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

RECOURSE TO ARTICLE 21.5 OF THE DSU BY COLOMBIA

RECOURSE TO ARTICLE 21.5 OF THE DSU BY PANAMA

REPORT OF THE PANELS

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US – Shrimp (Ecuador)	Panel Report, *United States – Anti-Dumping Measure on Shrimp from Ecuador*, WT/DS335/R, adopted on 20 February 2007, DSR 2007:II, p. 425
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US – Wool Shirts and Blouses	Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, adopted 23 May 1997, and Corr.1, DSR 1997:I, p. 323
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EXHIBITS REFERRED TO IN THIS REPORT

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PAN–46	"Two decrees strengthening customs control of footwear and clothing", *El Espectador*	*"Dos decretos que fortalecen control aduanero de calzado y ropa", El Espectador (2 de noviembre de 2016)* ("Two decrees strengthening customs control of footwear and clothing", *El Espectador* (2 November 2016))
PAN–50	"Entry of underinvoiced footwear into Colombia reduced by more than 90%", *Vanguardia*	*Y. Rodríguez Barajas, "Se redujo en más del 90% el ingreso de calzado subfacturado en Colombia", Vanguardia* (Y. Rodríguez Barajas, "Entry of underinvoiced footwear into Colombia reduced by more than 90%", *Vanguardia*)
PAN–63	Resolution No. 2199/2005	*Resolución No. 2199 de la Dirección General de Impuestos y Aduanas Nacionales, de fecha 30 de marzo de 2005, por la cual se reglamenta el artículo 74-1 del Decreto No. 2685 de 1999* (Resolution No. 2199 of the National Customs and Excise Directorate, dated 30 March 2005, regulating Article 74-1 of Decree No. 2685 of 1999)
PAN–64	Resolution No. 6934/2005	*Resolución No. 6934 de la Dirección General de Impuestos y Aduanas Nacionales, de fecha 8 de agosto de 2005, por la cual se modifica la Resolución No. 02199 del 30 de marzo de 2005* (Resolution No. 6934 of the National Customs and Excise Directorate, dated 8 August 2005, amending Resolution No. 02199 of 30 March 2005)
PAN–65	"New decree on customs control for textiles to be issued", *Vanguardia*	*"Se expedirá un nuevo decreto de control aduanero para textiles", Vanguardia (17 de agosto de 2017)* ("New decree on customs control for textiles to be issued", *Vanguardia* (17 August 2017))
PAN–83	Communications between the parties in the arbitration under Article 21.3(c)	*Comunicaciones entre las partes en el arbitraje según el párrafo 3 c) del artículo 21, Acta de sesión extraordinaria de la Comisión Interinstitucional de Lucha contra el Contrabando, página 4. COL-ARB-02* (Communications between the parties in the arbitration under Article 21.3(c), Minutes of the Special Session of the Inter-Institutional Commission against Smuggling, p. 4, COL-ARB-02)
PAN–84	Decree No. 436/2018	*Decreto No. 436 del Ministerio de Hacienda y Crédito Público de Colombia, de fecha 6 de marzo de 2018, por el cual se modifica el Decreto No. 2218/2017* (Decree No. 436 of the Ministry of Finance and Public Credit of Colombia, dated 6 March 2018, modifying Decree No. 2218/2017

Exhibit	Short title	Title
PAN−104	Circular No. 0170	*Circular No. 0170 de la DIAN, de fecha 10 de octubre de 2002 sobre la prevención y control al lavado de activos* (DIAN Circular No. 0170, dated 10 October 2002, on the prevention and control of money laundering

ABBREVIATIONS USED IN THIS REPORT

Abbreviation	Description
Customs Valuation Agreement	Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994
DIAN	*Dirección de Impuestos y Aduanas Nacionales de Colombia* (National Customs and Excise Directorate of Colombia)
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
f.o.b.	free on board
GATT 1994	General Agreement on Tariffs and Trade 1994
kg	kilograms
MFN	Most favoured nation
NIT	*número de identificación tributaria* (Tax Identification Number)
RUT	*registro único tributario* (Single Tax Register)
Triple A Committee	Committee on Customs, Tariffs and Foreign Trade
UAP	*usuarios aduaneros permanentes* (Regular Customs Users)
USD	United States dollars
WTO	World Trade Organization

1 INTRODUCTION

1.1. This report contains the findings of the Panels established separately at the request of Colombia and Panama under Article 21.5 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). Both proceedings relate to Colombia's compliance with the rulings and recommendations made by the Dispute Settlement Body (DSB) in the original proceeding in *Colombia – Measures Relating to the Importation of Textiles, Apparel and Footwear*.

1.2. In the original proceeding, Panama challenged the imposition by Colombia of a compound tariff affecting imports of textiles, apparel and footwear. The tariff was regulated by Decree No. 074 of the Ministry of Trade, Industry and Tourism of Colombia, dated 23 January 2013 (Decree No. 074/2013), which was subsequently amended by Decree No. 456 of the Ministry of Trade, Industry and Tourism of Colombia, dated 28 February 2014 (Decree No. 456/2014).[1]

1.3. The Panel found that, in certain situations involving imports of products classified in Chapters 61, 62, 63 and 64 of the Colombian Customs Tariff[2], the compound tariff constituted an ordinary customs duty which exceeded the levels bound in Colombia's Schedule of Concessions, and was therefore inconsistent with Article II:1(b), first sentence, of the GATT 1994. It also found that in those instances, the compound tariff accorded less favourable treatment than that provided for in Colombia's Schedule of Concessions, in a manner inconsistent with Article II:1(a) of the GATT 1994. Lastly, the Panel also found that Colombia had failed to demonstrate that the compound tariff was a measure necessary to protect public morals within the meaning of Article XX(a) of the GATT 1994 or a measure necessary to secure compliance with the Colombian anti-money laundering legislation, within the meaning of Article XX(d) of the GATT 1994.[3]

1.4. The Panel Report was circulated to Members on 27 November 2015. On 22 January 2016, Colombia notified the DSB of its decision to appeal to the Appellate Body certain issues of law and legal interpretations developed in the report. In its report circulated to Members on 7 June 2016, the Appellate Body found that, 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, in the instances identified in the Panel Report, the compound tariff exceeded the tariff rates bound in Colombia's Schedule of Concessions, and was therefore inconsistent with Articles II:1(a) and II:1(b) of the GATT 1994, confirming the Panel's findings in that respect.[4] In addition, the Appellate Body found that Colombia had failed to demonstrate that the compound tariff was a measure necessary to protect public morals within the meaning of Article XX(a) of the GATT 1994 or necessary to secure compliance with laws or regulations which are not inconsistent with the GATT 1994 within the meaning of Article XX(d) of that Agreement.[5] Consequently, the Appellate Body recommended that Colombia bring the measure found to be inconsistent with the GATT 1994 into conformity with its obligations under that Agreement.[6]

