



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

AB-2016-1

Report of the Appellate Body

Table of Contents

| | |
|---|-----------|
| 1 INTRODUCTION | 8 |
| 2 ARGUMENTS OF THE PARTICIPANTS | 11 |
| 3 ARGUMENTS OF THE THIRD PARTICIPANTS..... | 12 |
| 4 ISSUES RAISED IN THIS APPEAL | 12 |
| 5 ANALYSIS OF THE APPELLATE BODY | 13 |
| 5.1 Article II:1(a) and (b) of the GATT 1994 | 13 |
| 5.1.1 The Panel's findings..... | 13 |
| 5.1.2 Whether the Panel acted inconsistently with Article 11 of the DSU..... | 15 |
| 5.1.3 Completion of the legal analysis | 19 |
| 5.2 Article XX(a) of the GATT 1994..... | 24 |
| 5.2.1 The Panel's findings..... | 24 |
| 5.2.2 Whether the Panel erred under Article XX(a) in finding that Colombia had failed to demonstrate that the compound tariff is a measure "necessary to protect public morals" | 26 |
| 5.2.3 Completion of the legal analysis | 35 |
| 5.3 Article XX(d) of the GATT 1994..... | 40 |
| 5.3.1 Whether the Panel erred under Article XX(d) in finding that Colombia had 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..... | 40 |
| 5.3.2 Completion of the legal analysis | 45 |
| 5.4 Chapeau of Article XX of the GATT 1994 | 48 |
| 6 FINDINGS AND CONCLUSIONS..... | 49 |
| 6.1 Article II:1(a) and (b) of the GATT 1994 | 49 |
| 6.2 Article XX(a) of the GATT 1994..... | 49 |
| 6.3 Article XX(d) of the GATT 1994..... | 50 |
| 6.4 Chapeau of Article XX of the GATT 1994 | 51 |
| 6.5 Recommendation..... | 52 |

ABBREVIATIONS USED IN THIS REPORT

| Abbreviation | Description |
|-----------------------------|---|
| Anti-Dumping Agreement | Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 |
| Colombia's Customs Tariff | Adopted pursuant to Decree No. 4927 of 26 December 2011, and subsequently amended by, for purposes of this dispute, Decrees No. 074 of 23 January 2013 and No. 456 of 28 February 2014 |
| Customs Valuation Agreement | Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994 |
| Decree No. 074 | Decree of the President of the Republic of Colombia No. 074 of 23 January 2013, partially amending the Customs Tariff (Panel Exhibits PAN-2 and COL-16) |
| Decree No. 456 | Decree of the President of the Republic of Colombia No. 456 of 28 February 2014, partially amending the Customs Tariff (Panel Exhibits PAN-3 and COL-17) |
| Decree No. 4927 | Decree of the President of the Republic of Colombia No. 4927 of 26 December 2011, adopting the Customs Tariff and other provisions (Panel Exhibit PAN-1, containing extracts of Chapters 61 through 64) |
| DIAN | <i>Dirección de Impuestos y Aduanas Nacionales</i> (National Customs and Excise Directorate) |
| DSB | Dispute Settlement Body |
| DSU | Understanding on Rules and Procedures Governing the Settlement of Disputes |
| FATF | Financial Action Task Force |
| f.o.b. | free on board |
| FTA | free trade agreement |
| GATS | General Agreement on Trade in Services |
| GATT 1994 | General Agreement on Tariffs and Trade 1994 |
| Panel Report | Panel Report, <i>Colombia – Measures Relating to the Importation of Textiles, Apparel and Footwear</i> , WT/DS461/R, 27 November 2015 |
| Plan Vallejo | Special Import-Export Systems for Capital Goods and Spare Parts |
| TBT Agreement | Agreement on Technical Barriers to Trade |
| UIAF | <i>Unidad de Información y Análisis Financiero</i> (Information and Financial Analysis Unit) |
| Working Procedures | Working Procedures for Appellate Review, WT/AB/WP/6, 16 August 2010 |
| WTO | World Trade Organization |

PANEL EXHIBITS CITED IN THIS REPORT

| Panel Exhibit(s) | Description |
|-------------------|---|
| COL-6 | <i>Ministerio del Interior y de Justicia, "Política Nacional Contra las Drogas"</i> (Ministry of the Interior and Justice, <i>National Anti-Drug Policy</i>) |
| COL-8 | World Customs Organization, <i>Illicit Trade Report 2012</i> |
| COL-10 | <i>Ministerio de Hacienda y Crédito Público, Dirección de Impuestos y Aduanas Nacionales, Unidad de Información y Análisis Financiero de Colombia, "Tipologías de Lavado de Activos Relacionadas con Contrabando", enero de 2006</i> (Ministry of Finance and Public Credit, National Customs and Excise Directorate, and Information and Financial Analysis Unit, <i>Money Laundering Typologies Related to Smuggling</i> , January 2006) |
| COL-11 | Financial Action Task Force (FATF), <i>Trade-Based Money Laundering</i> , 23 June 2006 |
| COL-12 | Financial Action Task Force (FATF), <i>Money Laundering Vulnerabilities of Free Trade Zones</i> , March 2010 |
| COL-19 | <i>Consejo Nacional de Política Económica y Social, "Política Nacional Anti-Lavado de Activos y Contra la Financiación del Terrorismo", 18 de enero de 2013</i> (National Council for Economic and Social Policy, <i>National Policy against Money Laundering and the Financing of Terrorism</i> , 18 January 2013) |
| COL-27 | <i>Ministro de Justicia y del Derecho, Observatorio de Drogas de Colombia, "El Problema de las Drogas en Colombia, Acciones y Resultados 2011-2013"</i> (Ministry of Justice and Law, Drugs Observatory, <i>The Drug Problem in Colombia, Actions and Results 2011-2013</i>) |
| COL-30 | Charts containing import data submitted by Colombia with its opening statement at the first Panel meeting |
| COL-33 | <i>Departamento Nacional de Planeación, "Plan Nacional de Desarrollo 2010-2014" (extractos)</i> (National Planning Department, <i>National Development Plan 2010-2014</i> (extracts)) |
| PAN-1 | <i>Decreto del Presidente de la República de Colombia No. 4927 del 26 de diciembre de 2011, por el cual se adopta el Arancel de Aduanas y otras disposiciones (extractos de los Capítulos 61-64)</i> (Decree of the President of the Republic of Colombia No. 4927 of 26 December 2011, adopting the Customs Tariff and other provisions) (extracts of Chapters 61 through 64)) |
| PAN-2 / COL-16 | <i>Decreto del Presidente de la República de Colombia No. 074 del 23 de enero de 2013, por el cual se modifica parcialmente el Arancel de Aduanas</i> (Decree of the President of the Republic of Colombia No. 074 of 23 January 2013, partially amending the Customs Tariff) |
| PAN-3 / COL-17 | <i>Decreto del Presidente de la República de Colombia No. 456 del 28 de febrero de 2014, por el cual se modifica parcialmente el Arancel de Aduanas</i> (Decree of the President of the Republic of Colombia No. 456 of 28 February 2014, partially amending the Customs Tariff) |

CASES CITED IN THIS REPORT

| Short Title | Full Case Title and Citation |
|--|--|
| <i>Argentina – Financial Services</i> | Appellate Body Report, <i>Argentina – Measures Relating to Trade in Goods and Services</i> , WT/DS453/AB/R and Add.1, adopted 9 May 2016 |
| <i>Argentina – Textiles and Apparel</i> | Appellate Body Report, <i>Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items</i> , WT/DS56/AB/R and Corr.1, adopted 22 April 1998, DSR 1998:III, p. 1003 |
| <i>Australia – Salmon</i> | Appellate Body Report, <i>Australia – Measures Affecting Importation of Salmon</i> , WT/DS18/AB/R , adopted 6 November 1998, DSR 1998:VIII, p. 3327 |
| <i>Brazil – Retreaded Tyres</i> | Appellate Body Report, <i>Brazil – Measures Affecting Imports of Retreaded Tyres</i> , WT/DS332/AB/R , adopted 17 December 2007, DSR 2007:IV, p. 1527 |
| <i>Canada – Aircraft (Article 21.5 – Brazil)</i> | Appellate Body Report, <i>Canada – Measures Affecting the Export of Civilian Aircraft – Recourse by Brazil to Article 21.5 of the DSU</i> , WT/DS70/AB/RW , adopted 4 August 2000, DSR 2000:IX, p. 4299 |
| <i>Canada – Periodicals</i> | Appellate Body Report, <i>Canada – Certain Measures Concerning Periodicals</i> , WT/DS31/AB/R , adopted 30 July 1997, DSR 1997:I, p. 449 |
| <i>Canada – Renewable Energy / Canada – Feed-in Tariff Program</i> | Appellate Body Reports, <i>Canada – Certain Measures Affecting the Renewable Energy Generation Sector / Canada – Measures Relating to the Feed-in Tariff Program</i> , WT/DS412/AB/R / WT/DS426/AB/R , adopted 24 May 2013, DSR 2013:I, p. 7 |
| <i>Canada – Wheat Exports and Grain Imports</i> | Appellate Body Report, <i>Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain</i> , WT/DS276/AB/R , adopted 27 September 2004, DSR 2004:VI, p. 2739 |
| <i>China – Rare Earths</i> | Appellate Body Reports, <i>China – Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum</i> , WT/DS431/AB/R / WT/DS432/AB/R / WT/DS433/AB/R , adopted 29 August 2014, DSR 2014:III, p. 805 |
| <i>Dominican Republic – Import and Sale of Cigarettes</i> | Appellate Body Report, <i>Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes</i> , WT/DS302/AB/R , adopted 19 May 2005, DSR 2005:XV, p. 7367 |
| <i>EC – Asbestos</i> | Appellate Body Report, <i>European Communities – Measures Affecting Asbestos and Asbestos-Containing Products</i> , WT/DS135/AB/R , adopted 5 April 2001, DSR 2001:VII, p. 3243 |
| <i>EC – Bed Linen (Article 21.5 – India)</i> | Appellate Body Report, <i>European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India</i> , WT/DS141/AB/RW , adopted 24 April 2003, DSR 2003:III, p. 965 |
| <i>EC – Export Subsidies on Sugar</i> | Appellate Body Report, <i>European Communities – Export Subsidies on Sugar</i> , WT/DS265/AB/R , WT/DS266/AB/R , WT/DS283/AB/R , adopted 19 May 2005, DSR 2005:XIII, p. 6365 |
| <i>EC – Hormones</i> | Appellate Body Report, <i>EC Measures Concerning Meat and Meat Products (Hormones)</i> , WT/DS26/AB/R , WT/DS48/AB/R , adopted 13 February 1998, DSR 1998:I, p. 135 |
| <i>EC – Poultry</i> | Appellate Body Report, <i>European Communities – Measures Affecting the Importation of Certain Poultry Products</i> , WT/DS69/AB/R , adopted 23 July 1998, DSR 1998:V, p. 2031 |
| <i>EC – Sardines</i> | Appellate Body Report, <i>European Communities – Trade Description of Sardines</i> , WT/DS231/AB/R , adopted 23 October 2002, DSR 2002:VIII, p. 3359 |
| <i>EC – Seal Products</i> | Appellate Body Reports, <i>European Communities – Measures Prohibiting the Importation and Marketing of Seal Products</i> , WT/DS400/AB/R / WT/DS401/AB/R , adopted 18 June 2014 |
| <i>EC – Selected Customs Matters</i> | Appellate Body Report, <i>European Communities – Selected Customs Matters</i> , WT/DS315/AB/R , adopted 11 December 2006, DSR 2006:IX, p. 3791 |
| <i>EC – Tube or Pipe Fittings</i> | Appellate Body Report, <i>European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil</i> , WT/DS219/AB/R , adopted 18 August 2003, DSR 2003:VI, p. 2613 |
| <i>EC and certain member States – Large Civil Aircraft</i> | Appellate Body Report, <i>European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft</i> , WT/DS316/AB/R , adopted 1 June 2011, DSR 2011:I, p. 7 |

| Short Title | Full Case Title and Citation |
|---|---|
| <i>Japan – Agricultural Products II</i> | Appellate Body Report, <i>Japan – Measures Affecting Agricultural Products</i> , WT/DS76/AB/R , adopted 19 March 1999, DSR 1999:I, p. 277 |
| <i>Japan – Apples</i> | Appellate Body Report, <i>Japan – Measures Affecting the Importation of Apples</i> , WT/DS245/AB/R , adopted 10 December 2003, DSR 2003:IX, p. 4391 |
| <i>Korea – Alcoholic Beverages</i> | Appellate Body Report, <i>Korea – Taxes on Alcoholic Beverages</i> , WT/DS75/AB/R , WT/DS84/AB/R , adopted 17 February 1999, DSR 1999:I, p. 3 |
| <i>Korea – Dairy</i> | Appellate Body Report, <i>Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products</i> , WT/DS98/AB/R , adopted 12 January 2000, DSR 2000:I, p. 3 |
| <i>Korea – Various Measures on Beef</i> | Appellate Body Report, <i>Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef</i> , WT/DS161/AB/R , WT/DS169/AB/R , adopted 10 January 2001, DSR 2001:I, p. 5 |
| <i>Mexico – Taxes on Soft Drinks</i> | Appellate Body Report, <i>Mexico – Tax Measures on Soft Drinks and Other Beverages</i> , WT/DS308/AB/R , adopted 24 March 2006, DSR 2006:I, p. 3 |
| <i>Thailand – Cigarettes (Philippines)</i> | Appellate Body Report, <i>Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines</i> , WT/DS371/AB/R , adopted 15 July 2011, DSR 2011:IV, p. 2203 |
| <i>US – Anti-Dumping and Countervailing Duties (China)</i> | Appellate Body Report, <i>United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China</i> , WT/DS379/AB/R , adopted 25 March 2011, DSR 2011:V, p. 2869 |
| <i>US – Carbon Steel</i> | Appellate Body Report, <i>United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany</i> , WT/DS213/AB/R and Corr.1, adopted 19 December 2002, DSR 2002:IX, p. 3779 |
| <i>US – Continued Zeroing</i> | Appellate Body Report, <i>United States – Continued Existence and Application of Zeroing Methodology</i> , WT/DS350/AB/R , adopted 19 February 2009, DSR 2009:III, p. 1291 |
| <i>US – COOL</i> | Appellate Body Reports, <i>United States – Certain Country of Origin Labelling (COOL) Requirements</i> , WT/DS384/AB/R / WT/DS386/AB/R , adopted 23 July 2012, DSR 2012:V, p. 2449 |
| <i>US – Gambling</i> | Appellate Body Report, <i>United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services</i> , WT/DS285/AB/R , adopted 20 April 2005, DSR 2005:XII, p. 5663 (and Corr.1, DSR 2006:XII, p. 5475) |
| <i>US – Gambling</i> | Panel Report, <i>United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services</i> , WT/DS285/R , adopted 20 April 2005, as modified by Appellate Body Report WT/DS285/AB/R , DSR 2005:XII, p. 5797 |
| <i>US – Gasoline</i> | Appellate Body Report, <i>United States – Standards for Reformulated and Conventional Gasoline</i> , WT/DS2/AB/R , adopted 20 May 1996, DSR 1996:I, p. 3 |
| <i>US – Hot-Rolled Steel</i> | Appellate Body Report, <i>United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan</i> , WT/DS184/AB/R , adopted 23 August 2001, DSR 2001:X, p. 4697 |
| <i>US – Lamb</i> | Appellate Body Report, <i>United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia</i> , WT/DS177/AB/R , WT/DS178/AB/R , adopted 16 May 2001, DSR 2001:IX, p. 4051 |
| <i>US – Large Civil Aircraft (2nd complaint)</i> | Appellate Body Report, <i>United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)</i> , WT/DS353/AB/R , adopted 23 March 2012, DSR 2012:I, p. 7 |
| <i>US – Oil Country Tubular Goods Sunset Reviews</i> | Appellate Body Report, <i>United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina</i> , WT/DS268/AB/R , adopted 17 December 2004, DSR 2004:VII, p. 3257 |
| <i>US – Section 211 Appropriations Act</i> | Appellate Body Report, <i>United States – Section 211 Omnibus Appropriations Act of 1998</i> , WT/DS176/AB/R , adopted 1 February 2002, DSR 2002:II, p. 589 |
| <i>US – Shrimp</i> | Appellate Body Report, <i>United States – Import Prohibition of Certain Shrimp and Shrimp Products</i> , WT/DS58/AB/R , adopted 6 November 1998, DSR 1998:VII, p. 2755 |
| <i>US – Tuna II (Mexico)</i> | Appellate Body Report, <i>United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products</i> , WT/DS381/AB/R , adopted 13 June 2012, DSR 2012:IV, p. 1837 |

| Short Title | Full Case Title and Citation |
|---|---|
| <i>US – Upland Cotton</i> | Appellate Body Report, <i>United States – Subsidies on Upland Cotton</i> , WT/DS267/AB/R , adopted 21 March 2005, DSR 2005:I, p. 3 |
| <i>US – Upland Cotton (Article 21.5 – Brazil)</i> | Appellate Body Report, <i>United States – Subsidies on Upland Cotton – Recourse to Article 21.5 of the DSU by Brazil</i> , WT/DS267/AB/RW , adopted 20 June 2008, DSR 2008:III, p. 809 |
| <i>US – Wheat Gluten</i> | Appellate Body Report, <i>United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities</i> , WT/DS166/AB/R , adopted 19 January 2001, DSR 2001:II, p. 717 |
| <i>US – Zeroing (EC)</i> | Appellate Body Report, <i>United States – Laws, Regulations and Methodology for Calculating Dumping Margins (“Zeroing”)</i> , WT/DS294/AB/R , adopted 9 May 2006, and Corr.1, DSR 2006:II, p. 417 |

WORLD TRADE ORGANIZATION
APPELLATE BODY

Colombia – Measures Relating to the Importation of Textiles, Apparel and Footwear

Colombia, *Appellant*
Panama, *Appellee*

China, *Third Participant*
Ecuador, *Third Participant*
El Salvador, *Third Participant*
European Union, *Third Participant*
Guatemala, *Third Participant*
Honduras, *Third Participant*
Philippines, *Third Participant*
United States, *Third Participant*

AB-2016-1

Appellate Body Division:

Zhang, Presiding Member
Servansing, Member
Van den Bossche, Member

1 INTRODUCTION

1.1. Colombia appeals certain issues of law and legal interpretations developed in the Panel Report, *Colombia – Measures Relating to the Importation of Textiles, Apparel and Footwear*¹ (Panel Report). The Panel was established on 25 September 2013 to consider a complaint by Panama² with respect to a measure taken by Colombia affecting imports of textiles, apparel, and footwear.

1.2. This dispute concerns the imposition by Colombia of a "compound tariff" on the importation of certain textiles, apparel, and footwear classified under Chapters 61 through 64 of Colombia's Customs Tariff.³ The compound tariff was introduced by Decree of the President of the Republic of Colombia No. 074 of 23 January 2013⁴ (Decree No. 074), which was subsequently "replace[d] and repeal[ed]"⁵ by Decree of the President of the Republic of Colombia No. 456 of 28 February 2014⁶ (Decree No. 456). Decree No. 456 entered into force on 30 March 2014 for a period of two years⁷, and was recently extended until 30 July 2016.⁸

1.3. The compound tariff is composed of an *ad valorem* levy, expressed as a percentage of the customs value of goods, and a specific levy, expressed in units of currency per unit of measurement.⁹ While the *ad valorem* component of the compound tariff is 10% for all products regardless of their value, the specific component varies depending on the product and the declared free on board (f.o.b.) price in respect of two thresholds: (i) for products classified in

¹ WT/DS461/R, 27 November 2015.

² Request for the Establishment of a Panel by Panama, WT/DS461/3, 20 August 2013.

³ Panel Report, para. 2.1. The relevant chapters of Colombia's Customs Tariff are: (i) Chapter 61 – "Articles of apparel and clothing accessories, knitted or crocheted"; (ii) Chapter 62 – "Articles of apparel and clothing accessories, not knitted or crocheted"; (iii) Chapter 63 – "Other made up textile articles; sets; worn clothing and worn textile articles; rags"; and (iv) Chapter 64 – "Footwear, gaiters and the like; parts of such articles". (Ibid., fn 58 to para. 7.24)

⁴ Decree of the President of the Republic of Colombia No. 074 of 23 January 2013, partially amending Colombia's Customs Tariff (Panel Exhibits PAN-2 and COL-16). Decree No. 074 came into effect on 1 March 2013 and remained in force for one year. (Panel Report, para. 7.31)

⁵ Panel Report, para. 7.37.

⁶ Decree of the President of the Republic of Colombia No. 456 of 28 February 2014, partially amending Colombia's Customs Tariff (Panel Exhibits PAN-3 and COL-17).

⁷ Panel Report, paras. 2.7 and 7.31. For the products concerned, Decree No. 456 modifies Colombia's Customs Tariff adopted pursuant to Decree No. 4927 of 26 December 2011 (Decree No. 4927), which establishes ordinary customs duties in Colombia. (Decree of the President of the Republic of Colombia No. 4927 of 26 December 2011, adopting the Customs Tariff and other provisions. (See Panel Exhibit PAN-1, containing extracts of Chapters 61 through 64) See also Panel Report, para. 7.141)

⁸ Colombia's response to questioning at the oral hearing.

