COLOMBIA – INDICATIVE PRICES AND RESTRICTIONS ON PORTS OF ENTRY

Report of the Panel
TABLE OF CONTENTS

I. INTRODUCTION ................................................................................................................... 1

II. FACTUAL ASPECTS ........................................................................................................... 1
    A. BACKGROUND .................................................................................................................... 1
    B. THE USE OF INDICATIVE PRICES IN RELATION TO TEXTILE, APPAREL AND FOOTWEAR 3
    C. RESTRICTION ON PORTS OF ENTRY AND INTERNATIONAL TRANSIT RULES APPLICABLE
       TO TEXTILES, APPAREL AND FOOTWEAR ARRIVING FROM PANAMA .......................... 6
    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 .................................................................................................................................. 8
    E. THE REQUIREMENT TO PAY A FEE TO RECTIFY AN IMPORT DECLARATION APPLICABLE
       TO TEXTILE IMPORTS ARRIVING FROM PANAMA .......................................................... 9

III. PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS ........................... 9

IV. ARGUMENTS OF THE PARTIES .................................................................................... 11
    A. EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION OF PANAMA ............. 11
    1. Introduction .......................................................................................................................... 11
    2. The measures at issue .......................................................................................................... 13
       (a) Customs valuation of textiles, footwear and other products on the basis of "indicative
           prices" ................................................................................................................................... 13
       (b) Port of entry and transit restrictions and customs regulations for textiles from Panama .. 13
    3. Legal argument .................................................................................................................... 13
       (a) Colombia's use of indicative prices to determine the customs value of textiles,
           footwear and other products is inconsistent with Articles 1, 2, 3, 5, 6 and 7.2 (b), (f)
           and (g) of the Customs Valuation Agreement .................................................................... 13
       (i) Colombia's use of indicative prices is inconsistent with Article 1 of the Customs
           Valuation Agreement ......................................................................................................... 13
       (ii) Colombia's use of indicative prices is inconsistent with the methodologies set out in
           Articles 2, 3, 5, and 6 of the Customs Valuation Agreement ............................................... 14
       (iii) Colombia's use of indicative prices is inconsistent with Articles 7.2(b), (f) and (g) of
           the Customs Valuation Agreement .................................................................................... 15
       (iv) The payment of customs duties based on indicative prices is not a "guarantee" within
           the meaning of Article 13 of the Customs Valuation Agreement ...................................... 15
       (b) Colombia's reservation under the Customs Valuation Agreement to use minimum
           values has expired .................................................................................................................. 16
       (c) Colombia's use of indicative prices to determine the value of imported textiles,
           footwear and other products for the purpose of levying sales tax when the transaction
           value is used to determine the value of like domestic products for that purpose is
           inconsistent with Article III:2, first sentence, of the GATT 1994 .................................... 16
Colombia's prohibition of the importation of textiles from Panama except at the ports of Bogota and Barranquilla is inconsistent with Article XI:1 of the GATT 1994.

The port of entry restrictions are applied in a manner that is inconsistent with Article XIII:1 of the GATT 1994.

Colombia's suspension of the transit regime for textiles from Panama is inconsistent with Article V:2 of the GATT 1994.

The port of entry restrictions that accord treatment less favourable to goods in transit through Panama than that which they would have been accorded had they been transported from their place of origin without going through Panama are inconsistent with Article V:6 of the GATT 1994.

The requirement to present an advance declaration and pay customs duties and sales tax for textiles originating in Panama is inconsistent with Article I:1 of the GATT 1994.

4. Panama's request for findings and recommendations

B. EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION OF COLOMBIA

1. Request for preliminary ruling

2. Panama's claims with respect to the indicative price measure are to be rejected

(a) Panama's claims under the Customs Valuation Agreement are to be rejected as indicative prices are not a customs valuation method but only a customs control and verification mechanism.

(b) Panama's claim of discrimination under GATT Article III:2 is to be rejected as it lacks a factual and legal basis.

3. Panama's claims in respect of the port of entry measure are to be rejected

(a) Panama's claim under GATT Article XI is without merit as the port of entry measure does not constitute a prohibited quantitative restriction.

(b) Panama's claim that the port of entry measure is applied in a manner that is inconsistent with GATT Article XIII:1 is to be rejected because Article XIII:1 does not apply to the situation at hand.

(c) Panama's claim that the port of entry measure is inconsistent with the requirements of GATT Articles V.2 and V.6 lacks a factual basis as the port measure does not apply to goods in transit.

(d) Panama's claim that the requirement to present an advance import declaration and pay customs duties and sales taxes for textiles originating in Panama violates Colombia's MFN obligation under GATT Article I:1 lacks merit.

4. Colombia's port of entry measure is in any case justified under the general defence of GATT Article XX(d)

(a) The port measure is provisionally justified under paragraph (d) of GATT Article XX.

(i) The port of entry measure concerns a very important set of interests or values.

(ii) The port of entry measure is apt to contribute in a material way to the achievement of the objective.

(iii) The port of entry measure does not have a significant adverse impact on legitimate trade.
5. Request for findings .................................................................................................................. 27

C. EXECUTIVE SUMMARY OF THE REBUTTAL SUBMISSION OF PANAMA ............................................. 27

1. Legal argument .......................................................................................................................... 27

(a) Colombia has failed to demonstrate that it uses indicative prices as a customs control
mechanism and not for customs valuation purposes ...................................................................... 27

(b) Colombia has failed to demonstrate that the correction of the import declaration and
the payment of the customs taxes provided for in Article 128.5 e) of Decree No. 2685
are a guarantee mechanism within the meaning of Colombian Law and Article 13 of
the Customs Valuation Agreement .................................................................................................. 29

(c) Colombia has failed to demonstrate that its use of indicative prices is an action taken
pursuant to Article 17 of the Customs Valuation Agreement and the Decision
Regarding Cases Where Customs Administrations Have Reasons to Doubt the Truth
or Accuracy of the Declared Value .................................................................................................. 30

(d) Colombia has failed to rebut Panama's argument that the indicative prices are a
continuation of minimum customs values .......................................................................................... 31

(e) Colombia has failed to demonstrate that it does not use indicative prices for the
determination of the base for the sales tax for imported products in a manner
inconsistent with Article III:2 and Article III:4 of the GATT 1994 .............................................. 31

(f) Colombia has failed to rebut Panama's claim that the port of entry restrictions are
inconsistent with Article XI:1 of the GATT 1994 ........................................................................... 33

(i) The port of entry restrictions do not have the characteristics of a genuine customs
enforcement measure .......................................................................................................................... 33

(ii) Colombia's interpretation that Article XI:1 prohibits only measures that impose a
restriction on the quantity of imports is not supported by the text of Article XI:1 or the jurisprudence .......................................................................................................................... 33

(g) Colombia has failed to rebut Panama's claim that the ports of entry restrictions are
inconsistent with Article XIII:1 of the GATT 1994 ........................................................................ 34

(h) If the Panel were to find that Article XI:1 is not applicable, then Panama requests that
the Panel find that the discriminatory features of the port of entry measures are in
violation of Article I:1 of the GATT 1994 ....................................................................................... 34

(i) Colombia has failed to rebut Panama's claim that it imposes limitations on freedom of
transit in a manner inconsistent with Article V:2 of the GATT 1994 ............................................ 35

(j) Colombia has failed to rebut Panama's claim that it accords treatment less favourable
to goods that have been in transit through Panama in a manner inconsistent with its
obligations under Article V:6 of the GATT 1994 .............................................................................. 35

(k) Colombia has failed to rebut Panama's claim that the requirements to present an
advance declaration and pay customs duties for textiles originating in Panama are
inconsistent with Article I:1 of the GATT 1994 .............................................................................. 36

(l) Colombia has failed to demonstrate that its port of entry restrictions are justified
under Article XX(d) of the GATT 1994 .......................................................................................... 37

