

GATT 1994.³⁰⁷ We further recall our findings above that Colombia has not demonstrated that the compound tariff is provisionally justified under Article XX(a) or Article XX(d) of the GATT 1994.

5.153. Given these findings, we do not consider it necessary to examine Colombia's claims on appeal pertaining to the chapeau of Article XX of the GATT 1994. We express no view on the Panel's reasoning in that regard, or the Panel's findings in paragraphs 7.591 and 8.7 of its Report.

6 FINDINGS AND CONCLUSIONS

6.1. For the reasons set out in this Report, the Appellate Body makes the following findings and conclusions.

6.1 Article II:1(a) and (b) of the GATT 1994

6.2. With respect to the Panel's finding that it was unnecessary to interpret the scope of Article II:1(a) and (b) of the GATT 1994, we consider that this finding does not follow logically from its previous finding indicating that the measure applies, or could apply, to some illicit trade. We therefore consider that the Panel did not provide coherent reasoning, and that the basis upon which it refrained from interpreting Article II:1(a) and (b) of the GATT 1994 was flawed.

- a. We therefore find that the Panel acted inconsistently with its duty under Article 11 of the DSU to make an objective assessment of the matter, including an objective assessment of the applicability of the relevant covered agreements, in finding that it was unnecessary for the Panel to interpret the scope of Article II:1(a) and (b) of the GATT 1994.
- b. Consequently, we reverse the Panel's finding, in paragraphs 7.108 and 8.1 of the Panel Report, that it was unnecessary for the Panel to issue a finding as to whether or not Article II:1(a) and (b) of the GATT 1994 applies to illicit trade.

6.3. With respect to Colombia's request for completion of the legal analysis, we do not see that the text of Article II:1(a) and (b) of the GATT 1994 excludes what Colombia classifies as illicit trade. Moreover, the context provided in Articles II:2 and VII:2 of the GATT 1994 and the Customs Valuation Agreement supports our view that the scope of Article II:1(a) and (b) of the GATT 1994 is not limited in the manner suggested by Colombia. We also consider that our interpretation regarding the scope of Article II:1(a) and (b) of the GATT 1994 is in keeping with the object and purpose of the GATT 1994, and that a Member seeking to address concerns regarding money laundering may do so through the general exceptions contained in Article XX of the GATT 1994. In the light of this interpretation of Article II:1(a) and (b) of the GATT 1994, we see no grounds to disturb the Panel's findings that the compound tariff necessarily exceeds Colombia's bound tariff rates in the instances set out in paragraphs 7.164 and 7.180 of its Report.

- a. We therefore find, for imports of products classified in Chapters 61, 62, 63, and 64 (except for heading 64.06 but including tariff line 6406.10.00.00) of Colombia's Customs Tariff, that, in the instances identified in the Panel Report, the compound tariff exceeds the bound tariff rates in Colombia's Schedule of Concessions, and is therefore inconsistent with Article II:1(a) and (b) of the GATT 1994.
- b. Consequently, we uphold the Panel's findings, in paragraphs 7.189, 7.192-7.194, and 8.2-8.4 of the Panel Report.

6.2 Article XX(a) of the GATT 1994

6.4. With respect to the Panel's findings under Article XX(a) of the GATT 1994, the Panel erred in concluding that Colombia had failed to demonstrate that the measure is "designed" to combat money laundering given its recognition that the compound tariff is not incapable of combating money laundering, such that there is a relationship between that measure and the protection of public morals. Thus, the Panel failed to assess the "necessity" of the measure on the basis of a weighing and balancing exercise. Contrary to the legal standard under Article XX(a), the Panel

³⁰⁷ Panel Report, para. 7.551.

prematurely ceased its analysis under this provision without proceeding to assess the degree of contribution of the measure to its objective, together with the other "necessity" factors in a weighing and balancing exercise.

- a. We therefore reverse the Panel's finding, in paragraph 7.400 of the Panel Report, that Colombia has failed to demonstrate that the compound tariff is "designed" to combat money laundering, and the Panel's finding, in paragraph 7.401 of the Panel Report, that Colombia has not shown that the compound tariff is a measure "designed" to protect public morals.
- b. Since the Panel's ultimate findings in respect of Article XX(a) were based exclusively on these erroneous findings, we also reverse the Panel's findings, in paragraphs 7.471 and 8.5 of the Panel Report, that Colombia has failed to demonstrate that the compound tariff is a measure "necessary to protect public morals" within the meaning of Article XX(a) of the GATT 1994.

6.5. Given that we have reversed the Panel's finding that Colombia has failed to demonstrate that the compound tariff is "designed" to protect public morals, we do not consider it necessary to examine Colombia's additional claims of error, including that the Panel erred in its "necessity" analysis under Article XX(a) of the GATT 1994, and that the Panel acted inconsistently with its duty to conduct an objective assessment of the matter under Article 11 of the DSU.

6.6. With respect to Colombia's request that we complete the legal analysis and find that the measure at issue is "designed" to protect public morals, our prior examination of Colombia's claim of error revealed that, when several findings by the Panel are read together, it is clear from its analysis that the compound tariff is not incapable of combating money laundering, such that there is a relationship between that measure and the protection of public morals. Indeed, we understand the Panel to have recognized that at least some goods priced at or below the thresholds could be imported into Colombia at artificially low prices for money laundering purposes, and would thus be subject to the disincentive created by the higher specific duties that apply to these goods.

- a. Therefore, on the basis of the Panel's findings, we find that the measure at issue is "designed" to protect public morals in Colombia within the meaning of Article XX(a) of the GATT 1994.

