



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

AB-2016-1

Report of the Appellate Body

Addendum

This Addendum contains Annexes A to C to the Report of the Appellate Body circulated as document WT/DS461/AB/R.

The Notice of Appeal and the executive summaries of written submissions contained in this Addendum are attached as they were received from the participants and third participants. The content has not been revised or edited by the Appellate Body, except that paragraph and footnote numbers that did not start at one in the original may have been re-numbered to do so, and the text may have been formatted in order to adhere to WTO style. The executive summaries do not serve as substitutes for the submissions of the participants and third participants in the Appellate Body's examination of the appeal.

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NOTICE OF APPEAL

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ANNEX A-1

COLOMBIA'S NOTICE OF APPEAL*

1. Pursuant to Articles 16.4 and 17 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU") and Rule 20 of the Working Procedures for Appellate Review (WT/AB/WP/6, 16 August 2010) ("Working Procedures"), Colombia hereby notifies the Dispute Settlement Body ("DSB") of its decision to appeal certain issues of law and legal interpretations in the Panel Report in *Colombia – Measures Relating to the Importation of Textiles, Apparel and Footwear* (WT/DS461) ("Panel Report").
2. Pursuant to Rules 20(1) and 21(1) of the Working Procedures, Colombia files this Notice of Appeal together with its Appellant's Submission with the Appellate Body Secretariat.
3. Pursuant to Rule 20(2)(d)(iii) of the Working Procedures, this Notice of Appeal includes an indicative list of the paragraphs of the Panel Report containing the alleged errors, without prejudice to Colombia's ability to rely on other paragraphs of the Panel Report in its appeal.
4. Colombia seeks review by the Appellate Body of the following errors of law and legal interpretation by the Panel in its Report and requests the following findings by the Appellate Body.

I. Review of the Panel's Findings under Article II of the GATT 1994 and Request for Completion

5. The Panel erred in interpreting and applying Article II:1(b) of the GATT 1994 and failed to make an objective assessment of the matter under Article 11 of the DSU in finding that "the compound tariff, as regards the examples set out in paragraphs 7.164 and 7.180, exceeds the levels bound in Colombia's Schedule of Concessions and is therefore inconsistent with the obligation in Article II:1(b), first sentence, of the GATT 1994 not to impose on the import of products of other Members 'ordinary customs duties in excess of those set forth and provided' in Colombia's Schedule of Concessions".¹ The Panel erred because:

- it incorrectly concluded that it was not necessary to issue a finding on whether or not the obligations of Article II:1 of the GATT 1994 are applicable to illicit trade. In proceeding in this manner, the Panel failed to make an objective assessment of the matter under Article 11 of the DSU²;
- it improperly exercised judicial economy and violated Colombia's due process rights. By exercising false judicial economy and failing to respect Colombia's due process rights, the Panel failed to make an objective assessment of the matter under Article 11 of the DSU³;
- it incorrectly found that Colombia's measure is "structured and designed to be applied to all imports of the products concerned, without distinguishing between 'licit' and 'illicit' trade" and that "no legal provision that bans the importation of goods whose declared prices are below the thresholds established in Decree No. 456 has been identified".⁴ In making such findings, the Panel did not comply with Article 11 of the DSU. The Panel erred further because such findings did not provide a valid basis for the Panel's ultimate conclusion that it was not necessary for it to rule on whether Article II applied only to licit trade⁵;

* This document, dated 22 January 2016, was circulated to Members as document WT/DS461/6.

¹ Panel Report, paras. 7.189, 7.192-7.194, and 8.2-8.4.

² Panel Report, paras. 7.108 and 8.1.

³ Panel Report, paras. 7.90, 7.108 and 8.1.

⁴ Panel Report, para. 8.1. See also para. 7.106.

⁵ Panel Report, paras. 7.105-7.108 and 8.1.

- even on the assumption that Article II:1(b) were applicable to illicit trade, it erred in the interpretation and application of Article II:1(b), and under Article 11 of the DSU, in finding that it was not persuaded that Decree 456 "incorporates a legislative ceiling which prevents the compound tariff resulting in duties that exceed the levels bound in Colombia's Schedule of Concessions"⁶;
- it improperly relaxed the burden of proof for Panama in establishing a *prima facie* case under Article II.⁷ In proceeding in this manner, the Panel failed to comply with Article 11 of the DSU.