(i) The ports of entry restrictions are not provisionally justified under paragraph (d) of
Article XX ........................................................................................................................................ 37
(ii) The ports of entry restrictions do not meet the requirements set out in the chapeau to Article XX................................................................. 39
D. EXECUTIVE SUMMARY OF THE REBUTTAL SUBMISSION OF COLOMBIA............................................. 40
1. Claims relating to Colombia's indicative pricing mechanism as a customs valuation method under the Customs Valuation Agreement................................................. 40
(a) Panama fails to meet its burden of proof .......................................................................................... 40
(b) A proper interpretation of the challenged provisions concerning indicative prices shows that the indicative prices are not used for customs valuation purposes .................. 41
2. Panama's claims on indicative prices under GATT Article III ................................................. 42
(a) Panama's claim under GATT Article III:2 is flawed .................................................................. 42
(b) Panama's unsubstantiated new claim under GATT Article III:4 is to be rejected ...................... 42
3. Panama's claims in respect of the ports of entry measure .............................................................. 43
(a) Panama's claim under GATT Article XI is without merit as the port of entry measure does not constitute a prohibited quantitative restriction. .................................................. 43
(b) The Panel should reject Panama's claim that the port of entry measure is applied in a manner that is inconsistent with GATT Article XIII:1 because Article XIII:1 does not apply to the situation at hand .......................................................... 44
(c) Panama's new claim of inconsistency of the ports measure with GATT Article I:1 is to be rejected ........................................................................................................... 44
(d) Panama's claim that the port measure is inconsistent with the requirements of GATT Articles V:2 and V:6 lacks a factual and legal basis ............................................................ 44
(e) The requirement to present an advance import declaration and pay customs duties and sales taxes for textiles originating in Panama does not violate Colombia's MFN obligation under GATT Article I:1 .............................................................................. 45
4. Colombia's general defence under GATT Article XX(d)............................................................. 45
(a) The port measure is provisionally justified under paragraph (d) of GATT Article XX ............. 46
(b) The ports measure complies with the chapeau of Article XX ...................................................... 48
5. Request for findings .................................................................................................................. 49
V. ARGUMENTS OF THE THIRD PARTIES .................................................................................... 49
A. ECUADOR ..................................................................................................................................... 49
B. EUROPEAN COMMUNITIES ........................................................................................................ 50
1. Customs valuation methods based on indicative prices ............................................................... 50
(a) The measure at issue ................................................................................................................... 50
(b) Indicative Prices and the Customs Valuation Agreement ............................................................. 51
(c) Indicative Prices and Article III:2 of the GATT 1994 ................................................................. 52
2. Restrictions on ports of entry....................................................................................................... 52
(a) Restrictions on the number of ports available for imports of textiles from Panama: Article XI of the GATT 1994 ............................................................ 52
(b) Requirement to present an advance declaration to pay customs duties and sales tax for textiles originating in Panama: Article I of the GATT 1994 ......................................................... 53
Restrictions on the transit regime for textiles from Panama: Article V:2 and V:6 of the GATT 1994

Justification of the ports of entry restrictions based on Article XX(d) of the GATT 1994

C. GUATEMALA

D. HONDURAS

E. SEPARATE CUSTOMS TERRITORY OF TAIWAN, PENGHU, KINMEN AND MATSU

1. Introduction

2. Claims relating to the indicative prices used by Colombia

3. Colombia's measures restricting ports of entry for certain Panama products cannot be justified under the GATT 1994

4. Members should resolve disputes in good faith

F. UNITED STATES

VI. INTERIM REVIEW

A. PANAMA'S COMMENTS ON THE INTERIM REPORT

1. Descriptive part

2. Panama's claims under the Customs Valuation Agreement

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

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

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

6. Miscellaneous

A. COLOMBIA'S COMMENTS ON THE INTERIM REPORT

1. Descriptive part

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

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

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

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

VII. FINDINGS

A. PRELIMINARY ISSUES

1. Colombia's request for a preliminary ruling

(a) Background

(b) Main arguments of the parties

(i) Timing of the preliminary ruling request

(ii) Scope of the measures

(iii) Type of claims: "as such" and/or "as applied"
(c) Consideration by the Panel .................................................................73
(i) General considerations ........................................................................73
(ii) Timing of the preliminary ruling request .................................................73
(iii) Adequacy to Article 6.2 requirements .........................................................74
Identification of the specific measures at issue concerning the use of indicative prices ..................................................75
Panama's claims "as applied" ........................................................................78
2. Other issues concerning the scope of the matter subject to dispute ........80
(a) Measures potentially outside the Panel's mandate ......................................80
(b) Admissibility of Panama's second claim under Article I:1 of the GATT 1994 ........82
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 ............................................................................................................................... 84
1. Main arguments of the parties ....................................................................84
2. Consideration by the Panel .................................................................87
(a) Legislation authorizing the use of indicative prices .....................................87
(b) Order of analysis .......................................................................................88
(c) The concept of customs valuation within the Customs Valuation Agreement ..........89
(d) Whether the use of indicative prices by Colombia constitutes customs valuation ............90
(i) The legal nature of the payment under Article 128.5 e) ..................................91
Arguments of the parties ...........................................................................91
The Panel's approach to examining Colombia's domestic law – burden of proof ..................92
Analysis of the "very terms" of the challenged provisions ..................................94
Contextual analysis of the challenged provisions within Colombian domestic legislation ..........95
Analyzing 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 ..........................................................95
The placement of the challenged provisions within Colombia's Customs Code and Resolution No. 4240 .................................................................................................98
Analysis of the challenged provisions in the context of Andean Community law ..........99
Analysis of the specific cases of application of indicative prices .......................100
(ii) Conclusion ............................................................................................103
(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 ..........104
(i) Main arguments of the parties ...............................................................104
(ii) The text of Articles 1, 2, 3, 5, 6 and 7.2(b), (f) and (g) of the Customs Valuation Agreement ..................................................................................104
(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 ..........108
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 .......................................................... 109

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 .......................................................... 109

Whether the use of indicative prices is inconsistent with Article 7(b), (f) and (g) of the Customs Valuation Agreement .................................................................................................. 110

Conclusion .................................................................................................................................. 111

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 .......................................................... 112

1. Main arguments of the parties ............................................................................................. 112

2. Consideration by the Panel ............................................................................................... 113

(a) Legislation applicable to the calculation of sales tax for imports subject to indicative prices .......................................................................................................................... 113

(b) The Panel's approach to Panama’s claim under Article III:2, first sentence ......................... 114

(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 ........................................................................ 115

(d) The obligations in Article III:2, first sentence ................................................................... 116

(e) Whether subject imports and domestic products are like products .................................. 117

(f) Whether subject imports are taxed in excess ..................................................................... 118

(g) Conclusion .......................................................................................................................... 122

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 .......................................................... 122

1. Arguments of the parties ..................................................................................................... 122

2. Consideration by the Panel ............................................................................................... 123

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 ....................................................................................... 123

1. Main arguments of the parties ............................................................................................. 123

2. Consideration by the Panel ............................................................................................... 126

(a) Legislation authorizing restrictions on ports of entry ....................................................... 126

(b) The text of Article XI of the GATT 1947 ......................................................................... 127

(c) The ports of entry measure as an "other measure" ................................................................ 128

(d) The ports of entry measure as a "restriction on importation" ........................................... 129

(i) The concept of a restriction on importation under Article XI:1 ........................................ 129

(ii) Colombia's contextual arguments on interpretation of Article XI:1 of the GATT 1994 ......... 133

(iii) De jure versus de facto restrictions on importation ........................................................ 135
Whether the ports of entry measure affects competitive opportunities ........................................ 138

(c) Conclusion ..................................................................................................................................... 145

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 ..................................................................................................................................... 145

1. Main arguments of the parties ........................................................................................................... 145

2. Consideration by the Panel ................................................................................................................ 146

(a) Legislation authorizing restrictions on ports of entry ................................................................. 146

(b) The text of Article XIII:1 of the GATT 1994 .................................................................................. 147

(c) The Panel's approach to examining Panama's claim under Article XIII:1 of the
GATT 1994 ..................................................................................................................................... 147

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 ..................................................................................................................................... 149

1. Main arguments of the parties ........................................................................................................... 149

2. Consideration by the Panel ................................................................................................................ 150

(a) Legislation authorizing restrictions on ports of entry ................................................................. 150

(b) Panel's approach to examining Panama's second claim under Article I:1 of the
GATT 1994 ..................................................................................................................................... 150

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 .............................................................................................................................. 151

1. Main arguments of the parties ........................................................................................................... 151

2. Consideration by the Panel ................................................................................................................ 153

(a) Legislation related to the advance declaration and legalization requirements ......................... 153

(b) The text of Article I of the GATT 1994........................................................................................ 156

(c) Panama's right to bring a claim under Article I of the GATT 1994.............................................. 156

(d) Whether Colombia confers an advantage of the type covered by Article I:1 of the
GATT 1994 ..................................................................................................................................... 158

(e) Whether like products from other Members are granted an advantage within the
meaning of Article I:1 of the GATT 1994 ......................................................................................... 163

(f) Whether Colombia confers an advantage that is not extended "immediately and
unconditionally" to imports from Panama ......................................................................................... 165

(g) Conclusion ..................................................................................................................................... 167

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 ................................................. 167

1. Main arguments of the parties ........................................................................................................... 167

2. Consideration by the Panel ................................................................................................................ 168

(a) Legislation related to Colombia's international transit regime ................................................. 168
(b) Article V of the GATT 1994