⁹ Panel Report, para. 2.4.

Chapters 61, 62, and 63 (textiles and articles of apparel), and under tariff line 6406.10.00.00 of Chapter 64 of the Customs Tariff (uppers of footwear and parts thereof, other than stiffeners), the specific levy is US\$5/kg when the declared f.o.b. price is US\$10/kg or less, and US\$3/kg when the declared f.o.b. price is greater than US\$10/kg; and (ii) for products classified in Chapter 64 (footwear), with the exception of those under heading 64.06 (parts of footwear), the specific levy is US\$5/pair when the declared f.o.b. price is US\$7/pair or less, and US\$1.75/pair when the declared f.o.b. price is greater than US\$7/pair.¹⁰ When, in a single transaction, some goods under the same subheading are imported at prices at or below and others at prices above the respective threshold, the compound tariff payable is 10% *ad valorem* plus the highest specific levy applicable, i.e. US\$5/kg or US\$5/pair, depending on the classification of the goods.¹¹ Finally, with respect to certain imports of goods, the compound tariff does not apply.¹²

1.4. Panama claimed before the Panel that the compound tariff imposed by Colombia is inconsistent with Article II:1(a) and (b) of the General Agreement on Tariffs and Trade 1994 (GATT 1994) and Colombia's Schedule of Concessions.¹³ Furthermore, in response to the defences invoked by Colombia, Panama requested the Panel to reject the argument that the compound tariff is justified under the general exceptions set out in Article XX(a) and Article XX(d) of the GATT 1994.¹⁴ Finally, Panama requested the Panel to suggest, in accordance with Article 19.1 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), that Colombia introduce a cap mechanism that would guarantee compliance with the relevant bound tariffs, or, alternatively, that it revert to an *ad valorem* tariff system, without exceeding the bound levels of 35% and 40% *ad valorem* depending on the product.¹⁵

1.5. Colombia requested that the Panel reject Panama's claims in their entirety.¹⁶ Colombia contended that the compound tariff is a measure designed to combat illegal trade operations that are not covered by Article II:1 of the GATT 1994 and that Panama had not presented any evidence to support a *prima facie* case that the compound tariff results in a breach of the levels bound in Colombia's Schedule of Concessions.¹⁷ In the event that the Panel were to find that the measure at issue is inconsistent with any of the obligations under Article II:1 cited by Panama, Colombia maintained that the measure is justified under the general exceptions set out in Article XX(a) and Article XX(d) of the GATT 1994.¹⁸ Finally, Colombia requested the Panel to refrain from making suggestions as to the manner in which Colombia could comply with a recommendation of the Dispute Settlement Body (DSB) to bring the measure at issue into conformity with its World Trade Organization (WTO) obligations.¹⁹

1.6. In the Panel Report, circulated to Members of the WTO on 27 November 2015, the Panel found that the measure at issue is structured and designed to be applied to all imports of the products concerned, without distinguishing between "licit" and "illicit" trade, and that no provision in Colombia's legal system bans the importation of goods whose declared prices are below the thresholds established in the measure.²⁰ In the light of these findings, the Panel did not consider it necessary to rule on Colombia's claim that the obligations contained in Article II:1(a) and (b) of the GATT 1994 are not applicable to illicit trade.²¹

1.7. The Panel found that the compound tariff constitutes an ordinary customs duty that exceeds the levels bound in Colombia's Schedule of Concessions, and is therefore inconsistent with the first sentence of Article II:1(b) of the GATT 1994, and accords treatment less favourable than that

¹⁰ Panel Report, para. 7.25.

¹¹ Panel Report, para. 7.26.

¹² The compound tariff does not apply to: (i) imports of goods from countries with which Colombia has signed free trade agreements, in which subheadings subject to Decree No. 456 have been negotiated; (ii) imports of goods entering certain regions of Colombia designated as Special Customs Regime Zones; and (iii) imports of goods under the Special Import-Export Systems for Capital Goods and Spare Parts, also known as the "Plan Vallejo" (i.e. production inputs, which are subsequently processed or used to manufacture goods for export). (Panel Report, paras. 7.27-7.30)

¹³ Panel Report, para. 3.1.

¹⁴ Panel Report, para. 3.2.

¹⁵ Panel Report, para. 3.3.

¹⁶ Panel Report, para. 3.4.

¹⁷ Panel Report, para. 3.4.

¹⁸ Panel Report, para. 3.4.

¹⁹ Panel Report, para. 3.5.

²⁰ Panel Report, para. 8.1.

²¹ Panel Report, para. 8.1.

envisaged in Colombia's Schedule of Concessions, in a manner inconsistent with Article II:1(a) of the GATT 1994, in the following instances²²:

- a. for imports of products classified in Chapters 61, 62, and 63, and under tariff line 6406.10.00.00 of Chapter 64 of Colombia's Customs Tariff:
 - i. the tariff consisting of an *ad valorem* component of 10% plus a specific component of US\$5/kg, when the f.o.b. import price is US\$10/kg or less;
 - ii. the tariff consisting of an *ad valorem* component of 10% plus a specific component of US\$5/kg, when, in a single transaction, some products under the same subheading are imported at f.o.b. prices above and others at f.o.b. prices below the threshold of US\$10/kg; and
 - iii. with regard to subheading 6305.32, the tariff consisting of an *ad valorem* component of 10% plus a specific component of US\$3/kg, when the f.o.b. import price is greater than US\$10/kg but lower than US\$12/kg; and
- b. for imports of products classified under various tariff headings of Chapter 64 of Colombia's Customs Tariff subject to the measure at issue:
 - i. the tariff consisting of an *ad valorem* component of 10% plus a specific component of US\$5/pair, when the f.o.b. import price is US\$7/pair or less; and
 - ii. the tariff consisting of an *ad valorem* component of 10% plus a specific component of US\$5/pair, when, in a single transaction, some products under the same subheading are imported at f.o.b. prices above and others at f.o.b. prices below the threshold of US\$7/pair.

1.8. Thus, according to the Panel, the *ad valorem* equivalent of the compound tariff necessarily exceeds the levels bound in Colombia's Schedule of Concessions in the following circumstances:

| Products covered | Declared f.o.b. price | Formula for calculating the compound tariff |
|--|---|---|
| Chapters 61, 62, and 63, and Chapter 64, tariff line 6406.10.00.00 | Prices of US\$10/kg or less | 10% <i>ad valorem</i> plus US\$5/kg |
| Chapter 63, subheading 6305.32 | Prices above US\$10 and below US\$12/kg | 10% <i>ad valorem</i> plus US\$3/kg |
| Chapters 61, 62, and 63, and Chapter 64, tariff line 6406.10.00.00 | Some prices above and others below US\$10/kg when imported under the same subheading | 10% <i>ad valorem</i> plus US\$5/kg |
| Chapter 64, except for heading 64.06 | Prices of US\$7/pair or less | 10% <i>ad valorem</i> plus US\$5/pair |
| Chapter 64, except for heading 64.06 | Some prices above and others below US\$7/pair when imported under the same subheading | 10% <i>ad valorem</i> plus US\$5/pair |

Source: Panel Report, para. 7.187.

1.9. With respect to Colombia's recourse to certain of the general exceptions under Article XX of the GATT 1994, the Panel found that Colombia had failed to demonstrate that the compound tariff is a measure necessary to protect public morals within the meaning of Article XX(a), or necessary to secure compliance with Article 323 of Colombia's Criminal Code within the meaning of Article XX(d).²³ The Panel further found that, even assuming that Colombia had succeeded in

²² Panel Report, paras. 8.2-8.4.

²³ Panel Report, paras. 8.5-8.6.

demonstrating that its measure is provisionally justified under Article XX(a) or Article XX(d), the compound tariff is not applied in a manner that meets the requirements of the chapeau of Article XX.²⁴

1.10. In accordance with Article 19.1 of the DSU, the Panel recommended that Colombia bring the measure at issue into conformity with its obligations under the GATT 1994, but refrained from making a suggestion as to the manner in which Colombia could do so.²⁵

1.11. On 22 January 2016, Colombia notified the DSB, pursuant to Articles 16.4 and 17 of the DSU, of its intention to appeal certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel, and filed a Notice of Appeal and an appellant's submission pursuant to Rule 20 and Rule 21, respectively, of the Working Procedures for Appellate Review²⁶ (Working Procedures). On 9 February 2016, Panama filed an appellee's submission.²⁷ On 12 February 2016, the European Union filed a third participant's submission.²⁸ On the same day, China, Ecuador, El Salvador, Guatemala, Honduras, the Philippines, and the United States each notified its intention to appear at the oral hearing as a third participant.²⁹

1.12. By letter of 22 March 2016, the Chair of the Appellate Body notified the Chair of the DSB that the Appellate Body would not be able to circulate its Report in this appeal within the 60-day period pursuant to Article 17.5 of the DSU, or within the 90-day period pursuant to the same provision.³⁰ The Chair of the Appellate Body explained that this was due to a number of factors, including the overlap in the composition of the Divisions in appeals concurrently pending before the Appellate Body, constraints resulting from the need for Spanish-speaking staff of which the Appellate Body Secretariat has only a limited number, and the need to translate documents from Spanish into English for non-Spanish-speaking Appellate Body Members and staff. On 11 April 2016, the Chair of the Appellate Body informed the Chair of the DSB that the Report in these proceedings would be circulated no later than 7 June 2016.³¹

1.13. The oral hearing in this appeal was held on 4-5 April 2016. The participants and five third participants (China, the European Union, Guatemala, Honduras, and the United States) made opening and/or closing statements. The participants and third participants responded to questions posed by the Members of the Appellate Body Division hearing the appeal.

1.14. By letter of 1 June 2016, the participants and third participants were informed that, in accordance with Rule 15 of the Working Procedures, the Appellate Body had notified the Chairman of the DSB of its decision to authorize Mrs Yuejiao Zhang, the Presiding Member of the Division hearing this appeal, to complete the disposition of this appeal even though her second term as Appellate Body Member was due to expire before the completion of the appellate proceedings.

2 ARGUMENTS OF THE PARTICIPANTS

2.1. The claims and arguments of the participants are reflected in the executive summaries of their written submissions provided to the Appellate Body.³² The Notice of Appeal and the executive summaries of the participants' written submissions are contained, respectively, in Annexes A and B of the Addendum to this Report.³³

²⁴ Panel Report, para. 8.7.

²⁵ Panel Report, paras. 8.9-8.10.

²⁶ WT/AB/WP/6, 16 August 2010.

²⁷ Pursuant to Rule 22 of the Working Procedures.

²⁸ Pursuant to Rule 24(1) of the Working Procedures.

²⁹ Pursuant to Rule 24(2) of the Working Procedures.

³⁰ WT/DS461/7.

³¹ WT/DS461/8.

³² Pursuant to the Appellate Body Communication on "Executive Summaries of Written Submissions in Appellate Proceedings" and "Guidelines in Respect of Executive Summaries of Written Submissions in Appellate Proceedings". (WT/AB/23, 11 March 2015)

³³ WT/DS461/AB/R/Add.1.

3 ARGUMENTS OF THE THIRD PARTICIPANTS

3.1. The arguments of the European Union, as third participant, are reflected in the executive summary of its written submission provided to the Appellate Body³⁴, contained in Annex C of the Addendum to this Report.³⁵

4 ISSUES RAISED IN THIS APPEAL

4.1. The following issues are raised in this appeal:

- a. with respect to Article II:1(a) and (b) of the GATT 1994:
 - i. whether the Panel acted inconsistently with its duty to make an objective assessment of the matter pursuant to Article 11 of the DSU, including an objective assessment of the applicability of the relevant covered agreements, in concluding that it was not necessary to issue a finding as to whether or not the obligations of Article II:1(a) and (b) of the GATT 1994 apply to what Colombia considers to be illicit trade; and
 - ii. whether Article II:1(a) and (b) of the GATT 1994 applies to what Colombia considers to be illicit trade; and whether the Panel erred in the application of Article II:1(b) in finding that the measure did not incorporate a legislative ceiling;
- b. with respect to Article XX(a) of the GATT 1994:
 - i. whether the Panel erred in the interpretation and application of Article XX(a) in finding that Colombia failed to demonstrate that the measure is "necessary to protect public morals", and, in particular:
 - whether the Panel erred by imposing an incorrect legal standard in its analysis of whether the measure at issue is "designed" to protect public morals; and
 - whether the Panel erred in its analysis of whether the measure is "necessary" to protect public morals by imposing an incorrect legal standard in assessing the contribution of the measure towards its objective, and by failing to undertake a proper weighing and balancing of the relevant factors; and
 - ii. whether the Panel acted inconsistently with its duty to make an objective assessment of the matter pursuant to Article 11 of the DSU in its assessment of certain evidence provided by Colombia;
- c. with respect to Article XX(d) of the GATT 1994:
 - i. whether the Panel erred in the interpretation and application of Article XX(d), for the same reasons it erred in the interpretation and application of Article XX(a), in finding that Colombia failed to demonstrate that the measure is "designed" and "necessary" to secure compliance with laws or regulations that are not inconsistent with the GATT 1994; and
- d. with respect to the chapeau of Article XX of the GATT 1994:
 - i. whether the Panel erred in the interpretation and application of the chapeau of Article XX, and acted inconsistently with its duty to make an objective assessment of the matter pursuant to Article 11 of the DSU, in finding that the measure is not applied in a manner that meets the requirements of the chapeau of Article XX.

³⁴ Pursuant to the Appellate Body Communication on "Executive Summaries of Written Submissions in Appellate Proceedings" and "Guidelines in Respect of Executive Summaries of Written Submissions in Appellate Proceedings". (WT/AB/23, 11 March 2015)

³⁵ WT/DS461/AB/R/Add.1.

5 ANALYSIS OF THE APPELLATE BODY

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

5.1. Colombia appeals 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'".³⁶ Colombia argues that, in reaching this finding, the Panel failed to make an objective assessment of the matter before it, as required under Article 11 of the DSU. In the event that we reverse this finding of the Panel, Colombia requests us to complete the legal analysis and find that: (i) Article II:1(a) and (b) of the GATT 1994 does not apply to illicit trade; and (ii) because imports priced below the thresholds set out in the measure at issue are imported at artificially low prices that do not reflect market conditions, the compound tariff does not violate Article II:1(a) and (b) of the GATT 1994.³⁷

5.2. We begin by recalling the Panel's findings concerning Article II:1(a) and (b) of the GATT 1994 before turning to address Colombia's claim under Article 11 of the DSU.

5.1.1 The Panel's findings

5.3. The Panel first addressed Colombia's argument that "Article II of the GATT 1994 only 'covers licit trade and cannot cover operations where there are indications that they are being conducted at artificially low prices in order to launder money'".³⁸ In this connection, Colombia asserted that the terms "commerce" and "importation" in Article II:1(a) and (b) of the GATT 1994, respectively, refer only to licit trade and cannot be extended to trade operations conducted for the purpose of laundering money or for other illicit purposes.

5.4. The Panel began its analysis by noting that Colombia's argument would be pertinent only if the Panel were to make two determinations: (i) that the trade affected by the measure at issue is illicit trade; and (ii) that the obligations contained in Article II:1(a) and (b) of the GATT 1994 do not apply to illicit trade.³⁹

5.5. Turning to the issue of whether the trade affected by the measure is illicit, the Panel pointed out that the covered agreements contain no definition of "illicit trade".⁴⁰ Thereafter, the Panel reviewed the definitions of the concept of illicit trade in various international instruments furnished by Colombia.⁴¹ The Panel observed that the factor common to the various definitions of illicit trade cited by Colombia is that they all refer to "illegal" activities, i.e. "activities that have been prohibited by law".⁴² However, the Panel added that the compound tariff applies to *all* imports of products classified in Chapters 61, 62, 63, and 64 of Colombia's Customs Tariff (except for those classified under some tariff lines of heading 64.06). The Panel pointed out that the "[i]mposition of the compound tariff on imports is not preceded by any declaration on the part of the judicial or administrative authorities that the operation constitutes an unlawful act, nor is it even associated with the commission of any unlawful act."⁴³ Moreover, the Panel noted that Colombia had not identified any legal rule prohibiting the importation of goods at prices lower than the thresholds determined in the measure at issue. Therefore, in the Panel's view, "the compound tariff is applied to all imports of the products in question, without distinguishing as to whether the operations are lawful or unlawful" and "is not structured or designed to apply solely to operations which have been classified as 'illicit trade'".⁴⁴

5.6. The Panel also noted that the compound tariff does not apply to: (i) imports from countries with which Colombia has signed trade agreements in which Colombia's Customs Tariff subheadings subject to the measure at issue have been negotiated; (ii) goods entering Special Customs Regime

³⁶ Panel Report, para. 7.108. See also para. 8.1; and Colombia's Notice of Appeal, para. 5.

³⁷ Colombia's Notice of Appeal, para. 7.

³⁸ Panel Report, para. 7.59 (quoting Colombia's first written submission to the Panel, para. 67; and second written submission to the Panel, para. 37). See also para. 7.85.

³⁹ Panel Report, paras. 7.91 and 7.104.

⁴⁰ Panel Report, para. 7.93.

⁴¹ Panel Report, paras. 7.94-7.97.

⁴² Panel Report, para. 7.105.

⁴³ Panel Report, para. 7.105.

⁴⁴ Panel Report, para. 7.106.

Zones; and (iii) goods entering Colombian territory under the Special Import-Export Systems for Capital Goods and Spare Parts (Plan Vallejo). In the Panel's opinion, this supports the conclusion that "in Colombia's legal system there is no rule prohibiting or restricting what Colombia considers 'illicit trade', that is, the import of goods whose declared prices are below the thresholds provided for in Decree No. 456".⁴⁵

5.7. For these reasons, the Panel concluded that "a finding as to whether or not the obligations in Articles II:1(a) and II:1(b) of the GATT 1994 are applicable to 'illicit trade' would be merely theoretical and would be neither necessary nor of practical use in achieving a satisfactory settlement of the matter placed before [the] Panel."⁴⁶ As a result, the Panel considered it unnecessary to issue a finding on whether or not the obligations of Article II:1 of the GATT 1994 extend to illicit trade.

5.8. The Panel then examined whether the compound tariff exceeds the bound rates in Colombia's Schedule of Concessions. The Panel noted that the "complex feature"⁴⁷ of the present dispute is that the bound tariff rates in Colombia's Schedule of Concessions are expressed in *ad valorem* terms, whereas the compound tariff contains both an *ad valorem* and a specific component. In order to compare the tariff treatment accorded under the compound tariff with the bound rates established in Colombia's Schedule of Concessions, the Panel relied on a "break-even price" for each tariff subheading.⁴⁸ Having reviewed the arithmetical calculations furnished by Panama in respect of each scenario of the application of the compound tariff, the Panel concluded that Panama's calculations were correct and that, in the instances identified in the Panel Report, the compound tariff "necessarily exceeds the levels bound in Colombia's Schedule of Concessions of 35% and 40% *ad valorem* (depending on the subheading)".⁴⁹

5.9. The Panel also examined whether, as argued by Colombia, the measure at issue incorporates a legislative ceiling that prevents the bound tariff rates in Colombia's Schedule of Concessions from being exceeded.⁵⁰ Referring to the Appellate Body report in *Argentina – Textiles and Apparel*, the Panel noted that it is possible for a Member to establish a legislative ceiling or cap that would ensure that, even if the type of duty applied differs from the type provided for in that Member's Schedule of Concessions, its *ad valorem* equivalent would not exceed the bound rates provided for in that Schedule.⁵¹

5.10. However, in the Panel's view, the legislative ceiling referred to by Colombia applies only to imports at prices above the prescribed thresholds. Therefore, it would not apply to other imports, in particular, to imports priced below the thresholds or to imports under the same subheading, when, in a single transaction, some imports are priced above and others are priced below the relevant threshold.⁵² Moreover, the Panel recalled that, even with respect to imports entering at prices above the thresholds, it had found that, at least in the case of imports classified under heading 6305.32, at prices higher than US\$10/kg but lower than US\$12/kg, the compound tariff exceeds the bound tariff rates in Colombia's Schedule of Concessions. As a result, the Panel was not convinced by Colombia's argument that the measure incorporates a legislative ceiling that would prevent the compound tariff from resulting in duties that exceed Colombia's bound rates.⁵³

5.11. The Panel consequently concluded that, in the instances identified in the Panel Report, the compound tariff necessarily 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 1994.⁵⁴

⁴⁵ Panel Report, para. 7.107.

⁴⁶ Panel Report, para. 7.108.

⁴⁷ Panel Report, para. 7.145.

⁴⁸ Panel Report, paras. 7.146-7.148.

⁴⁹ Panel Report, para. 7.189. (emphasis original) See also para. 7.187.

⁵⁰ Panel Report, para. 7.182 (referring to Colombia's first written submission to the Panel, paras. 63-64).

⁵¹ Panel Report, para. 7.184 (referring to Appellate Body Report, *Argentina – Textiles and Apparel*, para. 54).

⁵² Panel Report, para. 7.185.

⁵³ Panel Report, para. 7.186.

⁵⁴ Panel Report, paras. 7.189 and 7.193-7.194.