6. For the reasons provided above, Colombia requests that the Appellate Body reverse the Panel's finding that "the compound tariff, as regards the examples set out in paragraphs 7.164 and 7.180, exceeds the levels bound in Colombia's Schedule of Concessions and is therefore inconsistent with the obligation in Article II:1(b), first sentence, of the GATT 1994 not to impose on the import of products of other Members' ordinary customs duties in excess of those set forth and provide' in Colombia's Schedule of Concessions".⁸ The Panel's finding under Article II:1(a) is based entirely on its erroneous findings of inconsistency under Article II:1(b). Therefore, if the Appellate Body were to agree with Colombia's request to reverse the Panel's findings under Article II:1(b), Colombia requests that the Appellate Body also reverse the Panel's finding under Article II:1(a).⁹ And, as a result of the above, the Appellate Body must also reverse the Panel's conclusions in paragraph 8.2, 8.3, and 8.4 of the Panel Report.

7. If, as requested by Colombia above, the Appellate Body reverses the Panel's finding that it was not necessary for the Panel to issue a finding on whether or not the obligations of Article II:1 of the GATT 1994 can be extended to illicit trade, Colombia requests the Appellate Body to complete the legal analysis under Articles II:1(a) and (b) and make the following findings:

- Articles II:1(a) and (b) do not apply to illicit trade; and,
- because imports priced below the thresholds established in Decree 456 are imported at artificially low prices that do not reflect market conditions, the compound tariffs established in Decree 456 do not violate Articles II:1(a) and (b) of the GATT 1994.

II. Review of the Panel's Findings under Article XX of the GATT 1994 and Request for Completion

8. The Panel erred in the interpretation and application of Article XX of the GATT 1994 and failed to make an objective assessment of the matter under Article 11 of the DSU in finding that Colombia has failed to demonstrate that its measure is justified under Article XX(a) and (d) of the GATT 1994.¹⁰ The Panel erred because:

- it incorrectly interpreted and applied the terms "to protect public morals" in subparagraph (a) and failed to make an objective assessment of the matter under Article 11 of the DSU when it found that Colombia has failed to demonstrate that the compound tariff is a measure to protect public morals,¹¹ specifically:
 - it erroneously imported elements of the "necessity" test to the assessment of whether Decree 456 is a measure "to protect public morals";
 - even in the event that it was appropriate for the Panel to examine the contribution of the measure, it developed and imposed an overly demanding standard of "to protect" that is inconsistent with Article XX(a);

⁶ Panel Report, paras. 7.186, 7.189, 7.192-7.194, and 8.2-8.4.

⁷ Panel Report, paras. 7.189, 7.192-7.194, and 8.2-8.4.

⁸ Panel Report, paras. 7.189, 7.192-7.194, and 8.2-8.4.

⁹ Panel Report, paras. 7.192 and 7.194.

¹⁰ Panel Report, paras. 7.592 and 8.5-8.7.

¹¹ Panel Report, paras. 7.331-7.401 and 8.5.

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- it required Colombia to demonstrate that Decree 456 addressed the money laundering problem in its entirety as opposed to addressing the particular aspect of money laundering targeted by Decree 456;
 - it failed to properly assess statistical evidence provided by Colombia demonstrating the existence of undervaluation and money laundering and thereby acted inconsistently with Article 11 of the DSU;
 - it misapplied "to protect" with regard to the text of the measure, the existence of exclusions, the period of validity, the legal consequences of importing goods at prices below the thresholds, and in regard to additional evidence.
- it incorrectly interpreted and applied the "necessity" requirement under subparagraph (a) and failed to make an objective assessment of the matter under Article 11 of the DSU in finding that Colombia has not demonstrated the contribution of the compound tariff to the alleged objective of combating money laundering¹² and that Colombia has not demonstrated that its compound tariff is necessary to combat money laundering.¹³ The Panel's errors include:
 - an erroneous assessment of the contribution of Decree 456 to the fight against money laundering and, in particular, to the use of imports of apparel at artificially low prices to launder money¹⁴;
 - its failure to undertake a proper weighing and balancing of the factors involved in the analysis of "necessity"; and
 - failing to comply with its obligations under Article 11 of the DSU by disregarding qualitative and quantitative evidence that amply demonstrated the contribution of Decree 456 to the fighting money laundering through imports of apparel and footwear at artificially low prices¹⁵;
 - it incorrectly interpreted and applied subparagraph (d) of Article XX because the Panel's findings under subparagraph (d) are entirely based on its erroneous findings under subparagraph (a)¹⁶;
 - it incorrectly interpreted and applied the chapeau of Article XX and failed to make an objective assessment of the matter under Article 11 of the DSU in finding that "because of the various exclusions from the application of the measure for imports originating in countries with which Colombia has trade agreements in force, for imports into Colombia's Special Customs Regime Zones and for imports under the 'Plan Vallejo', even assuming that Colombia had succeeded in showing that its measure was provisionally justified under Article XX(a) or Article XX(d) of the GATT 1994, the compound tariff is not applied in a manner such that it meets the requirements of the chapeau of Article XX of the GATT 1994".¹⁷ The Panel also erred under Articles 6.2 in finding that Colombia's arguments concerning Article XXIV were not within its terms of reference.