1.5. At its meeting on 22 June 2016, the DSB adopted the Appellate Body Report and the Panel Report, as modified by the Appellate Body Report.[7]

1.6. At the DSB meeting held on 21 July 2016, Colombia stated its intention to implement the DSB's recommendations and rulings and indicated that it would need a reasonable period of time to do so.[8] On 8 August 2016, Panama requested that the reasonable period of time be determined through binding arbitration pursuant to Article 21.3(c) of the DSU.[9] On 30 August 2016, the Director-General appointed Mr Giorgio Sacerdoti to act as arbitrator under Article 21.3(c) of the DSU. Mr Sacerdoti accepted this appointment by letter dated 5 September 2016.[10]

[1] Panel Report, paras. 1.1, 2.1 and 2.3.
[2] Extract from Decree No. 4927/2011 (Exhibit COL-2).
[3] Panel Report, *Colombia – Textiles*, paras. 7.189, 7.192-7.194, 7.471, 7.537, 7.591-7.592 and 8.2-8.6.
[4] Appellate Body Report, *Colombia – Textiles,* paras. 6.3.a and 6.3.b.
[5] Appellate Body Report, *Colombia – Textiles*, paras. 6.4-6.11.
[6] Appellate Body Report, *Colombia – Textiles,* para. 6.12.
[7] DSB, Minutes of the meeting held on 22 June 2016, WT/DSB/M/380, para. 9.7.
[8] DSB, Minutes of the meeting held on 21 July 2016, WT/DSB/M/383, para. 2.2.
[9] Panama's request for arbitration under Article 21.3(c) of the DSU, WT/DS461/11.
[10] Note by the Secretariat on appointment of arbitrator under Article 21.3(c) of the DSU (WT/DS461/12).

1.7. On 15 November 2016, the Award of the Arbitrator was circulated to Members. The Arbitrator determined the reasonable period of time to be seven months from the date on which the DSB adopted the Panel and Appellate Body reports. Accordingly, the reasonable period of time expired on 22 January 2017.[11]

1.8. On 13 December 2016, Colombia notified the DSB of the adoption of Decree No. 1744 of the Ministry of Trade, Industry and Tourism of Colombia, dated 2 November 2016, partially modifying the Customs Tariff (Decree No. 1744/2016).[12] This Decree modified the tariffs applicable to imports of products classified in Chapters 61 and 62 of the Customs Tariff, and certain items in Chapter 64. Colombia indicated that it had fully complied with the DSB's recommendations and rulings adopted on 22 June 2016.[13]

1.9. On 9 February 2017, Panama filed a request with the DSB for authorization to suspend concessions or other obligations in the amount of US$210 million, pursuant to Article 22.2 of the DSU.[14] In a communication of 17 February 2017 to the DSB, Colombia challenged the request submitted by Panama.[15] At its meeting on 20 February 2017, the DSB noted that the matter raised by Colombia in document WT/DS461/18 had been referred to arbitration, pursuant to Article 22.6 of the DSU.[16]

1.1 Panel establishment and composition

1.1.1 Establishment of the compliance panel requested by Colombia

1.10. On 9 February 2017, Colombia requested the establishment of a compliance panel under Article 21.5 of the DSU.[17] At the DSB meeting on 20 February 2017, Panama objected to the establishment of the compliance panel requested by Colombia, arguing that no consultations had been held.[18] Without prejudice to its position that, in this case, Article 21.5 of the DSU would not require the request for consultations as a preliminary to the panel request, on 27 February 2017 Colombia requested consultations with Panama pursuant to Article 21.5 and Article 4 of the DSU and Article XXII of the GATT 1994.[19]

1.11. At its meeting on 6 March 2017, the DSB referred to the original Panel, if possible, the matter raised by Colombia in document WT/DS461/17, pursuant to Article 21.5 of the DSU.[20]

1.12. The Panel's terms of reference are the following:

> To examine, in the light of the relevant provisions of the covered agreements cited by the parties to the dispute, the matter referred to the DSB by Colombia in document WT/DS461/17 and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.[21]

1.13. Australia, China, Ecuador, the European Union, Guatemala, Honduras, India, Korea, the Russian Federation, Chinese Taipei and the United States reserved their third-party rights to participate in the compliance panel proceedings.

1.1.2 Establishment of the compliance panel requested by Panama

1.14. On 9 March 2017, Panama requested consultations with Colombia under Article 21.5 and Article 4 of the DSU, Article 19 of the Agreement on Implementation of Article VII of the General

[11] Award of the Arbitrator, *Colombia – Textiles (Article 21.3(c))*, para. 4.1 (WT/DS461/13).
[12] Exhibits COL-1/PAN-1.
[13] Communication from Colombia, WT/DS461/15.
[14] Recourse to Article 22.2 of the DSU by Panama, WT/DS461/16.
[15] Recourse to Article 22.6 of the DSU by Colombia, WT/DS461/18.
[16] DSB, Minutes of the meeting held on 20 February 2017, WT/DSB/M/392, para. 8.20.
[17] Colombia's request for the establishment of a panel, WT/DS461/17.
[18] DSB, Minutes of the meeting held on 20 February 2017, WT/DSB/M/392, para. 9.4.
[19] Colombia's request for consultations, WT/DS/461/19.
[20] DSB, Minutes of the meeting held on 6 March 2017, WT/DSB/M/393, para. 1.14.
[21] Note by the Secretariat on the constitution of the Panel established at the request of Colombia, WT/DS461/24, para. 2.

Agreement on Tariffs and Trade 1994 (Customs Valuation Agreement) and Article XXII of the GATT 1994.[22] The consultations took place on 28 March 2017.

1.15. On 10 May 2017, Panama requested the establishment of a panel pursuant to Article 6 and Article 21.5 of the DSU.[23]

1.16. At its meeting on 19 June 2017, the DSB referred to the original Panel, if possible, the matter raised by Panama in document WT/DS461/22, in accordance with Article 21.5 of the DSU.[24]

1.17. The Panel's terms of reference are the following:

> To examine, in the light of the relevant provisions of the covered agreements cited by the parties to the dispute, the matter referred to the DSB by Panama in document WT/DS461/22 and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.[25]

1.18. Australia, China, Ecuador, the European Union, Guatemala, Honduras, India, Indonesia, Japan, Kazakhstan, Korea, the Russian Federation, Singapore, Chinese Taipei and the United States reserved their third-party rights to participate in the compliance panel proceedings.