5.1.2 Whether the Panel acted inconsistently with Article 11 of the DSU

5.12. Colombia contends that, in stating that it was not necessary for the Panel to make a finding on whether or not the obligations of Article II:1 of the GATT 1994 extend to illicit trade, the Panel failed to make an objective assessment of the matter before it, as required under Article 11 of the DSU, including an objective assessment of the applicability of and conformity with the relevant covered agreements.⁵⁵ We note that, in response to questioning at the oral hearing, Colombia explained that, when it uses the term "illicit trade", it is referring to transactions at prices at or below the thresholds incorporated in the measure at issue for which there is a very high chance that such transactions are being used for money laundering purposes.⁵⁶

5.13. For Colombia, "[t]he only conceivable way the Panel could have ... escape[d] the interpretative question was if it had found ... that none of the imports subject to [the measure] involved illicit trade."⁵⁷ However, Colombia points out that the Panel never made such a finding. Instead, in Colombia's view, in some of its statements, "the Panel acknowledged that imports subject to Decree 456 could involve illicit trade"⁵⁸, and therefore had to examine whether or not Article II:1(a) and (b) applies to illicit trade. Colombia further submits that "no prior panel has decided that it would only proceed with the interpretation [of a particular provision] after having affirmatively determined that the challenged measure *only* covered the type of conduct that was allegedly excluded from that provision"⁵⁹, and that the Panel "improperly dodged its interpretative function by first concluding that the challenged measure did not cover solely illicit trade".⁶⁰ In Colombia's view, the Panel's decision not to address the interpretative issue before it constitutes false judicial economy and a violation of Colombia's due process rights.⁶¹

5.14. Colombia further points out that the Panel failed to examine the relevance of the thresholds incorporated into the measure at issue, which, as Colombia had argued before the Panel, "reflected a distinction between licit imports, on the one hand, and imports that Colombia had determined were imported at artificially low prices to launder money, on the other hand".⁶² Moreover, Colombia contends that, in concluding that there is no rule under Colombian law prohibiting the importation of goods at prices lower than the thresholds determined in the measure, the Panel failed to take into account Colombia's argument that Article 323 of Colombia's Criminal Code prohibits a broad array of conduct, including money laundering.⁶³ Finally, Colombia takes issue with the Panel's statement that the fact that imports from free trade agreement (FTA) partners or under the Plan Vallejo may be subject to lower tariffs upon entering Colombia "supports the conclusion that in Colombia's legal system there is no rule prohibiting or restricting what Colombia considers 'illicit trade'".⁶⁴

5.15. In response, Panama argues that no provision in the covered agreements precluded the Panel from proceeding in the manner it did.⁶⁵ Moreover, Panama asserts that the obligation of a panel to clarify the scope of existing provisions arises to the extent that such clarification may be

⁵⁵ Colombia's Notice of Appeal, para. 5; appellant's submission, paras. 49-50.

⁵⁶ The Panel noted that, in some parts of its statements before the Panel, Colombia referred to illicit trade as "imports effected at artificially low prices which are used for money laundering", whereas, in other parts of its statements, Colombia referred to "the 'high risk' of imports at below-threshold prices being used for money laundering". (Panel Report, para. 7.352 (quoting Colombia's responses to Panel questions No. 1, para. 4, and No. 6, para. 14; and referring to Colombia's first written submission to the Panel, paras. 35, 60, 66, 73, and 93, respectively))

⁵⁷ Colombia's appellant's submission, para. 41.

⁵⁸ Colombia's appellant's submission, para. 41 (referring to Panel Report, paras. 7.359, 7.366, 7.375, and 7.434).

⁵⁹ Colombia's appellant's submission, para. 44. (emphasis original)

⁶⁰ Colombia's appellant's submission, para. 47. Colombia also refers to Articles 3.2 and 12.7 of the DSU in support of its claim under Article 11 of the DSU. (Ibid., para. 38)

⁶¹ Colombia's appellant's submission, paras. 52-61.

⁶² Colombia's appellant's submission, para. 65 (referring to Colombia's first written submission to the Panel, paras. 30-35 and 66-67; and second written submission to the Panel, paras. 30-37).

⁶³ Colombia's appellant's submission, para. 72 (referring to Colombia's second written submission to the Panel, paras. 41-42).

⁶⁴ Colombia's appellant's submission, para. 75 (quoting Panel Report, para. 7.107).

⁶⁵ Panama points out that nothing in Articles 3.2, 11, and 12.7 of the DSU requires a panel to resolve each issue raised by a party without being able to assess whether or not the resolution of that issue will assist in securing a positive solution to a dispute. (Panama's appellee's submission, paras. 3.15-3.16)

pertinent in the light of the specific facts of the dispute.⁶⁶ In Panama's view, having found that the measure at issue is neutral in terms of the lawfulness or unlawfulness of the trade affected, the Panel correctly concluded that it was unnecessary for it to address the interpretative issue.⁶⁷

5.16. We note that Article 11 of the DSU provides, in relevant part:

*Article 11
Function of Panels*

The function of panels is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements. Accordingly, a panel should make an objective assessment of the matter before it, including 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.

5.17. The Appellate Body remarked in *US – Hot-Rolled Steel* that Article 11 of the DSU imposes upon panels a comprehensive obligation to make an "objective assessment of the matter", which embraces "all aspects of a panel's examination of the 'matter', both factual and legal".⁶⁸ Thus, panels are required to make an "objective assessment of the facts", of the "applicability" of the covered agreements, and of the "conformity" of the measure at issue with the covered agreements.⁶⁹ With respect to "the applicability of ... the relevant covered agreements", a panel is required to conduct an objective assessment of whether the obligations in the covered agreements, with which an inconsistency is claimed, are relevant and applicable to the case at hand. The touchstone of this obligation is that a panel's assessment must be "objective".

5.18. With regard to a panel's assessment of the facts of the case, Article 11 requires a panel to "consider all the evidence presented to it, assess its credibility, determine its weight, and ensure that its factual findings have a proper basis in that evidence".⁷⁰ In addressing a panel's assessment of the facts, the Appellate Body has stated that a panel is "expected to provide reasoned and adequate explanations and coherent reasoning".⁷¹ We would also expect a panel to provide reasoned and adequate explanations and coherent reasoning when assessing the applicability of the covered agreements.

5.19. As noted, Colombia's claim under Article 11 of the DSU is that the Panel failed to make an objective assessment of the applicability of Article II:1 of the GATT 1994 to what Colombia considers to be illicit trade. We note that, ordinarily, in structuring its analysis, a panel would first identify which provisions of the covered agreements are applicable in the light of its terms of reference, and would then interpret those provisions as appropriate. In this dispute, the Panel stated that Colombia's argument that the obligations under Article II:1(a) and (b) of the GATT 1994 do not extend to illicit trade "would only be pertinent if the Panel determine[d] as a factual issue that, as asserted by Colombia, the trade affected by the measure at issue is 'illicit trade'".⁷² Thus, the Panel appears to have considered that it would be required to address the interpretative issue under Article II:1(a) and (b) of the GATT 1994 only if it were to find that the trade affected by the measure was illicit trade.

⁶⁶ Panama's appellee's submission, para. 3.16.

⁶⁷ Panama's appellee's submission, para. 3.17; response to questioning at the oral hearing.

⁶⁸ Appellate Body Report, *US – Hot-Rolled Steel*, para. 54.

⁶⁹ Appellate Body Report, *US – Hot-Rolled Steel*, para. 54.

⁷⁰ Appellate Body Reports, *China – Rare Earths*, para. 5.178 (quoting Appellate Body Report, *Brazil – Retreaded Tyres*, para. 185, in turn referring to Appellate Body Reports, *EC – Hormones*, paras. 132-133; *Australia – Salmon*, para. 266; *EC – Asbestos*, para. 161; *EC – Bed Linen (Article 21.5 – India)*, paras. 170, 177, and 181; *EC – Sardines*, para. 299; *EC – Tube or Pipe Fittings*, para. 125; *Japan – Apples*, para. 221; *Japan – Agricultural Products II*, paras. 141-142; *Korea – Alcoholic Beverages*, paras. 161-162; *Korea – Dairy*, para. 138; *US – Carbon Steel*, para. 142; *US – Gambling*, para. 363; *US – Oil Country Tubular Goods Sunset Reviews*, para. 313; and *EC – Selected Customs Matters*, para. 258).

⁷¹ Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, fn 618 to para. 293. At the same time, we note that a panel is not obligated to consider each and every argument put forward by the parties in support of their respective claims, as long as it completes an objective assessment of the matter before it, in accordance with Article 11 of the DSU. (See Appellate Body Reports, *EC and certain member States – Large Civil Aircraft*, para. 894; *Dominican Republic – Import and Sale of Cigarettes*, para. 125; and *EC – Poultry*, para. 135)

⁷² Panel Report, para. 7.104.

5.20. As a general principle, panels have a degree of discretion to structure the order of their analysis as they see fit, while ensuring "that they proceed on the basis of a properly structured analysis to interpret the substantive provisions at issue".⁷³ The fact that a panel first seeks to determine the coverage of the measure at issue in order to assess whether it is necessary to engage with an interpretative question is not, in itself, incorrect. Indeed, a panel may refrain from ruling on the scope of a particular provision in circumstances where it establishes that the measure does not even address the conduct that a particular party alleges is outside the scope of that provision. In doing so, however, a panel must not structure its analysis in a manner that prevents it from acting in accordance with its duty to conduct an objective assessment of the matter, as required under Article 11 of the DSU, including, where implicated, an objective assessment of the applicability of the relevant covered agreements.

5.21. Colombia also argues that the Panel's obligation to make an objective assessment of the applicability of Article II:1(a) and (b) in this dispute derives from Articles 3.2, 11, and 12.7 of the DSU, and that, by failing to resolve the interpretative issue before it, the Panel failed to fulfil its obligations under these provisions.⁷⁴ We note that, although in its appellant's submission Colombia refers to Articles 3.2 and 12.7 of the DSU in support of its claim under Article 11 of the DSU, it has not referred to these provisions in its Notice of Appeal. We therefore do not understand Colombia to have raised separate claims of error under these provisions and do not address them as such.

5.22. We recall that, at the outset of its analysis, the Panel explained that it was going to determine whether or not "the trade affected by the measure at issue is 'illicit trade'".⁷⁵ In doing so, the Panel stated the following:

The factor common to the various definitions of "illicit trade" cited by Colombia is that they all refer to "illegal" activities, that is, activities that have been prohibited by law. In the light of the actual terms of the measure that is the subject of this dispute, however, the compound tariff applies to all imports of products classified in Chapters 61, 62, 63 and 64 of Colombia's Customs Tariff (except for some tariff lines of heading 64.06). For each category of product, the compound tariff has two different levels, one that is lower (10% *ad valorem* and US\$3/kg or 10% *ad valorem* and US\$1.75/pair, depending on the products concerned) and one that is higher (10% *ad valorem* and US\$5/kg or 10% *ad valorem* and US\$5/pair, depending on the products concerned). In the specific case of the highest levels of the compound tariff, which correspond to some of the instances identified by Panama as inconsistent with Articles II:1(a) and II:1(b) of the GATT 1994, the compound tariff applies to all imports of the products concerned when they are effected at prices below the thresholds provided for in Decree No. 456. Imposition of the compound tariff on imports is not preceded by any declaration on the part of the judicial or administrative authorities that the operation constitutes an unlawful act, nor is it even associated with the commission of any unlawful act. Moreover, Colombia has not identified any legal rule prohibiting the import of goods at prices lower than the thresholds determined in Decree No. 456.⁷⁶

5.23. On this basis, the Panel concluded that the compound tariff applies to all imports without distinguishing whether or not they are lawful, and that the measure at issue "is not structured or designed to apply solely to operations which have been classified as 'illicit trade'".⁷⁷

5.24. Colombia argues that the Panel failed to engage with Colombia's argument that "the thresholds incorporated into Decree 456 reflected a distinction between licit imports, on the one hand, and imports that Colombia had determined were imported at artificially low prices to launder money, on the other hand."⁷⁸ Colombia further points out that, in reaching its conclusion that "in Colombia's legal system there is no rule prohibiting or restricting what Colombia considers 'illicit

⁷³ Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, para. 127. See also para. 126.

⁷⁴ Colombia's appellant's submission, para. 38.

⁷⁵ Panel Report, para. 7.104.

⁷⁶ Panel Report, para. 7.105.

⁷⁷ Panel Report, para. 7.106.

⁷⁸ Colombia's appellant's submission, para. 65 (referring to Colombia's first written submission to the Panel, paras. 30-35 and 66-67; and second written submission to the Panel, paras. 30-37).

trade"⁷⁹, the Panel failed to consider the relevance of Article 323 of Colombia's Criminal Code.⁸⁰ That provision, as Colombia noted, criminalizes money laundering activities.⁸¹

5.25. Although the Panel did not expressly analyse the implications of the above arguments for its understanding of the measure at issue, we note that the Panel did subsequently address similar arguments in analysing Colombia's defences under Article XX of the GATT 1994. As we discuss further below, the Panel was of the view that Colombia had failed to demonstrate that import transactions priced at or below the thresholds set out in the measure were necessarily at artificially low prices and were being undervalued for money laundering purposes.⁸² This conclusion is in keeping with the Panel's finding, in the context of its analysis under Article II:1 of the GATT 1994, that the compound tariff "applie[s] to all imports of the products in question, without distinguishing as to whether the operations are lawful or unlawful".⁸³ Moreover, although the Panel did not refer to Article 323 of Colombia's Criminal Code in this section of its Report, it subsequently remarked that "there is no indication that the importation of products at prices below the thresholds established in Decree No. 456 automatically results in the imposition of some other type of measure (distinct from the compound tariff) or any particular follow-up of the products or importers involved."⁸⁴ This observation supports the Panel's understanding that, while Article 323 of Colombia's Criminal Code prohibits money laundering, there is no rule in Colombia's legal system prohibiting or restricting what Colombia considers illicit trade. In addition, this observation supports the Panel's conclusion that no finding of illegality is required in respect of an import transaction priced at or below the relevant threshold before applying the compound tariff. Thus, we do not consider that the Panel would have reached a different conclusion had it expressly referred to Colombia's assertions regarding the thresholds set out in the measure at issue, or to any consequence that the importation of goods priced at or below such thresholds would have under Article 323 of Colombia's Criminal Code.

5.26. However, we disagree with the Panel's conclusion that it was not necessary for it to interpret Article II:1(a) and (b) of the GATT 1994 because the compound tariff is not structured or designed to apply "solely to operations which have been classified as 'illicit trade'".⁸⁵ The Panel's statement that the measure does not apply "solely" to illicit trade operations implies that the measure applies, or could apply, to some transactions classified by Colombia as illicit trade.⁸⁶ The fact that there is no legal rule establishing that *every* transaction priced at or below the thresholds is deemed an illegal or illicit transaction does not preclude the possibility that *some* such transactions nevertheless involve what Colombia considers to be illicit trade. In our view, the Panel's finding that the compound tariff does not distinguish between licit and illicit trade further indicates that the measure does or could cover what Colombia considers to be illicit trade.

5.27. In these circumstances, we do not consider that the Panel could have refrained from ruling on the interpretative issue before it simply because the challenged measure did not "solely" cover the type of transactions that Colombia maintained was outside the scope of the applicable provision. Rather, given that this statement of the Panel implies that the measure at issue applies, or could apply, to some transactions considered by Colombia to be illicit trade, the Panel was, in our view, required to address the interpretative issue before it pertaining to the scope of

⁷⁹ Panel Report, para. 7.107.

⁸⁰ Colombia's appellant's submission, para. 72. Colombia notes that "[t]he fact that the Criminal Code does not specifically define imports below the thresholds as a criminal act is immaterial. The fact remains that use of imports at artificially low prices to launder money falls within the offense of 'money laundering' and may be subject to criminal prosecution." (Ibid., para. 73)

⁸¹ Panel Report, para. 7.335 (referring to Colombia's second written submission to the Panel, para. 41; and joint study prepared by Colombia's Ministry of Finance and Public Credit, National Customs and Excise Directorate, and Information and Financial Analysis Unit, *Money Laundering Typologies Related to Smuggling*, January 2006 (Panel Exhibit COL-10), p. 8). See also Colombia's appellant's submission, para. 72.

⁸² See *infra*, paras. 5.53-5.55.

⁸³ Panel Report, para. 7.106.

⁸⁴ Panel Report, para. 7.390.

⁸⁵ Panel Report, para. 7.106.

⁸⁶ We further note that, as discussed in section 5.2.2 of this Report, the Panel subsequently made findings in its Report that indicated that the measure at issue could apply to some products that are imported at artificially low prices for money laundering purposes. (See *infra*, paras. 5.85-5.89)

Article II:1(a) and (b) of the GATT 1994.⁸⁷ The Panel's conclusion that it was not necessary for it to interpret Article II:1 of the GATT 1994 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.

5.28. 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. Consequently, we reverse the Panel's finding, in paragraphs 7.108 and 8.1 of its 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.

5.1.3 Completion of the legal analysis

5.29. Having reversed the Panel's finding that it was unnecessary for the Panel to interpret the scope of Article II:1(a) and (b) of the GATT 1994, we turn to Colombia's request that we complete the legal analysis and find that Article II:1(a) and (b) does not apply to illicit trade and that, because imports priced at or below the thresholds are imported at artificially low prices that do not reflect market conditions, the compound tariff does not violate Article II:1(a) and (b) of the GATT 1994.⁸⁸

5.30. At the outset, we note that, on a number of occasions, the Appellate Body has completed the legal analysis with a view to facilitating the prompt settlement and effective resolution of the dispute.⁸⁹ The Appellate Body has completed the legal analysis when sufficient factual findings by the panel and undisputed facts on the panel record allowed it to do so.⁹⁰ In addition to the lack of factual findings by the panel and undisputed facts on the panel record, the reasons that have prevented the Appellate Body from completing the analysis include "the complexity of the issues, the absence of full exploration of the issues before the panel, and, consequently, considerations for parties' due process rights".⁹¹

5.31. For Colombia, the term "commerce" in Article II:1(a) and the term "importation" in Article II:1(b) do not cover what Colombia considers to be illicit trade.⁹² Colombia argues that other provisions of the covered agreements, in particular, Article VII:2(a) and (b) of the GATT 1994 and Article 1.1 of the Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994 (Customs Valuation Agreement), provide contextual support for its interpretation of Article II:1 of the GATT 1994.⁹³ Colombia also contends that its interpretation of the terms in Article II:1 is consistent with the object and purpose of the GATT 1994, as reflected in the preamble.⁹⁴ In support of its interpretation, Colombia refers to the

⁸⁷ At the same time, we do not agree with Colombia that the Panel's decision not to address the interpretative issue before it constitutes judicial economy. The Panel did not refrain from interpreting Article II:1(a) and (b) due to its disposition of another legal claim. Rather, having found that the compound tariff is not designed or structured to apply solely to illicit trade, the Panel considered that it was not necessary for it to proceed to interpret Article II:1(a) and (b). (Panel Report, para. 7.108)

⁸⁸ Colombia's Notice of Appeal, para. 7.

⁸⁹ See e.g. Appellate Body Reports, *Australia – Salmon*, paras. 117-136; *US – Wheat Gluten*, paras. 80-92; and *Canada – Aircraft (Article 21.5 – Brazil)*, paras. 43-52.

⁹⁰ See e.g. Appellate Body Reports, *US – Gasoline*, p. 19, DSR 1996:I, p. 18; *Canada – Periodicals*, p. 24, DSR 1997:I, p. 469; *Australia – Salmon*, paras. 117-118; *US – Lamb*, paras. 150 and 172; *US – Section 211 Appropriations Act*, para. 352; *EC and certain member States – Large Civil Aircraft*, paras. 1174-1178; and *US – Large Civil Aircraft (2nd complaint)*, paras. 1272-1274. The Appellate Body did not complete the legal analysis in situations where the factual findings by the panel and undisputed facts on the panel record were insufficient for the Appellate Body to conduct its own analysis. (See e.g. Appellate Body Reports, *EC – Hormones*, para. 251; *US – Upland Cotton*, para. 693; *US – Zeroing (EC)*, paras. 228 and 243; *EC – Selected Customs Matters*, para. 286; *US – Continued Zeroing*, para. 194; *US – Anti-Dumping and Countervailing Duties (China)*, para. 537; *EC and certain member States – Large Civil Aircraft*, paras. 736, 990, and 993; and *US – COOL*, para. 481)

⁹¹ Appellate Body Reports, *Canada – Renewable Energy/Canada – Feed-in Tariff Program*, para. 5.224 (referring to Appellate Body Report, *EC – Export Subsidies on Sugar*, fn 537 to para. 339).

⁹² Colombia's appellant's submission, paras. 100 and 102. We recall that, for Colombia, transactions at artificially low prices used for money laundering purposes constitute illicit trade.

⁹³ Colombia's appellant's submission, paras. 103-106.