9. For the reasons provided above, Colombia requests that the Appellate Body reverse paragraphs 7.592 and 8.5-8.7 of the Panel Report, which find that Colombia has failed to demonstrate that its measure is justified under Article XX of the GATT 1994.¹⁸ Colombia additionally requests that the Appellate Body complete the analysis and find that Colombia's measure is justified under Articles XX(a) and (d) of the GATT 1994.

¹² Panel Report, paras. 7.409-7.445, 7.470, 7.471 and 8.5.

¹³ Panel Report, paras. 7.445, 7.470-7.471 and 8.5.

¹⁴ Panel Report, paras. 7.409-7.437.

¹⁵ Panel Report, paras. 7.354-7.355 and 7.414-7.430.

¹⁶ Panel Report, paras. 7.513-7.537 and 8.6.

¹⁷ Panel Report, paras. 7.550-7.591.

¹⁸ Colombia also requests that the Appellate Body reverse the Panel's intermediate findings under subparagraphs (a), (d), and the chapeau of Article XX, including the findings in paragraphs 7.401, 7.445, 7.470-7.471, 7.532, 7.536-7.537, 7.569, 7.580, and 7.590-7.59.

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ANNEX B-1**EXECUTIVE SUMMARY OF COLOMBIA'S APPELLANT'S SUBMISSION****I. INTRODUCTION**

1. In Colombia, trade is being used by criminal organizations to launder and repatriate the profits from overseas sales of narcotics and other criminal activities. Criminal groups launder the profits from narcotics sales by purchasing apparel and footwear overseas and importing them to Colombia at artificially low prices. Funds generated from this process are used to finance the illicit activities, such as narcotics operations, homicides, kidnappings, extortion, and bribery.

2. WTO Members agree to reduce barriers to imports on the good faith assumption that such imports are not linked with illicit activities and that the exporting Member is exercising adequate control and supervision of its exports. Where the exporting Member refuses to exercise adequate supervision and control of its exports, the importing Member should not be under an obligation to extend to those exports the benefits of the WTO agreements.

3. The Panel in this case failed to recognize that the benefits of the WTO Agreements, including the tariff concessions under Article II of the GATT 1994, were never intended to apply to illicit trade activities and erred in its interpretation of Article XX(a) and (d) used by Colombia in defense of its regulatory policies directed at combating trade-based money laundering.

4. The WTO now has an opportunity to make a clear statement that trade liberalization is not intended to benefit criminal activities, that both importing and exporting Members have a duty to ensure that trade is not being used for criminal activities, and that the WTO is not a straightjacket that constrains a WTO Member from taking measures to combat trade-based money laundering.

II. TRADE-BASED MONEY LAUNDERING

5. Illicit trade is the "dark side" of international trade growth, representing 8% to 15% of global GDP. "Trade-based money laundering" has been investigated and documented extensively by Colombian and international authorities.

6. Colombian authorities and the Financial Action Task Force ("FATF") have confirmed that one channel to launder money is by using under-invoiced goods—when importers launder the difference between prices that exporters issue on invoices and the lower prices that merchandises are paid for. An FATF investigation also found that Free Zones offer duty and tax exemptions and simplified administrative procedures, leading to reduced financial and custom controls. The investigation makes clear that abuse of Free Zones adversely impacts all jurisdictions when goods originating or transiting through Free Zones are not subject to adequate controls when exported.