(c) Interpretation of Article V:2 of the GATT 1994

(i) The scope of the concept of traffic in transit in Article V:2

(ii) The substantive obligations in Article V:2, first and second sentences

Article V:2, first sentence

Article V:2, second sentence

(iii) Whether the ports of entry measure violates Article V:2 of the GATT 1994

Whether the ports of entry measure is inconsistent with Article V:2, first sentence

Whether the ports of entry measure is inconsistent with Article V:2, second sentence

(iv) Conclusion

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

2. Consideration by the Panel

(a) Legislation related to Colombia's international transit regime

(b) Article V of the GATT 1994

(c) Interpretation of Article V:6 of the GATT 1994

(d) The scope of application of the MFN obligation in Article V:6 of the GATT 1994

(e) The substantive obligations in Article V:6 of the GATT 1994

(f) Whether the ports of entry measure complies with the obligations in Article V:6 of
the GATT 1994

(i) Conclusion

K. COLOMBIA'S DEFENCE UNDER ARTICLE XX(D) OF THE GATT 1994 TO PANAMA'S
CLAIMS AGAINST THE PORTS OF ENTRY MEASURE

1. Main arguments of the parties

2. Consideration by the Panel

(a) Legislation applicable to Colombia's Article XX(d) defence

(b) The measure relevant for purpose of analysis of Colombia's Article XX(d) defence

(c) Article XX of the GATT 1994

(d) Order of analysis under Article XX(d)

(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

(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

Identification of Colombian laws and regulations

Whether the laws or regulations are not themselves WTO-inconsistent
Whether the ports of entry measure is designed to secure compliance with Colombian laws or regulations which are not themselves WTO-inconsistent .............................................................. 206

(ii) Second element: Whether the ports of entry measure is "necessary" to secure compliance with Colombian customs enforcement laws and regulations .......................... 210

The relative importance of the common interests or values that the laws or regulations to be enforced are intended to protect ................................................................. 211

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 .................................................. 216

The restrictive impact of the measure .......................................................................................... 225

Preliminary conclusions on whether the ports of entry measure is provisionally justified as necessary under Article XX(d) .......................................................................................... 232

(iii) Conclusion .................................................................................................................................. 234

VIII. CONCLUSIONS AND RECOMMENDATIONS ........................................................................... 235
<table>
<thead>
<tr>
<th>Short Title</th>
<th>Full Case Title and Citation</th>
</tr>
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<tbody>
<tr>
<td>Short Title</td>
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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 X X I I :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. 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."  

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.  

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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. 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); 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 (matches and lighters); Resolution No. 10953 of 18 November 2005 (toys of pile fabrics, stuffed or unstuffed).


6 WT/DS348/1.

7 WT/DS348/10.

8 Exhibit PAN–1.

9 Exhibit PAN–1.

10 WT/DS348/1.
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.\(^{17}\)

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\(^{11}\) 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 Informacion y Analisis 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.


\(^{16}\) 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 price established by administrative act for use as a control mechanism on the declared f.o.b. value of imported goods. 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.

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. Under Colombian tax law, sales tax on imported goods is calculated based on the same value used to determine customs duties. Sales tax for domestic goods is based on the transaction value. 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.

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. 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); tires under Resolution No. 2671 of 18 March 2008 (Exhibit COL–48, pg. 5); jet-skis, 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 reship the goods in question within a period of one month or the goods will be considered "legally abandoned". 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. This initiates the "control posterior" process.

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. 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. According to Colombian legislation, this assessment is based on the value at the time of physical inspection or presentation of the import declaration and is conducted in accordance with the principles set forth in Articles 1 to 8 of the Customs Valuation Agreement. 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.

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. The importer must file a request for reimbursement. No timeline is provided for provision of the refund, although in three specific cases presented in this
dispute, importers did not receive refunds for more than two years since the initiation of the control posterior.\textsuperscript{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"\textsuperscript{37} including a proposed "Liquidación Oficial".\textsuperscript{38} At this time, the importer may dispute the proposed liquidation and provide further evidence supporting the value originally declared.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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".\textsuperscript{42}

\textbf{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.\textsuperscript{43} On these grounds, although Colombia has 26 ports of entry for international trade\textsuperscript{44}, it has limited imports of textile and apparel imports to 11 ports of entry.\textsuperscript{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 2007\textsuperscript{46}, as modified by Resolution No. 7637 of 28 June 2007\textsuperscript{47}, subject textiles, apparel and footwear may only be entered at Bogotá airport or Barranquilla seaport.\textsuperscript{48} However, the general

\textsuperscript{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.

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

\textsuperscript{38} Article 509 of Decree No. 2685 of 1999 (Exhibit COL-1).

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

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

\textsuperscript{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".

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

\textsuperscript{43} Article 41 of the Customs Statute (Exhibit COL–1).

\textsuperscript{44} Colombia's first written submission, para. 185.

\textsuperscript{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.

\textsuperscript{46} See Exhibit PAN-34.

\textsuperscript{47} See Exhibit PAN-36.

\textsuperscript{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. Additionally, Article 4 further 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 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. Resolution No. 8603 of 24 July 2007 establishes an additional exemption for footwear classifiable under sections 6406 of Colombia's Customs Schedule, and Resolution No. 7637 of 28 June 2007 further exempts goods consigned to "Highly Exporting Users" and "Permanent Customs Users".

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. 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.

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. Resolution No. 7373 was originally implemented for a period of approximately six months beginning 1 July 2007. However, the period of application of the measure has been extended on two occasions at the time of this writing, 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. 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. 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.

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 Colombia and accordingly pay customs duties and taxes in advance. 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. 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. 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. An importer may

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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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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).\textsuperscript{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 \textit{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 \textit{GATT 1994}\textsuperscript{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 \textit{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

\textsuperscript{71} Article 231 of Decree No. 2685 (Exhibit PAN-32).

\textsuperscript{72} Article 3 of Resolution No. 7373 of 22 June 2007 (Exhibit PAN–34).

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

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

\textsuperscript{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*\(^{77}\);

(c) 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.]

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\(^{76}\) 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


6.2 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:1 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 the 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. 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. 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.

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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".

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.


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 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 submission, 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.

(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. Supporting this statement, Panama refers to the Appellate Body's findings in US – FSC where the Appellate Body stated that:

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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

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

\textsuperscript{133} Colombia's first written submission, para. 37.
\textsuperscript{134} Colombia's first written submission, para. 140.
\textsuperscript{135} Colombia's first written submission, para. 141.
\textsuperscript{136} Panama's submission on the Request for a Preliminary Ruling by Colombia, para. 11.
\textsuperscript{137} Panama's submission on the Request for a Preliminary Ruling by Colombia, paras. 10-12.
\textsuperscript{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.
\textsuperscript{140} Panama's submission on the Request for a Preliminary Ruling by Colombia, paras. 18-20.
\textsuperscript{141} Panama's submission on the Request for a Preliminary Ruling by Colombia, para. 22.
Members\footnote{Panama refers to the Appellate Body Report in \textit{EC – Computer Equipment}.}{142}, a complainant is not required to list particular imports subject to a measure when presenting an "as applied" challenge.\footnote{Panama's submission on the Request for a Preliminary Ruling by Colombia, paras. 23-27 and 29.}{143}

(c) Consideration by the Panel

(i) General considerations

7.13 While the \textit{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.\footnote{Appellate Body Report, \textit{EC – Bananas III}, para. 144.}{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.\footnote{See, for example, Panel Report, \textit{Canada – Aircraft}, para. 9.15; Panel Report, \textit{India – Autos}, para. 7.7; Panel Report, \textit{EC – Bananas III}; Panel Report, \textit{EC – Computer Equipment}.}{145} Accordingly, the Panel concludes that it may exercise its own discretion on 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 \textit{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.\footnote{\textit{(footnote original)} See, for example, Appellate Body Report, \textit{Korea – Dairy}, para. 127, Appellate Body Report, \textit{Thailand – H-Beams}, para. 95.}{146} 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

\footnote{Appellate Body Report, \textit{Korea – Dairy}, para. 127.}{147}
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." As indicated above, the Appellate Body has further recommended panels to foresee the possibility of requests for preliminary rulings in their working procedures. 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.

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." 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.

150 Colombia's first written submission, pp.12-15.
152 Colombia's first written submission, paras. 36-38.
7.20 The Panel understands, as argued by Panama, 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, 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." 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."

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.

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. 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.

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

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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, Guatemala – Cement I, paras. 69-76.
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).  

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."  

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. 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. 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". 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. 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.

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
starting point. 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

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. 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).

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. Since these provisions were identified by Panama in its request for establishment, 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.

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.

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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.
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. 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.