6.7. With respect to Colombia's request that we complete the legal analysis and find that the measure at issue is "necessary" to protect public morals, our assessment of the Panel's findings reveals the Panel's consideration that there was a lack of sufficient clarity with respect to several key aspects of the "necessity" analysis concerning the defence that Colombia presented to the Panel under Article XX(a). In particular, there was a lack of sufficient clarity regarding the degree of contribution of the measure at issue to the objective of combating money laundering, and the degree of trade-restrictiveness of the measure. Without sufficient clarity in respect of these factors, a proper weighing and balancing that could yield a conclusion that the measure is "necessary" could not be conducted. In the light of these considerations, the Panel's findings support the conclusion that Colombia has not demonstrated that the conclusion resulting from a weighing and balancing exercise is that the measure at issue is "necessary" to protect public morals.

- a. Therefore, on the basis of the Panel's findings, we find that Colombia has not demonstrated that the compound tariff is a measure "necessary to protect public morals" within the meaning of Article XX(a) of the GATT 1994.

6.3 Article XX(d) of the GATT 1994

6.8. With respect to the Panel's findings under Article XX(d) of the GATT 1994, the Panel erred in concluding that Colombia had failed to demonstrate that the measure is "designed" to secure compliance with laws or regulations that are not GATT-inconsistent given its recognition that the compound tariff is not incapable of securing compliance with Article 323 of Colombia's Criminal Code, such that there is a relationship between that measure and securing such compliance. Thus, the Panel failed to assess the "necessity" of the measure on the basis of a weighing and balancing exercise. Contrary to the legal standard under Article XX(d), the Panel prematurely ceased its

analysis under this provision without proceeding to assess the degree of contribution of the measure to its objective, together with the other "necessity" factors in a weighing and balancing exercise.

- a. We therefore reverse the Panel's finding, in paragraph 7.519 of the Panel Report, that Colombia has failed to demonstrate that the compound tariff is "designed" to secure compliance with Article 323 of Colombia's Criminal Code.
- b. Since the Panel's ultimate findings in respect of Article XX(d) were based exclusively on this erroneous finding, we also reverse the Panel's findings, in paragraphs 7.537 and 8.6 of the Panel Report, that Colombia has failed to demonstrate that the compound tariff is a measure "necessary to secure compliance with laws or regulations which are not inconsistent" with the GATT 1994, namely, Article 323 of Colombia's Criminal Code, within the meaning of Article XX(d) of the GATT 1994.

6.9. With respect to Colombia's request that we complete the legal analysis and find that the measure at issue is "designed" to secure compliance with laws or regulations that are not GATT-inconsistent, our prior examination of Colombia's claim revealed that, when several findings by the Panel are read together, it is clear that the Panel recognized that the compound tariff is not incapable of securing compliance with Article 323 of Colombia's Criminal Code, such that there is a relationship between that measure and securing such compliance. Indeed, we understand the Panel to have recognized that at least some goods priced at or below the thresholds could be imported into Colombia at artificially low prices for money laundering purposes, and would thus be subject to the disincentive created by the higher specific duties that apply to these goods.

- a. Therefore, on the basis of the Panel's findings, we find that the measure at issue is "designed" to secure compliance with laws or regulations which are not inconsistent with the GATT 1994, namely, Article 323 of Colombia's Criminal Code, within the meaning of Article XX(d) of the GATT 1994.

6.10. With respect to Colombia's request that we complete the legal analysis and find that the measure at issue is "necessary" to secure compliance with laws or regulations that are not GATT-inconsistent, our assessment of the Panel's findings reveals the Panel's consideration that there was a lack of sufficient clarity with respect to several key aspects of the "necessity" analysis concerning the defence that Colombia presented to the Panel under Article XX(d). In particular, there was a lack of sufficient clarity regarding the degree of contribution of the measure at issue to securing compliance with Article 323 of Colombia's Criminal Code, and the degree of trade-restrictiveness of the measure. Without sufficient clarity in respect of these factors, a proper weighing and balancing that could yield a conclusion that the measure is "necessary" could not be conducted. In the light of these considerations, the Panel's findings support the conclusion that Colombia has not demonstrated that the conclusion resulting from a weighing and balancing exercise is that the measure at issue is "necessary" to secure compliance with Article 323 of Colombia's Criminal Code.

- a. Therefore, on the basis of the Panel's findings, we find that Colombia has not demonstrated that the compound tariff is a measure "necessary to secure compliance with laws or regulations which are not inconsistent" with the GATT 1994, within the meaning of Article XX(d) of the GATT 1994.

6.4 Chapeau of Article XX of the GATT 1994

6.11. With respect to the Panel's findings under the chapeau of Article XX of the GATT 1994, given our findings that Colombia has not demonstrated that the compound tariff is provisionally justified under Article XX(a) or Article XX(d) of the GATT 1994, we do not consider it necessary to examine Colombia's claims on appeal pertaining to the chapeau of Article XX of the GATT 1994. We express no view on the Panel's reasoning in that regard, or the Panel's findings in paragraphs 7.591 and 8.7 of the Panel Report.

6.5 Recommendation

6.12. The Appellate Body recommends that Colombia bring its measure, found in this Report, and in the Panel Report as modified by this Report, to be inconsistent with the GATT 1994, into conformity with its obligations under that Agreement.

Signed in the original in Geneva this 12th day of May 2016 by:

Yuejiao Zhang
Presiding Member

Shree Baboo Chekitan Servansing
Member

Peter Van den Bossche
Member
