵⁹ Appellate Body Report, *EC – Computer Equipment*, para. 70.

Resolution No. Nos. 07509, 07510, 07511, 07512, 07513 and 07530 and noted additionally that some provisions of the resolutions and decrees listed in the request for establishment are more pertinent to the operation of indicative prices than others. Subsequently, in response to a question from the Panel, Panama explained that it is challenging the specific provisions of Article 128.5 e) of Decree No. 2685 and Article 172.7 of Resolution No. 4240 as well as the operation of the import regime related to indicative prices, which has been listed in its request for establishment as:

- (a) Resolutions No. 07509, No. 07510, No. 07511, No. 07512, No. 07513, and No. 07530 of 26 June of the DIAN,
- (b) framework legislation such as Colombia's Customs Statute (Decree No. 2685 of 1999, in particular, Titles V and VI),
- (c) Resolution No. 4240 of 2000 and Colombia's Tax Code (Decree No. 624 of 1989).¹⁶⁰

7.27 In response to a follow-up question from the Panel, Panama further clarified that:

"Panama is seeking a finding by the Panel on the inconsistency of Article 128.5 e) of Decree No. 2685, Article 172.7 of Resolution No. 4240 and the specific resolutions, as amended or modified, establishing indicative prices that were listed in paragraph 29 of Panama's first written submission. Panama seeks a ruling that those measures are, as such, inconsistent with Articles 1, 2, 3, 5, 6, 7(b), (f) and (g) of the CVA, as well as with Article III:2 and, in the alternative, Article III:4 of GATT 1994."¹⁶¹

7.28 Panama also disputes Colombia's argument that it has not identified with sufficient clarity the measure in dispute with respect to its claim under Article III:2 and III:4 of *GATT 1994*. It notes that its request for establishment refers to "indicative prices established and applied in accordance with ... Colombia's Tax Code", particularly to Article 459 of the Tax Code, as the basis for the establishment of the tax base for imported goods, and to Article 447 of the Tax Code, as the basis for the establishment of the tax base for domestic goods.¹⁶² Panama argues that it is the application of Article 459 of the Tax Code in connection with the relevant provisions governing the determination of customs value for subject products that results in less favourable treatment being accorded to imported products.¹⁶³ Panama specifically says that it is challenging "Article 496 of the Tax Code in connection with Article 128.5 e) of Decree No. 2685 and Article 172.7 of Resolution No. 4240".¹⁶⁴ The Panel notes, however, that in response to a later question by the Panel quoted in paragraph 7.27 above, Panama does not mention Article 496 of the Tax Code as a measure it is challenging *as such* but rather Article 128.5 e) of Decree No. 2685 and Article 172.7 of Resolution No. 4240 as being inconsistent *inter alia* with Article III:2 (and III:4 in the alternative) of the *GATT 1994*.

7.29 Panama notes that both Colombia and the third parties have been able to identify the measure at issue and to put forward arguments with respect to Panama's claim.¹⁶⁵ Finally, Panama contends that, even if the request for establishment were to be considered "insufficient on its face", Colombia has failed to demonstrate any "prejudice" arising as a result of this allegedly unsound claim.¹⁶⁶

7.30 As the request for the establishment defines and limits the scope of the dispute and thereby the extent of a panel's jurisdiction, the Panel will begin with Panama's request for establishment as its

¹⁶⁰ Panama's response to Panel question No. 3.

¹⁶¹ Panama's response to Panel question No. 91.

¹⁶² Panama's second written submission, para. 82.

¹⁶³ Panama's response to Panel question No. 6.

¹⁶⁴ Panama's response to Panel question No. 6, Panama's second written submission, para. 84.

¹⁶⁵ Panama's second written submission, paras. 79-80.

¹⁶⁶ Panama's submission on the Request for a Preliminary Ruling by Colombia, para.19.

starting point.¹⁶⁷ A panel may review the dispute only in the light of the provisions cited in the Request. Therefore, the Panel's terms of reference in this dispute are limited to the specific measures and legal claims raised by Panama in document WT/DS366/6.

7.31 The relevant portion of Panama's Request reads as follows:

"Colombia establishes indicative prices to determine the value of products for the purpose of levying customs duties and internal taxes. These prices apply to specific goods from all countries except those with which Colombia has signed free trade agreements. These prices are established and applied in accordance with Resolutions No. 07509, No. 07510, No. 07511, No. 07512, No. 07513, and No. 07530 of 26 June 2007 of the Directorate of Taxes and National Customs ("DIAN"), as well as framework legislation such as Colombia's Customs Statute (Decree No. 2685 of 1999, in particular, Titles V and VI), Resolution No. 4240 of 2000 and Colombia's Tax Code (Decree No. 624 of 1989).

Colombia requires that importers of certain goods pay customs duties and other duties or charges and taxes based on the indicative prices, instead of on the valuation methods set out in Article VII of the GATT 1994 and the Agreement on Customs Valuation. Panama is challenging the indicative price measures on an 'as such' and 'as applied' basis.

Under Article 128.5 e) of Colombia's Customs Statute and Article 172.7 of Resolution No. 4240 of 2000, an importer declaring a f.o.b. value that is below the indicative price can obtain the release of merchandise only if it corrects its import declaration to reflect indicative prices and pays customs duties, other duties or charges and relevant taxes on the basis of those indicative prices. Article 115 of Colombia's Customs Statute further provides that if an importer fails to obtain release of the merchandise within the custody period, the merchandise shall be considered as legally abandoned and will eventually become the property of the State."

7.32 Within the cited text, Panama appears to challenge Resolutions No. 07509, No. 07510, No. 07511, No. 07512 and No. 07513 of the Directorate of Taxes and National Customs ("DIAN"), as well as framework legislation such as Colombia's Customs Statute (Decree No. 2685 of 1999, in particular, Titles V and VI), Resolution No. 4240 of 2000 and Colombia's Tax Code (Decree No. 624 of 1989). And, in particular, Article 128.5 e) of Colombia's Customs Statute and Article 172.7 of Resolution No. 4240 of 2000. The Panel notes that in its responses to the questions by the Panel, Panama clarified that: (a) it was not seeking a separate ruling on Article 115 of Decree No. 2685 of 1999, but referred to it in its request for establishment and its first written submission to demonstrate the adverse consequences faced by an importer that failed to "correct" the import declaration and pay the customs duties and sales tax as required by Article 128.5 e)¹⁶⁸; (b) it was not seeking a ruling on Resolution No. 07530 of 26 June 2007, which refers to products subject to "reference prices" and not to "indicative prices"¹⁶⁹; and (c) it was challenging the provisions governing the determination of the tax base for imported goods, i.e. Article 459 of the Tax Code applied in conjunction with Article 128.5 e) of Decree No. 2685 and Article 172.7 of Resolution No. 4240.¹⁷⁰

¹⁶⁷ Appellate Body Report, *EC – Bananas III*, para. 142, Appellate Body Report, *Brazil – Desiccated Coconut*, p. 21.

¹⁶⁸ Panama's response to Panel question No. 4.

¹⁶⁹ Panama's response to Panel question No. 5.

¹⁷⁰ Panama's response to Panel question No. 6.

7.33 The Appellate Body has ruled that panels can use the parties' submissions to interpret the terms of the request for establishment.¹⁷¹ In its first written submission, Panama refers to a number of provisions within those legal instruments. The Panel has thus sought to further clarify the scope of the measures at issue by way of questions to the parties.

7.34 Panama's arguments and the corresponding Colombian counter-arguments are mainly focussed on Article 128.5 e) of Decree No. 2685 and Article 172.7 of Resolution No. 4240. Panama also refers to the operation of the import regime related to indicative prices. In this context, Panama refers to "the specific Resolutions in the context of the entire framework legislation, that give effect to indicative prices", and specifically Resolutions No. 07509, No. 07510, No. 07511, No. 07512, No. 07513, and No. 07530 of 26 June of the Directorate of Taxes and National Customs ("DIAN"); Colombia's Customs Statute (Decree No. 2685 of 1999, in particular, Titles V and VI), Resolution No. 4240 of 2000 and Colombia's Tax Code (Decree No. 624 of 1989).¹⁷²

7.35 A review of Colombia's first and further submissions shows that Colombia has been able to identify Article 128.5 e) of Decree No. 2685, Article 172.7 of Resolution No. 4240 and the series of resolutions establishing and amending indicative prices as the relevant measures for the claims concerning its indicative prices regime.¹⁷³ Since these provisions were identified by Panama in its request for establishment¹⁷⁴, those provisions form part of the "measure" at issue. The Panel notes that Colombia's ability to defend itself does not appear to have been impaired by Panama's definition of the measures at issue.¹⁷⁵

7.36 The Panel therefore finds that Panama's request for establishment complies with the requirements of Article 6.2 of the *DSU* as far as the definition of the measures at issue regulating Colombia's use of indicative prices is concerned. The Panel thus establishes that the measure relevant to Panama's claims under the *Customs Valuation Agreement* and Article III of the *GATT 1994* comprises: Article 128.5 e) of Decree No. 2685 and Article 172.7 of Resolution No. 4240 as well as Resolution No. 7510 of 26 June 2007, as modified by Resolution No. 11412 of 28 September 2007; Resolution No. 7511 of 26 June 2007; Resolution No. 7509 of 26 June 2007, as modified by Resolution No. 11414 of 28 September 2007; Resolution No. 7512 of 26 June 2007, as modified by Resolution No. 11415 and Resolution No. 7513 of 26 June 2007. The issue of whether a number of these resolutions which have been enacted after the establishment of this Panel are part of our mandate will be dealt with in Section VII.A.2(a) below.

7.37 The Panel further declines to make findings on the WTO-consistency of Article 459 of the Tax Code. The Panel has taken such a decision on the basis of the text of Panama's request for establishment and its response to question No. 91 of the Panel, where Panama indicated that it is not challenging the WTO-consistency of Article 459 of the Tax Code *as such* but rather referred to the provision as context to establishing the WTO-inconsistency of Article 128.5 e) of Decree No. 2685 and Article 172.7 of Resolution No. 4240 with Article III:2 (and III:4 in the alternative) of the *GATT 1994*.

Panama's claims "as applied"

7.38 Colombia has additionally requested the Panel to reject Panama's "as applied" claims due to a failure by Panama to identify individual cases of application of the indicative prices measure at issue.

¹⁷¹ Appellate Body Report, *US – Carbon Steel*, para. 127, Appellate Body Report, *Thailand – H-Beams*, para. 95.

¹⁷² Panama's response to Panel question No. 3.

¹⁷³ Colombia's first written submission, para. 37, Colombia's first oral statement, para. 12, Colombia's second written submission, para. 10.

¹⁷⁴ WT/DS366/6, p. 1.

¹⁷⁵ Appellate Body Report, *Korea – Dairy*, para. 127; Appellate Body Report, *Thailand – H-Beams*, para. 88; Appellate Body Report, *EC – Bananas III*, para. 142.

7.39 In its request for establishment, Panama indicated that it is challenging those measures relating to the use of indicative prices both "as such" and "as applied". Hence, Panama is challenging the WTO-compatibility of the legal instruments themselves as well as the application of the various legal instruments cited in its request.

7.40 Colombia argues that the application of the challenged provisions in particular situations with respect to particular imported products is a distinct measure that needs to be identified with clarity in the context of an "as applied" claim. While Panama's request for establishment refers to the legal provisions at issue, Colombia argues that it does not refer to any single specific application of indicative prices.¹⁷⁶ As a result, Colombia argues that Panama's case must be limited to its "as such" challenge to Colombia's laws and regulations that establish the indicative prices regime.¹⁷⁷

7.41 Panama has clarified that it is challenging the general and systemic application of indicative prices and not individual customs determinations.¹⁷⁸ Panama argues that the distinction between an "as applied" and an "as such" challenge does not relate to the identification of the measures at issue, but to the nature of the complainant's legal claims. Generally, it argues, an "as such" challenge refers to a complainant's view that the identified measure – typically a legislative act – is *per se* WTO-inconsistent, in that every application of the measure would necessarily be WTO-inconsistent. According to Panama, such a challenge involves legal and factual issues that do not arise with respect to an "as applied" challenge. Panama contends that, an "as applied" challenge, on the other hand, refers to all other challenges that do not involve an allegation that an act is *per se* WTO-inconsistent. While this may involve a challenge with respect to an individual importation, there is no limitation that such challenges must be made only with respect to specific entries. In Panama's view, to impose such a limitation and require Members to list all imports to which a measure is applied would render access to dispute settlement virtually impossible.¹⁷⁹ Panama submits that the past practice of Members supports this interpretation. For instance, in *EC – Computer Equipment*, Panama argues that the complainant successfully challenged the application of a measure without describing specific transactions.¹⁸⁰

7.42 The question before the Panel is whether Panama is required to submit specific applications of the laws regulating indicative prices in order to properly raise an "as applied" challenge to the use of indicative prices in accordance with Article 6.2 of the *DSU*.

¹⁷⁶ Colombia's first written submission, para. 38.

¹⁷⁷ Colombia notes that the request for establishment referred to yet another legal basis by challenging Articles 447 and 459 of the Tax Code. WT/DS366/6, p. 2. See para. 141 of Colombia's first written submission.

¹⁷⁸ Panama nevertheless referred to examples of the application of the indicative prices regime. In particular, Panama draws the Panel's attention to: (i) an example of a case in which an importer at first did not correct the import declaration (Exhibit PAN-51) and then subsequently corrected the import declaration (Exhibit PAN-52); (ii) a case in which the importer corrected and paid, and then requested a refund of the customs duties paid in excess, which was refused (Exhibit PAN-53); and (iii) the specific examples submitted by Colombia in Exhibits COL 7-9. According to Panama, Exhibit COL-8, Exhibit COL-9 (complemented by Exhibit COL-64) and Exhibit PAN-53 (partially complemented by Exhibit COL-49) show a complete picture of the "post-importation" process. These Exhibits include documentary evidence from all the stages involved in the procedure, including requests by the importers for the official liquidation, responses by the División de Fiscalización and the División de Liquidación, and the final decisions by the Legal Division on the "recurso de reconsideración" presented by the importers to challenge the decision by the División de Liquidación. Panama has also submitted Exhibit PAN-23 which alleges that importers have corrected declarations and paid duties based on indicative prices in 87 per cent of all cases concerning textiles, apparel and footwear. Panama believes that this evidence illustrates and confirms that the legislation as applied operates in a manner inconsistent with the *Customs Valuation Agreement*.

¹⁷⁹ Panama's submission on the Request for a Preliminary Ruling by Colombia, paras. 23-24.

¹⁸⁰ Panama refers to the Appellate Body Report in *EC – Computer Equipment*. Panama's submission on the Request for a Preliminary Ruling by Colombia, paras. 26-27.

7.43 Under WTO law, an "as such" claim challenges "laws, regulations, or other instruments of a Member that have general and prospective application, asserting that a Member's conduct – not only in a particular instance, but in future situations as well – will necessarily be inconsistent with that Member's WTO obligations."¹⁸¹ It is the Panel's understanding that, leaving aside the issue dealt with in the previous section of whether the identification of the indicative prices measures in Panama's request for establishment complied with Article 6.2 of the *DSU*, both parties agree that Panama has put forward an "as such" claim concerning the WTO-compatibility of Colombia's laws regulating its indicative prices regime. Therefore, Colombia is only challenging the consistency of the "as applied" claims with Article 6.2 of the *DSU*.

7.44 Notwithstanding Colombia's concern, the Panel considers that it is not obliged, as a threshold matter, to find on whether Panama's "as applied" claims are part of its mandate. In the event of a finding of violation in respect of Panama's "as such" claims, the Panel considers a finding of violation "as applied" would be unnecessary since it stands to reason that each prospective individual application of indicative prices to import transactions would be based on WTO-inconsistent legislation. The fact that a panel makes a finding that a measure "as such" is inconsistent with the covered agreements also covers every instance of application of the same measure.¹⁸² The Panel notes that the parties agree on the admissibility of Panama's "as such" claims. Thus, the Panel will first address Panama's "as such" claims. Only if the Panel rejects Panama's "as such" claims, will it consider whether Panama's "as applied" claims comply with the requirements of Article 6.2 of the *DSU*.

2. Other issues concerning the scope of the matter subject to dispute

(a) Measures potentially outside the Panel's mandate

7.45 In its first written submission, Panama indicates that Colombia has replaced or modified a series of resolutions authorizing the application of indicative prices to a number of subject products, *following* the submission of its request for establishment. The specific resolutions, which authorize the imposition of indicative prices on a per unit basis are the following :

Resolutions in force at the time of the request for the establishment of the Panel	Subsequent legislative action
Resolution No. 7509	Replaced or modified by Resolution No. 11414 of 28 September 2007. ¹⁸³
Resolution No. 7510	Replaced or modified by Resolution No. 11412 of 28 September 2007. ¹⁸⁴
Resolution No. 7511	No modification.
Resolution No. 7512	Replaced or modified by Resolution No. 11415 of 28 September 2007. ¹⁸⁵
Resolution No. 7513	No modification.

7.46 Panama asks the Panel to make findings on the measures currently in force on the ground that, in its request for establishment, in addition to identifying the specific provisions at issue, it referred to

¹⁸¹ Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 172.

¹⁸² Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 172.

¹⁸³ Resolution No. 11414 of 28 September 2007, referring to footwear classifiable under Chapter 64 (Exhibit PAN-14).

¹⁸⁴ Resolution No. 11412 of 28 September 2007, referring to fabrics classifiable under Chapters 52, 54, 55, 56, 58, 59, 60 (Exhibit PAN-15).

¹⁸⁵ Resolution No. 11415 of 28 September 2007, referring to footwear classifiable under Chapter 64 (Exhibit PAN-16).

"any amendments or extensions to these measures as well as any related acts, practices and implementing measures".

7.47 Colombia stated in its first written submission that it did not object to Panama's reference to the measures that replaced or modified the originally challenged provisions.¹⁸⁶ Nevertheless, the Panel recalls that the Appellate Body has ruled that panels have a duty to examine issues of a "fundamental nature", issues that go to the root of their jurisdiction, on their own motion if the parties to the dispute remain silent on those issues.¹⁸⁷ Whether a measure falls within the Panel's terms of reference is clearly an issue that goes to the root of the Panel's jurisdiction. Therefore, even though Colombia does not contest the inclusion of these various regulations, the Panel must determine whether Resolutions 11414, 11412 and 11415 fall within its terms of reference.

7.48 The Panel considers Article 7 of the *DSU*, governing the Panel's terms of reference, Article 4 of the *DSU*, governing a complainant's request for consultations, and Article 6 of the *DSU*, governing a complainant's request for establishment of a panel, are relevant to this issue. Article 7.1 of the *DSU* provides:

"Panels shall have the following terms of reference unless the parties to the dispute agree otherwise within 20 days from the establishment of the panel:

To examine, in the light of the relevant provisions in (name of the covered agreement(s) cited by the parties to the dispute), the matter referred to the DSB by (name of party) in document ... 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)."

7.49 Article 4.4 of the *DSU* provides:

"All such requests for consultations shall be notified to the DSB and the relevant Councils and Committees by the Member which requests consultations. Any request for consultations shall be submitted in writing and *shall give the reasons for the request, including identification of the measures at issue* and an indication of the legal basis for the complaint." (emphasis added)

7.50 Article 6.2 of the *DSU* provides:

"The request for the establishment of a panel shall be made in writing. It shall indicate whether consultations were held, *identify the specific measures at issue* and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly. In case the applicant requests the establishment of a panel with other than standard terms of reference, the written request shall include the proposed text of special terms of reference." (emphasis added)

7.51 The Appellate Body affirmed in *US – Upland Cotton* that, "pursuant to Article 7 of the *DSU*, a panel's terms of reference are governed by the request for establishment of a panel".¹⁸⁸

7.52 The Panel believes that the Appellate Body's findings in *Chile – Price Band System* are relevant to the present dispute. On that occasion, the Appellate Body considered whether an

¹⁸⁶ Colombia's first written submission, para. 52, footnote 35.

¹⁸⁷ Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 36; Appellate Body Report, *US – Carbon Steel*, para. 123.

¹⁸⁸ See e.g. Appellate Body Report, *US – Upland Cotton*, para. 284, citing to Appellate Body Report, *US – Carbon Steel*, para. 124.

amendment to a measure enacted *after* the Panel had been established should nevertheless be considered as within the Panel's terms of reference.¹⁸⁹ In that case, the Appellate Body determined that the amendment at issue should be considered as part of the measure at issue since it clarified the legislation that established the measure at issue and did not change the original measure into something different than what was in force before the amendment.¹⁹⁰ This determination was considered consistent with earlier jurisprudence¹⁹¹ and was also found to be consistent with the object and purpose of the WTO dispute settlement system, as set forth in Article 3.7 of the *DSU*. The Appellate Body explained:

"If the terms of reference in a dispute are broad enough to include amendments to a measure – as they are in this case – and if it is necessary to consider an amendment in order to secure a positive solution to the dispute – as it is here – then it is appropriate to consider the measure *as amended* in coming to a decision in a dispute."¹⁹²

7.53 The Panel agrees with the Appellate Body's rationale. In the dispute before the Panel, Colombia enacted the aforementioned Resolutions 11414, 11412 and 11415 after the Panel was established. In the Panel's view, the terms of the Panama's request for establishment include the relevant amendments and replacements.

7.54 The Panel therefore finds that Resolutions 11414, 11412 and 11415 are properly part of the measure at issue and within the Panel's terms of reference. In the Panel's view, a failure to consider these additional resolutions would inhibit the Panel from securing a positive solution to the dispute.

(b) Admissibility of Panama's second claim under Article I:1 of the *GATT 1994*

7.55 In its first oral statement¹⁹³, Panama requested the Panel to find that the restriction on importation of textiles, apparel and footwear arriving from Panama to two ports, is inconsistent with Article I:1 of the *GATT 1994*, in the event of a finding that the ports of entry restrictions do not fall within "Article XI (and consequently Article XIII)". However, Panama did not raise this claim in its first written submission. Instead, in its first written submission, Panama exclusively argued that the requirement to present an advance import declaration, pay customs duties and sales tax on the basis of an advance declaration, and legalization fee requirements violate Article I:1 of the *GATT 1994*. Panama has argued that this late claim is justified on the ground that the claim was identified in its request for establishment. Panama explained that "[i]n its first written submission, [it] did not elaborate on its Article I:1 claim because it seemed indisputable that the ports of entry measure falls under Articles XI and XIII."¹⁹⁴

7.56 Colombia objects to the inclusion of what it considers a new claim and argues that the failure to develop any legal and factual arguments in respect of such claim implies that Panama failed to make a *prima facie* case of violation under GATT Article I:1.¹⁹⁵ Colombia submits that this claim

¹⁸⁹ Appellate Body Report, *Chile – Price Band System*, para. 137.

¹⁹⁰ Appellate Body Report, *Chile – Price Band System*, para. 137.

¹⁹¹ The Appellate Body in *Chile – Price Band System* cited to a passage from the Panel Report on *Argentina – Footwear (EC)* which concluded that modifications made to the measure at issue during the panel proceedings did:

"... not constitute entirely new safeguard measures in the sense that they were based on a different safeguard investigation, but are instead modifications of the legal form of the original definitive measure, which remains in force in substance and which is the subject of the complaint."

Appellate Body Report, *Chile – Price Band System*, para. 138.

¹⁹² Appellate Body Report, *Chile – Price Band System*, para. 144.

¹⁹³ Panama's first oral statement, para. 53.

¹⁹⁴ Panama's second written submission, para. 141.

¹⁹⁵ Colombia's second written submission, para. 149.

was not part of Panama's request for establishment and is therefore not part of the Panel's terms of reference. While Colombia acknowledges that Article I:1 of the *GATT 1994* is mentioned in Panama's request for establishment, Colombia considers that Panama has strictly referred to the Article I:1 claim developed in its first written submission in relation to advance import declaration and legalization requirements in the ports of entry measure.¹⁹⁶

7.57 Assuming *arguendo* that Panama's additional claim under Article I:1 is part of the Panel's terms of reference, Colombia further submits that Panama was required under paragraph 4 of the Panel's Working Procedures¹⁹⁷ to have presented its claims and arguments in its first written submission.¹⁹⁸ Colombia argues that it is a well-established principle in WTO case law that a party must present its arguments at the earliest opportunity: the first written submission in this case.¹⁹⁹ Colombia also contends that the Panel should not rely on the ruling by the Appellate Body in *EC – Bananas III* that "[t]here is no requirement in the DSU or in GATT practice for arguments on all claims relating to the matter referred to the DSB to be set out in a complaining party's first written submission to the panel".²⁰⁰ In Colombia's view, the Appellate Body authorized the introduction of a new claim after the first written submission due to the "very peculiar procedural developments" in that case and, thus such criteria would not be applicable to the case at hand.²⁰¹ Furthermore, Colombia notes that in *EC – Sardines*, the Appellate Body limited this reasoning to the development of new "arguments" rather than new "claims". In the instant case, Colombia contends, Panama is not simply developing an argument, but introducing a whole new claim.²⁰² Colombia has thus not presented any substantive rebuttal arguments as it considers there simply is no case to answer in the absence of any development of this new claim by Panama.²⁰³

7.58 Panama considers there can be no doubt that the claim under Article I:1 is within the panel's terms of reference. While it did not elaborate upon this claim in its first written submission, Panama argues that it did so at the next available opportunity, in its oral statement at the first meeting of the Panel with the parties. Panama contends that the fact that it advanced arguments regarding this claim in its oral statement at the first meeting of the Panel does not in any way affect the Panel's ability or obligation to resolve this claim. Moreover, Panama argues, Colombia had the opportunity to respond to Panama's Article I:1 claim in its second written submission as well as in its oral statement at the second meeting of the Panel, and in its answers to questions from the Panel. Thus, in Panama's view, no basis exists to suggest that Colombia has been in any way prejudiced by Panama's inclusion of arguments on this claim in its first oral statement. Panama notes that its claims under Article I:1 has, in any event, only been advanced in the alternative, in the event that the Panel rules against it on its claims under Article XIII:1.²⁰⁴

7.59 The question before the Panel is thus whether this second claim under Article I:1 of the *GATT 1994* is part of its mandate.

¹⁹⁶ Colombia's second written submission, paras. 148-149.

¹⁹⁷ Paragraph 4 provides that: "Before the first substantive meeting of the Panel with the parties, the parties to the dispute shall transmit to the Panel written submissions in which they present the facts of the case and their arguments".

¹⁹⁸ Colombia's second written submission, para. 155.

¹⁹⁹ Colombia's second written submission, para. 156. In support of this statement, Colombia refers to the Appellate Body Report, *US – Gambling*, para. 269 and to the Appellate Body Report, *India – Patents*, para. 94.

²⁰⁰ Colombia's second written submission, para. 161.

²⁰¹ Colombia's second written submission, para. 162.

²⁰² Colombia's second written submission, paras. 164-165.

²⁰³ Colombia's second written submission, para. 150, and Colombia's second oral statement, paras. 44-45.

²⁰⁴ Panama's second oral statement, para. 44.

7.60 The Panel considers that, notwithstanding Colombia's contention, it is not obliged, as a threshold matter, to find on whether Panama's second claim under Article I:1 is part of its mandate. The Panel notes that Panama has formulated this claim as an alternative to its Article XI and Article XIII claims. Thus, were the Panel to find a violation under Article XI and Article XIII, it would not need to examine Panama's alternative claim under Article I:1. Only if the Panel rejects Panama's claims under Article XI and Article XIII, will it consider whether Panama's second claim under Article I:1 is part of its mandate.

B. WHETHER COLOMBIA'S USE OF INDICATIVE PRICES IS INCONSISTENT WITH ARTICLES 1, 2, 3, 5, 6 AND 7.2(B), (F) AND (G) OF THE *CUSTOMS VALUATION AGREEMENT*

1. Main arguments of the parties

7.61 Panama requests the Panel to find that Colombia's determination of the customs value of textiles, apparel and footwear on the basis of indicative prices is inconsistent with Articles 1, 2, 3, 5, 6 and 7.2(b), (f) and (g) of the *Customs Valuation Agreement*. Panama submits that Article 128.5 e) of Decree No. 2685 and Article 172.7 of Resolution No. 4240 require that, in cases in which the importer has declared a value lower than the indicative price, the importer has to either correct the import declaration and pay customs duties and sales tax based on indicative prices, or re-ship the goods. In Panama's view, Colombian authorities determine the customs value based on the application of indicative prices to subject goods arriving from Panama. Panama argues that this method of customs valuation is inconsistent with the methodologies set out in the *Customs Valuation Agreement*.

7.62 Panama recalls that Article 15.1(a) of the *Customs Valuation Agreement* provides that the "customs value of imported goods" is defined as the value of a good for the purpose of levying *ad valorem* customs duties on imported goods. In the case of products subject to indicative prices, Panama argues that the customs value used for the purpose of levying *ad valorem* custom duties on imported goods is determined when the importer submits its import declaration. Panama considers that customs valuation occurs at this point when customs officials review the declared value in order to determine whether that value is greater or less than the relevant indicative price for a particular product under review. In accordance with Article 128.5 e) of Decree No. 2685 and Article 172.7 of Resolution No. 4240, if the declared value is lower than the indicative price, this value is not accepted and the importer is required to "correct" the value to reflect the indicative price. Since Colombian customs authorities have made a determination not to accept the declared customs value, Panama argues that this value based on an indicative price serves as the customs value for the purpose of levying customs duties. An importer is not permitted to contest the value used or submit any further evidence. The importer must pay the customs duties based on that "corrected" value, or otherwise re-ship the goods from Colombia.²⁰⁵ In the vast majority of cases (87 per cent of the total cases), according to Panama, importers have decided to "correct" the declared value and pay customs duties based on that value.²⁰⁶

7.63 Panama rejects Colombia's contention that customs valuation is postponed until the later "control posterior" stage. In Panama's view, Colombia has failed to demonstrate that customs valuation takes place during the "control posterior" or "*estudio de valor*". Moreover, Panama contends that Colombia has not identified the specific legal basis for the "control posterior" or the "*estudio de valor*" for products subject to indicative prices during the post-importation process.²⁰⁷

7.64 According to Panama, Article 128.5 e) prescribes that the relevant importation documents are forwarded to the *División de Fiscalización* for the purpose of initiating official liquidation. Panama notes that the definition of this "*proceso de liquidación oficial de revisión de valor*" provided by

²⁰⁵ Panama's second written submission, paras. 14-16.

²⁰⁶ See Exhibit PAN-23.

²⁰⁷ Panama's second written submission, paras. 17-21.

Article 514 of Decree No. 2685 refers to a "review" of the value aimed at amending "errors" in the import declaration, thus implying that there has already been a determination of the customs value that is being reviewed.²⁰⁸ Panama argues this conclusion is further reinforced by the wording of Article 548 of Decree No. 2685, which permits importers to request the reimbursement of the sums paid in excess. Foremost, Panama submits, Article 548 of Decree No. 2685 refers to the reimbursement of customs duties "that have been paid", and not to the "refund of a guarantee". Additionally, Panama argues that Article 548 distinguishes between "payments" and "provisional payments". Panama notes that paragraph (d), in Article 548 refers to payment of provisional anti-dumping duties; however paragraph (a) of the same provision, does not refer to "provisional payment" but instead provides the basis upon which importers may seek a "*devolución*" of funds, or "refund".²⁰⁹

7.65 Panama further argues that Article 222 of Resolution No. 4240 demonstrates that customs valuation always takes place at the time of inspection. Article 222 of Resolution No. 4240 provides that, the date of physical inspection or the date of presentation of the import declaration shall be considered as the date of valuation, for the purposes of determining the customs value for imports.²¹⁰ For Panama, Colombia's allegation that this Article merely establishes a "legal fiction" amounts to a "distinction without a difference".²¹¹ Panama considers this view is also contradicted by other provisions, such as Articles 254 and 237 of Decree No. 2685, which similarly provide that valuation should take place at the moment of importation.²¹²

7.66 Panama considers its interpretation of the point at which custom valuation takes place is not contradicted by the fact that the challenged provisions form part of sections of Colombian legislation that are not contained in the general section dealing with "customs valuation".²¹³ Panama submits that the placement of a provision in a particular chapter is not determinative of the nature of that measure.²¹⁴ In this regard, Panama notes that Colombia has itself confirmed that Article 128.8 of Decree No. 2685, authorizes official prices and in Colombia's words, serves the purpose of "mak[ing] sure that the government set price would be used as the basis for customs valuation".²¹⁵ Panama notes that Article 128.8 appears in the same section as Article 128.5 e) of Decree No. 2685. Thus, Panama argues if another provision alongside Article 128.5 e) in Chapter VI entitled "Ordinary Importation" concerns the determination of the dutiable base (*base gravable*) for customs valuation purposes²¹⁶, then Article 128.5 may also be an applicable provision for customs valuation. Neither of these provisions appears in Title VI entitled "Customs Valuation".

7.67 On the basis of its view that customs valuation takes place at the time of presentation of the import declaration, Panama claims that Colombia's use of indicative prices to determine the customs value of textiles, apparel and footwear is inconsistent with Articles 1, 2, 3, 5, 6 and 7.2(b), (f) and (g)

²⁰⁸ Panama's second written submission, paras. 22-26.

²⁰⁹ Panama's second written submission, paras. 29-33.

²¹⁰ Panama's second written submission, para. 12.

²¹¹ Panama's second written submission, para. 12.

²¹² Panama's second written submission, para. 12. Article 254 provides that when there is a dispute regarding the declared customs value and/or the supporting documents or *when it is not possible to determine the value at the moment of importation*, the release can be authorized upon posting a guarantee (emphasis added by Panama) ("*Levante de la Mercancía. Cuando exista controversia respecto al valor en aduana declarado y/o los documentos que lo justifican, o cuando no sea posible la determinación del valor al momento de la importación, se podrá otorgar el levante de las mercancías, previa constitución de garantía, en los términos del Artículo 13 del Acuerdo y artículo 128o. numeral 5 de este Decreto y conforme a las condiciones y modalidades que señale la autoridad aduanera*") Article 237 provides that the "moment of importation" is the date of arrival of the merchandise to the national customs territory ("*Momento de la importación La fecha de llegada de la mercancía al territorio aduanero nacional, establecida de conformidad con las normas aduaneras vigentes*").

²¹³ Panama's first written submission, para. 78.

²¹⁴ Panama's second written submission, para. 9.

²¹⁵ Colombia's first written submission, para. 87.

²¹⁶ Colombia's response to question No. 5(d) from Panama.

of the *Customs Valuation Agreement*.²¹⁷ According to Panama, the customs value should whenever possible be based on the transaction value except where not appropriate in accordance with the *Customs Valuation Agreement*.²¹⁸ When not based on transaction value, the value must be based on the methods laid out in Articles 2 to 7 of the *Customs Valuation Agreement*.²¹⁹ Panama contends that Colombia's use of indicative prices for purposes of customs valuation violates each of the sequential methodologies set forth in Articles 1 to 6 of the *Customs Valuation Agreement*. Additionally, Panama argues the use of indicative prices violates Article 7.2(b), (f) and (g) of the *Customs Valuation Agreement*, since: (i) the customs value is determined on the basis of "a system which provides for the acceptance for customs purposes of the higher of two alternative values"; (ii) the customs value is determined on the basis of "minimum customs values"; and (iii) the customs value is determined on the basis of "arbitrary or fictitious prices".²²⁰

7.68 Colombia does not deny the primacy of the transaction value or the sequential nature of the valuation methods in the *Customs Valuation Agreement*. However, Colombia submits that the use of indicative prices does not constitute customs valuation but instead is a control mechanism which takes place *prior* to the actual customs valuation. Colombia asserts that indicative prices are used to assess whether there is a reason to doubt the veracity of the declared f.o.b.f.o.b. value of products "that are known to have been the subject of under-invoicing, smuggling and money laundering".²²¹ Colombia asserts that its post-importation valuation method is consistent with the sequential order provided for in the *Customs Valuation Agreement*.

7.69 Colombia submits that its importation process takes place in two separate stages. In the first stage, referred to as the "*control previo*", goods are inspected and subsequently released. In the second stage, referred to as the "*control posterior*", Colombian customs officials determine the "customs value" of imported goods. Under this scheme, Colombia argues that indicative prices only play a role during the inspection process as a "customs control mechanism". Consequently, indicative prices do not factor into the final determination of the customs value which is assessed during the *control posterior*, according to Colombia.²²²

7.70 In Colombia's view, Article 128.5 e) of Decree No. 2685 and Article 172.7 of Resolution No. 4240 strictly regulate the release of goods ("*levante*") if the importer "provisionally pays, by way of deposit" customs duties and sales tax.²²³ This provisional payment is subject to a post-importation control (*control posterior*) at which time the customs value is determined.²²⁴ As evidence that valuation does not occur until the control posterior, Colombia notes that Article 128.5 e) of Decree No. 2685 and Article 172.7 of Resolution No. 4240 require that the importer's declaration and supporting documents are sent to the *División de Fiscalización* for customs valuation.²²⁵ Moreover, Colombia submits that the relevant provisions that "actually deal with customs valuation" are contained in Title VI of Decree No. 2685 and Chapter III of Resolution No. 4240, and specifies that valuation must be conducted in accordance with the criteria set forth in the *Customs Valuation Agreement*.²²⁶

7.71 Colombia argues that its interpretation that Article 128.5 e) of Decree No. 2685 and Article 172.7 of Resolution No. 4240 deal with the "release" of the goods and not with customs

²¹⁷ Panama's first written submission, Section IV.A, p. 24; Panama's second written submission, para. 226.

²¹⁸ Panama's first written submission, paras. 91-98.

²¹⁹ Panama's first written submission, paras. 110-115.

²²⁰ Panama's first written submission, paras. 122-128.

²²¹ Colombia's first written submission, para. 53.

²²² Colombia's first written submission, paras. 50-61, Colombia's second written submission, para. 30.

²²³ Colombia's first written submission, para. 55.

²²⁴ Colombia's first written submission, para. 55.

²²⁵ Colombia's second written submission, paras. 35-36.

²²⁶ Colombia's second written submission, paras. 51-54.

valuation is confirmed by an "ordinary reading" of the text of the challenged provisions.²²⁷ Colombia submits that "indicative prices" are clearly defined in Article 237 of Decree No. 2685 as a "control mechanism".²²⁸ Furthermore, Colombia stresses that both Article 128.5 e) and Article 172.7 appear in sections of Decree No. 2685 and Resolution No. 4240, respectively, that address matters of "customs control" as opposed to "customs valuation".²²⁹ Colombia notes in this respect that the GATT Panel Report on *US – Tobacco* clearly considered that the position occupied by the contested provisions in a Member's legal system is very relevant in determining the meaning of a Member's domestic law.²³⁰

7.72 While Colombia argues that importation terminates with the release of the good, this is not the case for the determination of the customs value. Thus, Colombia submits that the reference to the "*momento de valoración*" in Article 222 of its Customs Statute operates as a simple "legal fiction" to establish the proper point in time when the customs value should be recognized, but does not imply that the customs value of the goods has been determined at that stage in the proceedings.²³¹

7.73 In addition to consideration of the ordinary meaning of Article 128.5 e) of Decree No. 2685 and Article 172.7 of Resolution No. 4240 in their context, Colombia submits that the "consistent application" of these provisions confirms that indicative prices are not used to determine the customs value of imported goods. Colombia contends that Exhibit COL-8, Exhibit COL-9²³² and Exhibit PAN-53²³³ demonstrate that the "correction" of the import declaration simply involves ticking of the box "*Ajustes*" on the Import Declaration. According to Colombia, the payment of duties effectively serves as a cash deposit, wherein all relevant documents are subsequently transmitted to the *División de Fiscalización* for customs valuation purposes. At this later time, the *División de Fiscalización* determines the customs value based on the methods of the *Customs Valuation Agreement* and refunds any cash payment made in excess of the amount due.²³⁴

2. Consideration by the Panel

(a) Legislation authorizing the use of indicative prices

7.74 In addressing Colombia's challenge to Panama's identification of the measure relevant to its claims under the *Customs Valuation Agreement* and Article III of the *GATT 1994*²³⁵, the Panel established that the measure at issue comprises Article 128.5 e) of Decree No. 2685 and Article 172.7 of Resolution No. 4240 as well as Resolution No. 7510 of 26 June 2007, as modified by Resolution No. 11412 of 28 September 2007; Resolution No. 7511 of 26 June 2007; Resolution No. 7509 of 26 June 2007, as modified by Resolution No. 11414 of 28 September 2007; Resolution No. 7512 of 26 June 2007, as modified by Resolution No. 11415 and Resolution No. 7513 of 26 June 2007 (hereafter referred to as the resolutions establishing indicative prices).²³⁶

²²⁷ Colombia's second written submission, paras. 29-31.

²²⁸ Colombia's second written submission, para. 45-46. Article 237 of Decree No. 2685 reads as follows: "*Precio Indicativo. Es aquel precio de referencia establecido (...) para ser utilizado como mecanismo de control (...)*".

²²⁹ Article 128.5 e) is part of Title V Chapter IV of Decree No. 2685 (entitled "*Proceso de Importación*") and Article 172.7 is part of Title VI Chapter II of Resolution No. 4240 (entitled "*Controles en Valoración Aduanera*")

²³⁰ Colombia's second written submission, paras. 37-39.

²³¹ Colombia's second written submission, para. 32; See also Colombia's first written submission, para. 96.

²³² See also Exhibit COL-64.

²³³ See also Exhibit COL-49.

²³⁴ Colombia's second written submission, paras. 67-69.

²³⁵ See para. 7.36.

²³⁶ WT/DS366/6, pp. 1-2, Panama's first written submission, para. 29, Panama's responses to Panel questions Nos. 3 and 91.

7.75 Article 128 of Decree No. 2685 reads, in its relevant part, as follows:

"ARTICULO 128. AUTORIZACIÓN DE LEVANTE. La autorización de levante procede cuando ocurra uno de los siguientes eventos:

...

5. Cuando practicada la inspección aduanera física o documental, se suscite una controversia de valor en razón a que: ... e) el valor f.o.b. declarado está por debajo de los precios indicativos establecidos por el Director de Aduanas y el declarante dentro de los cinco (5) días siguientes a la práctica de dicha diligencia, corrige la declaración de importación y paga los tributos aduaneros con base en el precio indicativo en los términos y condiciones señalados por la DIAN, debiéndose en todo caso remitir las diligencias a la División de Fiscalización Aduanera con el fin de que se adelante el proceso de liquidación oficial de revisión de valor correspondiente."

7.76 Article 172 of Resolution No. 4240 reads, in its relevant part, as follows:

"ARTICULO 172. CONTROVERSIAS. Durante la diligencia de inspección aduanera en el proceso de importación, la controversia de valor puede ser originada por cualquiera de las situaciones descritas a continuación, en las cuales se actuará de la manera prevista en el numeral respectivo, teniendo en cuenta lo dispuesto en los artículos 128 del Decreto 2685 de 1999 y 17 de la Decisión Andina 571:

...

3) Cuando el importador haya constituido garantía para obtener el levante o haya corregido la base gravable a partir del precio de referencia establecido, el funcionario inspector deberá remitir, en el menor tiempo posible a través de su jefe inmediato, fotocopia de la Declaración de Corrección, de la documentación aportada por el importador y de la garantía a la División de Fiscalización Aduanera, para el correspondiente estudio de valor.

...

7) Cuando la controversia se origine en razón a que el valor f.o.b. declarado está por debajo del precio indicativo ... solo se autorizará el levante si dentro de los cinco (5) días siguientes a la práctica de la diligencia, el declarante corrige el precio declarado con el precio indicativo que corresponda al producto importado, o con el precio real de negociación, siempre que sea superior al indicativo."

(b) Order of analysis

7.77 Panama has requested the Panel to determine whether Colombia's use of indicative prices is inconsistent with Articles 1, 2, 3, 5, 6 and 7.2(b), (f) and (g) of the *Customs Valuation Agreement*. As the Panel discussed in paragraph 7.44 above, given that Panama has made "as such" and "as applied" claims, the Panel has decided to defer its decision on the admissibility of Panama's "as applied" claims until making findings on Panama's "as such" claims. This does not mean, however, that the Panel is prevented from examining instances where indicative prices have been applied as part of the operation of the measures at issue.

7.78 The Panel notes that the parties' arguments related to Colombia's use of indicative prices focus almost exclusively on a series of factual determinations concerning the actual nature and functioning of indicative prices within Colombia's customs procedures. The parties' understanding of

those facts differ radically. Panama considers that the use of indicative prices for the payment of customs duties and taxes constitutes customs valuation that is inconsistent with Articles 1, 2, 3, 5, 6 and 7.2(b), (f) and (g) of the *Customs Valuation Agreement*. Colombia, on the other hand, argues that the indicative prices regime does *not* constitute customs valuation but is used as a customs control mechanism. Colombia argues that the payment of duties resulting from the use of indicative prices amounts to a guarantee, and that customs valuation takes place only at a later stage.

7.79 The Panel recalls that both parties have advanced a series of arguments concerning whether the "*pago de tributos*" within the indicative prices measure is in fact a guarantee under Article 13 of the *Customs Valuation Agreement*.²³⁷ However, the Panel will only address this question if it determines that Colombia is not collecting customs duties at the time of inspection, based on indicative prices. Indeed, a finding that Colombia uses indicative prices to conduct customs valuation at the time of inspection would obviate such an analysis, since Article 13 addresses situations where a customs authority realizes the need to delay the final determination of the customs value.

7.80 The first question before the Panel is therefore whether indicative prices are used for the purpose of customs valuation within the meaning of the *Customs Valuation Agreement*. In order to answer that question, the Panel will examine the concept of customs valuation pursuant to the *Customs Valuation Agreement*. Having done so, the Panel will consider, under the facts of this case, whether Colombia's use of indicative prices amounts to customs valuation within the meaning of the *Customs Valuation Agreement*. If the Panel finds that Colombia's use of indicative prices does indeed constitute customs valuation as contemplated by the *Customs Valuation Agreement*, it will proceed to analyse Panama's claims under Articles 1, 2, 3, 5, 6 and 7.2(b), (f) and (g) of the *Customs Valuation Agreement*.

(c) The concept of customs valuation within the *Customs Valuation Agreement*

7.81 The Panel notes that the *Customs Valuation Agreement* does not provide a definition for customs valuation. Article 15 of the *Customs Valuation Agreement* does however include a definition of "customs value". The term "customs value of imported goods" is defined in Article 15.1(a) of the *Customs Valuation Agreement* as "the value of the goods for the purposes of levying *ad valorem* duties of customs on imported goods". The Panel believes that this definition of customs value is useful in understanding what customs valuation means within the *Customs Valuation Agreement*. Following Article 31 of the *Vienna Convention on the Law of Treaties* ("VCLT")²³⁸, the Panel shall look at the ordinary meaning of the relevant concepts present in this definition.

²³⁷ Colombia's first written submission, paras. 119-124; Panama's responses to Panel questions Nos. 37 and 38, Colombia's responses to Panel questions Nos. 37 and 38; Colombia's second written submission, para. 85, Panama's first oral statement, paras. 123-127, Panama's second written submission, paras. 46-64, Colombia's response to Panel question No. 94. Article 13 of the *Customs Valuation Agreement* reads as follows: "If, in the course of determining the customs value of imported goods, it becomes necessary to delay the final determination of such customs value, the importer of the goods shall nevertheless be able to withdraw them from customs if, where so required, the importer provides sufficient guarantee in the form of a surety, a deposit or some other appropriate instrument, covering the ultimate payment of customs duties for which the goods may be liable. The legislation of each Member shall make provisions for such circumstances".

²³⁸ Article 3.2 of the *DSU* provides that Members recognize that the WTO dispute settlement system serves to clarify the provisions of the covered agreements "in accordance with customary rules of interpretation of public international law". Article 31 of the *Vienna Convention on the Law of Treaties* ("VCLT"), recognized as one such rule (Appellate Body Report, *US – Gasoline*, p. 17. See also Appellate Body Report, *India – Patents (US)*, para. 46, Appellate Body Report, *Japan – Alcoholic Beverages II*, pp. 10-12; and Panel Report, *US – DRAMS*, para. 6.13.), provides that "[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." UN Doc. A/Conf.39/27; 1155 UNTS 331; 8 ILM 679 (1969).

7.82 The Panel will first assess the concept of "valuation" which is defined as "[t]he action of estimating or fixing the monetary value of something"²³⁹ or as "[t]he process of determining the value of a thing or entity".²⁴⁰ The term "value", in turn, is defined in the *Oxford English Dictionary* as "[t]hat amount of a commodity, medium of exchange, etc., considered to be an equivalent for something else"²⁴¹ and the term "value" is defined in the *Black's Law Dictionary* as "[t]he monetary worth or price of something; the amount of goods, services or money that something will command in an exchange".²⁴²

7.83 In light of the dictionary definitions of valuation and value, as well as the definition of customs value provided in Article 15 of the *Customs Valuation Agreement*, the Panel considers that the ordinary meaning of the concept of customs valuation is straightforward. Essentially, customs valuation involves the process of determining the monetary worth or price of imported goods for the purpose of levying customs duties. With this understanding of the meaning of customs valuation, the Panel will consider whether Colombia determines the customs value of imports through the use of its indicative prices regime.

(d) Whether the use of indicative prices by Colombia constitutes customs valuation

7.84 In the Panel's view, the two central aspects within the concept of customs valuation are (i) the *value* of the goods, which is used (ii) for the purposes of *levying ad valorem* customs duties.

7.85 The first question is whether the indicative prices set by Colombia represent the "*value of the goods*". In light of the ordinary meaning of customs valuation, indicative prices whenever higher than the declared value reflect the "value of the goods" imported into Colombia. Accordingly, the question arises whether the value assigned to goods entering Colombia is used for the purposes of levying customs duties. The Panel notes that the term "levy" is defined in the *Oxford English Dictionary* as "the collection of an assessment, duty or tax", while the *Black's Law Dictionary* defines "levy" as "the imposition of a fine or tax".²⁴³ The key issue is thus whether Colombia's customs authorities *collect* customs duties on the basis of indicative prices.

7.86 In the Panel's view, the value of goods can only be used for one of two possible purposes, either: (a) to determine the amount of *ad valorem* duties and sales tax that the importer must pay in order to obtain the release of the goods, as Panama argues; or (b) to determine the amount of a "guarantee in the form of a cash deposit" that will secure the future payment of customs duties and sales tax as determined in a latter stage, as Colombia argues. Therefore, if this disbursement by the importer constitutes a "payment" of *ad valorem* duties, as opposed to a "guarantee", it follows that the Customs Administration is in fact collecting customs duties and sales tax based on indicative prices, regardless of any other *a posteriori* mechanism that may be made available to refund duties paid in excess.

7.87 The parties disagree on whether Colombia collects duties based on indicative prices. This raises the larger issue of whether the "payment" of duties is in fact a payment *strictu sensu* or instead a guarantee in the form of a cash deposit, as claimed by Colombia. Throughout these proceedings, Colombia has consistently maintained that the concept of payment under Article 128.5 e) of Decree No. 2685 refers to a "guarantee in the form of a cash deposit".²⁴⁴ However, Colombia has

²³⁹ *Shorter Oxford English Dictionary*, 5th edition (2002), p. 3499.

²⁴⁰ *Black's Law Dictionary*, 7th edition (2000), p. 1548.

²⁴¹ *Shorter Oxford English Dictionary*, 5th edition (2002), p. 3500.

²⁴² *Black's Law Dictionary*, 7th edition (2000), p. 1549.

²⁴³ *Black's Law Dictionary*, 7th edition (2000), p. 737.

²⁴⁴ See for instance Colombia's first written submission, paras. 55-56, 104, 108, 130; Colombia's first oral statement, paras. 29, 40, 41, 52, 54, 57; Colombia's second written submission, paras. 57, 66, 69, 85, Colombia's responses to Panel questions Nos. 14 and 22, and Colombia's responses to questions Nos. 2(a), 2(b), 5(a)(i), 6(a) and 6(b) from Panama.

subtly evolved its position through a series of responses to the Panel's questions. In particular, Colombia submitted that:

"[T]he payment [made under Article 128.5 e) of Decree No. 2685] functions like a cash deposit but no separate deposit figure is created in Colombian law to deal with such payments, which are simply provisional payments in an amount sufficient to cover the ultimate payment of customs duties for which the goods may be liable.

...

Irrespective of the form the guarantee takes, a cash payment can and must be considered as a guarantee if it complies with the basic test relating to the timing and function of the payment made: first, that it is made prior to the final determination of the duty liability ... and, second, that its function is to secure the ultimate payment of customs duties."²⁴⁵

7.88 In the Panel's view, "payment" and "guarantee" are two different legal concepts that may not be equated lightly. This is true irrespective of the form that the guarantee may take, whether a bank guarantee, guarantee provided by an insurance company, cash deposit, or any other kind of guarantee. The term "guarantee" is referred to in the *Black's Law Dictionary* as "something given or existing as security, such as to fulfil a future engagement or a condition subsequent".²⁴⁶ The *Shorter Oxford English Dictionary* defines "guarantee" as "[a] thing ... given or existing as security for the fulfilment ... of certain conditions" and guarantee fund as "a sum pledge as a contingent indemnity for future loss".²⁴⁷ In contrast, the word "payment" is defined in the *Black's Law Dictionary* as the delivery of money for the "performance of an obligation" or the "satisfaction of an obligation".²⁴⁸ Thus, as emphasized by both parties, the aim of a guarantee is to secure the future payment of an obligation. Hence, the future obligation of payment that is secured by a guarantee cannot be confused with the obligation to provide that guarantee.²⁴⁹

7.89 In order to decide whether the use of indicative prices by Colombian authorities constitutes customs valuation in the sense of the *Customs Valuation Agreement*, or instead serves as a guarantee to secure the future collection of customs duties, the Panel will examine the legal nature of the disbursement that importers must make in order to obtain the release of the goods under Articles 128.5 e) of the Customs Statute and Article 172.7 of Resolution No. 4240.

(i) *The legal nature of the payment under Article 128.5 e)*

Arguments of the parties

7.90 The Panel recalls the parties' views on the legal nature of payment under Article 128.5 e). Panama argues that the customs duties for goods subject to the indicative prices measure are levied on the basis of the indicative price or, in cases where the declared value is higher than the indicative price, that higher amount. Therefore, Panama considers that customs valuation takes place at the time of inspection, whether or not based on the indicative price, when that price is higher than the original declared value, or based on the declared value when that price is higher than the indicative price.²⁵⁰

²⁴⁵ Colombia's response to Panel question No. 94(a).

²⁴⁶ *Black's Law Dictionary*, 7th edition (2000), p. 565

²⁴⁷ *Shorter Oxford English Dictionary*, 5th edition (1993), p. 1165.

²⁴⁸ *Black's Law Dictionary*, 7th edition (2000), p. 922.

²⁴⁹ Panama's response to Panel question No. 110.

²⁵⁰ Panama's first written submission, paras. 26-53; Panama's first oral statement, paras. 88-113; Panama's second written submission, paras. 8-77.

7.91 Colombia contends that the "*pago*" mentioned in the text of Article 128.5 e) of the Customs Statute is not in fact an actual payment but a *guarantee* in the form of a cash deposit, and that valuation takes place at a later procedural stage known as the *control posterior*.²⁵¹ In support of its view, Colombia argues that the terms of this provision are not "self-explanatory" and, thus, they should be given their meaning in their specific textual context. This specific context includes the overall location of Article 128.5 e) of Decree No. 2685 governing in the larger context of Colombia's customs laws, the definition of the terms "reference prices" and "indicative prices" on which this payment is based; the requirement that documents are transmitted to the *División de Fiscalización* "to determine the customs value" of the goods in question; and the requirement in Colombian law to conduct customs valuation in accordance with the principles of the *Customs Valuation Agreement*.²⁵² Moreover, Colombia emphasizes the importance of Andean Community law as part of the legal context in which to read the challenged provisions. It notes that Articles 51(1) and 61(1) of Andean Community Resolution 846 require that goods be released in case of a controversy over the customs value, but provide that such release may be made subject to the payment of a guarantee in the form of a bank or insurance guarantee, a cash deposit or any other appropriate form.²⁵³

7.92 In Panama's view, Colombia is requiring the Panel to read in Articles 128.5 e) of Decree No. 2685 and in Article 172.7 of Resolution No. 4240 "words that are not found in those provisions".²⁵⁴ Panama refers to the "clear wording" of Article 128.5 e) of Decree No. 2685 and submits that there is no textual basis for Colombia to argue that the payment of the customs duties is merely a deposit or a guarantee.²⁵⁵ Moreover, Panama notes that Article 496 of Resolution No. 4240 provides for only two types of guarantees: global or specific, which may only take the form of a bank or insurance company guarantee.²⁵⁶ Panama also submits that the time limitation provided for in Articles 523 and 527 of Resolution No. 4240 is only applicable to bank or insurance company guarantees and not to a cash deposit.²⁵⁷ As concerns the identified Andean Community regulations, Panama contends that Colombia's reasoning is flawed. According to Panama, Colombia wrongly assumes that because a deposit is one form of guarantee, the "deposit" made in Article 128.5 e) of Decree No. 2685 must be a guarantee.²⁵⁸ In addition, Panama contends that Colombia's invocation of Articles 51(1) and 61 of Andean Community Resolution 846 is irrelevant as this Resolution has not been implemented at the national level in Colombia via enabling domestic legislation, in accordance with Article 61, fourth paragraph.²⁵⁹ Thus, Panama argues, individual importers do not have the option to post a guarantee in the form of a "deposit".

The Panel's approach to examining Colombia's domestic law – burden of proof

7.93 WTO jurisprudence has established that municipal law is to be approached as a "factual issue".²⁶⁰ In making an "objective assessment" of municipal legislation, a panel should begin its analysis by considering the very terms of the law.²⁶¹ This examination should also include a reading

²⁵¹ Colombia's first written submission, paras. 49-61; Colombia's first oral statement, paras. 18-60, Colombia's second written submission, paras. 18, 24-86.

²⁵² Colombia's second written submission, paras. 55-59.

²⁵³ Colombia's second written submission, paras. 60-66.

²⁵⁴ Panama's second written submission, para. 1.

²⁵⁵ Panama's second written submission, para. 38.

²⁵⁶ Panama's second written submission, para. 40.

²⁵⁷ Panama's second written submission, para. 40.

²⁵⁸ Panama's second written submission, para. 36.

²⁵⁹ Panama's response to Panel question No. 95(a).

²⁶⁰ Appellate Body Report, *India – Patents (US)*, para. 66; See also Panel Report on *US – Section 301 Trade Act*, para. 7.18. See also PCIJ, *Certain German Interests in Polish Upper Silesia*, PCIJ, 1926, Rep., Series A, No. 7, p. 19.

²⁶¹ Appellate Body Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 112; See also Panel Report, *US – 1916 Act (EC)*, para. 16.

of the provisions in their proper context.²⁶² A panel is not however required to limit its examination solely to the text or wording of the norm under review.²⁶³ A panel's analysis should be complemented, whenever necessary, with additional sources, which may include proof 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.²⁶⁴

7.94 The Panel will thus look at the "very terms" of Article 128.5 e) of Decree No. 2685 and Article 172.7 of Resolution No. 4240, and will subsequently examine these provisions in their legal context. We note that neither party has offered the Panel any rulings of Colombian courts that interpret Article 128.5 e) of Decree No. 2685 and Article 172.7 of Resolution No. 4240.²⁶⁵ The parties have nevertheless provided the Panel with three examples of application of the relevant provisions of Colombian law.

7.95 Before commencing the analysis of the very terms of the relevant provisions, the Panel wishes to address Colombia's argument that Panama has not satisfied its burden of proof to support its interpretations of Colombia's legislation. In particular, Colombia contends that Panama has failed to provide relevant evidence necessary to sustain its "as such" claim by limiting its arguments to "an erroneous and restrictive reading" of Colombia's legislation.²⁶⁶ According to the defendant, the demonstration of the actual application of the law is "part and parcel" of the kind of evidence that Panama needs to provide. In having failed to do so, Colombia submits that Panama has fallen short of meeting its burden of proof requirement in a double sense: the "burden of production" of the evidence necessary to make a prima facie case, and the "burden of persuasion".²⁶⁷ In support of its argument, Colombia argues that in *Dominican Republic – Import and Sale of Cigarettes*, the Appellate Body "clearly rejected" an attempt by Honduras to impose a limited analysis of its "as such" claim based on the text of the relevant Dominican Republic legislation in isolation.²⁶⁸

7.96 The Panel agrees that in an "as such" claim the initial burden to establish the meaning of the respondent's municipal law lies with the complainant. As the Appellate Body stated "[t]he party asserting that another party's municipal law, as such, is inconsistent with relevant treaty obligations bears the burden of introducing evidence as to the scope and meaning of such law to substantiate that assertion."²⁶⁹ However, the Panel is not persuaded by Colombia's argument that Panama has failed to meet that burden by limiting itself to presenting an interpretation based on the sole text of the legal provisions at issue. The Panel notes that the facts of the *Dominican Republic – Import and Sale of Cigarettes* case cited by Colombia are quite different from the case at hand. Indeed, on that occasion, Honduras sought the exclusion of supplementary means of evidence of municipal legislation, other than its text. The Panel rejected this request on the basis that it was not bound to decide "exclusively" on the basis of the wording of the legislation. This finding, which was confirmed by the Appellate Body, does not mean that a Panel must rely on supplementary means when examining a Member's municipal legislation. It only means that the Panel is not precluded from doing so.

²⁶² Panel Report, *US – Section 301 Trade Act*, para. 7.27.

²⁶³ Appellate Body Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 112.

²⁶⁴ Appellate Body Report, *US – Carbon Steel*, para. 157.

²⁶⁵ In fact, in its response to Panama's question No. 1 a), Colombia states that it is not aware of any court decisions that have treated payments made in accordance with Article 128.5 e) as provisional deposits serving as guarantees.

²⁶⁶ Colombia's first written submission, para. 116.

²⁶⁷ Colombia's second written submission, para. 23.

²⁶⁸ Colombia's first written submission, para. 117.

²⁶⁹ Appellate Body Report, *US – Carbon Steel*, para. 157. See also Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 168.

7.97 We recall that the Appellate Body has repeatedly stated that the sole production of the text of the measure under dispute may be considered adequate to establish a prima facie case.²⁷⁰ Were the Panel to establish that the provisions of Colombian legislation at issue are clear on their face, Panama would have established a prima facie case solely through production of the relevant domestic provisions. The burden would thus be on Colombia to demonstrate that its legislation is not applied in the manner that is indicated by its very terms.

7.98 In any case, the Panel notes that, the nature and extent of the evidence required to satisfy the burden of proof varies from case to case.²⁷¹ In this respect, the Appellate Body recognized that a panel maintains a margin of discretion in weighing the relevance of certain types of evidence.²⁷²

Analysis of the "very terms" of the challenged provisions

7.99 In order to determine whether Colombian Customs authorities "collect" customs duties (and sales tax) in the application of Article 128.5 e) of Decree No. 2685, the Panel will commence its analysis by examining the very terms of the relevant provisions of Colombia's domestic legislation. In doing so, the Panel recalls that it is not obliged to accept at face value Colombia's interpretation of its own legislation, but rather, the Panel must make an "objective assessment" of the matter.²⁷³

7.100 An objective reading of Colombia's legislation strongly supports the conclusion that customs duties are collected at the time indicative prices are applied and goods are released. Under Article 128.5 e) of Colombia's Customs Statute and Article 172.7 of Resolution No. 4240, when a "controversia" arises as a result of the determination that the declared value is below the indicative prices, the importer can only obtain the release of the goods if he or she corrects the import declaration and pays customs duties and sales tax on the basis of the indicative price.²⁷⁴ The Panel considers that the use of the phrase "pay customs duties and sales tax" ("*paga los tributos aduaneros*") within Article 128.5 e)²⁷⁵, on its face leaves no room for any textual interpretation other than the following: that the collection of customs duties calculated on the basis of indicative price takes place at the time of release of the goods.

²⁷⁰ Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 263. Appellate Body Report, *US – Carbon Steel*, para. 157; Appellate Body Report, *Chile – Price Band System (Article 21.5 – Argentina)*, para. 135, Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 269.

²⁷¹ Appellate Body Report, *US – Carbon Steel*, para. 157.

²⁷² Appellate Body Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 112.

²⁷³ Panel Report, *EC – Trademarks and Geographical Indications (US)*, para. 7.55. See also Panel Report, *US – 1916 Act (EC)*, para. 19.

²⁷⁴ Article 128.5 e) states that "*Cuando practicada la inspección aduanera física o documental, se suscite una controversia de valor en razón de que: e) el valor f.o.b. declarado está por debajo de los precios indicativos establecidos por el Director de Aduanas y el declarante dentro de los cinco (5) días siguientes a la práctica de dicha diligencia, corrige la declaración de importación y paga los tributos aduaneros con base en el precio indicativo en los términos y condiciones señalados por la DIAN, debiéndose en todo caso remitir las diligencias a la División de Fiscalización Aduanera con el fin de que se adelante el proceso de liquidación oficial de revisión de valor correspondiente.*" (emphasis added). Article 172.7, in turn, prescribes that "*Durante la diligencia de inspección aduanera en el proceso de importación, la controversia de valor puede ser originada por cualquiera de las situaciones descritas a continuación, en las cuales se actuará de la manera prevista en el numeral respectivo, teniendo en cuenta lo dispuesto en los artículos 128 del Decreto 2685 de 1999 y 17 de la Decisión Andina 571: ... 7) Cuando la controversia se origine en razón a que el valor f.o.b. declarado está por debajo del precio indicativo ... solo se autorizará el levanto si dentro de los cinco (5) días siguientes a la práctica de la diligencia, el declarante corrige el precio declarado con el precio indicativo que corresponda al producto importado, o con el precio real de negociación, siempre que sea superior al indicativo*" (emphasis added).

²⁷⁵ It is noteworthy that Article 1 of Decree No. 2685 defines "tributos aduaneros" as "*los derechos de aduana y el impuesto sobre las ventas*". Thus, the term "tributos aduaneros" encompasses both customs duties and sales tax.

7.101 Having considered the terms of Article 128.5 e) of Decree No. 2685 and Article 172.7 of Resolution No. 4240, the Panel preliminarily concludes that an importer subject to indicative prices is required to make a payment for the purpose of collecting customs duties. The Panel will proceed to consider whether this interpretation is supported within the context of Colombian legislation.

Contextual analysis of the challenged provisions within Colombian domestic legislation

7.102 As noted by the Panel in *US – Section 301 Trade Act*, the elements of national laws are often inseparable and "should not be read independently from each other when evaluating the overall conformity of the law with WTO obligations."²⁷⁶ In this sense, Colombia argued in its responses to the Panel's questions that:

"[T]he terms used in Article 128.5 e) have to be read in the light of their textual context of the other provisions of the Decree No. 2685 and their legal context which consists of the relevant provisions of Andean Community law (which have direct effect in Colombia and have the status of Colombian law), the *Customs Valuation Agreement* as incorporated into Colombia law by Law No. 170 of 1994, and Resolution No. 4240."

7.103 The Panel will therefore examine the other paragraphs of Article 128.5 e) of Colombia's Customs Statute and Article 172.7 of Resolution No. 4240 as well as any other relevant provisions of both legal instruments.²⁷⁷ The Panel will also analyse Colombia's argument pertaining to the relevance of the actual position of these two provisions within the relevant legislation for their interpretation.

Analysis of Article 128.5 e) of Decree No. 2685 and Article 172.7 of Resolution No. 4240 in the context of other paragraphs of the same and other relevant provisions

7.104 It is the Panel's understanding that a contextual reading of Article 128.5 e) of Decree No. 2685 should, in the first place, look at the "closest" textual context, i.e. other paragraphs of the same provision. A reading of the provision at hand in the light of paragraphs (a) to (d) of Article 128 of Decree No. 2685 seems to indicate, contrary to Colombia's interpretation, that the silence of Article 128.5 e) of Decree No. 2685 regarding the possibility of providing a guarantee in order to obtain the release of the goods, was purposeful.