⁹⁴ Colombia's appellant's submission, para. 107.

doctrine of *abus de droit* and to several decisions of investment tribunals, which have refused to extend the protection of bilateral and regional investment treaties to illegal investments.⁹⁵

5.32. Panama responds that the terms "commerce" and "importation" are not subject to any qualification and that there is therefore no basis in the text of Article II:1(a) and (b) for excluding from its coverage any particular type of import transaction.⁹⁶ Moreover, for Panama, Article VII:2 of the GATT 1994 and the Customs Valuation Agreement do not provide context for the interpretation proposed by Colombia since imports with different declared values do not cease to be subject to the disciplines of the GATT 1994.⁹⁷ Panama points out that Colombia's interpretation of Article II:1 seeks to curtail the disciplines of the covered agreements with respect to what a Member unilaterally considers to be illicit trade, and that such an interpretation would be contrary to the purpose of the GATT 1994 of reducing barriers to international trade and eliminating discrimination. Finally, in Panama's view, Colombia's concern that certain imports could be used to commit unlawful acts could be addressed under Article XX of the GATT 1994.⁹⁸

5.33. We note that Article II:1 of the GATT 1994 provides, in relevant part:

Article II
Schedules of Concessions

1. (a) Each Member shall accord to the commerce of the other Members treatment no less favourable than that provided for in the appropriate Part of the appropriate Schedule annexed to this Agreement.
- (b) The products described in Part I of the Schedule relating to any Member, which are the products of territories of other Members, shall, on their importation into the territory to which the Schedule relates, and subject to the terms, conditions or qualifications set forth in that Schedule, be exempt from ordinary customs duties in excess of those set forth and provided therein. Such products shall also be exempt from all other duties or charges of any kind imposed on or in connection with the importation in excess of those imposed on the date of this Agreement or those directly and mandatorily required to be imposed thereafter by legislation in force in the importing territory on that date.

5.34. Article II:1 of the GATT 1994 serves the important function of preventing Members from applying duties that exceed the bound rates agreed to in tariff negotiations and incorporated into their Schedules of Concessions.⁹⁹ Article II:1(a) provides that a Member shall accord to the "commerce" of other Members treatment no less favourable than that provided for in its Schedule. The term "commerce" is defined as referring broadly to the exchange of goods such that, in this provision, the "commerce" of a Member should be understood to refer to all such exchanges of that Member.¹⁰⁰ We do not see that the scope of this term, as it appears in Article II:1(a), is qualified in respect of the nature or type of "commerce", or the reason or function of the transaction, in a manner that excludes what Colombia considers to be illicit trade.

5.35. The first sentence of Article II:1(b) provides that products described in a Member's Schedule shall, on their importation into that Member's territory, be exempt from ordinary

⁹⁵ Colombia's appellant's submission, paras. 109-110. With regard to the doctrine of *abus de droit*, Colombia explains that the behaviour of "[e]xporters that demand that tariffs not exceed the bindings, while colluding in illicit trade by providing a false invoice with an artificially low price, results in the abusive exercise of rights." (Ibid., para. 109)

⁹⁶ Panama's appellee's submission, para. 3.47.

⁹⁷ Panama's appellee's submission, para. 3.48.

⁹⁸ Panama's appellee's submission, para. 3.47.

⁹⁹ Appellate Body Report, *Argentina – Textiles and Apparel*, para. 47.

¹⁰⁰ The term "commerce" is defined as "buying and selling; the exchange of merchandise or services, especially on a large scale". (*Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 1, p. 462)

customs duties in excess of those set out in the Schedule.¹⁰¹ Article II:1(b) thus provides that the products described in a Member's Schedule may not, "on their importation", be subject to ordinary customs duties, or other duties or charges, that exceed that Member's bound tariff rates. The term "importation" refers generally to the action of bringing in goods from another country.¹⁰² Thus, as with the term "commerce", we do not see that the scope of the term "importation" is qualified in respect of the nature or type of imports, or the reason or function of the transaction, in a manner that excludes what Colombia considers to be illicit trade.

5.36. Moreover, we note that Article II:2 of the GATT 1994 provides immediate context for the obligations contained in Article II:1 by setting out instances in which the obligations of Article II:1 do not apply. Article II:2 provides that nothing in Article II, including Article II:1(b), shall prevent a Member from imposing on the importation of a product: (i) a charge equivalent to an internal tax imposed consistently with Article III:2 of the GATT 1994 in respect of a like domestic product; (ii) an anti-dumping or countervailing duty applied consistently with Article VI of the GATT 1994; or (iii) fees or other charges commensurate with the cost of services rendered. The three instances identified in Article II:2, in which the obligations set out in Article II:1 do not apply, constitute a closed list. In our view, the fact that Article II:2 sets out a closed list of instances in which bound tariff rates may be exceeded provides further support for a reading of Article II:1 that does not exclude what Colombia considers to be illicit trade.

5.37. Colombia further asserts that Article VII:2(a) and (b) of the GATT 1994 and the Customs Valuation Agreement provide contextual support for its interpretation of Article II:1 of the GATT 1994. Specifically, for Colombia, goods imported at artificially low prices with the purpose of laundering money cannot be considered to reflect "actual value" under Article VII:2 of the GATT 1994, or "transaction value" under Article 1.1 of the Customs Valuation Agreement.¹⁰³ In response, Panama points out that Article VII:2 of the GATT 1994 and the Customs Valuation Agreement do not provide context for the interpretation proposed by Colombia since imports with different declared values do not cease to be subject to the disciplines of the GATT 1994.¹⁰⁴

5.38. Article VII:2(a) of the GATT 1994 provides that the value of an imported product for customs purposes should be based on the "actual value" of the imported merchandise, and should not be based on "arbitrary or fictitious values". The "actual value" is further defined in Article VII:2(b) as "the price at which, at a time and place determined by the legislation of the country of importation, such or like merchandise is sold or offered for sale in the ordinary course of trade under fully competitive conditions."¹⁰⁵ The general valuation principles set out in Article VII of the GATT 1994 are further elaborated in the Customs Valuation Agreement. Article 1.1 of the Customs Valuation Agreement stipulates that "[t]he 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" of the Customs Valuation Agreement.¹⁰⁶ Where it is not possible to determine the customs value of imported

¹⁰¹ In *Argentina – Textiles and Apparel*, the Appellate Body stated in respect of the relationship between Article II:1(a) and Article II:1(b) that "[p]aragraph (b) prohibits a specific kind of practice that will always be inconsistent with paragraph (a): that is, the application of ordinary customs duties in excess of those provided for in the Schedule." (Appellate Body Report, *Argentina – Textiles and Apparel*, para. 45) We note that the term "importation" also appears in Article II:1(b), second sentence, and Article II:1(c) of the GATT 1994.

¹⁰² The term "importation" is defined as "the action of importing or bringing in something, specifically goods from another country". (*Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 1, p. 1339)

¹⁰³ Colombia's appellant's submission, paras. 105-106.

¹⁰⁴ Panama's appellee's submission, para. 3.48.

¹⁰⁵ We further note that the *Ad Note* to paragraph 2 of Article VII provides that the "actual value" may be represented by the invoice price, plus any non-included charges for legitimate costs that are proper elements of actual value, and any abnormal discount or other reduction from the ordinary competitive price.

¹⁰⁶ Article 1.1(a)-(d) of the Customs Valuation Agreement further specifies circumstances in which customs value need not be based on transaction value. In particular, the transaction value may not be acceptable when there are certain restrictions on the disposition or use of the goods by the buyer; the sale or price is subject to some condition or consideration for which a value cannot be determined with respect to the goods being valued; some part of the proceeds accrue to the seller; or where, under certain circumstances, the buyer and seller are related.

goods based on the transaction value, the Customs Valuation Agreement provides for five alternative valuation methods.¹⁰⁷

5.39. While Article VII:2 of the GATT 1994 provides that the value of a product for customs purposes should be based on "actual value" and not on "arbitrary or fictitious values" or sales on other than "fully competitive conditions"¹⁰⁸, these provisions do not support a reading of Article II:1 of the GATT 1994 that excludes from its disciplines transactions that are at "artificially low prices", "do not result from market operations", or are otherwise classified as illicit trade.¹⁰⁹ Rather, Article VII:2 of the GATT 1994 and the Customs Valuation Agreement have a different focus than Article II:1 of the GATT 1994 in that they set out conditions in which customs authorities may adjust or reject the declared value of goods and instead rely upon alternative methods for determining the value of those goods for customs purposes. Thus, where a declared value of a transaction is rejected because it is unduly low, the result under the Customs Valuation Agreement would be that the value for customs purposes would be adjusted or determined in an alternative manner. This value would subsequently serve as the basis for any imposition of a tariff in accordance with Article II:1 of the GATT 1994. The existence of such alternative methods for determining the customs value under these provisions confirms that the underlying transaction remains subject to the bound tariff rates pursuant to Article II:1 of the GATT 1994 and the relevant part of a Member's Schedule. This further supports our understanding that the scope of Article II:1(a) and (b) of the GATT 1994 does not exclude what Colombia considers to be illicit trade.

5.40. Colombia further contends that the object and purpose of the GATT 1994, as reflected in the preamble, supports its interpretation of Article II:1(a) and (b).¹¹⁰ Specifically, Colombia points out that the criminal activities associated with illicit trade reduce standards of living, generate economic distortions that hurt employment, and reduce real income.¹¹¹ We recall that the Appellate Body has previously stated that the GATT 1994 strikes a balance between Members' obligations, on the one hand, and their rights to adopt measures seeking to achieve legitimate policy objectives, on the other hand.¹¹² To effectuate such a balance, Article XX of the GATT 1994 contains a number of exceptions that reflect important societal objectives other than trade liberalization, which may be relied upon in seeking to justify an otherwise GATT-inconsistent measure. The GATT 1994 thus preserves the right of Members to pursue legitimate policy objectives, including addressing concerns relating to, *in casu*, money laundering, through the general exceptions set out in Article XX.

5.41. Moreover, we note that Colombia's interpretation would allow a Member to exclude from the scope of Article II:1(a) and (b) of the GATT 1994 trade activities that it has unilaterally determined to be illicit under its domestic law. Such an interpretation would mean that, in respect of concessions inscribed in a Member's Schedule, the scope of a Member's obligation could vary depending on what is defined as illicit or asserted to be illicit under that Member's domestic law. As we see it, such an approach to the interpretation of Article II:1(a) and (b) would create uncertainty as to the scope of coverage of tariff concessions undertaken by Members.

5.42. Finally, we note that Colombia also takes issue with the Panel's finding that the measure at issue does not incorporate a legislative ceiling that prevents the compound tariff from resulting in duties that exceed the bound rates in Colombia's Schedule of Concessions.¹¹³ In particular, for Colombia, Article II:1(a) and (b) does not impose an obligation on Members to ensure that their

¹⁰⁷ These methods are: (i) transaction value of identical goods (Article 2); (ii) transaction value of similar goods (Article 3); (iii) deductive value (Article 5); (iv) computed value (Article 6); and (v) residual or fall-back method (Article 7).

¹⁰⁸ The *Ad Note* to paragraph 2 of Article VII defines "actual value" and refers to "any abnormal discount or other reduction from the ordinary competitive price". It also describes the term "in the ordinary course of trade ... under fully competitive conditions" as "excluding any transaction wherein the buyer and seller are not independent of each other and price is not the sole consideration."

¹⁰⁹ Colombia's appellant's submission, para. 105.

¹¹⁰ The preamble of the GATT 1994 provides that the relations of Members "in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, developing the full use of the resources of the world and expanding the production and exchange of goods".

¹¹¹ Colombia's appellant's submission, para. 107.

¹¹² Appellate Body Report, *US – Shrimp*, para. 156.

¹¹³ Colombia's appellant's submission, paras. 83-84; response to questioning at the oral hearing.

bound rates are not exceeded when goods are imported at artificially low prices. Therefore, for Colombia, the legislative ceiling need not apply to imports priced at or below the thresholds that are not covered by Article II:1 of the GATT 1994. Moreover, in Colombia's view, the Panel's finding that the legislative ceiling does not apply to imports classified under heading 6305.32 of Colombia's Customs Tariff, entering at prices above US\$10/kg but below US\$12/kg, may indicate that the legislative ceiling does not apply in that particular scenario, but cannot serve as a basis for an overall conclusion that the legislative ceiling does not ensure conformity with Article II:1 of the GATT 1994.¹¹⁴

5.43. On the basis of our interpretation of Article II:1(a) and (b) of the GATT 1994 developed above, we do not find support for Colombia's argument that a legislative ceiling need not apply to imports priced at or below the thresholds incorporated in the measure at issue. We do not see that Article II:1(a) and (b) excludes from its scope transactions that Colombia considers to be illicit because they are at artificially low or below market prices for money laundering purposes. We therefore do not consider that a measure that fails to ensure that such transactions do not exceed Colombia's bound tariff rates can operate as a legislative ceiling. Moreover, Colombia does not contest the Panel's finding that imports classified under heading 6305.32 of the Customs Tariff, entering at prices above US\$10/kg but below US\$12/kg, exceed the rate bound in Colombia's Schedule of Concessions.¹¹⁵ We recall that the Appellate Body, in *Argentina – Textiles and Apparel*, explained that "it is possible, under certain circumstances, for a Member to design a legislative 'ceiling' or 'cap' on the level of duty applied which would ensure that, even if the type of duty applied differs from the type provided for in that Member's Schedule, the *ad valorem* equivalents of the duties actually applied would not exceed the *ad valorem* duties provided for in the Member's Schedule."¹¹⁶ For the foregoing reasons, contrary to the notion of a legislative ceiling articulated by the Appellate Body, the price thresholds set out in Colombia's measure do not ensure that duties imposed on certain imports do not exceed Colombia's bound tariff rates.

5.44. As we have noted, apart from the grounds of appeal identified and addressed above, Colombia has not challenged the Panel's findings regarding the instances in which the application of the compound tariff results in a duty that exceeds the bound tariff rates in Colombia's Schedule of Concessions. We therefore 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.

5.45. In sum, 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. We recall that we have reversed 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. However, in the light of our interpretation of Article II:1(a) and (b), 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.

5.46. 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. Consequently, we uphold the Panel's findings, in paragraphs 7.189, 7.192-7.194, and 8.2-8.4 of its Report.

5.47. Before turning to our analysis of Colombia's defences under Article XX(a) and Article XX(d) of the GATT 1994, we wish to remark that our analysis set out above should not be understood to suggest that Members cannot adopt measures seeking to combat money laundering. This aim,

¹¹⁴ Colombia's appellant's submission, para. 88.

¹¹⁵ Colombia's response to questioning at the oral hearing.

¹¹⁶ Appellate Body Report, *Argentina – Textiles and Apparel*, para. 54.

however, cannot be achieved through interpreting Article II:1 of the GATT 1994 in a manner that excludes from the scope of that provision what a Member considers to be illicit trade. A Member's right to adopt and pursue measures seeking to address concerns relating to money laundering can be appropriately preserved when justified, for example, in accordance with the general exceptions contained in Article XX of the GATT 1994.

5.2 Article XX(a) of the GATT 1994

5.48. We now address Colombia's appeal of the Panel's finding that Colombia had 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. We begin by summarizing relevant aspects of the Panel's findings before turning to examine Colombia's claims on appeal.

5.2.1 The Panel's findings

5.49. The Panel structured its analysis of whether the compound tariff is a measure necessary to protect public morals within the meaning of Article XX(a) of the GATT 1994 by assessing, first, whether Colombia had shown that the compound tariff has been adopted or enforced, or is designed, to protect public morals; and, second, whether the compound tariff is necessary to protect public morals.¹¹⁷

5.50. The Panel began by considering whether Colombia had shown that the declared policy objective of combating money laundering is one of the policies designed to protect public morals in Colombia. The Panel noted that money laundering is criminal conduct in Colombia under Article 323 of its Criminal Code, and that Colombia had submitted documents showing that combating money laundering is an important policy objective for Colombia.¹¹⁸ In the Panel's view, Colombia presented sufficient evidence to demonstrate the existence of a real and present concern in Colombia with regard to money laundering, as well as with regard to the way in which money laundering is linked with drug trafficking and other criminal activities and with Colombia's internal armed conflict. Consequently, the Panel concluded that combating money laundering is one of the policies designed to protect public morals in Colombia.¹¹⁹

5.51. The Panel then turned to examine whether the compound tariff is itself designed to combat money laundering. The Panel examined the text of Decree No. 456 and observed that it does not contain "any statement of reasons or recitals indicating that the objective of the compound tariff is to combat money laundering".¹²⁰

5.52. Turning to the design, architecture, and structure of the compound tariff, the Panel considered that Colombia made a series of interconnected assumptions that required verification, namely: (i) that the thresholds established in the measure reflect "market conditions" so that any price below them is "artificially low"; (ii) that products imported at prices below the thresholds established in the measure are being undervalued; and (iii) that imports of goods subject to the compound tariff at prices below the thresholds established in the measure are being used for money laundering purposes.¹²¹

5.53. As to whether the thresholds established in the measure reflect "market conditions" so that any price below them is "artificially low", the Panel highlighted Colombia's statement that the studies and calculations used as a basis for determining the price thresholds are confidential, but that Colombia had offered a general explanation of the methodology used for determining the price thresholds.¹²² In the light of these considerations, the Panel considered it "impossible" to verify, on the basis of the information available, whether the thresholds established in the

¹¹⁷ Panel Report, para. 7.330.

¹¹⁸ Panel Report, para. 7.335. The Panel referred to several documents submitted by Colombia, including National Planning Department, *National Development Plan 2010-2014* (extracts) (Panel Exhibit COL-33); Ministry of the Interior and Justice, *National Anti-Drug Policy* (Panel Exhibit COL-6); and National Council for Economic and Social Policy, *National Policy against Money Laundering and the Financing of Terrorism*, 18 January 2013 (Panel Exhibit COL-19).

¹¹⁹ Panel Report, paras. 7.338-7.339.

¹²⁰ Panel Report, para. 7.347.

¹²¹ Panel Report, para. 7.353.

¹²² Panel Report, para. 7.354. The Panel noted that Colombia had indicated that the price thresholds are based on domestic and international market prices.

measure reflect the prices of transactions under normal market conditions for the products in question.¹²³ In particular, the Panel pointed out that Colombia had not explained how the calculation of single price thresholds established on a fixed basis for each of the two broad categories of products covered by this dispute can be useful for determining market prices and the levels below which import prices must be considered "artificially low", without an examination of the specific characteristics of the particular transaction concerned.¹²⁴ The Panel added that it was not clear how the methodology used by Colombia takes into account the possible differences that could exist between the import prices of the different products, within each of the broad categories covered by these thresholds, in terms of factors such as: production costs; component materials; quality levels; trademarks; seasonality, consumer tastes, and preferences; and the actual nature of the products in question.¹²⁵ The Panel concluded that, while it could not be ruled out that the importation of goods at prices below the thresholds established in the measure could reflect "artificially low" prices, Colombia had not shown that the thresholds "could be decisive in establishing that the importation of goods at prices below those thresholds is *necessarily* taking place at 'artificially low' prices that do not reflect real prices or market conditions".¹²⁶

5.54. In assessing whether there was any evidence that the products imported at prices below the thresholds established in the measure are being undervalued, the Panel noted that "[t]he notion of underinvoicing or undervaluation pertains to a situation in which the price declared on the invoice for a particular transaction is lower than the price actually paid or payable."¹²⁷ Then, the Panel observed that "[t]he studies contributed by the parties are not conclusive with respect to whether the undervaluation occurs exclusively or even preponderantly in connection with imports of products with 'low' prices."¹²⁸ As a result, the Panel stated that, "insofar as the thresholds established in Decree No. 456 were determined on a fixed basis for broad categories of products and without examining the specific characteristics of the transaction concerned, there is no indication that products imported at prices below the thresholds established in Decree No. 456 are necessarily being undervalued."¹²⁹

5.55. The Panel then turned to examine whether there was any evidence that the products subject to the compound tariff upon importation into Colombia are being undervalued for money laundering purposes. In this regard, the Panel stated that the information available suggests that the undervaluation of imports is one of the methods used for money laundering detected by Colombian authorities.¹³⁰ The Panel, however, highlighted that not every undervaluation operation in an international trade transaction is for money laundering purposes. The Panel added that the undervaluation of imports is just one of the many methods used for money laundering, and that smuggling involving imports as a *modus operandi* for money laundering does not constitute one of the most commonly used methods.¹³¹ On this basis, the Panel concluded that, "even assuming, for the sake of argument, that products imported at prices below the thresholds established in Decree No. 456 are being undervalued, there is no evidence that this necessarily means that the undervaluation in question is for money laundering purposes."¹³²

¹²³ Panel Report, para. 7.355.

¹²⁴ Panel Report, para. 7.355.

¹²⁵ Panel Report, para. 7.357.

¹²⁶ Panel Report, para. 7.359. (emphasis original)

¹²⁷ Panel Report, para. 7.363.

¹²⁸ Panel Report, para. 7.364.

¹²⁹ Panel Report, para. 7.365.

¹³⁰ Panel Report, para. 7.366. In support of this proposition, the Panel referred to a joint study conducted by Colombia's Ministry of Finance and Public Credit, *Dirección de Impuestos y Aduanas Nacionales* (DIAN) (National Customs and Excise Directorate) and *Unidad de Información y Análisis Financiero* (UIAF) (Information and Financial Analysis Unit), which identifies some of the most common methods (known as "typologies") used for laundering money and financing terrorism by means of smuggling operations. The Panel indicated that the typologies include the "payment in kind for illicit activities with goods smuggled into the national territory" and the "transport of money of illicit origin to another country to purchase goods which are introduced into the local country by means of technical smuggling based on underinvoicing". Colombia stated before the Panel that both typologies correspond to the sort of practices that the compound tariff seeks to combat. (Ibid., paras. 7.369-7.370 (referring to Ministry of Finance and Public Credit, National Customs and Excise Directorate, and Information and Financial Analysis Unit, *Money Laundering Typologies Related to Smuggling*, January 2006 (Panel Exhibit COL-10); and quoting Colombia's response to Panel question No. 44, para. 101))

¹³¹ Panel Report, paras. 7.374-7.375.

