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## **1 ARTICLE V**

### **1.1 Text of Article V**

#### **Article V**

##### *Freedom of Transit*

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.\*

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).

## 1.2 Text of note *ad* Article V

### ***Ad Article V***

#### *Paragraph 5*

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.

## 1.3 General

### 1.3.1 "traffic in transit"

1. In *Colombia – Ports of Entry*, the dispute concerned in part legislation authorizing restrictions on entry of certain textiles, apparel and footwear arriving from Panama, which could only be entered at Bogota airport or Barranquilla seaport. Such goods could be shipped through any Colombian port if they were "subjected to trans-shipment" and/or were goods submitted for trans-shipment that do not have Colombia as their final destination.<sup>1</sup> Non-compliance with the obligation to enter and import goods from Panama exclusively at Bogota airport or Barranquilla seaport would subject the goods to seizure and forfeiture.

2. The Panel analysed claims under Articles V:2 and V:6 regarding these restrictions. It noted that Article V:1 and the second sentence of Article V:2 are based on corresponding provisions in the 1921 Barcelona Convention and Statute on Freedom of Transit; the Panel also analysed the drafting history of Article V.<sup>2</sup>

## 1.4 Article V:2

### 1.4.1 "There shall be freedom of transit"

3. Responding to the argument that the ports of entry measure described in paragraph 1 above was outside the scope of Article V, the Panel in *Colombia – Ports of Entry* concluded that

"In light of the ordinary meaning of freedom and the text of Article V:2 ... 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."<sup>3</sup>

4. The Panel found the measure violated Article V:2 because "the right to proceed in international transit under the [provision for goods "subjected to trans-shipment"] is conditioned

<sup>1</sup> Panel Report, *Colombia – Ports of Entry*, paras. 7.219-7.223, 7.374-7.375.

<sup>2</sup> Panel Report, *Colombia – Ports of Entry*, paras. 7.394-7.3965.

<sup>3</sup> Panel Report, *Colombia – Ports of Entry*, para. 7.401.

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.<sup>4</sup> The Panel found that the fact that there is no road connecting Panama and Colombia, and the lack of practicality of goods arriving by land through Ecuador, were not sufficient to rebut this finding of violation.<sup>5</sup>

5. In considering the terms "from the territory" and "to the territory" with regards to "traffic in transit", the Panel in *Russia – Traffic in Transit* stated the following:

"Accordingly, under the first sentence of Article V:2:

- a. Each Member is required to guarantee freedom of transit through its territory for any traffic in transit entering from any other Member, and
- b. Each Member is required to guarantee freedom of transit through its territory for traffic in transit to exit to any other Member.

To establish inconsistency with the first sentence of Article V:2, it will consequently be sufficient to demonstrate either that a Member has precluded transit through its territory for traffic in transit entering its territory from any other Member, or exiting its territory to any other Member, via the routes most convenient for international transit.

As a result, where a measure prohibits traffic in transit from another Member from entering at all points along a shared land border, the measure will necessarily be inconsistent with the first sentence of Article V:2."<sup>6</sup>

#### **1.4.2 "No distinction shall be made"**

6. The Panel in *Colombia – Ports of Entry* observed:

"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."<sup>7</sup>

7. Also:

"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."<sup>8</sup>

8. Regarding the ports of entry measure described in paragraph 1 above, the Panel found: "in light of the fact that only goods arriving from Panama or the CFZ are subject to the requirements

<sup>4</sup> Panel Report, *Colombia – Ports of Entry*, para. 7.418.

<sup>5</sup> Panel Report, *Colombia – Ports of Entry*, para. 7.422.

<sup>6</sup> Panel Report, *Russia – Traffic in Transit*, paras. 7.172 – 7.174.

<sup>7</sup> Panel Report, *Colombia – Ports of Entry*, para. 7.397.

<sup>8</sup> Panel Report, *Colombia – Ports of Entry*, para. 7.402.

under the Article 4 exemption, while goods originating in or departing from a Member other than Panama are permitted to proceed in international transit ... 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."<sup>9</sup>

### 1.5 Article V:5

9. In *Colombia – Ports of Entry*, the Panel discussed the relative scope of paragraphs 5 and 6 of Article V:

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 Article V:6 governs treatment extended to "traffic in transit" would overlap with the broad protection already ensured by Article V:5."<sup>10</sup>

### 1.6 Article V:6

#### 1.6.1 Scope of paragraph 6

10. The Panel in *Colombia – Ports of Entry* analysed the scope of Article V:6, observing that "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."<sup>11</sup> Responding to Colombia's argument that the ports of entry measure described in paragraph 1 above was outside the scope of Article V:6 because it did not apply to goods submitted for trans-shipment, the Panel further noted that Article V:6 refers not to "traffic in transit" but to "*products which have been in transit* through the territory of any other contracting party."<sup>12</sup> The Panel further observed that "...the ordinary meaning of products which *have been* in transit" remains unclear" and would require clarification based on the context of Article V:6."<sup>13</sup>

11. Examining the context of Article V:6, the Panel rejected Colombia's argument that the scope of all of Article V is informed by its title and Article V:1. Focusing on the second sentence of Article V:6, the Panel observed:

"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 [GATT] Secretariat.<sup>14</sup> 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.

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<sup>9</sup> Panel Report, *Colombia – Ports of Entry*, para. 7.430.

<sup>10</sup> Panel Report, *Colombia – Ports of Entry*, para. 7.468.

<sup>11</sup> Panel Report, *Colombia – Ports of Entry*, para. 7.445.

<sup>12</sup> Panel Report, *Colombia – Ports of Entry*, para. 7.453.

<sup>13</sup> Panel Report, *Colombia – Ports of Entry*, para. 7.454.

<sup>14</sup> Reference in original to GATT document CG.W.18/W.48.

"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.

"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.

"... 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."<sup>15</sup>

12. The Panel concluded 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."<sup>16</sup>

### **1.6.2 Obligations under paragraph 6**

13. As for the substantive obligation concerned, the Panel in *Colombia – Ports of Entry* considered:

"[T]he 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."<sup>17</sup>.

### **1.7 Relationship with other GATT provisions**

14. In *Colombia – Ports of Entry*, the Panel addressed the relationship between the MFN obligations in Article V:6 and Article I:1:

"[T]he 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 based on its transit trajectory regardless of the existence

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<sup>15</sup> Panel Report, *Colombia – Ports of Entry*, para. 7.465-7.467.

<sup>16</sup> Panel Report, *Colombia – Ports of Entry*, para. 7.475.

<sup>17</sup> Panel Report, *Colombia – Ports of Entry*, para. 7.477.

of a like product of a different origin. In the Panel's view, the obligations in these two provisions are not the same and should not be treated as redundant."<sup>18</sup>

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<sup>18</sup> Panel Report, *Colombia – Ports of Entry*, fn 783 to para. 7.477.