7.105 Articles 128.5 a) to e) of Decree No. 2685 describe different situations in which a controversy results from a discrepancy between the importer and the Administration about the declared value of the goods. In most of these situations, the importer has the opportunity to either present additional documents to support the declared value or provide a guarantee or correct the import declaration in order to obtain the release of the goods.²⁷⁸ In fact, the latter two options are available in all scenarios addressed under Article 128.5, except in the case of controversies involving the use of indicative prices at issue in this dispute.²⁷⁹ The same conclusions can be drawn from Article 172 of Resolution No. 4240. Indeed, while Article 172.7 of Resolution No. 4240 omits any reference to the possibility of posting a guarantee, all paragraphs in this Article that concern controversies regarding

²⁷⁶ Panel Report, *US – Section 301 Trade Act*, para. 7.27.

²⁷⁷ The Panel notes that it is Article 128.5 e) of Decree No. 2685 rather than Article 172.7 of Resolution No. 4240 and the various resolutions establishing indicative prices, which specifically deals with the "pago" of customs duties and sales tax. This explains that the focus of the Panel's examination in the next paragraphs will be on Article 128.5.

²⁷⁸ Article 128.5 a), b) and c) of Decree No. 2685. Panama's first written submission, para. 44.

²⁷⁹ Article 128.5 a), b), c), d) and e) of Decree No. 2685.

the declared price, i.e., paragraphs 2, 3, 4, 5, 6 and 8, explicitly provide for that option.²⁸⁰ Against this background, the Panel considers that, whenever Colombian legislation intends to contemplate the posting of a guarantee as a means to obtain the release of the goods, it explicitly provides for such option. Hence, since Article 128.5 e) of Decree No. 2685 and Article 172.7 of Resolution No. 4240 leave out that possibility, the Panel considers it reasonable to conclude that the posting of a guarantee was purposefully excluded as an option in situations where the declared value is lower than the indicative price.

7.106 Colombia has argued that, in fact, the possibility to provide a guarantee in the form of a deposit is also implicitly present in Article 128.5 a) to d) of Decree No. 2685. According to Colombia, the only difference between the latter provisions and Article 128.5 e) is that paragraphs a) to d) allow importers to provide either a bank security, an insurance security or a cash deposit, while paragraph e) only permits importers to provide a guarantee in the form of a cash deposit.²⁸¹ However, this account appears in conflict with other related provisions and, in particular, Article 496 of Resolution No. 4240, considered below.

7.107 Article 496 of the Resolution No. 4240 provides that only two types of guarantees may be posted to secure the compliance with customs obligations: bank guarantees and guarantees provided by insurance companies.²⁸² As such, no reference is made to a "guarantee in the form of a cash deposit". Colombia has advanced an explanation for this silence. Colombia argues that in the past it used cash deposits with a separate system of accounting, but decided to discontinue their use due to administrative issues. Thus, according to Colombia, at the time of Decree No. 2685 in 1999, the separate figure of a "cash deposit" was not provided as a possible guarantee. Subsequently, however, Colombia instituted the use of cash deposits to cope with the problems related to contraband through the use of reference prices beginning in 2000. Colombia claims the use of a "cash deposit" system became necessary "as a pure accounting matter". The same solution was later adopted in 2002 for estimated prices and in 2005 for indicative prices.²⁸³

7.108 Colombia has not produced any evidence to support this explanation, however. In fact, this explanation seems unpersuasive in view of several other factors. First, both Colombia's Customs Statute and Resolution No. 4240 have been amended several times since their respective enactments.²⁸⁴ Notably, Colombia did not amend or otherwise modify Article 496 of Resolution No. 4240, so as to allow for the use of a cash deposit as a form of guarantee additional to bank guarantees and guarantees provided by an insurance company. Second, DIAN's "*Manual de Valoración - Orden Administrativa 0005*", dated 29 December 2004, which has the stated aim of standardizing and harmonizing the prior and post-importation control processes, prescribes that when so requested, the importer shall post *a bank guarantee or a guarantee provided by an insurance company* equal to 100 per cent of the customs duties and sales tax arising from the difference between

²⁸⁰ Article 172 of Resolution No. 4240. The Panel notes that paragraph 1 of Article 172 is not relevant as context, as this paragraph envisions controversies arising from a failure of an importer to submit any import declaration whatsoever.

²⁸¹ Colombia's response to Panel question No. 14.

²⁸² This provision prescribes that "*Las garantías constituidas para asegurar el cumplimiento de las obligaciones aduaneras, serán globales o específicas y podrán ser bancarias o de Compañía de Seguros*". It is noteworthy that Resolution No. 4240 expressly states in its preamble that its aim is to precise the procedures, requirements and terms used in Decree No. 2685.

²⁸³ Colombia's responses to questions Nos. 5(a)(i) and 6(b) from Panama.

²⁸⁴ Decree No. 2685 was amended almost 40 times while Resolution No. 4240 was amended almost 70 times. Some of these modifications dealt specifically with the regime governing guarantees. That is the case, for instance, with Resolution No. 7002 of 2001, Resolution No. 7179 of 2000, Resolution 904 of 2004, Resolution No. 2795 of 2004, all of which amend articles included under Title XVII of Resolution No. 4240, referring to "guarantees".

the declared value and the reference price.²⁸⁵ Again, no mention whatsoever is made to a "guarantee in the form of a cash deposit". Third, a similar conclusion can be drawn from DIAN Memorando 00274²⁸⁶, which establishes guidelines for the application of Article 128.5. As in the case of the "*Manual de Valoración*", this document was issued many years after this new interpretation of the word "correction" was introduced by Colombian customs authorities.²⁸⁷ Again, no mention can be found in this document to the possibility for the importer to provide a guarantee in the form of a cash deposit in order to obtain the release of its goods.²⁸⁸ Finally, as will be seen in the following sections, no reference to the ability to post a "guarantee in the form of a cash deposit" can be found in the specific cases of application of the challenged measure submitted by the parties.²⁸⁹

7.109 When confronted with this silence in its legislation, Colombia acknowledged that no administrative instrument using the term "guarantee" or "cash deposit" exists.²⁹⁰ Furthermore, Colombia admitted that a separate concept with the name "cash deposit" has not been introduced anywhere in Colombian law. However, Colombia considers its use of the existing concept of the correction plus payment to constitute a guarantee in the form of a cash deposit as a condition for the release of the goods is an acceptable substitute.²⁹¹ Thus, Colombia considers it irrelevant that Article 128.5 e) of Decree No. 2685, Articles 172.7 and 496 of Resolution No. 4240, the *Manual de Valoración*, the DIAN Memorando 00274 do not use the words "cash deposits".²⁹²

7.110 In the absence of any evidence to support the existence of a cash deposit as a form of guarantee within any single piece of legislation, the Panel cannot accept Colombia's assertion that it employs a "*de facto*" guarantee in the form of a cash deposit among the options available to importers to secure future payment of customs duties and sales tax, where indicative prices apply. Furthermore, the absence of these "cash deposits" as a permitted form of guarantee under Colombian customs laws reinforces the Panel's interpretation that the "payment of customs duties and sales tax" under Article 128.5 e) is in fact a payment *strictu sensu* and not a mere "cash deposit" aimed at securing the future payment of those charges.

7.111 The Panel's reading of the challenged provisions is further confirmed by the wording of Article 542 and Article 548 a) of Decree No. 2685. The Panel notes that the word "payment" has a specific technical meaning under Colombian legislation. As Panama notes, Article 542 provides that the collection of customs duties shall be governed by the procedures set down in Decree 624 of 1989 (the "Tax Statute").²⁹³ Within the Tax Statute, Panama notes that Section V, Title 7, Chapter 2 of the Tax Statute, which is entitled "Termination of the tax obligation" contemplates payment as the

²⁸⁵ Article 2.6.2, *Orden Administrativa* 00005/2004 ("*Cuando así se requiera, el importador deberá constituir ante la División Servicio al Comercio Exterior o a la dependencia que haga sus veces, de la Administración Aduanera por donde se realiza el trámite de nacionalización, una garantía bancaria o de compañía de seguros a favor de la Nación – U.A.F. Dirección de Aduanas, por el término de un año, así: 1. Por el cien por ciento de los tributos aduaneros que pudieran causarse, por la diferencia entre el valor declarado por el importador y el precio de referencia o el que el inspector establezca con base en datos objetivos y cuantificables*").

²⁸⁶ Exhibit PAN-24.

²⁸⁷ Memorando 00274 is dated 5 May 2006.

²⁸⁸ Article 2.f of Memorando 00274. In fact, Article 2.f. of this Memorando states that, in the case that a "*controversia*" arises due to the fact that the declared f.o.b. value is lower than the indicative price, the sole option that the importer has is to correct the import declaration so as to reflect the corresponding indicative price.

²⁸⁹ See para. 7.123.

²⁹⁰ Colombia's response to Panel question No. 94(a).

²⁹¹ Colombia's response to Panel question No. 94(c).

²⁹² Colombia's response to Panel question No. 94(b).

²⁹³ Panama's first written submission, para. 48 and footnote 51.

primary means to terminate the tax obligation.²⁹⁴ Article 548 a) of Decree No. 2685 provides the legal basis upon which an importer may obtain a reimbursement of the sums paid in excess to obtain the release of goods under Article 128.5 e) of Decree No. 2685.²⁹⁵ As pointed out by Panama, this provision applies to cases where (i) the import declaration has been "liquidated"; (ii) customs duties and sales taxes have been paid; and (iii) the importer seeks to obtain a reimbursement for customs duties and sales taxes paid in excess.²⁹⁶ It is thus reasonable to conclude through reference to the termination of tax obligations and liquidation during the "post-importation control", that importers seek reimbursement of customs duties and sales taxes that have already been liquidated and paid at the time of inspection, and not the refund of a "guarantee in the form of a cash deposit".

The placement of the challenged provisions within Colombia's Customs Code and Resolution No. 4240

7.112 Colombia has argued that the placement of the challenged provisions provides further contextual evidence that they do not deal with customs valuation, but with customs control. It notes that Article 128 of Decree No. 2685 is part of title V "Importation Regime", Chapter VI, "Ordinary Importation", and not part of Title VI, entitled "Customs Valuation" (Articles 237-259). Similarly, Article 172 is part of Chapter II of Resolution No. 4240, entitled "Control of Customs Valuation" and not Chapter III on "Determination of Customs Valuation" (Articles 174-217).²⁹⁷

7.113 According to Colombia, it is "well established" in case law that the placement of a domestic provision is a significant factor when assessing the meaning of that provision.²⁹⁸ In support of that statement, Colombia cites a GATT Panel Report, *US – Tobacco*, in which the panel considered as "significant" that the provision under discussion was entitled "Penalties", in order to conclude that certain additional assessment and purchase requirements mandated by the norm were treated under United States domestic law as "penalties" and not as a "separate fiscal measure".²⁹⁹

7.114 The Panel agrees that the placement of a domestic provision may be "significant" when establishing its meaning. Still, as acknowledged by both parties, the position of a provision cannot be deemed as "determinative".³⁰⁰ In the case at hand, the Panel is not persuaded by the argument that the placement of Article 128.5 e) of Decree No. 2685 and Article 172.7 of Resolution No. 4240 entails that these provisions refer exclusively to customs control and not to customs valuation. First, in the GATT panel on *US – Tobacco* referred to by Colombia, the title of the provision at stake was only one out of many factors that were taken into account to interpret its meaning. Additionally, all the factors considered by the panel in *US – Tobacco* were in themselves not contradictory thereby confirming that the additional assessment and purchase requirements mandated by the measure at

²⁹⁴ The Panel further notes that Article 1626 of Colombia's Civil Code also prescribes that payment is one of the means to extinguish obligations.

²⁹⁵ See Colombia's response to Panel question No. 99. See also para. 2.11.

²⁹⁶ Article 548 a) of Decree No. 2685. See Panama's second written submission, para. 33.

²⁹⁷ Colombia's first written submission, paras. 78-80.

²⁹⁸ Colombia's second oral statement, para. 22.

²⁹⁹ GATT Panel Report, *US – Tobacco*, para. 76.

³⁰⁰ Colombia's second oral statement, para. 22. Panama quotes two instances in which the Appellate Body found that the manner in which the municipal law of a WTO Member classifies or labels an item cannot be determinative of the interpretation of a WTO agreements and that, instead, such determination must be based on the "content and substance" of the instrument (see Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 87, footnote 87 and Appellate Body Report, *US – Softwood Lumber IV*, para. 65). The Panel agrees with Colombia that these two decisions are not applicable to the specifics of this case. While these Appellate Body decisions refer to the placement of a domestic provision as a factor in determining the meaning of the terms of a WTO Agreement, the present case refers the placement of Article 128.5 e) within the context of Colombia's domestic legal system. See Panama's first oral statement, para. 94, Panama's second written submission, para. 10.

stake were considered as "penalties".³⁰¹ In contrast, the various factors considered by the Panel thus far in this dispute suggest that indicative prices are in fact used to determine the custom value of subject goods. Additionally, as noted by Panama³⁰², Colombia's reasoning is contradicted by the fact that an adjacent provision, Article 128.8 of Decree No. 2685, which authorizes official prices, has been described by Colombia as "mak[ing] sure that the government set price would be used as the basis for customs valuation".³⁰³ Both Article 128.5 e) and Article 128.8 of Decree No. 2685 are placed under the title "Ordinary Importation". As Colombia has admitted that Article 128.8 addresses a controversy in which customs valuation (and not only customs control) takes place at the time of inspection³⁰⁴, it is conceivable that Article 128.5, which is part of that same Article, does not exclusively address matters of "customs control", but may also concern customs valuation.

7.115 The Panel thus considers that the placement of Article 128.5 e) of Decree No. 2685 and Article 172.7 of Resolution No. 4240 cannot be considered as sufficient evidence to rebut all the textual and contextual evidence which suggest that these provisions address matters of customs valuation.

Analysis of the challenged provisions in the context of Andean Community law

7.116 Colombia further submits that the context in which the challenged provisions must be read should also include Articles 51(1) and 61(1) of Andean Community Resolution 846 which, Colombia argues, have direct effect in Colombia and prevail over Colombian domestic law.³⁰⁵

7.117 Article 51(1) of Andean Community Resolution 846 prescribes that the importer may obtain the release of the goods if he provides a guarantee in the form of a "*fianza, depósito u otro medio apropiado*".³⁰⁶ Similarly, Article 61(1) states that, when the final determination of the customs value needs to be delayed, the importer may obtain the release of the goods if he provides a sufficient guarantee in the form of "*fianzas bancarias o de compañías de seguros, depósito u otro medio apropiado*".³⁰⁷ Based on these provisions, which Colombia contends form part of its domestic law, Colombia argues "the importer is always allowed to obtain the release of the goods if he provides a guarantee in the form of a security, deposit or in any other form".³⁰⁸

7.118 Preliminarily, the Panel considers it necessary to address whether Andean Community Resolutions form part of Colombia's domestic law, before determining whether an importer is eligible

³⁰¹ GATT Panel Report, *US – Tobacco*, paras. 78-81.

³⁰² Panama's second written submission, para. 9.

³⁰³ Colombia's first written submission, para. 87.

³⁰⁴ See Colombia's second written submission, para. 59 (Colombia explained that "[t]he 'payment' of duties (*paga los tributos*) [referred to in Article 128.5 e)] is a general reference to a cash payment in the amount of the duties under discussion and does not refer to the final liquidation of duties as referred to in for example Article 128.8 in respect of *precios oficiales* (*se liquide los mayores tributos dejados de pagar*)"); See also Colombia's response to question No. 5(d) from Panama and Colombia's first written submission, paras. 87 and 110.

³⁰⁵ See Exhibit COL-39.

³⁰⁶ Exhibit COL-6 (Article 51 reads: "... *las Administraciones Aduaneras de los Países Miembros de la Comunidad Andina, harán uso del procedimiento que se establece a continuación para la verificación y comprobación del valor declarado ... En los casos en que este control se realice durante el despacho, el importador podrá retirar las mercancías, si presta una garantía suficiente en forma de fianza, depósito u otro medio apropiado, que cubra el pago de los Derechos*").

³⁰⁷ Exhibit COL-6 ("*En los casos en que resulte necesario demorar la determinación definitiva del valor en aduana de las mercancías importadas, el importador podrá retirar sus mercancías si, cuando así se lo exija, presta garantía suficiente que cubra el pago de los Derechos Aduaneros y demás gravámenes a los que eventualmente estarían sujetas tales mercancías, mediante fianzas bancarias o de compañías de seguros, depósitos u otro medio apropiado*").

³⁰⁸ Colombia's first written submission, paras. 102-103; Colombia's second written submission, paras. 60-66; Colombia's first oral statement, para. 29; Colombia's response to Panel question No. 14.

to submit a guarantee to obtain release of the goods. In the Panel's view, Colombia has demonstrated that Andean Community legislation has "direct effect" in Colombia and thus, as a general principle, Community law provisions do not require "implementing" or "enabling" legislation so as to be applied at the national level.³⁰⁹ Nevertheless, in the light of the explicit wording of Andean Community Resolution 846, the Panel considers that further regulation is necessary at the national level in order for guarantees to be considered as an acceptable form of a deposit. Indeed, Article 61 of Resolution 846 – the "*lex specialis*" that governs the posting of guarantees in Andean Community Resolution 846 – provides that the customs legislation of each Member shall identify the form, procedures and opportunity for the posting of a guarantee.³¹⁰ Accordingly, the Panel understands that, in the absence of any explicit reference in Colombian domestic legislation to "cash deposits" as a form of guarantee, and in the absence of any details concerning their "*forma, procedimientos y oportunidad*", the "cash deposit" is not an acceptable form of guarantee within Colombian law, on the basis of Article 51(1) of Andean Community Resolution 846.

7.119 In the Panel's view, Colombia has had many opportunities to provide for the "form, procedure and opportunity" of guarantees in the form of a cash deposit, as required by the relevant Andean Community legislation, but appears thus far not to have done so. As noted before, several amendments were made to the Colombian Customs Statute and Resolution No. 4240 after Andean Community Resolution 846 was published in the *Gaceta Oficial del Acuerdo de Cartagena*. None of these modified the Colombian domestic provisions governing the available types of guarantees. Furthermore, Colombia's "*Manual de Valoración - Orden Administrativa 0005*", dated 29 December 2004 (almost five months after Andean Community Resolution 846 entered into force)³¹¹, similarly does not envision the instrument of the "cash deposit" as an appropriate form of guarantee, instead prescribing the posting of a bank guarantee or a guarantee provided by an insurance company.³¹²

7.120 Accordingly, the Panel is not persuaded that Colombia's own laws are WTO-consistent on the basis of a provision of Andean Community law that allows importers to obtain the release of goods subject to constituting a guarantee as either a "*fianza, depósito u otro medio apropiado*".³¹³

Analysis of the specific cases of application of indicative prices

7.121 As discussed above, a Panel may examine a Member's municipal law whenever necessary, by considering evidence beyond the text of the legislation, including proof of the consistent application of such laws.³¹⁴ The parties have provided the Panel with three specific cases of application of the challenged provisions that the Panel will now consider: Exhibit COL-8, Exhibit COL-9 (as

³⁰⁹ Exhibit COL-39; Exhibit COL-62.

³¹⁰ Article 61, para. 4, Andean Community Resolution 846.

³¹¹ Article 1.1.2, *Orden Administrativa 00005/2004* ("*Fundamento Legal ... Reglamento Comunitario de la Decisión 571 adoptado por la Resolución 846*").

³¹² Article 2.6.2, *Orden Administrativa 00005/2004* ("*Cuando así se requiera, el importador deberá constituir ante la División Servicio al Comercio Exterior o a la dependencia que haga sus veces, de la Administración Aduanera por donde se realiza el trámite de nacionalización, una garantía bancaria o de compañía de seguros a favor de la Nación – U.A.F. Dirección de Aduanas, por el término de un año, así: 1. Por el cien por ciento de los tributos aduaneros que pudieran causarse, por la diferencia entre el valor declarado por el importador y el precio de referencia o el que el inspector establezca con base en datos objetivos y cuantificables*").

³¹³ Additionally, as noted by Panama, the figure of a "guarantee in the form of a cash deposit", which Colombia claims to have adopted, does not seem to reflect the type of guarantee that is required under Andean Community law. First, Panama submits that Colombia's obligation under Resolution 846 only applies to individuals. (The Panel notes that Article 61 of Andean Community Resolution 846 states that in the case of individuals or "*personas naturales*", who are not eligible to post a bank or insurance bond, individuals should nonetheless be allowed to constitute a guarantee in the form of a deposit). Second, Panama emphasizes that the cited norm refers to "bank deposits" and not to "cash deposits" or direct payments to the customs administration. See also Panama's response to Panel question No. 95(a).

³¹⁴ See para. 7.93.

complemented by Exhibit COL-64) and Exhibit PAN-53 (as partially complemented by Exhibit COL-49). The Panel would like to stress that it is not conducting an analysis of Panama's "as applied" claims, but rather looking at the specific examples provided by the parties in order to better ascertain the operation of Article 128.5 e) of Decree No. 2685 and Article 172.7 of Resolution No. 4240.

7.122 The examples provided by the parties include documentary evidence of all the stages in the so-called "post-importation" procedure, i.e requests by the importers for the official liquidation, responses by the *División de Fiscalización* and the *División de Liquidación*, and final decisions by the Legal Division of the relevant customs administration on the "*recurso de reconsideración*" that were presented by the importers to challenge the decision by the *División de Liquidación*. The parties submitted additional evidence of applications of indicative prices to specific importers within Exhibit COL-7, Exhibit PAN-51 and Exhibit PAN-52; however, the Panel will not consider these within its analysis as the evidence is incomplete.³¹⁵

7.123 As a principal matter, Colombia argues that the cases in Exhibit COL-8, Exhibit COL-9 and Exhibit PAN-53 illustrate that the "payment" of the duties under discussion are in effect cash deposits. However, this does not appear to be reflected in the documentation included among the Exhibits. In fact, the language of the Exhibits strongly suggests that both the importer and the customs officials treat the sums paid in excess as a "payment" and not as a "guarantee in the form of a deposit". For instance, in Exhibit COL-8, the importer filed a request for official liquidation for the purpose of obtaining a reimbursement of "*customs taxes paid in excess*".³¹⁶ The importer further explains that the adjustment of the value resulted in a "*payment of customs duties and sales tax in excess*".³¹⁷ The *División de Liquidación*, in turn, found that the total value of the *customs taxes liquidated and paid* based on the customs value resulted in a benefit for the importer in terms of the income tax.³¹⁸ Similarly, when considering the "*recurso de reconsideración*" filed by the importer, the Legal Division of the relevant customs administration noted that the *División de Liquidación* failed to acknowledge the *value paid in excess* and, consequently, did not recognize the importer's right to obtain the reimbursement of the *liquidated and paid customs duties*.³¹⁹ Even more telling, the Legal Division acknowledges that the importer has disbursed Col\$19,898.891 as the "*valor pagado en exceso en los tributos aduaneros liquidados y cancelados*".³²⁰

7.124 Moreover, in the two cases included as Exhibit COL-8 and Exhibit PAN-53, the customs authorities found that, since the importer had already received a benefit in the form of a deduction in its income tax, any refund of the sums paid in excess would amount to an "undue increase in the

³¹⁵ Exhibit COL-7 includes a brief narrative summary of a series of cases in which importers were required to correct the declared value. Exhibit PAN-51 and Exhibit PAN-52 provide an example of a case in which an importer at first did not correct the import declaration, and then subsequently did. These latter Exhibits only provide the respective "Actas de Inspección", however.

³¹⁶ Exhibit COL-8, p. 1 ("*... me dirijo respetuosamente a ustedes con el objeto de solicitar la liquidación Oficial de Revisión de valor para la devolución de los tributos pagados en exceso ... toda vez que el valor en aduanas fue ajustado con los precios indicativos ...*").

³¹⁷ Exhibit COL-8, p. 3 ("*En el momento de nacionalizar la mercancía con el fin de obtener el levante de la misma se ajustó el valor ... generándose un pago de tributos aduaneros en exceso ...*").

³¹⁸ Exhibit COL-8, p. 126 ("*... encontrando que el valor total de los tributos liquidados y pagados sobre el valor en aduana una vez efectuado el ajuste al precio f.o.b. ... se contabilizó en lo referente al arancel como mayor valor del inventario ... obtuvo un beneficio en el pago del impuesto sobre la renta ...*").

³¹⁹ Exhibit COL-8, p. 155 ("*La controversia versa en la negativa por parte de la División de Liquidación en expedir el acto administrativo correspondiente que reconozca el valor pagado en exceso de \$19.898.890 y en consecuencia, se le permita solicitar la devolución de la parte correspondiente al sobrearancel liquidado y pagado en cuantía de \$10.152.495 ...*").

³²⁰ Exhibit COL-8, p. 160 ("*Resuelve... Artículo Tercero. Reconocer ... la suma de ... como valor pagado en exceso en los tributos aduaneros liquidados y cancelados ...*").

patrimony of the importer".³²¹ The Panel notes that if the disbursement were in fact a "guarantee", it would not have left the importer's patrimony in the first place. Thus, a refund of this sum would have never amounted to an (due or undue) increase in his or her patrimony. In the Panel's view, this exchange further indicates that the nature of the disbursement was a "payment" and not a "guarantee in the form of a cash deposit". In addition, both the importer and the customs authorities consider the request for refund of the sums paid in excess is based on Article 548 a) of Decree No. 2685.³²² As argued by Panama (see paragraph 7.64 above), Article 548 a) refers to the reimbursement of customs duties "that have been paid", and not to the "refund of a guarantee". Thus, the references to Article 548 a) of Decree No. 2685 further confirm that payments made under Article 128.5 e) of Decree No. 2685 are payments *strictu sensu*, and not "guarantees in the form of a cash deposit".

7.125 As an additional matter, the Panel considers that the lengthy delay and non-automatic nature of the post-importation process mitigates against considering the payment based on indicative prices as a type of guarantee. Both Exhibit COL-8 and PAN-53 reveal that the length of the so-called "post-importation" process is two years or more.³²³ As noted in Section II.B above, the case described in Exhibit COL-8 began, upon request of the importer, on 2 April 2006 and concluded on 22 February 2008, almost two years later. In turn, the case described in Exhibit PAN-53 (and Exhibit COL-49) was initiated on 10 July 2005 and did not conclude until 18 December 2007, almost two and a half years later.³²⁴

7.126 In these cases, the proceedings were initiated upon request of the importer.³²⁵ Colombia suggested that these cases were initiated by the importer on the basis of a "special procedure" aimed at accelerating the ordinary process, called "*Proceso de Petición*".³²⁶ However, no mention whatsoever can be found in the exhibits to this "*Derecho de Petición*". Colombia argued that this silence in the exhibits results from the fact that there is no specific form for an importer to exercise the "*derecho de petición*". Colombia contends that this "*Derecho de Petición*" is a constitutional right, according to Article 23 of the Colombian Constitution and that, as a fundamental right, it is protected by the special constitutional injunction called "*Tutela*", which originates in Article 86 of Colombia's Constitution.³²⁷ According to Colombia, "all that the importer has to do is request, on its own initiative, that the authorities review a specific issue, and the Colombian authorities are then obligated to treat this as a '*Derecho de Petición*'".³²⁸ The Panel is not persuaded by this argument. The parties have not provided the Panel with convincing evidence of any decision by the Administration to treat the requests by the importers as a "*Derecho de Petición*" and none of the articles that govern this "*Derecho de Petición*" are quoted by the customs authorities when dealing with the importers' requests.³²⁹ The Panel thus understands that the plea by the importer in this process was not filed as a

³²¹ Exhibit PAN-53 ("*al aceptar la expedición de una Liquidación Oficial de Revisión de Valor para los efectos de devolución en los términos señalados por el peticionario estaríamos frente a un indebido incremento en su patrimonio toda vez que se beneficiaría doblemente de una suma de dinero que ya utilizó como quedó demostrado en el estudio técnico*"); Exhibit COL-8, p. 128 ("*... al aceptar la expedición de una Liquidación Oficial de Revisión de Valor para efectos devolutivos, en los términos señalados por el peticionario, estaríamos frente a un indebido incremento en su patrimonio, toda vez que se beneficiaría doblemente de una suma ...*").

³²² Exhibit COL-8, pp. 4-5, p. 127; Exhibit PAN-53.

³²³ Exhibit COL-9 does not have the necessary time references to determine the length of the whole process and, thus, it is not possible to make an assessment of its duration.

³²⁴ Exhibit PAN-53. See also footnote 36 above.

³²⁵ See Exhibit COL-9, p. 1 and Exhibit PAN-53.

³²⁶ Colombia's response to question No. 5(b)(iii) from Panama.

³²⁷ Colombia's response to Panel question No. 101(a).

³²⁸ Colombia's response to Panel question No. 101(b).

³²⁹ Instead, the decision in Exhibit COL-8 by the *Administración Especial de Aduanas* of Bogota, dated 16 August 2007, cites as the legal basis to forward the importer's request to the *División de Fiscalización Aduanera* a series of customs regulations that refer to the *División de Liquidación's* competence to entertain processes initiated upon request of the interested party that seek the issuing of *Liquidaciones Oficiales de*

"*Derecho de Petición*" aimed at accelerating a process that had started automatically and *ex officio*, but rather as a request to initiate the process that would lead to the *Liquidación Oficial de Revisión de Valor* and, subsequently, to the refund of the sums paid in excess.

7.127 In contrast to the examples presented in Exhibit COL-8 and PAN-53, Exhibit COL-9 appears to indicate that the importation documents were sent to the *División de Fiscalización* by the *Grupo Importaciones de la Administración Local de Aduanas de Medellín* without any request from the importer.³³⁰

7.128 In sum, these three specific cases of application of the challenged provisions seem to confirm the view that the disbursement that the importer must make in order to obtain the release of the goods subject to indicative prices is in fact a "payment" and not a "guarantee in the form of a cash deposit". These three examples show that, after such a payment, there is a review mechanism during which Colombian customs authorities determine a custom value according to the criteria established by the *Customs Valuation Agreement*, and decide on that basis whether the importer is entitled to a refund of the sum that it had paid in excess. The evidence produced by the parties, however, seems inconclusive as to whether this review process takes place automatically in all cases. At any rate, the review process itself appears quite lengthy, taking two years or more for an importer to obtain a refund.

(ii) *Conclusion*

7.129 The Panel's analysis in the previous sections demonstrates that payments made by importers in the situation described by Article 128.5 e) of Decree No. 2685 and Article 172.7 of Resolution No. 4240 are payments *strictu sensu* and not "guarantees in the form of a cash deposit". The very terms of Article 128.5 e) of Decree No. 2685 are revealing: in order to obtain the release of the goods in the situation described by this provision, the importer must *pay* customs duties and sales tax on the basis of indicative prices. A contextual reading of the challenged provisions as well as the examples provided by the parties confirm this view.

7.130 Accordingly, the Panel concludes that Colombia's use of indicative prices as mandated by Article 128.5 e) of Decree No. 2685 and Article 172.7 of Resolution No. 4240 constitutes customs valuation within the meaning of the *Customs Valuation Agreement*. Having reached this conclusion, the Panel will proceed to analyse Panama's claims under Articles 1, 2, 3, 5, 6 and 7.2(b), (f) and (g) of the *Customs Valuation Agreement*.

Corrección o Revisión de Valor (emphasis added). In the same vein, the legal basis for the request by the importer in Exhibit COL-8 are Articles 514 and 548(a) of Decree No. 2685 and Article 6.3 of Resolution No. 5634 of 1999, as modified by Article 1 of Resolution No. 2200 of 25 March 2003. The relevant part of the decision reads as follows: "... de acuerdo al Memorando No. 00297 de 15 de Mayo de 2007 y del Concepto No. 53001-35 del 04 de Mayo de 2007 ... en los cuales se hace precisión sobre la **competencia que tiene la División de Liquidación para adelantar los procesos iniciados a solicitud de parte para la expedición de liquidaciones oficiales de corrección o de revisión de valor** (...). Por lo expuesto en los casos de devolución por pago en exceso, el estudio de valor y la práctica de pruebas previas a la liquidación oficial de corrección debe realizarlo la División de Liquidación, por lo cual se procede al traslado a la mencionada División." (emphasis added). Notably, the latter provision establishes that the *División de Liquidación* shall be competent to decide in processes *initiated upon request of the interested party*, which seek the issuing of *Liquidaciones Oficiales de Corrección o de Revisión de Valor* (emphasis added). Exhibit COL-8, pp. 1 and 4.

³³⁰ The *Administración de Aduanas de Medellín*, pursuant to para. 3 of Article 172 of Resolution No. 4240, sent the file to the *División de Fiscalización ex officio*, with the purpose of initiating the "*estudio de valor*". Exhibit COL-64, p. 1.

- (e) Whether the use of indicative prices for customs valuation purposes is inconsistent with Articles 1, 2, 3, 5, 6 and 7.2(b), (f) and (g) of the *Customs Valuation Agreement*

7.131 The Panel will now examine whether the use of indicative prices in the determination of the customs value of subject imports complies with Articles 1, 2, 3, 5, 6 and 7.2(b), (f) and (g) of the *Customs Valuation Agreement*. The Panel notes that this Agreement has never been interpreted by GATT/WTO panels or the Appellate Body.

7.132 The Panel also recalls that it is addressing Panama's claims "as such". The Panel therefore will not examine the application by Colombian customs authorities of the sequential valuation methods provided by the *Customs Valuation Agreement* in each individual instance. Rather, the Panel will examine whether the use of indicative prices as provided for in Article 128.5 e) of Decree No. 2685 and Article 172.7 of Resolution No. 4240 is inconsistent with the above-mentioned provisions.

- (i) *Main arguments of the parties*

7.133 As discussed above, Panama contends that Colombia's use of indicative prices for the purposes of customs valuation violates each of the sequential methodologies set forth in Articles 1-6 of the *Customs Valuation Agreement*. Additionally, Panama argues the use of indicative prices violates Article 7.2(b), (f) and (g) of the *Customs Valuation Agreement*, since: (i) the customs value is determined on the basis of "a system which provides for the acceptance for customs purposes of the higher of two alternative values"; (ii) the customs value is determined on the basis of "minimum customs values"; and (iii) the customs value is determined on the basis of "arbitrary or fictitious prices".³³¹

7.134 Colombia maintains its earlier position that it does not conduct customs valuation based on indicative prices.³³² Accordingly, Colombia does not consider the use of indicative prices to violate Articles 1, 2, 3, 5, 6 and 7(b), (f) and (g) of the *Customs Valuation Agreement*.

- (ii) *The text of Articles 1, 2, 3, 5, 6 and 7.2(b), (f) and (g) of the Customs Valuation Agreement*

7.135 Panama's claims relate to a number of provisions of the *Customs Valuation Agreement*, namely Articles 1, 2, 3, 5, 6 and 7.2(b), (f) and (g). The text of these provisions reads as follows:

"Article 1

1. The customs value of imported goods shall be the transaction value, that is the price actually paid or payable for the goods when sold for export to the country of importation adjusted in accordance with the provisions of Article 8, provided:

(a) that there are no restrictions as to the disposition or use of the goods by the buyer other than restrictions which:

- (i) are imposed or required by law or by the public authorities in the country of importation;
- (ii) limit the geographical area in which the goods may be resold;
or
- (iii) do not substantially affect the value of the goods;

³³¹ Panama's first written submission, paras. 122-128.

³³² See Section VII.B.1.

- (b) that the sale or price is not subject to some condition or consideration for which a value cannot be determined with respect to the goods being valued;
- (c) that no part of the proceeds of any subsequent resale, disposal or use of the goods by the buyer will accrue directly or indirectly to the seller, unless an appropriate adjustment can be made in accordance with the provisions of Article 8; and
- (d) that the buyer and seller are not related, or where the buyer and seller are related, that the transaction value is acceptable for customs purposes under the provisions of paragraph 2.

2. (a) In determining whether the transaction value is acceptable for the purposes of paragraph 1, the fact that the buyer and the seller are related within the meaning of Article 15 shall not in itself be grounds for regarding the transaction value as unacceptable. In such case the circumstances surrounding the sale shall be examined and the transaction value shall be accepted provided that the relationship did not influence the price. If, in the light of information provided by the importer or otherwise, the customs administration has grounds for considering that the relationship influenced the price, it shall communicate its grounds to the importer and the importer shall be given a reasonable opportunity to respond. If the importer so requests, the communication of the grounds shall be in writing.

(b) In a sale between related persons, the transaction value shall be accepted and the goods valued in accordance with the provisions of paragraph 1 whenever the importer demonstrates that such value closely approximates to one of the following occurring at or about the same time:

- (i) the transaction value in sales to unrelated buyers of identical or similar goods for export to the same country of importation;
- (ii) the customs value of identical or similar goods as determined under the provisions of Article 5;
- (iii) the customs value of identical or similar goods as determined under the provisions of Article 6;

In applying the foregoing tests, due account shall be taken of demonstrated differences in commercial levels, quantity levels, the elements enumerated in Article 8 and costs incurred by the seller in sales in which the seller and the buyer are not related that are not incurred by the seller in sales in which the seller and the buyer are related.

(c) The tests set forth in paragraph 2(b) are to be used at the initiative of the importer and only for comparison purposes. Substitute values may not be established under the provisions of paragraph 2(b).

Article 2

1. (a) If the customs value of the imported goods cannot be determined under the provisions of Article 1, the customs value shall be the transaction value of identical goods sold for export to the same country of importation and exported at or about the same time as the goods being valued.

(b) In applying this Article, the transaction value of identical goods in a sale at the same commercial level and in substantially the same quantity as the goods being valued shall be used to determine the customs value. Where no such sale is found, the transaction value of identical goods sold at a different commercial level and/or in different quantities, adjusted to take account of differences attributable to commercial level and/or to quantity, shall be used, provided that such adjustments can be made on the basis of demonstrated evidence which clearly establishes the reasonableness and accuracy of the adjustment, whether the adjustment leads to an increase or a decrease in the value.

2. Where the costs and charges referred to in paragraph 2 of Article 8 are included in the transaction value, an adjustment shall be made to take account of significant differences in such costs and charges between the imported goods and the identical goods in question arising from differences in distances and modes of transport.

3. If, in applying this Article, more than one transaction value of identical goods is found, the lowest such value shall be used to determine the customs value of the imported goods.

Article 3

1. (a) If the customs value of the imported goods cannot be determined under the provisions of Articles 1 and 2, the customs value shall be the transaction value of similar goods sold for export to the same country of importation and exported at or about the same time as the goods being valued.

(b) In applying this Article, the transaction value of similar goods in a sale at the same commercial level and in substantially the same quantity as the goods being valued shall be used to determine the customs value. Where no such sale is found, the transaction value of similar goods sold at a different commercial level and/or in different quantities, adjusted to take account of differences attributable to commercial level and/or to quantity, shall be used, provided that such adjustments can be made on the basis of demonstrated evidence which clearly establishes the reasonableness and accuracy of the adjustment, whether the adjustment leads to an increase or a decrease in the value.

2. Where the costs and charges referred to in paragraph 2 of Article 8 are included in the transaction value, an adjustment shall be made to take account of significant differences in such costs and charges between the imported goods and the similar goods in question arising from differences in distances and modes of transport.

3. If, in applying this Article, more than one transaction value of similar goods is found, the lowest such value shall be used to determine the customs value of the imported goods.

Article 5

1. (a) If the imported goods or identical or similar imported goods are sold in the country of importation in the condition as imported, the customs value of the imported goods under the provisions of this Article shall be based on the unit price at which the imported goods or identical or similar imported goods are so sold in the greatest aggregate quantity, at or about the time of the importation of the goods being

valued, to persons who are not related to the persons from whom they buy such goods, subject to deductions for the following:

- (i) either the commissions usually paid or agreed to be paid or the additions usually made for profit and general expenses in connection with sales in such country of imported goods of the same class or kind;
- (ii) the usual costs of transport and insurance and associated costs incurred within the country of importation;
- (iii) where appropriate, the costs and charges referred to in paragraph 2 of Article 8; and
- (iv) the customs duties and other national taxes payable in the country of importation by reason of the importation or sale of the goods.

(b) If neither the imported goods nor identical nor similar imported goods are sold at or about the time of importation of the goods being valued, the customs value shall, subject otherwise to the provisions of paragraph 1(a), be based on the unit price at which the imported goods or identical or similar imported goods are sold in the country of importation in the condition as imported at the earliest date after the importation of the goods being valued but before the expiration of 90 days after such importation.

2. If neither the imported goods nor identical nor similar imported goods are sold in the country of importation in the condition as imported, then, if the importer so requests, the customs value shall be based on the unit price at which the imported goods, after further processing, are sold in the greatest aggregate quantity to persons in the country of importation who are not related to the persons from whom they buy such goods, due allowance being made for the value added by such processing and the deductions provided for in paragraph 1(a).

Article 6

1. The customs value of imported goods under the provisions of this Article shall be based on a computed value. Computed value shall consist of the sum of:

- (a) the cost or value of materials and fabrication or other processing employed in producing the imported goods;
- (b) an amount for profit and general expenses equal to that usually reflected in sales of goods of the same class or kind as the goods being valued which are made by producers in the country of exportation for export to the country of importation;
- (c) the cost or value of all other expenses necessary to reflect the valuation option chosen by the Member under paragraph 2 of Article 8 .

2. No Member may require or compel any person not resident in its own territory to produce for examination, or to allow access to, any account or other record for the purposes of determining a computed value. However, information supplied by the producer of the goods for the purposes of determining the customs

value under the provisions of this Article may be verified in another country by the authorities of the country of importation with the agreement of the producer and provided they give sufficient advance notice to the government of the country in question and the latter does not object to the investigation.

Article 7

1. If the customs value of the imported goods cannot be determined under the provisions of Articles 1 through 6, inclusive, the customs value shall be determined using reasonable means consistent with the principles and general provisions of this Agreement and of Article VII of GATT 1994 and on the basis of data available in the country of importation.

2. No customs value shall be determined under the provisions of this Article on the basis of:

(a) ...

(b) a system which provides for the acceptance for customs purposes of the higher of two alternative values;

....

(f) minimum customs values; or

(g) arbitrary or fictitious values."

(iii) *The primacy of the transaction value and sequential nature of the valuation methods provided in Articles 1 to 7 of the Customs Valuation Agreement*

7.136 As evidenced by the text of the relevant provisions, the *Customs Valuation Agreement* provides for sequential valuation methods in Articles 1 through 7.1. Article 1 establishes the primacy of the transaction value as the valuation method. Whenever customs authorities consider that the transaction value of the imported good, as defined in Article 1, cannot be used, authorities must follow, in a sequential manner, the valuation methods provided for in Article 2 (transactional value of identical goods), Article 3 (transaction value of similar goods), Article 5 (deductive method) and Article 6 (computed value) of the *Customs Valuation Agreement*. Where none of the methods in Articles 1 to 6 are available, Article 7 allows customs authorities to resort to any other reasonable means to determine the customs value, provided such methods are consistent with the principles and general provisions of the *Customs Valuation Agreement* and of *GATT 1994*. In doing so, customs authorities must not use any of the methods prohibited in paragraph 2 of Article 7.

7.137 The primacy of the transaction value as a customs valuation method and the sequential nature of the valuation methods derives from the "General Introductory Comment" to this Agreement. This Comment explains that the "primary basis for customs value under this Agreement is 'transaction value' as defined in Article 1", while also indicating that "Articles 2 through 7 provide methods of determining the customs value whenever it cannot be determined under the provisions of Article 1". In addition, the Preamble to the Agreement makes explicit reference to the crucial role of the transaction value in customs valuation.

7.138 The Panel therefore understands that the *Customs Valuation Agreement* imposes an obligation on national authorities to determine the customs value of imported goods based on the "transaction value" and, whenever that is not possible, to sequentially apply the customs valuation methods provided for in Articles 1, 2, 3, 5, 6 and 7.1 of the Agreement.

7.139 In order to determine whether Colombia complies with this obligation, the Panel must determine whether the use of indicative prices reflects the "transaction value", or any of the methodologies set out by those articles.

(iv) *Whether the use of indicative prices constitute any of the valuation methods provided for in Articles 1, 2, 3, 5 and 6 of the Customs Valuation Agreement*

7.140 The Panel will first examine whether the use of indicative prices reflects any of the methodologies provided for in Articles 1, 2, 3, 5 and 6 of the *Customs Valuation Agreement*.

7.141 The Panel recalls that, as explained in Section II.B above, indicative prices are determined *a priori*, for broad categories of products, as a result of surveys undertaken by the DIAN on the basis of past imports.³³³ They are calculated based on the average production costs of the imported goods, when available, or otherwise, on the lowest price actually negotiated or offered for importation of the good into Colombia.

7.142 The Panel considers that national customs authorities are required to apply the various customs valuation methods laid down in Articles 1, 2, 3, 5 and 6 of the *Customs Valuation Agreement* on a case-by-case basis, so as to reflect the particular conditions of the sale of the product in question. The Panel considers that, inasmuch as the customs values for subject goods are established on a fixed basis for broad categories of products without any examination of the specific circumstances surrounding the transaction at issue, indicative prices do not reflect any of the methodologies set out in the referred provisions.³³⁴ In fact, as acknowledged by Colombia, "the customs value as determined following the methods of the [*Customs Valuation Agreement*] will indeed be different from the indicative price in practically all cases".³³⁵

(v) *Whether the use of indicative prices is consistent with the obligation to conduct customs valuation according to the sequential methods laid down in Articles 1, 2, 3, 5 and 6 of the Customs Valuation Agreement*

7.143 The Panel acknowledges that the sequential nature of the various valuation methods permits national customs authorities to proceed from one method to the next without violating the previous method, provided the former cannot be used. However, the structure and design of the indicative prices system as provided in Article 128.5 e) of Decree No. 2685 and Article 172.7 of

³³³ See Methodology for the Determination of Reference Prices, pp. 12-15 (Exhibit PAN-18). See also para. 2.7.

³³⁴ Thus, as noted by Panama, indicative prices have no relation with the price actually paid or payable for the good, taking into account the specific circumstances surrounding the transaction at issue. Hence, the Panel is of the opinion that indicative prices do not reflect the "transaction value" as defined by Article 1 of the *Customs Valuation Agreement*. In addition, Colombia's customs officers do not assess the transaction value of identical or similar goods sold for export to Colombia at approximately the same time as the product in question, in compliance with Articles 2 and 3 of the *Customs Valuation Agreement*. Colombian authorities similarly do not conduct an inquiry into the unit price at which the imported goods or identical or similar imported goods are sold in the greatest aggregate quantity, at or about the time of the importation of the goods being valued, to unrelated persons, in accordance with the methodology set forth in Article 5. Finally, indicative prices are not established taking into account the factors listed in Article 6, such as the cost or value of materials and fabrication; an amount for profit and general expenses; and other expenses including cost of transport, loading, unloading and handling charges and insurance. Although in determining indicative prices, Colombian customs authorities factor "the costs and expenditures of production" and "profit", these variables are considered on "average" and for broad categories of products. Article 6, in contrast, clearly refers to the costs of production of the specific products that are being imported, as can be inferred from Article 6.1(a) and its Note.

³³⁵ Colombia's response to question No. 5 from Panama. Colombia further states that "the likelihood that the customs value [determined on the basis of the methods of Articles 1–7 of the *Customs Valuation Agreement*] is identical to the indicative price which is an average price is so small that indeed it is correct to say the customs values will, practically speaking, be different from the indicative price in all cases".

Resolution No. 4240 as well as the various resolutions establishing indicative prices, prevents Colombian customs authorities from sequentially applying the customs valuation methods provided in Articles 1 through 6. Indeed, when determining the value of subject goods imports, Colombian customs authorities are required to systematically apply a methodology that does not reflect any of the methods provided for in these provisions, i.e. the use of indicative prices, unless the transactional value is higher than the indicative price.

7.144 The Panel therefore finds that Article 128.5 e) of Decree No. 2685 and Article 172.7 of Resolution No. 4240 as well as the various resolutions establishing indicative prices, which together mandate the use of indicative prices for customs valuation purposes, are inconsistent with the obligation to conduct customs valuation of subject goods based on the sequential application of the methods established by Articles 1, 2, 3, 5 and 6 of the *Customs Valuation Agreement*.

(vi) *Whether the use of indicative prices is inconsistent with Article 7(b), (f) and (g) of the Customs Valuation Agreement*

7.145 Additionally, Panama argues the use of indicative prices violates Article 7.2(b), (f) and (g) of the *Customs Valuation Agreement*, since: (i) the customs value is determined on the basis of "a system which provides for the acceptance for customs purposes of the higher of two alternative values"; (ii) the customs value is determined on the basis of "minimum customs values"; and (iii) the customs value is determined on the basis of "arbitrary or fictitious prices".³³⁶

7.146 The Panel notes that Article 7.1 of the *Customs Valuation Agreement* allows national customs authorities to resort to reasonable means of valuation where the customs value of imported goods cannot be determined under the methods provided for in Article 1 through 6.³³⁷ Paragraph 2 of Article 7 further provides that those reasonable means cannot be determined using a series of prohibited customs valuation methods.

7.147 With respect to Article 7.2(b) of the *Customs Valuation Agreement*, Panama contends that the requirement established in Article 172.7 of Resolution No. 4240 to use an indicative price for customs valuation purposes whenever the transaction value is lower than the indicative price is tantamount to the acceptance of the higher of two alternative values.³³⁸ In relation to Article 7.2(f) of the *Customs Valuation Agreement*, Panama claims that the indicative prices are minimum customs values because importation of products subject to indicative prices will not be permitted unless this minimum value is declared by the importer.³³⁹ Panama also claims that, since the customs value of the goods is not based on the actual circumstances of the sale, but rather on the basis of a general survey, indicative prices are, in effect, arbitrary and fictitious prices, in contravention of Article 7.2(g) of the *Customs Valuation Agreement*.³⁴⁰

7.148 Colombia has not submitted any specific counterargument with respect to Panama's claims under Article 7.2 of the *Customs Valuation Agreement* other than the general contention that indicative prices are not used for customs valuations purposes.

7.149 The Panel considers that Article 128.5 e) of Decree No. 2685 and Article 172.7 of Resolution No. 4240, as well as the various resolutions establishing indicative prices, impose "the acceptance for customs purposes of the higher of two alternative values". As explained in

³³⁶ Panama's first written submission, paras. 122-128.

³³⁷ Article 7.1 provides as follows: "If the customs value of the imported goods cannot be determined under the provisions of Articles 1 through 6, inclusive, the customs value shall be determined using reasonable means consistent with the principles and general provisions of this Agreement and of Article VII of *GATT 1994* and on the basis of data available in the country of importation."

³³⁸ Panama's first written submission, paras. 125-126.

³³⁹ Panama's first written submission, para. 127.

³⁴⁰ Panama's first written submission, para. 128.

Section II.B above, for products subject to indicative prices, customs duties and sales taxes are levied at the time of inspection on the basis of the higher of two values: the declared value or the indicative price.³⁴¹ The Panel therefore finds that Article 128.5 e) of Decree No. 2685 and Article 172.7 of Resolution No. 4240 as well as the various resolutions establishing indicative prices, which mandate the use of indicative prices for customs valuation purposes are inconsistent with Article 7.2(b) of the *Customs Valuation Agreement*.

7.150 Moreover, as also explained above, in cases in which the declared value is lower than the indicative price, an importer has to "correct" the import declaration and pay custom duties and sales tax based on the indicative price.³⁴² If the importer refuses to do so, the importer has no choice but to re-ship the goods or abandon them. As a result, only two possible scenarios exist when subject goods are submitted for customs clearance: either customs duties and sales tax are collected on the basis of a value equal or higher than the indicative price; or the goods are not imported into Colombian customs territory at all. In practice, this results in a system in which customs duties and sales tax are never levied on the basis of a value lower than the one provided by the indicative price. For this reason, the Panel concludes that indicative prices amount to "minimum prices" and, therefore, finds that Article 128.5 e) of Decree No. 2685 and Article 172.7 of Resolution No. 4240 as well as the various resolutions establishing indicative prices which mandate the use of indicative prices for customs valuation purposes are also inconsistent with Article 7.2(f) of the *Customs Valuation Agreement*.

7.151 Having found that Article 128.5 e) of Decree No. 2685 and Article 172.7 of Resolution No. 4240 as well as the various resolutions establishing indicative prices which mandate the use of indicative prices for customs valuation purposes are inconsistent with Articles 7.2(b) and 7.2(f) of the *Customs Valuation Agreement*, the Panel does not consider it necessary to further rule on the consistency of these Colombian domestic provisions with Article 7.2(g) of the *Customs Valuation Agreement*.

(f) Conclusion

7.152 For the reasons discussed above, the Panel finds that Articles 128.5 e) of Decree No. 2685 and 172.7 of Resolution No. 4240, as well as the various resolutions establishing indicative prices, by mandating the use of indicative prices for customs valuation purposes are inconsistent "as such" with the obligation established in the *Customs Valuation Agreement* to apply, in a sequential manner, the methods of valuation provided in Articles 1, 2, 3, 5 and 6 of the Agreement.

7.153 The Panel further finds that Articles 128.5 e) of Decree No. 2685 and 172.7 of Resolution No. 4240, as well as the various resolutions establishing indicative prices, by mandating the use of the higher of two values or a minimum price as the customs value of subject goods, are inconsistent "as such" with Article 7.2(b) and (f) of the *Customs Valuation Agreement*. Therefore, notwithstanding the Panel's finding that Colombia's use of indicative prices is not inconsistent with Article 7.2(g), the Panel finds that such methodology does not constitute a "reasonable means [of customs valuation] consistent with the principles and general provisions of the *Customs Valuation Agreement*" permissible under Article 7.1.

7.154 Having found that Articles 128.5 e) of Decree No. 2685 and 172.7 of Resolution No. 4240, as well as the various resolutions establishing indicative prices are "as such" inconsistent with the *Customs Valuation Agreement*, the Panel considers it unnecessary to further examine Panama's "as applied" claims. As discussed in Section VII.A.1(c)(iii) above, as each of the individual applications

³⁴¹ See para. 2.8.

³⁴² See paras. 2.8-2.9.

of indicative prices to import transactions has been based on WTO-inconsistent legislation, such an analysis would be unnecessary³⁴³

7.155 In reaching its conclusions, the Panel recognizes that WTO Members have a legitimate right to apply measures aimed at combating under-invoicing, smuggling and money laundering. However, these measures should be WTO-consistent or fall within the exceptions included in Article XX of the *GATT 1994* which allow WTO Members to justify an otherwise WTO-inconsistent measure.

C. WHETHER COLOMBIA'S USE OF INDICATIVE PRICES TO DETERMINE THE VALUE OF IMPORTED TEXTILES, FOOTWEAR AND OTHER PRODUCTS FOR THE PURPOSE OF LEVYING SALES TAX IS INCONSISTENT WITH ARTICLE III:2, FIRST SENTENCE OF THE *GATT 1994*

1. Main arguments of the parties

7.156 Panama claims that the use of indicative prices as the basis to determine the value of imported textiles, footwear and other products for the purpose of levying sales tax is inconsistent with Article III:2, first sentence, of the *GATT 1994*. In Panama's view, the sales tax is imposed "in excess of" the sales tax imposed on like domestic products as the potentially like domestic products are subject to sales tax on the basis of the actual sale price of the product.³⁴⁴ Notwithstanding the application of the same tax rate, Panama asserts that imported products can still be taxed "in excess" of like domestic products if the application of differential tax bases leads to the imposition of higher taxes for imported products.³⁴⁵ Furthermore, since Article III protects the "equal competitive relationship between imported and domestic products"³⁴⁶ and depends on the "potential impact rather than on the actual consequences"³⁴⁷, Panama submits that there is at least potentially a like domestic product.³⁴⁸

7.157 Panama contends that Colombia has admitted that the tax base for domestic goods is the transaction value.³⁴⁹ In contrast, Panama notes that importers subject to indicative prices do not have the option under Article 459 of the Tax Code to demonstrate that the invoiced value is the actual transaction value, but must instead apply a higher value based on the indicative price.³⁵⁰ Thus, whenever indicative prices are applied, imports are taxed in excess of like domestic products. Due to the possibility of a violation, Panama argues that exceptional situations where the indicative price is the same as the transaction value are not relevant to the determination under Article III:2, as the "exposure of a particular imported product to a risk of discrimination"³⁵¹ already constitutes a form of discrimination.³⁵² Panama further argues that it is not required to show specific instances of Article III:2 violations because differential tax treatment is itself sufficient evidence of discriminatory treatment to show inconsistency with Article III:2.³⁵³

7.158 Colombia contends that there is no provision in Colombian law requiring the sales tax on imported products to be imposed on the basis of indicative prices. Colombia notes that Article 459 of Colombia's Tax Code only provides that the basis for assessing internal taxes on imported products is

³⁴³ See para. 7.44.

³⁴⁴ Panama's first written submission, para. 149.

³⁴⁵ Panama refers to the Appellate Body Report in *Argentina – Hides and Leather*. Panama's second written submission, para. 86.

³⁴⁶ Panama refers to the Appellate Body Report in *Japan – Alcoholic Beverages II*.

³⁴⁷ Panama refers to the GATT Panel Report on *US – Section 337*.

³⁴⁸ Panama's first written submission, para. 146.

³⁴⁹ Panama's second written submission, para. 95.

³⁵⁰ Panama's second written submission, para. 98.

³⁵¹ Panama refers to the GATT Panel Report on *EEC – Oilseeds I*.

³⁵² Panama's first written submission, para. 150.

³⁵³ Panama refers to the Panel Report on *Indonesia – Autos*.

the same as that used to determine customs duties.³⁵⁴ Thus, Colombia contends, the basic premise of Panama's claim is flawed, as the tax base for imported goods is not the indicative price of the product but the value of the goods used to determine customs duties which, according to Colombia, is not determined based on indicative prices, but on the basis of methods set out in the *Customs Valuation Agreement*.³⁵⁵ Moreover, Colombia draws the Panel's attention to the fact that Panama has failed to offer "even one specific application" of the Colombia's law that would support its argument.³⁵⁶ Colombia further disputes Panama's assertion that the sales tax of domestic products will always be calculated on the basis of the transaction value. According to Colombia, just as in the case of imported goods, the sales tax on domestic products may, in cases of undervaluation, be based on a value different from the declared value.³⁵⁷

7.159 Colombia further argues that Panama has failed to meet its burden of proof under Article III:2. In Colombia's view, Panama fails to demonstrate that the sales tax on imported products is not just "different in a neutral sense of the word"³⁵⁸, but that the difference leads to imported goods being taxed "in excess" of like domestic products.³⁵⁹ Colombia notes that Panama does not contest the fact that the same tax rate is applied for both domestic and imported products.³⁶⁰ Further, any difference in the application of differential tax bases is not considered determinative as such.³⁶¹ In addition, Colombia states that Panama failed to explain the alleged negative impact on competitive opportunities.³⁶²

2. Consideration by the Panel

(a) Legislation applicable to the calculation of sales tax for imports subject to indicative prices

7.160 In addressing Panama's claims under the *Customs Valuation Agreement* in Section VII.B.2(a) above³⁶³, the Panel established that the legislation mandating the use of indicative prices comprises Article 128.5 e) of Decree No. 2685 and Article 172.7 of Resolution No. 4240 as well as a series of resolutions establishing indicative prices.³⁶⁴ The Panel understands that Panama, under the present claim, is challenging "as such" the consistency of all these provisions with Article III:2 of the *GATT 1994*.

7.161 In addition, Panama has identified a number of tax provisions within Decree 624 of 1989 that it considers relevant to the present claim, although Panama has not explicitly challenged these provisions.

³⁵⁴ Colombia's second written submission, para. 91.

³⁵⁵ Colombia's first written submission, paras. 162-166; Colombia's second written submission, para. 91.

³⁵⁶ Colombia's first written submission, para. 167

³⁵⁷ Colombia's first written submission, paras. 168-173.

³⁵⁸ Colombia's first written submission, para. 156.

³⁵⁹ Colombia refers to the Appellate Body Reports in *Japan – Alcoholic Beverages II* and *Canada – Periodicals*. Colombia's first written submission, paras. 147-149.

³⁶⁰ Colombia's second written submission, para. 92.

³⁶¹ Colombia refers to the Panel Report on *Dominican Republic – Import and Sale of Cigarettes*. Colombia's second written submission, para. 94.

³⁶² Colombia refers to the Panel Report on *Dominican Republic – Import and Sale of Cigarettes* and the Appellate Body Report in *Argentina – Hides and Leather*. Colombia's first written submission, para. 159.

³⁶³ See also para. 7.36, discussing Colombia's challenge to Panama's identification of the measure at issue. Additionally, the Panel has included Article 453 of Decree 624 above as Colombia has referred to this provision in defence of its methodology applied to domestically-produced goods.

³⁶⁴ The various resolutions establishing the applicable indicative prices are: Resolution No. 7510 of 26 June 2007, as modified by Resolution No. 11412 of 28 September 2007; Resolution No. 7511 of 26 June 2007; Resolution No. 7509 of 26 June 2007, as modified by Resolution No. 11414 of 28 September 2007; Resolution No. 7512 of 26 June 2007, as modified by Resolution No. 11415 and Resolution No. 7513 of 26 June 2007.

7.162 Article 447 of Decree 624, in turn defines the taxable base ("*base gravable*") applicable to the calculation of sales tax for all goods sold in Colombia:

"En la venta y prestación de servicios, la base gravable será el valor total de la operación, sea que ésta se realice de contado o a crédito, incluyendo entre otros los gastos directos de financiación ordinaria, extraordinaria, o moratoria, accesorios, acarreos, instalaciones, seguros, comisiones, garantías y demás erogaciones complementarias, aunque se facturen o convengan por separado y aunque, considerados independientemente, no se encuentren sometidos a imposición."

7.163 Article 459 of Decree 624, which establishes the basis for the imposition of sales tax on imported goods, provides in relevant part as follows:

"La base gravable, sobre la cual se liquida el impuesto sobre las ventas en el caso de las mercancías importadas, será la misma que se tiene en cuenta para liquidar los derechos de aduana, adicionados con el valor de este gravamen."

7.164 Article 468 of Decree 624 establishes a sales tax rate of 16 per cent applicable to all goods sold in Colombia:

"La tarifa general del impuesto sobre las ventas es del dieciséis por ciento (16%), la cual se aplicará también a los servicios, con excepción de los excluidos expresamente. Igualmente, la tarifa general será aplicable a los bienes de que tratan los artículos 446, 469 y 474 y a los servicios de que trata el artículo 461 del Estatuto Tributario."

7.165 Panama is therefore not challenging the WTO-consistency of Articles 447, 459 and 468 of Decree 624 "as such", but considers these provisions as relevant context for the Panel's examination of the WTO-consistency of the use of indicative prices with Article III:2 (and Article III:4 in the alternative) of the *GATT 1994*.³⁶⁵

(b) The Panel's approach to Panama's claim under Article III:2, first sentence

7.166 Panama has requested the Panel to determine whether the use of indicative prices rather than the transaction value as the basis for assessing the sales tax on subject imports results in the imposition of tax in excess of that levied on like domestic products in violation of Article III:2, first sentence. As indicated above, the Panel has established that the legal provisions at issue are Article 128.5 e) of Decree No. 2685 and Article 172.7 of Resolution No. 4240, as well as a number of resolutions establishing indicative prices. Panama is not challenging the various tax provisions identified above but has simply referred to them as relevant context for the interpretation of the indicative prices provisions.

7.167 The Panel recalls its findings concerning the consistency of the challenged provisions with the *Customs Valuation Agreement* in Section VII.B.2(f) above as it considers them relevant to the present claim under Article III:2, first sentence. The Panel found that Article 128.5 e) of Decree No. 2685 and Article 172.7 of Resolution No. 4240, as well as the various resolutions establishing indicative prices, by mandating the use of indicative prices for customs valuation purposes, are inconsistent "as such" with the obligation established in the *Customs Valuation Agreement* to apply, in a sequential manner, the methods of valuation provided in Articles 1, 2, 3, 5 and 6 of the Agreement. Furthermore, the Panel found that Articles 128.5 e) of Decree No. 2685 and 172.7 of Resolution No. 4240, as well as the various resolutions establishing indicative prices, by mandating

³⁶⁵ Panama's response to Panel question No. 91.

the use of the higher of two values or a minimum price as the customs value of subject goods, are inconsistent "as such" with Article 7.2(b) and (f) of the *Customs Valuation Agreement*.

7.168 In this respect, the Panel recalls that Article 459 of Decree 624, which establishes the taxable base for the imposition of sales tax on imported goods, provides in relevant part as follows: "*La base gravable, sobre la cual se liquida el impuesto sobre las ventas en el caso de las mercancías importadas, será la misma que se tiene en cuenta para liquidar los derechos de aduana, adicionados con el valor de este gravamen.*" The Panel notes that Article 459 simply refers the determination of the relevant *base gravable* to the legislation establishing the customs value of imported goods, and does not address the use of indicative prices. This provision provides that the taxable base or *base gravable* for the purposes of collecting sales tax on imported goods will be the same as the one used for levying customs duties, which is to say, the customs value. The Panel considers that its finding that the use of indicative prices as the customs value is a prohibited method under the *Customs Valuation Agreement* has a direct impact on the present claim. Indeed, if Colombia is not allowed to use indicative prices in order to determine the customs value of imported goods, it will also not be permitted to use indicative prices as the basis for taxing imported goods. As noted, Article 459 of Decree 624 establishes that the basis to calculate sales tax will be the same as the customs value. Consequently, in the Panel's view, the exclusion of indicative prices as a customs valuation method will automatically result in the elimination of indicative prices as a valid means to determine the *base gravable* for calculating sales tax.

7.169 Hence, the Panel concludes that its findings pertaining to the WTO-inconsistency "as such" of the legal provisions imposing the use of indicative prices provide a positive solution to the dispute. Accordingly, the Panel concludes that it is not required to continue its analysis and make specific findings on the consistency "as such" of Articles 128.5 e) of Decree No. 2685 and 172.7 of Resolution No. 4240 as well as the relevant resolution imposing indicative prices with Article III:2 of the *GATT 1994*.

7.170 The Panel recalls that its findings in relation to Articles 1 through 7 of the *Customs Valuation Agreement* provide a positive solution to the dispute. However, notwithstanding this decision, assuming *arguendo* the permissibility of the use of indicative prices, the Panel will examine whether the fact that importers are obliged to pay the sales tax on the basis of the relevant indicative price, whenever the indicative price is higher than the declared transaction value, results in taxation of imported subject imports in excess of that levied on domestically like products, contrary to Article III:2, first sentence, as claimed by Panama.

7.171 The Panel recalls that Panama has made both an "as such" and "as applied" challenge under Article III:2. Consistent with the approach taken with respect to Panama's claims under the *Customs Valuation Agreement*, the Panel considers it appropriate to first consider Panama's claim "as such" under Article III:2, first sentence, and will defer its consideration of the admissibility of Panama's "as applied" claim until after having concluded its *arguendo* assessment of Panama's "as such" claim.

(c) The interaction of Articles 447, 453, 459 and 468 of Decree 624 in connection with Article 128.5 e) of Decree No. 2685 and Article 172.7 of Resolution No. 4240

7.172 As noted by the panel in *Dominican Republic – Import and Sales of Cigarettes*, in an *ad valorem* system, the tax payable at any given time is a function of the tax rate and the tax base. The Panel notes that Panama's claim does not relate to the sales tax rate imposed on imported goods. Instead, Panama claims that the use of indicative prices as the basis to determine the value of imported textiles and other products for the purpose of levying sales tax, results in taxation in excess of that imposed on like domestic products.

7.173 The Panel recalls from Section VII.B.2(d)(ii) above that the payment by the importer of customs duties and sales tax on the basis of the indicative price at issue constitutes a payment *stricto*

sensu rather than a guarantee in the form of a cash deposit. Therefore, whenever the indicative price is higher than the declared value, the indicative price is used to determine the customs value of subject imports.

7.174 Bearing this in mind, the Panel understands that, pursuant to Article 459 of Colombia's Tax Statute, the taxable base for imports subject to indicative prices is the addition of (i) the value listed on the import declaration (which itself is based on the applicable indicative price, or the transaction value if higher³⁶⁶); and (ii) the amount of customs duties (which is the applicable duty rate multiplied by the listed value).³⁶⁷ In contrast, the taxable base for the relevant like domestic products as prescribed under Article 447 of Decree 624, is the value established based on the transaction value ("*valor de operación*") or, in exceptional circumstances, on the market price.³⁶⁸ In accordance with Article 468 of Decree 624, a sales tax rate of 16 per cent is applied to both imported goods and like domestic products.