1.1.3 Meeting prior to composition of the Panels

1.19. On 24 July 2017, in the absence of a sequencing agreement, the WTO Secretariat met with the parties to ascertain their intentions with regard to the conduct of the two compliance proceedings and the arbitration provided for in Article 22.6 of the DSU. As a result of the meeting and subsequent exchanges, the parties separately expressed the following points of view:

a. Both compliance proceedings (including review by the Panels and possible subsequent appeal) would take place prior to the arbitration provided for in Article 22.6 of the DSU; a single harmonized timetable would be adopted, with uniform deadlines for the presentation of written submissions by the parties and third parties; a single joint substantive meeting would be held; and a single report would be issued;

b. Members that reserved their third-party rights solely in connection with the compliance proceeding initiated at Panama's request would also have access, for practical purposes, to the compliance proceeding initiated at Colombia's request.

1.1.4 Composition of the Panels

1.20. Pursuant to Article 21.5 of the DSU, on 6 September 2017[26] both Panels were composed with the same members as the original Panel:

Chairman: Mr Elbio Rosselli

Members: Mr Carlos Véjar Borrego
Mr Fabián Villarroel Ríos

1.21. For ease of reference, the term "Panel" will be used in the singular in this report to refer to both panels. If one panel needs to be referred to in particular, it will be expressly identified.

[22] Panama's request for consultations, WT/DS461/21.
[23] Panama's request for the establishment of a panel, WT/DS461/22.
[24] DSB, Minutes of the meeting held on 19 June 2017, WT/DSB/M/398, para. 6.9.
[25] Note by the Secretariat on the constitution of the Panel established at the request of Panama, WT/DS461/25, para. 2.
[26] On the same date, 6 September 2017, and in accordance with Article 22.6 of the DSU, the Arbitrator was constituted with the original panelists (Note by the Secretariat on recourse to Article 22.6 of the DSU by Colombia, WT/DS461/23).

1.2 Panel proceedings

1.22. After consultation with the parties and in the light of the views expressed by them (see para. 1.19 above), the Panel adopted harmonized working procedures on 15 September 2017.[27] In particular, paragraph 5 of the harmonized working procedures provides that "[the] Panel shall hold a joint substantive meeting and shall issue a single report concerning both proceedings".

1.23. The Panel also adopted a harmonized timetable for both proceedings on 19 September 2017. The harmonized timetable was modified on 18 January, 23 March, 5 April, 25 May, 14 June and 20 July 2018.

1.24. In a communication dated 12 January 2018, Colombia stated that it was having difficulties in accessing some of the exhibits provided by Panama, since they were not available among the printed exhibits or in the CD-ROMs or the Digital Dispute Settlement Registry.[28] In view of the foregoing, Colombia asked that Panama make available the exhibits concerned. In addition, considering that situation and the range of exhibits submitted by Panama to date, Colombia asked the Panel for an extension of the period of time for presenting respondent second written submissions. On 16 January 2018, Panama submitted the exhibits requested by Colombia and stated that it had no objections to the request for extending the deadline. On 18 January 2018, the Panel established new deadlines for the presentation of respondent second written submissions and third-party submissions.

1.25. In a communication of 26 January 2018, Panama informed the Panel that it had taken cognizance of two new regulatory instruments issued by the Colombian Government which were, on their face, related to the matters dealt with in this dispute. The instruments in question were Decree No. 2218 of the Ministry of Finance and Public Credit of Colombia, dated 27 December 2017, adopting measures for the prevention and control of customs fraud in connection with imports of fibres, yarns, fabrics, clothing and footwear (Decree No. 2218/2017)[29], and Joint Circular 001 of the Ministry of Trade, Industry and Tourism of Colombia, dated 19 January 2018, on the administration of Decree No. 2218/2017.[30] On 31 January 2018, Colombia requested that neither Panama's communication nor the exhibits should be deemed to have been submitted and that, otherwise, the period of time for presenting its second written submission as respondent should be extended. On 2 February 2018, Panama expressed its disagreement with those requests. On 6 February 2018, the Panel informed the parties that it rejected Colombia's request.

1.26. In a communication dated 15 March 2018, Panama informed the Panel that it had taken cognizance of the enactment of Decree No. 436 of the Ministry of Finance and Public Credit of Colombia, dated 6 March 2018, amending Decree No. 2218/2017 (Decree No. 436/2018).[31]

1.27. The Panel held a substantive meeting with the parties on 20 and 21 March 2018. The third-party session took place on 21 March 2018.

1.28. On 23 March 2018, the Panel, after consulting the parties and in order to preserve the procedural rights of Colombia, accorded to Colombia the possibility of presenting its arguments relating to Decree No. 2218/2017 in an additional written submission no later than 20 April 2018.

1.29. In a communication dated 4 April 2018, Colombia requested an extension of the deadline for responding to the questions posed by Panama and by the Panel. On 5 April 2018, Panama indicated that it had no objections to Colombia's request and asked that, if the request were approved, the time-limit for submitting comments on the responses should be extended. On the same date, the Panel set new time-limits for the submission of responses to questions from the Panel and the parties, and for the submission of comments on those responses.

[27] See the Panel's Working Procedures in Annex A-1.
[28] Specifically, Exhibits PAN-18, PAN-19 and PAN-20.
[29] Decree No. 2218/2017 (Exhibit PAN-43).
[30] Joint Circular No- 001/2018 (Exhibit PAN-44).
[31] Decree No. 436/2018 (Exhibit PAN-84).

1.30. On 28 May 2018, the Panel issued the descriptive part of its Report to the Parties. The Panel issued its Interim Report to the parties on 26 June 2018. The Panel issued its Final Report to the parties on 26 July 2018.

2 FACTUAL ASPECTS

2.1 Introduction

2.1. This dispute concerns certain measures adopted by Colombia subsequent to the adoption of the DSB's rulings and recommendations in the original proceeding, *Colombia – Measures Relating to the Importation of Textiles, Apparel and Footwear*.[32]

2.2. The Parties disagree as to which measures adopted by Colombia are "measures taken to comply" with the DSB's rulings and recommendations within the meaning of Article 21.5 of the DSU. In the light of that disagreement, the Panel will confine itself, in this section of its report, to describing the measures identified by Colombia and Panama as measures at issue. Insofar as the parties disagree on this or any other factual issue that needs to be resolved, the Panel will address it in its findings.