III. THE MEASURE AT ISSUE

7. Decree 456 was adopted by the Colombian Government and came into force on 31 March 2014 for a period of two years. Decree 456 followed Decree 074, which had been in force for one year.

8. Decree 456 discourages imports of apparel and footwear at artificially low prices and thereby reduced the opportunities to launder money through this modus operandi. The Decree incorporates thresholds that ensure that Colombia's tariff bindings are not exceeded when the price of the goods reflect market conditions. Decree 456 is part of a comprehensive strategy for combatting money laundering.

9. Analysis conducted by the Colombian government and submitted to the Panel show that Decrees 074 and 456 have been effective in reducing imports of apparel and footwear at artificially low prices thereby reducing the opportunities for criminal organizations to launder their illicit gains.

IV. ARTICLE II OF THE GATT 1994

A. The Panel Erred by Finding That it was Not Necessary for it to Rule on Whether Article II is Applicable to Illicit Trade

10. Under Article 11 and 12.7 of the DSU, a Panel must interpret and apply relevant provisions of covered agreements. Article 3.2 of the DSU states that the WTO dispute settlement system serves to clarify the existing provisions by considering customary rules and interpretation of public international law.

11. The interpretation of Articles II:1(a) and (b) were highly contested between Colombia and Panama, as Panama believed that both articles applied to all imports including even illicit transactions, whilst Colombia argued that the Articles only cover licit imports. The Panel was required by Articles 3.2, 11 and 12.7 of the DSU to objectively assess the applicability of Articles II:1(a) and (b) of the GATT 1994, and the Panel has thus committed an error of law by finding it unnecessary to rule on this matter.

12. The Panel's premise that Decree 456 applies not only to illicit trade did not provide a basis for it to avoid the interpretative issue. The Panel's reasoning could only be sound if it had found that all imports subject to Decree 456 were licit transactions. The Panel never concluded such findings, and in fact it had acknowledged that imports under Decree 456 could involve illicit trade. The Panel was thus obligated to determine whether Articles II:1(a) and (b) of the GATT 1994 applied to illicit trade. By failing to do so, the Panel has not resolved whether Decree 456 falls within the scope of Articles II:1(a) and (b) to the extent of its application to illicit trade. As the Panel's findings provide only a partial resolution, the Panel has committed an error of law.

B. The Panel's Exercise of Judicial Economy was Improper and Violated Colombia's Due Process Rights

13. The Panel's decision not to interpret Articles II:1(a) and (b) cannot be justified as an exercise of judicial economy, which only allows a panel to "refrain from making multiple findings that the same measure is *inconsistent* with various provisions when a single, or a certain number of findings of inconsistency, would suffice to resolve the dispute". Additionally, judicial economy cannot be used to bar defenses and arguments raised by a respondent party.

14. Unlike in previous cases where the exercise of judicial economy was authorized, the Panel was not refraining from making multiple findings on a claim by the complaining party. Rather, it relied on the Appellate Body's jurisprudence on judicial economy to refrain from ruling on an interpretative issue that was raised by the *respondent* party, which was central to the disposition of the matter before it. This resulted in false judicial economy, a violation of the Panel's Article 11 duty to make an objective assessment of the matter. The failure to hear a claim central to Colombia's defense also resulted in a violation of Colombia's due process rights.

C. The Panel's Assessment of Decree 456 Did Not Provide a Valid Basis for the Panel to Avoid Resolving the Interpretative Issue as to the Applicability of Article II to Illicit Trade

15. The Panel erred in justifying its refusal to rule on the claim raised by Colombia on its view that Decree 456 is "structured and designed to be applied to all imports of the products concerned" and does not distinguish between "'licit' and 'illicit' trade." It also erred in finding that "no legal provision that bans the importation of goods whose declared prices are below the thresholds established in Decree No. 456 has been identified".

16. The Panel failed to engage with arguments and evidence submitted by Colombia showing, among others, that the thresholds in the Decree reflected a distinction between licit and illicit imports, that transactions falling under the Decree are subject to control and may be subject to criminal procedures after the importation has taken place, that the Decree seeks to discourage illicit conduct by increasing the transactions costs on imports at artificially low prices that are used to launder money. Accordingly, the Panel's assessment of the consistency of Decree 456 with the obligations under Articles II:1(a) and (b) is legally flawed and therefore the Panel's ultimate findings cannot stand.