7.175 Therefore, whenever the value listed on the import declaration is the indicative price, the method used to determine the taxable base in order to calculate the sales tax applicable to imported products will differ from the method used to establish the taxable base for domestic like products.³⁶⁹ The Panel understands that the use of a different methodology to calculate sales tax on imports will result in a higher taxable base for imported subject goods than the taxable base determined for like domestic products whenever three conditions are met: (i) the value declared by the importer is less than the corresponding indicative price; (ii) the selling price of the like domestic product is also less than the corresponding indicative price; and (iii) the transaction price of the like domestic product is higher than the "market price". In these cases, the importer is required to correct the declared price so as to adjust it to the higher indicative price, and the importer will have to pay the tax on that basis. In contrast, the seller of a domestic like product will be taxed on the basis of its selling price. This latter price will, under these circumstances, be lower than the indicative price and, consequently, lower than the importer's corrected price.

(d) The obligations in Article III:2, first sentence

7.176 Article III:2 embodies one of the basic principles of the *GATT 1994*, the National Treatment principle. In the words of the Appellate Body, "the broad and fundamental purpose of Article III is to avoid protectionism in the application of internal tax and regulatory measures".³⁷⁰

³⁶⁶ The Panel recalls that, upon presentation of the import declaration for goods subject to indicative prices, if the declared f.o.b. value is lower than the indicative price, release of the goods will not be authorized unless the importer corrects the value on the declaration on the basis of the indicative price and pays customs duties and sales tax on this basis. See Article 128.5 e) of Decree No. 2685 of 1999 (Exhibit COL-1) and Article 172.7 of Resolution No. 4240 of 2000 (Exhibit COL-2).

³⁶⁷ Colombia confirmed the method for calculating the taxable base for imports subject to indicative prices in its response to question No. 41 by the Panel. In its response, Colombia urged the Panel to limit its finding to the aspects referred to by Panama. In particular, Colombia argues that Panama's claim is focused exclusively on the fact that indicative prices are allegedly used as the basis for determining customs value, which is a component of the taxable base used to determine the amount of internal sales tax. Thus, Colombia considers that Panama's claim does not concern the aspect of adding the amount of the customs duty to the customs value of the product. Panama has not rebutted Colombia's statement.

³⁶⁸ See Exhibit COL-3. In accordance with Article 453 of Decree 624, in cases in which there is no invoice or equivalent document, or the invoice or equivalent document shows a price lower than the market price, the taxable base shall be determined on the basis of the market price, unless proven otherwise.

³⁶⁹ The Panel additionally notes that the taxable base used to calculate sales tax applicable to imported products will differ from the taxable base for domestic like products in *all* cases due to the fact that the taxable base for imported products includes the amount of customs duties assessed upon entry of the goods. However, as Panama has not claimed a violation based on the inclusion of the amount of customs duties, the Panel declines to consider this issue.

³⁷⁰ Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 16.

7.177 Article III:2, first sentence reads as follows:

"The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products."

7.178 The Appellate Body in *Canada – Periodicals* clarified that two elements must be satisfied in order to establish a violation of the first sentence of Article III:2: a panel must establish that (i) imported and domestic products are *like products*; and (ii) imported products are subject to internal taxes or charges *in excess of* taxes assessed on domestic products.³⁷¹ In the case at hand, Panama, as the complainant, must demonstrate that both tests have been met.³⁷²

7.179 Assuming *arguendo* the permissibility of the use of indicative prices, the Panel will consider whether Panama has presented sufficient evidence to demonstrate that imported goods subject to indicative prices are alike to domestic Colombian products. Only if subject imports and domestic products are like products would it be appropriate to consider under the second test whether the sales tax for imported subject goods is in excess of the sales tax imposed on like domestic products.

(e) Whether subject imports and domestic products are like products

7.180 The Panel notes that Panama has not identified individual cases of alleged like products or argued on the basis of the recognized likeness criteria.³⁷³ According to Panama, all imported goods have potential "like" products. As mentioned above, Colombia has not disputed Panama's contentions. Accordingly, no controversy appears to exist as to whether Panama has discharged its burden of proof in this respect.

7.181 Notwithstanding the absence of disagreement between the parties, a panel is still bound by Article 11 of the *DSU* to make an "objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements". Therefore, the Panel considers it necessary to examine whether subject imports and domestic products are like products.

7.182 In the Panel's view, where a WTO Member imposes an origin-based distinction with respect to internal taxes, imported and domestic products may be considered as like products, and a case-by-case determination of "likeness" between the foreign and domestic would be unnecessary. The Panel recalls that both the Appellate Body and panels have previously recognized the possibility of the existence of hypothetical like products, and thus, considered that a likeness analysis would not be required, in cases similar to the one before this Panel.³⁷⁴ The Panel considers particularly relevant to the present case the following finding of the panel in *Indonesia – Autos*:

³⁷¹ Appellate Body Report, *Canada – Periodicals*, p. 20. See also Appellate Body Report, *Japan – Alcoholic Beverages II*, pp. 18-19.

³⁷² Panel Report, *Japan – Alcoholic Beverages II*, para. 6.14. In a finding subsequently not reviewed by the Appellate Body, the Panel stated that "complainants have the burden of proof to show first that products are like and second, that foreign products are taxed in excess of domestic ones".

³⁷³ In *Canada – Periodicals*, the Appellate Body found that "the proper [likeness] test is that a determination of 'like products' for the purposes of Article III:2, first sentence, must be construed narrowly, on a case-by-case basis, by examining relevant factors including: (i) the product's end-uses in a given market; (ii) consumers' tastes and habits, and (iii) the product's properties, nature and quality." Appellate Body Report, *Canada – Periodicals*, pp. 21-22.

³⁷⁴ Appellate Body Report, *Canada – Periodicals*, pp. 20-21. See also Panel Report, *Indonesia – Autos*, para. 14.113.

"Under the Indonesian car programmes the distinction between the products for tax purposes is based on such factors as the nationality of the producer or the origin of the parts and components contained in the product. Appropriate hypotheticals are therefore easily constructed. An imported motor vehicle alike in all aspects relevant to a likeness determination would be taxed at higher rate simply because of its origin or lack of sufficient local content ... In our view, such an origin-based distinction in respect of internal taxes suffices in itself to violate Article III:2, without the need to demonstrate the existence of actually traded like products. This is directly in accord with the broad purposes of Article III:2, as outlined by the Appellate Body ...".³⁷⁵

7.183 This view was further confirmed by the panel in *Argentina – Hides and Leather*.³⁷⁶ In this latter dispute, the panel explained that the "quantum and nature of the evidence" required for a finding under Article III:2, first sentence, would depend on the "structure and design" of the measure at issue. Since the level of tax in that case was not determined on the basis of the physical characteristics or end-uses of the goods at issue, the Panel concluded that a comparison of specific products was not required and, therefore, it did not see fit to examine the various criteria relevant to determine the likeness between the imported and domestic products.³⁷⁷

7.184 In the Panel's view, it is also not necessary to determine through a lengthy analysis whether imported goods subject to the indicative prices in this dispute are in fact like products to domestically produced Colombian goods. Based on the design and structure of Article 128.5 e) of Decree No. 2685, which authorizes the use of indicative prices, any imported good that arrives from Panama and is subject to indicative prices could potentially have a corresponding like domestically produced counterpart. Indeed, the distinction between products, which determines whether or not customs duties and sales tax are assessed, is not based on the physical characteristics or end-uses of products *per se*, but rather, the distinction is made based on the fact that imports arrive from Panama.

7.185 Therefore, assuming *arguendo* the permissibility of the use of indicative prices, the Panel considers that the first test of Article III:2, first sentence is met on the basis of the existence of potential "like products" produced in Colombia.

(f) Whether subject imports are taxed in excess

7.186 Again assuming *arguendo* the permissibility of the use of indicative prices, the Panel will next consider whether, under the second test, imported subject goods are taxed *in excess of* domestic like products.

7.187 Under Article III:2, the imposition of internal taxes or charges *in excess of* taxes assessed on domestic products has typically resulted from Members' imposition of different tax *rates* on domestic and imported products. In this case, however, Panama is claiming that taxation *in excess* results from the use of a different tax *base* for imported products than that used for domestic goods, which leads to the imposition of higher sales tax on imported goods.

7.188 In *Argentina – Hides and Leather*, the panel evaluated the actual tax burdens at issue as opposed to nominal tax burdens:

"Article III:2, first sentence, requires a comparison of actual tax burdens rather than merely of nominal tax burdens. Were it otherwise, Members could easily evade its disciplines. Thus, even where imported and like domestic products are subject to identical tax rates, the actual tax burden can still be heavier on imported products.

³⁷⁵ Panel Report, *Indonesia – Autos*, para. 14.113.

³⁷⁶ Panel Report, *Argentina – Hides and Leather*, paras. 11.168-11.170.

³⁷⁷ Panel Report, *Argentina – Hides and Leather*, para. 11.169.

This could be the case, for instance, where different methods of computing tax bases lead to a greater actual tax burden for imported products."³⁷⁸

7.189 The panel in that dispute further considered that the measure at issue imposed an "actual tax burden", despite the fact that the amounts disbursed by importers as "prepayments" in excess of amounts paid by domestic sellers were treated as credits against definitive tax liability (and, consequently, the additional payments did not give rise to "net tax payment" in excess). According to the panel, the actual tax burden at issue arose from the fact that taxable entities were required to commit disposable working capital to finance the required prepayments and, therefore, were forced to forego interest on that working capital in the interval between the tax prepayment and its crediting. In situations where taxable entities did not have access to disposable working capital to finance prepayments, the "burden" would result from the fact that taxable entities would need to raise additional capital in the interval between tax prepayment and the ultimate determination of a tax credit, and pay interest on additional capital during that interval.³⁷⁹

7.190 Similarly, the panel in *Dominican Republic – Import and Sales of Cigarettes* found that the Dominican Republic Tax Code created a distinction in the treatment between domestic and imported cigarettes as a result of the application of different methods to calculate the taxable base.³⁸⁰ In that dispute, the panel considered whether the levy of different tax rates on imported and domestic cigarettes of identical retail prices on the basis of on average retail selling prices, was inconsistent with Article III of the *GATT 1994*. The taxable base for domestic products was determined on the basis of average-price surveys conducted by the Central Bank of the Dominican Republic, whereas, the tax base for imported cigarettes was calculated based on the retail price of the "nearest similar product on the domestic market". The complainant alleged that the determination of the taxable base based on different criteria resulted in a higher rate assessed on certain imported cigarettes than on like domestic products sold at the same retail price.³⁸¹ The panel, however, found that the determination of the taxable base based on the retail price used for the nearest similar product "did not lead *per se* to imported cigarettes being subject to internal taxes in excess of those applied to like domestic cigarettes". Therefore, the panel analysed whether discrimination occurred "in practice".³⁸²

7.191 The Panel agrees with the view expressed in *Dominican Republic – Import and Sale of Cigarettes* that, in principle, there is no reason to presume that the determination of the taxable base under a methodology dependent on the "nearest similar product" would lead to taxation of imports in excess of that applied to domestic products. Indeed, in the light of the facts of that case, it was reasonable to assume that, as long as Dominican customs officers made an accurate determination on the "similarity" of the imported and the domestic products, an imported product would not be taxed in excess. In addition, the panel in that case noted that the rules contained in the Dominican Republic Tax Code would presumably be interpreted in the light of the implementing legislation. Implementing legislation set out a different methodology, which did not distinguish between imported and domestic goods.³⁸³

³⁷⁸ Panel Report, *Argentina – Hides and Leather*, paras. 11.182-11.184. See also GATT Panel *Japan – Alcoholic Beverages I*, para. 5.8.

³⁷⁹ Panel Report, *Argentina – Hides and Leather*, paras. 11.186-11.187.

³⁸⁰ Panel Report, *Dominican Republic – Import and Sale of Cigarettes*, paras. 7.351 and 7.354-7.358.

³⁸¹ Panel Report, *Dominican Republic – Import and Sale of Cigarettes*, paras. 7.317-7.319.

³⁸² Panel Report, *Dominican Republic – Import and Sale of Cigarettes*, paras. 7.351 and 7.354-7.358.

³⁸³ Panel Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 7.352. The Dominican Republic had declared that the method actually applied was one contained in this implementing legislation.

7.192 The Panel further concurs with the view set forth in *Dominican Republic – Import and Sale of Cigarettes* that a panel should look at whether *in practice* authorities tax imported goods on the basis of a taxable base that is calculated as higher than the one applied to domestic products.³⁸⁴

7.193 Nevertheless, the Panel considers that the facts of the case at hand, in spite of their apparent similarity, are actually quite different from those in *Dominican Republic – Import and Sale of Cigarettes*. Whether imported goods under HS Chapters 50-64 will be subject to a sales tax in excess of that applied to like domestic products will not depend on the specific determination by tax officials of the likeness of the domestic and the imported goods, as was the case of *Dominican Republic – Import and Sales of Cigarettes*. Instead, in each and every case in which the value declared by the importer is lower than the corresponding indicative price and the transaction price of the like domestic product is both lower than the indicative price and higher than the "market price", Colombian tax officers are required by Article 459 (in connection with Article 128.5 e) of Decree No. 2685 and Article 172.7 of Resolution No. 4240) to collect sales tax on the basis of a taxable base that will be necessarily higher than the one that would have been used had the product been a domestic like product. Thus, unlike the case of the tax measure in *Dominican Republic – Import and Sale of Cigarettes*, in the present case the application of a taxable base for imported goods higher than the one used for domestic like products is inherent in the design and structure of the legislation that authorizes the application of indicative prices.

7.194 Therefore, the Panel is not persuaded by Colombia's argument that Panama should have provided specific evidence of how the difference in the taxable base operates in practice.

7.195 The Panel recalls that in *Japan – Alcoholic Beverages II*, the Appellate Body clarified "[e]ven the smallest amount of 'excess' is too much". The Appellate Body further found that "[t]he prohibition of discriminatory taxes in Article III:2, first sentence, is not conditional on a 'trade effects test' nor is it qualified by a *de minimis* standard."³⁸⁵ Accordingly, the Panel concludes that Colombia taxes imported products in excess of the like domestic products each time that the factual conditions set out in paragraph 7.175 above are met, regardless of the amount of the difference between the declared and indicative prices.

7.196 In the Panel's view, such a conclusion is not affected by the fact that the importer may obtain a reimbursement of the taxes paid in excess during the so-called post-importation process. First, as noted above³⁸⁶, Colombia has failed to substantiate its contention that this post-importation control process takes place automatically and for each and every instance where the importer is required to correct the declared value and pay customs duties and sales tax based on indicative prices. Second, even if that were the case, Colombia's taxation system would still impose a greater tax burden on imported goods than the one imposed on domestic like products. This higher tax burden results from the additional financial cost that the importer must incur in the interval between the collection of sales tax based on the indicative price and the reimbursement of the taxes paid in excess during the post-

³⁸⁴ In *Dominican Republic – Import and Sales of Cigarettes*, the Panel based its findings of violation under Article III:2 on the specific application by Dominican customs officials, rather than on the design of the methodology itself. As established in that case, Dominican tax authorities determined that Marlboro cigarettes were the nearest similar product to imported Viceroy cigarettes, for the 2003 year. Thus, although Viceroy cigarettes had the same average selling price as the domestic-brand Lider cigarettes, Viceroy cigarettes were taxed based on the higher average retail price of Marlboro brand.. See Panel Report, *Dominican Republic – Import and Sale of Cigarettes*, paras. 7.354-7.358.

³⁸⁵ Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 23. This finding was followed by the Panel in *Argentina – Hides and Leather*, para. 11.243.

³⁸⁶ See para. 7.126.

importation control.³⁸⁷ As established above³⁸⁸, post-importation reimbursement may take more than two years.

7.197 Additionally, the Panel would like to address Panama's contention that exceptional situations where the indicative price is the same as or less than the transaction value are not relevant to the determination under Article III:2. In instances where the transaction value is higher than the indicative price, there is no difference in the taxable base arising from the use of indicative prices, as the transaction value serves as the basis to calculate sales tax applicable to the import. Panama submits that the "exposure of a particular imported product to a risk of discrimination"³⁸⁹ in itself constitutes a form of discrimination and is enough to trigger a violation of Article III:2.³⁹⁰ In examining whether a purchase regulation which does not necessarily discriminate against imported products but is capable of doing so was inconsistent with Article III:4, the GATT panel on *EEC – Oilseeds I* concluded that the "exposure of a particular imported product to a risk of discrimination" already constitutes a form of discrimination.³⁹¹ The Panel agrees with this interpretation and considers it applicable to the case of the specific type of discrimination envisaged in Article III:2, i.e. discrimination that results from taxation on imported goods in excess of the like domestic products. Accordingly, the Panel considers particular situations where the indicative price is the same as the transaction value irrelevant to its determination under Article III:2.

7.198 As a final matter, the Panel notes Colombia's argument that Panama failed to "explain the alleged negative impact on competitive opportunities of any difference that exists in the determination of the taxable base".³⁹² The Panel does not find support for this position within WTO jurisprudence. In *Japan – Alcoholic Beverages II*, the Appellate Body explained that consideration of trade effects is irrelevant for the purpose of determinations under Article III, stating:

"[I]t is irrelevant that 'the trade effects' of the tax differential between imported and domestic products, as reflected in the volumes of imports, are insignificant or even non-existent; Article III protects expectations not of any particular trade volume but rather of the equal competitive relationship between imported and domestic products"³⁹³

7.199 Moreover, the Appellate Body ruled in *Canada – Periodicals* that: "[i]t is a well-established principle that the trade effects of a difference in tax treatment between imported and domestic products do not have to be demonstrated for a measure to be found to be inconsistent with Article III".³⁹⁴

7.200 Therefore, having assumed *arguendo* the permissibility of the use of indicative prices, the Panel is satisfied that the second test in Article III:2, first sentence has also been met.

³⁸⁷ As noted in paragraph 7.189 above, the Panel on *Argentina – Hides and Leather* found that a tax burden may arise based on additional working capital committed to pay higher taxes (including interest payable), as well as interest that is forgone on any additional working capital. See Panel Report, *Argentina – Hides and Leather*, paras. 11.187-11.188.

³⁸⁸ See para. 7.125.

³⁸⁹ Panama refers to the GATT Panel Report on *EEC – Oilseeds I*.

³⁹⁰ Panama's first written submission, para. 150.

³⁹¹ GATT Panel Report, *EEC – Oilseeds I*, para. 141.

³⁹² Colombia's first written submission, para. 159.

³⁹³ Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 16. This statement was endorsed in *Korea – Alcoholic Beverages*. Appellate Body Report, *Korea – Alcoholic Beverages*, para. 119. See also Panel Report, *Indonesia – Autos*, para. 14.108.

³⁹⁴ Appellate Body Report, *Canada – Periodicals*, p. 18.

(g) Conclusion

7.201 As discussed in Section VII.C.2(b) above, the Panel does not consider it necessary to make findings under Article III:2, first sentence. However, assuming *arguendo* the permissibility of the use of indicative prices, the Panel considered whether Article 128.5 e) of Decree No. 2685 and Article 172.7 of Resolution No. 4240, as well as the various resolutions establishing indicative prices, by mandating the use of indicative prices to determine the taxable base for textile, apparel and footwear imports arriving from Panama, would be "as such" inconsistent with Article III:2, first sentence since imported subject goods are taxed *in excess of* domestic like products.

7.202 In light of the above, the Panel declines to examine Panama's "as applied" claims under this same provision.

D. WHETHER COLOMBIA'S USE OF INDICATIVE PRICES TO DETERMINE THE VALUE OF IMPORTED TEXTILES, FOOTWEAR AND OTHER PRODUCTS FOR THE PURPOSE OF LEVYING SALES TAX IS INCONSISTENT WITH ARTICLE III:4 OF THE *GATT 1994*

1. Arguments of the parties

7.203 In the alternative to its claim under Article III:2 of the *GATT 1994*, Panama argues that the use of indicative prices as the basis to determine the value of imported textiles, footwear and other products for the purpose of levying sales tax is inconsistent with Article III:4 of *GATT 1994*, as this methodology is based on laws and regulations affecting the sale, offering for sale, use and purchase of imported products. Notwithstanding the fact that it did not address its claim under Article III:4 in its first written submission, Panama submits that its claim is valid.³⁹⁵

7.204 Panama submits that in order to establish a violation of Article III:4, the Panel must satisfy itself that; the imported and domestic products at issue are like products; that the measure at issue is a law, regulation or requirement affecting their internal sale, offering for sale, purchase, transportation, or use; and that the imported products are accorded "less favourable" treatment than that accorded to like domestic products. Panama submits that Colombia has conceded that the indicative price measures apply to imported products that are like domestic products.³⁹⁶ Additionally, by increasing the tax base for imported products only, Panama argues that Colombia provides imported products treatment less favourable than that accorded to like domestic products and thus, the difference in the tax bases is inconsistent with Article III:4 of the *GATT 1994*.

7.205 Colombia responds that Panama has failed to present a claim under Article III.4 in a sufficiently clear manner, and that the claim should be rejected by the Panel.³⁹⁷ In this respect, Colombia argues that "merely dropping a footnote" in the first submission is not enough to discharge its burden of proof of establishing a prima facie case of violation of the provision at hand as it does not develop any legal or factual arguments.³⁹⁸

7.206 Colombia submits that, in any event, Panama erroneously asserts that only domestic products, and not imported products subject to indicative prices, can demonstrate that the declared value corresponds with the transaction value. Colombia submits that importers have the same opportunities as domestic producers since it does not conduct customs valuation on the basis of indicative prices.³⁹⁹

³⁹⁵ Panama's second written submission, para. 100.

³⁹⁶ Panama's second written submission, para. 104.

³⁹⁷ Colombia's second written submission, para. 97.

³⁹⁸ Colombia's second written submission, para. 98; Colombia's first written submission, para. 146.

³⁹⁹ Colombia's second written submission, para. 101.

7.207 Colombia submits that Panama's "less favourable treatment" claim is poorly developed as it does not link the particular facts to the alleged protective discrimination. Colombia argues that Panama ignores the fact that customs authorities may have reason to doubt the declared invoiced value is the taxable base and would thus use an alternative value for both domestic and imported products alike. Colombia asserts that there is no discrimination between domestic and imported products, as the starting point for both imported and domestic products is the declared transaction price.⁴⁰⁰

2. Consideration by the Panel

7.208 As discussed in Section VII.C.2(b) above, the Panel considered it unnecessary to examine Panama's claim under Article III:2, first sentence, in light of its finding that indicative prices are a prohibited method of customs valuation. Notwithstanding the decision not to make findings under Article III:2, first sentence, the Panel examined Panama's claim assuming *arguendo* the permissibility of the use of indicative prices, and concluded that the use of indicative prices to determine the taxable base for textile, apparel and footwear imports arriving from Panama would be inconsistent *as such* with Article III:2, first sentence. Since Panama's claim under Article III:4 is an alternative claim to that under Article III:2, first sentence, the Panel does not consider it necessary to examine this claim further, and thus declines to make a finding under Art III:4 of the GATT 1994.

E. WHETHER THE RESTRICTION ON PORTS OF ENTRY APPLICABLE TO TEXTILE, APPAREL AND FOOTWEAR ARRIVING FROM PANAMA IS INCONSISTENT WITH ARTICLE XI:1 OF THE GATT 1994

1. Main arguments of the parties

7.209 Panama claims that the requirement in the ports of entry measure to import certain textiles, apparel and footwear arriving from Panama exclusively at ports in Bogota and Barranquilla is a prohibited restriction within the meaning of Article XI:1 of the GATT 1994. Panama submits that the ports of entry measure modifies competitive opportunities by increasing overall delivery costs for transportation for goods destined for markets other than those near Bogota and Barranquilla, and thus constitutes a restriction on importation in violation of Article XI:1.⁴⁰¹

7.210 According to Panama, Article XI:1 covers a broad category of "other measures", and not just measures such as quotas and export or import restrictions that limit competitive opportunities for imported products.⁴⁰² Panama notes that the ordinary meaning of the term "restriction" is "[a] thing which restricts someone or something, a limitation on action, a limiting condition or regulation".⁴⁰³ In light of the ordinary meaning of the term "restriction", Panama argues that a restriction arises within the meaning of Article XI:1 where imports are technically allowed into the market without express quantitative restrictions, but are only allowed under conditions which are "limiting".⁴⁰⁴ Panama submits that references to "quantitative restrictions" in certain portions of Article XI but not the rest of the Article support a broad interpretation, as the references are intentional and demonstrate that negotiators intended any reference to quantitative restriction would apply only when "quantity" was specifically mentioned.⁴⁰⁵ In Panama's view, an interpretation that Article XI:1 applies only to measures which expressly set limits on quantity or value would undermine the scope of Article XI:1

⁴⁰⁰ Colombia's second written submission, para. 102.

⁴⁰¹ Panama's first written submission, para. 160; Panama's second oral statement, para. 33.

⁴⁰² Panama's second oral statement, paras. 18 - 22.

⁴⁰³ Panama's second oral statement, para. 19, citing *The New Oxford English Dictionary*, Vol. 2, p. 2569.

⁴⁰⁴ Panama's second written submission, para. 35.

⁴⁰⁵ Panama's first oral statement, para. 28.

and would allow circumvention of tariff concessions by permitting the introduction of restrictions that are not quantitative in nature, but are nevertheless restrictions.⁴⁰⁶

7.211 As an evidentiary matter, Panama considers its challenge against the ports of entry restriction is based on the structure, architecture and design of the measure itself. As such, Panama argues it has not alleged a *de facto* restriction on importation, and therefore is not required to demonstrate a causal link between the ports of entry measure and a low level of imports.⁴⁰⁷ Furthermore, as a practical matter, Panama submits that it is not possible to determine that a decline in imports resulted from the ports of entry measure in isolation from other factors.⁴⁰⁸ Nevertheless, if the Panel were to consider that Panama has made a *de facto* challenge, Panama argues that evidence reveals an actual decline in the volume of textile imports from Panama at the time the ports of entry measure came into force.⁴⁰⁹ Specifically, Panama submits that textile quantities imported from Panama declined in March 2005 when a measure similar to the ports of entry measure was in place, and imports declined again in March 2008 when the ports of entry measure at issue was imposed.

7.212 Colombia requests the Panel to reject Panama's interpretation of Article XI:1. According to Colombia, the text throughout Article XI, including its title establishes that Article XI:1 applies exclusively to limitations placed on the quantity or value of imports or exports, either as an absolute prohibition or a partial limitation.⁴¹⁰ Thus, Members may impose certain justified conditions on access to their markets as long as the fundamental thrust and effect to these measures is not to limit the amount of imports in terms of volume or value.⁴¹¹ The term "other measures" is included in the text to ensure that the goal of Article XI applies to measures that set limitations on quantity or value, other than strictly quotas or export/import licences.⁴¹² Colombia submits that Panama's interpretation of Article XI is overly broad as it implies that any government regulation relating to importation be considered a prohibited quantitative import restriction. Colombia considers Panama's interpretation would convert Article XI into a general elimination of all "conditions", since any regulation related to importation necessarily imposes some conditions which make importation more burdensome to a certain extent.⁴¹³

7.213 Colombia argues that a narrow interpretation of the term "restriction" in Article XI is further confirmed from the context provided by Articles XII and XIII of the *GATT 1994* and the *TRIMs Agreement*. In particular, Colombia considers the reference to restrictions on the "quantity or value of merchandise permitted to be imported" under Article XII:1 and to "Quantitative Restrictions" in the title of Article XIII confirm that some limitation on quantity or value must arise.⁴¹⁴ In support of its interpretation of Article XI:1, Colombia also refers to language in Paragraph 2 of the Illustrative List of the Annex of the *TRIMs Agreement* which describes those TRIMs that are inconsistent with Article XI:1, notably measures which "restrict ... importation ... generally or to an amount related to the volume or value of local production that it exports".⁴¹⁵

7.214 Colombia additionally considers that Article XI, by prohibiting Members from imposing any numerical limitation on imports, is compatible with the goal inherent in the *GATT 1994* of liberalizing trade and securing an open and predictable trading system. Moreover, Colombia considers its view complements the obligations presented in Articles II and III of the *GATT 1994*.⁴¹⁶ According to

⁴⁰⁶ Panama's second oral statement, para. 26.

⁴⁰⁷ Panama's second written submission, paras. 42-45.

⁴⁰⁸ Panama's second oral statement, para. 33.

⁴⁰⁹ Panama's second oral statement, para. 34, citing to Exhibit COL-42, chart 3.

⁴¹⁰ Colombia's second written submission, para. 108.

⁴¹¹ Colombia's second oral statement, para. 37.

⁴¹² Colombia's second written submission, para. 109.

⁴¹³ Colombia's second written submission, para. 110.

⁴¹⁴ Colombia's first written submission, paras. 221-223.

⁴¹⁵ Colombia's first written submission, para. 223.

⁴¹⁶ Colombia's first written submission, para. 224.

Colombia, historical international trade agreements which preceded the advent of the *GATT 1947* also distinguished between prohibited import or export restrictions and regulations related to the form or place of importation that were not used as a means of disguised protection or arbitrary restriction.⁴¹⁷

7.215 In light of its interpretation, Colombia argues that Panama must demonstrate that the ports of entry measure places limitations on the quantity or value of imports or exports.⁴¹⁸ Colombia considers Panama cannot establish the existence of a *de jure* violation as the ports of entry measure does not *per se* limit the amount of imports in terms of value or volume.⁴¹⁹ Colombia argues that, while placing a condition on importation by directing imports through two specific ports of entry, the ports of entry measure does not impose any express limitation on the volume or value of imports that are allowed into Colombia.⁴²⁰ Colombia submits that the measure is instead "quantity-neutral" by design and aims to ensure effective customs control.⁴²¹

7.216 Colombia further argues that Panama has failed to meet its burden of proof to establish the existence of a *de facto* restriction under Article XI:1⁴²², which requires a complainant to demonstrate a low level of imports and establish a causal link between the contested measure and the low import levels.⁴²³ Colombia submits that Panama cannot demonstrate a decrease in imports during the ports of entry measure's imposition, as the value of textile, apparel and footwear imports increased between 2006 and 2007, while shipment in terms of weight declined only slightly during those years.⁴²⁴ Colombia also disputes Panama's argument that shipping costs provided in a single quotation reveal that importers incur higher transportation costs under the ports of entry measure, and that these higher shipping costs negatively affect trade levels.⁴²⁵

7.217 While Colombia considers the available trade statistics demonstrate the absence of adverse trade effects, and thus the absence of any restriction⁴²⁶, Colombia nevertheless offers other explanations as to why the ports of entry measure has not contributed to a decline in imports. In this regard, Colombia disputes Panama's argument that the ports of entry measure has hindered traders' competitive opportunities or negatively affected textile, apparel or footwear import volumes. Primarily, Colombia notes that the ports of entry measure allows entry of textile, apparel and footwear at the two ports that are closest in proximity to the CFZ and main markets of Colombia – Bogota and Medellin.⁴²⁷ Colombia also claims that Barranquilla seaport operates 24 hours per day⁴²⁸ and that Bogota airport has more customs officials than any other office in Colombia.⁴²⁹ Colombia describes the ports at Bogota and Barranquilla as "among the most modern and important ports of Colombia", which staff officials specialized in handling contraband concerns related to textiles, apparel and footwear and offer improved container processing.⁴³⁰ According to Colombia, Bogota and Barranquilla are ranked as the number one and two ports for footwear, the number one and three ports for apparel, and the number two and three ports for textiles.⁴³¹

⁴¹⁷ Colombia's second oral statement, footnote 27.

⁴¹⁸ Colombia's second written submission, para. 111.

⁴¹⁹ Colombia's second written submission, para. 120.

⁴²⁰ Colombia's second oral statement, para. 39.

⁴²¹ Colombia's second oral statement, para. 40.

⁴²² Colombia's first written submission, para. 243.

⁴²³ Colombia's first written submission, paras. 244-245.

⁴²⁴ Colombia's second oral statement, para. 41.

⁴²⁵ Colombia's second written submission, para. 124.

⁴²⁶ Colombia's first written submission, para. 254.

⁴²⁷ Colombia's second written submission, para. 135.

⁴²⁸ Colombia's second written submission, para. 137.

⁴²⁹ Colombia's second written submission, para. 137.

⁴³⁰ Colombia's second written submission, para. 137.

⁴³¹ Colombia's second written submission, para. 138, Exhibit COL-28.

7.218 For all these reasons, Colombia asks the Panel to reject Panama's claim under Article XI:1 of the *GATT 1994*.

2. Consideration by the Panel

(a) Legislation authorizing restrictions on ports of entry

7.219 The parties have referred to legislation authorizing restriction on ports of entry as the ports of entry measure. Specifically, Article 2 of Resolution No. 7373 of 22 June 2007⁴³², as modified by Resolution No. 7673 of 28 June 2007⁴³³, authorizes Colombian customs officials to restrict entry of textile, apparel and footwear goods classifiable under Chapters 50-64 of the Colombian Tariff Schedule⁴³⁴ that arrive from Panama to either the Bogota airport or Barranquilla seaport:

*"Las mercancías clasificables por los capítulos 50 al 64 del Arancel de Aduanas, procedentes de la Republica de Panamá, deberán ser ingresadas e importadas exclusivamente por la jurisdicción de la Administración Especial de Aduanas de Bogotá, si se transportan por vía aérea y por la jurisdicción de la Administración Local de Aduanas de Barranquilla, si se transportan por vía marítima, y por tanto, no procederá para estas mercancías la autorización del régimen de tránsito aduanero."*⁴³⁵

7.220 The general restriction on ports of entry under Article 2 of Resolution No. 7373 is subject to several exceptions. Under Article 4 of Resolution No. 7373, restrictions will not apply to the following categories: goods consigned or endorsed to the State⁴³⁶; goods imported for specific state or emergency uses, to travellers or postal traffic, or in route to Leticia, San Andrés o Santa Catalina⁴³⁷; goods submitted for trans-shipment that do not have Colombia as their final destination, and goods consigned to industrial users of free trade zones⁴³⁸; and goods classifiable under sections 6401 to 6405 of Colombia's Customs schedule that arrive at any of the 11 ports designated in Article 39, paragraph 1 of Resolution No. 4240 of 2000.⁴³⁹ Resolution No. 8603 of 24 July 2007⁴⁴⁰ establishes an additional exemption for goods classifiable under sections 6406 of Colombia's Customs schedule, and Resolution No. 7637 of 28 June 2007⁴⁴¹ further exempts goods consigned or endorsed to "Usuarios Altamente Exportadores" and "Usuarios Aduaneros Permanentes".

7.221 Non-compliance with the obligation to enter and import goods from Panama exclusively at Bogota airport or Barranquilla seaport will subject the goods to seizure and forfeiture.⁴⁴²

⁴³² Exhibit PAN-34. Resolution No. 7373 was implemented in accordance with Article 41 of the Customs Statute (Exhibit COL-1), which permits Colombian customs authorities to restrict access to ports of entry whenever authorities are not satisfied that they will be able to fully exercise their powers of control and verification. On this basis, under see Article 39 of Resolution No. 4240 of 2000 (Exhibit PAN-38), for instance, Colombia has restricted access for all textiles, apparel and footwear classifiable under Chapters 50 64 of the Colombian Tariff Schedule from all countries to 11 ports of entry. These ports are: Barranquilla, Bucaramanga, Buenaventura, Cali, Cartagena, Cúcuta, Ipiales, Leticia, Medellín, San Andrés and Bogota.

⁴³³ Exhibit PAN-36.

⁴³⁴ As explained in Section II.C, Panama has clarified that it is challenging the application of the measure to *all* textile, apparel and footwear goods which are deemed to fall within the scope of the ports of entry measure.

⁴³⁵ Exhibit PAN-36.

⁴³⁶ Exhibit PAN-34, Article 4, para. 1.

⁴³⁷ Exhibit PAN-34, Article 4, para. 2.

⁴³⁸ Exhibit PAN-34, Article 4, para. 3.

⁴³⁹ Exhibit PAN-34, Article 4, para. 4.

⁴⁴⁰ Exhibit COL-35.

⁴⁴¹ Exhibit COL-36.

⁴⁴² Article 5 of Resolution No. 7373 (Exhibit PAN-34)

7.222 Resolution No. 7373 was implemented for a period of approximately six months beginning 1 July 2007.⁴⁴³ The period of application of the measure has been extended on two occasions at the time of this writing⁴⁴⁴, and is currently set to expire on 31 December 2008.

7.223 Resolution No. 7373 and its amendments are hereafter in this section referred to as the "ports of entry measure".

(b) The text of Article XI of the *GATT 1947*

7.224 The Panel is called upon to examine whether the ports of entry measure as described above is inconsistent with Article XI:1 of the *GATT 1994*. Article XI of the *GATT 1994* provides as follows:

"General Elimination of Quantitative Restrictions

1. 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 contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party."

2. The provisions of paragraph 1 of this Article shall not extend to the following:

- (a) Export prohibitions or restrictions temporarily applied to prevent or relieve critical shortages of foodstuffs or other products essential to the exporting contracting party;
- (b) Import and export prohibitions or restrictions necessary to the application of standards or regulations for the classification, grading or marketing of commodities in international trade;
- (c) Import restrictions on any agricultural or fisheries product, imported in any form⁴⁴⁵, necessary to the enforcement of governmental measures which operate:
 - (i) to restrict the quantities of the like domestic product permitted to be marketed or produced, or, if there is no substantial domestic production of the like product, of a domestic product for which the imported product can be directly substituted; or
 - (ii) to remove a temporary surplus of the like domestic product, or, if there is no substantial domestic production of the like product, of a domestic product for which the imported product can be directly substituted, by making the surplus available to certain groups of domestic consumers free of charge or at prices below the current market level; or

⁴⁴³ Exhibit COL-34, para. Article 8.

⁴⁴⁴ Resolution No. 16100 of 27 December 2007; Colombia's response to Panel question No. 122; Resolution No. 5542 of 2008.

⁴⁴⁵ The Ad Note to Article XI:2(c) provides as follows: "The term 'in any form' in this paragraph covers the same products when in an early stage of processing and still perishable, which compete directly with the fresh product and if freely imported would tend to make the restriction on the fresh product ineffective."

- (iii) to restrict the quantities permitted to be produced of any animal product the production of which is directly dependent, wholly or mainly, on the imported commodity, if the domestic production of that commodity is relatively negligible.

Any contracting party applying restrictions on the importation of any product pursuant to subparagraph (c) of this paragraph shall give public notice of the total quantity or value of the product permitted to be imported during a specified future period and of any change in such quantity or value. Moreover, any restrictions applied under (i) above shall not be such as will reduce the total of imports relative to the total of domestic production, as compared with the proportion which might reasonably be expected to rule between the two in the absence of restrictions. In determining this proportion, the contracting party shall pay due regard to the proportion prevailing during a previous representative period and to any special factors⁴⁴⁶ which may have affected or may be affecting the trade in the product concerned."

7.225 Article XI thus foresees the elimination of import or export restrictions or prohibitions. The Panel will proceed to examine whether the ports of entry measure is a restriction on importation of the type prohibited by Article XI of the *GATT 1994*.

(c) The ports of entry measure as an "other measure"

7.226 As per its text, Article XI:1 covers prohibitions and restrictions "made effective through quotas, import or export licenses or other measures". The ports of entry measure is clearly not a quota or an import/export licence. Nevertheless, the ports of entry may fall within the scope of Article XI:1 to the extent that it qualifies as an "other measure". In *Japan – Semi-Conductors*, the GATT panel recalled that:

"Article XI:1, unlike other provisions of the General Agreement, did not refer to laws or regulations but more broadly to measures. This wording indicated clearly that any measure instituted or maintained by a contracting party which restricted the exportation or sale for export of products was covered by this provision, irrespective of the legal status of the measure."⁴⁴⁷

7.227 WTO panels have also concluded that the language "other measures" in Article XI:1 is meant to encompass a "broad residual category"⁴⁴⁸, and that the concept of a restriction on importation covers any measures that result in "any form of limitation imposed *on*, or *in relation to* importation".⁴⁴⁹

7.228 In this dispute, the ports of entry measure is a measure instituted and maintained by a WTO Member that is imposed on importation of textiles, apparel and footwear arriving from Panama. The Panel therefore preliminarily concludes that the ports of entry measure, while not a quota or import

⁴⁴⁶ The Ad Note to Article XI:2 last subparagraph provides as follows: "The term 'special factors' includes changes in relative productive efficiency as between domestic and foreign producers, or as between different foreign producers, but not changes artificially brought about by means not permitted under the Agreement."

⁴⁴⁷ GATT Panel Report, *Japan – Semi-Conductors*, para. 106.

⁴⁴⁸ Panel Report, *Argentina – Hides and Leather*, para. 11.17.

⁴⁴⁹ Panel Report, *India – Autos*, paras. 7.254-7.263 and 7.265; Panel Report, *Brazil – Retreaded Tyres*, para. 7.371.

licence, could fall within the residual category of "other measure" that may be challenged under Article XI:1.⁴⁵⁰ The Panel will thus proceed to consider whether the ports of entry measure is a "restriction" on importation within the meaning of Article XI:1.

(d) The ports of entry measure as a "restriction on importation"

(i) *The concept of a restriction on importation under Article XI:1*

7.229 In order to determine whether the ports of entry measure violates Article XI:1, the Panel must establish whether the measure imposes a "restriction" within the meaning of Article XI:1.

7.230 The Panel recalls Panama's argument that Article XI:1 covers a broad category of measures that limit competitive opportunities for imported products.⁴⁵¹ In essence, based on the ordinary meaning of "restriction", Panama considers that Article XI broadly covers situations where imports are technically allowed into the market without express quantitative restrictions, but are only allowed under conditions which are "limiting".⁴⁵² This includes circumstances where imports are not limited absolutely or by a specific amount.⁴⁵³ Despite the various references to "quantitative restrictions" in certain provisions of Article XI, Panama argues that Article XI:1 should nevertheless be interpreted broadly. Panama argues that the references are intentional and only serve to demonstrate that negotiators intended any reference to quantitative restriction would apply only when "quantity" was specifically mentioned.⁴⁵⁴ Moreover, Panama submits that an interpretation that Article XI:1 applies only to measures which expressly set limits on quantity or value would undermine the scope of Article XI:1 by allowing circumvention of tariff concessions through the introduction of restrictions that are not quantitative in nature, but are nevertheless restrictions.⁴⁵⁵

7.231 Colombia argues that Article XI:1 should be interpreted more narrowly. According to Colombia, Members are only prohibited from imposing measures which limit the amount of imports that may be entered by quantity or value of imports. Thus, a Member may condition access to its market as long as the measure by design does not set a limit on the amount or value of imports.⁴⁵⁶ Colombia considers this view supported by the text and title of Article XI:1 as well as Articles XII and XIII of the *GATT 1994*, and Article 2 and the Illustrative List of the *TRIMs Agreement*. In particular, Colombia has cited to the inclusion of the term "Quantitative" in the title of Article XI and in several provisions in Article XI:2. Colombia also notes the reference to restrictions of the "quantity or value of merchandise permitted to be imported" under Article XII:1 and to "Quantitative Restrictions" in the title of Article XIII.⁴⁵⁷ Finally, Colombia notes that Paragraph 2 of the Illustrative List of the Annex of the *TRIMs Agreement* describes the type of TRIMs that should be considered inconsistent with Article XI:1, in particular, among other measures, those which "restrict ... importation ... generally or to an amount related to the volume or value of local production that it

⁴⁵⁰ The Panel notes that Colombia has not disputed whether the ports of entry measure is a government measure, nor does it dispute that government measures may properly be challenged under Article XI (see Colombia's first written submission, para. 230).

⁴⁵¹ Panama's second oral statement, paras. 18 and 33.

⁴⁵² Panama's second written submission, para. 35.

⁴⁵³ Panama's second oral statement, para. 19; Panama's second written submission, para. 35.

⁴⁵⁴ Panama's first oral statement, para. 28.

⁴⁵⁵ Panama's second oral statement, para. 26.

⁴⁵⁶ Colombia's second oral statement, para. 37.

⁴⁵⁷ Colombia's first written submission, paras. 221-223. The Panel notes that Article XI of the *GATT 1994* is entitled "General Elimination of Quantitative Restrictions". Moreover, several subparagraphs of Article XI:2 refer to restrictions of permitted quantities of specific types of products. Furthermore, the concluding paragraph of Article XI:2 refers to the need to "give public notice of the total quantity or value of the products permitted to be imported".

exports".⁴⁵⁸ Colombia concludes that each of these references reveals that only measures which limit imports by value or amount are covered under Article XI:1.

7.232 The Panel will first consider the concept of restriction as it has been interpreted in WTO and GATT jurisprudence, and subsequently address the parties' views to the extent necessary in reaching its conclusion as to the meaning of restriction under Article XI:1.

7.233 WTO panels have interpreted the term "restriction" in Article XI:1 broadly. The panel in *India – Quantitative Restrictions* discussed the scope of the notion of "restriction" in terms of its ordinary meaning:

"[T]he text of Article XI:1 is very broad in scope, providing for a general ban on import or export restrictions or prohibitions 'other than duties, taxes or other charges'. As was noted by the panel in *Japan – Trade in Semi-conductors*, the wording of Article XI:1 is comprehensive: it applies 'to all measure instituted or maintained by a [Member] prohibiting or restricting the importation, exportation, or sale for export of products other than measures that take the form of duties, taxes or other charges.' [footnote omitted] The scope of the term 'restriction' is also broad, as seen in its ordinary meaning, which is 'a limitation on action, a limiting condition or regulation'."⁴⁵⁹

7.234 The panel in *India – Autos* subsequently endorsed the view set forth in *India – Quantitative Restrictions* that a measure which imposes a "limiting condition" or imposes a "limitation on action" constitutes a "restriction" within the meaning of Article XI:1:

"The question of whether [the] measure can appropriately be described a restriction on importation turns on the issue of whether Article XI can be considered to cover situations where products are technically allowed into the market without an express formal quantitative restriction, but are only allowed under certain conditions which make the importation more onerous than if the condition had not existed, thus generating a disincentive to import.

On a plain reading, it is clear that a 'restriction' need not be a blanket prohibition or a precise numerical limit. Indeed, the term 'restriction' cannot mean merely 'prohibitions' on importation, since Article XI:1 expressly covers both 'prohibition or restriction'. Furthermore, the Panel considers that the expression '*limiting condition*' used by the *India – Quantitative Restrictions* panel to define the term 'restriction' and which this Panel endorses, is helpful in identifying the scope of the notion in the context of the facts before it. That phrase suggests the need to identify not merely a condition placed on importation, but a condition that is limiting, i.e. that has a limiting effect. In the context of Article XI, that limiting effect must be on importation itself."⁴⁶⁰

7.235 In terms of the ordinary meaning of the term "restriction", the Panel notes that the discussion in *India – Quantitative Restrictions* and *India – Autos* correlates closely with dictionary definition of the term "restriction", which is "a thing which restricts someone or something, a limitation on action, a limiting condition or regulation".⁴⁶¹ Several subsequent panels have coalesced around this

⁴⁵⁸ Colombia's first written submission, para. 223.

⁴⁵⁹ Panel Report, *India – Quantitative Restrictions*, para. 5.128.

⁴⁶⁰ Panel Report, *India – Autos*, paras. 7.269-7.270. In that particular dispute, the Panel considered whether a trade balancing condition which did not set an absolute numerical limit on the amount of imports that could be made, but limited the value of imports that could be made to the value of exports a particular entity intended to make, constituted a restriction on importation within the meaning of Article XI:1.

⁴⁶¹ *The New Oxford English Dictionary*, Vol. 2, p. 2569.

interpretation of the scope of Article XI:1, citing to the language set forth by these earlier panels while factoring in the circumstances of each dispute.⁴⁶²

7.236 Panels have also considered the concept of "restriction" in light of factors other than the ordinary meaning of the term. Notably, panels have also considered whether a measure makes effective a restriction by evaluating the measure's impact on competitive opportunities available to imported products. In this respect, the panel in *Argentina – Hides and Leather* recalled that "Article XI:1, like Articles I, II and III of the *GATT 1994*, protects competitive opportunities of imported products not trade flows".⁴⁶³ Consideration of a measure's effect on competitive opportunities, instead of effects on trade volumes, was earlier discussed in *Japan – Leather*, in which a GATT panel rejected the view that a quota should not be considered as restraining trade or causing nullification or impairment of benefits accruing under Article XI of the *GATT 1947* simply because the quota had not been fully utilized and thus could not have negatively affected trade volumes. The panel explained that nullification or impairment arises from prohibited quantitative restrictions, not only due to effects on trade volumes, but also because importers investment plans would be affected negatively and transaction costs would increase:

"[T]he existence of a quantitative restriction should be presumed to cause nullification or impairment not only because of any effect it had had on the volume of trade but also for other reasons, e.g. it would lead to increased transaction costs and would create uncertainties which could affect investment plans."⁴⁶⁴

7.237 More recently, the panel in *Brazil – Retreaded Tyres* found a violation of Article XI:1 where fines did not impose a *per se* restriction on importation, but acted as an absolute disincentive to importation by penalizing it and making it "prohibitively costly".⁴⁶⁵ The panel concluded that the fines of R\$400, which exceeded the normal per unit value of a typical retreaded tyres (R\$100-280), were "significant enough" to have a restrictive effect on importation in violation of Article XI:1.⁴⁶⁶

⁴⁶² The Panels in *Brazil – Retreaded Tyres* and *Dominican Republic – Import and Sale of Cigarettes*, for instance, cited, with approval, to key passages from *India – Quantitative Restrictions* and *India – Autos*, which delineated this standard: see Panel Report, *Brazil – Retreaded Tyres*, para. 7.371; Panel Report, *Dominican Republic – Import and Sale of Cigarettes*, paras. 7.252 and 7.258.

⁴⁶³ Panel Report, *Argentina – Hides and Leather*, para. 11.20. The importance of upholding competitive opportunities has also been discussed in connection with Article XI:1 prior to the establishment of the WTO. In *EEC – Oilseeds I*, the GATT Panel stated that "the CONTRACTING PARTIES have consistently interpreted the basic provisions of the General Agreement on restrictive trade measures as provisions establishing conditions of competition. Thus they decided that an import quota constitutes an import restriction within the meaning of Article XI:1 whether or not it actually impeded imports: see GATT Panel Report, *EEC – Oilseeds I*. Additionally, the notion of protecting competitive opportunities has been discussed extensively in the context of claims under Articles I and III of the *GATT*: see, for example, Appellate Body Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 5.141; Appellate Body Report, *Korea – Various Measures on Beef*, paras. 135-137; Appellate Body Report, *Korea – Alcoholic Beverages*, paras. 119-120, 127; Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 16, Panel Report, *Turkey – Rice*, para. 7.252, Panel Report, *US – FSC (Article 21.5 – EC)*, para. 8.128, Panel Report, *Chile – Alcoholic Beverages*, para. 7.158, Panel Report, *Korea – Alcoholic Beverages*, para. 10.81, Panel Report, *Indonesia – Autos*, para. 14.108, Panel Report, *Japan – Film*, para. 10.739, Panel Report, *EC – Bananas III*, para. 7.50; GATT Panel Report *US – Superfund*, para. 5.19.

⁴⁶⁴ GATT Panel Report, *Japan – Leather II (US)*, para. 55. In relation to claims under Article III of the *GATT 1994*, panels have also considered increases in transportation costs, or shifts in consumption due to discriminatory taxes that affected the cost of imported products were important factors affecting competitive opportunities: see Panel Report, *Canada – Wheat Exports and Grain Imports*, para. 6.348 (upheld by the Appellate Body); Panel Report, *US – Section 301 Trade Act*, paras. 7.83-7.84.

⁴⁶⁵ Panel Report, *Brazil – Retreaded Tyres*, para. 7.370.

⁴⁶⁶ Panel Report, *Brazil – Retreaded Tyres*, para. 7.372.

The fines were applied in addition to, and in support of, an actual prohibition on importation as an enforcement measure.⁴⁶⁷

7.238 In addition to considering a measure's impact on transaction costs, when assessing its effect on competitive opportunities and, as such, its compatibility with Article XI:1, panels have also considered restrictions on market access. In relation to claims brought under Article XI of the *GATT 1994*, the GATT panel in *Canada – Provincial Liquor Boards (EEC)* concluded that listing/delisting requirements and limitations on the availability of points of sale⁴⁶⁸ which discriminated against imported alcoholic beverages were "restrictions made effective through 'other measures' contrary to the provisions of Article XI:1."⁴⁶⁹ In a subsequent Report, a separate GATT panel examined a number of similar aspects of the measure from this dispute under Article III:4 of the *GATT 1947* and concluded that "by allowing the access of domestic beer to points of sale not available to imported beer, Canada accorded domestic beer competitive opportunities denied to imported beer".⁴⁷⁰

7.239 The notion of protecting market access for imports was also taken into consideration in *EEC – Minimum Import Prices*, where a GATT panel found that a minimum import price and security system for tomato concentrate resulted in a restriction under Article XI:1 even though it did not impose a *per se* quantitative limit on the amount of imports.⁴⁷¹

7.240 Thus, as evidenced above, a number of GATT and WTO panels have recognized the applicability of Article XI:1 to measures which create uncertainties and affect investment plans, restrict market access for imports or make importation prohibitively costly, all of which have implications on the competitive situation of an importer. Moreover, it appears that findings in each of

⁴⁶⁷ Colombia considers the linkage of the fines to the import prohibition measure essential to the finding of a violation, since the fines did not *per se* limit imports: see Colombia's second written submission, para. 118. The Panel notes, however, that separate findings were made concerning the import ban, on the one hand, and the fines, on the other hand.

⁴⁶⁸ The importation of alcoholic beverages into Canada, at the time of the dispute, was regulated by the federal government. Under federal legislation, the Canadian Parliament restricted the importation of alcoholic beverages into a province except to provincial agencies vested with the right to sell alcoholic beverages. This restriction applied whether the importation was from a foreign country or from another province. Additionally, each Canadian province required a license obtained from the designated provincial authority to manufacture or store and sell beer in the province. No foreign brewer was permitted to sell beer in a province except through the liquor board. On the basis of the provincial legislation governing the right to sell beer, each province had developed its own system for the delivery and sale at retail outlets. While circumstances varied from province to province, generally any supplier of alcoholic beverages, domestic or imported, wishing to sell a product in a province first needed to obtain a "listing" from the provincial marketing agency. See, e.g., GATT Panel Report, *Canada – Provincial Liquor Boards (EEC)*, paras. 2.1-2.5.

⁴⁶⁹ GATT Panel Report, *Canada – Provincial Liquor Boards (EEC)*, paras. 4.24-4.25.

⁴⁷⁰ GATT Panel Report, *Canada – Provincial Liquor Boards (US)*, para. 5.6.

⁴⁷¹ GATT Panel Report, *EEC – Minimum Import Prices*, para. 4.9. Under the measure at issue, importers of tomato concentrates were required to provide additional security to guarantee that the free-at-frontier price of the products to be imported plus the customs duty payable would together be equal to or more than a determined minimum price or special minimum price, whichever was appropriate. The security would be forfeit in proportion to any quantities imported at a price lower than the minimum price or special minimum price. If an importer were able to guaranty that products originating in third countries that the price on import into the Community would not be less than the minimum price for the product in question, the importer would not be required to provide additional security (see GATT Panel Report, *EEC – Minimum Import Prices*, para. 2.6). In a dissenting opinion, one panelist out of a panel of five in this dispute considered that, while the minimum price system, operating in tandem with the additional security "could well be applied in a way which would qualify it as a restriction 'other than duties, taxes or other charges' under Article XI:1", interested exporters could still import tomato concentrates below the minimum price (see GATT Panel Report, *EEC – Minimum Import Prices*, para. 4.9).

these cases were based on the design of the measure and its potential to adversely affect importation, as opposed to a standalone analysis of the actual impact of the measure on trade flows.

7.241 The Panel agrees with the interpretation of the term restriction taken by previous WTO and GATT panels as well as their decision to base findings on the design of the measure, as opposed to resulting trade effects.

(ii) *Colombia's contextual arguments on interpretation of Article XI:1 of the GATT 1994*

7.242 Before proceeding, the Panel would like to address arguments by Colombia pertaining to the relevance of the additional provisions in Article XI:1 and Article XI:2, as well as surrounding Articles and the *TRIMs Agreement* in the interpretation of the term "restriction".

7.243 Colombia has argued that the concept of "restriction" in Article XI should be interpreted narrowly as only concerning restrictions imposing quantity limitations in light of the title of Article XI:1, and the context provided by other provisions in Article XI:2 and provisions in surrounding Articles. The Panel does not consider the limited language appearing in the title of Article XI ("General Elimination of Quantitative Restrictions") as determinative in interpreting the ensuing specific provisions. In the Panel's view, its approach is consistent with the notion that Article XI of the *GATT 1994* (and the *GATT 1947*) was intended for the general elimination of *quantitative* restrictions. The Panel feels it is appropriate to consider a measure's effect on competitive opportunities, as negative effects on the competitive landscape for importers of a particular product in relation to domestic producers or other importers will inevitably pose damaging consequences for importation. In this sense, the panel in *India – Autos* stated that "it is clear that a 'restriction' need not be a blanket prohibition or a precise numerical limit."⁴⁷² More broadly, in the Panel's view, a measure that has identifiable negative consequences on the importation of a product will result in a restriction on importation under Article XI:1.

7.244 The appearance of the term "quantitative" in Article XI:2 does not run contrary to the Panel's interpretation of the term "restriction" within Article XI:1. The Panel first notes that the term "quantitative restrictions" is not used in any paragraph of Article XI and only appears in the general title to Article XI. Article XI:1 does not refer to restrictions of *quantity*. While certain provisions in Article XI:2 refer to "quantities permitted", such as in subparagraphs 2(c)(i) and 2(c)(iii), as well as in the concluding paragraph of Article XI:2, the Panel notes that other subparagraphs do not refer to quantities at all. Indeed, the various subparagraphs of Article XI:2 are each specific and thus limited in scope, for instance, regulating restrictions temporarily applied to prevent or relieve critical shortages of food in the case of subparagraph 2(a), or restrictions on agricultural or fisheries products in the case of subparagraph 2(c). Article XI:1 inherently reads more broadly, applying to "prohibitions or restrictions other than duties, taxes or other charges". In consideration of the selective use of the terms "quantities" and "quantitative", the Panel thus declines to attribute that restriction refers to a limitation on quantity where that term does not appear in the text. By way of example, although Article XI:2(c)(i) is concerned with restrictions on quantities of agricultural or fisheries products, Article XI:1 should not be interpreted narrowly as applying exclusively to agricultural or fisheries products as it is understood to apply more broadly to restrictions on all types of imports or exports. Similarly, Article XI:1 should not be interpreted as concerning only restrictions on quantity, as the word "quantity" does not appear in the text of Article XI:1, and in the Panel's view, applies to a broader array of measures which restrict importation or exportation.

7.245 Colombia has also argued that that a narrow interpretation of the term "restriction" in Article XI is further confirmed from the context provided by Articles XII and XIII of the *GATT 1994*. In particular, Colombia has referred to the language "may restrict the quantity or value of merchandise permitted to be imported" under Article XII:1 and to "Quantitative Restrictions" appearing in the title

⁴⁷² Panel Report, *India – Autos*, para. 7.270.

of Article XIII. The Panel is not persuaded by Colombia's arguments. As the Panel earlier noted with respect to the specific subparagraphs in Article XI:2⁴⁷³, Articles XII and XIII address specific circumstances and do not apply in all instances in which some form of restriction arises as a result of domestically imposed legislation. In particular, Article XII is entitled "Restrictions to Safeguard the Balance of Payments" and its first paragraph expressly states:

"Notwithstanding the provisions of paragraph 1 of Article XI, any contracting party, in order to safeguard its external financial position and its balance of payments, may restrict the quantity or value of merchandise permitted to be imported, subject to the provisions of the following paragraphs of this Article." [emphasis added]

7.246 As is evident from the text, although Article XII allows Members to restrict the quantity or value of imports, in contravention of Article XI:1, this provision only permits doing so in circumstances related to balance-of-payment problems. Due to the limited application of Article XII:1, this provision does not offer much insight into the scope of Article XI:1.

7.247 Article XIII of the *GATT 1994* is entitled "Non-discriminatory Administration of Quantitative Restrictions". In identical fashion to Article XI:1, the title in Article XIII uses the phrasing "Quantitative Restrictions"; however, as with Article XI:1 that phrase does not appear in any of the specific paragraphs of Article XIII. Moreover, the same broad language appearing in Article XI:1 ("No prohibition or restriction ...") also appears in Article XIII:1, without reference to "quantities" or "quantitative". While various provisions in Article XIII refer to the terms "quantity" or "quota", Article XIII:1 does not. Hence, the Panel declines to make conclusions on the scope of Article XI on the basis of the language appearing in Article XIII or its title.

7.248 Colombia has lastly referred to Paragraph 2 of the Illustrative List of the Annex of the TRIMs Agreement as informing the scope of Article XI:1. The *TRIMs Agreement* states in Article 2 that "no Member shall apply any TRIM that is inconsistent with the provisions of ... Article XI of *GATT 1994*". Paragraph 2 of the Illustrative List of the Annex of the *TRIMs Agreement* further provides in part that "TRIMs that are inconsistent with the obligation of general elimination of quantitative restrictions provided for in paragraph 1 of Article XI of *GATT 1994* include those ... which restrict: ... the importation ... generally or to an amount related to the volume or value of local production that it exports".⁴⁷⁴ On a plain reading, the Annex expressly recognizes that Article XI:1 contains an obligation to generally eliminate quantitative restrictions. The Illustrative List then identifies various type of TRIMs measures that should be considered prohibited import or export restrictions, i.e. each subparagraph of the Illustrative List refers to restriction based on specified amounts, such as the types of products used in or related to production; the volume or value of local production; the volume or value of products, in terms of product type; or to an amount related to foreign exchange flows. In the Panel's view, Article XI:1 is not restricted to such a finite list of possible measures. On the contrary, Article XI:1 applies to "prohibitions or restrictions other than

⁴⁷³ See para. 7.243.

⁴⁷⁴ Paragraph 2 of the Illustrative List of the Annex of the *TRIMs Agreement* provides in full as follows: "TRIMs that are inconsistent with the obligation of general elimination of quantitative restrictions provided for in paragraph 1 of Article XI of *GATT 1994* include those which are mandatory or enforceable under domestic law or under administrative rulings, or compliance with which is necessary to obtain an advantage, and which restrict:

- (a) the importation by an enterprise of products used in or related to its local production, generally or to an amount related to the volume or value of local production that it exports;
- (b) the importation by an enterprise of products used in or related to its local production by restricting its access to foreign exchange to an amount related to the foreign exchange inflows attributable to the enterprise; or
- (c) the exportation or sale for export by an enterprise of products, whether specified in terms of particular products, in terms of volume or value of products, or in terms of a proportion of volume or value of its local production."

duties, taxes or other charges" and does not include finite categories. Accordingly, the Panel declines to consider the Illustrative List of the Annex of the TRIMs Agreement in interpreting the scope of Article XI:1.

(iii) *De jure versus de facto restrictions on importation*

7.249 The Panel would also like to address Colombia's argument that Panama must establish the existence of a *de facto* restriction within the meaning of Article XI:1, since the ports of entry measure does not *per se* limit the volume or value of imports. Thus, Colombia considers that Panama must establish the existence of a *de facto* restriction in order to prove a violation of Article XI:1. Colombia argues that Panama carries the burden of proof to demonstrate a lower level of imports and prove the existence of a causal link between this lower level and the ports of entry measure. Colombia contends that the evidence before the Panel does not demonstrate a low level of imports nor any link between the measure and an alleged decline in imports. Rather, Colombia claims that evidence presented by Panama reflects an increase in the value of textile, apparel and footwear imports between 2006 and 2007 when the current ports of entry measure was in effect.⁴⁷⁵

7.250 As noted above, Panama submits that it is challenging the ports of entry measures on the basis of its design, structure and underlying architecture. Panama thus asserts that it is not claiming the existence of a *de facto* restriction. Although Panama considers it is not making a *de facto* challenge, in response to Colombia's allegation that Panama's challenge is necessarily a *de facto* one, Panama cites to data provided by Colombia indicating a decline in the weight of textile imports shipped from Panama during the time the ports of entry measure was in force.⁴⁷⁶

7.251 The Panel notes that Colombia's argument is primarily based on statements made in *Argentina – Hides and Leather*. In that case, the panel had to determine, *inter alia*, whether the presence of representatives of the domestic hide tanning industry in the Argentine customs inspection procedures for hides destined for export was a *de facto* export restriction. In particular, the panel discussed the evidentiary weight that should be attached to actual trade effect of the measure and the need to establish a causal link between the measure and a limitation on exports:

"Finally, as to whether Resolution No. 2235 makes effective a restriction, it should be recalled that Article XI:1, like Articles I, II and III of the GATT 1994, protects competitive opportunities of imported products not trade flows. In order to establish that Resolution No. 2235 infringes Article XI:1, the European Communities need not prove actual trade effects. However, it must be borne in mind that Resolution No. 2235 is alleged by the European Communities to make effective a *de facto* rather than a *de jure* restriction. In such circumstances, it is inevitable, as an evidentiary matter, that greater weight attaches to the actual trade impact of a measure.

Even if it emerges from trade statistics that the level of exports is unusually low, this does not prove, in and of itself, that that level is attributable, in whole or in part, to

⁴⁷⁵ Colombia notes that the value of imports from the CFZ falling under Chapters 50-64 increased between 2006 and 2007 from US\$483,587,075,000 to US\$503,461,216,000: see Exhibit PAN-56. Although Panama presented imports figures in Exhibit PAN-56 in Panamanian balboas, since the balboa has been tied to the United States dollar at an exchange rate of 1:1, the values are equivalent. The Panel notes further to the information contained in this Exhibit, the weight declined during these years from 67,486 to 60,871 metric tonnes.

⁴⁷⁶ Panama's second oral statement, para. 34. Panama has noted that between March 2007 and March 2008, the quantity of textiles imported into Colombia declined from 3,339,527 to 2,119,524 square meters. Panama has also noted a decline in 2005, from 5,169,008 to 4,481,075 square meters when a previous measure similar to the current ports of entry measure was in place. See Panama's second oral statement, para. 34, citing to Exhibit COL-42.

the measure alleged to constitute an export restriction. Particularly in the context of an alleged *de facto* restriction and where, as here, there are possibly multiple restrictions, it is necessary for a complaining party to establish a causal link between the contested measure and the low level of exports. In our view, whatever else it may involve, a demonstration of causation must consist of a persuasive explanation of precisely how the measure at issue causes or contributes to the low level of exports. In our view, whatever else it may involve, a demonstration of causation must consist of a persuasive explanation of precisely how the measure at issue contributes to the low level of exports."⁴⁷⁷ (footnotes omitted)

7.252 With the respect to the issue discussed in *Argentina – Hides and Leather*, the Panel first notes that the European Communities characterized its claim as a *de facto* one, unlike Panama in this dispute. In the context of this characterization, the panel in *Argentina – Hides and Leather* explained that the complainant would need to demonstrate the existence of a low level of imports and a link between the measure and the low import level. In light of the unique circumstances surrounding the European Communities' characterization of its claim, to the extent Panama were able to demonstrate a violation of Article XI:1 based on the measure's design, structure, and architecture, the Panel is of the view that it would not be necessary to consider trade volumes or a causal link between the measure and its effects on trade volumes.

7.253 In support of its approach, the Panel recalls that a number of panels have previously determined the existence of a restriction on importation based on the design of the measure and its potential to adversely affect importation, as opposed to the actual resulting impact of the measure on trade flows.⁴⁷⁸ The Panel notes further that more than one panel has declined to make a determination based on the alleged trade effects of a measure. In *Turkey – Textiles*, the respondent sought to rebut arguments of nullification and impairment under Article XI:1 based on the fact that imports of textiles and clothing had increased under the measure at issue, resulting in no adverse trade impact. Recalling an earlier view expressed by the Appellate Body, the panel in that dispute explained that reliance on the level of imports was not sufficient to rebut a presumption of nullification and impairment due to the impact of multiple factors on trade flows:

"We recall that in *EC – Bananas III*⁴⁷⁹, the Appellate Body confirms that the principles established in *US – Superfund*:

'... a demonstration that a measure has no or insignificant effects would not be a sufficient demonstration that the benefits accruing under that provision had not been nullified or impaired even if such a rebuttal were in principle permitted.'⁴⁸⁰

are still most relevant to violations of provisions of GATT 1994.