2.2 Measures at issue according to Colombia

2.3. In its panel request, referring to its statement before the DSB mentioned in paragraph 1.8 above, Colombia explains that it "replaced the compound tariff with an *ad valorem* tariff that does not exceed Colombia's WTO bound tariffs, and in that sense, it has brought the measure subject to the DSB's recommendations into compliance with its WTO obligations".[33]

2.4. Colombia refers to the adoption on 2 November 2016 of Decree No. 1744/2016[34] modifying the tariffs applicable to imports of products classified in Chapters 61 and 62 of the Customs Tariff, and certain items in Chapter 64.[35] Articles 1 to 3 of Decree No. 1744/2016, which are reproduced below, specify how the new *ad valorem* tariffs operate:

> ARTICLE 1. Establishment of a tariff of forty per cent (40%) on imports of products classified in Chapters 61 and 62 of the National Customs Tariff, when the declared f.o.b. price is lower than or equal to US$10 per gross kilogram.
>
> ARTICLE 2. Establishment of a tariff of thirty-five per cent (35%) on imports for which the declared f.o.b. price is lower than or equal to the threshold specified for the following tariff headings:

TARIFF HEADING	US$/PAIR THRESHOLD
6401	6
6402	6
6403	10
6404	6
6405	7

> Paragraph: For imports of subheading 6406.10.00.00 ("uppers") the tariff established in this article shall be applied when the declared f.o.b. price is lower than or equal to US$5 per gross kilogram.
>
> ARTICLE 3. The products classified in Chapters 61, 62 and 64 of the Customs Tariff that are not subject to the tariff set forth in Articles 1 and 2 of this Decree shall be subject to the tariff provided for in Decree 4927 of 2011 and the amendments thereto.

[32] DSB, Minutes of the meeting held on 22 June 2016, WT/DSB/M/380, para. 9.7.
[33] Colombia's request for the establishment of a panel, WT/DS461/17, p. 1.
[34] Decree No. 1744/2016 (Exhibits COL-1/PAN-1).
[35] Colombia's request for the establishment of a panel, WT/DS461/17, p. 2.

2.5. As indicated in the aforementioned Article 3, for imports of products classified in Chapters 61, 62 and 64 of the Customs Tariff that are not subject to the tariff set forth in Decree No. 1744/2016, the applicable tariff is the one provided for in Decree No. 4927 of the Ministry of Trade, Industry and Tourism of Colombia, dated 26 December 2011, adopting the Customs Tariff and other provisions (Decree No. 4927/2011) and the amendments thereto.[36] The Decree in question, No. 4927/2011, contains the Colombian Customs Tariff in force since 1 January 2012.[37]

2.6. For imports of the other products that were subject to the compound tariffs introduced by Decree No. 456/2014, including the products classified in Chapter 63 of the Customs Tariff and those classified under the headings of Chapter 64 not mentioned above, the applicable tariff, as from 2 November 2017, would be the one provided for in Decree No. 4927/2011 or any amending decree.[38]

2.7. The difference between the most-favoured-nation (MFN) tariff applicable to imports of the relevant products with a free on board (f.o.b.) price equal to or lower than the thresholds provided for in Articles 1 and 2 of Decree No. 1744/2016, and the MFN tariff applicable to imports with an f.o.b. price exceeding those thresholds, may be summarized as follows:

Table 1: Difference between tariffs

Product	MFN tariff where f.o.b. price does not exceed the respective threshold	MFN tariff where f.o.b. price exceeds the respective threshold (Decree No. 4927/2011 and amendments thereto)
Chapter 61	40%	15%
Chapter 62	40%	15%
Chapter 63	No differentiated regime	
Headings 64.01 to 64.05	35%	15%
Heading 64.06	No differentiated regime	
- Subheading 6406.10.00.00	35%	10%

Source: Prepared by the Secretariat.

2.8. Article 6 of Decree No. 1744/2016 provides that the tariffs thereunder would be in force for a period of one year from the date of their entry into force, 2 November 2016. On 2 November 2017, Colombia issued Decree No. 1786 of the Ministry of Trade, Industry and Tourism of Colombia, dated 2 November 2017, partially modifying the Customs Tariff (Decree No. 1786/2017).[39] Article 6 of Decree No. 1786/2017 establishes the same tariffs as Decree No. 1744/2016, which will be in force for a period of two years from the date of their entry into force, 2 November 2017.

2.9. The determination of the thresholds under Decrees No. 1744/2016 and No. 1786/2017 is carried out on the basis of the thresholds previously in force under Decrees No. 074/2013, No. 456/2014 et seq., taking into account the prices used by the National Customs and Excise Directorate of Colombia (DIAN) to establish the risk profiles and average price of imports in a period preceding the issuance of those decrees (the average in question being US$10.4/kg for clothing and US$6.8/pair for footwear).[40]

[36] Decree No. 1744/2016 (Exhibits COL-1/PAN-1), Article 3.
[37] Extract from Decree No. 4927/2011 (Exhibit COL-2).
[38] Colombia's second written submission as complainant, para. 44.
[39] Decree No. 1786/2017 (Exhibit PAN-45).
[40] Colombia's response to Panel question No. 1, para. 3.

2.3 Measures at issue according to Panama

2.3.1 Introduction

2.10. In its panel request[41], Panama identifies as measures at issue, *inter alia*:

a. The requirement of a security for the release of goods under Chapters 61, 62 and 64 of the Colombian Customs Tariff, when priced at or below certain thresholds (the "specific bond"), as contained in Decree No. 1745 of the Ministry of Finance and Public Credit of Colombia, dated 2 November 2016, adopting measures for the prevention and control of customs fraud in connection with imports of clothing and footwear (Decree No. 1745/2016)[42]; and

b. The customs and tariff regime applicable to imports of goods under those Chapters, when priced at or below the thresholds established by Colombia in the above-mentioned Decree No. 1745/2016 (the "special import regime").

2.11. In its written submissions, Panama identifies as measures at issue the specific bond and the special import regime, both with the characteristics described in Decree No. 1745/2016[43] and, following its enactment, with the characteristics described in Decree No. 2218/2017.[44]

2.12. Panama's request included two additional measures, namely the "entry restricted to specific ports of entry" and the "customs duty" (i.e. the *ad valorem* tariff of Decree No. 1744/2016 described in section 2.2 above). The respective claims were not subsequently developed by Panama. When consulted about this on 10 April 2018, Panama informed the Panel that it does not maintain its claims with regard to those measures.[45]

2.13. Set out below are the measures challenged by Panama, in relation to the corresponding regulations.

2.3.2 Measures challenged by Panama as contained in Decree No. 1745/2016

2.3.2.1 Scope and application of Decree No. 1745/2016

2.14. On 2 November 2016, Colombia issued Decree No. 1745/2016 "establishing mechanisms to strengthen the risk management system and customs control in the face of possible situations of customs fraud associated with imports of clothing and footwear".[46] Decree No. 1745/2016 entered into force on 2 November 2016, the date of its publication in the Official Journal[47], and was repealed on 27 December 2017 by Decree No. 2218/2017 (see section 2.3.3.1 below). The mechanisms established by Decree No. 1745/2016 are additional to the import requirements prescribed in Colombia's general import regime.[48]

2.15. With regard to the scope of Decree No. 1745/2016, Article 2 thereof provides as follows:

> ARTICLE 2. Scope. Imports of products consisting of clothing and footwear under Chapters 61, 62 and 64 of the Customs Tariff, for which the declared f.o.b. price is lower than or equal to the threshold established in Article 3 of this Decree, shall be subject to the measures set out herein.