¹³² Panel Report, para. 7.376.

5.56. Next, the Panel examined certain exemptions from the compound tariff. The Panel noted, first, that imports into Special Customs Regime Zones could be used for money laundering, and that Colombia had not indicated what measures it is taking to deal with the risk of money laundering in connection with these imports. Second, in respect of goods entering Colombia under the Plan Vallejo, the Panel did not rule out the possibility that companies participating in the Plan Vallejo might use imports for money laundering. Third, in respect of the exemption from the compound tariff for imports from countries with which Colombia has trade agreements in force, the Panel stated that this exemption is related to the negotiation of the relevant tariff subheadings in the respective agreement, rather than to the existence of customs cooperation and information exchange mechanisms, as Colombia had alleged. Therefore, the Panel concluded that the exemptions from the compound tariff are unrelated to, and inconsistent with, the measure's alleged objective of combating money laundering.¹³³

5.57. The Panel then stated that the fact that the measure would remain in force for a period of two years is not in keeping with the measure's alleged objective of combating money laundering.¹³⁴ Moreover, for the Panel, the fact that imports of products at prices below the thresholds established in the measure are not prohibited under Colombian legislation and are not automatically subject to some type of measure other than the compound tariff would appear to be inconsistent with the compound tariff's objective.¹³⁵

5.58. For the foregoing reasons, the Panel considered that the design, architecture, and revealing structure of the compound tariff did not make it possible to conclude that there is a relationship between the compound tariff and the declared objective of combating money laundering. Thus, the Panel found that Colombia had failed to demonstrate that the compound tariff is designed to combat money laundering.¹³⁶ Consequently, the Panel concluded that, although Colombia had demonstrated that combating money laundering is one of the policies designed to protect public morals in Colombia, it had not shown that the compound tariff is a measure designed to protect public morals.¹³⁷

5.59. Having made this finding, the Panel stated that, since it had concluded that Colombia had failed to demonstrate that the compound tariff is designed to combat money laundering, there should be no need to examine whether the compound tariff is necessary to protect public morals. However, the Panel indicated that, "in order to be exhaustive in its analysis", it would continue with its evaluation by assuming, for the sake of argument, that the compound tariff is designed to combat money laundering.¹³⁸

5.60. In the context of its analysis of "necessity", the Panel concluded that, even though Colombia had demonstrated that the objective of combating money laundering in Colombia serves societal interests that could be described as vital and important in the highest degree, Colombia had not demonstrated the contribution of the compound tariff to the alleged objective of combating money laundering. For this reason, and taking into account the restriction on international trade caused by the compound tariff, the Panel found that Colombia had failed to show that the compound tariff is a measure necessary to combat money laundering.¹³⁹ Consequently, the Panel concluded that Colombia had 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 1994.¹⁴⁰

5.2.2 Whether the Panel erred under Article XX(a) in finding that Colombia had failed to demonstrate that the compound tariff is a measure "necessary to protect public morals"

5.61. Colombia appeals the Panel's findings that Colombia had failed to demonstrate that the compound tariff is a measure "designed" to protect public morals, and that it is "necessary" to

¹³³ Panel Report, para. 7.388.

¹³⁴ Panel Report, para. 7.389.

¹³⁵ Panel Report, paras. 7.390-7.391. In addition, the Panel observed that Panama submitted evidence of statements made by high-ranking Colombian officials suggesting that the compound tariff was imposed to protect the textiles sector from unfair competition, revitalize industry, and protect domestic production. (Ibid., para. 7.392)

¹³⁶ Panel Report, para. 7.400.

¹³⁷ Panel Report, para. 7.401.

¹³⁸ Panel Report, para. 7.402.

¹³⁹ Panel Report, para. 7.445. See also para. 7.470.

¹⁴⁰ Panel Report, paras. 7.471 and 8.5.

protect public morals, within the meaning of Article XX(a) of the GATT 1994. We begin by assessing Colombia's claim concerning the Panel's finding regarding the "design" of the measure.

5.62. Colombia argues that the Panel erred under Article XX(a) of the GATT 1994 by requiring Colombia to demonstrate the "effectiveness" of the challenged measure as part of establishing that the measure is "designed" to protect public morals.¹⁴¹ According to Colombia, the "effectiveness" of the challenged measure goes to the contribution of the measure to the objective pursued, which, under Appellate Body jurisprudence, is a matter that is relevant to the "necessity" analysis, rather than to the consideration of whether the measure is "designed" to protect public morals. Colombia considers that the Panel required it to demonstrate that imported products covered by the measure are necessarily being undervalued and used for money laundering purposes, which focuses on the degree to which the measure is contributing to its objective. Therefore, in Colombia's view, the Panel erred by conflating the analysis of the "design" of the measure with the subsequent and more exhaustive analysis of the "necessity" of the measure under Article XX(a).¹⁴²

5.63. Colombia submits that, even if it was appropriate for the Panel to examine the contribution of the measure in the context of assessing its "design", the Panel erred by imposing an "overly demanding" standard of the term "to protect" public morals that is inconsistent with Article XX(a).¹⁴³ In particular, Colombia considers that the Panel, in essence, required that the measure satisfy a "100% effectiveness standard"¹⁴⁴, which is neither required, nor possible to meet, under Article XX(a). According to Colombia, the Panel imposed a standard that required Colombia to demonstrate that each and every transaction priced below the thresholds established in the measure involved money laundering. This is because the Panel required evidence "that demonstrated that products at prices below the threshold 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".¹⁴⁵

5.64. In response, Panama argues that, given that the parties disagreed about the objective of the measure, the Panel was required to examine the design, structure, and architecture of the measure.¹⁴⁶ In particular, Panama considers that the Panel was required to examine the relationship amongst low-priced imports, the alleged undervaluation, and the alleged money laundering.¹⁴⁷ Given that the price thresholds established in the compound tariff are established on a fixed basis for a wide range of diverse products, Panama considers that the Panel rightly found that it is not possible to conclude that all products imported at prices below the thresholds are necessarily undervalued. Moreover, the Panel found that it was not possible to conclude that every instance of undervaluation is necessarily used for money laundering purposes. This is because the undervaluation activity can be used to evade taxes or capital controls. Panama contends that, in both instances, the Panel could have omitted using the word "necessarily" without affecting the validity of its conclusions. Panama does not consider that the Panel was assessing the "necessity" of the compound tariff in its examination of the "design" of the measure at issue.¹⁴⁸

5.65. Panama also contends that, contrary to Colombia's assertion, the Panel did not seek to determine whether the compound tariff achieves "100% effectiveness" in eradicating the undervaluation of imports for money laundering purposes.¹⁴⁹ Rather, the Panel focused on whether the measure had been conceived to address problems relating to undervaluation and money laundering.¹⁵⁰ Panama points out that, at this point of its analysis, the Panel did not make a ruling about the measure's concrete results in eradicating or mitigating undervaluation or money laundering. Rather, the Panel's findings challenged by Colombia are part of a broader set of

¹⁴¹ Colombia's appellant's submission, para. 120.

¹⁴² Colombia's appellant's submission, paras. 120-123. Colombia adds that the Panel's assessment of the term "to protect" goes beyond what has been required in the past by panels and the Appellate Body. (Ibid., para. 124)

¹⁴³ Colombia's appellant's submission, heading section V.B.

¹⁴⁴ Colombia's appellant's submission, para. 127.

¹⁴⁵ Colombia's appellant's submission, para. 130. (emphasis original)

¹⁴⁶ Panama's appellee's submission, para. 4.4. Panama recalls its contention before the Panel that the real objective of the measure is the protection of Colombia's textile and footwear industry.

¹⁴⁷ Panama's appellee's submission, para. 4.5.

¹⁴⁸ Panama's appellee's submission, para. 4.6.

¹⁴⁹ Panama's appellee's submission, para. 4.7.

¹⁵⁰ Panama's appellee's submission, para. 4.7.

findings seeking to determine whether the measure's real objective is to address undervaluation as a means of money laundering.¹⁵¹

5.66. In order to analyse Colombia's claim on appeal, we first set out key aspects of the legal standard under Article XX(a) of the GATT 1994. Article XX(a), together with the introductory clause of Article XX, reads as follows:

Article XX
General Exceptions

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 Member of measures:

(a) necessary to protect public morals;

5.67. We recall that the analysis of a measure under Article XX of the GATT 1994 is two-tiered, such that a panel must first examine whether the measure falls under one of the exceptions listed in the paragraphs of Article XX, before considering the question of whether the measure satisfies the requirements of the chapeau of Article XX.¹⁵² Moreover, the Appellate Body has explained that provisional justification under one of the paragraphs of Article XX requires that a challenged measure "address the particular interest specified in that paragraph", and that "there be a sufficient nexus between the measure and the interest protected".¹⁵³ "The required nexus – or 'degree of connection' – between the measure and the interest is specified in the language of the paragraphs themselves, through the use of terms such as 'relating to' and 'necessary to'" in Article XX.¹⁵⁴ In order to establish whether a measure is justified under Article XX(a), the analysis proceeds in two steps. First, the measure must be "designed" to protect public morals.¹⁵⁵ Second, the measure must be "necessary" to protect such public morals.

5.68. With respect to the analysis of the "design" of the measure, the phrase "to protect public morals" calls for an initial, threshold examination in order to determine whether there is a relationship between an otherwise GATT-inconsistent measure and the protection of public morals.¹⁵⁶ If this initial, threshold examination reveals that the measure is incapable of protecting public morals, there is not a relationship between the measure and the protection of public morals that meets the requirements of the "design" step. In this situation, further examination with regard to whether this measure is "necessary" to protect such public morals would not be required. This is because there can be no justification under Article XX(a) for a measure that is not "designed" to protect public morals.¹⁵⁷ However, if the measure is not incapable of protecting

¹⁵¹ Panama's appellee's submission, para. 4.7. Panama recalls that the Panel also examined the text of the measure, the exemptions from the compound tariff, the period of validity of the measure, and the legal consequences of importing goods below the thresholds established by the measure. (Ibid., para. 4.8)

¹⁵² See Appellate Body Report, *US – Gasoline*, p. 22, DSR 1996:1, p. 20. See also Appellate Body Reports, *Dominican Republic – Import and Sale of Cigarettes*, para. 64; *US – Shrimp*, paras. 118-120; and *Brazil – Retreaded Tyres*, para. 139.

¹⁵³ Appellate Body Reports, *EC – Seal Products*, para. 5.169 (quoting Appellate Body Report, *US – Gambling*, para. 292).

¹⁵⁴ Appellate Body Report, *US – Gambling*, para. 292.

¹⁵⁵ In this dispute, the Panel noted that the term "public morals" denotes standards of right and wrong conduct maintained by or on behalf of a community or nation. (Panel Report, para. 7.299 (quoting Panel Report, *US – Gambling*, para. 6.465). See also para. 7.334)

¹⁵⁶ Recently, the Appellate Body examined in *Argentina – Financial Services* a defence under Article XIV(c) of the General Agreement on Trade in Services (GATS), in which it made similar observations regarding the phrase "to secure compliance". (Appellate Body Report, *Argentina – Financial Services*, para. 6.203) We recall that Article XIV of the GATS sets out the general exceptions from obligations under that Agreement in a manner similar to Article XX of the GATT 1994. The Appellate Body has indicated that, where similar language is used in both provisions, previous decisions under Article XX of the GATT 1994 are relevant for the analysis under Article XIV of the GATS. (Appellate Body Report, *US – Gambling*, para. 291) We consider that the reverse is also true.

¹⁵⁷ See Appellate Body Reports, *Argentina – Financial Services*, para. 6.203; and *Mexico – Taxes on Soft Drinks*, para. 72.

public morals, this indicates the existence of a relationship between the measure and the protection of public morals. In this situation, further examination of whether the measure is "necessary" is required under Article XX(a).

5.69. In order to determine whether such a relationship exists, a panel must examine evidence regarding the design of the measure at issue, including its content, structure, and expected operation.¹⁵⁸ We note that a measure may expressly mention an objective falling within the scope of "public morals" in that society.¹⁵⁹ However, an express reference to such objective may not, in and of itself, be sufficient to establish that the measure is "designed" to protect public morals for purposes of substantiating the availability of the defence under Article XX(a). Conversely, a measure that does not expressly refer to a "public moral" may nevertheless be found to have such a relationship with public morals following an assessment of the design of the measure at issue, including its content, structure, and expected operation.

5.70. We do not see the examination of the "design" of the measure as a particularly demanding step of the Article XX(a) analysis. By contrast, the assessment of the "necessity" of a measure entails a more in-depth, holistic analysis of the relationship between the measure and the protection of public morals. The Appellate Body has explained that a necessity analysis involves a process of "weighing and balancing" a series of factors, including the importance of the societal interest or value at stake, the contribution of the measure to the objective it pursues, and the trade-restrictiveness of the measure.¹⁶⁰ In most cases, a comparison between the challenged measure and possible alternatives should subsequently be undertaken.¹⁶¹

5.71. Regarding the specific factors of the "necessity" analysis, we first note that it entails "an assessment of the 'relative importance' of the interests or values furthered by the challenged measure".¹⁶² The more vital or important the interests or values that are reflected in the objective of the measure, the easier it would be to accept a measure as "necessary".¹⁶³

5.72. A panel must also examine the contribution of the measure to the objectives pursued by it. In assessing this factor, "a panel's duty is to assess, in a qualitative or quantitative manner, the extent of the measure's contribution to the end pursued, rather than merely ascertaining whether or not the measure makes any contribution."¹⁶⁴ This is because "[t]he greater the contribution, the more easily a measure might be considered to be 'necessary'".¹⁶⁵ The Appellate Body has indicated that there is no "generally applicable standard requiring the use of a pre-determined threshold of contribution in analysing the necessity of a measure under Article XX of the GATT 1994".¹⁶⁶ Since a measure's contribution is only one component of the necessity calculus under Article XX, the assessment of whether a measure is "necessary" cannot be determined by the degree of contribution alone, but will depend on the manner in which the other factors of the "necessity" standard inform the analysis.¹⁶⁷

5.73. Another relevant factor in conducting a "necessity" analysis is the restrictiveness of the measure in respect of international commerce. In assessing this factor, "a panel must seek to assess the degree of a measure's trade-restrictiveness, rather than merely ascertaining whether or not the measure involves some restriction on trade."¹⁶⁸ As with the assessment of a measure's contribution to its objective, the examination of a measure's trade-restrictiveness may be done in a qualitative or quantitative manner. The Appellate Body has stated that "[a] measure with a

¹⁵⁸ See Appellate Body Reports, *US – Shrimp*, paras. 135-142; and *EC – Seal Products*, para. 5.144.

¹⁵⁹ In discerning the objective of a measure, a panel is not limited to the text or preamble of a measure, or to a respondent's characterization of the objective in WTO dispute settlement proceedings; it may also look at other evidentiary elements such as the design, structure, and operation of the measure in making its own determination of a measure's objective. (Appellate Body Reports, *EC – Seal Products*, para. 5.144)

¹⁶⁰ See Appellate Body Reports, *Korea – Various Measures on Beef*, para. 164; *US – Gambling*, para. 306; *Brazil – Retreaded Tyres*, para. 182; and *EC – Seal Products*, para. 5.169.

¹⁶¹ Appellate Body Reports, *EC – Seal Products*, para. 5.169 (referring to Appellate Body Reports, *US – Gambling*, para. 307; and *Korea – Various Measures on Beef*, para. 166).

¹⁶² Appellate Body Report, *US – Gambling*, para. 306 (referring to Appellate Body Reports, *Korea – Various Measures on Beef*, para. 162; and *EC – Asbestos*, para. 172).

¹⁶³ Appellate Body Report, *Korea – Various Measures on Beef*, para. 162.

¹⁶⁴ Appellate Body Report, *Argentina – Financial Services*, para. 6.234.

¹⁶⁵ Appellate Body Report, *Korea – Various Measures on Beef*, para. 163.

¹⁶⁶ Appellate Body Reports, *EC – Seal Products*, para. 5.213.

¹⁶⁷ Appellate Body Reports, *EC – Seal Products*, para. 5.215.

¹⁶⁸ Appellate Body Report, *Argentina – Financial Services*, para. 6.234.

relatively slight impact upon imported products might more easily be considered as 'necessary' than a measure with intense or broader restrictive effects."¹⁶⁹

5.74. As we have noted, in most cases, a panel must then compare the challenged measure and possible alternative measures that achieve the same level of protection while being less trade restrictive.¹⁷⁰ The Appellate Body has explained that an alternative measure may be found not to be "reasonably available" where "it is merely theoretical in nature, for instance, where the responding Member is not capable of taking it, or where the measure imposes an undue burden on that Member, such as prohibitive costs or substantial technical difficulties".¹⁷¹

5.75. The Appellate Body has noted that "the very utility of examining the interaction between the various factors of the necessity analysis, and conducting a comparison with potential alternative measures, is that it provides a means of testing these factors as part of a holistic weighing and balancing exercise".¹⁷² In this respect, the weighing and balancing exercise can be understood as "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."¹⁷³

5.76. Finally, we observe that the "design" and "necessity" steps of the analysis under Article XX(a) are conceptually distinct, yet related, aspects of the overall inquiry to be undertaken into whether a respondent has established that the measure at issue is "necessary to protect public morals".¹⁷⁴ As the assessment of these two steps is not entirely disconnected, there may, in fact, be some overlap in the sense that certain evidence and considerations may be relevant to both aspects of the defence under Article XX(a). We note, in particular, that, in the context of the "design" step of the analysis, a panel is not precluded from taking into account evidence and considerations that may also be relevant to the examination of the contribution of the measure in the context of the "necessity" analysis.

5.77. We observe that, once an analysis of the "design" of a measure reveals that the measure is not incapable of protecting public morals, such that there is a relationship between the measure and the protection of public morals, a panel may not refrain from conducting the "necessity" step of the analysis. The Appellate Body has emphasized that "[a] panel must not ... structure its analysis of the ["design" step] in such a way as to lead it to truncate its analysis prematurely and thereby foreclose consideration of crucial aspects of the respondent's defence relating to the 'necessity' analysis."¹⁷⁵ As we have noted, the "necessity" analysis involves weighing and balancing the relative importance of the societal interest or value at stake, the degree of contribution, and the degree of trade-restrictiveness so as to determine whether the measure is "necessary" to protect public morals.¹⁷⁶ Whether a particular degree of contribution is sufficient for a measure to be considered "necessary" cannot be answered in isolation from an assessment of the degree of the measure's trade-restrictiveness and of the relative importance of the interest or value at stake. For example, a measure making a limited contribution to protecting public morals may be justified under Article XX(a) in circumstances where the measure has only a very low trade-restrictive impact, taking into account the importance of the specific interest or value at stake; similarly, it may be that a measure making a significant contribution is not justified under Article XX(a) if that measure is highly trade restrictive. Thus, if a panel finds some degree of contribution, but ceases to analyse the other factors (the degree of trade-restrictiveness and the relative importance of the interest or value at stake), a weighing and balancing exercise cannot be

¹⁶⁹ Appellate Body Report, *Korea – Various Measures on Beef*, para. 163.

¹⁷⁰ Appellate Body Reports, *EC – Seal Products*, para. 5.169. In *EC – Seal Products*, the Appellate Body recalled that, in *US – Tuna II (Mexico)*, it had identified in the context of Article 2.2 of the Agreement on Technical Barriers to Trade (TBT Agreement) circumstances in which a comparison with possible alternative measures may not be required, for instance, when the challenged measure is not trade restrictive, or when it makes no contribution to the objective. (Appellate Body Reports, *EC – Seal Products*, fn 1181 to para. 5.169 (referring to Appellate Body Report, *US – Tuna II (Mexico)*, fn 647 to para. 322))

¹⁷¹ Appellate Body Report, *US – Gambling*, para. 308.

¹⁷² Appellate Body Reports, *EC – Seal Products*, para. 5.215. (fn omitted)

¹⁷³ Appellate Body Report, *Brazil – Retreaded Tyres*, para. 182.

¹⁷⁴ Appellate Body Report, *Argentina – Financial Services*, para. 6.205.

¹⁷⁵ Appellate Body Report, *Argentina – Financial Services*, para. 6.203.

¹⁷⁶ As we have also noted, in most cases, a panel must then compare the challenged measure and possible alternative measures that achieve the same level of protection while being less trade restrictive. (Appellate Body Reports, *EC – Seal Products*, para. 5.169)

conducted, and thus a proper consideration of a respondent's defence that the measure is necessary is foreclosed.

5.78. With these considerations in mind, we now turn to assess Colombia's challenge to the Panel's finding that Colombia had failed to demonstrate that the measure is "designed" to protect public morals.