...

We are of the view that it is not possible to segregate the impact of the quantitative restrictions from the impact of other factors. While recognizing Turkey's efforts to liberalize its import regime on the occasion of the formation of its customs union with the European Communities, it appears to us that even if Turkey were to demonstrate that India's overall exports of clothing and textile products to Turkey have increased from their levels of previous years, it would not be sufficient to rebut the presumption

⁴⁷⁷ Panel Report, *Argentina – Hides and Leather*, paras. 11.20-11.21.

⁴⁷⁸ See Section VII.E.2(d)(i).

⁴⁷⁹ (footnote original) Appellate Body Report, *EC - Bananas III*, para. 253.

⁴⁸⁰ (footnote original) Panel Report, *US – Superfund*, para. 5.1.9.

of nullification and impairment caused by the existence of WTO incompatible import restrictions. Rather, at minimum, the question is whether exports have been what they would otherwise have been, were there no WTO incompatible quantitative restrictions against imports from India. Consequently, we consider that even if the presumption in Article 3.8 of the DSU were rebuttable, Turkey has not provided us with sufficient information to set aside the presumption that the introduction of these import restrictions on 19 categories of textile and clothing products has nullified and impaired the benefits accruing to India under GATT/WTO."⁴⁸¹

7.254 Furthermore, in *EEC – Oilseeds I*, a GATT panel held similar reservation about the ability to isolate the trade effects of a particular measure from other factors, stating that "changes in trade volumes result not only from governmental policies, but also from other factors, and that, in most circumstances, it is not possible to determine whether a decline in imports following a change in policies is attributable to that change or to other factors".⁴⁸²

7.255 In the present dispute, a number of variables complicate the picture, creating difficulties in interpreting trade statistics. As Colombia itself has pointed out, a number of measures have been implemented in the past decade in addition to the ports of entry measure to address problems with under-invoicing, money laundering and smuggling.⁴⁸³ Colombia has also imposed a series of other measures in addition to the ports of entry measure, including, but not limited to, the imposition of indicative prices on textile, apparel and footwear imports, for which the effects are unclear.⁴⁸⁴ Even considering the ports of entry measure in isolation, the Panel notes that Colombia has in the past applied a measure similar to the ports of entry measure, and then removed it for a time before imposing the current measure. Finally, the Panel notes that while the ports of entry measure applies to subject goods arriving from Panama, it does not regulate identical goods that arrive from other countries, further clouding the picture. The Panel would need to assess these realities, in addition to considering the large number of economic factors at play, such as worldwide supply and demand shocks and variations, the influence of worldwide events, and other factors. As such, it is extremely difficult, if not impossible to attribute changes in the level of imports of textile, apparel and footwear into Colombia specifically to the ports of entry measure.⁴⁸⁵ Wide-ranging fluctuations in the implicit

⁴⁸¹ Panel Report, *Turkey – Textiles*, paras. 9.202-9.204.

⁴⁸² GATT Panel Report, *EEC – Oilseeds I*, para. 151.

⁴⁸³ See, e.g. Colombia's response to Panel question No. 149. Colombia indicates that a number of measures have been applied in addition to the restrictions on ports of entry, including but not limited to a requirement to present an advance import/export declaration; restrictions on transit; cooperative agreements with other countries' customs administrations and the private sector; indicative and reference prices; and certain documentation and invoice requirements.

⁴⁸⁴ Colombia has asserted that increases in values of textile imports during the periods of imposition of indicative prices to textile imports is based entirely on the increase in the declared values, and does not factor in indicative price values: see Colombia's response to Panel question No. 127. Panama disputes this view, arguing that no textual basis exists to support Colombia's assertion, and is sceptical as to why calculated implicit prices increased due to auto-declared values during periods when indicative prices were applied: see Panama's response to Panel question No. 127; Question No. 1(d)(iv) of Colombia to Panama; Panama's comment on Colombia's response to Panel question No. 131.

⁴⁸⁵ Colombia itself seems to have recognized that unknown factors affect import volumes and prices of textiles, apparel and footwear. For instance, when commenting on the possibility of a "knock-on effect" arising following an earlier measure restricting port access, Colombia stated the following: "[Panama] is unwilling to accept the logical conclusions of the fact that the statistics equally show a decrease in volume in a period when no ports measure was in effect. This strongly suggests that the ports measure does not affect the volume of imports, but that such volumes are determined by other factors." See Colombia's comment on Panama's response to question 4(b) from Colombia's second set of questions. Additionally, Colombia also appears to acknowledge that clear-cut conclusions cannot be drawn from statistics on implicit prices for textiles. In response to a question from the Panel, Colombia discussed the problem of mixed signals: "In respect of textiles, the conclusions are not as clear cuts as the statistics show mixed signals. On the one hand, the average implicit price in 2007 (0.82 USD) and 2008 (0.67 USD) is much higher than in 2004 -2006 (when this average implicit

price and volume of textile, apparel and footwear imports into Colombia over the past decade reflect this difficulty.⁴⁸⁶ It is also difficult to accept Colombia's allegation that the "measure is working"⁴⁸⁷ due to the wide array of factors at play.⁴⁸⁸

7.256 The Panel believes a thorough examination of trade effects would be unnecessary and unwarranted due to the inherent difficulty in interpreting trade statistics, in which a wide variety of economic and other factors complicate the picture. Accordingly, the Panel will determine whether the ports of entry measure is a restriction on importation within the meaning of Article X:1, based on whether the measure has a limiting effect on importation by negatively affecting the competitive opportunities available to textile, apparel and footwear products arriving from Panama. The Panel will base its assessment on the terms of the measure as opposed to any previous or ongoing effect on the level of imports, in terms of volume or value. In light of this approach, Colombia cannot rely on evidence of an increase in imports to rebut arguments of a restriction on importation. Similarly, Panama cannot point solely to evidence demonstrating a decline in the level of imports to establish the existence of a restriction on importation or exportation.

(iv) *Whether the ports of entry measure affects competitive opportunities*

7.257 The Panel will therefore examine whether the ports of entry measure has a limiting effect on importation by negatively affecting the competitive opportunities related to textile, apparel and footwear products imported from Panama.

7.258 Panama has argued that the imposition of the ports of entry measure has limited competitive opportunities by forcing importers to incur higher shipping costs to reach a number of important markets in Colombia other than those near Bogota and Barranquilla. Panama contends that these costs create disincentives to export subject goods to Colombia and create unnecessary uncertainty to importation to numerous important markets in Colombia.⁴⁸⁹ Panama considers this restriction on entry points, which leads to higher transportation costs, is an inherent aspect of the design, architecture and structure of the measure. Due to increased overall delivery costs and uncertainty, Panama considers that the ports of entry measure constitutes a restriction on importation in contravention of Article XI:1.

7.259 Panama has submitted a set of quotations by DHL Global Forwarding⁴⁹⁰ as evidence that transportation costs to certain markets in Colombia have increased under the ports of entry measure.

price hovered around 0.17 – 0.24 USD). On the other hand, the comparison between the second half of 2007 and the first half of 2007 shows that the implicit price range stayed more or less the same (on average around 0.80 USA), and this trend continued in the first half of 2008. What is interesting, however, is that this stagnation of the implicit price is due to a large extent to the increase in quantities sold since the imposition of the ports measure." See Colombia's response to Panel question No. 158.

⁴⁸⁶ For instance, Colombia has provided monthly data in Exhibit COL-61 and Exhibit COL-65 which reveals high variability in implicit price, volumes and values for textiles, apparel and footwear products.

⁴⁸⁷ Colombia's second written submission, para. 241.

⁴⁸⁸ In relation to this discussion of whether the ports of entry measure has negatively affected import volumes and/or values, Panama has referred to documentation from a Colombian anti-dumping investigation on products from China (Exhibit PAN-75) in alleging that a link exists between the ports of entry measure and a decline in imports from Panama. The Panel declines to address Panama's arguments derived from this investigation for several reasons, primary among them is the fact that the anti-dumping investigation exclusively concerned trade from China. In addition, as discussed above, at the time of the anti-dumping investigation, a number of additional measures were imposed on imports from China, including but not limited to an indicative prices regime. The Panel is unable to precisely determine, and does not wish to speculate on the effects any particular measure has had based on consideration of imports from an altogether different trading partner.

⁴⁸⁹ Panama's first written submission, paras. 160-162.

⁴⁹⁰ Exhibit PAN-63. Panama has provided quotations by DHL Global Forwarding from CFZ to Cali via a route through Balboa and Buenaventura in one document dated 9 June 2008, and a second quotation, also by DHL Global Forwarding, from CFZ to Cali via MIT and Barranquilla dated 6 June 2008.

Specifically, Panama has provided two estimates of the transportation costs involved for exporters, depending on whether the subject goods are exported through Buenaventura or Barranquilla. The first quote is for the route from the CFZ to Cali via a route through Balboa and Buenaventura.⁴⁹¹ The second quote estimates the delivery cost for a route originating in the CFZ and arriving at Cali via Manzanillo International Terminal (MIT) and Barranquilla. Both quotes are based on an identical shipping weight, c.i.f. value and container size.⁴⁹² Panama's quotations comparatively indicate that transportation costs from the CFZ to Cali via Barranquilla seaport would be more expensive than shipment through Buenaventura, which is a prohibited port under the ports of entry measure. A table comparing shipping costs, originally presented by Panama, appears below:⁴⁹³

CFZ-Cali (via Balboa and Buenaventura)	Costs (US\$)	CFZ-Cali (via MIT and Barranquilla)	Costs (US\$)
CFZ – Balboa (by truck):	380.00	CFZ – Manzanillo (MIT) (by truck)	110.00
Handling (exportation)	35.00	Handling (exportation)	35.00
Documentation	75.00	Documentation	75.00
Courier	50.00	Courier	50.00
Port security	20.00	Port security	20.00
Carrier security	6.00	Carrier security	6.00
Balboa – Buenaventura (20' container)	1250.00	MIT – Barranquilla (20' container)	1490.00
Handling (importation)	100.00	Handling (importation)	100.00
Filing	35.00	Filing	35.00
Collect fee (<i>minimum</i>)	35.00	Collect fee (<i>minimum</i>)	35.00
CAF (<i>minimum</i>)	35.00	CAF (<i>minimum</i>)	35.00
Shipping cost (container)	50.00	Shipping cost (container)	50.00
Shipping cost (BL documentation fee)	50.00	Shipping cost (BL documentation fee)	50.00

⁴⁹¹ Panama characterizes the shipping route it selected, in which goods are shipped by truck from the CFZ to Balboa on the Pacific coast of Panama, before travelling to Buenaventura and ultimately Cali, as a "more practical, business-oriented approach" than the route proposed by Colombia in Exhibit COL-50. Panama claims that the distance from MIT to Balboa is 80 km and takes roughly one hour to cover by land transport, including train or truck options, at a cost of US\$380 (for a 20 feet or 40 feet container). According to Panama, it would be more expensive and inconvenient to ship goods from CFZ to MIT and then pass through the Panama Canal before embarking for Buenaventura, since the importer/exporter would have to pay canal toll fees, and would incur long waiting periods due to the high volume of traffic through the canal: see Panama's response to Panel question No. 123; see also Exhibit PAN-63. In response to an argument by Colombia that it does not make sense for goods shipped from China to pass through the Canal to reach the CFZ, and then return through the Canal a second time in route to Buenaventura, Panama has argued that the "sheer magnitude of the CFZ operations" makes it worthwhile for Asian exporters to deliver products directly to the CFZ. Panama submits that manufacturers/exporters prefer to sell to distributors, and not end customers, and thus do not know where products will be sold when first entering into contracts. According to Panama, this practice is followed as manufacturers do not want to be involved in dealing with the business practices and handle transactions in more than 30 different countries, each with their own currencies. Panama also notes that CFZ entities pay in US dollars via globally-recognized banks, and payments are guaranteed by competitively-priced letters of credit. See Panama's response to Panel question No. 125.

⁴⁹² The Panel notes that the delivery cost for each route is calculated based on the same shipment weight, which is unknown ("*desconocido*"), and container size (20 feet). As a result, the Customs Agent's Commission of \$669.35 is the same for both routes.

⁴⁹³ Panama included this table in its response to Panel question No. 124. The Panel has reproduced the table and verified the accuracy of the data included in this table in relation to the data that was originally presented in Exhibit PAN-63. No discrepancies were identified; however the Panel inserted clarifications (appearing in *italics*) where it considered them helpful.

CFZ-Cali (via Balboa and Buenaventura)	Costs (US\$)	CFZ-Cali (via MIT and Barranquilla)	Costs (US\$)
Customs Agent's Commission (0.35% of c.i.f. value)	669.38	Customs Agent's Commission (0.35% of c.i.f. value)	669.38
Paperwork expenditures	30.00	Paperwork expenditures	30.00
Preparation and process of obtaining VUCE registration	30.00	Preparation and process of obtaining VUCE registration	30.00
Forms (<i>approximate</i>)	+15.00	Forms (<i>approximate</i>)	+15.00
Preparation (<i>cost/unit</i>)	10.00	Preparation (<i>cost/unit</i>)	10.00
	5.00		5.00
Buenaventura – Cali (by truck up to 30 tonnes for a 20' container)	700.00	Barranquilla – Cali (by truck up to 30 tonnes for a 20' container)	2100.00
Total	US\$3580.38		US\$4950.38

7.260 The DHL Global Forwarding Quotation submitted by Panama separately lists estimates of the ocean freight delivery costs for 20 feet and 40 feet delivery from Balboa to Buenaventura:⁴⁹⁴

Origen	POL	Destino	POD	20'	BAF	40'ST	BAF	40'HC	BAF
Zona Libre de Colon	Balboa	Cali	Buenaventura	\$1,250	Incl.	\$1,350	Incl.	\$1,350	Incl.

7.261 The DHL Global Forwarding Quotation also includes estimates of the ocean freight delivery costs for 20 feet and 40 feet delivery from MIT to Barranquilla:⁴⁹⁵

Origen	POL	Destino	POD	20'	BAF	40'ST	BAF	40'HC	BAF
Zona Libre de Colon	MIT	Cali	Barranquilla	\$1,490	\$165	\$1,590	\$310	\$1,590	\$310

7.262 For reference, the DHL quotations also compare the local costs of delivery from Buenaventura to Cali, by land; and from Barranquilla to Cali, also by land:⁴⁹⁶

Trayecto	Carga suelta hasta 4 tons (turbo)	Hasta 7 tons por 20 ft	Hasta 17 tons por 20 ft	Hasta 24 tons por 20 ft	Hasta 18 tons por 20 ft	Hasta 30 tons port 20 ft	Serv. de Escolta
Buenaventura/ Cali	\$280	\$350	\$465	\$680	\$680	\$700	Opcional
Barranquilla/ Cali	\$725	\$990	\$1,350	\$1,850	\$1,930	\$2,100	Opcional

7.263 Colombia disputes the accuracy of the shipper quotation due to the fact that Panama compares the cost of a shipment from the CFZ to Cali via the port at Barranquilla, with the cost of shipment from the CFZ to Cali via the port at Buenaventura, without including toll charges arising from use of the Panama canal. Colombia has submitted two separate quotations from different shipping providers for the Panel's consideration.⁴⁹⁷ Based on its quotations, Colombia argues that the cost of shipment from the CFZ to Cali via Buenaventura seaport would be slightly more expensive when Panama canal toll charges are included in the estimate.⁴⁹⁸ The Panel notes that Colombia has provided in its first

⁴⁹⁴ Exhibit PAN-63.

⁴⁹⁵ Exhibit PAN-63.

⁴⁹⁶ Exhibit PAN-63.

⁴⁹⁷ Exhibit COL-50. This exhibit includes one quotation provided by TransBorder, SA, dated 25 June 2008, and a second one by UPS Supply Chain Solutions, dated 28 May 2008.

⁴⁹⁸ Colombia's second written submission, paras. 126-127; Exhibit COL-50.

quotation the "free on board" rate for delivery from MIT to Barranquilla for several container sizes, delivered on a weekly basis, and the price for delivery from MIT to Buenaventura for several sizes, also on a weekly basis. This data appears as follows:⁴⁹⁹

Origen	Destino	20 std	40 std	40 hc	T/T	Salidas	Linea naviera
Manzanillo	B/quilla	USD 900	USD 975	USD 975	1 dia	Semanal	Cosco
Manzanillo	B/ventura	USD 1300	USD 1400	USD 1400	1 dia	Semanal	Maersk

7.264 Colombia's also has provided a second quotation from UPS Supply Chain Solutions that outlines the total shipping charges to deliver textiles, as stated, "port to door". The table appearing in the submitted quotation compares the cost of delivery from Cristobal, Panama, to Cali, via Cartagena, with the cost of delivery from Cristobal, Panama to Cali via Buenaventura. The costs are broken down and summarized below:⁵⁰⁰

Application	40' std	40' std
	<i>via Cartagena</i>	<i>via Buenaventura</i>
Origin Service Fee	\$125.00	\$125.00
Documentation	\$25.00	\$25.00
Manifest Entry	\$35.00	\$35.00
Courier Fee	\$65.00	\$65.00
Security	\$25.00	\$25.00
Origin Port Fees	\$299.00	\$299.00
Ocean Freight Charges	\$2,100.00	\$3,673.00
Customs Entry	\$150.00	\$150.00
Destination Port Fees	\$210.00	\$210.00
Delivery	\$2,324.00	\$941.00
TOTAL CHARGES USD:	\$5,358.00	\$5,548.00

7.265 Before proceeding in its analysis, the Panel would like to make several preliminary observations concerning the evidence submitted by the parties. Foremost, the quotations submitted by each party are from different transportation providers, i.e. DHL Global Forwarding in the case of Panama, and TransBorder SA and UPS Supply Chain Solutions in the case of Colombia. Several interpretative problems arise from these quotations.

7.266 In Panama's submitted quotation, DHL Global Forwarding estimates a cost of US\$1,590 to ship goods by sea from MIT to Barranquilla, in addition to a Bunker Adjustment Factor (BAF) of between US\$310 per 40 feet container, while estimating a cost of US\$1,350 to ship the goods from Balboa to Buenaventura, and listing BAF charges as included for the Buenaventura route. Panama does not offer any explanation why this charge is included in the former route but not the latter. In addition, the Panel notes that while Panama indicates in its summary table presented in paragraph above that the quotation is for a shipment with a weight of 24000kg, c.i.f. value of US\$191,250 and container size of 20 feet, the actual copy of the quotation lists the weight as "unknown" and does not refer to a c.i.f. value. Also, the Panel notes that the local transport costs from either Buenaventura or Barranquilla ports to Cali list escort service as "optional", making a final precise estimate difficult.⁵⁰¹

⁴⁹⁹ Exhibit COL-50. The Panel has reproduced this table for inclusion in the report.

⁵⁰⁰ Exhibit COL-50. The Panel has reproduced this table for inclusion in the report.

⁵⁰¹ The Panel considers Panama's omission of an estimate of security/escort service especially troubling in light of the fact that Panama in open discussions during the Second Substantive meeting expressed concern

Finally, Panama has asserted that a proper estimate of the cost of delivery from the CFZ to Buenaventura would include transport of the goods from the CFZ to Balboa, on the Pacific coast of Panama, by train or truck, before shipping the goods to Buenaventura by ship. As argued by Colombia, Panama has merely asserted this is the case without presenting any evidence to substantiate this assertion.⁵⁰²

7.267 Regarding the quotations provided by Colombia, the Panel is also troubled as to why Colombia has in one quotation provided separate estimates of ocean freight rates from MIT to Barranquilla and MIT to Buenaventura, but in a second quotation from UPS Supply Chain Solutions, compares costs of delivery from the CFZ to Cali via *Cartagena*, with the cost of delivery from CFZ to Cali via Buenaventura. Cartagena is a prohibited port under the ports of entry measure, and Colombia has provided no explanation for this selection. At a minimum, this selection calls into question the choice to submit ocean freight charges from MIT to Barranquilla in the first place, if Colombia later relies on a different route quotation for its cost comparison. It is also troubling that the ocean rate for delivery from MIT to Buenaventura provided in the TransBorder SA quote (US\$1,400) is vastly lower than the ocean freight charge from Cristobal to Buenaventura referred to in its UPS quotation (US\$3,673).⁵⁰³ The Panel is concerned by the fact that the TransBorder SA estimates from MIT to Barranquilla and from MIT to Buenaventura are listed as "all-in fees", but these estimates do not appear to include land transportation costs from CFZ to MIT, nor land transportation charges from Buenaventura to Cali, or Barranquilla to Cali.⁵⁰⁴ In addition, the UPS Supply Chain Solutions quotation is labelled as a "port to door" estimate; however, it is unclear whether land transportation charges from the CFZ to Cristobal have been assessed, as only port origin fees are included.⁵⁰⁵ Finally, Panama has raised the issue of how the charge to ship a 40 feet container from Cristobal to Cartagena could be so high (US\$2,100) relative to the cost to ship the same size container from MIT to Barranquilla (US\$975) when the distance between Cristobal and MIT is approximately 3 km, and the distance between Cartagena and Barranquilla is 114 km.⁵⁰⁶ Panama has asked the Panel to factor in the inconsistencies when evaluating the relevance of the quotations presented by Colombia.

7.268 Regardless of whether one estimate is more accurate than the other, the Panel notes that quotations have been provided in both cases without reference to the weight or the c.i.f. for the container, although Panama has alleged a specific weight and c.i.f. value.

about the fact that Colombia's estimated costs for delivery from the CFZ to either Cartagena or Buenaventura both included identical security charges of US\$25. Thus, while questioning the accuracy of delivery estimates provided by Colombia, due to a low estimate for security fees, Panama has not included an appropriate estimate for security charges apart from reference to a port security charge of US\$20, both in the case of delivery via a Barranquilla and Buenaventura route. The Panel is therefore unclear on the accuracy of Panama's estimates.

⁵⁰² Colombia's comment on Question No. 1(d)(iii) to Panama from Colombia. Panama's assertion must also be weighed against written testimony provided by Colombian transportation specialist, Fabian Garcia Castañeda, who stated that he had never heard of goods being transported from the CFZ to the Pacific coast over land: Exhibit COL-63.

⁵⁰³ In relation with the Panel's concerns, Panama has also expressed concern about the large discrepancy between the UPS quotation from Cristobal to Buenaventura (US\$3,673) and the TransBorder SA quotation from MIT to Buenaventura (US\$1,400), despite what Panama claims is a distances of a "few kilometers" between Cristobal and MIT.

Panama has also commented that the TransBorder SA estimates from MIT to Barranquilla and from MIT to Buenaventura are listed as "all-in fees", but these estimates do not appear to include land transportation costs from CFZ to MIT, nor land transportation charges from Buenaventura to Cali, or Barranquilla to Cali. In addition, Panama express doubt regarding the designation of the UPS Supply Chain Solutions quotation as a "port to door" estimate, arguing that land transportation charges from the CFZ to Cristobal are not assessed (as only port origin fees are included): see Panama's response to Panel question No. 123.

⁵⁰⁴ Panama raised a similar concern in its response to Panel question No. 123.

⁵⁰⁵ See also Panama's response to Panel question No. 123.

⁵⁰⁶ Panama's response to Panel question No. 123. The Panel notes, however, that Panama's DHL Global Forwarding estimate from MIT to Barranquilla (US\$1,900 including the indicated BAF surcharge) is comparable with the estimate from Cristobal (in the CFZ) to Cartagena.

7.269 Despite confusion that may arise from the wide variations in prices revealed in the quotations submitted by the parties, the Panel does not consider it appropriate to base its findings exclusively on a finite amount of shipping price quotations for several other important reasons. As Colombia has generally suggested, it is complicated to compare quotations provided by different freight suppliers.⁵⁰⁷ Colombia has also recognized that it is also difficult to estimate other factors, such as logistical and security needs, when trying to understand the effect on importers.⁵⁰⁸ In addition to these inherent problems, prices charged to ship goods are dependant on many additional factors that are specific to particular customers, such as prior commercial relationships, the size of a shipping order, economies of scale, the frequency of business solicited, volume discounts, capacity availability and other factors.⁵⁰⁹ Moreover, an initial quotation may only provide a basis for negotiating a lower price. Finally, the Panel notes that while estimated costs to deliver goods to one Colombian city, Cali, have been informative, the circumstances of many other important markets/destinations in Colombia could vary widely. These factors do not even address the concern, identified on multiple occasions by both parties, as corresponds with their respective arguments, that neither DHL Global Forwarding or UPS Supply Chain Solutions are major players in ocean freight shipment between the CFZ and Colombian seaports.⁵¹⁰

7.270 The quotations provided by Panama and Colombia alike are based on one metric – the container size (20 feet in the case of Panama's extensive example, and 40 feet standard in the case of Colombia's). Colombia's example makes no reference to weight or c.i.f. value. While Panama refers to weight and c.i.f. value in its response to a question from the Panel⁵¹¹, this information is not acknowledged in Colombia's submitted quotation.⁵¹² It has also proven difficult to verify any of the figures submitted by the parties. For instance, Panama has submitted in its price quotation that in practice it is preferable to transport goods from the CFZ on the Atlantic coast of Panama to Balboa on the Pacific coast, rather than to transport goods by boat through the Panama Canal (and pay canal fees), and thus bases its estimation of delivery costs to Cali via Buenaventura on this practice. Colombia contests this approach. On the other hand, Colombia has provided a comparison of costs to ship via Buenaventura, presumably factoring in canal fees, and the Panel observes that the final cost of delivery is similar to a rate to deliver goods shipped to Cali via a route that arrives at Cartagena (on the Atlantic coast of Colombia). By Panama's estimates, the cost of shipping from the CFZ to Cali via Balboa and Buenaventura (US\$3,580.38) is nearly US\$2,000 less than the number proposed by Colombia in its UPS quotation (US\$5,548). Hence, the Panel finds it difficult to draw any conclusions.

7.271 We recall the view discussed above that increased transaction costs, market access restrictions or uncertainties affecting investment plans have previously been considered relevant in determining whether a measure resulted in a restriction which rose to a level to cause nullification or impairment of a Member's rights under Article XI:1.

7.272 Although the quotation data available is difficult to compare, Panama has also argued that the Panel should assess the existence of a restriction more broadly than in terms of increased shipping

⁵⁰⁷ Colombia acknowledged, based on a written testimony submitted by transportation specialist, Fabian Garcia Castañeda at Colombia's request, that "great care" must be taken when comparing quotations provided by different freight suppliers: see Exhibit COL-63; Colombia's comment on Panama's response to Panel question No. 123.

⁵⁰⁸ Colombia acknowledges complications like these in comments responding to one of Panama's responses to a question by the Panel: see Colombia's comment on Panama's response to Panel question No. 124.

⁵⁰⁹ The Panel notes that transportation specialist, Fabian Garcia Castañeda, identified many of these factors as relevant in determining actual transportation costs: see Exhibit COL-63.

⁵¹⁰ See, e.g. comments by specialist, Fabian Garcia Castañeda appearing in Exhibit COL-63.

⁵¹¹ See Panama's response to Panel question No. 124.

⁵¹² Instead the quotation lists weight as "unknown" and does not refer to a c.i.f. value: see Exhibit COL-63.

costs.⁵¹³ In this regard, Panama has submitted an ocean shipping delivery schedule which indicates a limited schedule of fortnightly deliveries from the CFZ (specifically, Colon) to Barranquilla.⁵¹⁴ This same schedule reveals that deliveries occur between Colon and Cartagena on a weekly basis, for instance, thereby increasing the frequency of opportunities available to ship to Colombia for exporters of goods from Panama. Although schedules were not provided for additional ports in Colombia, it is evident from the delivery schedules provided for Cartagena and Barranquilla that the ports of entry measure, by limiting entry of goods, exclusively to Barranquilla seaport and no other seaport, restricts the number of opportunities for importers to deliver goods into Colombia. The Panel does not have information before it comparing the volume of imports into Colombia, in relation to the total capacity available on ships travelling fortnightly between Colon and Barranquilla; however, it is clear that deliveries can only be shipped on fewer occasions and to fewer destinations, to the detriment of entities importing goods from Panama.

7.273 In the Panel's view, business and investment plans of entities importing goods from Panama are negatively affected in another way. As Colombia has indicated, a measure nearly identical to the ports of entry measure at issue in this dispute was imposed on 7 July 2005⁵¹⁵ for approximately six months until 31 December 2005, and was extended on two occasions⁵¹⁶, such that the measure did not expire until 31 December 2006, nearly one and a half years later. The current ports of entry measure was instituted on 22 June 2007 for approximately six months until 31 December 2007, but this date was extended twice⁵¹⁷, and the ports of entry measure is currently set to expire on 31 December 2008⁵¹⁸, one and a half years later. On every occasion the measure is in place, importers of goods from Panama generally have one seaport option available to enter goods – Barranquilla seaport, subject to certain exceptions for qualifying importers. When the measure is removed, all entities importing goods from Panama are permitted to enter any other of 11 designated ports and may rearrange their shipping schedules to do so. Data presented by Colombia indicates that import patterns to particular Colombian ports have shifted whenever a measure restricting port access was imposed, supporting the view that importers adjust their shipping patterns.⁵¹⁹

7.274 The uncertainties that arise from the ports of entry measure are substantial since importers' may only access one seaport and one airport whenever the measure is temporarily imposed, instead of the 11 ports open to importers of goods from points of departure other than Panama.⁵²⁰ In addition to the disadvantages that arise from restriction to two ports of entry, the Panel notes that both parties have recognized the substantial additional expense of using air transport as a long-term solution to high-volume importation of textiles, apparel and footwear.⁵²¹ When also considering the fact that the

⁵¹³ Panama's response to Panel question No. 84.

⁵¹⁴ Exhibit PAN-64.

⁵¹⁵ Resolution No. 05796 of 7 July 2005.

⁵¹⁶ Resolution No. 12465 of 21 December 2005; Resolution No. 06691 of 22 June 2006.

⁵¹⁷ Resolution No. 16100 of 27 December 2007, Resolution No. 5542 of 2008.

⁵¹⁸ Colombia's response to Panel question No. 122; Resolution No. 5542 of 2008.

⁵¹⁹ For instance, Buenaventura was the first port of entry in terms of value for textiles, apparel and footwear during the period before the first measure was established (January 2004 – June 2005), but fell to third place in the case of footwear, and fourth place in the case of textiles and apparel, following the imposition of the first measure between July 2005 and October 2006. Moreover, in terms of volume, 68 per cent of apparel imports and 77 per cent of footwear imports that arrived in Colombia during the period before the imposition of the first port of entry measure entered at Buenaventura. After the imposition of the first measure, only 7 per cent of apparel and 21 per cent of footwear were shipped to Buenaventura. See, e.g. Exhibit COL-61.

⁵²⁰ As noted in footnote 432, textile, apparel and footwear arriving from all points of departure, except Panama are required to enter at any of the following 11 ports: Barranquilla, Bucaramanga, Buenaventura, Cali, Cartagena, Cúcuta, Ipiales, Leticia, Medellín, San Andrés and Bogotá.

⁵²¹ By way of an example, Panama has presented a table comparing the total cost to ship goods by air from CFZ to Bogotá and then by truck to Cali (US\$26,261), with the total cost to ship goods by boat from CFZ to Barranquilla and then by truck to Cali (US\$6,366): see Panama's response to Panel question No. 125; Exhibit PAN-63, Exhibit PAN-77. While not providing factual evidence, Colombia acknowledged that sea transport would be cheaper than air transport which is "substantially more expensive": Colombia's response to

restrictions on port access have been imposed, extended and removed, then subsequently reinstated, importers' expectations and planning have undoubtedly been affected, which has led importers to rearrange shipping schedules, in turn affecting scheduled importation of subject goods arriving from Panama. In the Panel's view, all of these uncertainties, including access to one seaport for extended periods of time and the likely increased costs that would arise for importers operating under the constraints of the port restrictions, limit competitive opportunities for imports arriving from Panama.⁵²²

(e) Conclusion

7.275 In light of the Panel's conclusion that restrictions on ports of entry limit competitive opportunities for subject textiles, apparel and footwear arriving from Panama, the Panel concludes that the ports of entry measure has a limiting effect on imports arriving from Panama. On this basis, the Panel finds that the restriction to two ports of entry for subject goods arriving from Panama imposed under the ports of entry measure constitutes a restriction on importation within the meaning of Article XI:1 of the *GATT 1994*. Accordingly, the Panel finds that ports of entry measure is inconsistent with Article XI:1 of the *GATT 1994*.

F. WHETHER THE RESTRICTION ON PORTS OF ENTRY APPLICABLE TO TEXTILE, APPAREL AND FOOTWEAR ARRIVING FROM PANAMA IS INCONSISTENT WITH ARTICLE XIII:1 OF THE *GATT 1994*

1. Main arguments of the parties

7.276 Panama argues that the ports of entry measure violates Article XIII:1 of the *GATT 1994* as it constitutes a restriction on importation prohibited by Article XI of the *GATT 1994*⁵²³ that is not administered on a non-discriminatory basis. Since the ports of entry measure on its face only applies to textile, apparel and footwear goods arriving from Panama, and does not similarly restrict entry of textile, apparel and footwear goods arriving from third countries or other WTO Members, Panama contends that the measure is administered discriminatorily in violation of Article XIII:1.⁵²⁴

7.277 Panama rejects the view that the text of Article XIII:1 only applies to permitted restrictions, i.e. those import restrictions which are not prohibited pursuant to Article XI; but applies to *any*

Panel question No. 125. In light of Panama's assertion that air shipment of subject goods is cost-prohibitive, the Panel also sought to clarify why textile imports totaling US\$3.19 million entered Bogota during the second semester of 2007 (Exhibit COL-28). In response to this question, Panama commented that the apparent high value may be explained by the fact that the ports of entry measure exempts several categories of textiles, apparel and footwear from the measure, thus permitting goods falling under any of the exceptions to be entered at any of 11 ports and then shipped to Bogota by land to clear customs. As an example, Panama refers to Exhibit COL-29: see Panama's response to Panel question No. 126. While Colombia acknowledged that the data demonstrates subject goods are imported into Bogota, Colombia did not clarify whether this occurs as a result of the numerous exceptions or any other factors: see Colombia's response to Panel question No. 126.

⁵²² The Panel is of the view that a finding whereby Colombia were allowed to restrict access to two ports of entry for goods arriving from a particular Member or Members, would open the door for other WTO Members to do the same. For example, one GATT Contracting Party required all VCRs to enter its territory at a small inland customs office in the town of Poitiers. See Wilson B. Brown, Jan S. Hogendorn, *International Economics in the Age of Globalisation*, Broadview Press, 2000, pp. 197-198, Patrick A. Messerlin, *Measuring the costs of protection in Europe*, Peterson Institute for International Economics, 2001, pp. 270-271; Miroslav N. Javanovic, *The Economics of International Integration*, Edward Elgar Publishing, 2006, pp. 187.

⁵²³ Panama's first written submission, para. 167.

⁵²⁴ Panama's second written submission, paras. 136 and 139.

prohibition or restriction which is administered discriminatorily.⁵²⁵ Panama also notes that earlier panels have determined violations of both Article XI:1 and Article XIII.⁵²⁶

7.278 Colombia argues that Article XIII is not applicable to the ports of entry measure as it considers that Article XIII only applies to certain quantitative restrictions that are in principle prohibited by Article XI:1, but which are covered by the exceptions to this prohibition under Article XI:2, Article XII or Article XVIII.⁵²⁷ Colombia submits that Article XI:2 allows for a number of situations in which Members are allowed to maintain what would otherwise be prohibited quantitative restrictions.⁵²⁸ Additionally, Colombia considers that Article XII provides a specific exception for balance-of-payment purposes, and Article XVIII:2 provides an exception for developing countries to impose quantitative restrictions.⁵²⁹ In Colombia's view, the text of Article XIII clarifies that only measures which are permitted quantitative restrictions are subject to the additional requirement that such a measure be administered and applied non-discriminatorily.⁵³⁰ In this sense, Colombia refers to references in the second and third paragraphs of Article XIII which discuss the use of import licences, and the use of quotas which are properly notified to Members.⁵³¹

7.279 In addition to the text of Article XIII, Colombia considers the fact that Article XIV provides for a limited exception to the non-discrimination requirement in Article XIII, with respect to measures covered by Article XII and Article XVIII, further confirms that the scope of Article XIII is limited to measures allowed under Articles XI:2, XII and XVIII.⁵³² Finally, since Article XIII follows two other provisions dealing with quantitative restrictions – Article XI and Article XII – Colombia considers that Article XI:1 and Article XIII:1 are meant to address the same type of "prohibition or restriction".⁵³³ Colombia notes the similarity in terms and structure between Article XI:1 and Article XIII:1 as well as in the title to Article XIII, as confirmation that Article XI:1 and Article XIII:1 address the same restrictions.⁵³⁴

7.280 Colombia argues that Panama has failed to demonstrate that the port of entry measure is a prohibited quantitative restriction in the sense of Article XI:1.⁵³⁵ To the extent that the measure is not a prohibited restriction, Colombia submits that Article XIII would not apply.⁵³⁶ Even if the Panel were to find that the port of entry measure constitutes a quantitative restriction within the meaning of Article XI:1, as explained above, Colombia argues that Article XIII:1 does not apply to what are deemed prohibited restrictions.⁵³⁷

2. Consideration by the Panel

(a) Legislation authorizing restrictions on ports of entry

7.281 The measure at issue for this claim, referred to as the ports of entry measure, is discussed in detail in relation to Panama's claim under Article XI:1 of the *GATT 1994* in Section VII.E.2(a) above.

⁵²⁵ Panama's second written submission, para. 137.

⁵²⁶ Panama's first oral statement, para. 50.

⁵²⁷ Colombia's first written submission, para. 258.

⁵²⁸ Colombia's first written submission, para. 260.

⁵²⁹ Colombia's first written submission, para. 260.

⁵³⁰ Colombia's first written submission, para. 261.

⁵³¹ Colombia's first written submission, para. 262.

⁵³² Colombia's first written submission, para. 263.

⁵³³ Colombia's first written submission, para. 266.

⁵³⁴ Colombia's first written submission, para. 266.

⁵³⁵ Colombia's first written submission, para. 266.

⁵³⁶ Colombia's first written submission, para. 267.

⁵³⁷ Colombia's first written submission, para. 268.

(b) The text of Article XIII:1 of the *GATT 1994*

7.282 The Panel is called upon to examine whether the ports of entry measure as above described is inconsistent with Article XIII:1 of the *GATT 1994*. Article XIII:1 of the *GATT 1994* provides:

"No prohibition or restriction shall be applied by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation of any product destined for the territory of any other contracting party, unless the importation of the like product of all third countries or the exportation of the like product to all third countries is similarly prohibited or restricted."

(c) The Panel's approach to examining Panama's claim under Article XIII:1 of the *GATT 1994*

7.283 The Panel recalls its finding in Section VII.E.2(e) above that the ports of entry measure is a restriction on importation which is prohibited under Article XI:1 of the *GATT 1994*. In light of this finding, the Panel is faced with the issue of determining whether a measure deemed to be a WTO-inconsistent import restriction under Article XI:1 may also violate Article XIII:1 of the *GATT 1994*.

7.284 Panama submits that the ports of entry measure plainly violates Article XIII:1 since the measure on its face applies only to textile, apparel and footwear goods arriving from Panama, and does not similarly restrict entry of textile, apparel and footwear goods arriving from other Members. Colombia, however, has argued that Article XIII:1 only applies to quantitative restrictions that are permitted under the *GATT 1994*. In this sense, Colombia has stated that it simply does not "make sense" to apply Article XIII to measures which are determined to be prohibited import restrictions under Article XI:1.⁵³⁸ Panama rejects Colombia's interpretation, noting that the text does not indicate that Article XIII:1 only applies to permitted restrictions. Thus, Panama submits that Article XIII:1 covers *any* prohibition or restriction which is administered discriminatorily.

7.285 In relevant part, Article XIII:1 prohibits Members from imposing any "restriction ... on importation of any product of the territory of any other contracting party ... unless the importation of the like product of all third countries ... is similarly prohibited or restricted."

7.286 WTO panels have previously recognized that the protections under Article XIII:1 extend to restrictions authorized as exceptions to the general ban on non-tariff restrictions within Article XI:1 of the *GATT 1994*. The panel in *EC – Bananas III* stated:

"In interpreting the terms of Article XIII, it is important to keep their context in mind. Article XIII is basically a provision relating to the administration of restrictions authorized as exceptions to one of the most basic GATT provisions – the general ban on quotas and other non-tariff restrictions contained in Article XI."⁵³⁹

7.287 The panel in *Turkey – Textiles*, which both parties referenced in their submissions, also discussed the relationship between Article XI:1 and Article XIII:1 of the *GATT 1994*:

⁵³⁸ See, e.g. Colombia's first written submission, para. 268. In this regard, Colombia has also referred to the views of two noted scholars in GATT/WTO law, John H. Jackson and Petros Mavroidis. As Colombia notes, John H. Jackson commented that "[i]n case exceptions are utilized and quotas applied, they must be applied 'non discriminatorily,' i.e., similar to a Most-Favoured-Nation basis, and in accordance with certain other rules" (see Jackson, J., *World Trade And the Law of GATT* (1969) at 308). Additionally, Petros Mavroidis wrote that "the ambit of Article XIII of the GATT should not be extended so as to cover issues of substantive consistency of a [quantitative restriction] with the GATT; it should be narrowed down to issues consistency in the *administration* of an otherwise GATT-consistent [quantitative restriction]" (see Mavroidis, *Trade in Goods*, Oxford University Press, 2007, p. 64).

⁵³⁹ Panel Report, *EC – Bananas III*, para. 7.68.

"The wording of Articles XI and XIII is clear. Article XI provides that as a general rule (we note the wording of the title of Article XI: "General Elimination of Quantitative Restrictions"), WTO Members shall not use quantitative restrictions against imports or exports.

...

Article XIII provides that if and when quantitative restrictions are allowed by the GATT/WTO, they must, in addition, be imposed on a non-discriminatory basis."⁵⁴⁰

7.288 This particular statement by the panel in *Turkey – Textiles* must be taken into consideration in the face of its findings of violation both of Article XI:1 and Article XIII.⁵⁴¹ The panel in that dispute concluded that the measures at issue, on their face, imposed quantitative restrictions on imports that were only applicable to the complainant.⁵⁴²

7.289 Colombia submits that the panel's ultimate finding in *Turkey – Textiles* is not reflective of the proper interpretation of the relationship between Articles XI:1 and XIII:1. Colombia notes that the panel issued a finding at a time when the *Agreement on Textiles and Clothing* was still effective and allowed for certain quantitative restrictions.⁵⁴³ Colombia notes as well that the defendant, Turkey, did not present any arguments rebutting a violation of either Article XI:1 and Article XIII.⁵⁴⁴ Finally, Colombia submits the panel's rationale as opposed to its findings are the proper guideline, as the panel itself clarified that Article XIII should only be applied to permitted quantitative restrictions due to its statement that restrictions "must, in addition, be imposed on a non-discriminatory basis".⁵⁴⁵

7.290 Without prejudice to the views of earlier panels, in this dispute, the Panel, after careful consideration, refrains from ruling on Panama's claim under Article XIII:1 of the *GATT 1994* on the basis of judicial economy. The Panel recalls that the principle of judicial economy is recognized in WTO law. The Appellate Body has ruled that a panel has discretion to determine which claims it must address in order to resolve the dispute between the parties, provided that those claims are within its terms of reference.⁵⁴⁶ The Appellate Body has emphasized that the basic aim of dispute settlement in the WTO is to secure a positive solution to a disputes and not to "make law" by clarifying existing provisions of the *WTO Agreement* that fall outside the context of resolving a particular dispute:

"[G]iven the explicit aim of dispute settlement that permeates the DSU, we do not consider that Article 3.2 of the DSU is meant to encourage either panels or the Appellate Body to 'make law' by clarifying existing provisions of the WTO Agreement outside the context of resolving a particular dispute. A panel need only address those claims which must be addressed in order to resolve the matter in issue in the dispute."^{547,548}

⁵⁴⁰ Panel Report, *Turkey – Textiles*, paras. 9.61-9.62.

⁵⁴¹ Panel Report, *Turkey – Textiles*, para. 9.66.

⁵⁴² Panel Report, *Turkey – Textiles*, para. 9.66.

⁵⁴³ Colombia's first written submission, para. 270.

⁵⁴⁴ Colombia's first written submission, para. 270. In *Turkey – Textiles*, the Panel concluded that India had made a prima facie case of violation of Articles XI and XIII of the *GATT 1994*, after first noting the absence of a defence by Turkey (other than its defence based on Article XXIV of the *GATT 1994*) to India's claims that discriminatory import restrictions had been imposed: see Panel Report, *Turkey – Textiles*, para. 9.66.

⁵⁴⁵ Colombia's first written submission, para. 270.

⁵⁴⁶ Appellate Body Report, *India – Patents (US)*, para. 87.

⁵⁴⁷ (footnote original) The "matter in issue" is the "matter referred to the DSB" pursuant to Article 7 of the DSU.

⁵⁴⁸ Appellate Body Report, *US – Wool Shirts and Blouses*, DSR 1997:I, 323 at 340. See also Panel Report, *US – Steel Safeguards*, para. 10.701. The Panel bears in mind that, in *Australia – Salmon*, the Appellate

7.291 In making findings under Article XI:1 of the *GATT 1994*, the Panel considers it unnecessary to make findings in relation to Panama's Article XIII:1 claim in order to secure a positive solution to this dispute. In the Panel's view, the determination of a violation under Article XIII:1 would not assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements. The Panel observes that, in addition to being a prohibited restriction within the meaning of Article XI:1, the ports of entry measure is imposed only on certain textile, apparel or footwear goods arriving from Panama, independent of the products' origin, and not like-product imports originating in, and shipped from, any other Member or third country. Whether or not it is discriminatory in its design, the restrictions on ports of entry are prohibited under Article XI:1.⁵⁴⁹

7.292 For the above reasons, the Panel concludes that it is not necessary to proceed and rule on Panama's claim under Article XIII:1, and declines to do so.

G. WHETHER THE RESTRICTION ON PORTS OF ENTRY APPLICABLE TO TEXTILE, APPAREL AND FOOTWEAR ARRIVING FROM PANAMA IS INCONSISTENT WITH ARTICLE I:1 OF THE *GATT 1994*

1. Main arguments of the parties

7.293 In addition to its claims under Article XI:1 and Article XIII:1 of the *GATT 1994*, Panama requested the Panel to find that the ports of entry measure violates Article I:1 of the *GATT 1994*, in the event the Panel were to find Article XI:1 inapplicable.⁵⁵⁰ In Panama's view, if the discriminatory aspects of the measure could not be found to be inconsistent with Article XIII, there would need to be recourse to Article I:1 of the *GATT 1994*.⁵⁵¹ Panama justifies this late claim on the grounds that "[i]n its first written submission, [it] did not elaborate on its Article I:1 claim because it seemed indisputable that the port of entry restrictions fall under Articles XI and XIII."⁵⁵² Panama notes, however, in its request for establishment, that it claimed the ports of entry measure to be inconsistent with Article I:1 in addition to Article XI:1 and Article XIII:1.⁵⁵³

7.294 Panama considers the ports of entry measure is discriminatory and thus, inconsistent with Article I:1, as textiles, apparel and footwear of non-Panamanian origin may enter at any of 11 ports, as long as the goods do not transit through Panama, while identical goods arriving from Panama may only enter at two ports.⁵⁵⁴ Panama considers the right to enter products at Colombian ports is a rule in

Body cautioned panels against exercising judicial economy where only a partial resolution of a dispute would result:

"The principle of judicial economy has to be applied keeping in mind the aim of the dispute settlement system. This aim is to resolve the matter at issue and 'to secure a positive solution to a dispute'. To provide only a partial resolution of the matter at issue would be false judicial economy. A panel has to address those claims on which a finding is necessary in order to enable the DSB to make sufficiently precise recommendations and rulings so as to allow for prompt compliance by a Member with those recommendations and rulings 'in order to ensure effective resolution of disputes to the benefit of all Members.'"

See Appellate Body Report, *Australia – Salmon*, para. 223. See also Panel Report, *EC – Sardines*, paras. 7.148-7.152; Panel Report, *US – Steel Safeguards*, para. 10.703.

⁵⁴⁹ In light of its decision to exercise judicial economy in relation to Panama's Article XIII:1 claim, the Panel does not comment as to whether the fact that the ports of entry measure applies with respect to goods arriving from Panama, regardless of origin, but not to goods arriving into Colombia without previously transiting through Panama, qualifies as the type of discrimination discussed within the text of Article XIII:1.

⁵⁵⁰ Panama's first oral statement, para. 52 et seq; Panama's second written submission, paras. 141 et seq.

⁵⁵¹ Panama's first oral statement, para. 52.

⁵⁵² Panama's first oral statement, para. 52; Panama's second written submission, para. 141.

⁵⁵³ Panama's second written submission, para. 141.

⁵⁵⁴ Panama's first oral statement, para. 53.

connection with importation.⁵⁵⁵ Moreover, Panama argues that access to additional ports is an advantage that is not immediately and unconditionally extended to imports from Panama.⁵⁵⁶

7.295 Colombia objects to the inclusion of what it considers a new claim and argues that the failure to develop any legal and factual arguments in respect of such claim implies that Panama failed to make a *prima facie* case of violation under GATT Article I:1.⁵⁵⁷ While Colombia acknowledges that Article I:1 of the *GATT 1994* is mentioned in Panama's request for establishment, Colombia submits that this claim was not part of Panama's request for establishment and is therefore not part of the Panel's terms of reference.⁵⁵⁸ As such, Colombia has not presented any substantive rebuttal arguments at this stage as it considers there simply is no case to answer at the moment in the absence of any development of the claim by Panama.⁵⁵⁹ Nevertheless, Colombia notes that the ports of entry measure is not origin-based and does not fail to extend "immediately" and "unconditionally" an "advantage" to products originating from Panama.⁵⁶⁰

7.296 Despite its protest at the inclusion of a second claim under Article I:1, Colombia submits, assuming *arguendo* that this new claim was part of the Panel's terms of reference, that Panama was required by paragraph 4 of the Panel's Working Procedures⁵⁶¹ to have presented its claims and arguments in its first written submission.⁵⁶² However, in the event the Panel were to consider Panama's Article I:1 claim, Colombia has argued that it has a right to present rebuttal arguments at a later stage in the proceedings.⁵⁶³

2. Consideration by the Panel

(a) Legislation authorizing restrictions on ports of entry

7.297 The measure at issue for this claim, referred to as the ports of entry measure, is discussed in detail in relation to Panama's claims under Article XI:1 of the *GATT 1994* in Section VII.E.2(a) above

(b) Panel's approach to examining Panama's second claim under Article I:1 of the *GATT 1994*

7.298 The Panel notes that Panama has argued in the alternative that the ports of entry measure violates Article I:1 of the *GATT 1994*. Furthermore, the Panel acknowledges Colombia's extensive arguments in relation to whether this claim should be considered within the Panel's terms of reference and thus, within the Panel's mandate.⁵⁶⁴

7.299 As indicated in Section VII.A.2(b) above, setting aside any doubts about its admissibility due to its late formulation, the Panel has decided not to examine this claim in light of the Panel's findings that the ports of entry measure is a prohibited import restriction within the meaning of Article XI:1 of the *GATT 1994*, and in consideration of fact that this is an alternative claim. In the Panel's view, the determination of a violation under Article I:1 in respect of the ports of entry measure at issue would

⁵⁵⁵ Panama's second written submission, para. 143.

⁵⁵⁶ Panama's second written submission, para. 143.

⁵⁵⁷ Colombia's second written submission, para. 149.

⁵⁵⁸ Colombia's second written submission, para. 152.

⁵⁵⁹ Colombia's second written submission, para. 150.

⁵⁶⁰ Colombia's second written submission, para. 150.

⁵⁶¹ Paragraph 4 provides that: "Before the first substantive meeting of the Panel with the parties, the parties to the dispute shall transmit to the Panel written submissions in which they present the facts of the case and their arguments".

⁵⁶² Colombia's second written submission, para. 155.

⁵⁶³ Colombia's second written submission, para. 150.

⁵⁶⁴ Colombia's second written submission, paras. 148-172.

not assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements.⁵⁶⁵

H. WHETHER THE ADVANCE DECLARATION AND LEGALIZATION DECLARATION REQUIREMENTS APPLICABLE TO TEXTILES, APPAREL AND FOOTWEAR IMPORTS ARRIVING FROM PANAMA ARE INCONSISTENT WITH ARTICLE I:1 OF THE *GATT 1994*

7.300 In addition to a separate claim under Article I:1, discussed in Section VII.G above, Panama argues that a requirement to present an advance import declaration applicable to imports of textiles, apparel and footwear arriving from Panama, pay customs duties and sales tax on the basis of the advance declaration and the obligation to pay a fee to correct the import declaration whenever weight per square meter or width exceed 7 and 10 per cent, respectively, is inconsistent with Article I:1 of the *GATT 1994*.

1. Main arguments of the parties

7.301 Panama argues that importers of textiles, apparel and footwear arriving from Panama or the CFZ are subject to several additional requirements under the ports of entry measure, each of which is a rule in connection with importation that results in an advantage being conferred on imports originating in countries other than Panama.

7.302 Panama further argues that textile, apparel and footwear importers arriving from Panama or the CFZ are required to present an advance import declaration for imports of textiles, apparel and footwear, and to pay customs duties and sales tax on the basis of the advance declaration.⁵⁶⁶ Panama contends that importers of textiles, apparel and footwear originating in countries other than Panama are permitted to import into Colombia without submitting an advance declaration and without paying customs duties and sales tax on that basis.⁵⁶⁷

7.303 Panama additionally argues that importers of textiles arriving from Panama and the CFZ are required to pay a fee for the legalization of goods and to correct import declarations in cases where discrepancies in the declared weight per square meter and width exceed 7 per cent or 10 per cent, respectively.⁵⁶⁸ Panama claims that imported like products from other countries are not subject to the legalization declaration and fee requirement.⁵⁶⁹

7.304 In light of the requirement to present an advance importation declaration, pay customs duties and sales tax on the basis of the advance declaration, and the obligation to pay a fee to correct the import declaration whenever differences in weight per square meter, or width exceed 7 and 10 per cent, respectively, Panama argues that products originating in the CFZ or Panama are not accorded immediately and unconditionally the advantages accorded to like products originating in other countries.⁵⁷⁰ By granting advantages to like products originating in other countries, and not extending them immediately and unconditionally to products originating in Panama or the CFZ, Panama considers the relevant Colombian customs laws to be in violation of Article I:1 of the *GATT 1994*.

⁵⁶⁵ In light of its decision to exercise judicial economy in relation to Panama's Article XIII:1 claim, the Panel does not comment as to whether the fact that the ports of entry measure applies with respect to goods arriving from Panama, regardless of origin, but not to goods arriving into Colombia without previously transiting through Panama, qualifies as the type of discrimination discussed within the text of Article XIII:1.

⁵⁶⁶ Panama's first written submission, para. 186.

⁵⁶⁷ Panama's first written submission, para. 185.

⁵⁶⁸ Panama's first written submission, para. 187.

⁵⁶⁹ Panama's first written submission, para. 187.

⁵⁷⁰ Panama's first written submission, para. 188.

7.305 Colombia does not challenge Panama's characterization of the advance import declaration requirement under the port of entry measure, or customs duty, tax and legalization declaration requirements as rules and formality connected with importation. However, Colombia argues that the concept of "advantage" in Article I:1 of the *GATT 1994* only extends to those advantages that affects commercial opportunities in a way that creates more favourable competitive opportunities for products of a certain origin.⁵⁷¹ In Colombia's view, Panama has not presented any information to support its claim that an advanced import declaration, the requirement to pay customs duties⁵⁷² and taxes in advance, or the limitation of legalization without a fee, confers an advantage that affects a product's competitive opportunities.⁵⁷³ Colombia considers that the fact that many importers elect to use this advanced legalization option, and pay fees in advance attests to the fact that no competitive disadvantage arises from such use.⁵⁷⁴

7.306 To the extent an advantage were deemed to exist, Colombia argues that Panama has failed to demonstrate that such advantage is not extended "immediately and unconditionally" to all Members.⁵⁷⁵ Colombia argues that Members are entitled to condition access to its market on compliance with, and respect for, the Member's laws and regulations, including customs laws.⁵⁷⁶ Colombia argues that importers of goods arriving from Panama were originally extended the same rights related to presentation of an import declaration, payment of duties and taxes, and legalization fee requirements. However, since these importers did not comply with customs control and verification processes, these advantages were amended.⁵⁷⁷

7.307 Finally, Colombia argues that Article I:1 protection does not apply to goods arriving into Colombia from Panama since Article I:1 is based on the origin of the product, not on its place of exportation.⁵⁷⁸ Since Panama does not produce the textile, apparel, and footwear goods for export, Colombia considers that Panama does not confer origin of the goods.⁵⁷⁹

⁵⁷¹ Colombia's first written submission, para. 299; Colombia's second written submission, paras. 193-195.

⁵⁷² Colombia cautions the Panel against the incorrect use of the term "paid". In response to a question from the Panel, Colombia submitted that provisional payment occurs on the basis of the auto-declared value of the good at the time of submission of an import declaration. Regardless of whether the declaration is presented in advance or at the border upon entry, Colombia argues that the customs valuation for goods subject to indicative prices, does not occur upon entry of the goods. See Colombia's Answers to First Set of Panel Questions, question 74. For purposes of addressing Panama's Claim under Article I:1 of the *GATT 1994*, the Panel will not assess the characterization of the term "payment", but will only address the issue of whether importers are granted an advantage of the type contemplated under Article I:1 based on the application of advance import declaration, duty, tax and legalization requirements to importers from Panama. The nature of the term "payment" forms part of the Panel's analysis of Panama's claim in relation to indicative prices, discussed above.

⁵⁷³ Colombia's first written submission, para. 300, Colombia's second written submission, para. 196, Colombia's second oral statement, para. 50.

⁵⁷⁴ Colombia's first written submission, para. 300.

⁵⁷⁵ Colombia's second written submission, para. 198.

⁵⁷⁶ Colombia's first written submission, para. 306, Colombia's second written submission, para. 197.

⁵⁷⁷ Colombia's first written submission, paras. 307-308.

⁵⁷⁸ Colombia's first written submission, para. 311.

⁵⁷⁹ In response to a question from the Panel, the Panel notes that Panama submitted evidence demonstrating that one Panamanian Company exports at least one type of apparel, known as Panamanian *guayaberas*. Panama further explained that it does not currently produce footwear for export, and does not produce textiles. See Panama's response to Panel question No. 141.

2. Consideration by the Panel

(a) Legislation related to the advance declaration and legalization requirements

7.308 As discussed in Section II.D above, importers of textile, apparel and footwear imports classifiable under Chapter 50–64 of Colombia's Tariff Schedule and arriving from Panama are subject to special advance importation declaration and legalization requirements. The parties have referred to the advance declaration and legalization requirements as forming part of the ports of entry measure. Specifically, Article 1 of Resolution No. 7373 of 22 June 2007, as modified by Resolution No. 7637 of 28 June 2007, requires importers of subject goods arriving from Panama to present an advanced import declaration not more than 15 days prior to the goods' arrival in Colombia⁵⁸⁰ and accordingly pay customs duties and taxes in advance.⁵⁸¹

*"Artículo 1º. Declaración de importación de mercancías. En aplicación de lo previsto en el inciso 3o del artículo 199 del Decreto 2685 de 1999, adicionado por el artículo 2º del Decreto 2373 de 2004, la declaración de importación de las mercancías clasificables por los capítulos 50 a 64 del Arancel de Aduanas procedentes de la Zona Libre de Colon – República de Panamá, deberá presentarse en forma anticipada a su llegada al territorio aduanero nacional con una antelación no superior a quince (15) días."*⁵⁸²

7.309 Article 1 of Resolution No. 9859 of 23 August 2007 additionally requires importers of all goods from Panama or the CFZ that are subject to the 15-day advance import declaration requirement to declare the goods not less than five days prior to the arrival of the goods in Colombia:

"Artículo 1º. Oportunidad para declarar, Las mercancías que en desarrollo del inciso tercero del artículo 119 del Decreto 2685 de 1999, estén obligadas a presentar declaración de importación en forma anticipada a la llegada de la mercancía, deberán hacerlo con una antelación no superior a quince (15) días calendario y no inferior a cinco (5) días calendario.

*Para las demás mercancías, la declaración de importación deberá presentarse dentro del término previsto en el artículo 115 del Decreto 2685 de 1999, o en forma anticipada a la llegada de la mercancía, con una antelación no superior a quince (15) días calendario."*⁵⁸³

7.310 In combination with the requirement to present an import declaration, all importers are generally required to pay customs duties and sales tax at the time an import declaration is presented.

⁵⁸⁰ Exhibit PAN–34. Article 1 of Resolution No. 7637 of 28 June 2007 (Exhibit PAN–36) extends the scope of this obligation to all listed textile, apparel and footwear goods from Panama, and not only to those from the CFZ.

⁵⁸¹ In its response to Panel questions Nos. 73, 74 and 154, Colombia has confirmed that the requirement to present an import advance declaration only applies to textile, apparel and footwear goods classifiable under Chapters 50-64 of Colombia's Tariff Schedule and arriving from Panama.

⁵⁸² Resolution No. 7673 of 28 June 2007 (See Exhibit PAN-36) modifies paragraph 1 of Resolution No. 7373 to extend to goods arriving from any location in Panama, not strictly the CFZ as follows:

"Artículo 1º. Declaración de importación de mercancías. En aplicación de lo previsto en el inciso 3º del artículo 119 del Decreto 2685 de 1999, adicionado por el artículo 2º del Decreto 2373 de 2004, la declaración de importación de las mercancías clasificables por los capítulos 50 al 64 del Arancel de Aduanas, procedentes de la República de Panamá, deberá presentarse en forma anticipada a su llegada al territorio aduanero nacional con una antelación no superior a quince (15) días."

⁵⁸³ Exhibit PAN–46.

"Artículo 119. Oportunidad para declarar. La declaración de importación deberá presentarse dentro del término previsto en el artículo 115 del presente decreto, o en forma anticipada a la llegada de la mercancía, con una antelación no superior a quince (15) días.

*Dentro del mismo plazo señalado en dicho artículo, deberán cancelarse los tributos aduaneros, cuando hubiere lugar a ello."*⁵⁸⁴

7.311 Thus, under this regime, advance payment of customs duties and sales tax is obligatory for imports of subject goods from Panama and the CFZ.

7.312 Under Article 6 of Resolution No. 7373, an importer of subject goods arriving from Panama and the CFZ that fails to present an advance import declaration upon entry at Bogota or Barranquilla will only be able to proceed with importation if he or she submits a legalization declaration and pays a fee for the "rescate" of the goods in addition to all customs duties and any accrued warehouse storage charges; otherwise the importer may re-ship the goods from Colombian territory:

*"Artículo 6°. Cuando no se presente declaración anticipada en los términos del artículo 1° de la presente resolución y siempre que la mercancía arribe por los lugares habilitados y se cumplan los requisitos legales establecidos, se podrá presentar declaración de legalización de conformidad con lo previsto en el artículo 231 del Decreto 2685 de 1999, pagando el rescate correspondiente, o se podrá reembarcar mercancía"*⁵⁸⁵

7.313 If the importer does not submit a legalization declaration to obtain release of the goods or the goods are not re-shipped, the goods will be considered as legally abandoned and subject to seizure within a one month period.⁵⁸⁶ A "rescate" fee of 15 per cent of the value of the goods will be required to recover goods within this one-month period.⁵⁸⁷

7.314 Unlike subject imports arriving from Panama, imports arriving from points of departure other than Panama or the CFZ are not subject to an advance import declaration requirement (as long as the goods do not arrive from Panama or the CFZ). Under Article 119 of Decree No. 2685 of 1999, applicable to imported goods generally, an importer may present an import declaration as early as 15 days prior to arrival of the goods, but may delay presentation of the import declaration until one month after the goods' arrival into Colombia or up to two months following arrival, subject to authorization by Colombia's customs authority.⁵⁸⁸ In light of this flexibility, the advance payment of customs duties and sales tax is not mandatory, but is instead optional for imports of subject goods arriving from the territory of WTO Members other than Panama.⁵⁸⁹

7.315 In addition to the advance import declaration requirement imposed on imports arriving from Panama and the CFZ, and the concurrent advance customs duties and sales tax obligation, textile imports classifiable under Chapters 50-60 of Colombia's Tariff Schedule that arrive from Panama, are subject to special legalization requirements. In particular, Article 3 of Resolution No. 7373 exempts imports arriving from Panama and the CFZ that have been declared in advance from the requirement to pay a fee for "rescate" of goods in situations where differences in the weight per square metre or width of the textile exceed 7 and 10 per cent, respectively:

⁵⁸⁴ Exhibit COL-1.

⁵⁸⁵ Exhibit PAN-34; see also Article 231 of Decree No. 2685 (Exhibit PAN-32).

⁵⁸⁶ Article 115 of Decree No. 2685 of 1999 (Exhibit PAN-1).

⁵⁸⁷ Article 231 of Decree No. 2685 (Exhibit PAN-32).

⁵⁸⁸ Article 119 of Decree No. 2685 of 1999 (Exhibit COL-1); Article 115 of Decree No. 2685 of 1999 (Exhibit COL-1).

⁵⁸⁹ In its response to Panel question No. 154, Colombia confirmed that this advanced declaration requirement is an option for all goods arriving from all other points of departure except Panama (and the CFZ).

"Artículo 3°. Adicionase el artículo 153 de la Resolución 4240 de 2000, modificado por el artículo 49 de la Resolución 7002 de 2001, con los siguientes incisos:

'Podrán ser objeto de legalización sin el pago de rescate, las importaciones de telas y tejidos de materias textiles de los capítulos 50 al 60 del Arancel de Aduanas, respecto de los cuales se hubiere presentado Declaración Anticipada, cuando se presenten diferencias en el peso por metro cuadrado o el ancho de la tela y las mismas no superen el 7% y el 10%, respectivamente.

*Para acogerse a lo señalado en el inciso anterior, la Declaración de Legalización deberá presentarse dentro de los cinco (5) días hábiles siguientes a la llegada de la mercancía al territorio aduanero nacional."*⁵⁹⁰

7.316 In relation to this requirement, Article 128.7 of Decree No. 2685 of 1999, as modified by Decree No. 1232 of 2001, generally imposes a fee of 3 per cent of the value of the goods to correct errors in the description of the goods that exceed 7 per cent, in terms of weight per square metre, or 10 per cent in terms of width, within a period of five days after a declaration is presented:

"La autorización de levante procede cuando ocurra uno de los siguientes eventos:

*Cuando practicada inspección aduanera física se detecten errores u omisiones en la descripción, diferentes de los señalados en el numeral 4 del presente artículo, o por descripción incompleta de la mercancía que impida su individualización y el declarante, dentro de los cinco (5) días siguientes a la práctica de dicha diligencia, presenta Declaración de Legalización que los subsane, cancelando una sanción del tres por ciento (3%) del valor en aduana de la mercancía por concepto de rescate."*⁵⁹¹

7.317 As noted in paragraph 7.308 above, all textile imports arriving from Panama and the CFZ are subject to an advance import declaration requirement. Hence the special legalization requirement applies to *all* textile imports arriving from Panama and the CFZ.

7.318 Under Article 153 of Resolution No. 4240 of 2000, as modified by Article 1 of Resolution No. 8038 of 2005, imports classifiable under Chapters 50–60 of Colombia's Tariff Schedule arriving from all points of departure that are declared in advance are generally required to pay a fee to correct an import declaration in situations where differences in the weight per square metre or width of the textile exceed 7 and 10 per cent, respectively, and are similarly exempt when difference do not exceed these amounts.⁵⁹² However, importers of goods arriving from points of departure other than Panama and the CFZ are not required to, but may instead optionally present an advance import declaration. Thus, importers of goods from origins other than Panama or the CFZ are not mandatorily subject to the requirement to pay a fee of three per cent of the value of the goods to correct errors in the description of goods in excess of the 7 and 10 per cent margins explained above.