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[41] Panama's request for the establishment of a panel (WT/DS461/22, sections I.A and I.C.
[42] Decree No. 1765/2016 (Exhibit PAN-2).
[43] Panama's first written submission as complainant, para. 15. See also Panama's first written submission as respondent, paras. 5, 32 and 90(i); and second written submission as complainant, paras. 57 and 285.
[44] See for example, Panama's second written submission as respondent, paras. 6-11.
[45] Panama's response to Panel questions Nos. 50 and 51.
[46] Decree No. 1745/2016 (Exhibit PAN-2), Article 1.
[47] Extract from the Official Journal of Colombia, 2 November 2016 (Exhibit COL-12).
[48] This regime is contained in Decree No. 2685/1999 (Exhibit PAN-3) and Decree No. 390/2016 (Exhibit PAN-4), and the amendments and regulations thereto. (Colombia's response to Panel question No. 12, para. 36.)

2.16. As indicated in Article 2 itself, the relevant thresholds are established in Article 3 of the Decree in question. These thresholds differ from those established in Decree No. 1744/2016, as described in paragraph 2.4 above. Article 3 of Decree No. 1745/2016 provides as follows:

> ARTICLE 3. Thresholds for strengthening the risk management and customs control system. The measures provided for in this Decree shall be applicable to imported goods for which the declared f.o.b. price is lower than or equal to the threshold determined for the following tariff headings and subheading:
>
> Clothing:

TARIFF HEADING	GROSS US$/KG THRESHOLD
61.01	10
61.02	10
61.03	6
61.04	6
61.05	5
61.06	5
61.07	3
61.08	3
61.09	3
61.10	6
61.11	7
61.12	9
61.13	10
61.14	9
61.15	3
61.16	3
61.17	4
62.01	10
62.02	10
62.03	7
62.04	5
62.05	7
62.06	7
62.07	3
62.08	5
62.09	3
62.10	9
62.11	9
62.12	5
62.13	3
62.14	3
62.15	3
62.16	3
62.17	3

Footwear:

TARIFF HEADING	US$/PAIR THRESHOLD
64.01	3
64.02	2
64.03	7
64.04	3
64.05	4

TARIFF SUBHEADING	GROSS US$/KG THRESHOLD
6406.10.00.00	2

Paragraph: The Government shall revise the thresholds established in this Article annually or at shorter intervals when foreign trade trends so warrant.

2.17. In order to determine the thresholds of Decree No. 1745/2016, Colombia estimated the implicit price of imports (US$/net kg; US$/pair) per tariff heading. For this purpose, consideration was given to the prices used by the DIAN to establish risk profiles and the information on monthly imports of products during the period 2010-2017 (excluding imports registered under the re-import regime and the temporary import systems for inward processing). Using this information, the threshold was estimated in terms of the average value of the implicit price corresponding to the tenth percentile of each tariff heading group, for the period 2010-2017.[49]

2.18. Article 9 of Decree No. 1745/2016 provides that, if in the course of *ex post* control procedures, goods covered by Article 3 that have been shipped after its entry into force are found not to be in compliance with the requirements of that article, they shall be subject to seizure.[50]

2.19. During the period from 4 November 2016 to 31 December 2017, the total number of import declarations concerning products covered by Decree No. 1745/2016, independently of their declared f.o.b. price, was 332,744. Of those import declarations, 331,942 contained prices above the thresholds and 802 contained prices below the thresholds.[51]

2.20. The Panel now proceeds to describe the measures contained in this Decree which are challenged by Panama.

2.3.2.2 The specific bond under Decree No. 1745/2016

2.21. This measure consists of the requirement imposed on importers of clothing and footwear classified in Chapters 61, 62 and 64 of the Colombian Customs Tariff to post a specific bank or insurance guarantee in order to secure release of the imported goods when the declared f.o.b. price is lower than or equal to a certain threshold. The specific bond is contained in Article 7 of Decree No. 1745/2016, which provides as follows:

> ARTICLE 7. Guarantee. Once all the requirements stipulated in this Decree have been met, the importer, as a prerequisite for the release of the goods referred to in Article 3 of this Decree, shall furnish a specific bank or insurance guarantee of 200% of the unit "threshold" price established in that article, multiplied by the quantity imported, for a period of three (3) years, for the purpose of guaranteeing payment of the customs taxes and penalties that may apply.

[49] Colombia's response to Panel question No. 1, para. 4.

[50] The concept of seizure is regulated under the general customs regime in Article 550 of Decree No. 390/2016. This article was amended by Decree No. 349/2018 (Exhibit COL-47). (Colombia's response to Panel question No. 40, para. 219.)

[51] DIAN presentation on customs fraud (Exhibits COL-28 and COL-29); List of 802 import declarations (Exhibit COL-39); and Colombia's response to Panel questions No. 6(a), para. 20, and No. 6(b), para. 21.

> The fact of having provided a general guarantee or not having the obligation to do so shall not exempt the importer from the obligation mentioned herein.
>
> Should the obligation to post a guarantee in a valuation dispute coincide with the obligation mentioned in this article, the latter shall prevail and the procedures provided for in the customs legislation governing the approval, control and custody of guarantees shall apply in determining the customs value of the imported goods and the penalty.
>
> Once the release has been authorized, if appropriate, the Customs Operation Management Division, or whichever service is acting on its behalf, shall submit to the Inspection Management Division copies of the declaration together with supporting documents, and of the guarantee and the inspection report, in accordance with its remit.

2.22. Therefore, any importer of clothing and footwear classified in Chapters 61, 62 and 64 of Colombia's Customs Tariff will be obliged to post a specific bank or insurance guarantee for an amount equivalent to 200% of the corresponding threshold price, multiplied by the quantity imported (see para. 2.16 above), in order to obtain the release of the imported goods when the declared f.o.b. price is lower than or equal to the threshold. The guarantee will have to be posted for a period of three years. The fact of posting a general guarantee or not being obliged to do so does not exempt the importer from the obligation to post the specific guarantee stipulated in this article.