7.41 Panama has clarified that it is challenging the general and systemic application of indicative prices and not individual customs determinations. 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. 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.

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.

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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.
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:

<table>
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<tr>
<th>Resolutions in force at the time of the request for the establishment of the Panel</th>
<th>Subsequent legislative action</th>
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<tbody>
<tr>
<td>Resolution No. 7509</td>
<td>Replaced or modified by Resolution No. 11414 of 28 September 2007.(^{183})</td>
</tr>
<tr>
<td>Resolution No. 7510</td>
<td>Replaced or modified by Resolution No. 11412 of 28 September 2007.(^{184})</td>
</tr>
<tr>
<td>Resolution No. 7511</td>
<td>No modification.</td>
</tr>
<tr>
<td>Resolution No. 7512</td>
<td>Replaced or modified by Resolution No. 11415 of 28 September 2007.(^{185})</td>
</tr>
<tr>
<td>Resolution No. 7513</td>
<td>No modification.</td>
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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

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\(^{183}\) 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. 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. 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".

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

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186 Colombia's first written submission, para. 52, footnote 35.
amendment to a measure enacted after the Panel had been established should nevertheless be considered as within the Panel's terms of reference. 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. This determination was considered consistent with earlier jurisprudence 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."

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 statement, 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."

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. Colombia submits that this claim

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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."
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 Procedures\(^{197}\) 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.
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**

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.

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 customs 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. 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.

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.

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

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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 purposes\(^{216}\), 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)
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 ("levantes") 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

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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. Colombia submits that "indicative prices" are clearly defined in Article 237 of Decree No. 2685 as a "control mechanism". 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". 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.

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.

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-9 and Exhibit PAN-53 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.

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, 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).
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. 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"), the Panel shall look at the ordinary meaning of the relevant concepts present in this definition.

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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


\(^{244}\) 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 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).
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.
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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{253}

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".\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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

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

\textsuperscript{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.

\textsuperscript{252} Colombia's second written submission, paras. 55-59.

\textsuperscript{253} Colombia's second written submission, paras. 60-66.

\textsuperscript{254} Panama's second written submission, para. 1.

\textsuperscript{255} Panama's second written submission, para. 38.

\textsuperscript{256} Panama's second written submission, para. 40.

\textsuperscript{257} Panama's second written submission, para. 40.

\textsuperscript{258} Panama's second written submission, para. 36.

\textsuperscript{259} Panama's response to Panel question No. 95(a).

\textsuperscript{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.

\textsuperscript{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. A panel is not however required to limit its examination solely to the text or wording of the norm under review. 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.

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. 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. 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". 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.

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." 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.
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.
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. 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. In this respect, the Appellate Body recognized that a panel maintains a margin of discretion in weighing the relevance of certain types of evidence.

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.

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. 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.

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

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." 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."

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. 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**

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.

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. 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. 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...
the declared price, i.e., paragraphs 2, 3, 4, 5, 6 and 8, explicitly provide for that option. 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. 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. 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 references 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.

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. 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

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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. 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 00274, 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. 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. 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.

7.109 When confronted with this silence in its legislation, Colombia acknowledged that no administrative instrument using the term "guarantee" or "cash deposit" exists. 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. 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".

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"). 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 Article 2.1 of Memorando 00274 is dated 5 May 2006.

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

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

289 Panama's first written submission, para. 48 and footnote 51.
primary means to terminate the tax obligation.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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).\textsuperscript{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.\textsuperscript{298} In support of that statement, Colombia cites a GATT Panel Report, \textit{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".\textsuperscript{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".\textsuperscript{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 \textit{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 \textit{US – Tobacco} were in themselves not contradictory thereby confirming that the additional assessment and purchase requirements mandated by the measure at

\textsuperscript{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.
\textsuperscript{295} See Colombia's response to Panel question No. 99. See also para. 2.11.
\textsuperscript{296} Article 548 a) of Decree No. 2685. See Panama's second written submission, para. 33.
\textsuperscript{297} Colombia's first written submission, paras. 78-80.
\textsuperscript{298} Colombia's second oral statement, para. 22.
\textsuperscript{299} GATT Panel Report, \textit{US – Tobacco}, para. 76.
\textsuperscript{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, \textit{US – Corrosion-Resistant Steel Sunset Review}, para. 87, footnote 87 and Appellate Body Report, \textit{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". 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 Panama, 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". 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 inspection, 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.

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". 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". 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".

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

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 estarian 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. 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. 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), 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.

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".

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. 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

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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

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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". 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. 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. 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.

7.126 In these cases, the proceedings were initiated upon request of the importer. 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". 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. 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'". 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. The Panel thus understands that the plea by the importer in this process was not filed as a...
"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*.

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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.
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".

7.134 Colombia maintains its earlier position that it does not conduct customs valuation based on indicative prices. 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;"
(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. 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. 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".

(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

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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".

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. 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. 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. 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.

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

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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 unnecessary.343

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 domestics 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"n346 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. 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. 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. 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.

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", but that the difference leads to imported goods being taxed "in excess" of like domestic products. Colombia notes that Panama does not contest the fact that the same tax rate is applied for both domestic and imported products. Further, any difference in the application of differential tax bases is not considered determinative as such. In addition, Colombia states that Panama failed to explain the alleged negative impact on competitive opportunities.

2. Consideration by the Panel

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

In addressing Panama's claims under the Customs Valuation Agreement in Section VII.B.2(a) above, 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. 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.

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.

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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.
360 Colombia's first written submission, paras. 147-149.
361 Colombia's second written submission, para. 92.
362 Colombia refers to the Panel Report on Dominican Republic – Import and Sale of Cigarettes.
363 Colombia's second written submission, para. 94.
364 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.
365 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 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 argüendo 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 argüendo assessment of Panama's "as such" claim.

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 higher); and (ii) the amount of customs duties (which is the applicable duty rate multiplied by the listed value). 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. 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. 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".

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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 Panama. 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 Ibid. 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. In the case at hand, Panama, as the complainant, must demonstrate that both tests have been met.

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. 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. The Panel considers particularly relevant to the present case the following finding of the panel in Indonesia – Autos:

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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.
"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.

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

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.

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. 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. 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".

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.

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


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 Sale 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 above,\(^{386}\) 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-

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\(^{384}\) 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. As established above, 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" in itself constitutes a form of discrimination and is enough to trigger a violation of Article III:2. 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. 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". 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"

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".

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.

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

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. 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. 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.

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.

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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.
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 invoices' 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.\footnote{Colombia's second written submission, para. 102.}

2. Consideration by the Panel

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

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.\footnote{Panama's first written submission, para. 160; Panama's second oral statement, para. 33.}

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.\footnote{Panama's second oral statement, paras. 18 - 22.} 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".\footnote{Panama's second written submission, para. 35.} 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".\footnote{Panama's first oral statement, para. 28.} 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.\footnote{Panama's second written submission, para. 35.} 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...
and would allow circumvention of tariff concessions by permitting the introduction of restrictions that are not quantitative in nature, but are nevertheless restrictions.  

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.  

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. 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. 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. 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. 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. 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.

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. 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."

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. According to
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:1\(^{422}\), 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 restriction\(^{426}\), 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 day\(^{428}\) 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. 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 2007\(^{432}\), as modified by Resolution No. 7673 of 28 June 2007\(^{431}\), authorizes Colombian customs officials to restrict entry of textile, apparel and footwear goods classifiable under Chapters 50-64 of the Colombian Tariff Schedule\(^{434}\) 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 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."\(^{435}\)

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 State\(^{436}\); goods imported for specific state or emergency uses, to travellers or postal traffic, or in route to Leticia, San Andrés or Santa Catalina\(^{437}\); goods submitted for trans-shipment that do not have Colombia as their final destination, and goods consigned to industrial users of free trade zones\(^{438}\); 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 2007\(^{440}\) establishes an additional exemption for goods classifiable under sections 6406 of Colombia's Customs schedule, and Resolution No. 7637 of 28 June 2007\(^{441}\) 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.\(^{442}\)

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\(^{432}\) 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)
Resolution No. 7373 was implemented for a period of approximately six months beginning 1 July 2007.\textsuperscript{443} The period of application of the measure has been extended on two occasions at the time of this writing \textsuperscript{444}, and is currently set to expire on 31 December 2008.

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 \textit{GATT 1947}

The Panel is called upon to examine whether the ports of entry measure as described above is inconsistent with Article XI:1 of the \textit{GATT 1994}. Article XI of the \textit{GATT 1994} provides as follows:

"\textit{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 form\textsuperscript{445}, 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

\textsuperscript{443} Exhibit COL-34, para. Article 8.
\textsuperscript{444} Resolution No. 16100 of 27 December 2007; Colombia's response to Panel question No. 122; Resolution No. 5542 of 2008.
\textsuperscript{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 factors 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."
448 Panel Report, Argentina – Hides and Leather, para. 11.17.
licence, could fall within the residual category of "other measure" that may be challenged under Article XI:1. 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. 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". 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. 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. 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. 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'."