5.79. Colombia alleges that the Panel applied an "overly demanding"¹⁷⁷ legal standard in assessing whether the compound tariff is a measure "designed" to protect public morals, by erroneously importing aspects of the "necessity" analysis. Colombia considers that the standard applied by the Panel in the context of its analysis of the "design" of the measure focused on the degree to which the measure is contributing to its objective. According to Colombia, the assessment of the contribution of the measure is an aspect that may be examined under the "necessity" analysis, but not during the consideration of whether the measure is "designed" to protect public morals. Therefore, in Colombia's view, the Panel conflated the analysis of whether the measure is one "to protect public morals" with the subsequent and more exhaustive analysis of "necessity".

5.80. As highlighted above, in the context of an assessment of the "design" of a measure, the examination of the relationship between the measure and the protection of public morals under Article XX(a) does not, *a priori*, exclude from its scope an assessment of evidence and considerations that may also be relevant in the context of the "necessity" step of the analysis. Indeed, the examination of whether a measure is "designed" to protect public morals may involve scrutinizing a range of evidence and considerations related to the measure at issue, including the texts of statutes and/or regulations, the measure's legislative history, the measure's objective, and other evidence regarding its content, structure, and expected operation. Thus, an assessment of aspects that are related to a measure's contribution to its objective may also be of relevance for determining whether a measure is "designed" to protect public morals under Article XX(a). Consequently, to the extent that Colombia argues that the Panel erred in its analysis of the "design" of the measure for the mere reason that it examined evidence and considerations related to an analysis of the contribution of the measure, we disagree.

5.81. However, the thrust of Colombia's claim of error is that the Panel applied an "overly demanding" legal standard in assessing whether the compound tariff is a measure "designed" to protect public morals.¹⁷⁸ We therefore review the relevant findings by the Panel to determine whether Colombia is correct in asserting that the Panel improperly applied the legal standard in assessing the "design" of the measure under Article XX(a) of the GATT 1994.

5.82. The Panel began by finding that "combating money laundering is one of the policies designed to protect public morals in Colombia."¹⁷⁹ Having made this finding, the Panel turned to assess whether the compound tariff is itself "designed" to combat money laundering. Since the parties disagreed with regard to the nature of the objective of the measure, the Panel indicated that it would "make an objective assessment as to whether the compound tariff is, in fact, designed to combat money laundering" by assessing the design, architecture, and revealing structure of the compound tariff, as well as all of the available evidence.¹⁸⁰

5.83. The Panel examined the text of the measure and noted that neither Decree No. 456 nor the previous Decree No. 074 contains any statement of reasons indicating that the objective of the compound tariff is to combat money laundering.¹⁸¹ Then, the Panel turned to analyse other aspects relating to the design, architecture, and structure of the compound tariff. In this context, the Panel decided to verify the "series of interconnected assumptions" that, in the Panel's view, were the basis of Colombia's argument.¹⁸² The Panel therefore examined: (i) whether the thresholds established in the measure reflect "market conditions" so that any price below them is "artificially low"; (ii) whether products imported at prices below the thresholds established in the measure are

¹⁷⁷ Colombia's appellant's submission, heading section V.B.

¹⁷⁸ Colombia also contends that the Panel "required an erroneous 100% effectiveness standard". (Colombia's appellant's submission, para. 129)

¹⁷⁹ Panel Report, para. 7.339.

¹⁸⁰ Panel Report, para. 7.343.

¹⁸¹ Panel Report, para. 7.347.

¹⁸² Panel Report, para. 7.353.

being undervalued; and (iii) whether imports of goods subject to the compound tariff at prices below the thresholds established in the measure are being used for money laundering purposes.

5.84. The Panel's conclusions regarding these "assumptions" were that: (i) Colombia had not shown that the thresholds "could be decisive in establishing that the importation of goods at prices below those thresholds is *necessarily* taking place at 'artificially low' prices that do not reflect real prices or market conditions"¹⁸³; (ii) there was "no indication that products imported at prices below the thresholds established in Decree No. 456 are *necessarily* being undervalued"¹⁸⁴; and (iii) even assuming that products imported at prices below the thresholds established in the measure are being undervalued, there was "no evidence that this *necessarily* means that the undervaluation in question is for money laundering purposes".¹⁸⁵ On the basis of these conclusions and certain additional considerations, the Panel concluded that "a connection between the compound tariff and the alleged objective of combating money laundering ha[d] not been demonstrated", and that it was not "possible to conclude that there is a relationship between the compound tariff and the declared objective of combating money laundering".¹⁸⁶ Accordingly, the Panel concluded that Colombia had "failed to demonstrate that the compound tariff is designed to combat money laundering".¹⁸⁷

5.85. Having set out the main aspects of the Panel's analysis, we note that there is a tension between some of the Panel's intermediate findings and the conclusions it reached concerning the "design" of the measure. In particular, we note that, although the Panel concluded that Colombia had failed to establish a relationship between the compound tariff and the objective of combating money laundering, this conclusion is belied by findings indicating 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.

5.86. In respect of the question of whether prices below the thresholds set out in the measure are "artificially low", we note the Panel's finding that "it cannot be ruled out that the importation of goods at prices below the thresholds established in Decree No. 456 could, in practice, reflect 'artificially low' prices that do not reflect market conditions."¹⁸⁸ We consider that, by stating that "it cannot be ruled out" that goods imported at prices below the thresholds reflect "artificially low" prices, the Panel acknowledged that at least some transactions at or below the thresholds could reflect such prices.¹⁸⁹ In other words, this finding by the Panel shows that at least some goods imported at prices at or below the thresholds set out in the measure could reflect "artificially low" prices and thus would not reflect market conditions.¹⁹⁰

5.87. We also observe the Panel's finding that "the information available suggests that the undervaluation of imports is, in fact, one of the methods used for money laundering detected by the Colombian authorities."¹⁹¹ In this regard, the Panel examined a joint study prepared by Colombia's Ministry of Finance and Public Credit, *Dirección de Impuestos y Aduanas Nacionales* (DIAN) (National Customs and Excise Directorate) and *Unidad de Información y Análisis Financiero* (UIAF) (Information and Financial Analysis Unit)¹⁹², which identifies methods used in Colombia for laundering money. On the basis of this joint study, the Panel explained that one of the methods for laundering money that the compound tariff seeks to combat is the "transport of money of illicit origin to another country to purchase goods which are introduced into the local country by means

¹⁸³ Panel Report, para. 7.359. (emphasis original)

¹⁸⁴ Panel Report, para. 7.365. (emphasis added)

¹⁸⁵ Panel Report, para. 7.376. (emphasis added)

¹⁸⁶ Panel Report, para. 7.399.

¹⁸⁷ Panel Report, para. 7.400.

¹⁸⁸ Panel Report, para. 7.359.

¹⁸⁹ We note that, before the Panel, Colombia stated that "it use[d] the term 'underinvoicing' to refer in shorthand form to imports at artificially low prices that do not correspond to real or market prices." (Panel Report, para. 7.362 (quoting Colombia's response to Panel question No. 41, para. 98))

¹⁹⁰ We note that the Panel made some additional findings in assessing the contribution of the measure under the "necessity" analysis that further demonstrate the Panel's understanding that at least some of the products at issue priced at or below the thresholds could be imported into Colombia at artificially low prices and thus could be undervalued. For instance, the Panel held that "it cannot be ruled out that the existence of lower prices for some of the imports considered by Colombia indicates the existence of undervaluation practices." (Panel Report, para. 7.421)

¹⁹¹ Panel Report, para. 7.366.

¹⁹² *Money Laundering Typologies Related to Smuggling*, January 2006 (Panel Exhibit COL-10).

of technical smuggling based on underinvoicing".¹⁹³ These findings indicate recognition by the Panel that, in Colombia, one of the methods used to launder money is the undervaluation of imports. This is further supported by additional observations by the Panel about the phenomenon of trade-based money laundering as recognized by international bodies. As the Panel observed, the World Customs Organization refers to trade-based money laundering as "the process of legitimizing the proceeds of crime by disguising them in the form of a payment for an international trade transaction".¹⁹⁴ The Panel also noted that a study by an intergovernmental body, the Financial Action Task Force (FATF), similarly refers to trade-based money laundering as "the process of disguising the proceeds of crime and moving value through the use of trade transactions in an attempt to legitimize their illicit origin".¹⁹⁵ Furthermore, we note that the Panel stated that "the information available suggests that not every ... undervaluation operation in an international trade transaction is for money laundering purposes."¹⁹⁶ In our view, the Panel's finding that "not every" undervaluation operation is for money laundering purposes amounts to an acceptance that at least some of the undervaluation operations can be carried out in order to launder money.

5.88. We also note that, in assessing the contribution of the measure under the "necessity" analysis¹⁹⁷, the Panel addressed Colombia's contention that the compound tariff reduces the incentives for using textile, apparel, and footwear imports to launder money. According to Colombia, the compound tariff leads to an increase in the unit price of apparel and footwear imports, thereby reducing the artificially high profit margin, which is the incentive for using these imports to launder money.¹⁹⁸ While the Panel did not make a definitive finding that the compound tariff has discouraged undervaluation practices carried out for money laundering purposes¹⁹⁹, the Panel did make several findings that support Colombia's position that the compound tariff could reduce the incentive of using undervalued imports to launder money. In addition to finding that "since the compound tariff entered into force, Colombian imports of the products in question have declined and average import prices have increased"²⁰⁰, the Panel also accepted that "the compound tariff could reduce the incentives for importing textile products, apparel and footwear at prices below the thresholds laid down in Decree No. 456."²⁰¹ Similarly, in stating that "the effect of the compound tariff would be limited to reducing the profit margin of the persons intending to use imports for money laundering purposes"²⁰², the Panel recognized, in our view, that goods imported at prices at or below the thresholds for money laundering purposes would be subject to the disincentive created by the higher specific duties that apply to these goods.

5.89. Taking the above Panel findings together, we consider that the Panel itself recognized 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. We recall that the Panel concluded that Colombia had failed to establish a relationship between the compound tariff and the

¹⁹³ Panel Report, para. 7.370 (quoting Colombia's response to Panel question No. 44, para. 101).

¹⁹⁴ Panel Report, para. 7.367 (referring to World Customs Organization, *Illicit Trade Report 2012* (Panel Exhibit COL-8), p. 34).

¹⁹⁵ Panel Report, para. 7.367 (referring to Financial Action Task Force (FATF), *Trade-Based Money Laundering*, 23 June 2006 (Panel Exhibit COL-11), p. 3).

¹⁹⁶ Panel Report, para. 7.374.

¹⁹⁷ We recall that the Panel stated that, since it had concluded that Colombia had failed to demonstrate that the compound tariff is "designed" to combat money laundering, there should be no need to examine whether the compound tariff is "necessary" to protect public morals. However, the Panel indicated that, "in order to be exhaustive in its analysis", it would continue with its evaluation by assuming, for the sake of argument, that the compound tariff is "designed" to combat money laundering. (Panel Report, para. 7.402)

¹⁹⁸ Panel Report, para. 7.410 (referring to Colombia's first written submission to the Panel, paras. 37, 87, and 99; and opening statement at the first Panel meeting, paras. 31 and 33). Colombia also argued before the Panel that the compound tariff has resulted in a change in the composition of imports of the products in question, which would indicate that the measure has discouraged the undervaluation of such imports. (Ibid. (referring to Colombia's opening statement at the first Panel meeting, paras. 30 and 32; response to Panel question No. 57; and charts containing import data submitted by Colombia with its opening statement at the first Panel meeting (Panel Exhibit COL-30))

¹⁹⁹ We are cognizant that the Panel ultimately found that "the fact that the compound tariff has had a greater effect on lower-priced, as compared with higher-priced, products does not *in itself* prove that the compound tariff has helped to discourage the use of 'artificially low' prices or undervaluation for money laundering purposes." (Panel Report, para. 7.430 (emphasis added))

²⁰⁰ Panel Report, para. 7.428.

²⁰¹ Panel Report, para. 7.435.

²⁰² Panel Report, para. 7.436.

objective of combating money laundering.²⁰³ We further recall that a panel may cease its analysis of a defence under Article XX(a) of the GATT 1994 at the stage of assessing the "design" of the measure only where the measure at issue is incapable of protecting public morals, such that there is no relationship between the measure and the protection of public morals. In the light of the cited passages from the Panel Report, we consider that the Panel was not in a situation in which the measure at issue is incapable of protecting public morals. Although the Panel concluded that Colombia had failed to establish a relationship between the compound tariff and the objective of combating money laundering, we consider that this conclusion is belied by the Panel findings we have examined above. Indeed, we understand that 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. Thus, the Panel's analysis indicates 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.

5.90. Consequently, the Panel should not have ceased its analysis at this stage of its review of Colombia's defence under Article XX(a). Rather, it was incumbent on the Panel to turn to the analysis of the "necessity" of the measure to explore further the extent of that relationship in assessing the measure's contribution to the objective, and to evaluate any such contribution together with the other factors of the "necessity" analysis.²⁰⁴ As noted, a panel errs under Article XX(a) if, in assessing the "design" of the measure, it does not proceed to an analysis of "necessity" once it has determined that the measure is not incapable of protecting public morals, such that there is a relationship between the measure and the protection of public morals. Otherwise, a panel would foreclose an assessment of whether the degree of contribution, when weighed and balanced against the degree of trade-restrictiveness and the importance of the interests and values at stake, is sufficient to justify the measure under Article XX(a).

5.91. We recall that, having found that Colombia had not shown that the compound tariff is a measure "designed" to protect public morals, the Panel stated there was no need to examine whether the compound tariff is "necessary" to protect public morals. Nevertheless, "in order to be exhaustive in its analysis", the Panel evaluated whether the measure is "necessary" by assuming, for the sake of argument, that the compound tariff is "designed" to combat money laundering.²⁰⁵ We note, in any event, that the Panel's ultimate conclusion as to the availability of the Article XX(a) defence to Colombia was founded solely on its conclusion that Colombia had not demonstrated that the compound tariff is "designed" to combat money laundering.

5.92. In sum, 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 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.

5.93. We therefore reverse the Panel's finding, in paragraph 7.400 of its 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 its Report, that Colombia has not shown that the compound tariff is a measure "designed" to protect public morals. 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 its 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.

²⁰³ Panel Report, paras. 7.399-7.400.

²⁰⁴ While we agree with Colombia that the Panel imposed an "overly demanding" legal standard in assessing whether the measure at issue is "designed" to protect public morals, we do not see that the Panel required that the measure at issue satisfy a "100% effectiveness" standard, as also contended by Colombia.

²⁰⁵ Panel Report, para. 7.402.

5.94. We note that Colombia also presented additional challenges to the Panel's assessment of whether the measure is "designed" to protect public morals²⁰⁶ and raised certain claims of error concerning the Panel's findings in respect of the "necessity" analysis²⁰⁷, as well as claims under Article 11 of the DSU.²⁰⁸ 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.

5.2.3 Completion of the legal analysis

5.95. Having reversed the Panel's finding that Colombia has failed to demonstrate that the compound tariff is a measure "designed" to protect public morals, we now turn to consider Colombia's request that we complete the legal analysis and find that the measure at issue is necessary to protect public morals and is thus justified under Article XX(a) of the GATT 1994.²⁰⁹

5.96. Colombia maintains that we may be able to find that the compound tariff is a measure "designed" to protect public morals under Article XX(a) on the basis of the following:

- a. the Panel accepted that the importation of products at prices below the thresholds established in the measure could reflect "artificially low" prices that do not reflect market conditions²¹⁰;
- b. the Panel found that the evidence demonstrates that Colombian authorities had identified the use of undervaluation as one of the mechanisms used to launder money²¹¹;
- c. the Panel found that the use of undervaluation of imports to launder money had been confirmed by international organizations involved in the fight against money laundering and illicit trade²¹²; and
- d. the Panel found that the information available suggests that the undervaluation of imports is, in fact, one of the methods used for money laundering detected by the Colombian authorities.²¹³

5.97. We begin by noting that the Panel found that Colombia had presented sufficient evidence to demonstrate the existence of a real and present concern in Colombia with regard to money laundering, as well as with regard to the way in which money laundering is linked with drug trafficking and other criminal activities and with Colombia's internal armed conflict. On this basis, in a finding that is not contested on appeal, the Panel concluded that combating money laundering is one of the policies designed to protect public morals in Colombia.²¹⁴

5.98. Since the Panel found that combating money laundering is one of the policies designed to protect public morals in Colombia, we now proceed to examine whether the findings by the Panel are sufficient to establish that the compound tariff is a measure "designed" to combat money laundering and thus "to protect public morals" under Article XX(a) of the GATT 1994.

²⁰⁶ See executive summary of Colombia's appellant's submission in Annex B-1 to this Report, paras. 25 and 27.

²⁰⁷ See executive summary of Colombia's appellant's submission in Annex B-1 to this Report, paras. 29-30.

²⁰⁸ See executive summary of Colombia's appellant's submission in Annex B-1 to this Report, paras. 26 and 31.

²⁰⁹ Colombia's appellant's submission, paras. 201 and 243.

²¹⁰ Colombia's appellant's submission, para. 202 (referring to Panel Report, para. 7.359).

²¹¹ Colombia's appellant's submission, para. 203 (referring to Panel Report, para. 7.366). Colombia also indicates that the Panel reiterated subsequently in its Report that "it has been shown that the undervaluation ... of imports ... can be used for money laundering purposes". (Colombia's appellant's submission, para. 204 (quoting Panel Report, para. 7.434))

²¹² Colombia's appellant's submission, para. 205 (referring to Financial Action Task Force (FATF), *Trade-Based Money Laundering*, 23 June 2006 (Panel Exhibit COL-11), p. 25).

²¹³ Colombia's appellant's submission, para. 206 (quoting Panel Report, para. 7.366).

²¹⁴ Panel Report, para. 7.339.

5.99. 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.

5.100. 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.

5.101. We now proceed to examine whether the compound tariff is a measure "necessary" to protect public morals under Article XX(a) of the GATT 1994.

5.102. We recall that a necessity analysis involves a process of "weighing and balancing" a series of factors, including the importance of the societal interest or value at stake, the contribution of the measure to the objective it pursues, and the trade-restrictiveness of the measure.²¹⁵ We consider that each of these factors must be demonstrated with sufficient clarity in order to conduct a proper weighing and balancing exercise that may yield a conclusion that the measure is "necessary". In most cases, a comparison between the challenged measure and possible alternatives should subsequently be undertaken.²¹⁶

5.103. The weighing and balancing process begins "with an assessment of the 'relative importance' of the interests or values furthered by the challenged measure".²¹⁷ The more vital or important the interests or values that are reflected in the objective of the measure, the easier it would be to accept a measure as "necessary".²¹⁸ Turning to the contribution of the measure to the objectives pursued by it, we recall that "[t]he greater the contribution, the more easily a measure might be considered to be 'necessary'".²¹⁹ For this reason, the Appellate Body has emphasized that "in an analysis of 'necessity', a panel's duty is to assess, in a qualitative or quantitative manner, the extent of the measure's contribution to the end pursued, rather than merely ascertaining whether or not the measure makes any contribution."²²⁰ The nature of the analysis for ascertaining a measure's contribution to the objective pursued by it can be contrasted with the type of analysis that a panel must undertake in the context of assessing the "design" of the measure under Article XX(a). Indeed, whereas an assessment of whether the measure is "designed" to protect public morals focuses on determining whether the measure is or is not incapable of protecting public morals, an examination of the measure's contribution to the protection of public morals focuses on determining the degree of such contribution, in a qualitative or quantitative manner.

5.104. Turning to an assessment of the restrictive impact of the measure on international commerce, the Appellate Body has stated that "[a] measure with a relatively slight impact upon imported products might more easily be considered as 'necessary' than a measure with intense or broader restrictive effects."²²¹ Consequently, in assessing a measure's trade-restrictiveness "a panel must seek to assess the degree of a measure's trade-restrictiveness, rather than merely ascertaining whether or not the measure involves some restriction on trade."²²²

5.105. With these considerations in mind, we begin with the Panel's findings regarding the relative importance of the interests or values pursued by the challenged measure. We recall that the Panel noted that money laundering is criminal conduct in Colombia under Article 323 of its Criminal Code, and that Colombia had submitted documents showing that combating money

²¹⁵ See Appellate Body Reports, *Korea – Various Measures on Beef*, para. 164; *US – Gambling*, para. 306; *Brazil – Retreaded Tyres*, para. 182; and *EC – Seal Products*, para. 5.169.

²¹⁶ Appellate Body Reports, *EC – Seal Products*, para. 5.169 (referring to Appellate Body Reports, *US – Gambling*, para. 307; and *Korea – Various Measures on Beef*, para. 166).

²¹⁷ Appellate Body Report, *US – Gambling*, para. 306 (referring to Appellate Body Reports, *Korea – Various Measures on Beef*, para. 162; and *EC – Asbestos*, para. 172).

²¹⁸ Appellate Body Report, *Korea – Various Measures on Beef*, para. 162.

²¹⁹ Appellate Body Report, *Korea – Various Measures on Beef*, para. 163.

²²⁰ Appellate Body Report, *Argentina – Financial Services*, para. 6.234.

²²¹ Appellate Body Report, *Korea – Various Measures on Beef*, para. 163.