⁵⁹⁰ Exhibit PAN-34.

⁵⁹¹ Exhibit COL-1.

⁵⁹² Article 153 of Resolution No. 4240 of 2000 (Exhibit COL-2) provides:

"[P]odrán ser objeto de legalización sin el pago de rescate, las importaciones de telas y tejidos de materias textiles clasificables por los capítulos 50 al 60 del Arancel de Aduanas, para los cuales se hubiere presentado Declaración Anticipada, de conformidad con lo establecido en la Resolución 1513 de 2005, modificada por la Resolución 5482 del mismo año, cuando se presenten diferencias en el peso por metro cuadrado o el ancho de la tela, siempre que tales diferencias no superen el 7% y el 10%, respectivamente. Para acogerse a lo señalado en el inciso anterior, la Declaración de Legalización deberá presentarse dentro de los cinco (5) días hábiles siguientes a la llegada de la mercancía al territorio aduanero nacional."

7.319 The Panel will hereafter discuss the advance declaration and legalization fee requirements in connection with the obligation set forth in the ports of entry measure.

(b) The text of Article I of the *GATT 1994*

7.320 In this instance, the Panel is called upon to examine whether simultaneous imposition of the advance import declaration and legalization requirements under the ports of entry measure is inconsistent with Article I:1 of the *GATT 1994*. Article I:1 of the *GATT 1994* contains the Most-Favoured Nation (MFN) principle, considered as "a cornerstone of the GATT and ... one of the pillars of the WTO trading system".⁵⁹³ Article I:1 provides as follows:

"With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III, any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties."

7.321 The Appellate Body in *Canada – Autos* discussed the object and purpose of Article I:1:

"Th[e] object and purpose [of Article I] is to prohibit discrimination among like products originating in or destined for different countries. The prohibition of discrimination in Article I:1 also serves as an incentive for concessions, negotiated reciprocally, to be extended to all other Members on an MFN basis."⁵⁹⁴

7.322 As recognized by other panels, the Appellate Body's ruling in *EC – Bananas III* confirmed how to examine a measure under Article I:1:

"The Appellate Body in *Bananas III*, confirmed that to establish a violation of Article I, there must be an advantage, of the type covered by Article I and which is not accorded unconditionally to all 'like products' of all WTO Members."⁵⁹⁵

7.323 In accordance with the approach set out in *EC – Bananas III (Article 21.5 – US)*, and upheld by the Appellate Body, the Panel will conduct its analysis by first considering whether Colombia, by imposing the advanced import and legalization requirements within the ports of entry measure, confers an advantage of the type covered by Article I, and then determine whether the advantages are extended to all like products unconditionally. However, prior to doing so, the Panel must preliminarily establish whether Panama is eligible to bring a claim under Article I even though it does not currently export textiles, apparel and footwear of Panamanian origin to Colombia.

(c) Panama's right to bring a claim under Article I of the *GATT 1994*

7.324 Before proceeding to assess whether Colombia confers an advantage that is not extended unconditionally to all like products, the Panel will first address whether Panama may properly raise its claim under Article I:1 of the *GATT 1994*. Colombia has argued that it cannot be considered as having failed to meet its obligations under Article I:1 of the *GATT 1994* since Panama does not

⁵⁹³ Appellate Body Report, *Canada – Autos*, para. 69.

⁵⁹⁴ Appellate Body Report, *Canada – Autos*, para. 84.

⁵⁹⁵ Panel Report, *EC – Bananas III (Article 21.5 – US)*, para. 7.555, Panel Report, *Indonesia – Autos*, para. 14.138, citing to Appellate Body Report, *EC – Bananas III*, para. 206.

actually produce the textile, apparel and footwear at issue in this dispute. Colombia argues that Article I:1 only applies to products originating in one Member's territory as the provision is based on the origin of the product, and not on the place of exportation.⁵⁹⁶ In light of Panama's failure to demonstrate that it produces textile, apparel or footwear products for export, Colombia considers it has not failed to meet its obligations under Article I.⁵⁹⁷

7.325 In considering whether a measure violates Article I:1 based on its design, structure and architecture, Panama considers it legally irrelevant whether or not Panama produces the good in question.⁵⁹⁸ Panama considers that Article I:1 protects potential future trade, and the conditions of competition between suppliers of different origin, irrespective of trade volumes.⁵⁹⁹ Panama additionally notes that it currently produces at least one apparel product for export⁶⁰⁰, and has a potential export interest for other apparel as well as textiles and footwear.⁶⁰¹

7.326 The Appellate Body in *EC – Bananas III* has previously considered the issue of whether the United States had "standing" to bring a claim under the GATT. In that particular dispute, the United States filed a claim under the GATT against the European Communities, even though it did not, at that time, export bananas. The Appellate Body found the United States was sufficiently justified in raising its claim, stating:

"We are satisfied that the United States was justified in bringing its claims under the GATT 1994 in this case. The United States is a producer of bananas, and a potential export interest by the United States cannot be excluded ... We also agree with the Panel's statement that:

... with the increased interdependence of the global economy, ... Members have a greater stake in enforcing WTO rules than in the past since any deviation from the negotiated balance of rights and obligations is more likely than ever to affect them, directly or indirectly.^{602,603}

7.327 In reaching its conclusion, the Appellate Body noted that Members have broad discretion to bring a claim before the WTO:

"[W]e believe that a Member has broad discretion in deciding whether to bring a case against another Member under the DSU. The language of Article XXIII:1 of the GATT 1994 and of Article 3.7 of the DSU suggests, furthermore, that a Member is expected to be largely self-regulating in deciding whether any such action would be 'fruitful'. "⁶⁰⁴

⁵⁹⁶ Colombia's first written submission, para. 311.

⁵⁹⁷ Colombia's first written submission, para. 311.

⁵⁹⁸ Panama's first oral statement, para. 72.

⁵⁹⁹ Panama's second written submission, para. 162. Panama has stated it has a manufacturing industry with a potential interest in exporting to Colombia: see Panama's first oral statement, para. 74. In response to a question from the Panel, Panama also indicated that no Panamanian companies presently produce textiles, and does not export domestically produced footwear.

⁶⁰⁰ As mentioned in footnote 579, Panama submitted in response to Panel question No. 141 that one Panamanian Company exports a particular type of apparel, which it refers to as Panamanian *guayaberas*.

⁶⁰¹ Panama's first oral statement, para. 74; Panama's response to Panel question No. 141; Exhibits PAN 78(a) and (b).

⁶⁰² (*footnote original*) Panel Reports, para. 7.50.

⁶⁰³ Appellate Body Report, *EC – Bananas III*, para. 136.

⁶⁰⁴ Appellate Body Report, *EC – Bananas III*, para. 135. The Appellate Body considered the language in the chapeau of Article XIII ("If any Member should consider that any benefit accruing to it directly or

7.328 The Panel further notes the notion of protecting benefits that accrue to Members directly or indirectly within Article 3.3 of the DSU, which has Article XXIII of the *GATT 1994* as its basis:

"The prompt settlement of situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members."

7.329 In line with the Appellate Body's decision in *EC – Bananas III*, the Panel is satisfied that a sufficient basis exists for Panama to bring its claim under Article I:1 of the *GATT 1994*, with respect to subject textiles, apparel and footwear classifiable under Chapters 50–64 of Colombia's Tariff Schedule. As noted, Panama currently produces apparel for export, has stated its interest in exporting domestically produced footwear and other apparel in the future, and stated its potential to manufacture textiles in the future. In the Panel's view, Panama has sufficiently demonstrated its interest in a determination of rights and obligations under the *WTO Agreement*.

7.330 Accordingly, the Panel concludes that Panama is entitled to bring, and had sufficient interest to initiate and proceed, with an Article I:1 claim against Colombia in relation to its advance declaration and legalization measure concerning imports of textile, apparel and footwear products.

(d) Whether Colombia confers an advantage of the type covered by Article I:1 of the *GATT 1994*

7.331 The Panel will first consider whether Colombia, by imposing the requirement to present an advance import declaration, the requirement to pay customs duties and taxes on the basis of this declaration, and the legalization declaration fees under the ports of entry measure, confers an advantage of the type covered by Article I:1 of the *GATT 1994*.

7.332 The Panel recalls that under Article 119 of Decree No. 2685 of 1999, applicable to imported goods of all origins, an importer is generally permitted (but not required) to present an import declaration as early as 15 days prior to arrival of the goods, or may delay presentation of the import declaration until one month after the goods' arrival into Colombia or up to two months following arrival, subject to authorization by Colombia's customs authority.⁶⁰⁵ In combination with the requirement to present an import declaration, importers of goods are also required to pay customs duties and sales tax at the time an import declaration is presented.⁶⁰⁶

7.333 As explained in Section II:D, under the advance import declaration and legalization requirements within the ports of entry measure, importers of textiles, apparel and footwear arriving from Panama or the CFZ are required to present an advance import declaration not more than 15 days⁶⁰⁷, but not less than five days prior to the arrival of the goods in Colombia.⁶⁰⁸ Those importers of subject goods from Panama or the CFZ are also required to pay customs duties and taxes in advance.⁶⁰⁹ Any importer that fails to present an advanced import declaration upon entry will only be

indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded ...") alongside that in Article 3.7 of the DSU ("Before bringing a case, a Member shall exercise its judgement as to whether action under these procedures would be fruitful.")

⁶⁰⁵ Article 119 of Decree No. 2685 of 1999 (Exhibit COL-1); Article 115 of Decree No. 2685 of 1999 (Exhibit COL-1).

⁶⁰⁶ Article 119 of Decree No. 2685 (Exhibit COL-1).

⁶⁰⁷ Article 1 of Resolution No. 7373 of 2007 (Exhibit PAN-34); Article 1 of Resolution No. 7637 of 28 June 2007 (Exhibit PAN-36).

⁶⁰⁸ Article 1 of Resolution No. 9859 of 23 August 2007 (Exhibit PAN-46).

⁶⁰⁹ Since all importers are generally required to pay customs duties and sales tax at the time an import declaration is presented, importers of textiles and apparel from Panama and the CFZ, which are required to present an import declaration in advance, therefore, must pay customs duties and sales tax in advance.

able to proceed with importation if the importer submits a legalization declaration and pays a fee for the "rescate", or recovery, of the goods (equal to 15 per cent of the value of the goods) in addition to all customs duties and any accrued warehouse storage charges.⁶¹⁰ Otherwise, the importer must remove the goods from Colombian territory⁶¹¹ or the goods will be subject to seizure.⁶¹²

7.334 In addition to the requirement to present an advance declaration and pay customs duties and sales tax on the basis of that declaration, importers of textiles from Panama or the CFZ are subject to a requirement to pay a fee equal to 3 per cent of the value of the goods to correct errors in the import declaration, whenever discrepancies exceed 7 and 10 per cent of the value in terms of weight per square metre and width, respectively.⁶¹³ This means that under the advance import declaration and legalization requirements, importers of textiles from Panama or the CFZ are exempt from the fee only in cases where errors do not exceed the 7 and 10 per cent discrepancies.⁶¹⁴

7.335 On the basis of the text of Article I:1 and in light of Appellate Body's jurisprudence, Panama considers that the term "advantage" in Article I:1 should be interpreted broadly to include *any* advantage and not only those economic in nature, as the *GATT* is intended to protect competitive opportunities and not trade flows.⁶¹⁵ Panama considers the requirement to present an advance declaration and pay customs duties at that time creates a disadvantage for importers of textile from Panama, as importers are not able to inspect goods in advance.⁶¹⁶ If there are discrepancies between the information provided in the import declaration and the goods actually entered, then an importer will be required to file a legalization declaration under the ports of entry measure.⁶¹⁷ Second, if the discrepancies or errors in the description of goods exceed 7 per cent in terms of weight per square metre, or 10 per cent in terms of the width of the textile, the importer will be required to pay a fee for the "rescate", or recovery, of the goods.⁶¹⁸ Thus, the advantage granted to importers of textiles from other countries of being able to inspect the goods before submitting an import declaration is not an advantage extended to textile importers from Panama.⁶¹⁹

7.336 Colombia has argued that the concept of advantage in Article I only extends to any advantage that affects commercial opportunities in a way that creates more favourable competitive opportunities for products of a certain origin.⁶²⁰ In this sense, Article I:1 would not prohibit differences in conditions that apply to Members' imports as long as those differences do not extend a competitive advantage to other Members' imports.⁶²¹

7.337 Colombia argues that Panama has failed to demonstrate that the advance declaration requirement, which is optional for all importers and which is regularly used by importers to accelerate

⁶¹⁰ Article 231 of Decree No. 2685 (Exhibit PAN-32).

⁶¹¹ Article 6 of Resolution No. 7373 (Exhibit PAN-34); Article 231 of Decree No. 2685 (Exhibit PAN-32).

⁶¹² Article 115 of Decree No. 2685 of 1999 (Exhibit PAN-1).

⁶¹³ Article 128.7 of Decree No. 2685 of 1999 (Exhibit COL-1), as modified by Decree No. 1232 of 2001. The Panel notes under Article 153 of Resolution No. 4240 of 2000 (Exhibit COL-2), as modified by Article 1 of Resolution No. 8038 of 2005 all importers submitting an advance import declaration are required to pay a fee to correct an import declaration, where differences between the actual goods and what is stated in the import declaration exceed 7 per cent, in terms of weight per square metre, or 10 per cent in terms of width.

⁶¹⁴ Article 3 of Resolution No. 7373 of 22 June 2007 (Exhibit PAN-34).

⁶¹⁵ Panama's second oral statement, para. 61.

⁶¹⁶ Panama's second oral statement, para. 62.

⁶¹⁷ Resolution No. 7373, Article 6.

⁶¹⁸ Article 231 of Decree No. 2685.

⁶¹⁹ Panama's second oral statement, para. 62; Panama's response to Panel question No. 75.

⁶²⁰ Colombia's first written submission, para. 299, citing to *EC – Bananas III*, para. 7.239. Colombia considers that in the context of an economic agreement such as the *GATT*, the term "advantage" must have an economic meaning which implies that it refers to an advantage in economic and competitive terms (see Colombia's second written submission, para. 193).

⁶²¹ Colombia's first written submission, para. 302.

the importation process, imposes a competitive disadvantage.⁶²² Colombia considers the fact that many importers elect to use this advanced legalization option signifies that it must be seen as an advantage rather than a disadvantage.⁶²³ Colombia also submits that the 7 and 10 per cent discrepancy rule is favourable to importers and is intended to offset the fact that an importer is not able to inspect goods before importation. In what Colombia deems an "ordinary" situation, an importer is not allowed to legalize any discrepancies without having a fee assessed, whereas importers are able to do so whenever submitting an advance import declaration.⁶²⁴

7.338 Panama rejects Colombia's argument that importers' use of an advance import declaration signifies that it must be seen as an advantage.⁶²⁵ Panama notes primarily that the majority of importers have the option to file an advance declaration when the importer is certain about the contents of a particular shipment, whereas importers of textile from Panama must file an advance declaration for *all* shipments regardless of whether the importer is certain about the content and specifications of the shipment.⁶²⁶ Panama further rejects the notion that other importers' use of an optional advance declaration mitigates against considering an advance declaration requirement as disadvantageous. In this respect, Panama argues that it is not a requirement under Article I:1 to submit evidence in the form of adverse trade effects that these customs requirements create more favourable opportunities for other Members' imports.⁶²⁷ According to Panama, whether a measure violates Article I:1 does not depend on whether adverse trade effects result from the measure's imposition, but whether the measure is applicable based exclusively on the product's origin.⁶²⁸

7.339 The first issue before the Panel is thus whether Colombia, by imposing the advance import declaration and legalization requirements under the ports of entry measure, confers an advantage within the meaning of Article I:1 of the *GATT 1994* on textile, apparel and footwear imported from other WTO Members, as compared with like products imported from Panama or the CFZ.

7.340 The term "advantage" within Article I:1 of the *GATT 1994* has been interpreted broadly by the Appellate Body as well as GATT and WTO panels.⁶²⁹ In *Canada – Autos*, the Appellate Body discussed the significance of "any advantage ... granted by any Member to any product":

"We note next that Article I:1 requires that '*any advantage, favour, privilege or immunity granted by any Member to any product* originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of *all other Members*.' (emphasis added) The words of Article I:1 refer not to *some* advantages granted 'with respect to' the subjects that fall within the defined scope of the Article, but to '*any advantage*'; not to *some* products, but to '*any product*'; and not to like products from *some* other Members, but to like products originating in or destined for '*all other*' Members."⁶³⁰

⁶²² Colombia's first written submission, para. 302; Colombia's second written submission, para. 191; Colombia's second oral statement, para. 49.

⁶²³ Colombia's second written submission, para. 196.

⁶²⁴ Colombia's second oral statement, para. 50.

⁶²⁵ Panama notes that Colombia has not provided any evidence to substantiate this argument: Panama's second written submission, para. 153.

⁶²⁶ Panama's response to Panel question No. 75; Panama's second written submission, para. 154; Panama's second oral statement, para. 64.

⁶²⁷ Panama's first oral statement, para. 69; Panama's second written submission, para. 158.

⁶²⁸ Panama's first oral statement, para. 70.

⁶²⁹ The Appellate Body in *EC – Bananas III* commented that "a broad definition has been given to the term 'advantage' in Article I:1 of the *GATT 1994* by the Panel in *United States – Non-Rubber Footwear*." See Appellate Body Report, *EC – Bananas III*, para. 206, citing to GATT Panel Report, *US – Non-Rubber Footwear*, para. 6.9.

⁶³⁰ Appellate Body Report, *Canada – Autos*, para. 79.

7.341 The panel in *EC – Bananas III* considered that "advantages" within the meaning of Article I:1 are those that create "more favourable competitive opportunities" or affect the commercial relationship between products of different origins.⁶³¹

7.342 The parties consider that these measures constitute "rules and formalities in connection with importation".⁶³² As the Panel notes, Colombia has confirmed that importers of certain textiles, apparel and footwear originating in and/or arriving from Panama or the CFZ must present an import declaration no earlier than 15 days but no later than five days prior to the goods entry into Colombia, and pay customs duties and sales tax on the basis of this advance declaration.⁶³³ This requirement to present a declaration in advance applies only to importers of subject goods from Panama or the CFZ, as such an advance declaration remains an option for other importers whose goods do not transit through Panama before arriving to Colombia.⁶³⁴ Colombia has additionally confirmed that all importers of textiles must pay a fee to rectify import declarations, whenever the differences between the actual goods and what is stated in the import declaration with respect to the weight per square metre or the width exceed 7 and 10 per cent, respectively.⁶³⁵ While this latter requirement applies to all textile importers that *elect* to present an advance declaration, as Colombia has acknowledged that only importers of textiles arriving from Panama or the CFZ are obliged to present an advance declaration, the Panel concludes that only importers from Panama or the CFZ are necessarily subject to this 7 and 10 per cent discrepancy rule.⁶³⁶

7.343 As noted above, these requirements apply to subject goods originating in, *or* arriving from, Panama or the CFZ. In other words, these measures apply to goods originating in Panama or the CFZ as well as subject like-product goods originating in other countries which transit through Panama or the CFZ before arriving to Colombia. Like-product goods originating in other countries which do not transit through Panama or the CFZ are *not* subject to any of the above requirements outright, as long as the importer does not elect as an option to present an advance import declaration.

7.344 In light of Colombia's factual confirmations, the Panel concludes that the flexibility to present an import declaration simultaneous with (or after) the arrival of the goods provides an advantage to imports eligible for advance declarations as compared to imports that are not. As to whether this advantage is the type of "advantage" within the meaning of Article I:1 of the *GATT 1994*, the Panel notes the statement by the Appellate Body in *Canada – Autos*, discussed above:

"The words of Article I:1 refer not to *some* advantages granted 'with respect to' the subjects that fall within the defined scope of the Article, but to '*any advantage*'; not to *some* products, but to '*any product*'; and not to like products from *some* other Members, but to like products originating in or destined for '*all other*' Members."⁶³⁷

7.345 As demonstrated by this statement, the Appellate Body attributed a broad interpretation to the notion of "advantage".

7.346 In light of this broad view, the Panel disagrees with Colombia's contention that importers are not granted an advantage that affect commercial opportunities in a way that creates more favourable competitive opportunities for products of a certain origin. On the contrary, in the Panel's view, the measure has precisely that effect. Colombia argues that Panama has not presented any information to support its claim that an advanced import declaration, or the requirement to pay customs duties and

⁶³¹ Panel Report, *EC – Bananas III (Guatemala and Honduras)*, para. 7.239; Colombia's first written submission, para. 299; Panama's first written submission, para. 185

⁶³² Panama's first written submission, para. 184, Colombia's first written submission, para. 297.

⁶³³ Colombia's response to Panel question No. 154.

⁶³⁴ Colombia's response to Panel question No. 154.

⁶³⁵ Colombia's response to Panel question No. 77.

⁶³⁶ Colombia's response to Panel question No. 154.

⁶³⁷ Appellate Body Report, *Canada – Autos*, para. 79.

taxes in advance, or the limitation of legalization without a fee, affects a product's competitive opportunities or confers an advantage.⁶³⁸ However, the Panel disagrees.

7.347 As Panama has noted, importers of goods arriving from Panama are required to submit import declarations in advance, and accordingly, pay customs duties and taxes in advance. Importers of goods from other destinations, however, are not required to file import declarations in advance. Accordingly, those importers are granted flexibility to make customs duty and tax payments when they see fit. In addition to this aspect, and possibly more importantly, since importers of goods from Panama and the CFZ are required to present an advance declaration prior to the goods' arrival in Colombia, the importers are prevented from inspecting goods prior to presenting the related import declaration.⁶³⁹ As is the case with all textiles importers, a fee is assessed to correct an import declaration in cases where discrepancies in the reported weight per square metre or width are determined to exceed 7 and 10 per cent, respectively. In cases where differences are less than 7 and 10 per cent, an importer who has filed an advance declaration will be able to correct his declaration without being assessed a fee, just as an importer who has not presented an advance import declaration would. However, in cases where the difference is greater than 7 and 10 per cent, respectively, an importer who has filed an advance declaration would be assessed a fee. An importer who has not filed an advance import declaration would retain the option to inspect his goods on site upon arrival, verifying their dimension and weight, prior to submitting a declaration, thereby assuring himself of the accuracy of the declaration and avoiding the fees required to file a legalization declaration. In this sense, such an importer not filing an import declaration in advance, although able to do so, may avoid the assessment of fees, whereas an importer of goods arriving from Panama will not.

7.348 The Panel notes Colombia's assertion that the requirement to present an advance import declaration should not be considered a disadvantage to importers from Panama and the CFZ as many importers that are not required to do so nevertheless "regularly use" advance import declarations.⁶⁴⁰ Panama disputes this argument on a number of grounds. From a factual standpoint, Panama notes that Colombia has not presented any evidence to support this statement. In reference to the *US – Certain EC Products* dispute, Panama also argues that it is not a requirement under Article I:1 to submit evidence that these customs requirements create more favourable opportunities for other Members' imports.⁶⁴¹ Instead, a violation of Article I:1 can arise because a measure extends an advantage only to one Member's imports, but not to all Members' imports, and depends exclusively on the product's origin.⁶⁴² Colombia argues that Panama's reference to the case of *US – Certain EC Products* is erroneous, as the panel in that dispute found that a negligible effect arising from an increased bonding requirement did not detract from the basic conclusion that a continuous bond requirement significantly increased the burden on certain European Community products in 93 per cent of cases.⁶⁴³

⁶³⁸ Colombia's first written submission, para. 300, Colombia's second written submission, para. 196; Colombia's second oral statement, para. 50.

⁶³⁹ Colombia has confirmed in its response to Panel question No. 155 that importers may inspect goods before presenting an import declaration in ordinary situations, although Colombia asserted that inspection is not very common in practice. Colombia considers that certain importers are willing to file advance declarations in the interest of expediency, thereby taking on the risk that, in case of discrepancies, the importer will need to pay for the legalization of the goods.

⁶⁴⁰ Colombia's first written submission, para. 300. Colombia also notes that, by imposing this advanced import declaration, the two relevant customs administrations will have received prior information of the products that are being shipped to Colombia. This allows DIAN to have special customs officials in these administrations to examine particular shipments and it enables the use of "observadores" (experts in the smuggling of goods) to perform their tasks adequately, thus allowing DIAN to be more effective in combating smuggling.

⁶⁴¹ Panama's first oral statement, para. 69.

⁶⁴² Panama's first oral statement, para. 70.

⁶⁴³ Colombia's second written submission, para. 196, citing to Panel Report, *US – Certain EC Products*, para. 6.48.

7.349 The Panel considers this argument unpersuasive for several reasons. In the Panel's view, the conclusions in *US – Certain EC Products*, support the view taken by Panama. In discussing the effect of a continuous bond requirement, the Panel noted:

"We recall that approximately 93 per cent of the EC imports (and assuming therefore approximately 93 per cent of the EC listed imports) were subject to continuous entry bonds. From the evidence before us, we believe that in most cases of EC listed imports the 3 March Measure led to increased bonding requirements. There may, however, be situations where the 3 March additional bonding requirements were negligible or did not increase. We consider, however, that the object of our examination is the mechanism put in place through the 3 March Measure as a whole."⁶⁴⁴ (footnote omitted)

7.350 Thus, the panel in *US – Certain EC Products* recognized that although a measure may not have application in every situation, the relevant consideration remains the mechanism put in place by the measure, not its effect in a certain number of occasions or to a certain volume of imported products.

7.351 In examining the measure in terms of its design, the fact remains that for all imports arriving in Colombia without previously transiting through Panama or the CFZ, importers are given a number of options: to present an import declaration in advance, at the time of arrival or up to two months after arrival in certain cases. Despite the frequency with which importers opt to inspect goods, Colombia agrees that importers may choose to inspect goods before presenting an import declaration if permitted to do so.⁶⁴⁵ Colombia has noted that importers would conduct an inspection in cases where they have doubts about the reliability of the exporter or the specific shipment. Colombia has additionally pointed out that certain importers are willing to file advance declarations in the interest of expediency, thereby taking on the "risk" that, in case of discrepancies, the importer will need to pay for the legalization of the goods. In the Panel's view, these statements alone demonstrate the existence of an advantage of the type contemplated under Article I:1 of the *GATT 1994*. As Colombia notes, on certain occasions an importer may be willing to declare in advance for the sake of expediency, at the risk of paying a fee in case of discrepancies uncovered at the time of inspection. However, an importer in other occasions may perceive a high risk and choose to withhold presenting a declaration until he has determined the contents and specifications of the goods, in order to avoid discrepancies. Inherently, an advantage arises for an importer that can choose how to operate his business in order to enhance his profitability and competitiveness, among other concerns.

7.352 In light of the foregoing conclusions, the Panel determines that Colombia, by imposing the advance import declaration and legalization requirements within the ports of entry measure confers an advantage within the meaning of Article I:1 of the *GATT 1994*. In particular, one advantage arises from the fact that importers of subject goods from territories other than Panama or the CFZ are granted flexibility to make customs duty and tax payments when they see fit. Additionally, an importer that has not filed an advance import declaration would retain the option to inspect his goods on site upon arrival, verifying its dimension and weight, prior to submitting a declaration, thereby assuring himself of the accuracy of the declaration and avoiding fees required to file a legalization declaration.

(e) Whether like products from other Members are granted an advantage within the meaning of Article I:1 of the *GATT 1994*

7.353 The Panel will next consider whether like products from other Members are granted an advantage which is not extended unconditionally to subject goods from Panama. The Panel notes that

⁶⁴⁴ Panel Report, *US – Certain EC Products*, para. 6.51.

⁶⁴⁵ Colombia has confirmed this in its response to Panel question No. 155.

the advance import declaration and legalization requirements do not apply strictly on the basis of origin, but also depend on the path of transit taken by particular textile, apparel and footwear products. Thus, for instance, a textile product shipped from China with passage through Panama or the CFZ will be subject to the advance import declaration and legalization requirements. However, if the same good is shipped from China directly to Colombia that good will not be subject to these additional requirements, including the obligation to declare goods in advance and pay customs duties and taxes on the basis of that advance declaration.

7.354 The Panel further notes that the parties have not disputed whether textiles, apparel and footwear from other Members are like products to those arriving from Panama or the CFZ. However, as mentioned above, Colombia has challenged whether Panama has standing to bring a claim under Article I:1 on the basis of the fact that Panama does not export textiles, apparel or footwear products.⁶⁴⁶ We recall our finding that Panama is entitled to bring, and had sufficient interest to initiate and proceed with, an Article I:1 claim against Colombia in relation to its advance import declaration and legalization requirements within the ports of entry measure.

7.355 In the Panel's view, it is not necessary to determine through lengthy analysis whether textiles, apparel or footwear arriving from other countries are in fact like products to those goods originating in and arriving from Panama. Based on the design of the ports of entry measure, any textiles, apparel or footwear imported from territories other than Panama or the CFZ, are like products, and would necessarily be allowed entry at 11 ports of entry in Colombia without presenting an advance import declaration, as long as the product did not circulate through Panama or the CFZ prior to arrival in Colombia.⁶⁴⁷ The distinction between products, which determines whether or not an advance declaration is required (and hence whether customs duties and sales tax are assessed, and what rights are available to inspect merchandise and verify accuracy of the import declaration), is not based on the products *per se*, but rather on the territory from which the product arrives. In this sense, a product originating in, or arriving from Panama, or the CFZ identical in all respects to a product arriving into Colombia from any other territory (that did not circulate through Panama or the CFZ prior to arrival in Colombia), would be subject to the advance import declaration and other requirements at issue.

7.356 The Appellate Body has previously recognized the possibility of using hypothetical imports to determine whether a measure violates Article III:2 of the *GATT 1994*.⁶⁴⁸ Under the advance import declaration and legalization requirements, the distinction between products is based on the circulation and points of departure of textile, apparel and footwear products prior to the products' arrival in Colombia. In particular, since Panama does not currently produce any of these products for export to Colombia, but in light of the fact that the Panel views it as proper to consider Panama's claim, hypothetical imports from Panama or the CFZ are appropriate for consideration. An advance import declaration, advance payment of customs duties and taxes, and special rules concerning legalization would be required simply because of the products' origin. In the Panel's view, the hypothetical origin-based distinction that would arise if Panama were to produce the subject goods and export those goods to Colombia is sufficient for the Panel to proceed in considering Panama's claim under Article I:1 of the *GATT 1994*.

7.357 Therefore, the Panel considers it appropriate to proceed in comparing hypothetical textile, apparel and footwear products originating in Panama or the CFZ with those "like products" arriving from other Members (which have not previously circulated through Panama or the CFZ prior to

⁶⁴⁶ See Section VII.H.2(c).

⁶⁴⁷ Colombia has confirmed that while 26 ports of entry exist in its territory (see Colombia's first written submission, para. 185), textiles, apparel and footwear from all Members may only enter at 11 designated ports of entry (see Article 39 of Resolution No. 4240 of 2000 (Exhibit PAN-38)).

⁶⁴⁸ Appellate Body Report, *Canada – Periodicals*, pp. 20-21; see also Panel Report, *Indonesia – Autos*, para. 14.113.

arrival in Colombia). Accordingly, the Panel concludes that textile, apparel and footwear originating in Panama are like products to textiles, apparel and footwear originating in other countries.

(f) Whether Colombia confers an advantage that is not extended "immediately and unconditionally" to imports from Panama

7.358 The Panel will next determine whether the advantage discussed above has not been accorded "immediately and unconditionally" to goods from Panama. The Panel recalls its finding that the imposition of the advance import declaration and legalization requirements, in combination with restrictions on ports of entry⁶⁴⁹, grants an advantage to imports of textiles, apparel and footwear from countries other than Panama or the CFZ, as importers of those goods are not required to present an advance import declaration, pay customs duties and sales tax on the basis of the advance declaration, or conform with particular legalization requirements associated with the presentation of an advance declaration. The Panel recalls that importers of textiles, apparel and footwear from Panama are required to make an advance declaration, while importers of products from other territories maintain the option to do so, as long as those goods do not circulate through Panama or the CFZ prior to arrival in Colombia. As the Panel explained, the advantage arises from the fact that importers from countries other than Panama or the CFZ are granted flexibility to make customs duty and tax payments when they see fit. Additionally, an importer that has not filed an advance import declaration would retain the option to inspect his goods on site upon arrival, verifying its dimension and weight, prior to submitting a declaration, thereby assuring himself of the accuracy of the declaration and avoiding fees required to file a legalization declaration.

7.359 In light of these findings, the Panel must also establish that the discussed advantages have not been accorded "immediately and unconditionally" to goods from Panama. Panama considers it self-evident that the advantage has not been conferred immediately and unconditionally on imports from Panama and the CFZ as only importers of products arriving from Panama are required to present an advance declaration and comply with other customs requirements.⁶⁵⁰

7.360 Colombia argues that Panama has failed to demonstrate that such advantage is not extended "immediately and unconditionally" to imports from Panama. As noted above, Colombia considers that Members are permitted to attach conditions when granting an advantage in the first place, as long as additional conditions are not placed on certain Members while not on others.⁶⁵¹ In this sense, Colombia argues that Members are entitled to condition access to its market on compliance with and respect for the Member's laws and regulations, including customs laws.⁶⁵² Failure to respect the conditions may permit a Member to deny an advantage to an importer, as the privilege is conditioned on requirements, which, if not respected or met, may be revoked.⁶⁵³ In Colombia's view, its customs procedures are conditioned on the need for customs authorities to be able to control and verify imported merchandise from Panama and to avoid circumvention of such laws and regulation through under-invoicing, fraud and smuggling – general policy conditions that apply to all goods irrespective of their origin.⁶⁵⁴

7.361 We recall that the panel in *Canada – Autos* considered that the issue of whether an advantage within the meaning of Article I:1 is accorded "unconditionally" cannot be determined independently of an examination of whether it involves discrimination between like products of different

⁶⁴⁹ As discussed above in Section VII.H.2(a), these measures include Article 119 of Decree No. 2685 of 1999, Resolution No. 9859 of 23 August 2007, Article 231 of Decree No. 2685, Article 128.7 of Decree No. 2685 of 1999, and Article 153 of Resolution No. 4240 of 2000.

⁶⁵⁰ Panama's second written submission, para. 160.

⁶⁵¹ Colombia's first written submission, para. 304; Colombia's second written submission, para. 197.

⁶⁵² Colombia's first written submission, para. 306.

⁶⁵³ Colombia's first written submission, para. 306.

⁶⁵⁴ Colombia's first written submission, para. 307. Colombia noted in the preceding paragraph of its first written submission that the test of Article I is about discrimination not deregulation.

countries.⁶⁵⁵ The panel found that "[w]hether conditions attached to an advantage granted in connection the importation of a product offend Article I:1 depends upon whether or not such conditions discriminate with respect to the origin of products."⁶⁵⁶ The panel explained its view in light of the term "unconditionally" as it appears in Article I:1 in its context and in light of the object and purpose of Article I:1. The panel commented as follows:

"The word 'unconditionally' in Article I:1 does not pertain to the granting of an advantage *per se*, but to the obligation to accord to the like products of all Members an advantage which has been granted to any product originating in any country. The purpose of Article I:1 is to ensure unconditional MFN treatment. In this context, we consider that the obligation to accord 'unconditionally' to third countries which are WTO Members an advantage which has been granted to any other country means that the extension of that advantage may not be made subject to conditions with respect to the situation or conduct of those countries. This means that an advantage granted to the product of any country must be accorded to the like product of all WTO Members without discrimination as to origin.

In this respect, it appears to us that there is an important distinction to be made between, on the one hand, the issue of whether an advantage within the meaning of Article I:1 is subject to conditions, and, on the other, whether an advantage, once it has been granted to the product of any country, is accorded "unconditionally" to the like product of all other Members. An advantage can be granted subject to conditions without necessarily implying that it is not accorded "unconditionally" to the like product of other Members. More specifically, the fact that conditions attached to such an advantage are not related to the imported product itself does not necessarily imply that such conditions are discriminatory with respect to the origin of imported products."⁶⁵⁷

7.362 In line with the approach elaborated in the *Canada – Autos* dispute, the Panel considers that it may thus assess whether the advantage is conferred "immediately and unconditionally" based on whether an advantage granted to textiles, apparel or footwear of any Member is not similarly accorded to those products originating in Panama for reasons related to its origin or the conduct of Panama.

7.363 Colombia has confirmed that the requirement to present an advance import declaration and pay customs duties and taxes on the basis of this advance declaration apply to subject textile, apparel and footwear goods arriving from Panama.⁶⁵⁸ This is also clear on the face of the legislative instruments, discussed above, which specify goods arriving from Panama and the CFZ as applicable merchandise. Colombia has also clarified that the products other than those under the ports of entry measure are not subject to the requirement to present an advance declaration.⁶⁵⁹ Other products may optionally submit an advance import declaration, but are not required to do so.

7.364 The Panel notes Colombia's argument that the requirement to pay a fee to rectify import declarations outside the 7 and 10 per cent discrepancy rule, applies not just to Panamanian imports but to all textile imports. However, as noted above⁶⁶⁰, the Panel has determined that this requirement is disadvantageous in combination with the requirement to present an advance declaration, which prevents an importer from inspecting goods and determining its weight and width before submitting a customs declaration.

⁶⁵⁵ Panel Report, *Canada – Autos*, para. 10.22.

⁶⁵⁶ Panel Report, *Canada – Autos*, para. 10.29.

⁶⁵⁷ Panel Report, *Canada – Autos*, paras. 10.23-10.24.

⁶⁵⁸ Colombia's response to Panel question No. 73. Colombia's response to Panel question No. 154.

⁶⁵⁹ Colombia's response to Panel question No. 154.

⁶⁶⁰ See para. 7.347.

7.365 Based on Colombia's clarifications, since the option to present an import declaration in advance is denied to any textile, apparel or footwear goods originating in Panama or the CFZ based on the goods' origin, the Panel concludes that the advantages arising from the ability to present an import declaration in advance or withhold doing so until after the goods enter Colombia have not been extended unconditionally to imports from Panama.

7.366 With respect to Colombia's view that it may condition its customs procedures on the need to control and verify imported merchandise from Panama and to avoid circumvention of such laws and regulation through under-invoicing, fraud and smuggling, without violating Article I:1, the Panel reiterates the view expressed in *Canada – Autos*⁶⁶¹ that conditions attached to an advantage granted in connection with the importation of a product will violate Article I:1 when such conditions discriminate with respect to the origin of products. As such, in the Panel's view, Article I:1 prohibits Members from addressing such concerns through the use of customs rules that are applied on the basis of origin.

(g) Conclusion

7.367 Accordingly, the Panel concludes that, by subjecting textile, apparel and footwear imports arriving from Panama and the CFZ to an advance import declaration requirement, which thereby requires payment of customs duties and sales tax in advance, and by preventing inspection of goods on site upon arrival in order to verify the accuracy of the declaration and avoid payment fees prior to submitting a declaration, where applicable, Colombia confers advantages to like products from all other WTO Members and third countries that are not extended immediately and unconditionally to textile, apparel and footwear imports from Panama. Therefore, the Panel finds that Colombia's imposition of advance import declaration and legalization requirements within the ports of entry measure on imports of textiles, apparel and footwear arriving from Panama or the CFZ is inconsistent with Article I:1 of the *GATT 1994*.

I. WHETHER THE PORTS OF ENTRY MEASURE DENIES FREEDOM OF TRANSIT TO TEXTILES, APPAREL AND FOOTWEAR ARRIVING FROM PANAMA IN INTERNATIONAL TRANSIT IN CONTRAVENTION OF ARTICLE V:2 OF THE *GATT 1994*

1. Main arguments of the parties

7.368 Panama argues that Colombia's failure to permit "freedom of transit" to all textiles, apparel and footwear in international transit, and not only those that are trans-shipped, is inconsistent with its obligations under the first sentence of Article V:2 of the *GATT 1994*. Panama submits that Colombian law requires that goods must be trans-shipped from the same customs office⁶⁶², and not merely have their final destination outside of Colombia in order to be exempt from the port of entry restrictions.⁶⁶³ Thus, Colombian law only exempts textiles, apparel and footwear from port of entry and transit restrictions if the goods are trans-shipped.⁶⁶⁴ Panama argues that Article V:2, first sentence, as informed by Article V:1, obliges WTO Members to grant freedom of transit to traffic in transit to a territory of a third country regardless of whether the goods are trans-shipped or warehoused, or whether the importer breaks bulk or whether changes are made in the mode of transport.⁶⁶⁵

7.369 Panama additionally argues that the ports of entry measure violates Article V:2, second sentence. While textiles, apparel and footwear originating in, or transiting through Panama must enter

⁶⁶¹ Panel Report, *Canada – Autos*, para. 10.23.

⁶⁶² Panama's second written submission, para. 144.

⁶⁶³ Panama's second oral statement, para. 49.

⁶⁶⁴ Panama's second written submission, para. 146.

⁶⁶⁵ Panama's second oral statement, para. 50.

and clear customs at Bogotá or Barranquilla, Panama submits that goods arriving directly from other Member countries may enter at any of 11 eligible ports in Colombia (on the condition the goods did not first transit through Panama), and proceed in international transit without clearing customs. Under Article V:2, second sentence, Panama submits that Members may not make distinction between products arriving from another Member based on the place of origin or departure of goods.

7.370 Colombia argues that Panama's claim under Article V is invalid as the ports of entry measure does not apply to goods in international transit, but only goods, irrespective of their origin or point of shipment, which are shipped from Panama and have Colombia as a final destination. For this reason, Colombia submits that the ports of entry measure or any of its laws and regulations are consistent with Article V:2 of the *GATT 1994*.

7.371 Colombia submits that Article V:2 applies to goods as traffic in transit when the goods' passage across the territory of another Member is only a portion of a complete journey beginning and terminating beyond the frontier of the contracting party across whose territory the goods pass.⁶⁶⁶ Under the ports of entry measure, Colombia argues that textiles, apparel and footwear in international transit with a final destination outside Colombia are expressly exempt from restrictions on ports of entry, and can thus enter at any of 11 eligible ports.⁶⁶⁷

7.372 Colombia further disputes that the reference to trans-shipment within the port of entry measure's exemption clause allows for violations of Article V, first or second sentence.⁶⁶⁸ In practical terms, Colombia submits that it is only possible for goods to enter Colombia from Panama by sea or air, as no road connects the countries, thereby necessitating that the goods undergo trans-shipment in order to enter Colombia and proceed in international transit.⁶⁶⁹ As such, a requirement to undergo trans-shipment does not inhibit freedom of transit, as trans-shipment will always be necessary for goods arriving from Panama.

7.373 Despite its view that Panama has failed to meet its burden of proof to demonstrate that goods are not extended freedom of transit⁶⁷⁰, Colombia argues it is clear under its international obligations that freedom of transit is guaranteed for all merchandise from all countries.⁶⁷¹ Colombia has also stated that it is willing to make a public commitment that goods in international transit are not covered by the measure in question.⁶⁷²

2. Consideration by the Panel

(a) Legislation related to Colombia's international transit regime

7.374 As explained in Section VII.E.2(a) above, under the ports of entry measure, Colombia has imposed temporary restrictions on the importation of certain textiles, apparel and footwear classifiable under Chapters 50-64 of the Colombian Tariff Schedule arriving from Panama into Colombia. Specifically, under Article 2 of Resolution No. 7373⁶⁷³, as modified by Resolution No. 7637⁶⁷⁴, subject textiles, apparel and footwear may only be entered at Bogota airport or Barranquilla seaport:⁶⁷⁵

⁶⁶⁶ Colombia's first written submission, para. 278.

⁶⁶⁷ Colombia's first written submission, paras. 282-283; Colombia's second written submission, paras. 174-175.

⁶⁶⁸ Colombia's second written submission, para. 177; Colombia's second oral statement, para. 46.

⁶⁶⁹ Colombia's second written submission, para. 179; Colombia's second oral statement, para. 46.

⁶⁷⁰ Colombia's first written submission, para. 285; Colombia's second oral statement, para. 47.

⁶⁷¹ Colombia's first written submission, para. 284.

⁶⁷² Colombia's first written submission, para. 287.

⁶⁷³ See Exhibit PAN-34

⁶⁷⁴ See Exhibit PAN-36.

⁶⁷⁵ Exhibit PAN-34.

*"Las mercancías clasificables por los capítulos 50 al 64 del Arancel de Aduanas, procedentes de la República de Panamá, deberán ser ingresadas e importadas exclusivamente por la jurisdicción de la Administración Especial de Aduanas de Bogotá, si se transportan por vía aérea y por la jurisdicción de la Administración Local de Aduanas de Barranquilla, si se transportan por vía marítima, y por tanto, no procederá para estas mercancías la autorización del régimen de tránsito aduanero."*⁶⁷⁶

7.375 In addition to other exemptions, Article 4, paragraph 3 of Resolution No. 7373 provides that the general restriction imposed under Article 2 will not apply to goods which are submitted for trans-shipment, in consideration that goods that undergo trans-shipment do not have Colombia as a final destination:

*"Lo señalado en el artículo 2º, de la presente resolución no se aplicará sobre aquellos bienes que se pretendan someter a las modalidad de transbordo, considerando que en este caso la mercancía no tiene como destino final Colombia."*⁶⁷⁷

7.376 The restriction to two ports of entry, including the exemption applicable to goods in international transit, supersedes the regular transit regime under Colombian law. Article 1 of Colombia's Customs Statute permits transit of goods of foreign origin from one customs office to another located in the national territory. Pursuant to this provision, transport by transit, cabotage or trans-shipment is permitted:

"TRANSITO ADUANERO

Es el régimen aduanero que permite el transporte de mercancías nacionales o de procedencia extranjera, bajo control aduanero, de una Aduana a otra situadas en el territorio aduanero nacional."

En este régimen se pueden dar las modalidades de tránsito, cabotaje y transbordo."

7.377 Article 370 of Colombia's Customs Statute further defines the term "international transit" by reference to the relevant Andean Community provisions:

"ARTICULO 370. TRÁNSITO ADUANERO INTERNACIONAL.

Para la realización del tránsito aduanero internacional se aplicará lo previsto en las Decisiones 327 y 399 de la Comisión del Acuerdo de Cartagena o las normas que las sustituyan, modifiquen o adicionen y en lo pertinente, lo dispuesto en el presente Capítulo.

7.378 Andean Community Decision 327 defines international transit as the regime under which goods are transported from one port to another in a single operation, wherein goods cross one or more borders:

⁶⁷⁶ Exhibit PAN-36.

⁶⁷⁷ Exhibit PAN-36. Additionally, Article 4 exempts goods consigned or endorsed to the State; goods imported for specific state or emergency uses; goods arriving by travellers or postal traffic, or in route to Leticia, San Andrés or Santa Catalina; goods consigned to industrial users of free trade zones; and goods under subheadings 64.01 to 64.05 of Colombia's Tariff Schedule that arrive at any of the 11 ports designated in Article 39, paragraph 1 of Resolution No. 4240. Resolution No. 7637 further exempts goods consigned to "Highly Exporting Users" and "Permanent Customs Users": see Article 3 of Resolution No. 7637.

Tránsito Aduanero Internacional: *El régimen aduanero bajo el cual las mercancías sujetas a control aduanero son transportadas desde una aduana de partida hasta una aduana de destino en una misma operación de transporte internacional, en el curso de la cual se cruzan una o varias fronteras."*

7.379 Andean Community Decision 327 applies to goods in international transit between two ports in different Andean Member Countries as well as between two ports within the same Member country provided that the goods transit through another Member Country:

"AMBITO DE APLICACION

Artículo 2.- Las disposiciones de la presente Decisión regirán para las operaciones de transporte internacional de mercancías que circulen bajo el régimen de Tránsito Aduanero Internacional:

- Desde una aduana de partida de un País Miembro hasta una aduana de destino de otro País Miembro;*
- Desde una aduana de partida de un País Miembro con destino a un tercer país, en tránsito por uno o más Países Miembros distintos del de la aduana de partida; y*
- Desde una aduana de partida hasta una aduana de destino ubicadas en el mismo País Miembro, siempre que se transite por el territorio de otro País Miembro."*

7.380 Andean Community Decision 399 provides that goods transported by road to and from third countries, with passage through two or more Member Countries, will be subject to the national legislation of each of the Member Countries through which they pass or to the relevant provisions of international agreements in force:

"Artículo 7.- Para el transporte internacional de mercancías por carretera, se establecen los siguientes tráficó:

- a) Entre dos Países Miembros limítrofes;*
- b) Entre dos Países Miembros, con tránsito por uno o más Países Miembros;*
- c) Desde un País Miembro hacia un tercer país, con tránsito por uno o más Países Miembros distintos del país donde se inicia el transporte;*
- d) Desde un tercer país hacia un País Miembro, con tránsito por uno o más Países Miembros distintos del país donde termina el transporte; y,*
- e) En tránsito a través de dos o más Países Miembros desde y hacia terceros países.*

En los tráficó señalados en los literales c), d) y e) son aplicables las disposiciones de la presente Decisión y sus normas complementarias, sólo durante el recorrido por los Países Miembros.

Artículo 8.- El transporte internacional que efectúen transportistas de terceros países por el territorio de uno o más Países Miembros, se regirá por las normas nacionales de cada uno de los Países Miembros por los cuales se transite o por lo establecido en los convenios internacionales vigentes." (emphasis added)

7.381 In addition, Andean Community Decision 617 sets rules for free circulation of goods between Andean Community Member Countries from their place of origin to their destination without undergoing certain customs clearance procedures. In particular, freedom of transit is guaranteed for non-community goods that begin or conclude transit in a Member Country. Andean Community Decision 617 provides in relevant part:

"Artículo 7.- Los Países Miembros, con arreglo a los procedimientos establecidos en la presente Decisión, permitirán la circulación al amparo del régimen de tránsito aduanero comunitario de:

1. Mercancías Comunitarias

1.1 Desde una aduana de partida de un País Miembro hasta una aduana de destino del mismo País Miembro u otro País Miembro, en tránsito por uno o más Países Miembros.

1.2 Desde una aduana de partida de un País Miembro con destino a un tercer país, en tránsito por uno o más Países Miembros distintos del de la aduana de partida.

2. Mercancías No Comunitarias

2.1 Desde una aduana de partida de un País Miembro hasta una aduana de destino de otro País Miembro, en tránsito por uno o más Países Miembros distintos del País Miembro de partida.

2.2 Desde una aduana de partida de un País Miembro con destino a un tercer país, en tránsito por uno o más Países Miembros distintos del País Miembro de partida.

2.3 Desde un tercer país hasta una aduana de destino de un País Miembro, en tránsito por uno o más Países Miembros.

Artículo 8.- Las Aduanas de los Países Miembros permitirán la libre circulación de los medios de transporte y unidades de carga, con arreglo a las disposiciones establecidas en el ordenamiento jurídico comunitario y los Convenios Internacionales y Convenios Bilaterales de transporte suscritos por los Países Miembros que sean compatibles con el primero." (emphasis added)

7.382 Article 385 of Colombia's Customs Statute defines trans-shipment as follows:

"Es la modalidad del régimen de tránsito que regula el traslado de mercancías del medio de transporte utilizado para la llegada al territorio aduanero nacional, a otro que efectúa la salida a país extranjero, dentro de una misma aduana y bajo su control sin que se causen tributos aduaneros."

7.383 Article 387 specifies that trans-shipment may be direct (i.e. without deposit in a warehouse) or indirect (when goods are deposited in a warehouse during a period of storage):

"El transbordo puede ser directo si se efectúa sin introducir las mercancías a un depósito habilitado, o indirecto cuando se realiza a través de éste."

7.384 Andean Community Decision 327 similarly defines trans-shipment under international transit as involving the transfer of goods from one container or vehicle to another, in which goods are then transported from one customs port to another in a single operation, and where one or more borders are crossed.

"Transbordo: El régimen aduanero con arreglo al cual se realiza, bajo control de una aduana, el traslado de las mercancías de una unidad de carga o de un medio de transporte a otro.

Tránsito Aduanero Internacional: El régimen aduanero bajo el cual las mercancías sujetas a control aduanero son transportadas desde una aduana de partida hasta una aduana de destino en una misma operación de transporte internacional, en el curso de la cual se cruzan una o varias fronteras."

7.385 Andean Community Decision 617 additionally defines trans-shipment as the transfer of goods, within the same customs office, from a means of transport to another, or to the same means of transport in a separate trip, with or without unloading, with the objective of proceeding to the customs of destination:

"Operación de Transbordo: Traslado de mercancías, efectuado bajo control aduanero de una misma aduana, desde un medio de transporte o unidad de carga a otro, o al mismo en distinto viaje, incluida o no su descarga a tierra, con el objeto de que continúe hasta la aduana de destino."

(b) Article V of the *GATT 1994*

7.386 Article V is entitled "Freedom of Transit" and provides as follows:

1. Goods (including baggage), and also vessels and other means of transport, shall be deemed to be in transit across the territory of a contracting party when the passage across such territory, with or without trans-shipment, warehousing, breaking bulk, or change in the mode of transport, is only a portion of a complete journey beginning and terminating beyond the frontier of the contracting party across whose territory the traffic passes. Traffic of this nature is termed in this article 'traffic in transit'.

2. There shall be freedom of transit through the territory of each contracting party, via the routes most convenient for international transit, for traffic in transit to or from the territory of other contracting parties. No distinction shall be made which is based on the flag of vessels, the place of origin, departure, entry, exit or destination, or on any circumstances relating to the ownership of goods, of vessels or of other means of transport.

3. Any contracting party may require that traffic in transit through its territory be entered at the proper custom house, but, except in cases of failure to comply with applicable customs laws and regulations, such traffic coming from or going to the territory of other contracting parties shall not be subject to any unnecessary delays or restrictions and shall be exempt from customs duties and from all transit duties or other charges imposed in respect of transit, except charges for transportation or those commensurate with administrative expenses entailed by transit or with the cost of services rendered.

4. All charges and regulations imposed by contracting parties on traffic in transit to or from the territories of other contracting parties shall be reasonable, having regard to the conditions of the traffic.

5. With respect to all charges, regulations and formalities in connection with transit, each contracting party shall accord to traffic in transit to or from the territory

of any other contracting party treatment no less favourable than the treatment accorded to traffic in transit to or from any third country.⁶⁷⁸

6. Each contracting party shall accord to products which have been in transit through the territory of any other contracting party treatment no less favourable than that which would have been accorded to such products had they been transported from their place of origin to their destination without going through the territory of such other contracting party. Any contracting party shall, however, be free to maintain its requirements of direct consignment existing on the date of this Agreement, in respect of any goods in regard to which such direct consignment is a requisite condition of eligibility for entry of the goods at preferential rates of duty or has relation to the contracting party's prescribed method of valuation for duty purposes.

7. The provisions of this Article shall not apply to the operation of aircraft in transit, but shall apply to air transit of goods (including baggage)."

7.387 As its title indicates, Article V of the *GATT 1994* thus generally addresses matters related to "freedom of transit" of goods. This includes protection from unnecessary restrictions, such as limitations on freedom of transit, or unreasonable charges or delays (via paragraphs 2-4), and the extension of Most-Favoured-Nation (MFN) treatment to Members' goods which are "traffic in transit" (via paragraphs 2 and 5) or "have been in transit" (via paragraph 6).⁶⁷⁹

(c) Interpretation of Article V:2 of the *GATT 1994*

7.388 The Panel is called upon to determine whether the ports of entry measure is inconsistent with the first and second sentences of Article V:2 of the *GATT 1994*. As was the case with the *Customs Valuation Agreement*, Article V has never before been interpreted by the Appellate Body or a GATT/WTO panel. The Panel's task is therefore arduous since it will be necessary to interpret Article V of the *GATT 1994* without any meaningful guidance.

7.389 Accordingly, the Panel will proceed to analyse Panama's claim under Article V:2 in accordance with the principles of treaty interpretation set for the in the *VCLT*. In particular, the Panel will consider Article V:2 in accordance with its ordinary meaning in its context and in light of its object and purpose where necessary. To the extent the meaning of any terms in Article V:2 are unclear, the Panel may also resort to supplementary means of interpretation, including the *travaux préparatoires* to inform its interpretation.

(i) *The scope of the concept of traffic in transit in Article V:2*

7.390 The Panel will proceed to examine the scope of the term "traffic in transit" in Article V:2 by considering the text of this provision on its face and in light of the context provided by Article V:1.

7.391 The Panel notes that the text of Article V:2, first sentence refers to "traffic in transit". In particular, this provision reads: "There shall be freedom of transit through the territory of each contracting party, via the routes most convenient for international transit, for *traffic in transit* to or from the territory of other contracting parties." (emphasis added) The second sentence of Article V:2 provides that "[n]o distinction shall be made which is based on the flag of vessels, the place of origin,

⁶⁷⁸ The Ad Note to Article V:5 provides as follows: "With regard to transportation charges, the principle laid down in paragraph 5 refers to like products being transported on the same route under like conditions."

⁶⁷⁹ Paragraph 7 clarifies that the provisions of Article V of the *GATT 1994* apply equally to transit of goods by aircraft.

departure, entry, exit or destination, or on any circumstances relating to the ownership of goods, of vessels or of other means of transport."

7.392 The Panel recalls that both parties have referred to Article V:1 to inform the scope of the obligations under Article V:2. In particular, Article V:1 defines goods as "traffic in transit" when their passage across the territory of a Member "with or without trans-shipment, warehousing, breaking bulk, or change in the mode of transport, is only a portion of a complete journey beginning and terminating beyond the frontier of the Member across whose territory the traffic passes".⁶⁸⁰

7.393 In light of this definition, and in reference to the obligations in Article V:2, first sentence, Panama argues that WTO Members are obliged to grant freedom of transit to traffic in transit to a territory of a third country, via the route most convenient for international transit, regardless of whether the goods are trans-shipped or warehoused, or whether the importer breaks bulk or whether changes are made in the mode of transport.⁶⁸¹ Colombia has argued in favour of a similar view, submitting that the obligations in Article V apply only to goods destined for sale outside of the country through which the goods pass.⁶⁸²

7.394 The Panel notes that the protections in Article V:1 and the second sentence of Article V:2 are based on corresponding provisions of the 1921 Barcelona Convention.⁶⁸³ A draft text for all of Article V provisions was discussed at a 28 November 1946 meeting of the Preparatory Committee of the International Conference on Trade and Employment, after which the Technical Sub-Committee published a report commenting on the United States Suggested Charter for an International Trade Organization of the United Nations, including Article 10 of this report, entitled "Freedom of Transit".⁶⁸⁴ While this report offers perhaps the most extensive discussion on the development of provisions at issue in Article V, commentary by participants to the meeting related to Article V:1 and Article V:2 is limited.

7.395 Subsequent to the entry into force of the original GATT in 1947, the provisions in Article V were also considered by the Interim Commission for the International Trade Organization at a 1948 United Nations Conference on Trade and Employment.⁶⁸⁵ The draft Havana Charter for an International Trade Organization, which was reviewed and partly modified at the Conference, includes as its Article 33 a nearly verbatim copy of Article V. Several differences exist between the GATT and Havana Charter texts. For instance, the Havana Charter does not include the interpretative note contained in the GATT, instead containing three different interpretative notes to its Article 33,

⁶⁸⁰ Taken as a whole and read objectively, Article V:1 appears plainly definitional in purpose. In its entirety, this provision defines when goods qualify as being "in transit across the territory of a contracting party".

⁶⁸¹ Panama's second oral statement, para. 50.

⁶⁸² Colombia's first written submission, paras. 277-278.

⁶⁸³ See Articles 1 and 2 of the Convention and Statute on Freedom of Transit, Barcelona, April 29, 1921. See also UN doc. E/PC/T/C.II/54/Rev.1.

⁶⁸⁴ UN doc. #/PC/T/C.II/54/Rev.1, pp. 7-12. The report of the Technical Subcommittee was entitled "Preparatory Committee of the International Conference on Trade and Employment" and is dated 28 November 1946. The report notes that the meeting served as "the occasion for a thorough examination and exchange of views upon the provisions of the United States Suggested Charter for an International Trade Organization of the United Nations in regard to the General Commercial Provisions, namely Articles 9-17 inclusive, and the General Exceptions, Article 32." (see p. 3). Only slight differences exist between Article 10 of the United States Suggested Charter, discussed above, and Article V of the *GATT 1947/1994*. For instance, paragraph 1 of Article 10 refers to "Baggage and goods, and also vessels, coaching and goods stock, and other means of transport", and specifies that "[t]he provisions of this Article shall not apply to air traffic in transit". Paragraph 1 of Article V, on the other hand, refers to "Goods (including baggage), and also vessels and other means of transport", and does not exclude treatment of air traffic in transit (although Article V:7 now provides for this exclusion).

⁶⁸⁵ United Nations Conference on Trade and Employment, Final Act and Related Documents, dated April 1948.

concerning transit.⁶⁸⁶ Hence, while several differences exist between the GATT and Havana Charter texts, none inform interpretation of the provisions at issue. Accordingly, the preparatory work related to the first and second paragraphs of Article V is not of assistance.

7.396 In the Panel's view, the definition of "traffic in transit" provided in Article V:1 seems sufficiently clear on its face. When applied to Article V:2, "freedom of transit" must thus be extended to all traffic in transit when the goods' passage across the territory of a Member is a only a portion of a complete journey beginning and terminating beyond the frontier of the Member across whose territory the traffic passes. Freedom of transit must additionally be guaranteed with or without trans-shipment, warehousing, breaking bulk, or change in the mode of transport.

7.397 The Panel notes that the term "traffic in transit" does not appear in Article V:2, second sentence. This provision reads: "No distinction shall be made which is based on the flag of vessels, the place of origin, departure, entry, exit or destination, or on any circumstances relating to the ownership of goods, of vessels or of other means of transport." In spite of the absence of an explicit reference to traffic in transit in this second sentence of Article V:2, the Panel believes that it is sufficiently clear from its text that the MFN obligation in the second sentence is closely related to the obligation to extend freedom of transit, in the first sentence. In the Panel's view, the second sentence complements and expands upon the obligation to extend freedom of transit, stating additionally that distinctions must not be made based on the nationality, or place of origin, departure, entry, exit or destination of the vessel transporting goods. Moreover, both obligations form part of the same textual provision.

7.398 Accordingly, the Panel will now examine in detail the substantive obligations in the first and second sentences of Article V:2.

(ii) *The substantive obligations in Article V:2, first and second sentences*

Article V:2, first sentence

7.399 The Panel recalls that, while noting that Article V or any other provision of the *GATT 1994* do not provide a definition of the term "freedom of transit", Panama submits that the definition of "freedom" means the "the unrestricted use of something".⁶⁸⁷ Therefore, Panama argues that traffic in transit must be allowed unrestricted through the territory of a Member.⁶⁸⁸ The Panel also recalls that Colombia has not commented on the significance of this obligation, but has asserted that the ports of entry measure falls outside the scope of Article V, as it exempts all goods in international transit.⁶⁸⁹

⁶⁸⁶ Article V of the GATT includes a single interpretative note while Article 33 contains three separate interpretative notes. Consequently, Article V lacks the interpretative note providing that "[i]f, as a result of negotiations in accordance with paragraph 6, a Member grants to a country which has no direct access to the sea more ample facilities than those already provided for in other paragraphs to Article 33, such special facilities may be limited to the land-locked country concerned unless the Organization finds, on the complaint of any other Member, that the withholding of the special facilities from the complaining Member contravenes the most-favoured-nation provisions of this Charter." Also noteworthy, Article V of the *GATT 1947/1994* lacks a provision appearing in Article 33(6) of the Havana Charter, which allows the organization to "... undertake studies, make recommendations and promote international agreement relating to the simplification of customs regulations concerning traffic in transit, the equitable use of facilities required for such transit and other measures designed to promote the objectives of this Article. Members shall co-operate with each other directly and through the Organization to this end." This provision was incorporated into the Havana Charter at the Havana Conference. See Havana Reports, UN Doc. ICITO/1/8, p. 3, para. 16.

⁶⁸⁷ Panama's first written submission, para. 171, citing *The New Oxford Dictionary of English*, (Clarendon Press, 2nd Ed. 2001), p. 730.

⁶⁸⁸ Panama's first written submission, para. 172.

⁶⁸⁹ Colombia's first written submission, para. 275.

7.400 In addition to the definition of "freedom", the Panel notes the significance of the rest of the text in Article V:2. The opening text in Article V:2, first sentence ("*There shall be freedom of transit through the territory of each contracting party ...*") introduces the obligation – the provision of "freedom of transit" by Members within their territory. The intermediate clause in Article V:2, first sentence ("*... via the routes most convenient for international transit ...*") imposes a limiting condition on the obligation – that freedom of transit should be provided on the most convenient routes. The remainder of Article V:2, first sentence ("*... for traffic in transit to or from the territory of other contracting parties*") explains that "freedom of transit" must be provided for 'traffic in transit' entering and then subsequently departing from the Member's territory. The Panel notes that the term of art "traffic in transit" has been defined in the preceding section to include goods when those goods' passage across the territory of a Member with or without trans-shipment, warehousing, breaking bulk, or change in the mode of transport, is only a portion of a complete journey beginning and terminating beyond the frontier of the Member across whose territory the traffic passes.⁶⁹⁰

7.401 In light of the ordinary meaning of freedom and the text of Article V:2, the Panel concludes that the provision of "freedom of transit" pursuant to Article V:2, first sentence *requires* extending unrestricted access via the most convenient routes for the passage of goods in international transit whether or not the goods have been trans-shipped, warehoused, break-bulked, or have changed modes of transport. Accordingly, goods in international transit from any Member must be allowed entry whenever destined for the territory of a third country. Reasonably, in the Panel's view, a Member is not required to guarantee transport on necessarily any or all routes in its territory, but only on the ones "most convenient" for transport through its territory.

Article V:2, second sentence

7.402 The Panel shall now turn to examine the scope of the obligation in Article V:2, second sentence. In this regard, the Panel considers that the obligation in Article V:2, second sentence is clear on its face: Members shall not make distinctions between goods which are "traffic in transit" based on the flag of vessels; the place of origin, departure, entry, exit or destination of the vessel; or on any circumstances relating to the ownership of goods, of vessels or of other means of transport. As noted, the first sentence in Article V:2 addresses freedom of transit for goods in international transit. As a complement to this protection, the Panel considers that Article V:2, second sentence further prohibits Members from making distinctions in the treatment of goods, based on their origin or trajectory prior to arriving in their territory, based on their ownership, or based on the transport or vessel of the goods. Accordingly, the Panel concludes that Article V:2, second sentence requires that goods from all Members must be ensured an identical level of access and equal conditions when proceeding in international transit.

(iii) *Whether the ports of entry measure violates Article V:2 of the GATT 1994*

7.403 In light of the above conclusions on the interpretation of the obligations in Article V:2, the Panel will examine whether the ports of entry measure restricts the freedom of transit of goods arriving from Panama as "traffic in transit" in violation of the first sentence of Article V:2. In addition, the Panel will determine whether Colombia violates Article V:2 by making distinctions in goods arriving from Panama based on any of the conditions listed in the second sentence of Article V:2.

Whether the ports of entry measure is inconsistent with Article V:2, first sentence

7.404 The Panel recalls Panama's argument that ports of entry measure denies freedom of transit to textile, apparel and footwear goods arriving from Panama by requiring that all goods undergo trans-shipment as a pre-requisite to proceeding in international transit. Panama has recognized, pursuant to

⁶⁹⁰ See para. 7.396.