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."

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". Several subsequent panels have coalesced around this

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458 Colombia's first written submission, para. 223.
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.
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, EU – 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.


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 sale\(^{468}\) 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

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\(^{467}\) 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." 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

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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 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

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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.”

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. 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, is would not be sufficient to rebut the presumption

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478 See Section VII.E.2(d)(i).
480 (footnote original) Panel Report, *US – Superfund*, para. 5.1.9.
nullification 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

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.\textsuperscript{486} It is also difficult to accept Colombia's allegation that the "measure is working"\textsuperscript{487} due to the wide array of factors at play.\textsuperscript{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) \textit{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.\textsuperscript{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 Forwarding\textsuperscript{490} as evidence that transportation costs to certain markets in Colombia have increased under the ports of entry measure.

\textsuperscript{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.
\textsuperscript{487} Colombia's second written submission, para. 241.
\textsuperscript{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.
\textsuperscript{489} Panama's first written submission, paras. 160-162.
\textsuperscript{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. 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. 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:

<table>
<thead>
<tr>
<th>CFZ-Cali (via Balboa and Buenaventura)</th>
<th>Costs (US$)</th>
<th>CFZ-Cali (via MIT and Barranquilla)</th>
<th>Costs (US$)</th>
</tr>
</thead>
<tbody>
<tr>
<td>CFZ – Balboa (by truck):</td>
<td>380.00</td>
<td>CFZ – Manzanillo (MIT) (by truck)</td>
<td>110.00</td>
</tr>
<tr>
<td>Handling (exportation)</td>
<td>35.00</td>
<td>Handling (exportation)</td>
<td>35.00</td>
</tr>
<tr>
<td>Documentation</td>
<td>75.00</td>
<td>Documentation</td>
<td>75.00</td>
</tr>
<tr>
<td>Courier</td>
<td>50.00</td>
<td>Courier</td>
<td>50.00</td>
</tr>
<tr>
<td>Port security</td>
<td>20.00</td>
<td>Port security</td>
<td>20.00</td>
</tr>
<tr>
<td>Carrier security</td>
<td>6.00</td>
<td>Carrier security</td>
<td>6.00</td>
</tr>
<tr>
<td>Balboa – Buenaventura (20' container)</td>
<td>1250.00</td>
<td>MIT – Barranquilla (20' container)</td>
<td>1490.00</td>
</tr>
<tr>
<td>Handling (importation)</td>
<td>100.00</td>
<td>Handling (importation)</td>
<td>100.00</td>
</tr>
<tr>
<td>Filing</td>
<td>35.00</td>
<td>Filing</td>
<td>35.00</td>
</tr>
<tr>
<td>Collect fee (minimum)</td>
<td>35.00</td>
<td>Collect fee (minimum)</td>
<td>35.00</td>
</tr>
<tr>
<td>CAF (minimum)</td>
<td>35.00</td>
<td>CAF (minimum)</td>
<td>35.00</td>
</tr>
<tr>
<td>Shipping cost (container)</td>
<td>50.00</td>
<td>Shipping cost (container)</td>
<td>50.00</td>
</tr>
<tr>
<td>Shipping cost (BL documentation fee)</td>
<td>50.00</td>
<td>Shipping cost (BL documentation fee)</td>
<td>50.00</td>
</tr>
</tbody>
</table>

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 (approximate) | +15.00 | Forms (approximate) | +15.00
Preparation (cost/unit) | 10.00 | Preparation (cost/unit) | 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

<table>
<thead>
<tr>
<th>Trayecto</th>
<th>Carga suelta hasta 4 tons (turbo)</th>
<th>Hasta 7 tons por 20 ft</th>
<th>Hasta 17 tons por 20 ft</th>
<th>Hasta 24 tons por 20 ft</th>
<th>Hasta 18 tons por 20 ft</th>
<th>Hasta 30 tons por 20 ft</th>
<th>Serv. de Escolta</th>
</tr>
</thead>
<tbody>
<tr>
<td>Buenaventura/ Cali</td>
<td>$280</td>
<td>$350</td>
<td>$465</td>
<td>$680</td>
<td>$680</td>
<td>$700</td>
<td>Opcional</td>
</tr>
<tr>
<td>Barranquilla/ Cali</td>
<td>$725</td>
<td>$990</td>
<td>$1,350</td>
<td>$1,850</td>
<td>$1,930</td>
<td>$2,100</td>
<td>Opcional</td>
</tr>
</tbody>
</table>

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

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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:

<table>
<thead>
<tr>
<th>Origen</th>
<th>Destino</th>
<th>20 std</th>
<th>40 std</th>
<th>40 hc</th>
<th>T/T</th>
<th>Salidas</th>
<th>Linea naviera</th>
</tr>
</thead>
<tbody>
<tr>
<td>Manzanillo</td>
<td>B/quilla</td>
<td>USD 900</td>
<td>USD 975</td>
<td>USD 975</td>
<td>1 dia</td>
<td>Semanal</td>
<td>Cosco</td>
</tr>
<tr>
<td>Manzanillo</td>
<td>B/ventura</td>
<td>USD 1300</td>
<td>USD 1400</td>
<td>USD 1400</td>
<td>1 dia</td>
<td>Semanal</td>
<td>Maersk</td>
</tr>
</tbody>
</table>

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:

<table>
<thead>
<tr>
<th>Application</th>
<th>40' std via Cartagena</th>
<th>40' std via Buenaventura</th>
</tr>
</thead>
<tbody>
<tr>
<td>Origin Service Fee</td>
<td>$125.00</td>
<td>$125.00</td>
</tr>
<tr>
<td>Documentation</td>
<td>$25.00</td>
<td>$25.00</td>
</tr>
<tr>
<td>Manifest Entry</td>
<td>$35.00</td>
<td>$35.00</td>
</tr>
<tr>
<td>Courier Fee</td>
<td>$65.00</td>
<td>$65.00</td>
</tr>
<tr>
<td>Security</td>
<td>$25.00</td>
<td>$25.00</td>
</tr>
<tr>
<td>Origin Port Fees</td>
<td>$299.00</td>
<td>$299.00</td>
</tr>
<tr>
<td>Ocean Freight Charges</td>
<td>$2,100.00</td>
<td>$3,673.00</td>
</tr>
<tr>
<td>Customs Entry</td>
<td>$150.00</td>
<td>$150.00</td>
</tr>
<tr>
<td>Destination Port Fees</td>
<td>$210.00</td>
<td>$210.00</td>
</tr>
<tr>
<td>Delivery</td>
<td>$2,324.00</td>
<td>$941.00</td>
</tr>
<tr>
<td>TOTAL CHARGES USD:</td>
<td>$5,358.00</td>
<td>$5,548.00</td>
</tr>
</tbody>
</table>

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.
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 Buenaventura (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.
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. 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. 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. 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.

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 Panel, this information is not acknowledged in Colombia's submitted quotation. 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 from the CFZ on the Atlantic coast of Panama to 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.

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.

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 costs.

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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.
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. 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 by shipped on fewer occasions and to fewer destinations, to the detriment of entities importing goods from Panama.

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 2005 for approximately six months until 31 December 2005, and was extended on two occasions, such that the measure did not expire until 31 December 2006, nearly one and a half years later. The current ports or entry measure was instituted on 22 June 2007 for approximately six months until 31 December 2007, but this date was extended twice, and the ports of entry measure is currently set to expire on 31 December 2008, 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.

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. 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. 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.
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 forth 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 other than Panama are required to enter at any of the following 11 ports: Barranquilla, Bucaramanga, Buenaventura, Cali, Cartagena, Cucuta, Ipiales, Leticia, Medellin, San Andrés and Bogota.
521 By way of an example, Panama has presented a table comparing the total cost to ship goods by air from CFZ to Bogota 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 1994523 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. Jovanovic, 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.
(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."

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

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.
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

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**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.'"


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. Moreover, Panama argues that access to additional ports is an advantage that is not immediately and unconditionally extended to imports from Panama.

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. 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. 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. 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.

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 Procedures to have presented its claims and arguments in its first written submission. 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.

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.

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

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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 then 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 affect commercial opportunities in a way that creates more favourable competitive opportunities for products of a certain origin. In Colombia's view, Panama has not presented any information to support its claim that an advanced import declaration, the requirement to pay customs duties and taxes in advance, or the limitation of legalization without a fee, confers an advantage that affects a product's competitive opportunities. 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.