²²² Appellate Body Report, *Argentina – Financial Services*, para. 6.234.

laundering is an important policy objective for Colombia.²²³ In the Panel's view, Colombia presented sufficient evidence to demonstrate the existence of a real and present concern in Colombia with regard to money laundering, as well as with regard to the way in which money laundering is linked with drug trafficking and other criminal activities and with Colombia's internal armed conflict.²²⁴ For these reasons, in a finding that is not contested on appeal, the Panel held that, in Colombia, the objective of combating money laundering reflects societal interests that can be described as vital and important in the highest degree.²²⁵ We also observe that, before the Panel and on appeal, Panama has not denied that, for Colombia, the fight against money laundering is a societal interest that could be described as vital and important in the highest degree.²²⁶

5.106. We now turn to examine the contribution of the measure to combating money laundering. Above, we have identified a number of findings concerning the Panel's understanding regarding the relationship between the measure at issue and the objective of combating money laundering. We consider that the same findings of the Panel that led us to conclude 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, also indicate that there may be at least some contribution by the compound tariff to the objective of combating money laundering. We recall the Panel's finding that "it cannot be ruled out that the importation of goods at prices below the thresholds established in Decree No. 456 could, in practice, reflect 'artificially low' prices that do not reflect market conditions."²²⁷ We further recall that the Panel found that "the information available suggests that the undervaluation of imports is, in fact, one of the methods used for money laundering detected by the Colombian authorities."²²⁸ Moreover, we noted the Panel's findings that, "since the compound tariff entered into force, Colombian imports of the products in question have declined and average import prices have increased"²²⁹, and that "the compound tariff could reduce the incentives for importing textile products, apparel and footwear at prices below the thresholds laid down in Decree No. 456".²³⁰ As stated above, these findings demonstrate the Panel's understanding 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. Therefore, we consider that these findings establish the Panel's recognition that there may be at least some contribution by the measure to the objective of combating money laundering.

5.107. However, while the Panel's findings discussed above indicate that there may be *at least some* contribution, they are also indeterminate as to the *degree* of such contribution. For instance, the Panel's finding that "it cannot be ruled out that the importation of goods at prices below the thresholds established in Decree No. 456 could, in practice, reflect 'artificially low' prices that do not reflect market conditions"²³¹ does not indicate whether the amount or proportion of goods imported at prices at or below the thresholds is low or high, or anywhere in between. A similar observation can be made in respect of the Panel's finding that "the undervaluation of imports is, in fact, one of the methods used for money laundering detected by the Colombian authorities."²³² Indeed, this finding does not indicate the frequency or scope of this method as a means for laundering money. In this regard, we also observe the Panel's statement that the undervaluation of imports "is just one of the many methods used for money laundering".²³³ The Panel also referred to a document of the Colombian Ministry of Justice and Law indicating that, "according to

²²³ The Panel referred to several documents submitted by Colombia, including National Planning Department, *National Development Plan 2010-2014* (extracts) (Panel Exhibit COL-33); Ministry of the Interior and Justice, *National Anti-Drug Policy* (Panel Exhibit COL-6); and National Council for Economic and Social Policy, *National Policy against Money Laundering and the Financing of Terrorism*, 18 January 2013 (Panel Exhibit COL-19). (Panel Report, para. 7.335)

²²⁴ Panel Report, para. 7.338. See also paras. 7.406-7.407.

²²⁵ Panel Report, para. 7.408.

²²⁶ Panel Report, para. 7.405.

²²⁷ Panel Report, para. 7.359.

²²⁸ Panel Report, para. 7.366.

²²⁹ Panel Report, para. 7.428.

²³⁰ Panel Report, para. 7.435.

²³¹ Panel Report, para. 7.359.

²³² Panel Report, para. 7.366.

²³³ Panel Report, para. 7.375.

the Office of the Attorney-General of the Nation, this *modus operandi* does not constitute one of those most commonly employed for money laundering purposes."²³⁴

5.108. Other findings by the Panel highlight the lack of sufficient clarity surrounding the amount or proportion of import transactions involving the products at issue that are actually used for money laundering purposes. In this regard, the Panel observed that "the compound tariff does not directly target undervalued imports, still less imports used for money laundering, but all imports declared at below-threshold prices, regardless of whether or not there is undervaluation and whatever the purpose of the transaction."²³⁵ As a consequence, the Panel concluded, "the compound tariff affects imports which enter at prices below the thresholds even if there is no undervaluation."²³⁶ While the Panel considered that it "has been shown that the undervaluation ... of imports ... can be used for money laundering purposes", it also noted that "money laundering can be based on other practices or methodologies, including non-undervalued imports and overt smuggling."²³⁷ Moreover, according to the Panel, "the practice of undervaluation may have purposes other than money laundering, including tax evasion in particular."²³⁸ In this regard, the Panel concluded that, "even assuming, for the sake of argument, that products imported at prices below the thresholds established in Decree No. 456 are being undervalued, there is no evidence that this necessarily means that the undervaluation in question is for money laundering purposes."²³⁹ In making these findings, we read the Panel as emphasizing that Colombia had not established with sufficient clarity the amount or proportion of import transactions involving the relevant products that are, in fact, undervalued for money laundering purposes.

5.109. Moreover, the Panel did not have much clarity as to how effective the disincentive of the compound tariff is as a means of combating money laundering. The Panel acknowledged that imports of the products in question have declined and average import prices have increased since the compound tariff entered into force, and that the compound tariff has affected imports of lower-priced products to a greater extent than imports of higher-priced products.²⁴⁰ Ultimately, however, the Panel found that "the fact that the compound tariff has had a greater effect on lower-priced, as compared with higher-priced, products does not *in itself* prove that the compound tariff has helped to discourage the use of 'artificially low' prices or undervaluation for money laundering purposes."²⁴¹ Other findings by the Panel also highlight the lack of sufficient clarity surrounding the effectiveness of the compound tariff as a means of combating money laundering. For instance, in assessing the existence of undervaluation of imports of textiles, apparel, and footwear, the Panel stated that, "[a]lthough it cannot be ruled out that some imports with low declared prices are being undervalued, on the basis of the information available and in view of the great diversity of the products considered, it is not possible to arrive at a general conclusion as to the degree of undervaluation of the imports prior to the entry into force of the compound tariff."²⁴² Similarly, the Panel indicated that "the available information does not make it possible to arrive at a general conclusion concerning the degree to which, as Colombia asserts, the entry into force of the compound tariff has resulted in a decrease in the undervaluation index of imports of the relevant products."²⁴³

5.110. The above considerations regarding the uncertainty surrounding the amount or proportion of imported goods below the thresholds that are actually used for money laundering purposes, as well as the extent to which the compound tariff acts as a disincentive to money laundering, indicate the Panel's view that Colombia had not demonstrated with sufficient clarity the *degree* of contribution made by the compound tariff to the objective of combating money laundering.²⁴⁴ The Panel's uncertainty is also evident in its overall conclusion that, "[t]aking into account the relevant facts and the relevant circumstances of the case, including the design, architecture and revealing

²³⁴ Panel Report, para. 7.375 (referring to Ministry of Justice and Law, Drugs Observatory, *The Drug Problem in Colombia, Actions and Results 2011-2013* (Panel Exhibit COL-27), p. 145).

²³⁵ Panel Report, para. 7.432.

²³⁶ Panel Report, para. 7.432.

²³⁷ Panel Report, para. 7.434.

²³⁸ Panel Report, para. 7.434. (fn omitted)

²³⁹ Panel Report, para. 7.376.

²⁴⁰ Panel Report, paras. 7.428-7.429.

²⁴¹ Panel Report, para. 7.430. (emphasis added)

²⁴² Panel Report, para. 7.415.

²⁴³ Panel Report, para. 7.423.

²⁴⁴ We note that, in assessing the "necessity" of a measure, the degree of a measure's contribution to its objective may be expressed in a qualitative or quantitative manner.

structure of the compound tariff, ... Colombia ha[d] failed to demonstrate the contribution of the compound tariff to the objective of combating money laundering".²⁴⁵

5.111. Turning to the trade-restrictiveness of the measure at issue, we note that the Panel found that "the compound tariff is less restrictive on international trade than an import ban or a measure having the effects of a ban."²⁴⁶ This finding by the Panel reflects uncertainty as to the *degree* of trade-restrictiveness of the measure at issue because it does not indicate how much less trade restrictive the measure is in comparison to an import ban. In this regard, we also observe that Colombia asserts that the trade-restrictive effect of the measure is "modest" since it is less restrictive on international trade than an import ban.²⁴⁷ Our examination of the Panel Report shows that, contrary to Colombia's assertion, the Panel did not find that the trade-restrictive effect of the measure is "modest". Rather, the Panel indicated that "[t]he compound tariff has definite effects on international trade, by reducing the capacity of the products concerned to compete on the Colombian market, particularly when the imports are subject to the highest levels of the tariff."²⁴⁸ The Panel added that "[t]his is confirmed by the figures submitted by the parties, which indicate increases in import prices, as well as reductions in imports, mainly in terms of volume, but also in terms of value."²⁴⁹ On this basis, the Panel concluded that "the trade-restrictiveness of the compound tariff is undeniable and is recognized by both parties."²⁵⁰ Thus, while Colombia is not correct in asserting that the trade-restrictiveness of the measure is "modest", the Panel's findings that the measure is less restrictive than an import ban and that the trade-restrictiveness is "undeniable" do not sufficiently elucidate the degree of trade-restrictiveness of the compound tariff.

5.112. We also note that, despite acknowledging that the measure is less restrictive than an import ban, the Panel also raised the possibility that the compound tariff can be highly trade restrictive, and in some circumstances as restrictive as a ban. Indeed, the Panel stated that, "[b]y its very nature, a tariff *can* reduce the capacity of imports to compete in the domestic market of the country of importation, by increasing the price of the products. If the tariffs are too high, they *can* have a very restrictive, *even prohibitive effect*."²⁵¹ The fact that the Panel did not or could not determine whether the higher specific duty had such a prohibitive effect further supports our view that the Panel was unable to determine the *degree* of trade-restrictiveness of the measure.

5.113. The above findings by the Panel indicate the uncertainty as to the degree to which the compound tariff can be considered to be less trade restrictive than an import ban, and thus support the view that Colombia had not established with sufficient clarity the degree of trade-restrictiveness of the measure.²⁵²

5.114. We note that our understanding of the Panel's findings examined above is in line with the Panel's preliminary conclusion with respect to the assessment of the "necessity" factors. We recall that the Panel found that, "even though Colombia ha[d] demonstrated that the objective of combating money laundering in Colombia serves social interests that could be described as vital and important at the highest degree, Colombia ha[d] not demonstrated the contribution of the compound tariff to the alleged objective of combating money laundering."²⁵³ The Panel also held that, "[f]or this reason, and taking into account the restriction on international trade caused by the compound tariff, Colombia ha[d] failed to show that the compound tariff is a measure necessary to combat money laundering."²⁵⁴ Given our above examination of the relevant Panel findings, we understand that the Panel's weighing and balancing of the "necessity" factors revealed that Colombia had failed to demonstrate that the measure is "necessary" to protect public morals.²⁵⁵

²⁴⁵ Panel Report, para. 7.437.

²⁴⁶ Panel Report, para. 7.444.

²⁴⁷ Colombia's appellant's submission, para. 243.

²⁴⁸ Panel Report, para. 7.442.

²⁴⁹ Panel Report, para. 7.443. (fn omitted)

²⁵⁰ Panel Report, para. 7.444.

²⁵¹ Panel Report, para. 7.441. (emphasis added)

²⁵² We note that the degree of a measure's trade-restrictiveness may be expressed in a qualitative or quantitative manner.

²⁵³ Panel Report, para. 7.445.

²⁵⁴ Panel Report, para. 7.445.

²⁵⁵ Panel Report, para. 7.445.

5.115. Finally, we note that, before the Panel, the parties also advanced arguments as to whether there are any less trade-restrictive alternatives that are reasonably available. Before the Panel, Panama presented three possible alternative measures to the compound tariff: (i) the disciplines of the Customs Valuation Agreement; (ii) customs cooperation and information exchange mechanisms; and (iii) the disciplines of the Agreement on Preshipment Inspection.²⁵⁶ We recall that, "in order to qualify as an alternative, a measure proposed by the complaining Member must be not only less trade restrictive than the measure at issue, but should also 'preserve for the responding Member its right to achieve its desired level of protection with respect to the objective pursued'."²⁵⁷ Given the lack of sufficient clarity regarding the *degree* of contribution of the measure to the objective of combating money laundering, and the *degree* of trade-restrictiveness of the measure, we see no basis to proceed with a comparison of the measure at issue with any possible alternative measures.

5.116. In sum, 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.

5.117. 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.

5.3 Article XX(d) of the GATT 1994

5.3.1 Whether the Panel erred under Article XX(d) in finding that Colombia had 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

5.118. Colombia further appeals the Panel's finding that Colombia had failed to demonstrate that the compound tariff is a measure "designed" 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 1994.²⁵⁸ According to Colombia, the Panel's conclusions regarding whether the measure is "designed" to secure compliance with Article 323 of Colombia's Criminal Code, and whether the measure is "necessary" to secure such compliance, are based entirely on its previous analysis under Article XX(a) of the GATT 1994. In Colombia's view, since the Panel's analysis under Article XX(a) is "fundamentally flawed", the Panel's analysis under Article XX(d) "necessarily suffers from the same flaws".²⁵⁹ Colombia requests, if we reverse the Panel's findings under Article XX(a), that we also reverse the Panel's findings under Article XX(d), and that we complete the legal analysis and find that the measure at issue meets the requirements of Article XX(d) of the GATT 1994.²⁶⁰

5.119. Panama maintains that Colombia's claim of error regarding the Panel's analysis under Article XX(d) relies entirely on the same arguments it presented in challenging the Panel's analysis under Article XX(a), and that Colombia has not developed any arguments on appeal specific to Article XX(d). Characterizing Colombia's claim of error as imprecise and vague, Panama considers that it should be rejected.²⁶¹ In addition, Panama maintains that, since the Panel did not err in its analysis under Article XX(a), the Panel also did not err in its analysis under Article XX(d).

²⁵⁶ Panel Report, para. 7.448.

²⁵⁷ Appellate Body Report, *Brazil – Retreated Tyres*, para. 156 (quoting Appellate Body Report, *US – Gambling*, para. 308).

²⁵⁸ Colombia's Notice of Appeal, para. 8.

²⁵⁹ Colombia's appellant's submission, para. 249.

²⁶⁰ Colombia's appellant's submission, paras. 249-254.

²⁶¹ Panama's appellee's submission, para. 6.6 (referring to Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 179).

Consequently, Panama asks that we reject Colombia's request to reverse the Panel's findings and complete the legal analysis under Article XX(d) of the GATT 1994.²⁶²

5.120. Before the Panel, Colombia asserted a defence under Article XX(d) by maintaining that the compound tariff is "designed" to secure compliance with laws or regulations which are not inconsistent with the provisions of the GATT 1994. The Panel first found that "Colombia ha[d] identified Article 323 of its Criminal Code, which creates the crime of money laundering, as the anti-money laundering legislation with which it seeks to secure compliance by means of the compound tariff."²⁶³ The Panel then turned to assess whether Colombia had demonstrated that its anti-money laundering legislation is not inconsistent with the provisions of the GATT 1994. In this regard, the Panel held that "there [wa]s no reason to consider that Article 323 of the Colombian Criminal Code is itself inconsistent with the provisions of the GATT 1994."²⁶⁴ These findings by the Panel are not appealed.

5.121. Next, the Panel examined whether Colombia had demonstrated that the compound tariff is itself "designed" to secure compliance with Colombia's anti-money laundering legislation. The Panel observed that "Colombia ha[d] used the same arguments to try to show that its compound tariff seeks to combat money laundering as to try to show that its compound tariff seeks to secure compliance with Article 323 of the Colombian Criminal Code".²⁶⁵ The Panel recalled its main findings in the context of Article XX(a), highlighting that it had found that "Colombia had not demonstrated a connection between the compound tariff and the alleged objective of combating money laundering."²⁶⁶ In the Panel's view, the "same considerations" led it to a similar conclusion under Article XX(d), since the "same elements" that led the Panel to conclude that Colombia had failed to demonstrate that the compound tariff is "designed" to combat money laundering also led it to conclude that Colombia had also failed to demonstrate that the measure is "designed" to secure compliance with Article 323 of Colombia's Criminal Code.²⁶⁷ The Panel therefore concluded that, "[i]n fact, on the basis of the totality of the evidence, including the text of Decree No. 456, and the other evidence submitted by the parties, no connection ha[d] been shown to exist between the compound tariff and the alleged objective of securing compliance with the Colombian anti-money laundering provisions, and more specifically Article 323 of the Criminal Code."²⁶⁸

5.122. As is clear from the foregoing discussion, the Panel's examination of the first step of the legal standard under Article XX(d) – i.e. whether the measure is "designed" to secure compliance with Article 323 of Colombia's Criminal Code – relied mainly on reasoning and findings it had developed in the context of its analysis under Article XX(a). We therefore focus on the relevant elements of the legal standard under Article XX(d) of the GATT 1994, and point to certain similarities with a panel's analysis of a defence under Article XX(a) of the GATT 1994, before turning to a more detailed assessment of the Panel's findings.

5.123. In *Korea – Various Measures on Beef*, the Appellate Body explained that, for a respondent to justify provisionally a measure under Article XX(d) of the GATT 1994, the following two elements must be shown: (i) 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; and (ii) the measure must be "necessary" to secure such compliance.²⁶⁹

5.124. Recently, in *Argentina – Financial Services*, the Appellate Body addressed aspects of the two elements of the legal standard as it pertains to a similar exception set out in Article XIV(c) of the General Agreement on Trade in Services (GATS):

With respect to the first element, the phrase "to secure compliance" circumscribes the scope of Article XIV(c) of the GATS, as it speaks to the function of the measures that a Member can seek to justify under this provision. This phrase calls for an initial examination of the relationship between the inconsistent measure and the relevant

²⁶² Panama's appellee's submission, para. 6.8.

²⁶³ Panel Report, para. 7.508.

²⁶⁴ Panel Report, para. 7.512.

²⁶⁵ Panel Report, para. 7.515.

²⁶⁶ Panel Report, para. 7.516.

²⁶⁷ Panel Report, para. 7.517.

²⁶⁸ Panel Report, para. 7.518.

²⁶⁹ Appellate Body Report, *Korea – Various Measures on Beef*, para. 157.

laws or regulations and, for this purpose, directs panels assessing whether a measure secures compliance with laws or regulations to scrutinize the design of the measures sought to be justified. A measure can be said "to secure compliance" with laws or regulations when its design reveals that it secures compliance with specific rules, obligations, or requirements under such laws or regulations, even if the measure cannot be guaranteed to achieve such result with absolute certainty. The more precisely a respondent is able to identify specific rules, obligations, or requirements contained in the GATS-consistent laws or regulations, the more likely it will be able to elucidate how and why the inconsistent measure secures compliance with such laws or regulations. Yet, where the assessment of the design of the measure, including its content and expected operation, reveals that the measure is incapable of securing compliance with specific rules, obligations, or requirements under the relevant law or regulation, as identified by a respondent, further analysis with regard to whether this measure is "necessary" to secure such compliance may not be required. This is because there is no justification under Article XIV(c) for a measure that is not designed to "secure compliance" with a Member's laws or regulations. A panel must not, however, structure its analysis of the first element in such a way as to lead it to truncate its analysis prematurely and thereby foreclose consideration of crucial aspects of the respondent's defence relating to the "necessity" analysis.

The second element entails a more in-depth, holistic analysis of the relationship between the inconsistent measure and the relevant laws or regulations. In particular, this element entails an assessment of whether, in the light of all relevant factors in the "necessity" analysis, this relationship is sufficiently proximate, such that the measure can be deemed to be "necessary" to secure compliance with such laws or regulations.²⁷⁰

5.125. In addressing above the legal standard under Article XX(a), we have noted similar considerations pertaining to the "design" and "necessity" steps of that standard. In that context, we have observed that these two steps of the analysis are conceptually distinct, yet related, aspects of the overall inquiry to be undertaken into whether a respondent has established that the measure at issue is "necessary to protect public morals", and that such an assessment is not entirely disconnected in the sense that certain evidence and considerations may be relevant to both aspects of the defence. This applies equally in the context of Article XX(d) when examining whether the measure at issue is "necessary to secure compliance with laws or regulations which are not inconsistent" with the GATT 1994.

5.126. We further recognize that, while the content of the legal standards under Article XX(a) and Article XX(d) differ, there are also certain similarities that are relevant for our consideration of Colombia's appeal. Under both paragraphs (a) and (d) of Article XX, justification is sought for an otherwise GATT-inconsistent measure. Under Article XX(a), the societal interest or value at stake must fall within the scope of "public morals", whereas the interests and values reflected in the "laws or regulations" under Article XX(d) are not limited in a similar way. Also, recourse to Article XX(d) requires identification of specific rules, obligations, or requirements of laws or regulations that are not themselves GATT-inconsistent, while such a requirement is absent in Article XX(a).²⁷¹ The examination of a defence under both Article XX(a) and Article XX(d) requires an initial, threshold examination of the design of the measure at issue, including its content, structure, and expected operation. In the case of Article XX(a), a panel must examine the relationship between the measure and the protection of public morals; in the case of Article XX(d), a panel must examine the relationship between the measure and securing compliance with relevant provisions of laws or regulations that are not GATT-inconsistent.²⁷² Thus, while the terms

²⁷⁰ Appellate Body Report, *Argentina – Financial Services*, paras. 6.203-6.204. (fn omitted) As we have noted *supra* at footnote 156, Article XIV sets out the general exceptions from obligations under the GATS in a similar manner to Article XX of the GATT 1994. The Appellate Body has indicated that, since similar language is used in both provisions, previous decisions under Article XX of the GATT 1994 are relevant for the analysis under Article XIV of the GATS. (Appellate Body Report, *US – Gambling*, para. 291) We consider that the reverse is also true.