2.3.2.3 Special import regime under Decree No. 1745/2016

2.23. This measure would comprise various aspects of the special import regime established under Decree No. 1745/2016, which is applicable to imports of clothing and footwear classified in Chapters 61, 62 and 64 of Colombia's Customs Tariff, when the declared f.o.b. value of the relevant imported products is lower than or equal to the thresholds established in Article 3 of that Decree (see para. 2.16 above). The aspects in question would include the specific bond described as a separate measure in the previous section and other requirements set out in the articles referred to below.

2.3.2.3.1 Documentary and certification requirements

2.24. Article 4 of Decree No. 1745/2016 establishes certain documentation and certification requirements, as follows:

> ARTICLE 4. Importation. Natural or legal persons seeking to import into the national customs territory and/or to bring into a free zone goods from abroad consisting of clothing and footwear classified in the headings and subheading of the Customs Tariff listed in Article 3 of this Decree, at a price lower than or equal to the threshold specified in that article, shall be required to provide evidence to the Customs Operation Management Division (or whichever service is acting on its behalf) of the Sectional Customs and Excise Directorate with jurisdiction over the place of arrival, that the following requirements have been met:
>
> 1. Without prejudice to submission of the advance declaration in the terms and in the manner prescribed by the National Customs and Excise Directorate, the importer, which must also be the consignee, shall be required, at least one month in advance of the arrival of the goods in the national customs territory, to submit for each shipment the identity and liability form, under such terms and conditions as may be specified by the National Customs and Excise Directorate for that purpose, accompanied by the following documents:
>
>   (a) Certification from the foreign supplier, apostilled or legalized with an official translation into Spanish, showing evidence of the intention to sell to the importer in Colombia and indicating, where appropriate, the type of economic relationship with the importer in accordance with the Tax Statute, and also providing the address, telephone number and email address of the supplier as well as the six-digit tariff subheading containing the detailed description of the products to be exported, the quantity and their respective prices.

(b) Apostilled or legalized certification, with an official translation into Spanish, of the existence of the foreign supplier, to be issued by the entity in the exporting country that keeps the official register of producers or traders. Should no such entity exist, the importer must testify to that fact under oath, which shall be deemed to be have been taken by the signing of the document, without prejudice to the supervisory and inspection powers of the National Customs and Excise Directorate.

(c) List of distributors in Colombia of the goods to be imported, indicating their tax identification number (NIT), business name, address, telephone number and email address.

(d) Declaration signed by the legal representative of the customs agency, where appropriate, certifying that they have conducted a background check on the customer for the importer for which they are to act as customs broker, and indicating how long the parties have worked together.

(e) Declaration signed by the importer or the importer's legal representative, certifying the following:

(i) that the value to be declared for the goods being imported corresponds to the price actually paid or payable;

(ii) the address of the storage facilities for the goods being imported;

(iii) detailed information on the distribution and marketing chain in Colombia for the goods being imported;

(iv) that they are aware that the customs authority is entitled to submit the documents related to the import transaction to the Attorney General's Office and the Financial Information and Analysis Unit (UIAF).

2. Without prejudice to the presence of the customs representative from the customs agency, where action is taken through the latter, the importer, the legal representative or the agent of the importing company must be present for the process of customs inspection or examination (*aforo*) of the goods. For this purpose, the importer's agent must be different from the customs agency. The absence of the importer, the legal representative or the agent of the importing company shall result in the non-admissibility or non-authorization of release.

Paragraph 1. The identity and liability form and the documents referred to in this article shall constitute supporting documents for the import declaration.

Failure to submit or the extemporaneous submission of these documents shall result in the non-admissibility or non-authorization of release.

Paragraph 2. In the case of goods that are to be imported from a free zone to the remainder of the national customs territory, the importer must be the same as the consignee whose name appears in the transport document with which the goods entered the free zone, unless it is a matter of products classified under subheading 6406100000 and consigned to an industrial user of goods or of goods and services.

In the event that the consignee and the importer are not the same, this will result in the non-admissibility or non-authorization of release.

2.25. Thus, in order to be able to import goods regulated by Decree No. 1745/2016 at prices equal to or below the thresholds prescribed in that Decree (see paragraph 2.16 above), importers are required to submit a set of documents to the customs authority at least one month in advance of the arrival of the goods in Colombian territory. Likewise, such importation requires the physical presence of the importer, the legal representative or the agent of the importing company, as

appropriate, during the process of customs inspection or examination of the goods. If the importer does not submit the required documents or does so extemporaneously, the goods cannot be released.

2.3.2.3.2 Authorized entry sites

2.26. Article 5 of Decree No. 1745/2016 provides for the possibility of designating authorized sites for the entry of such goods in the following terms:

> ARTICLE 5. Authorized entry sites. In order to strengthen customs control and the risk management system within the ten (10) days following the entry into force of this Decree, the National Customs and Excise Directorate shall establish by administrative decision the authorized sites for the importation of clothing and footwear classified in the headings and subheading of the Customs Tariff referred to in Article 3 of this Decree.

2.27. The DIAN would therefore be empowered to determine what would be the authorized sites for the import of goods under the decree within ten days following its entry into force. The DIAN did not determine the entry sites in accordance with this provision during the period of validity of Decree No. 1745/2016.

2.3.2.3.3 Import operations observers

2.28. Article 6 of Decree No. 1745/2016 provides for the intervention of import operations observers in the following terms:

> ARTICLE 6. Import Operations Observers. The National Customs and Excise Directorate shall provide the Import Operations Observers with information to be constituted by resolution of that entity, which shall be issued within sixty (60) calendar days following the entry into force of this Decree; the resolution in question shall also establish the procedure for the provision of the information to the said observers.
>
> The observer shall provide cooperation and collaboration required by the customs authority, including the technical report, where appropriate, on the tariff classification, identification, quantity, description, weight and price of the goods, among other aspects.
>
> For the purposes of this Decree, the role of the observer shall be confined to analysing the information and generating alerts to the customs authority, as well as closely monitoring the conduct of the inspection or examination procedure with respect to the goods classified under the headings listed in Article 3 of this Decree.
>
> The customs authority shall safeguard the confidentiality of the information, taking into account the provisions of the Political Constitution and Laws 863 of 2003 and 1712 of 2014 and other amending or supplementary regulations.

2.29. Decree No. 1745/2016 would therefore permit the participation of import operations observers, whose role is to analyse the information supplied and generate alerts to the customs authority, and also to closely monitor the inspection or examination procedure with respect to the corresponding goods.[52]

[52] The Colombian customs regime envisages the use of import operations observers for all types of imports. The observers are members of Colombian private industry and are selected from lists of candidates submitted by the trade associations and approved by the Joint National Commission on Tax Management. The observers work voluntarily, at the request of the interested trade associations, generating no costs for the Colombian State. The observers make non-binding recommendations to the customs officials. (Decree No. 2685/1999 (Exhibit PAN-3), Article 74-1 and Decree No. 390/2016 (Exhibit PAN-4), Article 183.) See Colombia's response to Panel questions Nos. 38b, c, d and f, paras. 210-215 and Resolution No. 6934/2005 (Exhibit PAN-64).