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. 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. 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.

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. Since Panama does not produce the textile, apparel, and footwear goods for export, Colombia considers that Panama does not confer origin of the goods.

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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 first 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 Colombia and accordingly pay customs duties and taxes in advance.\footnote{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.}

 Artikel 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 Aduanero de la Zona Libre de Colon – República de Panamá, deberá presentarse en forma anticipada a su llegada el territorio aduanero nacional con una antelación no superior a quince (15) días.\footnote{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.}

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.\footnote{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 1°. Declaración de importación de mercancías. En aplicación de lo previsto en el inciso 3° del artículo 119 del Decreto 2685 de 1999, adicionado por el artículo 2° 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."}

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.
"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."  

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 6º. Cuando no se presente declaración anticipada en los términos del artículo 1º de la presente resolución y si empre 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."

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. A "rescate" fee of 15 per cent of the value of the goods will be required to recover goods within this one-month period.

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. 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.

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.

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."

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.

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. 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". 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."  

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."

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

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593 Appellate Body Report, *Canada – Autos*, para. 69.
594 Appellate Body Report, *Canada – Autos*, para. 84.
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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{599} Panama additionally notes that it currently produces at least one apparel product for export\textsuperscript{600}, and has a potential export interest for other apparel as well as textiles and footwear.\textsuperscript{601}

7.326 The Appellate Body in \textit{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."\textsuperscript{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'."\textsuperscript{604}

\textsuperscript{596} Colombia's first written submission, para. 311.
\textsuperscript{597} Colombia's first written submission, para. 311.
\textsuperscript{598} Panama's first oral statement, para. 72.
\textsuperscript{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.
\textsuperscript{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 \textit{guayaberas}.
\textsuperscript{601} Panama's first oral statement, para. 74; Panama's response to Panel question No. 141; Exhibits PAN 78(a) and (b).
\textsuperscript{602} (footnote original) Panel Reports, para. 7.50.
\textsuperscript{604} Appellate Body Report, \textit{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. 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.

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 days, but not less than five days prior to the arrival of the goods in Colombia. Those importers of subject goods from Panama or the CFZ are also required to pay customs duties and taxes in advance. Any importer that fails to present an advanced import declaration upon entry will only be
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. Otherwise, the importer must remove the goods from Colombian territory or the goods will be subject to seizure.

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. 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.

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. 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. 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. 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. 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.

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. 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.

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

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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. 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. 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.

7.338 Panama rejects Colombia's argument that importers' use of an advance import declaration signifies that it must be seen as an advantage. 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. 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. 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.

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. 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."

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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.
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.  

7.342 The parties consider that these measures constitute "rules and formalities in connection with importation". 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. 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. 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. 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.

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."  

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
taxes in advance, or the limitation of legalization without a fee, affects a product's competitive opportunities or confers an advantage.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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 \textit{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.\textsuperscript{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.\textsuperscript{642} Colombia argues that Panama's reference to the case of \textit{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.\textsuperscript{643}

\textsuperscript{638} Colombia's first written submission, para. 300, Colombia's second written submission, para. 196; Colombia's second oral statement, para. 50.

\textsuperscript{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.

\textsuperscript{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.

\textsuperscript{641} Panama's first oral statement, para. 69.

\textsuperscript{642} Panama's first oral statement, para. 70.

\textsuperscript{643} Colombia's second written submission, para. 196, citing to Panel Report, \textit{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

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\(^{644}\) 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)).
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 entry, 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.

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. 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. 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. 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.

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

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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 Colombia's first written submission, para. 197.

651 Panama's second written submission, para. 160.

652 Colombia's first written submission, para. 304; Colombia's second written submission, para. 197.

653 Colombia's first written submission, para. 306.

654 Colombia's first written submission, para. 306.

655 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.\textsuperscript{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.\textsuperscript{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 \textit{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.\textsuperscript{657}

7.362 In line with the approach elaborated in the \textit{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.\textsuperscript{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.\textsuperscript{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 above\textsuperscript{660}, 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.

\begin{footnotesize}
\textsuperscript{655} Panel Report, \textit{Canada – Autos}, para. 10.22.
\textsuperscript{656} Panel Report, \textit{Canada – Autos}, para. 10.29.
\textsuperscript{658} Colombia's response to Panel question No. 73. Colombia's response to Panel question No. 154.
\textsuperscript{659} Colombia's response to Panel question No. 154.
\textsuperscript{660} See para. 7.347.
\end{footnotesize}
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.

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

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**

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 office\(^{662}\), 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.\(^{665}\)

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. 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.

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. 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. 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 transit, Colombia argues it is clear under its international obligations that freedom of transit is guaranteed for all merchandise from all countries. 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.

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. 7373, as modified by Resolution No. 7637, subject textiles, apparel and footwear may only be entered at Bogota airport or Barranquilla seaport.

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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 transito, 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 adicen 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 tráficos:

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 tráficos 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)
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)

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."

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."

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 "no 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 33,686

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).
concerning transit. 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 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". Therefore, Panama argues that traffic in transit must be allowed unrestricted through the territory of a Member. 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.

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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 organisation 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.


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, break-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.

\(\text{(iii) Whether the ports of entry measure violates Article V:2 of the GATT 1994}\)

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.

\(\text{Whether the ports of entry measure is inconsistent with Article V:2, first sentence}\)

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.  

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. 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. 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. 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. 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. 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.

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.

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.

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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.
As noted above, 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. 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. Since all textile, apparel and footwear products are not restricted, Colombia considers there cannot be any violation of Article V.

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. 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. In particular, Colombia submits that Article 370 of its Customs Statute, by reference to Article 327, 399 and 617 of Andean Community legislation establishes that freedom of international transit is guaranteed irrespective of the mode of transport. 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. Thus, Colombia submits that all goods entering Colombia from Panama in international transit would necessarily meet the conditions of the Article 4 exemption.

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. Colombia has also offered to make a public commitment that goods in international transit are not covered by the measure in question.

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.
that goods may be shipped from Panama, arrive in Ecuador, then transit through Colombia by truck with Venezuela as a final destination.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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 above\textsuperscript{714} 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".\textsuperscript{715} Article 385 of Colombia's Customs Statute, which Colombia has described as applicable to the ports of entry measure\textsuperscript{716}, 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).\textsuperscript{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.

\textsuperscript{711} See Panama's response to Panel question No. 66.

\textsuperscript{712} See Panama's response to Panel question No. 66.

\textsuperscript{713} See Panama's first oral statement, para. 58.

\textsuperscript{714} See Section VII.I.2(c)(ii).

\textsuperscript{715} In this sense, Article 4 provides "la presente resolución no se aplicará sobre aquellos bienes que se pretendan someter a la modalidad de transbordo."

\textsuperscript{716} Colombia's response to Panel question No. 69.

\textsuperscript{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 a 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. Panama has argued...
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. 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. 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. 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.
Colombia has expressed its willingness to make a public commitment regarding the guarantee of freedom of transit to goods arriving from Panama.\textsuperscript{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.

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.\textsuperscript{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.\textsuperscript{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

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.

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.

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).

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.

\textsuperscript{722} Colombia's first written submission, para. 287; Colombia's response to Panel question No. 70.


(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. 7373, as modified by Resolution No. 7637 (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 via aérea y por la jurisdicción de la Administración Local de Aduanas de Barranquilla, si se transportan por via marítima, y por tanto, no procederá para estas mercancías la autorización del régimen de tránsito aduanero."  

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 2°, 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 ..."  

7.440 The Panel will consider both parties' arguments in relation to Article V:6 in the context of this
legislation.

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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:2\(^{735}\), 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 preparatoire* 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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{739} In Panama's view, while paragraphs 2-5 of Article V refer to the obligation to provide freedom of transit though its territory, Article V:6 refers to the obligation imposed on the Member whose territory is the final destination not to discriminate against goods.\textsuperscript{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.\textsuperscript{741} In effect, Article V:6, first sentence, established an MFN requirement that must be observed by the country of destination.\textsuperscript{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."\textsuperscript{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.\textsuperscript{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.\textsuperscript{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 no discriminate on the basis of the country through which the goods have been in transit.\textsuperscript{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.\textsuperscript{747} The phrase in Article V:1 that goods "beginning and terminating beyond the frontier of the contracting party across whose territory the
traffic passes" informs that all subsequent obligations in Article V do not apply to goods which terminate in a Member's territory. Colombia argues that this is the context in which Articles V:2–6 must be read. The definition of goods "in transit" establishes the scope of Article V. 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. 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.

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. 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. 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.

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. 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".

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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. 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. 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." Colombia argues that this definition of "traffic in transit" informs the definition of "transit" for the entire Article, including Article V:6. 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.