D. Even on the Assumption that Article II:1(b) is Applicable to Illicit Trade, the Panel Erred When it Concluded that Decree 456 Does Not Incorporate a Legislative Ceiling that Avoids Exceeding the Colombia's Tariff Bindings

17. The Panel erred when it found that Decree 456 is inconsistent with Article II:1(b) on the ground that the legislative ceilings in Decree 456 resulted in customs duties that exceed tariff bindings. The Panel did not address Colombia's arguments and evidence that prices below the legislative ceiling were artificial and did not represent market conditions. Rather the Panel opted to conclude on the basis of hypotheticals advanced by Panama that failed to refute Colombia's arguments on this issue. Accordingly, the panel erred under Article II:1(b) and under Article 11 of the DSU.

E. The Panel Improperly Relaxed the Burden of Proof for Panama in Establishing a *Prima Facie* Case under Article II

18. The Panel erred by relaxing the burden of proof for Panama to establish a *prima facie* on the inconsistency of Decree 456 with Article II and by summarily dismissing rebuttal evidence advanced by Colombia demonstrating that prices below the thresholds in Decree 456 did not reflect market conditions. This lack of even-handedness is not consistent with the Article 11 of the DSU obligation to make an objective assessment of the matter.

F. Article II of the GATT 1994 Does Not Apply to Illicit Trade

19. Colombia requests that the Appellate Body find that Article II of the GATT 1994 only covers licit trade and its benefits do not extend to products imported at artificially low prices. Colombia further requests that the Appellate Body find that the compound tariffs applied under Decree 456 do not exceed the tariffs in Colombia's Schedule when products are imported at prices that reflect market conditions and Panama has failed to rebut the arguments and evidence submitted by Colombia in this regard. In these circumstances, the Appellate Body must find that Decree 456 is not inconsistent with Articles II:1(a) and (b) of the GATT 1994.

V. THE PANEL ERRED IN FINDING THAT DECREE 456 IS NOT A MEASURE "TO PROTECT PUBLIC MORALS" UNDER ARTICLE XX(A)

20. Although the Panel correctly found that Colombia had demonstrated that the fight against money laundering falls within the scope of policies to protect public morals, it erroneously found that Colombia failed to establish that Decree 456 is a measure "to protect public morals". This finding is based on the application of an overly rigorous test that is more onerous and intrusive than the tests applied in previous cases.

A. The Panel erred by Erroneously Importing Elements of the "Necessity" Test to the Assessment of Whether Decree 456 is a Measure "To Protect Public Morals"

21. The Panel erred under Article XX(a) by requiring Colombia to demonstrate the effectiveness of the challenged measure as part of establishing that the measure is "to protect public morals".

22. The effectiveness of the challenged measure goes to the contribution of the measure to the objective pursued, which under well-established Appellate Body case law, is a matter relevant to the necessity analysis, *not* whether the measures is adopted or enforced to protect public morals.

23. Not only does the Panel's assessment of "to protect" public morals go beyond the requirements of Article XX(a), it also goes beyond what has been required in the past by panels and the Appellate Body. Given the gravity of the concerns related to money laundering and the enormity of the problem that Colombia faces in connection with international crime, it would be egregious that Colombia be forced to meet a higher standard to invoke public morals than other WTO Members.

B. Even if it was Appropriate for the Panel to Examine the Contribution of the Measure, the Panel Erred by Developing and Imposing an Overly Demanding Standard of "To Protect" That is Inconsistent with Article XX(a)

24. The Panel erred when it required that Colombia's measure satisfy a 100% effectiveness standard by requiring evidence that demonstrated that products at prices below the thresholds established in Decree 456 were *necessarily* imported at artificially low prices that did not reflect market conditions, that the thresholds themselves *necessarily* reflected artificially low prices, and that imports at prices below the thresholds *necessarily* were being used to launder money. Such a standard is not required under subparagraph (a), is impossible to meet, and therefore improperly precludes Members from taking measures to protect public morals, and is not supported by prior Appellate Body decisions on "to protect" in Article XX(a).