Article 4, paragraph 3 of Resolution No. 7373, that textiles, apparel and footwear from Panama in international transit which undergo trans-shipment are exempt from the ports of entry restrictions. Panama nevertheless disputes that those goods arriving from Panama are granted the requisite freedom of transit. Panama considers it a logical consequence that goods subject to trans-shipment procedures will not have Colombia as their final destination. However, Panama argues that the relevant factor at issue is that the goods are subject to trans-shipment procedures, not that the goods have a country other than Colombia as their final destination.⁶⁹¹

7.405 Panama notes that Article 4 of Resolution No. 7373 does not *allow* trans-shipment, but instead provides that transit restrictions will not apply to goods that are trans-shipped.⁶⁹² Therefore, Panama concludes that goods *must* be trans-shipped in order to qualify for the Article 4 exemption. Principally, Panama argues that Article V:2, as informed by Article V:1, obliges WTO Members to grant freedom of transit to traffic in international transit regardless of whether the goods are trans-shipped or warehoused, or whether the importer breaks bulk or whether changes are made in the mode of transport.⁶⁹³ In addition, Panama notes that under Colombian law, trans-shipment refers to the transfer of goods from the means of transportation used for the arrival of the goods in Colombia to another means of transportation that will be used to take the goods out of Colombia.⁶⁹⁴ Under this definition, Panama considers that textiles, apparel and footwear arriving from Panama must be transferred from one mode of transport to another at the same customs office, and then goods must be transferred via a mode of transport that has its immediate destination outside of Colombia.⁶⁹⁵ As such, Panama argues that goods arriving by sea would not be allowed to transit by land through Colombia to another country as the goods would not be trans-shipped from ship to a vehicle that has an immediate destination beyond Colombian territory.⁶⁹⁶ Moreover, Panama considers it is irrelevant that both direct or indirect trans-shipment is permitted, the latter of which allows for goods to be warehoused prior to trans-shipment, as those goods must be warehoused at the same customs office.⁶⁹⁷

7.406 Panama dismisses Colombia's view that because transit involving trans-shipment is allowed, without condition, then *a fortiori* transit without trans-shipment is allowed. Panama notes, if this proposition were correct, and trans-shipment were not intended as a limitation, then Article 4 would have read that the ports of entry restrictions would not apply to goods that do not have Colombia as their final destination, which is not how it reads.⁶⁹⁸

7.407 Thus, in Panama's view, not all subject goods with a destination outside Colombia are exempt from the restrictions. Only those goods in international transit that undergo trans-shipment and depart by a mode of transport that has an immediate destination beyond Colombian territory will be exempt from the ports of entry measure. Otherwise, the ports of entry measure requires that those goods arriving in Colombia are restricted to entry at Barranquilla or Bogota. For these reasons, Panama submits that restrictions on ports of entry and the requirement to trans-ship goods violate the obligation under Article V:2, first sentence, to guarantee freedom of transit via the most convenient routes for all goods that are traffic in international transit.⁶⁹⁹

⁶⁹¹ Panama's second written submission, para. 145.

⁶⁹² Panama's second written submission, para. 146.

⁶⁹³ Panama's second oral statement, para. 50.

⁶⁹⁴ Panama's first oral statement, para. 56, citing to Article 385 of Colombia's Customs Statute; see also Section VII.I.2(a).

⁶⁹⁵ Panama's first oral statement, para. 57; Panama's second written submission, para. 144; Panama's second oral statement, para. 49.

⁶⁹⁶ Panama's second written submission, para. 145.

⁶⁹⁷ Panama's second written submission, para. 146.

⁶⁹⁸ Panama's second written submission, para. 147.

⁶⁹⁹ Due to the fact that the terms of the ports of entry measure apply only to goods arriving from Panama and the CFZ, Panama asserts that the ports of entry measure is also inconsistent with the obligations under Article V:2, second sentence, which prohibits Members from making distinctions on freedom of transit

7.408 As noted above⁷⁰⁰, Colombia has argued that the obligations in Article V apply only to goods in international transit that are destined for sale outside of the country through which the goods transit. Colombia argues that the ports of entry measure only applies to textile, apparel and footwear goods which have Colombia as their final destination, and clearly exempts those goods that enter Colombia from Panama but have a final destination outside of Colombia.⁷⁰¹ In light of the port of entry measure's Article 4 exemption, Colombia thus submits that all textile, apparel and footwear goods in international transit that arrive from Panama may enter unrestricted at any of Colombia's 11 eligible ports.⁷⁰² Since all textile, apparel and footwear products are not restricted, Colombia considers there cannot be any violation of Article V.⁷⁰³

7.409 Colombia disputes that the reference to trans-shipment in the Article 4 exemption violates its obligations to extend freedom of transit to goods in international transit. In support of this view, Colombia insists that the whole rationale of the Article 4 exemption and the ports of entry measure relating to customs enforcement argues against such a reading of the term "trans-shipment" as exempting only goods in international transit that are trans-shipped.⁷⁰⁴ Moreover, Colombia submits that its international obligations make clear that freedom of international transit is guaranteed for all merchandise regardless of whether the goods are trans-shipped, warehoused, the importer breaks bulk, or changes are made in the mode of transport.⁷⁰⁵ In particular, Colombia submits that Article 370 of its Customs Statute, by reference to Article 327, 399 and 617 of Andean Community legislation⁷⁰⁶, establishes that freedom of international transit is guaranteed irrespective of the mode of transport.⁷⁰⁷ Finally, Colombia argues that any requirement to trans-ship goods does not limit freedom of transit for goods arriving from Panama, since the absence of a road connecting Panama with Colombia necessitates that all deliveries from Panama must undergo trans-shipment to enter Colombian markets.⁷⁰⁸ Thus, Colombia submits that all goods entering Colombia from Panama in international transit would necessarily meet the conditions of the Article 4 exemption.

7.410 To the extent any further doubts exist that Colombia does not guarantee freedom of transit to goods arriving from Panama in international transit, Colombia submits that past practice reveals that textiles, apparel and footwear arriving from Panama have indeed been permitted to proceed in international transit without limitation whenever the importer complied with the requirements in Resolution No. 7373 and demonstrated goods would be consumed elsewhere.⁷⁰⁹ Colombia has also offered to make a public commitment that goods in international transit are not covered by the measure in question.⁷¹⁰

7.411 While rejecting that it is necessary to demonstrate in practice that goods arriving from Panama have been allowed to proceed in international transit, Panama disputes the argument that the ports of entry measure is consistent with Article V:2, despite its trans-shipment requirement, based on the notion that any good in transit from Panama must necessarily undergo trans-shipment due to the unavailability of a road connecting Panama and Colombia. Contrary to this claim, Panama has argued

based on place of origin or departure, or on any circumstances relating to ownership of the goods (see Panama's First oral statement, para. 62). The Panel will consider this claim in Section VII.J

⁷⁰⁰ See Section VII.I.1.

⁷⁰¹ Colombia's first written submission, para. 282.

⁷⁰² Colombia's first written submission, paras. 282-283; Colombia's second written submission, paras. 174-175.

⁷⁰³ Colombia's second written submission, para. 177; Colombia's second oral statement, para. 46.

⁷⁰⁴ See Colombia's response to Panel question No. 71.

⁷⁰⁵ Colombia's first written submission, para. 284; Colombia's response to Panel question No. 69.

⁷⁰⁶ The full text of these provisions appear in Section VII.I.2(a).

⁷⁰⁷ See Colombia's response to Panel question No. 69.

⁷⁰⁸ Panama's response to Panel question No. 66; Colombia's second written submission, para. 179.

⁷⁰⁹ Colombia's first written submission, para. 286; Colombia's second written submission, para. 177; Exhibit COL-29.

⁷¹⁰ Colombia's first written submission, para. 287; Colombia's response to Panel question No. 70.

that goods may be shipped from Panama, arrive in Ecuador, then transit through Colombia by truck with Venezuela as a final destination.⁷¹¹ In this respect, Panama also notes that Andean Community law cited by Colombia, in particular Article 7 of Andean Decision 617, does not govern the transit of goods from a non-Andean Community country (e.g. Panama) through an Andean Community Member (e.g. Colombia), that has a non-Andean Community country as the final destination (e.g. Venezuela). Regardless, Panama argues that the circumstances prevailing in *most* cases cannot justify a failure to accord freedom of transit in *all* cases.⁷¹²

7.412 Panama also disputes that the examples provided by Colombia in Exhibit COL-29 demonstrate that freedom of transit is guaranteed. Panama argues that the goods in these examples were allowed transit based on *other* special exemptions under Article 4 of Resolution No. 7373, thus failing to show that all goods arriving from Panama are assured freedom of international transit. Under Article 4 of Resolution No. 7373, Panama notes that textile, apparel and footwear goods consigned or endorsed to the State, or to imports effected for processing, travellers or postal traffic, or to goods consigned to industrial users of free trade zones or to "Permanent Customs Users" are exempt from the port of entry restrictions.⁷¹³

7.413 The issue before the Panel is therefore whether freedom of transit is extended to subject textiles, apparel and footwear arriving from Panama in international transit, via the exemption in Article 4, paragraph 3, of Resolution No. 7373.

7.414 The Panel concluded above⁷¹⁴ that the provision of "freedom of transit" requires extending *unrestricted* access via the most convenient routes for the passage of goods in international transit whether or not the goods have been trans-shipped, warehoused, break-bulked, or have changed modes of transport. While a Member is not required to guarantee transport on necessarily any or all routes in its territory, transit must be provided on those routes "most convenient" for transport through its territory.

7.415 Article 4 of Resolution No. 7373 indicates that exemption from the measure imposing the ports of entry restriction arises where goods are "subjected to trans-shipment".⁷¹⁵ Article 385 of Colombia's Customs Statute, which Colombia has described as applicable to the ports of entry measure⁷¹⁶, defines trans-shipment as the transfer of goods from the means of transportation used for the arrival of the goods in Colombia to another means of transportation that will be used to take the goods out of Colombia (as translated).⁷¹⁷

7.416 Based on the Panel's earlier interpretation that freedom of transit under Article V:2 must be extended to goods in international transit regardless of whether the goods have been trans-shipped or have changed modes of transport, the Panel preliminarily finds that the language in Article 4, paragraph 3, when considered in light of the definition of "trans-shipment" as it appears in applicable Colombian legislation, *denies* freedom of transit to *all* textiles, apparel and footwear that are traffic in transit arriving from Panama or the CFZ.

⁷¹¹ See Panama's response to Panel question No. 66.

⁷¹² See Panama's response to Panel question No. 66.

⁷¹³ See Panama's first oral statement, para. 58.

⁷¹⁴ See Section VIII.2(c)(ii).

⁷¹⁵ In this sense, Article 4 provides "la presente resolución no se aplicará sobre aquellos bienes que se pretendan someter a las modalidad de transbordo."

⁷¹⁶ Colombia's response to Panel question No. 69.

⁷¹⁷ Article 385 defines "transbordo", or trans-shipment, in its original text as follows: "Es la modalidad del régimen de tránsito que regula el traslado de mercancías del medio de transporte utilizado para la llegada al territorio aduanero nacional, a otro que efectúa la salida a país extranjero, dentro de una misma aduana y bajo su control sin que se causen tributos aduaneros".

7.417 The Panel is of the view that, on its face, the violation is clear. As Panama noted, the right to proceed in international transit under the Article 4 exemption of the ports of entry measure is conditioned on whether goods arriving from Panama or the CFZ are trans-shipped, and not on whether the goods have a country other than Colombia as their final destination. The applicable definition of "trans-shipment" in Colombian law indicates that goods must be transferred between means of transportation that will be used to remove the goods from Colombia. As such, goods must be trans-shipped in order to proceed as traffic in transit, in plain contravention of the definition given to the term of art "traffic in transit" in Article V:1.

7.418 The Panel thus agrees with Panama's concern that Colombia's definition of trans-shipment fails to guarantee that goods arriving from Panama or the CFZ will be permitted to transit through Colombia by land after arriving by sea or air in Colombia. Article 385 of Colombia's Customs Statute indicates that arriving goods must be transferred from the means of transportation used for their arrival to another means of transportation *that will be used to take the goods out of Colombia*. Under this definition, it is thus not clear whether goods arriving in Colombia by boat from Panama may be transferred to a truck to proceed in international transit, when that truck does not have an immediate direct route to a final destination outside Colombia. Although the Panel shares this concern, the Panel reiterates that its finding is based on the express requirement that goods be trans-shipped in order to proceed in international transit.

7.419 The Panel further considers Colombia's additional arguments insufficient to rebut the presumption of violation arising from the trans-shipment requirement in the Article 4 exemption in Resolution No. 7373. In particular, the Panel will address Colombia's arguments that its international commitments, geographic considerations and past practice reveal that Colombia ensures freedom of international transit for all textile, apparel and footwear goods arriving from Panama or the CFZ.

7.420 The Panel will first address Colombia's argument that by virtue of its participation in the Andean Community, Colombia is obliged to guarantee freedom of international transit to all covered goods arriving from non-Community members when in international transit through its territory. The Panel notes under Decision 399, as indicated in its Article 8, international transportation provided by carriers from third countries through the territory of one or more member countries, shall be regulated by the national legislation of each of the member countries through which they pass or by the provisions of international agreements in force. Andean Community Decision 617, in turn sets rules for free circulation of goods among Andean Community member countries. However, Article 7 of this Decision notably does not recognize transit of goods from a third country, such as Panama, through one or more members' territories (e.g. Colombia), to a final destination in another third country (e.g. Venezuela). As such, the Andean Community Decisions cited by Colombia do not regulate all conceivable transit trajectories for international transit by non-Community member countries. Accordingly, the Panel disagrees that Colombia's Andean Community commitments demonstrate that international transit is in all cases guaranteed for covered merchandise from Panama. Instead, Andean Community Decision 399 explains that transportation by third countries through member countries, such as Colombia, will be subject to national legislation, which, as the Panel noted above, has been deemed inconsistent with Article V:2 on its face. Moreover, due to the inapplicability of Andean Community legislation to non-member to non-member transit matters, definitions of trans-shipment in Andean Community Decisions 327 and 617 provided by Colombia are not relevant to the Panel's consideration.

7.421 The Panel also finds unpersuasive Colombia's arguments that past practice reveals that textiles, apparel and footwear arriving from Panama have indeed been permitted to proceed in international transit without limitation whenever the importer complied with the requirements in Resolution No. 7373 and demonstrated goods would be consumed elsewhere.⁷¹⁸ Panama has argued

⁷¹⁸ Colombia's first written submission, para. 286; Colombia's second written submission, para. 177; Exhibit COL-29.

that examples presented by Colombia do not demonstrate that international transit is guaranteed on the basis that goods in these examples were allowed transit based on *other* special exemptions under Article 4 of Resolution No. 7373.⁷¹⁹ Setting aside Panama's argument, the Panel finds it difficult to conclude anything on the basis of examples presented in Exhibit COL-29, referred to by Colombia. At most, each example indicates that the goods departed from China (Shanghai in the first example and Chiwan in the second example), arrived in Buenaventura, and have Bogota as a destination. The Panel cannot identify any indication that the goods will proceed to a destination beyond Colombia, thus calling into question how the exhibits demonstrate that freedom of transit is ensured for "traffic in transit". Based on the absence of adequate information, the Panel rejects the argument that Exhibit COL-29 sufficiently demonstrates that freedom of international transit is ensured for all covered merchandise.

7.422 Colombia has also argued that the requirement in Article 4 of the ports of entry measure to trans-ship goods does not limit freedom of transit for goods arriving from Panama, since the absence of a road connecting Panama with Colombia necessitates that all deliveries from Panama must undergo trans-shipment to enter Colombian markets.⁷²⁰ Essentially, Colombia is arguing that any goods arriving from Panama would never have the occasion to transit through Colombia without undergoing trans-shipment (e.g. from boat or aircraft to another vehicle, such as a truck or second airplane), thus necessarily meeting the conditions of the Article 4 exemption. The Panel recalls that to rebut Colombia's claim, Panama has presented an example of a good first shipped to Ecuador, and then proceeding to Venezuela via a route that enters Colombia... In response to Panama's example, Colombia has stated that such a route would be highly unrealistic due to business impracticalities, but submits that such entry would be permitted subject to the condition that the importer posted a guarantee and ensured that the goods were destined for consumption outside of Colombia.⁷²¹ In the Panel's view, Panama has not sufficiently demonstrated to the Panel the possibility let alone the practicality of goods arriving in Colombia via a route through Ecuador. Nor has Colombia provided any evidence to demonstrate that such a route is impossible, even if it is impractical. However, in the Panel's view, whether or not Panama has done so cannot in itself resolve the matter of whether Colombia ensures freedom of transit, within the meaning of Article V:2 to all goods arriving from Panama and proceeding in international transit. As noted above, the text of the Article 4 exception within Resolution No. 7373 on its face is inconsistent with the requirement set forth in Article V:2. Thus, the Panel is not persuaded that Colombia's argument that all goods from Panama must necessarily undergo trans-shipment is adequate to rebut our preliminary finding that the ports of entry measure fails to accord freedom of transit to goods arriving from Panama or the CFZ within the meaning of Article V:2.

7.423 Accordingly, the Panel concludes that by requiring that goods undergo trans-shipment in order to proceed in international transit, Colombia has failed to extend freedom of transit via the most convenient routes to goods arriving from Panama in international transit within the meaning of Article V:2 as informed by Article V:1 of the *GATT 1994*. The Panel therefore finds Colombia's port of entry measure is inconsistent with Article V:2 of the *GATT 1994*.

7.424 Having reached its finding, the Panel however recognizes that as indicated by Colombia, most, if not all of the subject goods shipped from Panama, arrive in Colombia via sea or air transport, and thus undergo trans-shipment before proceeding in international transit or importation.

⁷¹⁹ In particular, Panama emphasized that Article 4 of Resolution No. 7373 exempts textile, apparel and footwear goods consigned or endorsed to the State, or to imports effected for processing, travellers or postal traffic, or to goods consigned to industrial users of free trade zones or to "Permanent Customs Users" are exempt from the port of entry restrictions.

⁷²⁰ Colombia's response to Panel question No. 67; Colombia's second written submission, para. 179.

⁷²¹ Colombia's response to question No. 7 from Panama.

7.425 Colombia has expressed its willingness to make a public commitment regarding the guarantee of freedom of transit to goods arriving from Panama.⁷²² The Panel understands that this "public commitment" while commendable would not involve an amendment of the wording of Article 4 of Resolution No. 7373 to allow for an exemption from the measure imposing the ports of entry restriction to all goods in international transit.

7.426 The Panel notes that in previous GATT/WTO disputes, where a measure included in the terms of reference was otherwise amended or removed following the initiation of panel proceedings, panels have nevertheless made findings in respect of such a measure.⁷²³ Article 3.7 of the *DSU* provides that the aim of the dispute settlement mechanism is to secure a positive solution to a dispute. Article 3.4 of the *DSU* provides that recommendations or rulings made by the DSB shall be aimed at achieving a satisfactory settlement of the matter. The Panel believes that declining to rule on this issue on the basis of Colombia's promise to publicly commit to allow all international transit, would not allow it to secure a positive solution to this dispute and to make sufficiently precise recommendations and rulings so as to allow for prompt compliance.⁷²⁴ The Panel's view may have been different if Colombia had amended the text of Article 4 to allow all international transit. In the current circumstances, though, the Panel believes that a public commitment is not sufficient for the Panel to find otherwise.

Whether the ports of entry measure is inconsistent with Article V:2, second sentence

7.427 Panama has additionally claimed that the ports of entry measure and Colombian legislation is inconsistent with the obligations in the second sentence of Article V:2 by making distinctions on freedom of transit based on place of origin or departure, or on any circumstances relating to ownership of the goods.

7.428 The Panel recalls its conclusion that Article V:2 extends MFN obligations to goods based on the circumstances of their transit, and prohibits Members from making distinctions in the treatment of goods, based on their origin or trajectory prior to arriving in their territory, based on their ownership, or based on the transport or vessel of the goods.

7.429 The Panel notes that the ports of entry measure applies exclusively to textile, apparel and footwear goods originating in or arriving from Panama or the CFZ. As such, only those goods arriving from Panama or the CFZ are subject to the requirement within the Article 4 exemption in Resolution No. 7373 to trans-ship goods in order to proceed in international transit. The Panel recalls its finding that Colombia has failed to extend freedom of transit to goods arriving from Panama due to this requirement. Since this requirement is imposed on goods arriving from Panama, the requirement is based on the goods' origin (i.e. the goods originated in Panama or the CFZ), and based on its trajectory prior to arriving in Colombia (i.e. the goods originated in a third country but transited through Panama or the CFZ prior to arriving in Colombia).

7.430 Accordingly, in light of the fact that only goods arriving from Panama or the CFZ are subject to the requirements under the Article 4 exemption, while goods originating in or departing from a Member other than Panama are permitted to proceed in international transit, the Panel finds that Colombia makes distinctions based on the place of origin or departure of textiles, apparel and footwear arriving from Panama or the CFZ in violation of the second sentence of Article V:2.

⁷²² Colombia's first written submission, para. 287; Colombia's response to Panel question No. 70.

⁷²³ Panel Report, *Indonesia – Autos*, para. 14.9, Appellate Body Report, *Argentina – Footwear*, para. 64, Panel Report, *US – Wool Shirts and Blouses*, para. 6.2, where the US measure was withdrawn shortly before the issuance of the Panel Report, GATT Panel Report, *EEC – Dessert Apples*, GATT Panel Report, *EEC – Apples (US)*, GATT Panel Report, *US – Canadian Tuna*, GATT Panel Report, *EEC – Apples I (Chile)*, GATT Panel Report, *EEC – Animal Feed Proteins*.

⁷²⁴ Appellate Body Report, *Australia – Salmon*, para. 223, Appellate Body Report, *Chile – Price Band System*, paras. 140-143.

(iv) *Conclusion*

7.431 Accordingly, the Panel finds that the ports of entry measure is inconsistent with both the first and second sentences of Article V:2 of the *GATT 1994*.

J. WHETHER THE RESTRICTION ON PORTS OF ENTRY APPLICABLE TO TEXTILES, APPAREL AND FOOTWEAR ARRIVING FROM PANAMA IS INCONSISTENT WITH ARTICLE V:6 OF THE *GATT 1994*

1. Main arguments of the parties

7.432 Panama argues that Colombia's ports of entry measure accords treatment less favourable to goods in transit through Panama than that which would have been accorded had those same goods been shipped directly from their place of origin without transiting through Panama and therefore is inconsistent with Article V:6 of the *GATT 1994*.

7.433 Panama argues that Article V:6 requires WTO Members in whose territory importation occurs to accord treatment not less favourable to goods that have been in transit through another WTO Member than they would have accorded to those products had they not transited through that Member.⁷²⁵ In Panama's view, an examination of the ordinary meaning of the terms in Article V:6 confirms that it applies to goods which "have been" in transit *to* a Member's territory in the sense that the journey of goods which were previously in transit has terminated.⁷²⁶ Panama considers the immediate context of the other terms in Article V:6, second sentence, notably the references to the terms "direct consignment", the "entry of goods" at "preferential rates of duty" and the Member's "prescribed method of valuation for duty purposes", confirm that the obligation applies to the Member in whose territory the journey terminates.⁷²⁷ Panama further submits that the placement of this obligation in Article V:6 among the other provisions in Article V in its entirety is reasonable as the obligation present in Article V:6 establishes a most-favoured-nation-requirement to sanction practices by importing Members that may restrict or undermine the freedom of transit through other WTO Members.⁷²⁸

7.434 In light of its interpretation, and in consideration of the fact that the ports of entry measure is exclusively applicable to goods which have arrived in Colombia after transiting through Panama or the CFZ, Panama considers the violation of Article V:6 is clear.

7.435 Colombia argues that Panama's claim under Article V:6 is invalid since the ports of entry measure does not apply to merchandise in transit through Colombia with a final destination elsewhere. As Colombia argued in relation to its claim under Article V:2, Colombia contends that the title and first paragraph of Article V provide context and clearly delineate the obligations in Article V:6. According to Colombia, Article V only contains obligations related to "freedom of transit" and as such, all provisions under Article V are limited in scope to goods in transit when the passage across a Member's territory is a portion of a journey "beginning and terminating beyond the frontier of the contracting party across whose territory the traffic passes".⁷²⁹

7.436 Colombia reiterates its argument presented in relation to its claim under Article V:2 that all textiles, apparel and footwear arriving from Panama in international transit through Colombia are exempted from restrictions.⁷³⁰ Due to the exemption, Colombia submits that textile, apparel and

⁷²⁵ Panama's second oral statement, para. 54, Panama's second written submission, para. 151.

⁷²⁶ Panama's first oral statement, para. 63, Panama's second written submission, para. 150, Panama's second oral statement, para. 54.

⁷²⁷ Panama's second oral statement, para. 55, Panama's second written submission, para. 150.

⁷²⁸ Panama's second oral statement, para. 57.

⁷²⁹ Colombia's second written submission, para. 182, Colombia's second oral statement, para. 48.

⁷³⁰ Colombia's second written submission, para. 184.

footwear goods of any origin that have transited through Panama may enter any of the 11 designated ports, when in transit to a final destination elsewhere, just as if those goods had arrived directly from their place of origin.

2. Consideration by the Panel

(a) Legislation related to Colombia's international transit regime

7.437 In the preceding Sections VII.C.1-VII.I, the Panel discussed Colombian legislation applicable to textile, apparel and footwear goods arriving from Panama, including the regulation of subject goods arriving for final consumption in Colombia as well as those subject goods proceeding through Colombia in international transit to destinations beyond Colombia.

7.438 Panama considers that the port of entry measure is inconsistent with Article V:6 based on the requirement under Article 2 of Resolution No. 7373⁷³¹, as modified by Resolution No. 7637⁷³² (explained in detail in Section VII.E.2(a) above), that textiles, apparel and footwear classifiable under Chapters 50-64 of the Colombian Tariff Schedule arriving from Panama into Colombia may only be entered at Bogota airport or Barranquilla seaport:

*"Las mercancías clasificables por los capítulos 50 al 64 del Arancel de Aduanas, procedentes de la Republica de Panamá, deberán ser ingresadas e importadas exclusivamente por la jurisdicción de la Administración Especial de Aduanas de Bogotá, si se transportan por vía aérea y por la jurisdicción de la Administración Local de Aduanas de Barranquilla, si se transportan por vía marítima, y por tanto, no procederá para estas mercancías la autorización del régimen de tránsito aduanero."*⁷³³

7.439 Colombia, on the other hand, argues that the port of entry measure is fully consistent with Article V:6, in light of the exemption in Article 4 of Resolution No. 7373 (explained in Section VII.I.2(a) above), which provides that the general restriction imposed under Article 2 of Resolution No. 7373 does not apply to goods which are submitted for trans-shipment, in consideration that goods that undergo trans-shipment do not have Colombia as a final destination:

*"Lo señalado en el artículo 2º, de la presente resolución no se aplicará sobre aquellos bienes que se pretendan someter a las modalidad de transbordo, considerando que en este caso la mercancía no tiene como destino final Colombia ..."*⁷³⁴

7.440 The Panel will consider both parties' arguments in relation to Article V:6 in the context of this legislation.

⁷³¹ Exhibit PAN-34.

⁷³² Exhibit PAN-36.

⁷³³ Exhibit PAN-34.

⁷³⁴ Exhibit PAN-34. Additionally, Article 4 exempts goods consigned or endorsed to the State; goods imported for specific state or emergency uses; goods arriving by travellers or postal traffic, or in route to Leticia, San Andrés or Santa Catalina, goods consigned to industrial users of free trade zones; and goods under subheadings 64.01 to 64.05 of Colombia's Tariff Schedule that arrive at any of the 11 ports designated in Article 39, paragraph 1 of Resolution No. 4240. Resolution No. 7637 further exempts goods consigned to "Highly Exporting Users" and "Permanent Customs Users": see Article 3 of Resolution No. 7637.

(b) Article V of the *GATT 1994*

7.441 Article V:6 of the *GATT 1994* provides as follows:

"Each contracting party shall accord to products which have been in transit through the territory of any other contracting party treatment no less favourable than that which would have been accorded to such products had they been transported from their place of origin to their destination without going through the territory of such other contracting party. Any contracting party shall, however, be free to maintain its requirements of direct consignment existing on the date of this Agreement, in respect of any goods in regard to which such direct consignment is a requisite condition of eligibility for entry of the goods at preferential rates of duty or has relation to the contracting party's prescribed method of valuation for duty purposes."

7.442 The full text of Article V appears above in Section VII.I.2(b) above.

(c) Interpretation of Article V:6 of the *GATT 1994*

7.443 The Panel is therefore called upon to determine whether the ports of entry measure is inconsistent with Article V:6 of the *GATT 1994*. As the Panel noted in relation to Panama's claims under Article V:2⁷³⁵, Article V addresses matters related to "freedom of transit" of goods. This is reflected in the title of the provision. Moreover, the Panel noted that Article V:6 generally extends MFN protection to Members' goods which "have been in transit".

7.444 The parties dispute the proper interpretation of this text as it informs the scope of coverage of Article V:6. As was the case with Article V:2, neither the Appellate Body nor a GATT/WTO panel has ever interpreted Article V:6. Accordingly, the Panel will again analyse Panama's claim under Article V:6 in accordance with the principles of treaty interpretation set forth in the *VCLT*. The Panel will thus consider Article V:6 in accordance with its ordinary meaning in its context and in light of its object and purpose, where necessary. The Panel may also resort to supplementary means of interpretation, including the *travaux préparatoire* to inform its interpretation, whenever the meaning of its term is ambiguous.

(d) The scope of application of the MFN obligation in Article V:6 of the *GATT 1994*

7.445 The Panel will first consider the ordinary meaning of the terms in Article V:6 on its face and in its context. As the parties' arguments indicate, the central issue is whether Article V:6 extends MFN obligations to Members whose territory is the ultimate destination of the good in transit, or whether the obligation only extends to Members whose territory a good passes through intermediately in route to a final destination elsewhere.

7.446 Article V:6 provides in its first sentence that:

"Each contracting party shall accord to products *which have been in transit* through the territory of any other contracting party treatment no less favourable than that which would have been accorded to such products had they been transported from their place of origin to their destination without going through the territory of such other contracting party." (emphasis added).

7.447 The Panel recalls Panama's argument that the application of the principles of treaty interpretation to Article V:6 makes clear that Article V:6 imposes obligations on the country in which

⁷³⁵ See Section VII.I.

the goods terminate their journey, in this case, Colombia.⁷³⁶ Panama notes that Article V:6, first sentence imposes an obligation on WTO Members to respect products that "have been" in transit through another Member.⁷³⁷ The reference to "have been" means that the transit across the territory of another WTO Member has already taken place and the goods are not longer in transit, but are in the country in which they terminate their journey.⁷³⁸ Panama notes that Article V:1 makes no qualification that goods in transit have to be sold outside the country through which the goods transit.⁷³⁹ In Panama's view, while paragraphs 2-5 of Article V refer to the obligation to provide freedom of transit through its territory, Article V:6 refers to the obligation imposed on the Member whose territory is the final destination not to discriminate against goods.⁷⁴⁰ Thus, Panama argues the obligation in Article V:6, first sentence is that the WTO Member in whose territory the journey terminates must accord treatment no less favourable to goods that have been in transit through another WTO Member than they would have accorded to those products had they not been in transit through that Member.⁷⁴¹ In effect, Article V:6, first sentence, established an MFN requirement that must be observed by the country of destination.⁷⁴²

7.448 Panama considers the immediate context of the other terms in Article V:6, second sentence, confirm that the obligation applies to the Member in whose territory the journey terminates. In particular, Panama notes the second sentence includes the terms "direct consignment", the "entry of goods" at "preferential rates of duty" and the Members "prescribed method of valuation for duty purposes."⁷⁴³ Panama submits that all these terms relate to the final importation of goods in a Member's territory and make clear that the Member upon which the obligations are imposed is the importing country and not the country of transit.⁷⁴⁴

7.449 As a matter of proper treaty interpretation, Panama considers the placement of paragraph 6 of Article V reasonable as it sanctions practices by importing Members that may restrict or undermine the freedom of transit through other WTO Members.⁷⁴⁵ Moreover, Panama argues its interpretation of Article V:6 would not result in duplication of the protections provided in Article I:1. In Panama's view, Article I:1 provides protection from discrimination on the basis of the origin of goods, while Article V:6 requires that Members do not discriminate on the basis of the country through which the goods have been in transit.⁷⁴⁶

7.450 Colombia has argued that all the provisions in Article V contain obligations related to "freedom of transit" for goods in transit when the passage across a Member's territory is a portion of a journey beginning and ending beyond the frontier of the Member across whose territory the traffic passes.

7.451 Colombia argues that the context of Article V, including its title and the definition of goods in transit in Article V:1 guide interpretation of Article V:6. In the context of Article V:1, Colombia submits that Article V:6 does not impose on Members any obligations to goods that do not have another Member's territory as their final destination.⁷⁴⁷ The phrase in Article V:1 that goods "beginning and terminating beyond the frontier of the contracting party across whose territory the

⁷³⁶ Panama's second oral statement, para. 53.

⁷³⁷ Panama's second oral statement, para. 54.

⁷³⁸ Panama's second oral statement, para. 54.

⁷³⁹ Panama's second written submission, para. 150.

⁷⁴⁰ Panama's second written submission, para. 150.

⁷⁴¹ Panama's second oral statement, para. 54.

⁷⁴² Panama's second written submission, para. 150.

⁷⁴³ Panama's question No. 8 to Colombia, Panama's second written submission, para. 150, Panama's second oral statement, para. 55.

⁷⁴⁴ Panama's second oral statement, para. 55.

⁷⁴⁵ Panama's second oral statement, para. 57.

⁷⁴⁶ Panama's second oral statement, para. 59.

⁷⁴⁷ Colombia's second written submission, para. 181; Colombia's second oral statement, para. 48.

traffic passes" informs that all subsequent obligations in Article V do not apply to goods which terminate in a Member's territory.⁷⁴⁸ Colombia argues that this is the context in which Articles V:2 – 6 must be read.⁷⁴⁹ The definition of goods "in transit" establishes the scope of Article V.⁷⁵⁰ While noting that Article V:6 has never been ruled upon previously, Colombia argues that views expressed by the WTO Secretariat and academic scholars support its view.⁷⁵¹ Moreover, Colombia argues that Panama's interpretation of MFN obligations in Article V:6 would essentially undo the explicit limitation of MFN protections as provided to goods based on their origin, set forth in Article I:1 of the *GATT 1994*.⁷⁵²

7.452 Colombia also disputes Panama's argument that the exemption for direct consignment in Article V:6, second sentence would be rendered inutile by interpreting the scope of the first sentence as limited to goods in transit *through* a Member's territory.⁷⁵³ Colombia argues that the direct consignment exemption merely indicates that Members were not prevented from maintaining historical consignment rules and has nothing to do with whether a Member is allowed to discriminate between goods in transit directly from their place of origin as compared to goods which transit through other Member territories before arriving at their final destination.⁷⁵⁴ Instead, Colombia considers the second sentence to be out of place, as it is unexpected that anything dealing with direct consignment, preferential duty rates and customs valuation should appear in Article V. According to Colombia, this is readily apparent since Article V deals with goods in transit that would not be subject to customs duties.⁷⁵⁵

7.453 The Panel notes that Article V:6, first sentence includes the phrase "*products which have been in transit* through the territory of any other contracting party" (emphasis added) when discussing the applicable goods regulated by the provision. The Panel notes that the phrase incorporates the present perfect tense of the verb "to be". No other provisions in Article V employ the present perfect verb tense, instead relying on the term of art "traffic in transit", which is defined in Article V:1, when discussing the applicable goods regulated by the provision.⁷⁵⁶ In particular, Article V:5 addresses MFN protection requiring parties to accord "treatment no less favourable" to "traffic in transit through the territory of any other contracting party" "[w]ith respect to all charges, regulations and formalities in connection with transit". The text of Article V:6 does *not* provide that each contracting party shall accord treatment no less favourable to *traffic in transit through the territory of any other contracting party*. Moreover, Members are not obliged to accord MFN protection to products which *are* in transit, or to products which *were* in transit. Instead, Article V:6 requires Members to extend MFN protection to "*products which have been in transit* through the territory of any other contracting party".

⁷⁴⁸ Colombia's first written submission, para. 279; Colombia's second written submission, para. 182.

⁷⁴⁹ Question No. 8 from Panama to Colombia.

⁷⁵⁰ Colombia's second written submission, para. 182.

⁷⁵¹ Colombia's second written submission, paras. 185-186.

⁷⁵² Colombia's second written submission, para. 188.

⁷⁵³ Question No. 8 from Panama to Colombia.

⁷⁵⁴ Question No. 8 from Panama to Colombia.

⁷⁵⁵ Question No. 8 from Panama to Colombia.

⁷⁵⁶ The Panel notes that Article V:1 defines the term "traffic in transit". Subsequently, paragraphs 2-5 employ this term. Paragraph 2 reads in part: "There shall be freedom of transit ... for *traffic in transit* ..." (emphasis added). Paragraph 3 reads in part: "Any contracting party may require that *traffic in transit* through its territory be entered at the proper custom house ..." (emphasis added). Paragraph 4 reads in part: "All charges and regulations imposed by contracting parties on *traffic in transit* ..." (emphasis added). Paragraph 5 reads: "With respect to all charges, regulations and formalities in connection with transit, each contracting party shall accord to *traffic in transit* to or from the territory of any other contracting party treatment no less favourable than the treatment accorded to *traffic in transit* to or from any third country" (emphasis added). Paragraph 6 does not refer to "traffic in transit" in its text.

7.454 The Panel thus considers it necessary to examine the meaning of the phrase "*products which have been in transit* through the territory of any other contracting party" in order to determine the scope of Article V:6, i.e. what goods are regulated by the provision. The Panel recalls that the Appellate Body in *Chile – Price Band System* observed generally that requirements expressed in the present perfect tense impose obligations that came into being in the past, but may continue to apply at present.⁷⁵⁷ Implicitly, the present perfect verb tense refers to an action that happened at an unspecified time in the past before the present moment. In addition, the perfect aspect refers to a past happening that is considered in relation to a later event or time, although it is unclear whether the event referred to is understood to continue at present, or has recently concluded.⁷⁵⁸ As such, the ordinary meaning of products which "*have been in transit*" remains unclear. On the one hand, the goods may have begun transit in the past, but are still continuing in transit until an unspecified time in the future. On the other hand, the goods may have recently been in transit, but are no longer in transit. Due to these opposing possibilities for interpretation, the Panel considers it is not possible to clearly determine the meaning of the phrase "to products which *have been in transit*" simply by reference to the text. Accordingly, the Panel will consider Article V:6 in light of context provided elsewhere in Article V.

7.455 As discussed above and in relation to Panama's Article V:2 claim, Article V is generally entitled "Freedom of Transit". Moreover, the Panel notes that a definition of the term "traffic in transit" appears in Article V:1. Colombia argues that the scope of Article V is informed by its title ("Freedom of Transit") and the definition of "traffic in transit" provided in Article V:1 that goods are "deemed to be in transit across the territory of a contracting party when the passage across such territory ... is only a portion of a complete journey beginning and terminating beyond the frontier of the contracting party across whose territory the traffic passes."⁷⁵⁹ Colombia argues that this definition of "traffic in transit" informs the definition of "transit" for the entire Article, including Article V:6.⁷⁶⁰ Thus, Colombia argues that the scope of Article V is limited to goods destined for sale outside of the country through which it is passing.⁷⁶¹

7.456 While Colombia considers that "freedom of transit" is one and the same for all provisions, the Panel does not agree. The Panel notes that neither "freedom" nor "transit" are defined anywhere in Article V or the *WTO Agreement*. The Panel recalls that the dictionary definition of "freedom" as referred to in relation to Panama's Article V:2 claim is "the unrestricted use of something".⁷⁶² Moreover, the Panel notes that the dictionary definition of "transit" is "the action of passing across or through; passage or journey from one place or point to another"⁷⁶³, or "[t]he passage or carriage of people or goods from one place to another."⁷⁶⁴ Taken in combination, consideration of the dictionary or ordinary meaning of these terms does not shed light on the issue of whether Article V:6 only concerns goods which are in passage through a territory with a destination outside/beyond that

⁷⁵⁷ Appellate Body Report, *Chile – Price Band System*, para. 206, citing G. Leech and J. Svartvik, *A Communicative Grammar of English*, (Longman, 1979), paras. 112-119. R. Quirk and S. Greenbaum, *A University Grammar of English*, (Longman, 1979), paras. 328-330.

⁷⁵⁸ G. Leech and J. Svartvik, *A Communicative Grammar of English*, (Longman, 3rd edition, 2002), paras. 122 and 125. The authors comment that the present perfect tense has four related possible uses: (i) a past event with results in the present time; (ii) an indefinite event in a period leading up to the present time; (iii) a habit in a period leading up to the present time; and (iv) a state leading up to the present time. In uses (i), (iii), and (iv) the authors note that events may be understood to continue at the present time. However in use (ii), the authors note that the present perfect tense often refers to the *recent* indefinite past, i.e. the event has recently concluded.

⁷⁵⁹ Colombia's comment on Panama's response to Panel question No. 116.

⁷⁶⁰ Colombia's comment on Panama's response to Panel question No. 116.

⁷⁶¹ Colombia's first written submission, para. 279.

⁷⁶² See Panama's first written submission, para. 171, citing *The New Oxford Dictionary of English*, (Clarendon Press, 2nd Ed. 2001), p. 730.

⁷⁶³ *The New Shorter Oxford English Dictionary* (Clarendon Press, 4th Ed. 1993), p. 3327.

⁷⁶⁴ *The New Shorter Oxford English Dictionary* (Clarendon Press, 4th Ed. 1993), p. 3327.

territory, whether it concerns goods which have arrived at their final destination, or both.⁷⁶⁵ Thus, the title and the ordinary meaning of the term "transit" do not inform the scope of all the provisions of Article V.

7.457 Additionally, the Panel rejects the view that the definition of "traffic in transit" provided in Article V:1 necessarily informs the definition of transit for the entire article, in particular, the reference to "products which *have been* in transit" in Article V:6. As the Panel has noted, while the term of art "traffic in transit" appears in paragraphs 1-5 of Article V, the term is not used in paragraph 6. Contrary to Colombia's argument, Article V:1 clearly indicates that "[t]raffic of this nature is termed *in this Article* 'traffic in transit'" (emphasis added) when referring to goods in which "passage across such territory ... is only a portion of a complete journey beginning and terminating beyond the frontier of the contracting party across whose territory the traffic passes". Moreover, Article V:1 does not expressly state that the concept of "traffic in transit" is applicable to *all* provisions in Article V. Therefore, the Panel declines to conclude based either on the definition of traffic in transit appearing in Article V:1 that the scope of Article V:6 only concerns goods which pass through a territory of a Member as a portion of a larger trajectory that begins and ends in beyond the frontier of the Member across whose territory the goods pass.

7.458 In the Panel's view, the immediate context provided by Article V:6, second sentence helps to inform the intended scope and application of Article V:6. The Panel recalls that the second sentence in Article V:6 provides as follows:

"Any contracting party shall, however be free to maintain its requirements of direct consignment existing on the date of this Agreement, in respect of any goods in regard to which such direct consignment is a requisite condition of eligibility for entry of the goods at preferential rates of duty or has relation to the contracting party's prescribed method of valuation for duty purposes".

7.459 The Panel notes the inclusion of the terms "direct consignment" as "a requisite condition of eligibility for entry of the goods at preferential rates of duty" and "method of valuation for duty purposes". As argued by Panama, these terms are irrelevant for countries that are intermediary destinations for goods in transit, since "eligibility for entry", "valuation" and "duty" collection are not undertaken for goods in transit *through* a Member's territory that will not be subject to importation and customs valuation requirements. In light of the focus on activities in the second sentence commonly associated with importation of goods, Panama argues that the requirements of the second sentence of Article V:6 would be unnecessary if the first sentence of Article V:6 were limited in application to goods that are in transit *through* a Member's territory. Panama submits that such an interpretation is impermissible as it cannot be reconciled with the principle that interpreters may not reduce whole clauses to inutility.⁷⁶⁶

7.460 Colombia has argued that the second sentence is of historical relevance only, as the requirement is linked to historical preferential schemes that are no longer relevant today.⁷⁶⁷ Colombia additionally argues that the reference to direct consignment requirements in paragraph 6 simply clarifies that direct consignment requirements are not affected by the obligation to extend MFN treatment to goods in international transit through a Member's territory.⁷⁶⁸ Finally, Colombia

⁷⁶⁵ For instance, in the Panel's view, these terms may be construed to mean "the unrestricted passage or journey of goods through a territory", but also "the unrestricted passage or journey from one location to another location".

⁷⁶⁶ Question No. 8 from Panama to Colombia.

⁷⁶⁷ Question No. 8 from Panama to Colombia.

⁷⁶⁸ Question No. 8 from Panama to Colombia. The Panel notes that Colombia has argued as follows: "[T]he second part of Article V:6 remains entirely valid and useful as a clarification that nothing in this provision limits the right of Members to maintain their pre-existing direct consignment requirements. In other words, what this says is that it is not because a Member is

characterizes the second sentence as misplaced⁷⁶⁹ since issues related to direct consignment, preferential duty rates and customs valuation are not relevant with goods in transit, which are not subject to customs duties.⁷⁷⁰ In light of this misplacement, Colombia argues that the second sentence should not read as context to interpret Article V:1. Otherwise, interpretation would render the first sentence equally out of place, despite that fact that the first sentence makes complete sense in the context of provisions dealing with goods in international transit. Colombia argues this form of interpretation would "impos[e] consistency on the basis of an oddity" and would lead to an "absurd result", an approach which is not permitted under the principles of treaty interpretation within the *VCLT*.⁷⁷¹

7.461 The Panel does not agree with Colombia's approach to interpretation of the second sentence of Article V:6. The Appellate Body in *US – Gasoline* explained as fundamental to the principle of effective treaty interpretation (*ut res magis valeat quam pereat*) that meaning and effect should be given to all terms in a treaty:

"One of the corollaries of the 'general rule of interpretation' in the *VCLT* is that interpretation must give meaning and effect to all the terms of a 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."⁷⁷²

7.462 In the Panel's view, treatment of language appearing in the second sentence as "out of place" or historically outdated seems inconsistent with the intent of the drafters of the Agreement, as it suggests reading an entire clause out of the Agreement. In accordance with the rules of interpretation as set forth in the *VCLT*, the Panel considers itself obliged to consider the text of Article V:6 as it exists in its entirety.

7.463 The Panel will therefore consider the second sentence both in terms of its placement and in terms of substance. Panama has submitted that discussion of a requirement related to direct consignment as a condition for entry of goods at preferential duty rates would be illogical if the second as well as the first sentence were not addressed to Members whose territory served as the final destination for importation of a good. As a structural matter, aside from the fact that both sentences appear in the same paragraph, the use of the conjunction "however" in the opening clause of the second sentence serves to grammatically and logically link the first and second sentences. Thus, to the extent the second sentence may only address concerns related to a Member whose territory serves as a final destination for goods in transit, the placement of the second sentence and its grammatical link to the first sentences defies interpreting the first sentence as extending obligations to intermediary destinations for goods in international transit.

7.464 In terms of substance, the Panel notes that the second sentence permits a Member to maintain any direct consignment requirements that existed in 1947, whenever those direct consignment requirements were a mandatory condition for *entry* of the goods at preferential rates of duty or related to the Member's prescribed method of customs duty valuation. Requirements related to the direct

not allowed to discriminate between transiting goods that are shipped directly from their country of origin and transiting goods with the same origin that arrive at the border after having been in transit through another Member, that Members cannot maintain direct consignments [sic] requirements that pre-dated the entry into force of the GATT for that Member."

⁷⁶⁹ Colombia refers to the second sentence of Article V:6 as the "odd one out": see Question No. 8 from Panama to Colombia.

⁷⁷⁰ Question No. 8 from Panama to Colombia.

⁷⁷¹ Question No. 8 from Panama to Colombia.

⁷⁷² See Appellate Body Report, *US – Gasoline*, p. 23.

consignment of goods have previously been discussed in a 1981 Note by the WTO Secretariat.⁷⁷³ In that Note, the Secretariat indicated that direct consignment rules for goods require that a product must be transported directly from the place of production to its preferential destination in order to be eligible for origin treatment. Moreover, the Note explains (as relevant at that point in time) that a good under direct consignment could only be transported through territory other than that of its origin or final destination, if justified for geographical reasons, and if the goods in question have remained under customs surveillance and have not entered into the commerce of the transit country.

7.465 Though not binding on Members' rights and obligations, the Panel considers the Secretariat's commentary consistent with the view that the second sentence of Article V:6 is intended to clarify that, in complying with requirements of the first sentence of Article V:6, a Member is nevertheless permitted to maintain any direct consignment requirements that existed in 1947 (when commitments among Members were negotiated) without violating the obligation in the first sentence. In other words, Article V:6, first sentence requires Members to extend MFN treatment to all goods that have been in international transit, except with respect to specific, pre-existing direct consignment commitments.

7.466 In light of the fact that direct consignment requirements are discussed in the context of being a prerequisite for the eligibility for entry of goods at preferential rates of duty or that relate to that Member's method of valuation for duty purposes, the Panel thus considers that both the first and second sentences of Article V:6 apply to a Member's territory which serve as the final destination of the goods.⁷⁷⁴

7.467 In reaching its conclusion, the Panel considers that its interpretation conforms with the principles of treaty interpretation set forth by the Appellate Body in *US – Gasoline* to avoid interpretations that reduce certain other provisions to inutility. The Panel recalls its findings above⁷⁷⁵, that Article V:2, second sentence imposes an MFN obligation by prohibiting Members from making distinction based on the flag of vessels, the place of origin, departure, entry, exit or destination, or on any circumstances relating to the ownership of goods, of vessels or of other means of transport of "traffic in transit". The definition of "traffic in transit" from Article V:1 include those goods "when the passage across such territory, ... is only a portion of a complete journey beginning and terminating beyond the frontier of the contracting party across whose territory the traffic passes". Thus, Article V:2 extends MFN protection to goods in transit through Member countries, while Article V:6 extends MFN protection from discrimination based on the geographic course of goods in transit upon reaching their final destination.

7.468 The Panel additionally notes that Article V:5 extends MFN protection to "traffic in transit" "[w]ith respect to *all charges, regulations and formalities in connection with transit*" (emphasis added). In accordance with the Ad Note to this provision, MFN protection extends to "like products being transported on the same route under like conditions" in relation to transportation charges. Setting aside transportation charges, the protection under Article V:5 broadly extends to all regulations and formalities for all "traffic in transit". As Article V:6 extends MFN protection broadly to "treatment" (i.e. "Each contracting party shall accord to products which have been in transit through the territory of any other contracting party treatment no less favourable..."), an interpretation that

⁷⁷³ See Rules of Origin, Note by the Secretariat, Consultative Group of Eighteen, Fourteenth Meeting, 25-27 March 1981, CG.18/W.48, 6 March 1981, Special Distribution, p. 5.

⁷⁷⁴ In resorting to the second sentence of Article V:6 as context to interpret the first sentence of the same provision, the Panel does not reach any finding in regard to the provisions in the second sentence. The Panel recognizes that the second sentence provides a limited and time-bound exception to the requirements set forth in the first sentence. Furthermore, the Panel is not aware of the existence of any direct consignment rules that comply with the second sentence.

⁷⁷⁵ See Section VII.I.2(c)(iv).

Article V:6 governs treatment extended to "traffic in transit" would overlap with the broad protection already ensured by Article V:5.

7.469 Finally, while the Panel is satisfied that its interpretation conforms with well-established rules governing treaty interpretation, the Panel nevertheless notes that preparatory work to Article V does not offer any conclusive guidance regarding interpretation. In Section VII.I.2(c)(i), the Panel summarized the *travaux préparatoires* involved in the development of Article V of the *GATT 1947*. The Panel noted that the first and second paragraphs of Article V were derived from parallel provisions in the 1921 Barcelona Convention. These provisions do not shed light on the significance of Article V:6. In addition, during a 1946 meeting of the Preparatory Committee of the International Conference on Trade and Employment, the Technical Subcommittee published a report commenting on the United States Suggested Charter for an International Trade Organization of the United Nations, which included proposed text and comments regarding Article 10 of the suggested Charter, entitled "Freedom of Transit".

7.470 Comments in the report of the Technical Sub-Committee reveal disagreement on the correct interpretation of the provisions in paragraph 6 of Article 10, which reads nearly identically to Article V:6 of the *GATT 1947* (and consequently *GATT 1994*).⁷⁷⁶ As both Panama and Colombia have acknowledged⁷⁷⁷, in discussing paragraphs 2-6 of the report of the Technical Sub-Committee commented that:

"It is understood that paragraphs 2 – 5 of this Article cover the treatment to be given by a member country to products in transit *through* its territory between any other member country and any third country, and paragraph 6 covers the treatment to be given by a member country to products cleared from customs within its territory *after* transit through any other member country".⁷⁷⁸ (emphasis added)

7.471 However, in light of the distinction made between coverage in paragraphs 2-5 and that in paragraph 6, the report also notes that "several delegates believed that paragraph 6 should be excluded from Article 10 and set forth elsewhere in the Charter because it does not deal with products in transit."⁷⁷⁹

7.472 The 12 January 2005 WTO Secretariat Negotiating Group on Trade Facilitation acknowledged the earlier disagreement surrounding the various possibilities for interpretation of Article V:6 of the *GATT 1994*:

"Paragraph 6 requires each party to treat products, which have been in transit through the territory of another Member, no less favourably than products transported from their place of origin to their destination without going through the territory of such other Member. The text might be read to imply that a country V would have to treat goods transported through its territory from country X with a destination in country Z, after having already been carried through country Y, in the same manner that would treat goods passing through its territory from X directly to Z, without having passed through Y. It may be open to discussion, however, whether paragraph 6's equal treatment requirement only covers products passing through a party's territory after having already passed through another country, or whether it

⁷⁷⁶ Paragraph 6 of Article 10 differs only slightly from Article V:6, substituting the phrases "member country" and "other member country" with the phrases "territory of any other contracting party" and "territory of such other contracting party", respectively; and substituting the word "origin" with "place of origin".

⁷⁷⁷ Panama's second oral statement, paras. 56-57; Colombia's second written submission, para. 187.

⁷⁷⁸ Report of the Technical Sub-committee of the Preparatory Committee of the International Conference on Trade and Employment, Committee II, UN doc. # E/PC/T/C.II/54/Rev.1, p. 11.

⁷⁷⁹ Report of the Technical Sub-committee of the Preparatory Committee of the International Conference on Trade and Employment, Committee II, UN doc. # E/PC/T/C.II/54/Rev.1, p. 11.

extends to products, which, having passed through a country, enter another party's territory to remain there as their final destination. In other words, it may be debatable whether paragraph 6 applies only to cases where the goods are shipped from X through Y and V to Z, or whether it also covers goods coming from X through Y to V (without continuing to Z)".⁷⁸⁰

7.473 Although the Panel understands that commentary by the WTO Secretariat does not have an impact upon rights and obligations under the covered agreements⁷⁸¹, the quotation reflects the lack of consensus regarding the proper interpretation of Article V:6.

7.474 Colombia has raised the question of whether, since the provisions in Article V:6 were ultimately not moved elsewhere, the delegates intended that Article V:6 should indeed be read in its context of goods in transit and to apply therefore only to goods proceeding in transit.⁷⁸² The Panel declines to speculate in such a manner.

7.475 For all of the foregoing reasons, the Panel concludes that the obligations in Article V:6, first and second sentences apply to Members whose territory is the final destination for goods in international transit.

(e) The substantive obligations in Article V:6 of the *GATT 1994*

7.476 In light of its determination that Article V:6 extends obligations with respect to goods that have been in transit, but have reached their final destination, the Panel will consider the obligation to provide "treatment no less favourable" to those goods in comparison to the same goods "had they been transported from their place of origin to their destination without going through the territory of such other contracting party".

7.477 The Panel considers the obligation in Article V:6 first sentence is straightforward: all treatment extended to goods that were transported from their place of origin to their destination without going through the territory of other contracting party, must be extended to goods that have been transported from their place of origin, and passed through the territories of such other contracting countries as "traffic in transit" prior to reaching their final destination. Such "treatment" must strictly be "no less favourable". As the comparison is made based on a hypothetical, identical set of goods, i.e. the passage a good that was shipped from its origin via its actual route through one or more Member countries prior to arrival at its final destination is compared to the hypothetical passage of that good directly from its place of origin to its final destination, no like product analysis is required.⁷⁸³

⁷⁸⁰ Doc. TN/TF/W/2, "Article V of the GATT 1994 – Scope and Application, Note by the Secretariat", 12 January 2005, para. 25.

⁷⁸¹ The Panel notes that the 2005 Note by the Secretariat expressly provides that it is "without prejudice to the positions of Members and to their rights and obligations under the World Trade Organization". See TN/TF/W/2, "Article V of the GATT 1994 – Scope and Application, Note by the Secretariat", 12 January 2005, p. 1.

⁷⁸² Colombia's second written submission, para. 187.

⁷⁸³ In this respect, the Panel would like to address Colombia's argument that adherence to Panama's interpretation of MFN obligations in Article V:6 would essentially undo the explicit limitation of MFN protections set forth in Article I:1 of the GATT 1994. As explained above, Article V:6 requires a Member to treat a good shipped from its origin via its actual route through one or more Member countries prior to arrival at its final destination, identically had that same good hypothetically passed from its place of origin to its final destination without traversing a particular territory in question. In contrast, Article I:1 of the *GATT 1994* broadly ensures that any advantage extended to a product of a particular origin must be extended immediately and unconditionally to the like product originating in or destined for the territories of all other Members. Thus, Article I:1 ensures MFN treatment to like products of all origins, whereas Article V:6 ensures MFN treatment

7.478 Thus, products that are transported from their place of origin which pass through any other Member country on the route to their final destination must be treated no less favourably than had those same products been transported from their place of origin to their final destination without ever passing through that other Member's territory.

(f) Whether the ports of entry measure complies with the obligations in Article V:6 of the *GATT 1994*

7.479 In accordance with its findings in relation to the scope and substantive obligations in Article V:6, first sentence, the Panel's mandate requires it to determine whether, by imposing the ports of entry measure, Colombia provides treatment no less favourable to goods of a particular origin that arrive in Colombia after passage through Panama, than it would have provided those goods had those goods arrived directly from their place of origin.

7.480 The Panel recalls that Article 2 of Resolution No. 7373 mandates simultaneous entry *and* customs clearance exclusively at Bogota airport or Barranquilla seaport of all subject textiles, apparel and footwear that have arrived from Panama and the CFZ. The Panel notes that the restriction applies exclusively to textile, apparel and footwear goods originating in or arriving from Panama or the CFZ. Goods which do not arrive from Panama or the CFZ are not required to simultaneously enter and customs clear goods at two ports, but may do so at 11 eligible ports. Since the restriction is imposed on goods of all origins that have passed through Panama or the CFZ prior to their arrival in Colombia as their final destination, while the restriction would not apply to those same goods, had they not entered Panama, Colombia does not extend "treatment no less favourable" to goods arriving from Panama and the CFZ in comparison to the same goods had they been transported from their place of origin to Colombia without circulating through Panama and the CFZ. Accordingly, the Panel finds that the ports of entry measure is inconsistent with the obligation in the first sentence of Article V:6.

(i) *Conclusion*

7.481 Accordingly, the Panel finds that, by failing to extend "treatment no less favourable" to goods arriving from Panama and the CFZ in comparison to the same goods had they been transported from their place of origin to Colombia without circulating through Panama and the CFZ, the ports of entry measure is inconsistent with the first sentence of Article V:6 of the *GATT 1994*.

K. COLOMBIA'S DEFENCE UNDER ARTICLE XX(D) OF THE *GATT 1994* TO PANAMA'S CLAIMS AGAINST THE PORTS OF ENTRY MEASURE

7.482 The Panel recalls its findings that the requirement within the ports of entry measure to enter subject textiles, apparel and footwear arriving from Panama exclusively at Bogota and Barranquilla is inconsistent with Articles XI:1 and V:6 of the *GATT 1994*; the requirement to submit an advance import declaration, pay taxes on the basis of that advance declaration, and comply with legalization rules is inconsistent with Article I:1 of the *GATT 1994*; and the requirement to trans-ship goods in order to proceed in international transit is inconsistent with Article V:2 of the *GATT 1994*. In light of these findings, the Panel will proceed to examine Colombia's defence under Article XX(d) of the *GATT 1994* in relation to these violations. As the Panel has not made findings with respect to Panama's additional claims against the ports of entry measure under Article XIII:1 and Article I:1 of the *GATT 1994*⁷⁸⁴, Colombia's defence will not be considered in relation to these claims.

based on its transit trajectory regardless of the existence of a like product of a different origin. In the Panel's view, the obligations in these two provisions are not the same and should not be treated as redundant.

⁷⁸⁴ "The Panel exercised judicial economy with respect to both claims, albeit for separate reasons. See Sections VII.F.2(c) and VII.G.2(b).

1. Main arguments of the parties

7.483 Colombia submits that in the event that the Panel were to uphold some or all of Panama's claims under Articles I:1, V:2, V:6, XI:1 or XIII:1 concerning the ports of entry measure, then the Panel should find the ports of entry measure is justified under Article XX(d). Colombia argues that the ports of entry measure is a temporary measure necessary to secure compliance with Colombia's customs laws and regulations, and is not applied in a manner which constitutes arbitrary or unjustifiable discrimination.⁷⁸⁵ Colombia submits that it faces problems of smuggling and under-invoicing, which are particularly problematic with respect to imports from Panama.⁷⁸⁶ Colombia argues that a clear link exists between the problems of customs fraud and smuggling and criminal activities such as money-laundering and drug trafficking.⁷⁸⁷

7.484 Colombia submits that two conditions must be met for the ports of entry measure to be justified under Article XX: the measure at issue must come under one of the exceptions in paragraphs (a) to (j), and the measure must satisfy the requirements imposed by the chapeau of Article XX.⁷⁸⁸ In relation to paragraph (d), the measure must be one to "secure compliance" with laws or regulations that are themselves not inconsistent with the *GATT 1994*, and the measure must be "necessary" to secure such compliance.⁷⁸⁹

7.485 Colombia submits that the ports of entry measure meets the conditions to be provisionally justified under paragraph (d) of Article XX. First, Colombia asserts that its customs laws and regulations are not inconsistent with the *GATT 1994*. Second, the ports of entry measure is designed to secure compliance with those laws and regulations. Third, the ports of entry measure is necessary to secure such compliance.⁷⁹⁰

7.486 Colombia deems its customs laws and regulations to be *GATT* -consistent as none of its customs laws and regulations have been found to be *GATT*-inconsistent.⁷⁹¹ Moreover, Colombia considers that the administration of the ports of entry measure by the DIAN and the preamble of the Customs Statute, demonstrate that the measure is designed to secure compliance with Colombia's customs enforcement, a fact Colombia argues has been acknowledged by Panama.⁷⁹²

7.487 In assessing whether the measure is "necessary" to secure compliance with those laws, Colombia argues that the Panel should weigh and balance a series of factors, including the contribution made by the compliance measure to the enforcement of those laws and regulations.⁷⁹³

7.488 Colombia argues that the ports of entry measure concerns a very important set of interests or values. In this regard, Colombia argues that the fight against illegal and criminal activities, such as tax evasion and smuggling which contribute to the loss of public revenue has been accepted to be a "most important interest for any country and particularly a developing country".⁷⁹⁴ Second, the ports of entry measure makes a material contribution to customs control through limiting the entry of goods from Panama to two ports and by allowing for the specialization of customs officials.⁷⁹⁵ Colombia

⁷⁸⁵ Colombia's first written submission, para. 314.

⁷⁸⁶ Colombia's first written submission, paras. 193-210; Colombia's second written submission, para. 219.

⁷⁸⁷ Colombia's first written submission, paras. 336-340; Colombia's second written submission, paras. 220-223.

⁷⁸⁸ Colombia's first written submission, para. 316.

⁷⁸⁹ Colombia's first written submission, para. 317.

⁷⁹⁰ Colombia's first written submission, para. 319.

⁷⁹¹ Colombia's first written submission, para. 320; Colombia's second written submission, para. 202.

⁷⁹² Colombia's first written submission, para. 325.

⁷⁹³ Colombia's first written submission, para. 329.

⁷⁹⁴ Colombia's first written submission, para. 331; Colombia's second written submission, para. 217.

⁷⁹⁵ Colombia's second written submission, para. 228.

submits this is evidenced by the significant increase in contraband related seizures, the increase in the "implicit" declared prices of subject goods and the decrease in the level of trade distortions.⁷⁹⁶ Third, Colombia argues that the ports of entry measure does not have a significant negative impact on trade.⁷⁹⁷ Colombia emphasizes that it is not imposing a ban or limiting trade but merely regulating the entry of goods through a certain number of ports. This measure is narrow relative to those imposed by other countries such as import bans which have been considered justified under Article XX.⁷⁹⁸

7.489 In addition to satisfying the requirements that the ports of entry measure is provisionally justified as necessary to secure compliance with Colombian customs laws and regulations related to customs enforcement matters, Colombia argues that there are no reasonably available alternative measures to achieve compliance. Colombia notes that previous attempts at closer customs cooperation were unsuccessful.⁷⁹⁹ Furthermore, Colombia considers it is not feasible to conclude agreements with the private sector for textiles, apparel and footwear products because the "*casas matrices*" or producers of these products are numerous and difficult to identify.⁸⁰⁰

7.490 Colombia argues that the ports of entry measure also satisfies the requirements imposed by the chapeau of Article XX as the measure is not applied in a manner which constitutes arbitrary or unjustifiable discrimination, or a disguised restriction on trade.⁸⁰¹

7.491 Colombia considers the meaning of the word "arbitrary" to be "capricious, unpredictable, inconsistent".⁸⁰² Additionally, the measure must have a "rational connection" to the objective of the relevant paragraph of Article XX.⁸⁰³ In Colombia's view, the test is whether such discrimination is "justifiable" in the sense that it is "defensible" or "able to be shown to be just, reasonable."⁸⁰⁴ Colombia argues that evidence illustrates the problem of contraband coming from Panama, which is linked to money-laundering and drug trafficking. This shows that the situation in respect of Panama is unique from that of other countries, and therefore Colombia's ports of entry measure, which is applied only to Panama, bears a "rational connection" to the objective of paragraph (d) of Article XX. Thus, Colombia argues that the measure therefore is not arbitrary and unjustifiable.⁸⁰⁵

7.492 Colombia argues that the question before the Panel of whether the ports of entry measure constitutes a disguised restriction on trade excludes the question of whether the measure has a restrictive effect on trade.⁸⁰⁶ Colombia submits that the term "disguised restriction" may be read together with "arbitrary discrimination" and "unjustifiable discrimination", which also means concealed or unannounced restriction or discrimination.⁸⁰⁷ Colombia also submits that the term "disguised restriction" is really about "avoiding abuse or illegitimate use of the exceptions", and that a study of the intent of the measure is important in analysing the measure.⁸⁰⁸ Colombia reiterates that

⁷⁹⁶ Colombia's first written submission, paras. 344-346; Colombia's second oral statement, paras. 60-62; Colombia's second written submission, para. 232.

⁷⁹⁷ Colombia's first written submission, para. 350.

⁷⁹⁸ Colombia's first written submission, para. 351; Colombia's second written submission, para. 250.

⁷⁹⁹ Colombia's second written submission, paras. 267-287.

⁸⁰⁰ Colombia's second written submission, para. 292.

⁸⁰¹ Colombia's first written submission, para. 386.

⁸⁰² Colombia's first written submission, para. 390; Colombia's second written submission, paras. 296.

⁸⁰³ Colombia's first written submission, para. 392.

⁸⁰⁴ Colombia's second written submission, para. 296.

⁸⁰⁵ Colombia's first written submission, paras. 395-398; Colombia's second written submission, paras. 299-310.

⁸⁰⁶ Colombia's first written submission, para. 400.

⁸⁰⁷ Colombia's first written submission, para. 401.