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". 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", or "[t]he passage or carriage of people or goods from one place to another." 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
territory, whether it concerns goods which have arrived at their final destination, or both. 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 "traffic 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.

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. 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. 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 I that it is not because a Member is
characterizes the second sentence as misplaced\footnote{Colombia refers to the second sentence of Article V:6 as the "odd one out": see Question No. 8 from Panama to Colombia.} 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.\footnote{Question No. 8 from Panama to Colombia.} 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 "impose 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.\footnote{Question No. 8 from Panama to Colombia.}

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 (\textit{ut res magis valeat quam pereat}) that meaning and effect should be given to all terms in a treaty:

\begin{quote}
"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."\footnote{See Appellate Body Report, \textit{US – Gasoline}, p. 23.}
\end{quote}

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.

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.

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
consignment of goods have previously been discussed in a 1981 Note by the WTO Secretariat.\textsuperscript{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.\textsuperscript{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 \textit{US – Gasoline} to avoid interpretations that reduce certain other provisions to inutility. The Panel recalls its findings above\textsuperscript{775}, 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


\textsuperscript{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.

\textsuperscript{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.1.2(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*). As both Panama and Colombia have acknowledged, 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". (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."  

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

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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 agreements 781, 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

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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
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.

Whether the ports of entry measure complies with the obligations in Article V:6 of the *GATT 1994*

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.

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.

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**

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*, Colombia's defence will not be considered in relation to these claims.

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7.481 **Conclusion**

7.482 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. Third, Colombia argues that the ports of entry measure does not have a significant negative impact on trade. 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.

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. 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.

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.

7.491 Colombia considers the meaning of the word "arbitrary" to be "capricious, unpredictable, inconsistent". Additionally, the measure must have a "rational connection" to the objective of the relevant paragraph of Article XX. 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." 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.

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. 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. 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. 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. 356.
802 Colombia's first written submission, para. 357.
803 Colombia's second written submission, para. 386.
804 Colombia's first written submission, para. 390; Colombia's second written submission, paras. 296.
805 Colombia's first written submission, para. 392.
806 Colombia's second written submission, para. 296.
807 Colombia's first written submission, para. 395-398; Colombia's second written submission, paras. 299-310.
808 Colombia's first written submission, para. 400.
809 Colombia's first written submission, para. 401.
810 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 XII: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

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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 above, 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.”

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. 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.

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 dispute”, and thus proceeded to examine China’s global defence under Article XX(d).

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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). 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 ...

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

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".  

7.516 Throughout its main written submissions, Colombia referred generally to its "laws and regulations relating to customs enforcement" 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." When questioned by the Panel, Colombia referred more specifically to laws and regulations for which it seeks to secure compliance though 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."  

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.  Among other aspects, this provision allows the DIAN to prohibit or restrict the

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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. 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 carga, descarga, 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.
PARÁGRAFO. 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.

"ARTICULO 39. PROHIBICIONES Y RESTRICCIONES PARA EL INGRESO DE MERCANCÍAS.
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 aduanares de: Barranquilla, Bucaramanga, Buenaventura, Cali, Cartagena, Cúcuta, Ipiales, Leticia, Medellín, San Andrés, Santa Marta y Barranquilla. Lo dispuesto en este inciso, se aplica igualmente a las importaciones de mercancías procedentes de las Zonas Franca 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.\footnote{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."}

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.\footnote{Panama's second written submission, paras. 173-178.} 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.\footnote{Panama's second oral statement, para. 67.} 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.\footnote{Panama's second oral statement, para. 67, referring to the Panel Report on China – Auto Parts, para. 7.290.}

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.\footnote{Panel Report, China – Auto Parts, paras. 7.293-7.296.}

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.\footnote{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.}
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.\(^{850}\)

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.

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.

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

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.

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.


\(^{853}\) Colombia's second written submission, para. 202.

\(^{854}\) Colombia's first written submission, para. 320; Colombia's second written submission, para. 202.
Panama has contested Colombia’s assertion that its customs enforcement laws and regulations 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.\textsuperscript{855}

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.\textsuperscript{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.

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 \textit{Customs Valuation Agreement} and, \textit{arguendo}, Article III:2 of the \textit{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.

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.\textsuperscript{857}

Accordingly, the Panel concludes that, for the purpose of its analysis of Colombia's defence under Article XX(d) of the \textit{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 \textit{GATT 1994}.

\textbf{Whether the ports of entry measure is designed to secure compliance with Colombian laws or regulations which are not themselves WTO-inconsistent}

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 \textit{designed to secure compliance} with those laws and regulations.

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

\textsuperscript{855} Panama's second written submission, para. 176.
\textsuperscript{856} Panama's second written submission, para. 178.
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 de l 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".

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

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.
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. 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. 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. 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".

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". This has been described to mean "to enforce obligations" rather than "to ensure the attainment of the objectives of laws and regulations." 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".

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. On this same basis, Colombia additionally restricts entry of subject goods arriving from Panama to ports at Bogota and Barranquilla.

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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 sobrefacturación, 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).


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.
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.

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.

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. 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. 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. 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.

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

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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."


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 fulfill 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.

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.  

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."  

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". The complaining Member has the burden to identify possible alternatives to the measure at issue that the respondent could have taken.  

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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{884} Colombia additionally notes publications by the United Nations\textsuperscript{885} and the International Monetary Fund\textsuperscript{886}, which also refer to problems with smuggling in the CFZ.\textsuperscript{887} Colombia's own UIAF\textsuperscript{888} has referred to a close relationship between contraband and money-laundering.\textsuperscript{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.\textsuperscript{890} The United Nations describes the CFZ as a "integral part" of the BMPE.\textsuperscript{891} Colombia submits that the BMPE typically employs consumer merchandise such as those arriving from Panama to facilitate the exchange.\textsuperscript{892}

\begin{thebibliography}{99}
\bibitem{880} Colombia's second written submission, para. 218.
\bibitem{881} Colombia's second written submission, para. 220.
\bibitem{882} Colombia's response to Panel question No. 151, Colombia's second written submission, para. 218.
\bibitem{883} Colombia's first written submission, para. 333.
\bibitem{884} Colombia's second written submission, para. 221.
\bibitem{887} Colombia's first written submission, para. 192.
\bibitem{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.
\bibitem{889} Colombia's second written submission, para. 221; Exhibit COL-30.
\bibitem{890} Colombia's second written submission, para. 222.
\bibitem{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. 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.

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. 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).

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. Colombia submits that textiles accounted for 27.9 per cent of all seizures, and footwear, 9.2 per cent. 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:

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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.
7.558 Based on internal studies, 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.

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. In Exhibit COL-21, Colombia lists 89 companies registered in the CFZ, which it alleges to be involved in these activities. 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.

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. 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

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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 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.\textsuperscript{907} Moreover, Panama refers to the general nature of information included in reports by the United Nations\textsuperscript{908}, the International Monetary Fund\textsuperscript{909}, the US Drug Enforcement Administration\textsuperscript{910}, and the US State Department.\textsuperscript{911} Panama notes that several of these reports designate the BMPE as the root cause of the problem.\textsuperscript{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.\textsuperscript{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 \textit{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."\textsuperscript{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 \textit{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

\textsuperscript{907} Panama's first oral statement, para. 14.  
\textsuperscript{908} Colombia's first written submission, footnote 162.  
\textsuperscript{909} Colombia's first written submission, footnote 163.  
\textsuperscript{910} Colombia's first written submission, footnote 179.  
\textsuperscript{911} Colombia's first written submission, footnote 179.  
\textsuperscript{912} Panama's first oral statement, para. 13.  
\textsuperscript{913} Panama's first oral statement, para. 16.  
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.\textsuperscript{915} Colombia argues that a genuine relationship of ends and means exists between the objective pursued and the measure at issue.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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 taken 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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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

\textsuperscript{915} Colombia's first written submission, para. 344. Colombia's second written submission, para. 224.

\textsuperscript{916} 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, \textit{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.

\textsuperscript{917} Colombia's second oral statement, para. 63, citing to Brazil – Retreaded Tyres, para. 7.119.

\textsuperscript{918} Exhibit COL-18; Colombia's second written submission, para. 232.

\textsuperscript{919} Colombia's second oral statement, para. 63.

\textsuperscript{920} Colombia's second written submission, para. 244.

\textsuperscript{921} Colombia's first written submission, para. 344.

\textsuperscript{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.\(^\text{923}\) 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\(^\text{924}\) 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.\(^\text{925}\)

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.\(^\text{926}\) 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.\(^\text{927}\) 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.\(^\text{928}\)

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.\(^\text{929}\) In Panama's view, these statistics demonstrate that the ports of entry restrictions are completely ineffective at combating contraband.\(^\text{930}\) 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.\(^\text{931}\) In Panama's view, this raises the question as to the relative effectiveness of one of the primary ports

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\(^{923}\) Panama's second written submission, paras. 186-191; Panama's second oral statement, para. 69.