C. The Panel Erred by Requiring Colombia to Demonstrate that Decree 456 Addressed the Money Laundering Problem in its Entirety as Opposed to Addressing the Particular Aspect of the Money Laundering Targeted by Decree 456

25. The Panel erred when it focused on the contribution of Decree 456 to the overall fight against money laundering rather than to the particular aspect of the problem targeted by the measure. There is no basis in Article XX(a) for the Panel to have assessed the extent to which Decree 456 addresses money laundering overall or the comparative magnitude of trade-based money laundering and of the contribution that the measure makes in terms of the broader money laundering problem.

D. The Panel Erred in its Assessment of the Statistical Evidence Provided by Colombia Demonstrating the Existence of Undervaluation and Money Laundering

26. The Panel unreasonably dismissed scientific evidence produced and submitted by Colombia demonstrating the contribution of Decree 456 to combating money laundering through imports of apparel and footwear and arbitrarily discharged Panama of its burden of proof. The Panel stated that Colombia's duty was to produce evidence of actual transactions relating to goods coming from China directly or through Panama despite the sufficiency of statistical evidence and the evidentiary hurdles in producing specific transaction data in Panama's hands. The Panel's actions in this regard conflict with its Article 11 duty to conduct an impartial and reasonable analysis of the evidence and properly allocate the burden of proof.

E. Additional Errors that Invalidate the Panel's Finding

27. The Panel made the following further errors in its application of "to protect public morals" in Article XX(a):

- **Text of the Measure:** The Panel imposed a requirement that the measure being justified under subparagraph (a) include an express indication of the public morals objective being pursued even though no such requirement is in Article XX(a) and no prior case has ever interpreted Article XX(a) as imposing such a requirement.
- **Exclusions:** The Panel interpreted exemptions in the measure as unrelated and inconsistent with the measures objective of fighting money laundering. In doing so, the Panel again held Colombia to an improperly high standard that is not required for a finding that the Decree is a measure to protect public morals.
- **Period of Validity of the Measure:** The Panel erred in finding that a measure with a duration of 2 years, like Decree 456, cannot have been taken to protect public morals.
- **Legal Consequences of Importing Goods at Prices Below the Thresholds:** The Panel improperly found that Decree 456 is not a measure to protect public morals based on the lack of automatic criminal consequences. This interpretation runs counter to prior Appellate Body decisions which emphasize that "Members of the WTO have the right to determine for themselves the level of enforcement of their WTO-consistent laws and regulations."

- **Additional Evidence:** The Panel was not entitled to dismiss government statements on the objectives of Decree 456 on the mere grounds that they post-dated the establishment of the Panel, especially in light of the fact that it was the Panel that accepted Decree 456 (a post-establishment measure) within its terms of reference.

F. The Appellate Body Should Reverse the Panel's Findings and Conclude that Decree 456 is "to Protect Public Morals."

28. Colombia requests that the Appellate Body reverse the Panel's findings and find that Decree 456 is a measure taken to protect public morals.

VI. THE PANEL ERRED IN FINDING THAT DECREE 456 IS NOT "NECESSARY" TO PROTECT PUBLIC MORALS

A. The Panel Erred in the Assessment of Contribution of Decree 456 in Combating Money Laundering

29. The Panel developed and applied an incorrect 100% effectiveness standard that is unrealistic for any government to meet and demanded that Colombia show that Decree 456 addresses the public morals objective in totality. There are no such requirements in Article XX(a) and prior Appellate Body decisions do not require Members to meet such a stringent standard.

B. The Panel Failed to Undertake a "Weighing and Balancing"

30. The Appellate Body has explained that the necessity analysis "involves a process of 'weighing and balancing' a series of factors, including the importance of the objective, the contribution of the measure to that objective, and the trade-restrictiveness of the measure." The Panel did not follow this guidance in its analysis. It based its negative finding of necessity solely on its analysis of contribution without taking into account its assessment or findings with respect to the important and vital nature of the interests at stake and the moderate trade-restrictive effects of the measure. This resulted in an improper "necessity" analysis under Article XX(a) which should be reversed.