⁸⁰⁸ Colombia's first written submission, para. 404.

the measure was applied in good faith with the intent of customs enforcement, and does not restrict trade for a protectionist purpose.⁸⁰⁹

7.493 Panama considers that Colombia has not discharged the necessary burden to invoke the Article XX defence by failing to present a separate defence for each and every measure and respective violation which it seeks to justify under Article XX(d).⁸¹⁰ Panama further argues that Colombia cannot demonstrate that the measure is one designed to secure compliance with specific laws and regulations as it has not properly identified those laws and regulations.⁸¹¹ In addition to Colombia's failure to identify the relevant laws and regulations, Panama argues that a mere claim of a presumption of WTO-consistency is insufficient to demonstrate that all of Colombia's customs laws and regulations are themselves consistent with the *GATT 1994*.⁸¹²

7.494 Panama argues that Colombia has not demonstrated how the ports of entry measure secures compliance with its customs laws and regulations as the restrictions only apply to a limited range of products, despite the fact Colombia has customs enforcement problems with respect to a wide range of other products.⁸¹³ Panama also notes that Colombia only applies these restrictions to Panama, even though it experiences problems with *contrabando técnico*, *subfacturación* and *sobrefacturación* with the United States, Europe, Asia and *Asociación Latinoamericana de Integración* (ALADI) countries.⁸¹⁴ As such, Panama asserts that the ports of entry measure has been imposed to protect certain domestic industries from competition.⁸¹⁵

7.495 Panama considers that in order for a measure to be considered "necessary", it must be close to "indispensable".⁸¹⁶ Panama argues that Colombia cannot demonstrate that its ports of entry measure is close to "indispensable" because previous similar measures have been ineffective in combating contraband.⁸¹⁷ Panama also considers that Colombia's ports of entry measure has not contributed in a material way in securing compliance with its customs laws and regulations. Panama submits that the requirement to contribute to securing compliance with the law or regulation at issue referred to by the Appellate Body in *Korea – Various Measures on Beef* was not aimed at the policy objective of the law or regulation, but at securing compliance with the law or regulation at issue itself.⁸¹⁸ Panama submits that Colombia's argument that its measure contributes to the policy objective of its customs laws and regulations has been rejected by the GATT panel in *EEC – Parts and Components*.⁸¹⁹ Additionally, Panama considers Colombia's reliance on *Brazil – Retreaded Tyres* is flawed as the Appellate Body in that case considered Article XX(b), which is a purpose-oriented exception, and not Article XX(d), which is a functional exception.⁸²⁰ In Panama's view, the fact that contraband has continued at high levels after Colombia first imposed restrictions on the ports of entry clearly demonstrates that the measure does not make a material contribution to the policy objectives of customs enforcement and combating contraband trade.⁸²¹ Instead, Panama submits that Colombia's ports of entry measure has an adverse impact on trade from Panama. In Panama's view, it is irrelevant

⁸⁰⁹ Colombia's first written submission, para. 404; Colombia's second written submission, paras. 318-323.

⁸¹⁰ Panama's second oral statement, para. 66, citing Colombia's second written submission, para. 199.

⁸¹¹ Panama's second written submission, paras. 168-175.

⁸¹² Panama's second written submission, para. 176; Panama's second oral statement, para. 67.

⁸¹³ Panama's second written submission, para. 179.

⁸¹⁴ Panama's second written submission, para. 180.

⁸¹⁵ Panama's first oral statement, para. 77.

⁸¹⁶ Panama's second oral statement, paras. 68-69.

⁸¹⁷ Panama's second written submission, paras. 184-185.

⁸¹⁸ Panama's second written submission, para. 186; Panama's second oral statement, paras. 70-71.

⁸¹⁹ Panama's second written submission, para. 190.

⁸²⁰ Panama's second written submission, para. 193.

⁸²¹ Panama's second written submission, para. 196.

that the trade effects of the measure are insignificant or even non-existent. Panama submits that the "restrictive effects" must refer to the effects on the trade flows of imported products.⁸²²

7.496 In regards to the requirements set out in the chapeau to Article XX, Panama submits that Colombia's ports of entry measure constitutes a "disguised restriction" on international trade as the design, structure and architecture of the measure reveals that its true purpose is to protect fragile domestic industries and not to enforce customs laws.⁸²³ According to Panama, statements made by Colombia's Ministry of Commerce, Industry and Tourism and Colombia's introduction of quotas on the importation of garments from China, illustrate a relation between protection for Colombia's domestic industry and its ports of entry restrictions.⁸²⁴

7.497 Panama further submits that Colombia's ports of entry measure is applied in a manner that is "arbitrary" and "unjustifiable". The application of the measure is "arbitrary" because it is only applied to Panama despite the fact that Colombia has experienced various similar customs problems from many other countries.⁸²⁵ Panama notes that *all* imports of the covered items from Panama are subject to restrictions while *all* imports of like products from *all* other countries are exempted.⁸²⁶ In Panama's view, such discrimination can only be justifiable if it is based on differences in conditions prevailing in those countries. Panama submits that Colombia's argument that its application of the measure to Panama only is justifiable because customs irregularities occur less frequently in respect of goods from other countries is flawed as this approach was rejected by the Appellate Body in *Brazil – Retreaded Tyres*.⁸²⁷ Panama therefore submits that Colombia's measure is also "unjustifiable".⁸²⁸

2. Consideration by the Panel

7.498 At the outset, the Panel wishes to recall its view stressed earlier that WTO Members are entitled to enforce policies aimed at combating under-invoicing, smuggling and money laundering, and any related problems, provided however, that measures implemented for these purposes are themselves WTO-consistent. In any cases where a measure may violate a particular provision of the WTO Agreements, a number of exceptions – notably those included in Article XX of the *GATT 1994* – allow WTO Members to justify a WTO-inconsistent measure. In this light, the Panel will consider Colombia's affirmative defence raised under Article XX(d) of the *GATT 1994*.

(a) Legislation applicable to Colombia's Article XX(d) defence

7.499 The principal aspects of the ports of entry measure, which form the basis for Panama's claims under Articles I:1, V:2, V:6, XI:1 or XIII:1 include: (i) the requirement to enter and customs clear goods exclusively at Bogota (for air shipments) and Barranquilla (for sea shipments); (ii) the exception for goods that undergo trans-shipment to enter at any of 11 eligible ports when proceeding in international transit; and (iii) the requirement to submit an advance import declaration, pay taxes on the basis of that advance declaration, and comply with special legalization requirements (in the case of textiles only). These requirements are discussed in detail in Sections VII.H, VII.I, VII.J, VII.E and VII.F above, respectively.

7.500 The Panel notes that Colombia has presented a general defence to all of these claims, referring to them collectively as the ports of entry measure. Panama has also structured its arguments in response to Colombia's Article XX(d) defence by referring to the ports of entry measure broadly and generally. However, Panama has argued that Colombia has not met its burden of proof by failing

⁸²² Panama's second written submission, para. 206.

⁸²³ Panama's second oral statement, para. 76.

⁸²⁴ Panama's second written submission, para. 216.

⁸²⁵ Panama's second written submission, para. 217; Panama's second oral statement, para. 76.

⁸²⁶ Panama's second written submission, para. 218.

⁸²⁷ Panama's second written submission, para. 221.

⁸²⁸ Panama's second written submission, para. 219.

to present evidence to demonstrate that each of the aspects in the ports of entry measures are necessary and in compliance with the requirements of the chapeau to Article XX.

7.501 The Panel will next consider the implications of Colombia's general defence approach.

(b) The measure relevant for purpose of analysis of Colombia's Article XX(d) defence

7.502 As noted above⁸²⁹, Colombia has presented a general defence under Article XX(d) to Panama's claims of violation of Articles I:1, V:2, V:6, XI:1 and XIII:1. Accordingly, the Panel understands that Colombia is arguing that the various requirements in the ports of entry measure in unison (and not independently of each other) are necessary to secure compliance with laws or regulations which are not themselves WTO-inconsistent, and thus are justified collectively.

7.503 As a consequence of structuring its arguments in this manner, Colombia has not presented evidence to demonstrate how each requirement (i.e. the requirement to enter and customs clear goods exclusively at Bogota and Barranquilla airport, the exception for goods that undergo trans-shipment to enter at any of 11 eligible ports when proceeding in international transit, and the requirement to submit an advance import declaration, pay taxes on the basis of that advance declaration, and comply with special legalization requirements), as the object of a separate claim, is individually necessary to secure compliance. In response to a question from the Panel, Colombia has submitted that the requirements within the ports of entry measure, alongside a number of other measures, are "part of a comprehensive set of measures to combat this persistent problem of fraudulent under-invoicing and contraband."⁸³⁰

7.504 Panama has questioned whether, by taking such a global approach, Colombia has met its burden to present its Article XX(d) defence in a manner clear enough for Panama to respond to Colombia's arguments. In this regard, Panama refers to recent findings in the Panel Report on *China – Auto Parts*, where the panel in that case questioned the validity of China's defence under Article XX(d) due to the fact that China failed to distinguish its justification of the measures with regards to possible violations of different provisions of the *GATT 1994*.⁸³¹ Panama considers Colombia's failure to present a separate defence for each and every measure and respective violation which it seeks to justify under Article XX(d) is analogous.⁸³²

7.505 In *China – Auto Parts*, the respondent, China, had not initially distinguished its justification of the relevant measures under Article XX(d) in respect of the separate claims of violation under Articles II and III of the *GATT 1994*. Later in the proceedings, however, China changed in its position and clarified that the Article XX(d) analysis would depend on whether a violation were found under either Article II or Article III of the *GATT 1994*. From the information provided in that Report, it appears that China offered limited argumentation. Recalling that China held the burden to prove its defence under Article XX(d), the Panel questioned the overall validity of China's defence. Nevertheless, the Panel considered that "[i]t is not for the Panel to advance or presume specific arguments or analysis for a claim made by a party to the dispute⁸³³", and thus proceeded to examine China's global defence under Article XX(d).⁸³⁴

⁸²⁹ See para. 7.499.

⁸³⁰ Colombia's response to Panel question No. 159.

⁸³¹ Panama's second oral statement, para. 66, referring to the Panel Report on *China – Auto Parts*, paras. 7.283 and 7.287.

⁸³² Panama's second oral statement, para. 66, citing Colombia's second written submission, para. 199.

⁸³³ (*footnote original*) The Appellate Body states in *US – Gambling*: "In the context of affirmative defences, then, a responding party must invoke a defence and put forward evidence and arguments in support of its assertion that the challenged measure satisfies the requirements of the defence. When a responding party fulfils this obligation, a panel may rule on whether the challenged measure is justified under the relevant defence, relying on arguments advanced by the parties or developing its own reasoning. The same applies to

7.506 The present case is similar to *China – Auto Parts* in the sense that Colombia has not presented an individual defence per claim of violation. Noteworthy differences exist, however. Primarily, Colombia has not modified its position during the proceedings as China appears to have done in *China – Auto Parts*. Additionally, Colombia has provided substantial argumentation in support of its defence.

7.507 In the Panel's view, Colombia has not met its burden (nor has it attempted) to demonstrate that each of the requirements within the ports of entry measure contributes to enforcement of its customs laws. As the arguments and evidence provided by Colombia are of a general nature, it is not possible to evaluate, for instance, the extent to which the restriction on entry to Bogota and Barranquilla contributes to enforcement, as separate from the contribution of the advance import declaration requirement, and so forth. Hence, the Panel will not examine whether each of the requirements in the ports of entry measure which have been separately found inconsistent with different provisions of the *GATT 1994*, are nevertheless justified by Article XX(d).

7.508 Notwithstanding the difficulty in assessing the requirements within the ports of entry measure individually, in light of Colombia's approach and in line with the panel's approach in *China – Auto Parts*, the Panel will address Colombia's global defence that the ports of entry measure is justified as necessary to secure compliance with the relevant laws or regulations by considering the requirements under the ports of entry measure collectively, without attempting to evaluate the individual contributions of each requirement in the ports of entry measure.

(c) Article XX of the *GATT 1994*

7.509 The text of Article XX(d) and the chapeau of Article XX provide as follows:

"Subject to the requirement that such measures are not 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, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

...

(d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices."

(d) Order of analysis under Article XX(d)

7.510 In *US – Gasoline*, the Appellate Body concluded that the analysis of a measure under one of the paragraphs of Article XX is a "two-tiered" approach:

"In order that the justifying protection of Article XX may be extended to it, the measure at issue must not only come under one or another of the particular exceptions -- paragraphs (a) to (j) -- listed under Article XX; it must also satisfy the requirements

rebuttals. A panel may not take upon itself to rebut the claim (or defence) where the responding party (or complaining party) itself has not done so" (emphasis added) (Appellate Body Report, *US – Gambling*, para. 282).

⁸³⁴ Panel Report, *China – Auto Parts*, paras. 7.283 and 7.287.

imposed by the opening clauses of Article XX. The analysis is, in other words, two-tiered: first, provisional justification by reason of characterisation of the measure under [in that case] XX(g); second, further appraisal of the same measure under the introductory clauses of Article XX ..."⁸³⁵

7.511 The Appellate Body has explained that two elements must be satisfied in order for a measure to be provisionally justified under paragraph (d) of Article XX:

"For a measure ... to be justified provisionally under paragraph (d) of Article XX, two elements must be shown. First, the measure must be one designed to 'secure compliance' with laws or regulations that are not themselves inconsistent with some provision of the *GATT 1994*. Second, the measure must be 'necessary' to secure such compliance. A Member who invokes Article XX(d) as a justification has the burden of demonstrating that these two requirements are met."⁸³⁶

7.512 The Panel agrees with the approach taken by the Appellate Body and will follow it in addressing Colombia's defence under Article XX(d) of the *GATT 1994*. Therefore, the Panel will first look at whether the requirements in the ports of entry measures are necessary to secure compliance with the relevant Colombian laws and regulations that are not themselves WTO-inconsistent; if the response to this question is positive, the Panel will next consider whether the ports of entry measure is *necessary* to secure such compliance. The Panel will only proceed to analyse whether the ports of entry measure meets the requirements of the *chapeau* to Article XX, i.e. whether the measure allows for "arbitrary or unjustifiable discrimination between countries where the same conditions prevail", or constitute a "disguised restriction on international trade", if the Panel has first determined that the measure has met the requirements under paragraph (d) of Article XX.

(e) Whether the ports of entry measure is necessary to secure compliance with Colombian laws and regulations as provided in Article XX(d) of the *GATT 1994*

7.513 The Panel will first examine whether the ports of entry measure is designed to secure compliance with Colombian laws and regulations that are not themselves WTO-inconsistent. Thereafter, the Panel will consider whether the ports of entry measure is *necessary* to secure such compliance.

(i) *First element: Whether the ports of entry measure has been "designed" to secure compliance with Colombian laws and regulations that are not themselves WTO-inconsistent*

7.514 In determining whether a measure is designed to secure compliance with laws and regulations as provided in Article XX, the panel in *US – Shrimp (Thailand)* explained that a WTO Member raising a defence should identify the laws or regulations for which it seeks to secure compliance, establish that those laws or regulations are not themselves WTO-inconsistent, and demonstrate that the particular measure at issue is itself designed to secure compliance with the relevant laws or regulations.⁸³⁷

Identification of Colombian laws and regulations

7.515 The Panel will therefore examine whether Colombia has properly identified the laws and regulations relevant to its Article XX(d) defence. In *Mexico – Taxes on Soft Drinks*, the Appellate Body confirmed that the terms "laws or regulations" refer to rules that form part of the domestic legal

⁸³⁵ Appellate Body Report, *US – Gasoline*, p. 22.

⁸³⁶ Appellate Body Report, *Korea – Various Measures on Beef*, para. 157.

⁸³⁷ Panel Report, *US – Shrimp (Thailand)*, para. 7.174. See also Panel Report, *US – Customs Bond Directive*, para. 7.295.

system of a WTO Member and thus encompass the rules adopted by a WTO Member's legislative or executive branches of government, further noting that "matters 'relating to customs enforcement' will generally involve rights and obligations that apply to importers or exporters".⁸³⁸

7.516 Throughout its main written submissions, Colombia referred generally to its "laws and regulations relating to customs enforcement"⁸³⁹ and indicated that the "port of entry measure on certain products from Panama were implemented ... in order to ensure compliance with Colombian customs law and combat contraband and money-laundering."⁸⁴⁰ When questioned by the Panel, Colombia referred more specifically to laws and regulations for which it seeks to secure compliance through the ports of entry measure:

"In the case of the ports measure, the measure itself, through its preamble, demonstrates that it is designed to strengthen customs controls and customs enforcement. The express reference to Decree No. 2685 and the fact that the challenged Resolution No. 7373 is issued by the customs authority, the DIAN, in exercise of its authority under Article 41 of Decree No. 2685 clearly show that Decree No. 2685 and the implementing regulation Resolution No. 4240 are the laws and regulations relating to customs enforcement the compliance with which is being sought by the ports measure. Colombia does not consider it necessary to identify specific provisions in such laws and regulations for the purposes of its Article XX d) defence but it is clear that a number of provisions such as for example Article 87 of Decree No. 2685 expressly set forth the customs obligations that exists in respect of any goods that is being introduced into Colombia, including the requirement to make a declaration supported by documentary evidence and to comply with all obligations set forth in Colombia's laws and regulations."⁸⁴¹

7.517 As reflected through its response, Colombia contends that the ports of entry measure is intended to secure compliance with Article 41 of Decree No. 2685 and Resolution No. 4240. More specifically, Colombia also referred to Article 87 of Decree No. 2685.

7.518 The Panel has considered each of these legislative provisions and instruments in turn. Article 41 of Decree No. 2685 sets forth rules on the designation of ports for importation and clearance of goods.⁸⁴² Among other aspects, this provision allows the DIAN to prohibit or restrict the

⁸³⁸ Appellate Body Report, *Mexico – Taxes on Soft Drinks*, paras. 69-70.

⁸³⁹ For example, Colombia's first written submission, paras. 321, 323, 325, 326, 330, 343, 348 etc. Colombia's first oral statement, paras. 90-91. Colombia's second written submission, paras. 203, 205-207, 213 etc.

⁸⁴⁰ Colombia's first written submission, para. 188.

⁸⁴¹ Colombia's response to Panel question No. 145. The Panel would like to stress that Colombia provided this identification of the laws and regulations in response to a question from the Panel relating to Article 319 of Colombia's *Código Penal*. In footnote 142 of its second written submission, Colombia had referred to Article 319 of its *Código Penal* when discussing evidence to demonstrate that the ports of entry measure is effective in addressing contraband-related seizures. The Panel thus asked the parties whether they consider this Article a specific law or regulation related to combating contraband, for which the ports of entry measure is designed to secure compliance. Colombia indicated that "[I]t is by enforcing respect and compliance with such customs laws that in an indirect manner action is taken against criminal activities - whether the criminal act of smuggling as such, or the use of smuggled or under-invoiced goods in order to launder money. DIAN is not a criminal enforcement agency and a DIAN Resolution is therefore not a measure that secures compliance with Colombia's criminal laws such as the one referred to by the Panel. However, Colombia considers that this does not imply that customs enforcement does not protect interests that go beyond mere revenue protection for the government. Colombia has explained its position in this respect in previous submission and has pointed to the specific situation of Colombia and its problems of drug trafficking and public order."

⁸⁴² The text of Article 41 of Decree No. 2685 provides as follows:

entry of certain goods into designated ports for customs control purposes. Within Resolution No. 4240, referred to broadly by Colombia, Article 39 serves as the corresponding implementing provision and thus regulates (i) the administration of the restriction of textiles, apparel and footwear to 11 ports of entry imposed pursuant to Article 41 of Decree No. 2685, and (ii) the administration of the restriction to two ports applicable to textile, apparel and footwear arriving from Panama.⁸⁴³ Article 87 of Decree No. 2685 does not deal directly with ports restrictions or prohibitions but sets forth the general customs obligations linked to the importation of goods, including the

"ARTICULO 41. LUGARES HABILITADOS PARA EL INGRESO Y SALIDA DE MERCANCÍAS BAJO CONTROL ADUANERO.

Son aquellos lugares por los cuales la Dirección de Impuestos y Aduanas Nacionales permite el ingreso y salida de mercancías bajo control aduanero del territorio aduanero nacional.

En el acto administrativo de habilitación deberán delimitarse claramente los sitios que constituyen Zona Primaria Aduanera, disponiendo si fuere del caso, su demarcación física y señalización.

Para la habilitación de puertos y aeropuertos, la Dirección de Impuestos y Aduanas Nacionales exigirá que las instalaciones destinadas a las operaciones de cargue, descargue, custodia, almacenamiento y traslado de las mercancías bajo control aduanero y aquellas áreas destinadas a la realización de las operaciones aduaneras, cuenten con la debida infraestructura física y con los sistemas y dispositivos de seguridad que garanticen, a satisfacción de dicha entidad, la seguridad de las mercancías y el pleno ejercicio del control aduanero.

La autoridad aduanera, en coordinación con las autoridades portuarias y aeroportuarias y con los administradores de los puertos y aeropuertos habilitados, dispondrá de las medidas y procedimientos tendientes a asegurar en la Zona Primaria Aduanera, el ejercicio sin restricciones de la potestad aduanera, donde además de lo previsto en el inciso anterior, deberá reglamentar conjuntamente con las autoridades competentes, la circulación de vehículos y personas y disponer de sistemas de identificación de los mismos.

El incumplimiento de lo previsto en este artículo por parte de los titulares de la habilitación podrá ocasionar la pérdida de la habilitación para la entrada y salida de mercancías del territorio aduanero nacional.

PARAGRAFO. La Dirección de Impuestos y Aduanas Nacionales podrá por razones de control, prohibir o restringir el ingreso o salida de determinadas mercancías por los lugares habilitados."

⁸⁴³ The text of Article 39 of Resolution No. 4240 provides in relevant part as follows:

"ARTICULO 39. PROHIBICIONES Y RESTRICCIONES PARA EL INGRESO DE MERCANCIAS.

En desarrollo de lo dispuesto en el parágrafo del artículo 41 del Decreto 2685 de 1999, la importación de materias textiles y sus manufacturas, clasificables en la Sección XI (Capítulos 50 a 63, ambos inclusive) del Arancel de Aduanas, únicamente podrá realizarse por los puertos, aeropuertos y lugares de arribo, de servicio público, ubicados en la jurisdicción de las siguientes administraciones aduaneras de: Barranquilla, Bucaramanga, Buenaventura, Cali, Cartagena, Cúcuta, Ipiales, Leticia, Medellín, San Andrés, Santa Marta y Bogotá. Lo dispuesto en este inciso, se aplica igualmente a las importaciones de mercancías procedentes de las Zonas Francas Industriales de Bienes y de Servicios.

...

PARÁGRAFO 2o. <Parágrafo adicionado por el artículo 1 de la Resolución 5796 de 2005. Rige hasta el 30 de junio de 2006. El nuevo texto es el siguiente:> Las mercancías clasificables por los Capítulos 50 al 64 del Arancel de Aduanas, correspondientes a materias textiles y sus manufacturas, y calzado y sus partes, originarias y/o provenientes de la República de Panamá y de la República Popular China, deberán ingresar e importarse exclusivamente por las jurisdicciones de la Administración Especial de Servicios Aduaneros Aeropuerto El Dorado y la Administración Especial de Aduanas de Bogotá, si se transportan vía aérea; y por la Administración Especial de Aduanas de Barranquilla, si es por vía marítima..."

requirement to present an import declaration and pay duties and fees, as required, and generally comply with all relevant obligations set forth in Colombia's laws and regulations.⁸⁴⁴

7.519 Panama argues that Colombia has not met its burden to adequately identify which are the laws and regulations that are not themselves inconsistent with the *GATT 1994*.⁸⁴⁵ In its view, Colombia's assertion that its general customs laws and regulations are presumed to be GATT-consistent is inadequate to discharge its burden of identifying the specific laws and regulations, and demonstrating that those provisions are "not inconsistent" with the *GATT 1994*.⁸⁴⁶ Panama argues that the practice in previous panels establishes that the respondent in a dispute is required to identify the *specific* domestic laws or regulations that are not themselves inconsistent with the *GATT 1994*. To emphasize the necessary specificity that is required, Panama refers to *China – Auto Parts*, where the panel expressed concern that China "interchangeably referred to various items as the law or regulation the measures are securing compliance with" such as "China's customs laws or regulation, China's customs laws, including its tariff provisions, its tariff schedule" and other general laws and regulations.⁸⁴⁷

7.520 The Panel agrees with Panama that Colombia bears the burden to identify the domestic laws or regulations relevant to its Article XX(d) defence. However, the Panel does not consider the reference to *China – Auto Parts* is pertinent in this instance. During the course of proceedings, China had indicated that the law or regulation for the purpose of its Article XX(d) defence was China's alleged valid interpretation of its tariff provisions for motor vehicles. The panel in that dispute indicated that China's interpretation of its concessions on motor vehicles could not form part of China's tariff schedule itself, and found that such an interpretation was not a law or regulation relevant to its Article XX(d) defence.⁸⁴⁸

7.521 In this Panel's view, although it would have been desirable for Colombia to have clarified this issue much earlier in the proceedings, it has nevertheless referred to legal provisions of Colombian law as opposed to an interpretation by national customs authorities of how the national schedule must be interpreted.⁸⁴⁹

⁸⁴⁴ Article 87 of Decree No. 2685 provides as follows:

"*ARTICULO 87. OBLIGACIÓN ADUANERA EN LA IMPORTACIÓN*

La obligación aduanera nace por la introducción de la mercancía de procedencia extranjera al territorio aduanero nacional

La obligación aduanera comprende la presentación de la Declaración de Importación, el pago de los tributos aduaneros y de las sanciones a que haya lugar, así como la obligación de obtener y conservar los documentos que soportan la operación, presentarlos cuando los requieran las autoridades aduaneras, atender las solicitudes de información y pruebas y en general, cumplir con las exigencias, requisitos y condiciones establecidos en las normas correspondientes."

⁸⁴⁵ Panama's second written submission, paras. 173-178.

⁸⁴⁶ Panama's second oral statement, para. 67.

⁸⁴⁷ Panama's second oral statement, para. 67, referring to the Panel Report on *China – Auto Parts*, para. 7.290.

⁸⁴⁸ Panel Report, *China – Auto Parts*, paras. 7.293-7.296.

⁸⁴⁹ The Panel recalls that it may consider a wide array of provisions cited by either of the parties in determining the relevant laws and regulations relevant to Colombia's Article XX(d) defence. The Appellate Body explained in *US – Shrimp (Thailand)* that a panel is free to use the various arguments made and provisions cited by the parties in order to assess objectively which laws and regulations were relevant to the defendant's defence:

"In our view, the Panel was free to use the arguments made and provisions cited by all the parties—including Thailand and India—in order to assess objectively which laws and regulations were relevant to the United States' defence. We do not believe that, in doing so, the Panel exceeded its jurisdiction."

Appellate Body Report, *US – Shrimp (Thailand)*, para. 302.

7.522 The pertinent question is thus whether the legal instruments and particular provisions identified by Colombia can be considered by the Panel as laws or regulations relevant for Article XX(d). As explained above, when questioned by the Panel, Colombia referred to Decree No. 2685, and in particular Articles 41 and 87, and to Resolution No. 4240, as the relevant laws or regulations for the Panel to consider. In reference to Decree No. 2685, Panama at the outset argued that Article 41 is the *enabling legislation* pursuant to which Colombia enacted the ports of entry restrictions and thus the ports of entry restrictions cannot be said to *secure compliance* with Article 41 as that would be tantamount to concluding that the ports of entry restrictions are designed to secure compliance with a provision allowing port of entry restrictions.⁸⁵⁰

7.523 While the Panel agrees with Panama that Article 41 of Decree No. 2685 is the provision authorizing Colombia to impose restrictions on ports of entry, whenever it considers further regulation necessary, the Panel does not consider Colombia's reference to this provision, or Resolution No. 4240, as problematic to its identification of the relevant laws and regulations. Although Article 41 provides authority to impose restrictions, it also refers more broadly to the objective of ensuring the security of goods and ability of customs authority to exercise control. Additionally, Article 41 is one of the various provisions in Decree No. 2685 addressing matters related to ensuring customs control and enforcement. For instance, Colombia has identified Article 87 of Decree No. 2685 as well, which sets forth several obligations, including the requirement to present an import declaration and pay duties and fees, as required, and generally comply with all relevant obligations set forth in Colombia's laws and regulations. Resolution No. 4240 similarly addresses matters of customs control broadly.

7.524 As noted, the concept of laws and regulations in Article XX refers to rules that form part of the domestic legal system of a WTO Member and thus encompass the rules adopted by a WTO Member's legislative or executive branches of government, including those relating to the rights and obligations applicable to imports.⁸⁵¹ In the Panel's view, Colombia has identified to the satisfaction of the Panel the array laws and regulations for which the ports of entry measure seeks to ensure compliance. These broadly include the provisions in Decree No. 2685, including its Article 41 and 87, and Resolution No. 4240.

7.525 The Panel will therefore consider whether Decree No. 2685, and Resolution No. 4240 are laws and regulations not themselves WTO-inconsistent.

Whether the laws or regulations are not themselves WTO-inconsistent

7.526 The Panel will thus next consider whether the laws and regulations identified by Colombia in Decree No. 2685, and Resolution No. 4240 are in themselves consistent with the provisions of the WTO Agreements.

7.527 Colombia argues that the laws and regulations for which the ports of entry measure seeks to ensure compliance are not inconsistent with the *GATT 1994*. In Colombia's view, a WTO Member's laws and regulations are presumed to be GATT/WTO-consistent.⁸⁵² Colombia argues that Panama has not challenged Colombia's customs laws and regulations in a general manner, having only made claims in respect of certain specific aspects of Colombia's customs laws and regulations.⁸⁵³ As such, Colombia deems its laws and regulations relating to customs enforcement to be consistent with the provisions of the *GATT 1994*.⁸⁵⁴

⁸⁵⁰ Panama's second written submission, para. 174.

⁸⁵¹ See para. 7.515.

⁸⁵² Colombia's second written submission, para. 202, citing to Appellate Body Report, *US – Carbon Steel*, para. 157.

⁸⁵³ Colombia's second written submission, para. 202.

⁸⁵⁴ Colombia's first written submission, para. 320; Colombia's second written submission, para. 202.

7.528 Panama has contested Colombia's assertion that its customs enforcement laws and regulation are deemed WTO-consistent. In Panama's view, a mere claim of a presumption of WTO-consistency is not sufficient. As Colombia's customs laws and regulations total thousands of pages, Panama submits that it would not be possible for the Panel to satisfy itself that all the relevant customs law and regulations are GATT-consistent.⁸⁵⁵

7.529 The Panel again agrees with Panama that Colombia has the burden of proof to demonstrate that all conditions of the defence are met, including the condition that the laws and regulations for which the ports of entry measure is designed to secure compliance are not in themselves GATT-inconsistent.⁸⁵⁶ The Panel does not, however, consider that Colombia must demonstrate that each and all of the provisions of Decree No. 2685 and the implementing regulation Resolution No. 4240 are WTO-consistent, in order to meet its burden of proof.

7.530 In the present dispute, the Panel has found in Sections VII.B and VII.C above that Article 128.5 e) of Decree No. 2685 and Article 172.7 of Resolution No. 4240 are inconsistent with several provisions of the *Customs Valuation Agreement* and, *arguendo*, Article III:2 of the *GATT 1994*. Notwithstanding these findings, the Panel does not consider the fact that one provision in a country's customs regulations is WTO-inconsistent, means that necessarily any or all other individual provisions are incompatible as well. For instance, Colombia has identified Article 87 of Decree No. 2685 which, as explained above, comprises the importers' general customs obligations. As far as the Panel understands, Panama's claim that the ports of entry measure is not justified under Article XX(d) does not mean that Panama is challenging Colombia's right to enforce its customs laws and, in particular, the importers' general customs obligations of the type provided for in Article 87 of Decree No. 2685.

7.531 As Panama points out, Colombia's customs laws and regulations total thousands of pages and therefore, it is not possible for the Panel to examine every provision of Colombia's customs laws and regulations in order to determine whether they are GATT-consistent. However, the Panel does not consider it necessary to complete a comprehensive review. As pointed out by Colombia, the Appellate Body has stressed that a responding Member's law will be treated as WTO-consistent until proven otherwise.⁸⁵⁷

7.532 Accordingly, the Panel concludes that, for the purpose of its analysis of Colombia's defence under Article XX(d) of the *GATT 1994*, Decree No. 2685 and Resolution No. 4240, with the exception of Article 128.5 e) of Decree No. 2685 and Article 172.7 of Resolution No. 4240 (which have been determined WTO-inconsistent in Section VII.B.2(e) above) are not themselves inconsistent with any provision of the *GATT 1994*.

Whether the ports of entry measure is designed to secure compliance with Colombian laws or regulations which are not themselves WTO-inconsistent

7.533 Having established that generally Decree No. 2685 and, in particular Article 87, and Resolution No. 4240, are the laws and regulations with which the ports of entry measure aims at securing compliance are not on the whole WTO-inconsistent, the Panel will therefore determine whether the ports of entry measure is *designed to* secure compliance with those laws and regulations.

7.534 Colombia argues that the preamble in Resolution No. 7373 makes clear that the ports of entry measure has been implemented to strengthen and make more effective customs controls, thus

⁸⁵⁵ Panama's second written submission, para. 176.

⁸⁵⁶ Panama's second written submission, para. 178.

⁸⁵⁷ Appellate Body Report, *US – Carbon Steel*, para. 157. See also Appellate Body Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 111 and Appellate Body Report, *US – Gambling*, para. 138.

demonstrating that the measure is designed to secure compliance with Colombia's laws relating to customs enforcement. The Preamble of Resolution No. 7373 provides as follows:

"Que el artículo 41 del Decreto 2685 de 1999 establece en la Dirección de Impuestos y Aduanas Nacionales la facultad de restringir, por razones de control, el ingreso de determinadas mercancías por algunos lugares de arribo;

Que el inciso 3° del artículo 119 del Decreto 2685 de 1999, adicionado por el artículo 2° del Decreto 2373 de 2004, prevé que la Dirección de Impuestos y Aduanas Nacionales puede establecer la obligación de presentar la declaración de importación en forma anticipada para determinadas mercancías;

Que para el fortalecimiento y agilización de los controles aduaneros y para la prestación de un mejor servicio, es preciso tener información previa sobre algunos bienes que se pretenden ingresar al país;

Que para lograr controles más eficientes es importante que las administraciones aduaneras se especialicen en el manejo técnico de determinadas mercancías, que hacen parte de importantes sectores productivos nacionales;

Que el conocimiento previo de la información relativa a las mercancías que se pretenden ingresar al país, así como la especialización técnica de las aduanas, permitirán contar con elementos para el fortalecimiento del control aduanero sobre las mismas".

7.535 Colombia notes that the preamble expressly refers to Article 41 of Decree No. 2685, which, it argues, allows the DIAN to impose limitations on the ports of entry whenever necessary for purposes of customs control. In addition, as discussed in the preamble, Colombia submits that prior knowledge of the information of merchandise to be imported and the technical specialization of customs authorities are linked to the objective of enhancing customs controls with respect to subject merchandise.⁸⁵⁸

7.536 In addition to its preamble, Colombia argues that the design and purpose of the ports of entry measure is clear from circumstances surrounding its implementation. Colombia considers that the fact that it had agreed to remove an earlier, similar ports restriction measure following the entry into force of a Customs Cooperation Protocol demonstrates problems exist with customs control and that Colombia is not simply addressing protectionist ends.⁸⁵⁹ Colombia argues that the ports of entry measure's entry into force at a time of widespread contraband problems that have been acknowledged by Panama through its participation in cooperation efforts, supports the rationale that the measure was designed and implemented to secure compliance with customs regulations.⁸⁶⁰

⁸⁵⁸ Colombia's second written submission, para. 204. Colombia argues that further confirmation of this policy objective can be found in a letter from the DIAN, submitted by Panama as Exhibit PAN-43, which provides:

"En este orden de ideas y a efecto de lograr controles más eficientes, es importante que las administraciones aduaneras se especialicen en el manejo técnico de determinadas mercancías, que hacen parte de importantes sectores productivos nacionales y para lo cual, conociendo la infraestructura operativa, técnica y humana que tiene disponible la DIAN en las administraciones de Bogotá y Barranquilla, se determine que fueran las administraciones de Bogotá y Barranquilla ... por donde ingresen las mercancías clasificables por los capítulos 50 al 64 del Arancel de Aduanas..."

⁸⁵⁹ Colombia's second written submission, para. 207.

⁸⁶⁰ Colombia's second written submission, para. 211.

7.537 Panama has argued that Colombia has not demonstrated how the ports of entry measure is designed to secure compliance with all the provisions of its customs laws. Panama notes that Colombia experiences similar, serious infringements of its customs laws by other trading partners, including the United States and Europe. However, Colombia only applies the ports of entry measure to certain products from Panama. Additionally, Panama notes, in 2004, when none of the restrictions at issue in this dispute were in place, other regions accounted for a much larger share of *contrabando técnico* and *sobrefacturación* problems than Panama.⁸⁶¹ Panama also submits that Colombia has customs enforcement problems with respect to a wide range of products, such as "*máquinas y aparatos eléctricos*" and vehicles and vehicle parts, apart from subject textiles, apparel and footwear.⁸⁶² Panama considers that if Colombia's intention were to secure compliance with its customs laws and regulations, then it should apply the requirements in the ports of entry measure to imports from all trading partners that have had customs irregularities, not simply on a country-specific and narrow product-specific basis.⁸⁶³ In light of the ports of entry measure's application solely to textiles, apparel and footwear products arriving from Panama and the CFZ, Panama argues that the "obvious function [of the measure] is to protect certain domestic industries from import competition".⁸⁶⁴

7.538 The Appellate Body in *Mexico – Taxes on Soft Drinks* explained that the burden to demonstrate that a measure is designed to "secure compliance" must focus on the "design of the measure sought to be justified".⁸⁶⁵ This has been described to mean "to enforce obligations" rather than "to ensure the attainment of the objectives of laws and regulations."⁸⁶⁶ Moreover, the Appellate Body clarified that a measure may be considered as securing compliance regardless of whether it is certain to achieve results: "In our view, a measure can be said to be designed 'to secure compliance' even if the measure cannot be guaranteed to achieve its result with absolute certainty".⁸⁶⁷

7.539 As pointed out by Colombia, the preamble of Resolution No. 7373 refers to Article 41 of Decree No. 2685, which generally authorizes Colombian customs authorities to restrict access to ports of entry whenever authorities are not satisfied that they will be able to fully exercise their powers of control and verification. On this basis, Colombia has generally restricted access for all textiles, apparel and footwear classifiable under Chapters 50-64 of the Colombian Tariff Schedule from all countries to 11 ports of entry.⁸⁶⁸ On this same basis, Colombia additionally restricts entry of subject goods arriving from Panama to ports at Bogota and Barranquilla.

⁸⁶¹ Panama's second oral statement, para. 67; According to Chart 3 of Exhibit COL-38, the United States accounted for US\$959,228 of *contrabando técnico*, while ALADI countries (including Panama) accounted for US\$625,115. As concerns *subfacturación*, Panama notes that Europe accounted for US\$455,981, while ALADI accounted for US\$372,359. With respect to *sobrefacturación*, the United States accounted for US\$776,136, while Panama (separate from other ALADI countries) accounted for US\$137,657.

⁸⁶² Panama's second written submission, para. 179. Panama notes that "*máquinas y aparatos eléctricos*" accounted for \$189,907 of under-invoicing, whereas under-invoiced textiles and footwear amounted to \$82,254 and \$98,666, respectively. (Panama's first oral statement, para. 7).

⁸⁶³ Panama's second oral statement, para. 68.

⁸⁶⁴ Panama's first oral statement, para. 77. In support of this view, Panama notes a DIAN letter describing the goods at issue as "goods that form part of an important domestic industry" (Panama's first oral statement, para. 78).

⁸⁶⁵ Appellate Body Report, *Mexico – Taxes on Soft Drinks*, para. 72, Appellate Body Report, *Korea – Various Measures on Beef*, para. 157.

⁸⁶⁶ Panel Report, *Canada – Periodicals*, para. 5.9. Panel Report, *Mexico – Taxes on Soft Drinks*, para. 8.175; GATT Panel Report, *EEC – Parts and Components*, para. 5.17.

⁸⁶⁷ Appellate Body Report, *Mexico – Taxes on Soft Drinks*, para. 74.

⁸⁶⁸ In accordance with Article 39 of Resolution No. 4240 of 2000 (Exhibit PAN-38), textiles, apparel and footwear classifiable under Chapters 50-64 of Colombia's Tariff Schedule must enter exclusively at Barranquilla, Bucaramanga, Buenaventura, Cali, Cartagena, Cúcuta, Ipiales, Leticia, Medellín, San Andrés and Bogota.

7.540 Resolution No. 7373 further refers to Article 119 of Decree No. 2685 in its preamble, which generally allows Colombian Customs authorities to impose an advance customs declaration requirement to imports.

7.541 We note that both Article 41 and Article 119 authorize Colombian customs officials to impose the various requirements that comprise the ports of entry measure. Apart from the above provisions, the preamble to Resolution No. 7373 also refers generally to the need to strengthen and improve customs controls related to the importation of subject textiles, apparel and footwear arriving from Panama, which are described as constituting an important national industry in Colombia.⁸⁶⁹

7.542 The Panel notes that the circumstances surrounding the imposition of the ports of entry measure support the view that that the measure was imposed at a time when customs fraud-related problems existed.⁸⁷⁰ As Colombia notes, Panama previously agreed to launch a programme of cooperation and mutual assistance for the purpose of investigating and preventing customs law infringements in both countries, which led to the removal of earlier restrictions on ports of entry.⁸⁷¹ The panel agrees that this coordinated effort is suggestive of the existence of a problem with customs fraud that may have formed the basis for imposing restriction on importation in the first place.⁸⁷² Colombia has submitted quantitative assessment of the existence of significant ongoing problems with under-invoicing and smuggling in relation to textiles, apparel and footwear, with particular emphasis placed on those arriving from the CFZ and Panama.⁸⁷³

7.543 On the basis of the foregoing evidence and circumstances surrounding the implementation of the ports of entry measure, and in light of the fact that the measure was imposed with a view to addressing the need to strengthen and improve customs controls related to the importation of subject textiles, apparel and footwear arriving from Panama, the Panel considers that Colombia has

⁸⁶⁹ As noted above, the preamble provides in relevant part as follows:

"Que para lograr controles más eficientes es importante que las administraciones aduaneras se especialicen en el manejo técnico de determinadas mercancías, que hacen parte de importantes sectores productivos nacionales."

⁸⁷⁰ As noted by Colombia in paragraph 210 of its second written submission, the Appellate Body in *Korea – Various Measures on Beef* has considered the prevailing circumstances surrounding implementation, in assessing whether a measure is designed to secure compliance with applicable laws and regulations':

"[T]he dual retail system was put in place, at least in part, in order to secure compliance with the Korean legislation against deceptive practices to the extent that it serves to prevent acts inconsistent with the Unfair Competition Act. First, the system was established at the time when, as stated by Korea and not refuted by the Complaining parties, acts of misrepresentation were widespread in the beef sector. Second, it must be conceded that the dual retail system does appear to reduce the opportunities and thus the temptations for butchers to misrepresent foreign beef for domestic beef, when compared with the situation where all domestic and imported beef could officially be supplied to the same shop."

Panel Report, *Korea – Various Measures on Beef*, para. 658.

⁸⁷¹ As explained in Section II.A, on 20 July 2006, Panama requested consultations under the DSU with Colombia concerning, *inter alia*, the imposition of restrictions on ports of entry similar to those at issue in this dispute. Colombia had imposed these earlier restrictions between July 2005 and October 2006, on the basis of Resolution No. 05796 of 7 July 2005, Resolution No. 12465 of 21 December 2005 and Resolution No. 06691 of 22 June 2006. On 1 December 2006, Panama notified the DSB that it had reached a Mutually Agreed Solution with Colombia in accordance with Article 3.6 of the DSU, under which Colombia repealed the earlier restrictions and the parties concluded a customs cooperation agreement, entitled the "Protocol of Procedure for Cooperation and Exchange of Customs Information between Customs Authorities of the Republic of Panama and the Republic of Colombia".

⁸⁷² Colombia's second written submission, para. 207.

⁸⁷³ Colombia's first written submission, para. 203; Exhibit COL-21. For instance, a UIAF study claims that 89 firms incorporated in the Colon Free Zone were identified by Colombian intelligence as regularly participants in the purchase of goods with contraband US dollars.

demonstrated to its satisfaction that the ports of entry measure is designed to secure compliance with Decree No. 2685 and Resolution No. 4240.⁸⁷⁴

7.544 Accordingly, the Panel will proceed to determine whether the ports of entry measure is necessary to secure compliance with the aforementioned laws and regulations.

(ii) *Second element: Whether the ports of entry measure is "necessary" to secure compliance with Colombian customs enforcement laws and regulations*

7.545 Having established that the ports of entry measure has been designed to secure compliance with Decree No. 2685 and the implementing regulation Resolution No. 4240, the Panel will next examine whether the ports of entry measure is "necessary" to ensure compliance with these domestic provisions.

7.546 The Appellate Body when examining the concept of "necessary" in the context of Article XX(d) of the *GATT 1994 in Korea – Various Measures on Beef*, concluded that, in order to be considered "necessary" to secure compliance, a measure does not need to be "indispensable", but should constitute something more than strictly "making a contribution to":

"We believe that, as used in the context of Article XX(d), the reach of the word 'necessary' is not limited to that which is 'indispensable' or 'of absolute necessity' or 'inevitable'. Measures which are indispensable or of absolute necessity to secure compliance certainly fulfil the requirements of Article XX(d). But other measures, too, may fall within the ambit of this exception. As used in Article XX(d), the term 'necessary' refers, in our view to a range of degrees of necessity. At one end of this continuum lies 'necessary' understood as 'indispensable'; at the other end, is 'necessary' taken to mean as 'making a contribution to'. We consider that a 'necessary' measure is, in this continuum, located significantly closer to the pole of 'indispensable' than to the opposite pole of simply 'making a contribution to'.⁸⁷⁵

7.547 In assessing the "necessity" of a measure within the meaning of Article XX(d), in particular, whether the measure is "necessary to ensure compliance with laws and regulations ... , including those relating to customs enforcement", the Appellate Body explained that several criteria should be taken into consideration, including a weighing and balancing of these aspects:

"It seems to us that a treaty interpreter assessing a measure claimed to be necessary to secure compliance of a WTO-consistent law or regulation may, in appropriate cases, take into account the relative importance of the common interests or values that the law or regulation to be enforced is intended to protect. The more vital or important those common interests or values are, the easier it would be to accept as 'necessary' a measure designed as an enforcement instrument. There are other aspects of the enforcement measure to be considered in evaluating that measure as 'necessary'. One is the extent to which the measure contributes to the realization of the end pursued, the securing of compliance with the law or regulation at issue. The greater the contribution, the more easily a measure might be considered to be 'necessary'. Another aspect is the extent to which the compliance measure produces restrictive effects on international commerce, that is, in respect of a measure inconsistent with Article III:4, restrictive effects on imported goods. A measure with a relatively slight

⁸⁷⁴ The Panel notes that it is not yet making an assessment of whether the port of entry measure has been effective in securing compliance of Colombian customs enforcement laws. The Panel is strictly evaluating whether Colombia designed the ports of entry measure in order to secure compliance with such laws and regulations.

⁸⁷⁵ Appellate Body Report, *Korea – Various Measures on Beef*, para. 161.

impact upon imported products might more easily be considered as 'necessary' than a measure with intense or broader restrictive effects. In sum, determination of whether a measure, which is not 'indispensable', may nevertheless be 'necessary' within the contemplation of Article XX(d), involves in every case a process of weighing and balancing a series of factors which prominently include the contribution made by the compliance measure to the enforcement of the law or regulation at issue, the importance of the common interests or values protected by that law or regulation, and the accompanying impact of the law or regulation on imports or exports."⁸⁷⁶

7.548 The weighing and balancing of factors should be conducted through consideration of the factors individually and in relation to each other:

"The weighing and balancing is a holistic operation that involves putting all the variables of the equation together and evaluating them in relation to each other after having examined them individually, in order to reach an overall judgement."⁸⁷⁷

7.549 Finally, the Appellate Body has clarified that a measure will not be considered "necessary" within the meaning of Article XX(d) of the *GATT 1994* "if an alternative measure which [a Member] could reasonably be expected to employ and which is not inconsistent with other GATT provisions is available to it".⁸⁷⁸ The complaining Member has the burden to identify possible alternatives to the measure at issue that the respondent could have taken.⁸⁷⁹

7.550 Thus, in evaluating whether the ports of entry measure is necessary within the meaning of Article XX(d), the Panel will consider: (i) the relative importance of the common interests or values that the law or regulation to be enforced is intended to protect; (ii) the extent to which the measures contribute to the realization of the end pursued; and, (iii) the restrictive impact of the measure on imported goods.

The relative importance of the common interests or values that the laws or regulations to be enforced are intended to protect

7.551 Colombia has requested the Panel to examine the measures in light of the important interests involved in securing compliance with its customs laws, both in terms of revenue lost, and in terms of

⁸⁷⁶ Appellate Body Report, *Korea – Various Measures on Beef*, paras. 162-164. In a more recent assessment of the meaning of the term "necessary" in connection with a defence raised under Article XX(b), the Appellate Body indicated that a panel may evaluate whether a measure is "necessary" based on the extent to which the measure is "apt to produce a material contribution to the achievement of its objective":

"Thus, a panel might conclude that an import ban is necessary on the basis of a demonstration that the import ban at issue is apt to produce a material contribution to the achievement of its objective."

Appellate Body Report, *Brazil – Retreaded Tyres*, para. 151. The Panel considers the well-established approach set forth in *Korea – Various Measures on Beef* relevant to its analysis of Colombia's Article XX(d) defence.

⁸⁷⁷ Appellate Body Report, *Brazil – Retreaded Tyres*, para. 182.

⁸⁷⁸ Appellate Body Report, *Korea – Various Measures on Beef*, para. 165, citing to GATT Panel Report, *US – Section 337*, footnote 69, para. 5.26:

"It was clear to the Panel that a contracting party cannot justify a measure inconsistent with another GATT provision as "necessary" in terms of Article XX(d) if an alternative measure which it could reasonably be expected to employ and which is not inconsistent with other GATT provisions is available to it. By the same token, in cases where a measure consistent with other GATT provisions is not reasonably available, a contracting party is bound to use, among the measures reasonably available to it, that which entails the least degree of inconsistency with other GATT provisions."

⁸⁷⁹ Appellate Body Report, *Brazil – Retreaded Tyres*, para. 156.

illegal and criminal activities linked to contraband and smuggling in general.⁸⁸⁰ Colombia further argues that the problem of contraband is significant, as contraband trade plays a proven role in certain types of money-laundering, wherein money-laundering is linked to other illegal activities.⁸⁸¹ Due to its status as a developing country, Colombia emphasizes that a loss of revenue and threats to political and economic stability are of even greater importance.⁸⁸² Colombia characterizes itself as unlike any other country as it is faced with an important domestic problem of drug trafficking and public order.

7.552 In relation to revenue collection, Colombia has provided estimates of the loss of revenue arising from the entry of contraband from Panama at US\$300 million annually.⁸⁸³

7.553 Colombia views the link between customs fraud and smuggling and other criminal activities, including money laundering and drug trafficking, has been clearly established, and, in particular, in relation to the CFZ. As Colombia notes, a Memorandum of Understanding between the World Customs Organization and the International Criminal Police Organization linked customs fraud with other criminal activities, including money-laundering and terrorism.⁸⁸⁴ Colombia additionally notes publications by the United Nations⁸⁸⁵ and the International Monetary Fund⁸⁸⁶, which also refer to problems with smuggling in the CFZ.⁸⁸⁷ Colombia's own UIAF⁸⁸⁸ has referred to a close relationship between contraband and money-laundering.⁸⁸⁹

7.554 In response to a question from the Panel, Colombia described the problem of money laundering in the specific context of the Black Market Peso Exchange (BMPE), which utilizes a recognized money-laundering technique to convert illicit funds outside of Colombia into Colombian pesos via the importation of goods into Colombia.⁸⁹⁰ The United Nations describes the CFZ as a "integral part" of the BMPE.⁸⁹¹ Colombia submits that the BMPE typically employs consumer merchandise such as those arriving from Panama to facilitate the exchange.⁸⁹²

⁸⁸⁰ Colombia's second written submission, para. 218.

⁸⁸¹ Colombia's second written submission, para. 220.

⁸⁸² Colombia's response to Panel question No. 151, Colombia's second written submission, para. 218.

⁸⁸³ Colombia's first written submission, para. 333.

⁸⁸⁴ Colombia's second written submission, para. 221.

⁸⁸⁵ United Nations, Office on Drugs and Crime, *Crime and Development in Central America*, at 69 (May 2007), available at <http://www.unodc.org/documents/data-and-analysis/Central-america/study/en.pdf-2007-11-02>.

⁸⁸⁶ International Monetary Fund, Panama: Detailed Assessments of Observance of Standards and Codes for Banking Supervision, Insurance Supervision, and Securities Regulation, IMF Country Report No. 07/67, at 198-199 (Feb. 2007), available at <http://www.imf.org/external/pubs/cat/longres.cfm?sk=20450.0>.

⁸⁸⁷ Colombia's first written submission, para. 192.

⁸⁸⁸ The Unidad de Información y Análisis Financiero (UIAF) is an entity of the Colombian government created by Ley 526 of 1999 for the purpose of preventing detecting and fighting money laundering and financial terrorism.

⁸⁸⁹ Colombia's second written submission, para. 221; Exhibit COL-30.

⁸⁹⁰ Colombia's second written submission, para. 222.

⁸⁹¹ United Nations, Office on Drugs and Crime, *Crime and Development in Central America*, at 69 (May 2007), available at <http://www.unodc.org/documents/data-and-analysis/Central-america/study/en.pdf-2007-11-02>

⁸⁹² Exhibit COL-43, Exhibit COL-30. Colombia cites to the International Narcotics Control Strategy Report – 2008, released by the Bureau of International Narcotics and Law Enforcement Affairs, in order to explain the operations of the Black Market Peso Exchange (BMPE):

"Panama's sophisticated international banking sector, Colon Free Zone (CFZ), US dollar-based economy, and legalized gambling sector are utilized to facilitate potential money laundering. The CFZ is the world's second largest free zone after Hong Kong, and serves as an originating or transshipment point for some goods purchased with narcotics proceeds (mainly dollars obtained in the United States) through the Colombian Black Market Peso Exchange. The CFZ has over 2,600 business, 25 bank branches, and employs approximately 25,000

7.555 Apart from that discussion of problems generally among international organizations, Colombia argues that problems with customs fraud and under-invoicing are clearly demonstrated through trade statistics. Citing to both Colombian and Panamanian export statistics for the period 2000-2006, Colombia notes that its reported import figures from Panama are lower amounts than export figures reported by Panama. In particular, Colombia notes a difference of US\$629.642 million and US\$848.317 million in 2005 and 2006, respectively.⁸⁹³ As a result of these discrepancies in reported figures, which Colombia terms distortions, Colombia has concluded by its own estimates, that Panama contributes 10 per cent in distortions while only representing approximately 2.1 per cent of total imports into Colombia, representing US\$877.3 million of "*contrabando abierto*" in 2006.⁸⁹⁴

7.556 In relative terms, as a component of total annual distortions, Colombia estimates that in 2006, contraband from Panama was responsible for 83.8 per cent of all *contrabando abierto* and 62 per cent of all *contrabando técnico* entering Colombia.⁸⁹⁵ Additionally, Colombia submits that more irregularities have been found in respect of declarations of goods from Panama (6.8 per cent) than the average from other countries (4.8 per cent).⁸⁹⁶

7.557 Colombia considers these figures depict a serious overall problem with under-invoicing and smuggling. As pertains to subject goods to this dispute, Colombia argues that 84.27 per cent of products imported from Panama were contraband trade, increasing to 89 per cent in the case of textiles.⁸⁹⁷ Colombia submits that textiles accounted for 27.9 per cent of all seizures, and footwear, 9.2 per cent.⁸⁹⁸ Between 2001 and 2007, Colombia alleges that 121 million pairs of shoes were imported from Panama of which 82.5 million (or 68 per cent) were imported at a price below US\$1, which, in Colombia's view, strongly suggests that this trade is affected by under-invoicing and

personnel. The CFZ is estimated to have imported and re-exported over US \$15 billion in goods during 2007. The ports of Panama handle over 4 million twenty-foot equivalent units (TEUs) of container traffic per year. The CFZ has limited resources to conduct supervisory programs and monitor for illegal activities, with a legal staff of approximately five people who, among other things, oversee efforts to detect money laundering, trans-shipment, goods smuggling, counterfeit products and intellectual property rights violations."

See http://www.thepanamanews.com/pn/v_14/issue_05/news_07.html. See also Colombia's second written submission, para. 222; Exhibit COL-38; Exhibit COL-51.

⁸⁹³ Colombia's first written submission, para. 193. Figures for all years are as follows:

	2000	2001	2002	2003	2004	2005	2006
Importations from Panama							
Colombian Registry	291,090	391,201	431,285	290,476	383,331	381,050	412,091
Panamanian Registry	873,656	783,741	744,889	691,459	903,302	1,010,692	1,260,408
Difference	582,566	392,540	313,604	400,983	519,971	629,642	848,317

Source: Contraloria de Panama; DIAN.

Note: In its original presentations, Colombia's calculation of the difference contained an arithmetic error, which has been corrected here.

⁸⁹⁴ Exhibit COL-38.

⁸⁹⁵ Colombia's first written submission, para. 194. The Panel notes that these figures seem to be contradicted by ones presented in Exhibit COL-38. This exhibit, which contains a report by the DIAN on the measurement of import value distortions in 2006, shows that almost all trade distortion with Panama in 2006 correspond to the modality of "*contrabando abierto*" (96.8 per cent of the total) and, to a much lesser extent, "*sobrefaturación*" (3.2 per cent of the total). See Table 4, p. 10; Table 1, p. 11 and Table 8, p. 16. In fact, Table 4 reports problems of "*contrabando técnico*" with United States (49 per cent); Europe (24.2 per cent); ALADI (16.9 per cent) and Asia (11.2 per cent). Moreover, the Section of the report dedicated to the analysis of the "Panama case" refers exclusively to the problem of "*contrabando abierto*", and does not even mention problems of "*contrabando técnico*". See Exhibit COL-38, pp. 17-19.

⁸⁹⁶ Exhibit COL-17.

⁸⁹⁷ Exhibit COL-16.

⁸⁹⁸ Exhibit COL-18; Exhibit COL-31.

contraband.⁸⁹⁹ In 2007, Colombia claims that, of nine million pairs imported below US\$1, seven million (77.7%) were imported from Panama.⁹⁰⁰

7.558 Based on internal studies⁹⁰¹, Colombia asserts that Panamanian exporters were involved in 40 per cent of the cases in which money-laundering was linked to international trade. Colombia argues the number rises to nearly two-thirds in cases in which Panamanian exporters that are indirectly involved are factored.⁹⁰²

7.559 Colombia has presented a series of data showing criminal investigations into companies located in Panama and the CFZ that have allegedly participated in contraband trade operations in Colombia.⁹⁰³ In Exhibit COL-21, Colombia lists 89 companies registered in the CFZ, which it alleges to be involved in these activities.⁹⁰⁴ In Exhibit COL-66, Colombia has submitted a list of 106 cases involving textiles, apparel and footwear imports from Panama that were criminally prosecuted between 2005 and 2007, based on information submitted by each of the country's customs administration. In Exhibit COL-67, Colombia lists 150 cases that concern false invoices by two shoe major importers of footwear imports from Panama into Colombia.⁹⁰⁵

7.560 Colombia argues that the scope of its efforts to date demonstrate the existence of a severe problem with under-invoicing and customs fraud with respect to Panama.⁹⁰⁶ Measures identified by Colombia include a requirement to present an advance import declaration or export declaration, restrictions on domestic transit, the establishment of a "Customs Observer" post, the incorporation of Fiscal and Customs police in the structure of the DIAN, modifications to the structure of customs administrations, the adoption of an indicative and reference prices regime, special document requirements, and agreement with other countries' customs authorities and the private sector. Colombia further notes that Panama's willingness to participate in the Customs Cooperation Protocol provides further evidence that Panama has also recognized the problem.

7.561 Panama has not called into question the incidence of money laundering or contraband in relation to goods arriving to Colombia. Panama, however, calls into question Colombia's attribution

⁸⁹⁹ Colombia's first written submission, para. 206.

⁹⁰⁰ Colombia's first written submission, para. 206.

⁹⁰¹ Exhibit COL-19.

⁹⁰² The UIAF report in Exhibit COL-19 provides as follows:

"Es así como, entre el 1 de julio de 2005 hasta el 20 de febrero de 2008 el G.I.T. de Control y Prevención de Lavado de Activos a remitido a la UIAF doscientos setenta y siete (277) casos, de los cuales ciento cuarenta y nueve (149) corresponden a actividades económicas que incluyen importaciones, correspondiendo a PANAMA cincuenta y nueve (59) casos como principal país de procedencia, lo que representa un 40% del total casos; sin embargo PANAMA aparece en un menor porcentaje como país de procedencia en más de 30 casos adicionales.

El valor f.o.b. total de los 149 casos es de USD\$499.287.988 y a PANAMA le corresponde el 19% de este valor, es decir USD\$95.758.038, comparado como el principal país de procedencia."

In Panama's first oral statement, footnote 15, Panama disputes the arithmetic, noting that 89 of 149 cases totals 59.73 percent, which is less than 66.66 per cent or two thirds. Colombia notes further that the report refers to five specific cases in which a typical situation of money laundering involving Panamanian exporters involves warning signals that include contraband, under-invoicing, fraud, and the use of falsified documents, among other indicators. (Exhibit COL-19)

⁹⁰³ Exhibit COL-52.

⁹⁰⁴ In Exhibit COL-22, Colombia provides results of an investigation, which concluded that buyers of merchandise in the CFZ can choose whether they want goods with or without invoices, and whether they want the goods to go into a "normal" or "special" container.

⁹⁰⁵ Colombia's response to Panel question No. 159.

⁹⁰⁶ Colombia's first written submission, para. 211.

of the severity of the problem in light of the fact that the anti-fraud and anti-money laundering steps have not been imposed at all ports of entry.⁹⁰⁷ Moreover, Panama refers to the general nature of information included in reports by the United Nations⁹⁰⁸, the International Monetary Fund⁹⁰⁹, the US Drug Enforcement Administration⁹¹⁰, and the US State Department.⁹¹¹ Panama notes that several of these reports designate the BMPE as the root cause of the problem.⁹¹² Panama additionally characterizes Colombia's assessment of a GIT-UIAF report, in which Colombia argues that transactions involving Panama amounted to 19 per cent of total in terms of value of contraband goods as flawed. Panama argues that value is the relevant consideration, and not the number of investigated cases: 59 out of 149.⁹¹³ In this light, if value is the focus, Panama argues that the vast majority of problems are connected with other countries. For these reasons, Panama considers that the CFZ is only tangentially related to the problem of smuggling, money laundering and drug trafficking.

7.562 In addressing a Member's right to raise an affirmative defence under Article XX(d), no previous panel has directly addressed measures designed to address problems of under-invoicing in relation to the payment of customs duties. However, in *Dominican Republic – Import and Sale of Cigarettes*, the panel recognized the important interest for the Dominican Republic in its efforts to curb tax evasion and smuggling:

"The Panel finds no reason to question the Dominican Republic's assertions in the sense that the collection of tax revenue (and, conversely, the prevention of tax evasion) is a most important interest for any country and particularly for a developing country such as the Dominican Republic."⁹¹⁴

7.563 While the relative importance of the common interests or values that may be addressed within the gamut of Article XX of the *GATT 1994* (including all its subparagraphs) do not adhere to any hierarchical ranking or prioritization of interests therein, an assessment of the importance of interest or values must take into account the evidence presented as well as the prevailing circumstances faced by the respondent. This proposition holds true in relation to measures necessary to secure compliance with laws or regulations relating to customs enforcement.

7.564 With respect to the defence raised by Colombia, the Panel is of the view that the fight against under-invoicing and smuggling must be assessed in the proper context in consideration of the particular realities faced by Colombia. In the Panel's view, evidence submitted by Colombia demonstrates that problems exist with contraband, smuggling and under-invoicing in Colombia, in particular, in connection with the CFZ as well as the BMPE. Colombia has presented additional evidence in an effort to demonstrate the effects of these problems in relation to goods arriving from Panama, and has referred to these problems in relation to what it considers the affiliated problem of drug trafficking.

7.565 Despite reservations by Panama concerning the general nature of evidence to demonstrate problems with money laundering and contraband goods in the region and the link between these phenomenon and drug-trafficking, it has nevertheless acknowledged the problem through its own

⁹⁰⁷ Panama's first oral statement, para. 14.

⁹⁰⁸ Colombia's first written submission, footnote 162.

⁹⁰⁹ Colombia's first written submission, footnote 163.

⁹¹⁰ Colombia's first written submission, footnote 179.

⁹¹¹ Colombia's first written submission, footnote 179. Panama argues that State Department report cites to 2005-2006 period when former ports of entry measure was in place. Yet, Panama argues that problems with money laundering still existed. Thus, Panama considers the argument that the ports of entry measure combats money-laundering is unsubstantiated when statistics do not indicate a decline in money laundering.

⁹¹² Panama's first oral statement, para. 13.

⁹¹³ Panama's first oral statement, para. 16.

⁹¹⁴ Panel Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 7.215, as upheld by the Appellate Body, Appellate Body Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 71.

participation in a Customs Cooperation Protocol with Colombia in an attempt to address these exact problems. Moreover, evidence of ongoing and completed investigations submitted by Colombia shed light on Colombia's broad efforts to address these problems.

7.566 In the Panel's view, combating under-invoicing and money laundering associated with drug trafficking is a relatively more important reality for Colombia than for many other countries.

The extent to which the measure contributes to the realization of the end pursued, the securing of compliance with the laws or regulations at issue

7.567 Through presentation of quantitative and qualitative evidence, Colombia submits that the ports of entry measure is apt to make a material contribution to the objective of combating contraband.⁹¹⁵ Colombia argues that a genuine relationship of ends and means exists between the objective pursued and the measure at issue.⁹¹⁶

7.568 Colombia draws the Panel's attention to a series of quantitative indicators to demonstrate that the ports of entry measure is contributing to reducing smuggling. First, Colombia argues that the evolution of the implicit price of textiles, apparel and footwear, i.e. price per unit, demonstrates that the measure has materially contributed to combating contraband.⁹¹⁷ Second, Colombia points to the notable increase in the number of contraband-related seizures with respect to textiles products coming from Panama in 2007, as compared to 2006.⁹¹⁸ Finally, Colombia argues that the fact that the "level of distortion" has decreased since the introduction of the measure, provides further evidence of the measure's effectiveness.⁹¹⁹

7.569 Colombia acknowledges that not all the data in these indicators point in the same direction, and that there are many intervening factors that must be taking into account. However, Colombia considers it inevitable that certain measure might take some time before become effective. In support of this statement, Colombia notes in *Brazil – Retreaded Tyres* that the Appellate Body found effective contribution of certain measures can only be made clear with the benefit of time, especially in the case of complex and multi-layered problems.⁹²⁰

7.570 Apart from price and trade flow data, Colombia submits that "it is difficult to deny" that requiring products be imported through a limited number of ports equipped to control imports in a most effective manner is apt to make a material contribution to combat smuggling.⁹²¹ Colombia submits that it is easier to control importation and verify the accuracy of the import declaration when imports are entering at two points of entry only. Moreover, Colombia argues that the increased exposure of customs officials to potential contraband products provides them with important experience in respect of the techniques applied by the smugglers.⁹²²

7.571 Panama argues that Colombia erroneously submits that the ports of entry measure is "apt to make a material contribution" to the policy objective of combating smuggling. Panama submits that

⁹¹⁵ Colombia's first written submission, para. 344, Colombia's second written submission, para. 224. Colombia explained in its response to Panel's question No. 118 that "contraband" is a "general term that refers to products that are not declared or are improperly declared and are thus entering the country in an illegal manner". The Panel thus understands that "contraband" is a term that encompasses all customs irregularities, *inter alia*, open smuggling, technical smuggling and under-invoicing. See also Colombia's first written submission, para. 196, in which Colombia suggests that the term "contraband" includes under-invoicing and smuggling.

⁹¹⁶ Colombia's second oral statement, para. 63, citing to *Brazil – Retreaded Tyres*, para. 7.119.

⁹¹⁷ Colombia's second written submission, paras. 235 and 240.

⁹¹⁸ Exhibit COL-18; Colombia's second written submission, para. 232.

⁹¹⁹ Colombia's second oral statement, para. 63.

⁹²⁰ Colombia's second written submission, para. 244.

⁹²¹ Colombia's first written submission, para. 344.

⁹²² Colombia's second written submission, para. 229.