\(^{924}\) 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).

\(^{925}\) Appellate Body Report, Brazil – Retreaded Tyres, para. 151.

\(^{926}\) Panama's second oral statement, para. 69.

\(^{927}\) Panama's second written submission, para. 186.

\(^{928}\) Colombia's second written submission, para. 226.

\(^{929}\) Panama's second oral statement, para. 71.

\(^{930}\) Panama's first oral statement, paras. 5, 12 and 81, Panama's second written submission, para. 194.

\(^{931}\) 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).
under the measure in carrying out seizures of contraband textiles.\footnote{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.} 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.\footnote{Panama's second written submission, para. 196.} 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.\footnote{Panama's first oral statement, para. 179.}

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.\footnote{Panama's first oral statement, para. 7.} 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.\footnote{Chart 3 of Exhibit COL-38.} 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.\footnote{Panama's second written submission, paras. 179-180.} 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.\footnote{Exhibit COL-17; Colombia's first written submission, paras. 197 and 199.}

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).\footnote{Panama's first oral statement, para. 8.} Panama considers the fact that irregularities were 2 per cent higher does not justify imposing measures exclusively against goods arriving from Panama.\footnote{Panama's first oral statement, para. 8.}

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.\footnote{Panama's second written submission, para. 198.} 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
the amount of contraband (and therefore revenue foregone) 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

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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 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. 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.

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. 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.

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".

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 (origen)", "Panamá (Procedencia, sin origen China)" and "Resto del Mundo". 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).

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).

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.

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.

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 measures 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. 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.

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. 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. 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"\textsuperscript{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.\textsuperscript{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".\textsuperscript{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.\textsuperscript{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.\textsuperscript{960} However, Colombia has not provided any data regarding seizures of apparel. In light of these discrepancies, the Panel considers that Colombia has

\begin{table}
\centering
\begin{tabular}{|l|c|c|}
\hline
\textbf{Product} & \textbf{Value US$} & \textbf{%} & \textbf{Value US$} & \textbf{%} \\
\hline
\textbf{Textiles} & 18,811,237.00 & 13 & 28,285,929.00 & 18 \\
\hline
\textbf{Apparel} & 56,525,328.00 & 38 & 66,951,932.00 & 42 \\
\hline
\textbf{Footwear} & 71,984,506.00 & 49 & 63,366,809.00 & 40 \\
\hline
\end{tabular}
\caption{Total value of subject goods arriving from Panama - distribution by category of product (2006 and 2007)}
\end{table}

\textsuperscript{956} Colombia's first written submission, para. 346.
\textsuperscript{957} Colombia's first written submission, para. 346, Colombia's second written submission, para. 232.
\textsuperscript{958} Colombia's second written submission, para. 230.
\textsuperscript{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.
\textsuperscript{960} Exhibit COL-61. Based on data in that exhibit, the Panel has determined the following distribution by category of product.
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. 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. 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. 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.

<table>
<thead>
<tr>
<th>Difference between subject goods exports to Colombia reported by Panama</th>
<th>and subject goods imports from Panama reported by Colombia – thousands of US$</th>
</tr>
</thead>
<tbody>
<tr>
<td>Values reported by Panama</td>
<td>241,400 231,255 229,526 199,458 324,114 413,290 483,587 503,461</td>
</tr>
<tr>
<td>Values reported by Colombia</td>
<td>46,172 69,847 57,869 53,625 75,312 104,926 132,854 158,300</td>
</tr>
<tr>
<td>Trade distortions</td>
<td>195,228 161,408 171,657 145,833 248,802 308,364 350,733 345,161</td>
</tr>
</tbody>
</table>

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:

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 Colombia's second written submission, para. 229.
967 Colombia's second written submission, para. 230.
968 Colombia's second written submission, para. 229.
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 occuring in this section, due to the limited number of importers and distributors of such products (only six), and their clear willigness 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. 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. 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. 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 implementation 975, 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

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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.
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.\textsuperscript{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.\textsuperscript{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".\textsuperscript{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.\textsuperscript{982}

7.594 Panama disputes Colombia's interpretation that the ports of entry measure does not have a significant negative impact on legitimate trade.\textsuperscript{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 \textit{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".\textsuperscript{984} Accordingly, for Panama, the "restrictive effects" referred to by the Appellate Body in \textit{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{987} Furthermore, even though trade

\textsuperscript{979} Colombia's second written submission, para. 137.
\textsuperscript{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. Briefly, 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).
\textsuperscript{981} Resolution No. 7373 (Exhibit PAN-36); Resolution No. 7637 (Exhibit PAN-36).
\textsuperscript{982} Colombia's second written submission, paras. 255-256.
\textsuperscript{983} Panama's second written submission, paras. 199-206.
\textsuperscript{984} Panama's first oral statement, para. 43. Panama's second written submission, para. 131.
\textsuperscript{985} Panama's second written submission, para. 206.
\textsuperscript{986} Panama's response to Panel's question No. 136; Exhibit PAN-56 (Revised).
\textsuperscript{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.  

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.

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\(^{988}\) 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. 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. Based on the data submitted in Exhibit COL-28, 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.

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.” 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...
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)

<table>
<thead>
<tr>
<th></th>
<th>Jan 04-Jun 05</th>
<th>Jul 05-Oct 06</th>
<th>Nov 06-Jun 07</th>
<th>Jul 07-today</th>
<th>Jan 04-Jun 05</th>
<th>Jul 05-Oct 06</th>
<th>Nov 06-Jun 07</th>
<th>Jul 07-today</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>1. Textiles</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Barranquilla</td>
<td>31,631,139.90</td>
<td>70,560,929.42</td>
<td>5,882,622.82</td>
<td>31,814,779.54</td>
<td>2,196,747.75</td>
<td>12,042,947.46</td>
<td>4,822,988.11</td>
<td>22,695,060.12</td>
</tr>
<tr>
<td>Bogota</td>
<td>19,203,267.02</td>
<td>6,334,135.03</td>
<td>2,820,178.39</td>
<td>6,925,141.48</td>
<td>4,615,003.16</td>
<td>5,851,357.37</td>
<td>2,274,261.23</td>
<td>7,016,691.29</td>
</tr>
<tr>
<td>Buenaventura</td>
<td>28,539,767.11</td>
<td>2,240,066.73</td>
<td>8,880,089.11</td>
<td>371,531.83</td>
<td>5,941,926.38</td>
<td>946,169.64</td>
<td>6,462,773.18</td>
<td>319,137.38</td>
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<tr>
<td>Cali</td>
<td>755,761.76</td>
<td>0.00</td>
<td>15,464.29</td>
<td>4,714.58</td>
<td>269,401.92</td>
<td>0.00</td>
<td>17,624.55</td>
<td>4,092.31</td>
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<td>Cartagena</td>
<td>7,860,830.04</td>
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<td>4,359,292.98</td>
<td>3,146,153.08</td>
<td>5,926,338.61</td>
<td>2,336,703.67</td>
<td>2,088,853.90</td>
<td>2,350,455.25</td>
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<tr>
<td>Medellin</td>
<td>605,630.89</td>
<td>39,698.17</td>
<td>175,743.60</td>
<td>141,318.25</td>
<td>607,160.30</td>
<td>32,689.18</td>
<td>242,004.74</td>
<td>167,135.32</td>
</tr>
<tr>
<td><strong>2. Apparel</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Barranquilla</td>
<td>29,923,249.22</td>
<td>100,643,699.62</td>
<td>31,775,841.00</td>
<td>10,173,577.00</td>
<td>12,052,608.76</td>
<td>31,402,525.89</td>
<td>14,977,406.14</td>
<td>25,823,446.35</td>
</tr>
<tr>
<td>Bogota</td>
<td>5,464,798.26</td>
<td>3,201,055.68</td>
<td>11,126,448.00</td>
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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).

| Table 2 - Volume and value of imports per port of entry - First Semester 2007 |
|---------------------------------|-----------------|-----------------|-----------------|-----------------|-----------------|-----------------|-----------------|
| Textiles | Apparel | Footwear |
| Value | Volume | 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." 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.

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 cent 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. 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. During 2007, UAPs comprised 54 per cent of the value of apparel, 26 per cent of
textiles and 24 per cent of footwear.

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 Protocol\(^{1003}\), 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.

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\(^{1003}\) 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.
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.

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 levels of distortion correlates with the introduction and removal of measures imposed on goods arriving from Panama.

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).

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.

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

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.
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 consistently 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*. 

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