C. The Panel Disregarded Qualitative and Quantitative Evidence that Amply Demonstrated the Contribution of Decree 456 to the Fight Against Money Laundering

31. The Panel dismissed or disregarded quantitative and qualitative evidence that plainly make the case that Decree 456 contributes to Colombia's multidimensional regulatory efforts to eliminate money laundering and, in particular, money laundering through imports of apparel and footwear at artificially low prices. The Panel should have found that Colombia met its burden in establishing a presumption that the Decree 456 contributed to this important public policy objective. The Panel should have also found that Panama's failure to submit evidence in response could not rebut the presumption that Decree 456 contributed to the objective. As a result, the Panel erred given that Article 11 of the DSU mandates that Panels consider all of the evidence presented to it and to ensure that its findings have a proper basis on that evidence.

D. Request for Completion of the Analysis

32. Colombia requests that the Appellate Body complete the analysis and find that Decree 456 is a measure that is necessary to protect public morals within the meaning of Article XX(a) of the GATT 1994.

VII. THE PANEL ERRED IN THE INTERPRETATION AND APPLICATION OF PARAGRAPH (D) OF ARTICLE XX OF THE GATT 1994

33. The Panel erroneously concluded that Colombia had failed to demonstrate that Decree 456 is designed to secure compliance with Article 323 of Colombia's Criminal Code within the meaning of Article XX(d) based entirely on its previous analysis under subparagraph (a). Colombia demonstrated that the Panel's analysis under subparagraph (a) is fundamentally flawed. The Panel's analysis under subparagraph (d) thus necessarily suffers from the same flaws.

Consequently, to the extent the Appellate Body agrees with Colombia and reverses the Panel's findings under subparagraph (a), it must also reverse the Panel's findings under subparagraph (d).

VIII. THE PANEL ERRED IN FINDING THAT DECREE 456 DOES NOT MEET THE REQUIREMENTS OF THE CHAPEAU OF ARTICLE XX OF THE GATT 1994

A. Exclusion of FTA Partners

34. Colombia argued that the exclusion of imports of apparel and footwear from its FTA partners was justified by Article XXIV of the GATT 1994 and could not be inconsistent with the chapeau of Article XX. Rather than engage Colombia's argument and examine the relationship between Article XX and XXIV, the Panel dismissed Colombia's claim on an incorrect interpretation of Articles XX and XIV, which taints and invalidates its finding under the chapeau.

B. Zones with Special Customs Regimes and Plan Vallejo

35. The Panel erred in the interpretation and application of the chapeau of Article XX in finding that, due to the exclusion of the SCRZs and of imports entering Colombia under the Plan Vallejo from the application of the compound tariff, the measure is applied in a manner that constitutes a means of arbitrary or unjustifiable discrimination and a disguised restriction on international trade. Accordingly, Colombia requests that the Appellate Body reverse the Panel's finding.

ANNEX B-2**EXECUTIVE SUMMARY OF PANAMA'S APPELLEE'S SUBMISSION¹**

1.1. Colombia has failed to demonstrate the existence of errors in the Panel's decision not to rule on the applicability of Articles II:1(a) and (b) of the GATT 1994 to so-called "illicit trade". As was found by the Panel, the measure at issue is neutral in terms of the legality or illegality of the trade to which it is applied (i.e. it makes no distinction between "licit" and "illicit" trade). It was therefore appropriate for the Panel to assess the necessity or usefulness of ruling on whether or not Articles II:1(a) and (b) were applicable to "illicit trade", and ultimately to determine that there was no such necessity or usefulness. There was no improper use of judicial economy, as the Panel effectively addressed the interpretative issue raised by Colombia. Colombia also failed to demonstrate the existence of errors that call into question the Panel's good faith with respect to the factual finding that the compound tariff is not a measure that distinguishes between "licit trade" and "illicit trade". The argument that the Panel did not take into account the tariff's "legislative ceiling" is factually incorrect, and the argument that the Panel relaxed the burden of proof in favour of Panama is based on a misinterpretation of the applicable legal standard and of the evidentiary requirement deriving from that standard. In any case, Panama notes that neither the text and context of Articles II:1(a) and (b) of the GATT 1994, nor the object and purpose of that Agreement, support an interpretation of the terms "importation" and "commerce", in both provisions respectively, under which the GATT 1994 does not apply to "illicit trade".