²⁷¹ Appellate Body Report, *Argentina – Financial Services*, para. 6.203.

²⁷² The Appellate Body has remarked that the objectives of, or the common interests or values protected by, the relevant law or regulation may assist in elucidating the content of specific rules, obligations, or requirements in such law or regulation. (Appellate Body Report, *Argentina – Financial Services*, fn 495 to para. 6.203)

"to protect" and "to secure compliance" may differ, we consider that both terms involve establishing the existence of such a relationship. If the assessment of the design of the measure, including its content, structure, and expected operation, reveals that the measure is incapable of, in the case of Article XX(a), protecting public morals, or, in the case of Article XX(d), securing compliance with relevant provisions of laws or regulations that are not GATT-inconsistent, there is not a relationship that meets the requirements of the "design" step. In either situation, further analysis with regard to whether the measure is "necessary" would not be required. This is because there can be no justification under Article XX(a) for a measure that is not "designed" to protect public morals, just as there can be no justification under Article XX(d) for a measure that is not "designed" to secure compliance with relevant provisions of laws or regulations that are not GATT-inconsistent.²⁷³ However, as indicated by the Appellate Body, in both cases, "[a] panel must not ... structure its analysis of the ["design" step] in such a way as to lead it to truncate its analysis prematurely and thereby foreclose consideration of crucial aspects of the respondent's defence relating to the 'necessity' analysis."²⁷⁴

5.127. In the circumstances of this case, the analysis of the "design" of the measure as it relates to Colombia's defences under Article XX(a) and Article XX(d) of the GATT 1994 examines what amounts to a similar relationship. In the case of Article XX(a), as we have explained, the question before the Panel was whether its examination of the "design" of the measure revealed that there is a relationship between the measure and protecting public morals by combating money laundering. In the context of Article XX(d), the question before the Panel was whether its examination of the "design" of the measure revealed that there is a relationship between the measure and securing compliance with a specific rule, obligation, or requirement of Colombian legislation, namely, Article 323 of its Criminal Code, which combats money laundering by criminalizing such conduct. Thus, provided that the Panel's reasoning accounts for the differences in the legal standards under paragraph (a) and paragraph (d) of Article XX, we do not see that the Panel acted improperly simply because it relied, in the context of its application of the legal standard under Article XX(d), on reasoning it had developed in assessing Colombia's defence under Article XX(a). As the Panel observed, Colombia itself had presented the same arguments and evidence in respect of both paragraph (a) and paragraph (d) of Article XX. Indeed, in both instances, Colombia maintained that the compound tariff seeks to combat money laundering so as to secure compliance with Article 323 of Colombia's Criminal Code because, "by its design, [it] reduces the incentives for criminal groups to use imports of apparel and footwear for money laundering purposes, by means of artificially low prices."²⁷⁵ In the context of this dispute, the objective of combating money laundering is also reflected in a provision of a Colombian law that combats money laundering by criminalizing such conduct. In these circumstances, the Panel did not act improperly by examining similar aspects of the manner in which the measure did or did not demonstrate a relationship to combating money laundering activities, or by relying on similar considerations and reasoning in reaching its conclusions under Article XX(a) and Article XX(d).²⁷⁶

5.128. At the same time, however, we consider that the concerns we have raised in the context of the Panel's assessment of whether the compound tariff is "designed" to protect public morals under Article XX(a) are also relevant in the context of the assessment under Article XX(d). We recall that, in our examination of Colombia's claim on appeal under Article XX(a), we have reviewed a number of findings made by the Panel in its assessment of the relationship between the measure and combating money laundering.

5.129. In that prior analysis, we have noted that, with regard to whether the price thresholds set out in the measure are such that any price below them is "artificially low", the Panel stated that "it cannot be ruled out that the importation of goods at prices below the thresholds established in Decree No. 456 could, in practice, reflect 'artificially low' prices that do not reflect market conditions."²⁷⁷ By stating that "it cannot be ruled out" that goods priced below the thresholds

²⁷³ See Appellate Body Reports, *Argentina – Financial Services*, para. 6.203; and *Mexico – Taxes on Soft Drinks*, para. 72.

²⁷⁴ Appellate Body Report, *Argentina – Financial Services*, para. 6.203.

²⁷⁵ Panel Report, para. 7.515.

²⁷⁶ We recall that neither party contests the Panel's conclusions that combating money laundering is a Colombian policy "designed" to protect public morals (Panel Report, para. 7.339), or that Article 323 of Colombia's Criminal Code forms part of legislation that criminalizes money laundering activities (para. 7.508). Moreover, neither party appeals the Panel's finding that there is "no reason to consider that Article 323 of the Colombian Criminal Code is itself inconsistent with the provisions of the GATT 1994." (Ibid., para. 7.512)

²⁷⁷ Panel Report, para. 7.359.

reflect "artificially low" prices, the Panel acknowledged that at least some transactions at or below the thresholds could reflect such prices. Second, the Panel found that "the information available suggests that the undervaluation of imports is, in fact, one of the methods used for money laundering detected by the Colombian authorities."²⁷⁸ By making this statement, the Panel acknowledged that, in Colombia, one of the methods used to launder money is the undervaluation of imports.²⁷⁹

5.130. Moreover, we have considered that additional findings by the Panel show a relationship between the compound tariff and the money laundering activities that Colombia seeks to discourage through the application of the challenged measure. For instance, we have noted the Panel's findings that the compound tariff leads to an increase in the unit price of apparel and footwear imports, thereby reducing the artificially high profit margin that is the incentive for using these imports to launder money. The Panel found, for example, that, "since the compound tariff entered into force, Colombian imports of the products in question have declined and average import prices have increased."²⁸⁰ In addition, the Panel also accepted that "the compound tariff could reduce the incentives for importing textile products, apparel and footwear at prices below the thresholds laid down in Decree No. 456"²⁸¹, and that "the effect of the compound tariff would be limited to reducing the profit margin of the persons intending to use imports for money laundering purposes".²⁸²

5.131. In our view, these findings demonstrate the Panel's recognition, in respect of its analysis under both Article XX(a) and Article XX(d), 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. Taking these findings together, we consider that the Panel itself 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.

5.132. We recall that the Panel concluded that Colombia had failed to establish a relationship between the compound tariff and securing compliance with provisions of Colombian anti-money laundering legislation.²⁸³ In this regard, we further recall that a panel may cease its analysis of a defence under Article XX(d) at the stage of assessing the "design" of the measure only where the measure at issue is incapable of securing compliance with relevant provisions of laws or regulations that are not GATT-inconsistent, such that there is no relationship between the measure and securing such compliance. In the light of the cited passages from the Panel Report, we consider that the Panel was not in a situation in which the measure at issue is incapable of securing such compliance. Although the Panel concluded that Colombia had failed to establish a relationship between the compound tariff and Article 323 of Colombia's Criminal Code, we consider that this conclusion is belied by the Panel findings we examined above. 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. Thus, the Panel's analysis indicates 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.

5.133. Consequently, the Panel should not have ceased its analysis at this stage of its review of Colombia's defence under Article XX(d). As we have noted, a panel errs under Article XX(d) if, in assessing the "design" of the measure, it does not proceed to an analysis of "necessity" once it has determined that the measure is not incapable of securing compliance with relevant provisions of

²⁷⁸ Panel Report, para. 7.366.

²⁷⁹ The Panel made additional findings that further demonstrate the Panel's understanding regarding the existence of trade-based money laundering through the importation of undervalued goods. For instance, the Panel explained that one of the methods for laundering money that the compound tariff seeks to combat is the "transport of money of illicit origin to another country to purchase goods which are introduced into the local country by means of technical smuggling based on underinvoicing". (Panel Report, para. 7.370 (quoting Colombia's response to Panel question No. 44, para. 101))

²⁸⁰ Panel Report, para. 7.428.

²⁸¹ Panel Report, para. 7.435.

²⁸² Panel Report, para. 7.436.

²⁸³ Panel Report, para. 7.518.

laws or regulations that are not GATT-inconsistent, such that there is a relationship between the measure and securing such compliance. Otherwise, a panel would foreclose an assessment of whether the degree of contribution, when weighed and balanced against the degree of trade-restrictiveness and the importance of the interests and values at stake, is sufficient to justify the measure under Article XX(d).

5.134. We recall that, having found that Colombia had not shown that the compound tariff is a measure "designed" to secure compliance with Article 323 of the Criminal Code, the Panel concluded that there was no need to examine whether the compound tariff is "necessary" to secure compliance with Colombian anti-money laundering legislation. Nevertheless, "in order to be exhaustive in its analysis", the Panel evaluated whether the measure is "necessary" by assuming, for the sake of argument, that the compound tariff is "designed" to secure such compliance.²⁸⁴ We note, in any event, that the Panel's ultimate conclusion as to the availability of the Article XX(d) defence to Colombia was founded solely on its conclusion that Colombia had not demonstrated that the compound tariff is "designed" to secure compliance with Article 323 of Colombia's Criminal Code.

5.135. In sum, 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.

5.136. We therefore reverse the Panel's finding, in paragraph 7.519 of its Report, that Colombia has failed to demonstrate that the compound tariff is "designed" to secure compliance with Article 323 of Colombia's Criminal Code. 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 its 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.

5.3.2 Completion of the legal analysis

5.137. This brings us to Colombia's request that we complete the legal analysis and find that the measure at issue meets the requirements set out in Article XX(d) of the GATT 1994. Colombia contends that it had demonstrated before the Panel that the measure is aimed at securing compliance with Colombian laws and regulations against money laundering and the financing of other criminal activities. Colombia points out that money laundering is a criminal offense in Colombia under Article 323 of its Criminal Code, and that the Panel found that Article 323 is consistent with the provisions of the GATT 1994.²⁸⁵ Colombia adds that the use of imports of apparel and footwear at artificially low prices to launder money is well established by competent Colombian authorities²⁸⁶ and international bodies²⁸⁷, and that the Panel acknowledged that criminal groups use imports of apparel and footwear at artificially low prices to launder illicit money.²⁸⁸ Therefore, Colombia asserts, the measure is "designed" to secure compliance with its anti-money laundering legislation, as it discourages criminal groups from using imports of apparel and footwear at artificially low prices to launder money.²⁸⁹

²⁸⁴ Panel Report, para. 7.520.

²⁸⁵ Colombia's appellant's submission, para. 250 (referring to Panel Report, para. 7.512).

²⁸⁶ Colombia's appellant's submission, para. 251 (referring to Ministry of Finance and Public Credit, National Customs and Excise Directorate, and Information and Financial Analysis Unit, *Money Laundering Typologies Related to Smuggling*, January 2006 (Panel Exhibit COL-10)).

²⁸⁷ Colombia's appellant's submission, para. 251 (referring to Financial Action Task Force (FATF), *Trade-Based Money Laundering*, 23 June 2006 (Panel Exhibit COL-11); and *Money Laundering Vulnerabilities of Free Trade Zones*, March 2010 (Panel Exhibit COL-12)).

²⁸⁸ Colombia's appellant's submission, para. 251.

²⁸⁹ Colombia's appellant's submission, para. 252.

5.138. We begin by recalling the Panel's finding that "Article 323 of [Colombia's] Criminal Code, which creates the crime of money laundering, [i]s the anti-money laundering legislation with which [Colombia] seeks to secure compliance by means of the compound tariff."²⁹⁰ This finding is not challenged on appeal. We therefore consider that, in the circumstances of this dispute, the specific provision of the legislation with which Colombia seeks to secure compliance within the meaning of Article XX(d) of the GATT 1994 is the prohibition of money laundering set out in Article 323 of Colombia's Criminal Code.

5.139. Article XX(d) also indicates that the laws or regulations with which the measure at issue secures compliance must not be inconsistent with the provisions of the GATT 1994. In this regard, the Panel found that "there is no reason to consider that Article 323 of the Colombian Criminal Code is itself inconsistent with the provisions of the GATT 1994."²⁹¹ This finding is also not challenged on appeal. We therefore see no basis to consider that Article 323 is inconsistent with the provisions of the GATT 1994.

5.140. Our prior examination of Colombia's claim 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 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.

5.141. 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.

5.142. We now proceed to examine whether the compound tariff is a measure "necessary" to secure compliance with laws or regulations that are not GATT-inconsistent, within the meaning of Article XX(d) of the GATT 1994. We recall that a "necessity" analysis involves a process of "weighing and balancing" a series of factors, including the importance of the societal interest or value at stake, the contribution of the measure to the objective it pursues, and the trade-restrictiveness of the measure.²⁹² We further recall that each of these factors must be demonstrated with sufficient clarity in order to conduct a proper weighing and balancing exercise that may yield a conclusion that the measure is "necessary".

5.143. Turning to Colombia's request for completion of the legal analysis, we note that Colombia considers that it has provided sufficient arguments and evidence to demonstrate, and that certain conclusions by the Panel provide a sufficient basis to find, that the measure at issue is "necessary" to secure compliance with Article 323 of the Criminal Code as regards money laundering operations that use undervalued imports of apparel and footwear.²⁹³

5.144. With respect to the importance of the interests or values at stake, the Panel noted Colombia's position that such interests or values in this dispute are vital and important in the highest degree, and that Panama does not question that the fight against money laundering is a societal interest that could be characterized as vital and important in the highest degree.²⁹⁴ The Panel therefore considered that, for reasons similar to those mentioned in its analysis under Article XX(a), securing compliance with Article 323 of Colombia's Criminal Code reflects societal

²⁹⁰ Panel Report, para. 7.508.

²⁹¹ Panel Report, para. 7.512.

²⁹² See Appellate Body Reports, *Korea – Various Measures on Beef*, para. 164; *US – Gambling*, para. 306; *Brazil – Retreaded Tyres*, para. 182; and *EC – Seal Products*, para. 5.169. Moreover, in most cases, a comparison between the challenged measure and possible alternatives should subsequently be undertaken. (Appellate Body Reports, *EC – Seal Products*, para. 5.169 (referring to Appellate Body Report, *US – Gambling*, para. 307))

²⁹³ Colombia's appellant's submission, paras. 253-254 (referring to Panel Report, paras. 7.408, 7.436, 7.444, and 7.448-7.469).

²⁹⁴ Panel Report, para. 7.522.

interests that can be characterized as vital and important in the highest degree.²⁹⁵ We note that this finding is not challenged on appeal.

5.145. We now turn to examine the contribution of the measure to the objective it pursues. Above, we have identified a number of findings concerning the Panel's understanding regarding the relationship between the measure and the objective of securing compliance with Colombian anti-money laundering legislation, namely, Article 323 of Colombia's Criminal Code. We consider that the same findings of the Panel that led us to conclude 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, also indicate that there may be at least some contribution by the compound tariff to securing such compliance. As we have noted, various findings of the Panel demonstrate its understanding 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. We therefore consider that these findings establish the Panel's recognition that there may be at least some contribution by the measure to securing compliance with Article 323 of Colombia's Criminal Code.

5.146. However, while the Panel's findings that we have discussed indicate that there may be *at least some* contribution, they are also indeterminate as to the *degree* of such contribution. As we have noted, various findings by the Panel highlight the lack of sufficient clarity surrounding the amount or proportion of import transactions involving the products at issue that are actually used for money laundering purposes. Moreover, we have noted findings by the Panel that indicate that the Panel did not have much clarity as to how effective the disincentive of the compound tariff is as a means of combating money laundering. These considerations regarding the uncertainty surrounding the amount or proportion of imported goods below the thresholds that are actually used for money laundering purposes, as well as the extent to which the compound tariff acts as a disincentive to money laundering, indicate the Panel's view that Colombia had not demonstrated with sufficient clarity the *degree* of contribution made by the compound tariff to the objective of combating money laundering.²⁹⁶ The Panel's uncertainty is also evident in its overall conclusion that, "[t]aking into account the relevant facts and relevant circumstances of the case, including the design, architecture and revealing structure of the compound tariff", Colombia had "failed to demonstrate the contribution of the compound tariff to the objective of securing compliance with the Colombian anti-money laundering legislation".²⁹⁷

5.147. Turning to the trade-restrictiveness of the measure at issue, we note that the Panel found that "the compound tariff is less trade-restrictive than a ban on imports".²⁹⁸ This finding by the Panel reflects uncertainty as to the *degree* of trade-restrictiveness of the measure at issue because it does not indicate how much less trade restrictive the measure is in comparison to an import ban. We also note that, despite acknowledging that the measure at issue is less restrictive than an import ban, the Panel had previously raised the possibility that the compound tariff can be highly trade restrictive, and in some circumstances as restrictive as a ban. Indeed, the Panel stated that, "[b]y its very nature, a tariff *can* reduce the capacity of imports to compete in the domestic market of the country of importation, by increasing the price of the products. If the tariffs are too high, they *can* have a very restrictive, *even prohibitive effect*."²⁹⁹ The fact that the Panel did not or could not determine whether the higher specific duty had such a prohibitive effect further supports our view that the Panel was unable to determine the *degree* of trade-restrictiveness of the measure. In our view, the above findings by the Panel indicate the uncertainty as to the degree to which the compound tariff can be considered to be less trade restrictive than an import ban, and thus support the view that Colombia had not established with sufficient clarity the degree of trade-restrictiveness of the measure.³⁰⁰

²⁹⁵ Panel Report, paras. 7.523-7.524.

²⁹⁶ We note that, in assessing the "necessity" of a measure, the degree of a measure's contribution to its objective may be expressed in a qualitative or quantitative manner.

²⁹⁷ Panel Report, para. 7.528.

²⁹⁸ Panel Report, para. 7.530.

²⁹⁹ Panel Report, para. 7.441. (emphasis added)

³⁰⁰ In addition, as we have noted in the context of our analysis under Article XX(a), given the lack of sufficient clarity regarding the degrees of contribution and trade-restrictiveness of the measure, there is no basis to proceed in comparing the measure at issue with any possible alternative measures regarding their contribution and trade-restrictiveness.

5.148. We note that our understanding of the Panel's findings examined above is in line with the Panel's preliminary conclusion with respect to the assessment of the "necessity" factors. We recall that the Panel found that, "even though the objective of securing compliance with the Colombian anti-money laundering legislation reflects social interests that could be characterized as vital and important in the highest degree, Colombia ha[d] failed to demonstrate the contribution of the compound tariff to the alleged objective of securing compliance with the Colombian anti-money laundering legislation."³⁰¹ The Panel also held that, "[f]or this reason, and taking into account the restriction on international trade caused by the compound tariff, Colombia ha[d] failed to demonstrate that the compound tariff is a measure necessary to secure compliance with the Colombian anti-money laundering legislation and, more specifically, Article 323 of the Criminal Code."³⁰² Given our above examination of the relevant Panel findings, we understand that the Panel's weighing and balancing of the "necessity" factors revealed that Colombia had failed to demonstrate that the measure is "necessary" to secure compliance with laws or regulations that are not GATT-inconsistent.³⁰³

5.149. In sum, 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.

5.150. 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.

5.4 Chapeau of Article XX of the GATT 1994

5.151. Finally, we take note of Colombia's appeal of the Panel's findings pertaining to the chapeau of Article XX of the GATT 1994. Colombia claims that the Panel erred under Article XX and Article XXIV of the GATT 1994, and under Article 11 of the DSU, in rejecting Colombia's contention that an FTA-based exemption from the compound tariff is consistent with Article XXIV, and therefore does not contravene the requirements of the chapeau of Article XX.³⁰⁴ In addition, Colombia claims that the Panel erred under Article XX by failing to establish that any treatment arising from certain exemptions reflects discrimination "between countries where the same conditions prevail", and that the Panel also erred under Article 11 of the DSU by making the case for Panama, and by ignoring Colombia's arguments as to why the exemptions are justified.³⁰⁵

5.152. We recall the Panel's finding that, because Colombia had failed to demonstrate that its compound tariff is justified under Article XX(a) or Article XX(d) of the GATT 1994, it was not necessary for the Panel to analyse whether the compound tariff meets the requirements of the chapeau.³⁰⁶ Nevertheless, "in order to be exhaustive in its analysis", the Panel conducted its assessment of the chapeau by assuming, for the sake of argument, that Colombia had succeeded in showing that its measure is provisionally justified under Article XX(a) or Article XX(d) of the

³⁰¹ Panel Report, para. 7.532.

³⁰² Panel Report, para. 7.532.

³⁰³ Panel Report, para. 7.532.

³⁰⁴ Colombia's appellant's submission, paras. 256-280. Colombia also claims that the Panel erred under Article 6.2 of the DSU by allegedly finding that Colombia's arguments concerning Article XXIV of the GATT 1994 were not within its terms of reference. (See *ibid.*, para. 271; and Colombia's Notice of Appeal, para. 8)

³⁰⁵ Colombia's appellant's submission, paras. 281-300. The relevant exemptions are those for imports into Colombia's Special Customs Regime Zones, and under the Plan Vallejo.

³⁰⁶ Panel Report, para. 7.550.

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