Article XX(d) does not require an assessment of whether the measure at issue secures the attainment of the objectives of those laws and regulations, but an examination of whether the measure secures compliance with the laws or regulations themselves.⁹²³ Moreover, Panama considers the finding in *Brazil – Retreaded Tyres* that a measure may be considered as "necessary" if it brings about "a material contribution to the achievement of its objective ... of the protection of human health or environmental objectives pursued"⁹²⁴ is inapplicable to defences raised under Article XX(d). Panama notes that the protection of "human, animal or plant life or health" in Article XX(b) is a purpose-oriented exception. In contrast, Panama considers that Article XX(d) provides that a measure is necessary to secure compliance with specific laws and regulations, which is a functional exception. In Panama's view, Colombia has confused its approach with the test under Article XX(b) which requires an assessment of whether a measure brings about a material contribution to the achievement of its objective.⁹²⁵

7.572 While Panama concedes that the fight against tax evasion and smuggling is an important interest for a developing country, it considers that Colombia has not established how the restrictions contribute in a material way to secure compliance with the applicable laws.⁹²⁶ Panama notes that, as stated by Colombia, the ports of entry measure is part of a "comprehensive strategy", which includes the use of customs observers, the requirement to make an advance declaration, automatic licensing, pre-shipment inspection, contraband agreement with the private sector, customs cooperation, modernization of ports and various measures to fight internal corruption.⁹²⁷ Due to such a comprehensive approach, Panama argues that Colombia cannot establish a direct cause and effect relationship to determine that the ports of entry measure has materially contributed to the policy objective of combating contraband, at least in respect of under-invoicing.⁹²⁸

7.573 Apart from what Panama considers Colombia's erroneous interpretative approach to Article XX(d) and its failure to demonstrate a causal link between the measure and its contribution, Panama considers the ports of entry measure has not been effective in combating contraband. Panama notes between July 2005 and October 2006, Colombia imposed restrictions on ports of entry similar to those at issue in this dispute. During 10 months in 2006, when the restrictions were in force, Panama notes Colombia's estimation that the percentage of contraband trade exceeded 84 per cent generally, and 89 per cent in the case of textiles.⁹²⁹ In Panama's view, these statistics demonstrate that the ports of entry restrictions are completely ineffective at combating contraband.⁹³⁰ In addition, Panama notes that, according to the data submitted by Colombia, Cartagena was responsible for seizing 17 billion pesos of contraband in 2007, whereas Barranquilla was responsible for seizing only 10 billion pesos.⁹³¹ In Panama's view, this raises the question as to the relative effectiveness of one of the primary ports

⁹²³ Panama's second written submission, paras. 186-191; Panama's second oral statement, para. 69. Panama notes the following statement in GATT Panel Report, *EEC – Parts and Components*:

"If the qualification 'to secure compliance with laws and regulations' is interpreted to mean 'to ensure the attainment of the objectives of the laws and regulations', the function of Article XX(d) would be substantially broader. Whenever the objective of a law consistent with the General Agreement cannot be attained by enforcing the obligations under the law, the imposition of further obligations inconsistent with the General Agreement could then be justified under Article XX(d) on the grounds that this secures compliance with the objectives of that law. This cannot, in the view of the Panel, be the purpose of Article XX(d) ..." (GATT Panel Report, *EEC – Parts and Components*, para. 5.17).

⁹²⁴ Appellate Body Report, *Brazil – Retreaded Tyres*, para. 151.

⁹²⁵ Panama's second oral statement, para. 69.

⁹²⁶ Panama's second written submission, para. 186.

⁹²⁷ Colombia's second written submission, para. 226.

⁹²⁸ Panama's second oral statement, para. 71.

⁹²⁹ Panama's first oral statement, paras. 5, 12 and 81, Panama's second written submission, para. 194.

⁹³⁰ Panama's first oral statement, para. 5. Panama notes as well that indicative prices were in place in 2006 when some of the highest levels of customs irregularities were reported (para. 6).

⁹³¹ Panama's first oral statement, para. 82, Panama's second written submission, para. 198.

under the measure in carrying out seizures of contraband textiles.⁹³² In reaching its conclusion, Panama disputes the argument put forth by Colombia that measures normally take time to have effect. Considering the nature of the measure, Panama submits it should be possible to detect the immediate impact of the measure and to assess its effectiveness.⁹³³ Panama considers that the ports of entry measure by its design is ineffective at combating contraband. First, Panama notes that the measure only applies to a subject textiles, apparel and footwear despite the fact that Colombia has customs enforcement problems with respect to a wide range of products, including "*máquinas y aparatos eléctricos*" and vehicles and vehicle parts, which are not subject to the ports of entry restrictions.⁹³⁴ As discussed in paragraph 7.537 above, for instance, Panama notes that "*máquinas y aparatos eléctricos*" accounted for US\$189,907 of under-invoicing, whereas subject textiles and footwear accounted for US\$82,254 and US\$98,666, respectively.⁹³⁵ Furthermore, Panama notes that the ports of entry measures are applied only to textiles, apparel and footwear arriving from Panama, even though Colombia experiences significant problems with *contrabando técnico*, *subfacturación* and *sobrefacturación* with other regions. As noted in paragraph 7.494 above, Colombian evidence indicates the United States accounted for US\$959,228 of *contrabando técnico*, while ALADI countries (including Panama) accounted for US\$625,115.⁹³⁶ With respect to *subfacturación*, Europe accounted for US\$455,981, while ALADI accounted for US\$372,359, and with respect to *sobrefacturación*, the United States accounted for US\$776,136, while Panama (separate from other ALADI countries) accounted for US\$137,657.⁹³⁷ Panama considers that a measure designed to secure compliance with customs enforcement would apply to all products known to be problematic, and would address the most significant contraband problems stemming from trade with all trading partners.⁹³⁸

7.574 Panama disputes that any basis exists to justify targeting textiles, apparel and footwear arriving from Panama. Panama notes Colombia's claim that the frequency of irregularities found in declaration of goods from Panama (6.8 per cent) exceeded the average from other countries (4.8 per cent).⁹³⁹ Panama considers the fact that irregularities were 2 per cent higher does not justify imposing measures exclusively against goods arriving from Panama.⁹⁴⁰

7.575 Panama argues that it is inappropriate to focus on the relative proportion of contraband from a particular country as opposed to the absolute amount of contraband from a particular country.⁹⁴¹ In Panama's view, if Colombia seeks to combat contraband to ensure that revenues are not foregone, in addition to addressing problems with under-invoicing and securing compliance with its customs laws and regulations broadly, Colombia should apply the measures to all imports giving rise to customs irregularities. If this is not possible, Panama argues it would only be logical for Colombia to combat contraband in trade from its larger trading partners, including the United States and Europe, because

⁹³² Panama's second written submission, para. 198. Panama notes that Colombian data is not broken down on a monthly basis, so it is not possible to determine whether the seizures in Cartagena were conducted before or after the re-introduction of the ports of entry measure.

⁹³³ Panama's second written submission, para. 196.

⁹³⁴ Panama's first oral statement, para. 179.

⁹³⁵ Panama's first oral statement, para. 7. Furthermore, Panama notes that, although not subject to the port of entry measure, vehicles and vehicle parts accounts for 16.2 per cent of seizures. In contrast, footwear accounted for only 9.2 per cent of seizures between 2005 and 2007. See Panama's first oral statement, para. 9, Panama's second written submission, para. 109.

⁹³⁶ Chart 3 of Exhibit COL-38.

⁹³⁷ Chart 3 of Exhibit COL-38.

⁹³⁸ Panama's second written submission, paras. 179-180.

⁹³⁹ Exhibit COL-17; Colombia's first written submission, paras. 197 and 199.

⁹⁴⁰ Panama's first oral statement, para. 8.

⁹⁴¹ Panama's first oral statement, para. 8.

the amount of contraband (and therefore revenue forgone) in absolute terms is higher than that of Panama.⁹⁴²

7.576 The Panel will thus assess the extent to which the ports of entry measure contributes to the realization of the end pursued in light of the quantitative and qualitative assessment advanced by Colombia. Preliminarily, the Panel notes that Colombia has not presented any evidence whether the measure contributes to combating problems allegedly related to contraband, such as money-laundering and drug trafficking. The Panel analysis will thus be limited to corroborating whether Colombia has succeeded in establishing that the measure is apt to contribute to tackling under-invoicing and smuggling, which Colombia considers to be linked to illicit activities, including problems with money-laundering and drug trafficking. The Panel will not address the broader question of whether the measure is also apt to combat money-laundering and drug trafficking.

7.577 Colombia has presented a series of quantitative indicators to confirm the effectiveness of the ports of entry measure. Colombia argues that an appropriate way of monitoring the effectiveness of the measure is to analyse the "implicit price", or the declared price per unit. According to Colombia, an increase in the implicit price demonstrates that the ports of entry measure is effective in addressing under-invoicing, since under-valuation is being curtailed due to increased controls.⁹⁴³ Based on data submitted as Exhibit COL-42, Colombia contends that implicit prices for textiles, apparel and footwear have increased during the periods of application of the measure.⁹⁴⁴ For Colombia, this demonstrates that the measure is effective in combating under-invoicing.⁹⁴⁵

7.578 The Panel will evaluate whether implicit prices for textiles, apparel and footwear have increased during the imposition of the ports of entry measure. Before addressing Colombia's analysis of the data, the Panel would like to comment on several observations concerning the accuracy of the data. The Panel notes that Colombia's analysis of the evolution of the implicit price draws almost exclusively from data submitted in Exhibit COL-42 and, in particular, from the *Boletín 12 Seguimiento Resolución 7373 / 2007* (hereinafter "Bulletin 12").⁹⁴⁶ However, a critical portion of the imports arriving to Colombia from Panama, i.e. textile, apparel and footwear imports originating in

⁹⁴² Panama's comment of Colombia's response to Panel question No. 138.

⁹⁴³ Colombia's second written submission, para. 235; Colombia's second oral statement, paras. 60-62.

⁹⁴⁴ Colombia's second written submission, para. 235.

⁹⁴⁵ See Colombia's second written submission, paras. 235-242. The Panel wishes to note that it does not agree with Colombia's account of the evolution of the implicit price. Thus, Colombia's proposition that implicit prices of textiles imports arriving from Panama ranged from US\$1.01 to US\$0.84 during the period of application of the port of entry measure is not reflected by the numbers provided by Colombia in Exhibit COL-42 and Exhibit COL-61. In fact, during the periods of application of the measure, the implicit price of textiles coming from Panama reached such low levels as 0.12 in December 2005, during application of the restrictions on ports of entry, and 0.61 in May 2008, during the application of the ports of entry measure. Colombia's assertion that implicit prices of textiles goods "just prior to the imposition of the first ports measure were at a range of 0.19 to 0.30" is not supported by the data. According to Exhibits COL-42 and COL-61 the implicit prices during the months preceding the first measure were: US\$0.26 (May-2005); US\$0.35 (April-2005); US\$0.36 (March-2005); US\$0.39 (Feb-2005); US\$0.25 (Jan-2005). There are also some minor discrepancies between the numbers presented by Colombia and the figures appearing in the databases with respect to apparel. Thus, during the application of the challenged measure, implicit prices ranged from US\$1.98 (July-2007) to US\$4.15 (Sept-2007), and not a range of US\$1.95 and US\$3.89 as stated by Colombia.

⁹⁴⁶ See Colombia's second written submission, paras. 234-241. Bulletin 12 contains monthly data for the period 2004-2008 on the value, volume and implicit price of imports of textiles, apparel and footwear arriving from Panama and other points of departure (Statistical Annex No. 4). Bulletin 12 charts the evolution of these variables over time (Charts 1-12). In addition, data is included on the value, volume and implicit price of imports by port of entry (Table 2 and Statistical Annexes Nos. 5, 6 and 14) and by type of importer (Table 3 and Statistical Annex Nos. 7, 8, 11 and 12). At the Panel's request, Colombia additionally submitted Exhibit COL-61, which provides the value, volume and implicit price for each of the subject goods, on a monthly basis, in total and per port of entry.

China, seem to have been excluded from Bulletin 12.⁹⁴⁷ In response to an inquiry from the Panel, several months after submitting Bulletin 12, Colombia informed the Panel that imports arriving from Panama of Chinese origin were reflected in the data, contrary to labels and column headings indicating otherwise.⁹⁴⁸ The Panel is troubled by Colombia's explanation in two respects. As a procedural matter, Colombia informed the Panel of this significant purported mislabelling of data at a very late point in the proceedings, and only then in comments in response to a letter submitted by Panama.⁹⁴⁹ Substantively, this late correction seems to contradict the data presented in earlier submissions. In this respect, the Panel notes that the alleged mistakes in column headings in Bulletin 12 are reproduced in a section of the Report specifically aimed at explaining the methodology adopted for the whole Report.⁹⁵⁰

7.579 Notwithstanding the aforementioned concerns with the accuracy of evidence submitted by Colombia, the Panel will nevertheless proceed to assess Colombia's interpretation of the data. As Colombia itself acknowledged, examining and interpreting the statistics in Exhibit COL-42 is a complex task due to the "many intervening factors that must be taken into account".⁹⁵¹ Indeed,

⁹⁴⁷ Indeed, Section 3 of Boletín 12. Seguimiento. Resolución 7373/2007, p. 5, states that, following the methodology established in 2005, the Report presents a series of charts for imports of textiles, apparel and footwear that: (a) arrived from Panama but did not originate in China; (b) originated in China but did not arrive from Panama; and (c) originated in countries other than China and arrived from countries other than Panama (Bulletin 12 reads in relevant part as follows: "*A continuación se describe el comportamiento de las importaciones de los tres productos sensibles (textiles, confecciones y calzado) con la metodología que se introdujo en julio de 2005... En tal sentido se han construido cuadros y gráficos de seguimiento en donde se muestran las importaciones mensuales desde el 2005 para estos tres productos sensibles de la siguiente manera: importaciones con origen China, con todas las procedencias menos Panamá; Importaciones procedentes de Panamá, sin origen China; y las demás importaciones procedentes del resto del mundo, sin origen China ni procedencia Panamá. De esta manera se logra captar el comportamiento de las importaciones con criterios que aíslan y clarifican las tendencias del comercio con China (según origen), Panamá (según procedencia) y el resto del mundo (según procedencia) para estos tres tipos de producción.*") (Exhibit COL-42). The column headings read as follows: "China (origin)", "Panama (arriving from, not originating in China)", "Rest of the World". In Spanish, the columns read as follows: "*China (origen)*"; "*Panamá (Procedencia, sin origen China)*" and "*Resto del Mundo*" (See Statistical Annex No. 4, Exhibit COL-42).

⁹⁴⁸ According to Colombia, certain columns in the provided table were mislabelled, but in fact included imports arriving from Panama of Chinese origin. Colombia explained that subsequent versions of Bulletin 12 had been amended to clearly indicate the inclusion of Chinese-origin goods. (Comments by Colombia in respect of Panama's letter of 15 October 2008, p. 3).

⁹⁴⁹ See Communication to Colombia requesting its comments on an unsolicited letter submitted by Panama. Through an unsolicited letter submitted to the Panel, Panama commented on Colombia's interpretation of certain arguments made by Panama in relation to the indicative prices measure. In response to a request for comments from the Panel, Colombia addressed Panama's comments; however, in addition, Colombia provided additional comments regarding monthly data on import volumes and value for subject textiles, apparel and footwear, which had been submitted earlier.

⁹⁵⁰ See footnote 947. In addition, the Panel disagrees with the arguments set forth in Exhibit COL-68, attached to the note. The DIAN's Director proposes in that exhibit to analyse the implicit price in four periods: January 2004 – June 2005 (when no ports of entry restrictions were in place); July 2005 – November 2005 (during imposition of the first set of restriction on port of entry); December 2006 (following removal of the first set of restrictions) and July 2007 until present (see Exhibit COL-68, p. 3). The Panel notes that the first measure was repealed in 1 November 2006, and not in December 2006, as suggested by the time periods put forward by the DIAN's Director. In fact, the original measure imposing restrictions on ports of entry was repealed by Resolution No. 13034 of 31 October 2006. Article 2 of this Resolution states that the Resolution "shall take effect from the date of its publication for goods dispatched to Colombia subsequent to its entry into force" (See WT/DS348/10, p. 4). The Resolution was published on 1 November 2006 (see "nota de vigencia" No. 70 of Resolution No. 4240). Accordingly, in the Panel's view, the relevant periods for comparison should be: January 2004 – June 2005; July 2005 – October 2006; November 2006 – June 2007; and July 2007 – present.

⁹⁵¹ Colombia's second written submission, para. 242; Colombia's second oral statement, para. 62. See also Panama's second oral statement, paras. 70-71.

Colombia argues that the ports of entry measure is "part of a comprehensive set of measures to combat this persistent problem of fraudulent under-invoicing and contraband". According to Colombia, this "set" of measure includes, the requirement to present an advance import declaration; the requirement to present an export declaration or similar documents in support of the import declaration; restriction on domestic transit; creation of the position of Customs Observer; incorporation of the Fiscal and Customs Policy in the organizational structure of DIAN; strengthening of cooperation between various customs administrations; adoption of indicative and references prices as a control mechanism; additional documentary requirements that accompany the invoice; and the conclusion of agreements with other countries' customs administrations and with the private sector.⁹⁵² Preliminarily, the Panel is concerned as to what individual effect this wide array of policies implemented in addition to the requirements within the ports of entry measure may have on the evolution of implicit prices calculated for subject textiles, apparel and footwear imported into Colombia. Additionally, the Panel notes that many market factors influence implicit prices, beyond the effects of the various measures imposed by Colombia.⁹⁵³

7.580 In the Panel's view, Colombia has failed to set forth a methodology capable of controlling all the factors that influence implicit prices. In the absence of an adequate methodology, the Panel is unable to rely on provided data on the implicit value of subject goods imports in order to determine the contribution of the ports of entry measure to reduce the incidence of under-invoicing and/or smuggling.

7.581 In any case, the Panel is of the opinion that the data submitted by Colombia does not show a strict correlation between the implementation of the ports of entry measure and the implicit price, but is inconclusive. As Colombia itself recognized, not all the data in Exhibit COL-42 points in the same direction.⁹⁵⁴ Indeed, an analysis of the data in Exhibit COL-42 and of the more detailed and updated data in Exhibit COL-61 reveal many "anomalies" in the evolution of the implicit price, in clear depart from Colombia's general conclusion that the implicit prices of subject products have increased during the periods of application of the port of entry measures.⁹⁵⁵ Colombia has not provided any

⁹⁵² Colombia's response to Panel question No. 149.

⁹⁵³ To illustrate the problems inherent in interpreting implicit price data provided by Colombia in isolation of other market factors, such as changes in consumer tastes or demand, the Panel, for example, notes the possible effect on implicit price that may arise from a change in the composition of the products imported within the category of footwear. The Panel notes for instance, that the product category "footwear" as designated broadly by Colombia, includes a wide array of specific products, falling within a wide range of prices. According to the estimated values assigned by the DIAN, the category "footwear" comprises goods with prices ranging from US\$1.40 to US\$63.40 (See Exhibit PAN-14). Thus, an increase in the volume of the imported products at the latter price would have an upward influence on the "implicit price" for the average price per unit for the whole footwear category. However, this increase would not necessarily result from any improvement in customs enforcement.

⁹⁵⁴ Colombia's second written submission, para. 242; Colombia's second oral statement, para. 62.

⁹⁵⁵ For instance, the Panel notes that the implicit price of textiles arriving from Panama did not surpass the implicit price of textiles arriving from rest of the world until a period when restrictions were not applied: December 2007 – July 2007, except for one month during the imposition of Colombia's first set of restrictions (September 2006), in which the implicit price of goods arriving from Panama briefly exceeded the one of textiles arriving from the rest of the world. While implicit prices of apparel arriving from Panama increased dramatically during the two ports of entry measures, there was a spectacular collapse of the implicit price during the period of application of the first measure restricting port of entry (August 2006). In that one-month period, the implicit price plunged from US\$2.77 in July 2006 to US\$0.39. Subsequently, the implicit price surged during the period following Colombia's original restriction and prior to imposition of the ports of entry measure, from US\$0.21 in January 2007 to US\$2.06 in April 2007. This significant fluctuations cannot be explained as a result of a general trend, as evidenced by the fact that the implicit price for apparel arriving from the rest of the world stayed relatively constant during this period (During the period August 2006 – April 2007, the implicit price for apparel imports oscillated between US\$0.49 and US\$0.88). Finally, the Panel also notes a sharp increase in the implicit price of footwear imports arriving from Panama during both periods where restrictions were imposed (July 2005–October 2006 and July 2007–present). As in the case of apparel, a sharp

explanation for the possible causes of these anomalies. In the absence of explanation, the Panel lacks the necessary elements to assess whether these irregularities arise from the ineffectiveness of the ports of entry measure, or to the fact that other intervening variables may have influenced these prices. The Panel therefore finds that there is no correlation, much less causal link, demonstrated between implicit prices and the ports of entry measure. For the reasons discussed in the preceding paragraphs, the Panel considers that Colombia has failed to substantiate its statement that an analysis of the implicit price of subject goods arriving from Panama demonstrates that the measure is effective in combating under-invoicing. Even setting aside concerns on whether or not the data submitted by Colombia includes imports of Chinese origin arriving from Panama, the Panel does not consider Colombia had provided evidence sufficient to conclude that under-invoicing has diminished during the periods of implementation of the port of entry measure.

7.582 The Panel will also address Colombia's argument that the effectiveness of the measure is demonstrated through the "significant increase in contraband related seizures ... with respect to textiles products from Panama in 2007 compared to 2006".⁹⁵⁶ In order to substantiate this claim, Colombia submitted Exhibit COL-31, which contains the total value of seizures of textiles products for the years 2006 and 2007, and Exhibit COL-18, which details the total value of seizures per category of product for the same years. Colombia submits that the total number of seizures of textiles nearly doubled from 2006 to 2007.⁹⁵⁷ In Colombia's view, this substantial increase demonstrates that the port of entry measure is "clearly having a positive effect in terms of combating contraband".⁹⁵⁸

7.583 The Panel observes, as pointed out by Panama, that the information contained in Exhibit COL-31 and Exhibit COL-18 is not provided on a monthly basis. Hence, it is not possible to determine whether the seizures were conducted before or after the reintroduction of the measure in July 2007. Moreover, the Panel observes that the value of textiles imports arriving from Panama increased by 50 per cent between 2006 and 2007.⁹⁵⁹ An important portion of the increase in seizures could therefore be attributable to the increase in trade, rather to the strengthening of customs controls. In any case, the Panel observes that the increase in seizures of footwear goods (around 12 per cent) was smaller than the increase in textile seizures. More importantly, the Panel notes that textiles accounted for only 13 per cent and 18 per cent of the total value of subject goods imports arriving from Panama in 2006 and 2007, respectively, while apparel imports represented 38 per cent and 42 per cent of the total value of subject imports.⁹⁶⁰ However, Colombia has not provided any data regarding seizures of apparel. In light of these discrepancies, the Panel considers that Colombia has

increase in the implicit price of footwear arriving from Panama occurred during the period in-between the two measures, from US\$1.41 in Jan-2007 to US\$8.12 in May-2007. Again, the implicit price for footwear arriving from the rest of the world shows a much softer increase: it grew from US\$3.85 in January 2007 to US\$5.18 in March 2007 and then fell to US\$4.66 in May 2007.

⁹⁵⁶ Colombia's first written submission, para. 346.

⁹⁵⁷ Colombia's first written submission, para. 346, Colombia's second written submission, para. 232.

⁹⁵⁸ Colombia's second written submission, para. 230.

⁹⁵⁹ See Exhibit COL-61. Based on data presented in that exhibit, the Panel calculates that the total value of imported textiles arriving from Panama was US\$18,811,236 in 2006 and US\$28,099,040 in 2007.

⁹⁶⁰ Exhibit COL-61. Based on data in that exhibit, the Panel has determined the following distribution by category of product:

Total value of subject goods arriving from Panama - distribution by category of product (2006 and 2007)				
Product	2006		2007	
	Value US\$	%	Value US\$	%
Textiles	18,811,237.00	13	28,285,929.00	18
Apparel	56,525,328.00	38	66,951,932.00	42
Footwear	71,984,506.00	49	63,366,809.00	40

failed to demonstrate that the value of seizures of subject goods (which includes textiles, but also footwear and apparel) has increased since the imposition of the measure at issue.

7.584 Finally, Colombia submits that the "level of distortion", i.e. the difference between the value of exports reported by Panama and the value of imports reported by Colombia, for textiles, apparel and footwear has decreased since the introduction of the measure, thus demonstrating the measure has been effective at reducing under-invoicing and smuggling.⁹⁶¹ The Panel considers that its approach used when assessing the pertinence of Colombia's implicit prices analysis and the number of seizures, is also applicable to the examine Colombia's arguments concerning trade distortions. First, the Panel notes that Colombia calculates trade distortions on an annual basis.⁹⁶² Thus, it is not possible to determine the extent to which the alleged decrease in this indicator correlates with the introduction of measures imposed on goods arriving from Panama (both in the periods July 2005-October 2006 and July 2007-present). Second, as noted many variables beyond the ports of entry measure may affect the evolution of trade distortions, the application of indicative prices being the most obvious.⁹⁶³ The Panel therefore concludes that Colombia has not demonstrated that the alleged diminution on the level of distortions was caused by the imposition of the ports of entry measure.⁹⁶⁴

⁹⁶¹ Colombia's second oral statement, para. 63. Colombia calculates trade distortions as the difference between the data on Panamanian exports presented in Exhibits PAN-56 (Re-exports from the Colon Free Zone to Colombia, for the goods under HS Chapters 50-64, between 2000-2007) and the figures on Colombian imports in Exhibit COL-45 (Official Statistics, Imports of Textiles, Apparel and Footwear from Panama, between 2000-2008). Based on these two exhibits, the Panel has determined trade distortions as follows:

Difference between subject goods exports to Colombia reported by Panama and subject goods imports from Panama reported by Colombia – thousands of US\$								
	2000	2001	2002	2003	2004	2005	2006	2007
Values reported by Panama	241,400	231,255	229,526	199,458	324,114	413,290	483,587	503,461
Values reported by Colombia	46,172	69,847	57,869	53,625	75,312	104,926	132,854	158,300
Trade distortions	195,228	161,408	171,657	145,833	248,802	308,364	350,733	345,161

⁹⁶² See Exhibit COL-57.

⁹⁶³ The Panel acknowledges that, as Colombia explained in its responses to Panel questions Nos. 127, 128 and 129, Colombian official statistics reflect the value declared by the importer and not the value based on the indicative price. Regardless, the Panel is of the opinion that there is a strong incentive for importers to declare a value above the indicative price as a result of the imposition of the indicative prices measure. The Panel therefore recognizes that the imposition of the indicative prices measure may have affected the prices declared by the importers. Furthermore, the Panel notes that the amount of "trade distortion" is inherently affected by two factors: (a) the value declared by Panamanian exporters; and (b) the value declared by Colombian importers. It is possible that only the latter figure may be affected by the ports of entry measure. In this respect, Colombia has not demonstrated the extent to which the alleged decrease in trade distortions is attributable to the value declared to customs officials upon arrival to Colombia, and not to a relative decline in the prices declared by Panamanian exporters.

⁹⁶⁴ According to Exhibit COL-16, the distortion that corresponds to textiles, apparel and footwear represents US\$350,996,000 out of a total distortion for all products of US\$844,858,000. The Panel is concerned about the accuracy of the data provided by Colombia in this exhibit. First, Colombia has not provided a source of the data presented therein. Second, that data contained in this exhibit seems to be inconsistent with data presented in Table 9 of Exhibit COL-48. For instance, Exhibit COL-48 shows that "contrabando abierto" of *Máquinas y aparatos eléctricos* for the year 2006 was US\$192,337,000, while, Exhibit COL-16 states an amount of US\$2,430,000. Third, Exhibit COL-16 also seems to be inconsistent with Exhibit COL-51. There are discrepancies among the figures of *contrabando* and under-invoicing of goods classifiable under HS chapter 64 in 2006 presented in Exhibit COL-51 (US\$5,175,000 and 119,734,000, respectively), and data included in Exhibit COL-16 (US\$5,204,000 and US\$98,666,000, respectively). Fourth, the figure corresponding to "*sobrefacturación*" for the same products and year in Exhibit COL-51, i.e. US\$21,073,000, exactly matches figures in Exhibit COL-16 as "*contrabando técnico*". Finally, as noted by Panama in its second written submission, para. 111, a discrepancy exists between the figure cited in Exhibit COL-16 as the value of imports

7.585 For the reasons set forth above, the Panel considers that Colombia has failed to meet its burden to substantiate that the measure at issue has contributed to the fight against smuggling and under-invoicing. In fact, as Panama noted, Colombia reported during these proceedings that between July 2005 and October 2006 the percentage of contraband trade arriving from Panama exceeded 84 per cent in general and 89 per cent in the case of textiles, at a time when a restriction highly similar to the ports of entry measure at issue was in force.⁹⁶⁵ This appears to suggest that the ports of entry measure does not contribute to reducing contraband and smuggling.⁹⁶⁶

7.586 In addition to its consideration of implicit price data, contraband seizures and trade distortions, Colombia has advanced arguments of a qualitative nature to demonstrate that the measure is effective in combating contraband. Colombia contends that, due to its "thrust and architecture", the ports of entry measure is apt to contribute to securing better compliance with Colombia's customs laws.⁹⁶⁷ Colombia recalls that the Appellate Body has stated in *Brazil – Retreaded Tyres* that a demonstration of such contribution could consist of "qualitative reasoning based on a set of hypotheses that are tested and supported by sufficient evidence".⁹⁶⁸ The Panel notes, however, that Colombia has not provided evidence to demonstrate increased compliance arising from the measure, but instead speculates that this must be the case. As noted above, evidence on price data, seizures and trade distortions has not demonstrated the measure is effective.

7.587 Furthermore, the Panel considers that the scope of application of the port of entry measure, both in terms of the categories and origin of subject goods, entails structural shortcomings that limit its potential to contribute to tackling problems with smuggling and under-invoicing. Exhibit COL-38 shows that Colombia had greater trade distortions in 2006 with other trading partners, such as the United States (US\$2,902 million), ALADI (US\$2,500 million) and Europe (US\$1,837 million), than with Panama (US\$906 million).⁹⁶⁹ In fact, Exhibit COL-38 shows that distortions with Panama in 2006 were almost exclusively related to "*contrabando abierto*", and not to other trade-related problems that the measure also aims to tackle, such as "*contrabando técnico*", "*subfacturación*", "*sobrefacturación*" and "*cambio de procedencia*".⁹⁷⁰

7.588 Without further evidence that the measure has enhanced enforcement related to problems of under-invoicing and contraband, the Panel is not able to conclude that the ports of entry measure has contributed in the past or currently contributes to combating customs fraud and contraband in Colombia.

in 2006 (US\$415,550,000) and the figure cited in the table included in Colombia's first written submission, para. 193 (US\$412,091,000).

⁹⁶⁵ Colombia's first written submission, para. 196. Exhibit COL-18.

⁹⁶⁶ Despite its reference to the reports that the percentage of contraband trade arriving from Panama exceeded 84 per cent in general and 89 per cent in the case of textiles between July 2005 and October 2006, the Panel declines to place too much emphasis on the figures. The Panel notes that these figures concern only one of the three product categories and concern only the period between July 2005 and October 2006. In addition, the Panel was not able to determine the basis for calculating these figures.

⁹⁶⁷ Colombia's second written submission, para. 229.

⁹⁶⁸ Colombia's second written submission, para. 230.

⁹⁶⁹ Table 7 of Exhibit COL-38, p. 15

⁹⁷⁰ Table 4 of Exhibit COL-38, p. 10. The Panel additionally notes Panama's argument that evidence submitted by Colombia in Exhibit COL-16 demonstrates, for instance that "*máquinas y aparatos eléctricos*" are more frequently connected with under-invoicing practices than are textiles, apparel and footwear. Despite this fact, Panama notes that the ports of entry measures does not apply to "*máquinas y aparatos eléctricos*". Colombia responded in its response to Panel question No. 48 that it has imposed a series of measures, including most notably, the conclusion of "contraband agreements" with the private sector, in order to closely monitor under-invoicing problems with "*máquinas y aparatos eléctricos*". According to Colombia, this type of agreement provides an effective way to address contraband occurring in this section, due to the limited number of importers and distributors of such products (only six), and their clear willingness to cooperate and fight contraband. While declining to decide on this issue, the Panel notes that Colombia did not submit any evidence to support its reasoning.

The restrictive impact of the measure

7.589 The Panel will next consider the restrictive impact of the measure on imported goods in its evaluation of whether the ports of entry measure may be considered "necessary" within the meaning of Article XX(d). In the context of this assessment, the Panel would first like to recall its finding that the ports of entry measure constitutes a prohibited restriction on importation under Article XI:1 of the *GATT 1994*.⁹⁷¹ More specifically, the Panel established that the ports of entry measure has a limiting effect on imports arriving from Panama, and thus constitutes a restriction on importation. While the Panel's analysis under Article XI:1 considers the design, structure and architecture of the measure and its potential to restrict importation, the Panel will here examine the extent of the restrictive impact on trade resulting from the measure's application.

7.590 Colombia argues that the various requirements in the ports of entry measure have not had a significant negative impact on legitimate trade, while the measure overall has been effective in combating smuggling and under-invoicing.⁹⁷² In support of that view, Colombia notes that the value of subject imports arriving from Panama and the CFZ increased during the implementation of the measure.⁹⁷³ In this respect, Colombia observes that the panel in *Dominican Republic – Import and Sale of Cigarettes* considered relevant the fact that the tax stamp requirement did not prevent Honduras from exporting cigarettes to the Dominican Republic and that its exports had increased significantly over recent years. Accordingly, Colombia mentions, the Panel assumed "that the measure has not had any intense restrictive effects on trade."⁹⁷⁴

7.591 Furthermore, Colombia contends that prior to the imposition of the measure in 2007, trade flow data supports the conclusion that Barranquilla and Bogota were important ports for Panamanian traders. As no negative effects have arisen from the measure, due to the fact that the value of imports increased during the measure's implementation⁹⁷⁵, Colombia argues that the ports of entry measure should not be considered as having an intensive restrictive effect on trade.⁹⁷⁶

7.592 Colombia offers additional qualitative explanations on why the ports of entry measure has not adversely affected textile, apparel and footwear imports from Panama. Colombia offers a series of reasons why the two available ports, Barranquilla and Bogota, are to be considered as the most convenient ports of entry for subject goods arriving from Panama. According to Colombia, these ports are "among the most modern and important ports of Colombia"⁹⁷⁷ and the closest in proximity to the CFZ and main markets of Colombia.⁹⁷⁸ Moreover, they are staffed with customs officials specialized at handling contraband concerns and they have a more substantial industrial and transit

⁹⁷¹ See Section VII.E.

⁹⁷² Colombia's first written submission, para. 351.

⁹⁷³ Colombia's first written submission, para. 356; Colombia's second written submission, para. 258.

⁹⁷⁴ Panel Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 7.215.

⁹⁷⁵ Colombia's first written submission, para. 356, Colombia's second written submission, para. 258.

⁹⁷⁶ Colombia's first written submission, para. 357. According to Colombia, the closure of other ports logically has not had a significant trade impact on exports from Panama. Colombia notes in 2004, for instance, that Buenaventura, Barranquilla and Bogota were three principal ports for imports from Panama, constituting 63 per cent of net weight of imports of subject goods, and 87 per cent of value (Colombia's second oral statement, para. 67). According to Colombia, Bogota and Barranquilla rank as the number one and two ports for footwear, the number one and three ports for apparel, and the number two and three ports for textiles (Colombia's second written submission, para. 138; Exhibit COL-28).

⁹⁷⁷ Colombia's second written submission, para. 137. In particular, Colombia submits that Barranquilla has a more substantial industrial and transit network including high capacity cargo processing, an airport, financial, commercial and telecommunication services, in comparison to Buenaventura seaport. Colombia points out that Barranquilla seaport operates 24 hours per day as well.

⁹⁷⁸ Colombia's second written submission, paras. 135 and 137. According to Colombia, more than 80 per cent of goods imported from Panama to Colombia arrive from the CFZ, which is situated along the Atlantic ocean.

capacity.⁹⁷⁹ Foremost, Colombia submits that the ports of entry measure has not restricted trade as the measure by design allows entry of textile, apparel and footwear at the two ports that are closest in proximity to the CFZ and main markets of Colombia – Bogota and Medellin.⁹⁸⁰

7.593 In addition to these factors, Colombia argues that the impact of the ports of entry measure must be assessed in light of a series of exemptions existing in the measure, which are linked to the objective pursued by the measure. Under the ports of entry measure, exception from the requirement to enter at Bogota or Barranquilla is provided for goods consigned to the State or territorial entities; imports effected for processing or assembly, travellers, postal traffic or urgent consignments; goods that are trans-shipped; goods that are consigned to industrial users of free trade zones whose economic activity involves the industrial processing of those goods; goods that enter Leticia, or imports in San Andrés, Providencia or Santa Catalina; and goods imported by "Permanent Customs Users" or "Highly Exporting Users".⁹⁸¹ In regard to this last category, Colombia points out that the "Permanent Customs Users" represented 62 per cent of the value of Panamanian trade in textiles in 2006, 50 per cent of Panamanian trade in footwear and 48 per cent of Panamanian trade in apparel.⁹⁸²

7.594 Panama disputes Colombia's interpretation that the ports of entry measure does not have a significant negative impact on legitimate trade.⁹⁸³ With respect to the alleged increase in the volume of imports during the period of imposition of the measure, Panama disagrees with Colombia's view of what constitutes "restrictive effects on trade". Panama cites to findings by the Appellate Body in *Japan – Alcoholic Beverages II* that "it is irrelevant that the 'trade effects' of the [measure at issue], as reflected in the volumes of imports, are insignificant or even non-existent".⁹⁸⁴ Accordingly, for Panama, the "restrictive effects" referred to by the Appellate Body in *Korea – Various Measures on Beef* must be viewed as meaning the effects on the conditions of competition of the imported products rather than the restrictive effects on the trade flows of imported goods.⁹⁸⁵ Notwithstanding this view, Panama disagrees with Colombia's statement that imports of textile, apparel and footwear goods from Panama have increased under the ports of entry measure. According to Panama, the volume of imports of such goods declined from 67,486 metric tonnes in 2006 to 60,871 metric tonnes in 2007.⁹⁸⁶

7.595 Panama further argues that data relied on by Colombia in Exhibit COL-28, which incorporates data from 2006 and 2007 is unreliable, as restrictions on ports of entry were in place for a portion of the time under review. Thus, trade volumes and values today cannot be compared with figures that were affected by the previous ports of entry measure. Moreover, Panama notes that the measure restricts trade by limiting access to ports which have been important points of access for traders of goods from Panama. Based on data from 2003–2004, before any restrictions were imposed on ports of entry, Panama argues that Cartagena accounted for 41.3 and 40.5 per cent, whereas Buenaventura accounted for 22.1 and 22.4 per cent, respectively.⁹⁸⁷ Furthermore, even though trade

⁹⁷⁹ Colombia's second written submission, para. 137.

⁹⁸⁰ Colombia's second written submission, para. 137. Colombia has also offered various justifications as to why Buenaventura was not a logical selection to include as an available port under the ports of entry measure. Broadly, Colombia argues that the efficiency of Bogota and Barranquilla exceed that of Buenaventura with respect to customs control. In addition, Colombia reiterates that more than 80 per cent of goods imported from Panama to Colombia arrive from the CFZ, situated along the Atlantic Ocean, as opposed to the Pacific Ocean, to which Buenaventura is nearest. Finally, Colombia cites to a number of documented structural problems with Buenaventura, including an inadequate roadway connecting Buenaventura with the national highway system and a concentration of guerrilla activities and security problems (Colombia's response to Panel question No. 58; Exhibit COL-58).

⁹⁸¹ Resolution No. 7373 (Exhibit PAN-36); Resolution No. 7637 (Exhibit PAN-36).

⁹⁸² Colombia's second written submission, paras. 255-256.

⁹⁸³ Panama's second written submission, paras. 199-206.

⁹⁸⁴ Panama's first oral statement, para. 43, Panama's second written submission, para. 131.

⁹⁸⁵ Panama's second written submission, para. 206.

⁹⁸⁶ Panama's response to Panel's question No. 136; Exhibit PAN-56 (Revised).

⁹⁸⁷ Exhibit PAN-71.

may have continued between Panama and Colombia since restrictions were first imposed, Panama stresses that trade may well have increased by even greater quantities had the measure not been enacted at all.⁹⁸⁸

7.596 The Panel will therefore look at to what extent the ports of entry measure affects trade between Panama and Colombia.

7.597 The Panel agrees with the panel in *Dominican Republic – Import and Sale of Cigarettes*⁹⁸⁹ that the fact that exports of the subject products increased during the application of the measure at issue is one appropriate parameter to establish whether the measure at issue has a restrictive impact on relevant trade, provided it is put in its proper context. In this respect, as argued by Panama, a comparison of the import data of subject goods before and after the imposition of the ports of entry measures may not by itself prove helpful if that data mostly reflects the import volumes pertaining to the time where the prior ports of entry restrictions were in force. Indeed, the data presented by Colombia in Exhibit COL-28 incorporates data from 2006 and 2007, during which time restrictions were in place. Moreover, the Panel considers that the relevant question is not whether Panamanian imports increased in absolute terms, but whether or not importation was suppressed, in other words, whether the imports would have increased to an even greater extent had the measure not been in place. The Panel notes that Colombia has not provided any analysis to address the question of whether the measure had a suppressing effect or not.

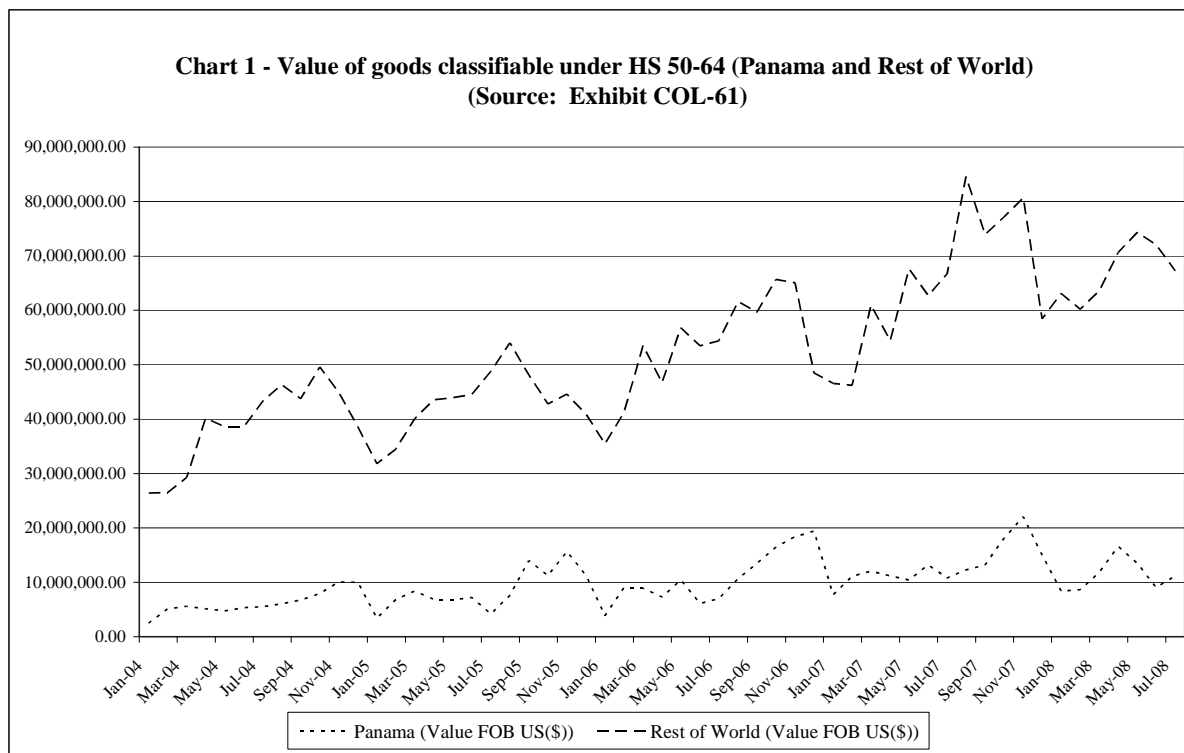
7.598 The Panel considers the growth (in terms of value) of imports arriving in Colombia from the points of departure from the rest of the world (which are thus not subject to the ports of entry measure) provides a useful point of comparison in assessing what might have been a reasonable growth rate for imports arriving from Panama.⁹⁹⁰ Chart 1 below depicts graphically the growth in aggregate value of textiles, apparel and footwear arriving from Panama in comparison to growth in aggregate value from the rest of the world, between January 2004 and July 2008.⁹⁹¹ As evident from Chart 1, abrupt fluctuations in the value of imports arriving from Panama are present both during periods of application of restriction on entry, and during periods without restriction, and they are of a similar nature than in the case of imports from the rest of the world making it difficult to discern any general pattern. Accordingly, the Panel is unable to establish on the basis of the evidence submitted by the parties whether the increase in the value of textiles, apparel and footwear imports arriving from Panama to Colombia would have been greater in the absence of the ports of entry measure.

⁹⁸⁸ Panama's comments on Colombia's response to Panel question No. 158.

⁹⁸⁹ Panel Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 7.215.

⁹⁹⁰ The Panel has opted to consider rates of import growth in terms of value for all subject textiles, apparel and footwear arriving from the rest of the world, in comparison to imports arriving from Panama. Thus the Panel considered the aggregated value of textile, apparel and footwear imports. The Panel considers it impractical to make an overall comparison of growth rates in terms of import volumes however, due to the fact that units of import volumes are different among textile, apparel and footwear imports.

⁹⁹¹ Chart 1 is based on data provided in Exhibit COL-61.



7.599 The Panel recalls that importation of subject goods from Panama is not absolutely prohibited, but entry is restricted to two out of 11 eligible ports available for imports of textile, footwear and apparel from points of departure other than Panama. Panama argues that the measure restricts trade by restricting access to those ports which have previously been used heavily by traders arriving from Panama. Based on data from 2003–2004, for instance, before any restrictions were imposed on ports of entry, Panama submits that Cartagena accounted for 41.3 and 40.5 per cent, whereas Buenaventura accounted for 22.1 and 22.4 per cent, respectively.⁹⁹² Colombia asserts that the ports of Bogotá and Barranquilla were very important in the importation of the subject goods from Panama prior to the implementation of the ports of entry measure.⁹⁹³ Based on the data submitted in Exhibit COL-28⁹⁹⁴, Colombia advances a series of propositions to support this statement. The Panel will analyse each of these propositions below. In doing so, the Panel will also consider the more detailed and updated data contained in Exhibit COL-61, submitted upon the Panel's request.⁹⁹⁵

7.600 First, Colombia argues that "Barranquilla was the most important port for goods under HS 50–64 from Panama in the year 2006, even during the second semester of 2006 when, for an important period of the time (November–December), no measures were in place".⁹⁹⁶ During 10 out of 12 months of the period referred to by Colombia ("year 2006"), the Panel notes that Colombia had in place restrictions and importation requirements on imports arriving from Panama, similar to those imposed under the ports of entry measure. In light of these restrictions, the Panel considers that it is only appropriate to consider those two months where no restrictions were imposed (November and December, 2006) to evaluate whether the measure in fact restricted trade. Otherwise, the Panel notes

⁹⁹² Exhibit PAN-71.

⁹⁹³ Colombia's first written submission, para. 353; Colombia's second oral statement, para. 68.

⁹⁹⁴ As a result of a clerical error, Colombia referred in its first written submission, para. 353, to Exhibit COL-32. This was amended in subsequent submissions. See, e.g. Colombia's second written submission, para. 259, footnote 154.

⁹⁹⁵ Exhibit COL-61 provides import data in terms of value and volume, per port of entry on a monthly basis for the period 2004-2008. Exhibit COL-28, referred to by Colombia, relies on the same data, but is aggregated on a semester basis).

⁹⁹⁶ Colombia's first written submission, para. 353.

that there are two relevant periods where unrestricted import flows can be observed: (i) between the two impositions of restrictions on the ports of entry, which extends from November 2006 to June 2007; and (ii) prior to imposition of any of the aforementioned restrictions, from January 2004 to June 2005. A comparative analysis (Table 1 below) of the value and volume of subject goods imports arriving from Panama per port of entry during these two periods, as well as during the two periods when port of entry measures were imposed, (thus totalling four separate periods) reveals a very different picture to the one depicted by Colombia:

**Table 1 - Volume and value of imports per port of entry and period of application of the ports of entry measure
Textiles, Apparel and Footwear
(Source: Exhibit COL-61)**

	Volume				Value			
	Jan 04-Jun 05	Jul 05-Oct 06	Nov 06-Jun 07	Jul 07-today	Jan 04-Jun 05	Jul 05-Oct 06	Nov 06-Jun 07	Jul 07-today
1. Textiles								
Barranquilla	31,631,139.90	70,560,929.42	5,882,622.82	31,814,779.54	2,196,747.75	12,042,947.46	4,822,988.11	22,695,060.12
Bogota	19,203,267.02	6,334,135.03	2,820,178.39	6,925,141.48	4,615,003.16	5,851,357.37	2,274,261.23	7,016,691.29
Buenaventura	28,539,767.11	2,240,066.73	8,890,089.11	371,531.83	5,941,926.38	946,169.64	6,462,773.18	319,137.38
Cali	755,761.76	0.00	15,464.29	4,714.58	269,401.92	0.00	17,624.55	4,092.31
Cartagena	7,860,830.04	4,577,662.35	4,359,292.98	3,146,538.98	5,926,338.61	2,336,703.67	2,088,853.90	2,350,455.25
Medellin	605,630.89	39,698.17	175,743.60	141,318.25	607,160.30	32,689.18	242,004.74	167,135.32
2. Apparel								
Barranquilla	29,923,249.22	100,643,699.62	31,775,841.00	10,173,577.00	12,052,608.76	31,402,525.89	14,977,406.14	25,823,446.35
Bogota	5,464,798.26	3,201,055.68	11,126,448.00	2,235,682.56	7,768,629.16	11,280,262.50	8,685,484.98	14,373,745.15
Buenaventura	109,975,872.73	9,719,650.12	11,018,975.00	614,433.00	14,187,577.75	2,505,263.65	3,585,391.03	1,324,823.06
Cali	4,469,860.00	237,186.00	235,535.00	14,044.00	2,762,735.01	27,913.91	191,788.97	125,332.04
Cartagena	9,859,514.20	17,901,626.00	33,851,356.00	6,149,312.00	5,344,856.26	6,508,784.98	10,837,691.66	15,788,042.25
Medellin	1,001,570.09	543,936.00	1,294,810.00	1,510,889.00	4,174,041.09	2,078,413.83	3,691,275.50	6,538,005.94
3. Footwear								
Barranquilla	830,844.00	7,831,074.00	3,919,866.00	4,419,293.28	1,587,131.20	38,117,939.28	11,683,228.12	28,815,544.77
Bogota	1,155,351.50	2,133,302.50	1,317,781.00	1,953,763.50	9,665,395.24	30,342,190.73	15,012,637.68	33,353,741.11
Buenaventura	16,304,768.41	3,184,278.00	2,378,213.00	102,255.00	9,836,275.37	5,148,052.90	4,585,310.63	1,427,203.13
Cali	964,438.00	6,121.00	207,531.00	54,768.00	2,628,376.47	73,981.98	604,839.66	1,063,637.03
Cartagena	1,487,621.00	1,929,124.00	4,769,067.00	515,517.00	1,443,375.23	2,232,255.99	4,737,942.85	2,530,092.26
Medellin	403,282.58	116,207.00	300,988.00	217,215.00	5,895,371.25	1,333,231.32	4,726,158.37	2,472,726.05

7.601 As can be observed in Table 1, Buenaventura was the preferred port of entry for textiles, apparel and footwear in terms of value during the period before the first measure was imposed (January 2004–June 2005), and it was the preferred port of entry for textiles during the period in-between the two measures (November 2006–June 2007). Moreover, Cartagena was the second most-used port of entry for textiles during January 2004–June 2005 and the second most-used port of entry for apparel during the period in-between the two measures (November 2006–June 2007).

7.602 Colombia's proposition that the ports of entry measure has not had a significant negative impact on legitimate trade is even more bluntly contradicted in terms of the volume of subject imports arriving from Panama. In terms of volume, 68 per cent of apparel imports and 77 per cent of footwear imports that arrived in Colombia during the period before the imposition of the first measure arrived at the port of Buenaventura. Moreover, Cartagena was the preferred port of entry for apparel and footwear during the period falling between Colombia's imposition of restrictions on ports of entry. In the case of textiles, Buenaventura was the preferred port of entry in terms volume during the period prior to imposition of the ports of entry measure at issue, and the second most-used port during the period before the first measure was imposed (January 2004–June 2005).

7.603 Second, Colombia states that "[f]or apparel, Barranquilla remained the number one port for shipments from Panama during the first semester of 2007 – the period of time that no measures were in place", and that "[w]ith respect to footwear, Barranquilla was a close second, in the same period of 2007, second only to Bogotá". The Panel disagrees with Colombia's arbitrary determination of the period of time during which the impact of the measure is to be examined. The Panel observes that the duration of the last period when no restrictions were in place (the one to which Colombia appears to refer to) was much longer than suggested by Colombia (it extended from November 2006–June 2007, and not only from January 2007–June 2007, as Colombia suggests). Moreover, the Panel recalls that there was another period of time when "no measures were in place", i.e. prior to the enactment of the first ports of entry measure (see paragraph 7.600 above). Even if the Panel assumes that restrictions were not in place from January 2007 to June 2007, as Colombia suggests, Colombia's assertions only holds true with respect to the value of apparel imports (and not textiles or footwear). In terms of volume, Cartagena was the preferred port of entry for both apparel and footwear during the first semester of 2007 (see Table 2 below). Additionally, Colombia affirms that "... Barranquilla and Bogota ... were the number two and three ports of choice with respect to textiles during this period". As Colombia acknowledges, the Panel notes that the preferred port of entry in terms of value for textiles is neither Barranquilla nor Bogotá, but Buenaventura. Furthermore, Cartagena is in a close fourth place. In terms of value, the two most-used ports of entry are Buenaventura and Cartagena (See Table 2 below).

	Textiles		Apparel		Footwear	
	Value	Volume	Value	Volume	Value	Volume
Barranquilla	2,635,512.28	2,897,265.26	10,331,461.51	19,418,973.00	6,743,254.70	2,708,016.00
Bogota	2,191,839.53	2,763,622.81	5,083,377.95	4,789,745.00	8,091,935.52	663,388.00
Buenaventura	4,621,946.03	5,527,218.32	1,691,139.30	3,302,263.00	2,540,680.79	998,404.00
Cali	17,624.55	15,464.29	119,165.74	223,821.00	449,622.04	197,243.00
Cartagena	1,857,844.95	3,166,273.80	8,146,024.42	23,748,771.00	3,377,889.21	3,374,954.00
Medellin	210,871.57	157,385.60	2,659,576.26	922,606.00	3,037,042.87	203,833.00

7.604 In the Panel's view, a careful analysis of the volume and value of textile, apparel and footwear imports, per port of entry, presents a more accurate picture to inform Colombia's statement that the ports of Bogota and Barranquilla were "very important" in the importation of the subject goods from Panama prior to the implementation of the ports of entry measure. The Panel is of the view that such

a careful analysis shows that the Panamanian exporters' choice of port was substantially affected by the imposition of the ports of entry measure.

7.605 Finally, Colombia has argued that the ports of entry measure provides for a number of exemptions that should be taken into account when assessing the restrictive impact of the ports of entry measure. The various exceptions are listed in paragraph 7.592 above.

7.606 In this respect, Colombia states that "the 'Permanent Customs Users' (UAPs) represented 62 [per cent] of the value of Panamanian trade in textiles in 2006, 50 [per cent] of Panamanian trade in footwear and 48 [per cent] of Panamanian trade in apparel."⁹⁹⁷ In support of this contention, Colombia refers to Exhibit COL-46, which breaks down volumes of textile, apparel and footwear imports by exempted importers of goods arriving from Panama in comparison to non-exempt importers, for the years 2006 and 2007; and to Bulletin 12, which presents similar data for the period January-March 2006, as well as an analysis of these data by the DIAN.⁹⁹⁸

7.607 With respect to Colombia's comments on Permanent Customs Users' involvement in importations arriving from Panama (62 per cent of the value for textiles, 50 per cent for footwear and 48 per percent for apparel), the Panel notes that these percentages correspond exclusively to one month, March 2006, and not the entire year 2006, as Colombia seems to suggest.⁹⁹⁹ In fact, according to the annual data presented in Exhibit COL-46, the UAPs represented 41 per cent of the total value of Panamanian trade in textiles, 62 per cent of trade in apparel and only 26 per cent of trade in footwear.¹⁰⁰⁰ During 2007, UAPs comprised 54 per cent of the value of apparel, 26 per cent of textiles and 24 per cent of footwear.¹⁰⁰¹

7.608 In any case, the Panel finds it difficult to gauge the restrictive impact on trade of the ports of entry measure. As noted above, the Panel is unable to conclude whether the imposition of the measure has had a suppressing effect on trade volumes, in terms of value or volume. In addition, the Panel noted that the measure has caused shifts in trade from prohibited ports to eligible ports. The Panel questions why such shifts would have occurred if such substantial percentages of trade were to benefit from the exemptions. As such, while the existence of exemptions have perhaps lessened the restrictive impact of the measure, the significance of this lessening is difficult to measure overall.

7.609 Despite uncertainty, the Panel nevertheless recalls, as the Appellate Body set forth in *Korea – Various Measures on Beef*, it is necessary to weigh and balance these factors, and not solely consider a particular factor, such as the contribution made by the measure, or its restrictive impact in isolation. Accordingly the Panel will consider whether Colombia has met its burden to establish provisionally that the ports of entry measure is "necessary" to secure compliance with Colombian customs enforcement laws and regulations.

Preliminary conclusions on whether the ports of entry measure is provisionally justified as necessary under Article XX(d)

7.610 In addition to weighing and balancing the importance of the common interests or values protected by that law or regulation, the contribution made by the compliance measure to the enforcement of the law or regulation at issue, and the accompanying impact of the law or regulation on imports or exports, the Appellate Body has stated that a measure may only be considered necessary if no alternative measure is available that could reasonably be employed and which is not inconsistent

⁹⁹⁷ Colombia's second written submission, paras. 255-256.

⁹⁹⁸ See Exhibit COL-46 and Bulletin 12, pp. 15-16 (Exhibit COL-42).

⁹⁹⁹ See Table 3 of Bulletin 12, p. 16 (Exhibit COL-42).

¹⁰⁰⁰ Exhibit COL-46.

¹⁰⁰¹ Exhibit COL-46.

with other *GATT* provisions.¹⁰⁰² While Panama initially proposed that a reasonably available less-trade restrictive alternative would be for Colombia and Panama to enter into a formal agreement to cooperate in the fight against contraband-related problems, similar to an approach taken under an earlier Customs Cooperation Protocol¹⁰⁰³, Panama subsequently retracted its proposal.¹⁰⁰⁴

7.611 The Panel recalls that the complaining member has the burden to identify possible alternatives.¹⁰⁰⁵ However, since Panama has solely proposed the application of Colombia's general customs laws to subject imports arriving from Panama, which is essentially the same result as would be obtained if the Panel were to uphold some or all of Panama's various claims under Articles I:1, V:2, V:6, XI:1, and or XIII:1, the Panel concludes that Panama has not identified any reasonably available specific measure for the Panel to consider in relation to Colombia's Article XX(d) defence. Thus, the Panel is left to consider whether Colombia has sufficiently established that the ports of entry measure is provisionally justified as necessary to ensure compliance with the applicable laws and regulations. Were Colombia to succeed in this respect, the Panel would proceed to examine whether the measure meets the requirements of the chapeau to Article XX.

7.612 The Panel recalls its earlier conclusions that the fight against under-invoicing and smuggling is an important interest in consideration of the particular conditions faced by Colombia. The Panel is satisfied that problems with under-invoicing and contraband occur in connection with the CFZ, which falls within Panama's jurisdiction. The Panel is also aware that smuggling and contraband are practices commonly affiliated with money laundering and drug trafficking.

7.613 Colombia has submitted evidence in an attempt to demonstrate that the ports of entry measure is effective in reducing under-invoicing and contraband, and that it has been narrowly designed to limit its trade restrictiveness, due to its focus on goods arriving from Panama and the multitude of exceptions for approved users and goods in international transit. As discussed above, the Panel finds it difficult to gauge the restrictive impact on trade of the ports of entry measure. Primarily, Colombia has not demonstrated and thus, the Panel is unable to conclude whether the imposition of the measure has had a suppressing effect on trade, in terms of value or volume. What is clear, however, is that the ports of entry measure has forced significant shifts in trade from prohibited ports to eligible ports. Even taking into consideration textiles, apparel and footwear that may enter Colombia unaffected due to express exemptions contained in the measure, the full extent of the measure's restrictiveness is unclear.

7.614 Aside from the measure's restrictiveness, the Panel considers more relevant the fact that, in its view, Colombia has not provided sufficient evidence to demonstrate that the ports of entry measure, which sets forth various requirements imposed exclusively on imports arriving from Panama, has contributed to reducing under-invoicing and the entry of smuggling. As discussed at length, Colombia failed to demonstrate a strict correlation between the implementation of the ports of entry measure and shifts in the implicit price (the average price per unit per month) of subject textiles, apparel and footwear. Due to many anomalies in the evolution of the implicit price, and the fact that Colombia did not attempt to control for other market factors which may influence prices, the Panel is unable to conclude whether these irregularities arise from the ineffectiveness of the ports of entry measure, or due to other intervening variables that may have influenced these prices.

¹⁰⁰² Appellate Body Report, *Korea – Various Measures on Beef*, para. 165, citing to GATT Panel Report, *US – Section 337*, footnote 69, para. 5.26.

¹⁰⁰³ See Exhibit PAN-1.

¹⁰⁰⁴ In light of its view that Colombia has a "far worse" customs problems with many trading partners other than Panama, to which Colombia applies its general customs laws and regulations, Panama explained to the Panel its view that the only reasonable course of action would be for Colombia to apply its general customs laws and regulations to Panama. Panama considers that Colombia could apply these same conditions to Panama as they are a reasonably available and less-trade restrictive alternative. Panama's second written submission, para. 211; Panama's second oral statement, paras. 72-73.

¹⁰⁰⁵ Appellate Body Report, *Brazil – Retreaded Tyres*, para. 156.

7.615 Colombia further argued that a higher incidence of seizures of contraband goods has occurred since the ports of entry measure's imposition, thus demonstrating its effectiveness. The Panel noted that it is not possible to determine whether the seizures were conducted before or after the reintroduction of the measure, or whether the increased incidence of seizures arose due to an overall increase in trade, rather than simply due to a strengthening of customs controls. Moreover, Colombia did not provide any data on seizures of apparel imports, which is the most significant of the three categories of products in terms of volume. Hence, the Panel considers that Colombia has failed to demonstrate that the value of seizures of subject goods has increased since the imposition of the measure at issue.

7.616 The Panel further concluded that Colombia did not demonstrate that the alleged diminution on the level of distortions caused by contraband and under-invoicing of goods arriving from Panama resulted from the imposition of the ports of entry measure. Broadly, the Panel is concerned about the possibility that other variables may also have affected the prices declared by Colombian importers, such as the application of indicative prices. In addition, the Panel considers data provided by Colombia is in part inconclusive, as Colombia presented data on an annual basis, during periods when restrictions on importation and related measures were at times in place, and other times not. Thus, the Panel is unable to ascertain the extent to which the alleged decrease in this levels of distortion correlates with the introduction and removal of measures imposed on goods arriving from Panama.

7.617 When considering the ports of entry measure's effectiveness, the Panel lastly addressed aspects of the measure's design, notably that the ports of entry measure applies exclusively to goods of various origins arriving from Panama. As such, the measure is narrowly targeted. However, evidence reveals that Colombia has experienced greater distortions in relation to smuggling and contraband involving the United States (US\$2,902 million), ALADI countries (US\$2,500 million) and Europe (US\$1,837 million), than with Panama (US\$906 million).¹⁰⁰⁶

7.618 For these reasons, the Panel considers that Colombia has failed to substantiate its statement that under-invoicing has diminished during the periods of implementation of the port of entry measure, possibly due to the influence of a wide array of market factors, which Colombia did not account for in its argumentation presented to the Panel, or due to the fact that Colombia has under-invoicing and smuggling problems with respect to textiles, apparel and footwear arriving from many trading partners. Without further evidence that the measure has enhanced enforcement related to problems of under-invoicing and contraband, the Panel is not able to conclude that the ports of entry measure has contributed in the past or currently contributes to combating of customs fraud and contraband in Colombia.

7.619 Accordingly, the Panel finds that Colombia has failed to establish that the ports of entry measure is necessary to ensure compliance with Colombian customs laws and regulations.

(iii) *Conclusion*

7.620 In light of the Panel's findings that Colombia has failed to establish that the ports of entry measure is necessary to ensure compliance with Colombian customs laws and regulations, the Panel therefore finds that the ports of entry measure is not justified under Article XX(d) of the *GATT 1994*. As such, the Panel will not proceed to examine whether the measure meets the requirements of the chapeau to Article XX.

¹⁰⁰⁶ Table 7 of Exhibit COL-38, p. 15.

VIII. CONCLUSIONS AND RECOMMENDATIONS

8.1 In light of the above findings, the Panel *upholds* Panama's claims that that Articles 128.5 e) of Decree No. 2685 and 172.7 of Resolution No. 4240, as well as the various resolutions establishing indicative prices, are inconsistent "as such" with the obligation established in the *Customs Valuation Agreement* to apply, in a sequential manner, the methods of valuation provided in Articles 1, 2, 3, 5 and 6 of the *Customs Valuation Agreement*.

8.2 The Panel further *upholds* Panama's claims that Article 128.5 e) of Decree No. 2685 and Article 172.7 of Resolution No. 4240 as well as the various resolutions establishing indicative prices, are inconsistent "as such" with Article 7.2(b) and (f) of the *Customs Valuation Agreement*.

8.3 In light of the above findings, the Panel *declines to rule* separately on Panama's claims that Article 128.5 e) of Decree No. 2685 and Article 172.7 of Resolution No. 4240, as well as the various resolutions establishing indicative prices, are "as such" inconsistent with Article 7.2(g) of the *Customs Valuation Agreement* and Article III:2, first sentence, and III:4 of the *GATT 1994*.

8.4 The Panel also *declines to rule* separately on Panama's "as applied" claims pertaining to the consistency of Colombia's indicative prices regime with the *Customs Valuation Agreement*, as well as Article III:2, first sentence, and III:4 of the *GATT 1994*.

8.5 The Panel *upholds* Panama's claims that the ports of entry measure is inconsistent with Article I:1, the first and second sentences of Article V:2, the first sentence of Article V:6, and Article XI:1 of the *GATT 1994*.

8.6 The Panel *declines to rule* separately on Panama's claims that the port of entry measure is inconsistent with Articles I:1 and XIII:1 of the *GATT 1994*.

8.7 The Panel further *rejects* Colombia's defence that the ports of entry measure is justified under Article XX(d) of the *GATT 1994*.

8.8 Under Article 3.8 of the *DSU*, in cases where there is infringement of the obligations assumed under a covered agreement, the action is considered prima facie to constitute a case of nullification or impairment of benefits under that agreement. Accordingly, we conclude that to the extent that Colombia has acted inconsistently with the provisions of the *Customs Valuation Agreement* and the *GATT 1994*, it has nullified or impaired benefits accruing to Panama thereunder.

8.9 Article 19.1 of the *DSU* is explicit concerning the recommendation a panel is to make in the event it determines that a measure is inconsistent with a covered agreement:

"[I]t shall recommend that the Member concerned bring the measure into conformity with that agreement." (footnotes omitted)

8.10 The Panel therefore recommends that Colombia bring its measures into conformity with its obligations under the *Customs Valuation Agreement* and the *GATT 1994*.