1.2. Regarding the claim linked to Article XX(a) of the GATT 1994, the Panel found correctly that Colombia had failed to demonstrate that the compound tariff was a measure "designed" to protect public morals. Colombia's arguments are based on a misinterpretation of the Panel's findings. The Panel carefully examined the opinions of the parties; the text of Decree No. 456; the design, architecture and structure of the measure; the exemptions from the measure; the legal consequences of importation; the period of validity of the compound tariff; and other evidence, and correctly determined that there were no factual elements to support the argument that the measure had been "designed" to protect public morals. At no point did the Panel demand that the measure be 100% effective, nor did it "require" any demonstration that Decree No. 456 addressed the problem of money laundering in its entirety, and much less did it mishandle the statistical information provided by Colombia.

1.3. Panama also maintains that the Panel correctly concluded that the compound tariff was not a measure "necessary" to protect public morals within the meaning of Article XX(a) of the GATT 1994. The Panel did not err in its assessment of the measure's "contribution". Colombia never in fact managed to demonstrate the existence of a genuine relationship of ends and means between the compound tariff and the objective of combating money laundering. Furthermore, the Panel did weigh and balance these factors in the "necessity" analysis, and properly concluded that the measure did not contribute to the objective pursued and that trade-restrictiveness did exist. In Panama's view, the Panel did not disregard evidence relating to the measure's "contribution" and thereby act inconsistently with Article 11 of the DSU.

1.4. With regard to Colombia's claim concerning the Panel's findings in respect of Article XX(d) of the GATT 1994, Panama is of the opinion that Colombia has failed to properly articulate its arguments. In any case, in the light of the same arguments put forward under Article XX(a) of the GATT 1994, Panama considers that the Panel correctly concluded that the compound tariff is not a measure necessary to secure compliance with Article 323 of the Colombian Criminal Code.

1.5. Lastly, with regard to the chapeau of Article XX of the GATT 1994, the Panel correctly concluded that the compound tariff is not applied in a manner such that it meets the requirements of this chapeau. In particular, the Panel correctly assessed the exclusion of trading partners and free zones as factual elements that show the arbitrary way in which Colombia has administered the compound tariff.

¹ This executive summary consists of 766 words, less than 10% of the total word count of the introduction plus the other sections of this written submission.

ANNEX C

ARGUMENTS OF THE THIRD PARTICIPANTS

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ANNEX C-1

EXECUTIVE SUMMARY OF THE EUROPEAN UNION'S THIRD PARTICIPANT'S SUBMISSION¹

1. The European Union considers that Article II of the GATT 1994 applies to trade flows, regardless of their characterisation under the municipal law of the Member concerned as "illicit" or "illegal".
2. For a measure to be justified under Article XX of the GATT 1994 the analysis boils down to determining whether the measure is *rational and reasonable* in both its design and in its application. When the measure at issue is *manifestly* not designed to serve the alleged objective, it may be appropriate for a panel to conduct a similar analysis both with regard to the design of the measure at issue in the light of the value addressed, and with regard to the contribution of the measure to the value protected under the necessity test.
3. It is not required that, in order to be justified under Article XX(a), a measure must include an express reference to the protection of public morals. However, it is relevant if such a reference is made. Nevertheless, a panel should not be bound by such a characterisation and should rather make an objective assessment on the basis of the design, the architecture, and the revealing structure of the measure at issue.
4. A measure containing certain exceptions is not rendered automatically a measure not designed to protect public morals for the simple fact that it includes the said exceptions. The European Union considers that such exceptions should not necessarily be related and consistent with the alleged objective. WTO Members enjoy regulatory space so as to design such measures, provided that the exceptions are *permissible*.
5. A certain measure may be considered as part of a broader strategy aimed at tackling a particular public policy issue and thus making the required contribution to the objective sought.
6. The Appellate Body has further indicated in *EC – Seal Products* that an exception may be justified by a different purpose than the purpose of the measure at issue, provided that the exception is designed so as to minimise the negative effect on the main purpose of the measure.
7. The European Union notes that there may be situations when certain elements of the analysis under the necessity test and under the *chapeau* overlap, in particular in cases when the rationale for the main measure, as well as that for the discrimination occurring through an exception to the main measure, is the same.

¹ Total words of the submission (including footnotes but excluding the executive summary) = 5,395; total words of the executive summary = 421.