2.3.2.3.4 Risk management

2.30. With respect to risk management, Article 8 of Decree No. 1745/2016 provides as follows:

> ARTICLE 8. Risk management. Importers that declare goods consisting of clothing and footwear classified under the headings and subheading of the Customs Tariff listed in Article 3 of this Decree, at a price lower than or equal to the threshold specified in that Article, must be reported to the Operational Analysis Management Subdirectorate of the National Customs and Excise Directorate so that the information concerning such operations can be incorporated in the risk management system.

2.31. Consequently, the DIAN will be informed of any importers of clothing and footwear classified in Chapters 61, 62 and 64 of Colombia's Customs Tariff at prices lower than or equal to the respective thresholds, so that these operations can be incorporated in the risk management system.[53]

2.3.3 Measures challenged by Panama as contained in Decree No. 2218/2017

2.3.3.1 Scope and application of Decree No. 2218/2017

2.32. On 27 December 2017, Colombia issued Decree No. 2218/2017 repealing Decree No. 1745/2016. Decree No. 2218/2017 establishes "mechanisms to strengthen the risk management system and customs control in the face of possible situations of customs fraud associated with imports of fibres, yarns, fabrics, clothing and footwear".[54] Decree No. 2218/2017 entered into force on 27 December 2017, the date of its publication in Colombia's Official Journal.[55] The mechanisms established by Decree No. 2218/2017 are additional to the import requirements prescribed in Colombia's general import regime.[56]

2.33. With regard to the scope of Decree No. 2218/2017, Article 2 thereof provides as follows:

> ARTICLE 2. Scope. Imports of products consisting of fibres, yarns, fabrics, clothing and footwear under Chapters 52, 53, 54, 55, 56, 58, 59, 60, 61, 62, 63 and 64 of the Customs Tariff, for which the declared f.o.b. price is lower than or equal to the threshold established in Article 3 of this Decree, shall be subject to the measures provided for herein.

2.34. As indicated in Article 2 itself, the relevant thresholds are established in Article 3 of the same decree, which provides as follows:

> ARTICLE 3. Thresholds for strengthening the risk management and customs control system. The measures envisaged in this Decree shall apply to imported goods with a declared f.o.b. price lower than or equal to the threshold prescribed for the following tariff headings and subheading:
>
> Yarns

TARIFF HEADING	US$/KG THRESHOLD
5205	2.00
5402	2.00
5509	2.00
5510	2.00

[53] Panama's request for the establishment of a panel, WT/DS461/22, section D.

[54] Decree No. 2218/2017 (Exhibit PAN-43), Article 1. On 6 March 2018, Colombia issued Decree No. 436/2018 (Exhibit PAN-84) amending Decree No. 2218/2017. The second preambular paragraph of Decree No. 436/2018 explains that the purpose of the decree is "to provide some details concerning the conditions laid down in Decree 2218 of 2017 with respect to the goods subject to control therein". In particular, changes were made to some of the thresholds established in Article 3 (Thresholds for strengthening the risk management and customs control system), the paragraphs of Article 4 (Importation) and the whole of Article 10 (Seizure and confiscation). Panama has not requested the Panel to rule on these changes.

[55] Colombia's response to Panel question No. 8, para. 26 and extract from the Official Journal of Colombia, 27 December 2017 (Exhibit COL-13).

[56] See footnote 48.

Fibres

TARIFF HEADING	US$/KG THRESHOLD
5503	1.00
5504	1.00
5505	1.00
5506	1.00
5507	1.00

Fabrics

TARIFF HEADING	US$/KG THRESHOLD
5208	2.50
5209	2.50
5210	2.50
5211	2.50
5212	2.50
5309	2.50
5407	2.50
5408	2.50
5512	2.50
5513	2.50
5514	2.50
5515	2.50
5516	2.50
5601	2.50
5801	2.50
5802	2.50
5803	2.50
5804	2.50
5805	2.50
5806	2.50
5901	2.50
5903	2.50
5906	2.50
5907	2.50
5910	2.50
5911	2.50
6001	2.50
6002	2.50
6003	2.50
6004	2.50
6005	2.50
6006	2.50

Clothing

HEADING	US$/KG THRESHOLD
6101	10.00
6102	10.00
6103	5.00
6104	8.00
6105	5.00
6106	5.00
6107	5.00

HEADING	US$/KG THRESHOLD
6108	5.00
6109	5.00
6110	8.00
6111	5.00
6112	8.00
6113	10.00
6114	10.00
6115	5.00
6116	5.00
6117	5.00
6201	10.00
6202	10.00
6203	5.00
6204	5.00
6205	10.00
6206	8.00
6207	5.00
6208	5.00
6209	5.00
6210	8.00
6211	10.00
6212	5.00
6213	5.00
6214	5.00
6215	5.00
6216	5.00
6217	5.00

Made up textile articles

HEADING	US$/KG THRESHOLD
6301	2.0
6302	2.0
6303	1.5
6304	4.5

Footwear

HEADING	US$/PAIR THRESHOLD
6401	3.0
6402	3.0
6403	8.0
6404	3.0
6405	4.0

TARIFF SUBHEADING	US$/KG THRESHOLD
6406.10.00.00	2.0

Paragraph: The Government shall revise the thresholds established in this article annually or at shorter intervals when foreign trade trends so warrant.

2.35. The thresholds of Decree No. 2218/2017 were determined in accordance with the same methodology applied in connection with Decree No. 1745/2016, as described in paragraph 2.17 above.[57]

2.36. Article 10 of Decree No. 2218/2017 provides that, if in the course of *ex post* control procedures, goods covered by Article 3 that have been shipped after its entry into force are found not to be in compliance with the requirements of that Article, they shall be subject to seizure. The seized goods may under no circumstances be the subject of legalization or recovery.[58]

2.37. The Panel now proceeds to describe the measures contained in this Decree that are challenged by Panama.

2.3.3.2 The specific bond under Decree No. 2218/2017

2.38. This measure consists of the requirement imposed on the importer of clothing and footwear classified in Chapters 52, 53, 54, 56, 58, 59, 60, 61, 62, 63 and 64 of Colombia's Customs Tariff, when a valuation dispute arises, to post a specific bank or insurance guarantee in order to secure release of the imported goods where the declared f.o.b. price is lower than or equal to a certain threshold. The specific bond is contained in Article 7 of Decree No. 2218/2017, as follows:

> ARTICLE 7. Guarantee. In the case of goods covered by the scope of application of this Decree, if the valuation dispute arises in connection with the inspection or examination procedure, and it becomes necessary for that reason to delay the final determination of the customs value of the goods, in accordance with Article 13 of the Customs Valuation Agreement of the World Trade Organization, the importer may secure release by posting a guarantee sufficient to ensure payment of any customs taxes, penalties and interest that may apply.
>
> The guarantee shall be accorded on a value equivalent to two hundred per cent (200%) of the difference between the f.o.b. price declared by the importer and the result of multiplying the threshold unit price established in Article 3 of this Decree by the imported quantity.
>
> The guarantee must be from a bank or insurance company. There shall be no possibility of posting a guarantee in the form of a monetary deposit.
>
> The period of validity of the guarantee shall be three (3) years.
>
> The fact of having provided a general guarantee or not having the obligation to do so shall not exempt the importer from the obligation mentioned herein.
>
> Once the release has been authorized, the Customs Operation Management Division, or whichever service is acting on its behalf, shall submit to the Inspection Management Division copies of the import declaration together with supporting documents, and of the guarantee and the inspection report in accordance with its remit.

2.39. Thus, in cases where a valuation dispute arises in connection with the inspection or examination procedure, the importer of clothing and footwear will be obliged to post a specific bank or insurance guarantee for an amount equivalent to 200% of the difference between the declared f.o.b. price and the result of multiplying the threshold unit price (see paragraph 2.34 above) by the quantity imported, in order to secure the release of the imported goods when the declared f.o.b. price is lower than or equal to that threshold. The guarantee must be constituted for a period of three years and may not be constituted in the form of a monetary deposit.

2.3.3.3 Special import regime under Decree No. 2218/2017

2.40. This measure would comprise different aspects of the special import regime established by Decree No. 2218/2017, applicable to imports of clothing and footwear classified in Chapters 52, 53,

[57] See paragraph 2.17 above. Colombia's response to Panel question No. 1, para. 4.
[58] See footnote 50.

54, 55, 56, 58, 59, 60, 61, 62, 63 and 64 of Colombia's Customs Tariff, where the declared f.o.b. value of the relevant imported products is lower than or equal to the thresholds established in Article 3 of that Decree (see para. 2.34 above). Those aspects would include the specific bond described as a separate measure in the previous section as well as other requirements contained in Articles 4, 5, 6 and 8 of Decree No. 2218/2017.

2.41. With regard to the requirements concerning the presence of import operations observers (Article 6) and risk management (Article 8), see sections 2.3.2.3.3-2.3.2.3.4 of this Report, which describe such requirements with respect to identical provisions in Decree No. 1745/2016. The Panel will now describe the requirements contained in Articles 4 and 5 of Decree No. 2218/2017, which exhibit some discrepancies with respect to the respective Articles 4 and 5 of Decree No. 1745/2016.

2.3.3.3.1 Documentary and certification requirements

2.42. With regard to the documentary and certification requirements, Article 4 of Decree No. 2218/2017 provides as follows:

> ARTICLE 4. Importation. Natural or legal persons seeking to import into the national customs territory and/or to bring into a free zone goods from abroad consisting of fibres, yarns, fabrics, clothing and footwear classified in the subheadings of the Customs Tariff listed in Article 3 of this Decree, at a price lower than or equal to the threshold specified in that Article, shall be required to provide evidence to the Customs Operation Management Division (or whichever service is acting on its behalf) of the Sectional Customs and Excise Directorate with jurisdiction over the place of arrival, that the following requirements have been met:
>
> 1. Without prejudice to submission of the advance declaration in the terms and in the manner prescribed by the National Customs and Excise Directorate, the importer, which must also be the consignee, shall be required, at least one month in advance of the arrival of the goods in the national customs territory, to submit for each shipment the identity and liability form, under such terms and conditions as may be specified by the National Customs and Excise Directorate for that purpose, accompanied by the following documents:
>
>   (a) Certification from the foreign supplier, apostilled or legalized with an official translation into Spanish, showing evidence of the intention to sell to the importer in Colombia and indicating, where appropriate, the type of economic relationship with the importer in accordance with the Tax Statute, and also providing the address, telephone number and email address of the supplier as well as the six-digit tariff subheading, containing the detailed description of the products to be exported, the quantity and their respective prices.
>
>   (b) Apostilled or legalized certification, with an official translation into Spanish, of the existence of the foreign supplier, to be issued by the entity in the exporting country that keeps the official register of producers or traders. Should no such entity exist, the importer must testify to that fact under oath, which shall be deemed to have been taken by the signing of the document, without prejudice to the supervisory and inspection powers of the National Customs and Excise Directorate.
>
>   (c) If the importer of the goods is to sell them in the same state, it must submit a list of the distributors of the goods in Colombia, indicating their tax identification number (NIT), business name, address, telephone number and email address.
>
>   (d) Declaration of the goods signed by the legal representative of the Colombian customs agency, indicating their tax identification number (NIT), business name, address, telephone number and email address, where appropriate, certifying that they have conducted a background check on the customer for the importer for which they are to

act as customs broker, and indicating how long the parties have worked together.

(e) Declaration signed by the importer or the importer's legal representative, certifying the following:

(i) That the value to be declared for the goods being imported corresponds to the price actually paid or payable.

(ii) The address of the storage facilities for the goods being imported.

(iii) Detailed information on the distribution and marketing chain in Colombia for the goods being imported.

(iv) That they are aware that the customs authority is entitled to submit the documents related to the import transaction to the Attorney General's Office and the Financial Information and Analysis Unit (UIAF).

2. Without prejudice to the presence of the customs representative from the customs agency, where action is taken through the latter, the importer, the legal representative or the agent of the importing company must be present for the process of customs inspection or examination of the goods.

For this purpose, the importer's agent must be different from the Customs Agency.

The absence of the importer, the legal representative or the agent of the importing company shall result in the non-admissibility or non-authorization of release.

Paragraph 1. The identity and liability form and the documents referred to in this article shall constitute supporting documents for the import declaration.

Failure to submit or the extemporaneous submission of these documents shall result in the non-admissibility or non-authorization of release.

Paragraph 2. In the case of goods that are to be imported from a free zone to the remainder of the national customs territory, the importer must be the same as the consignee whose name appears in the transport document with which the goods entered the free zone, unless it is a matter of products classified under subheading 6406100000, and consigned to an industrial user of goods or of goods and services.

In the event that the consignee and the importer are not the same, this will result in the non-admissibility or non-authorization of release.

Paragraph 3. The special measures provided for in this Decree shall not apply to the goods specified in Article 3 hereof, owned by foreign companies or persons not resident in the country, which have been introduced from abroad to International Logistical Distribution Centres, for distribution in their entirety to the rest of the world.

2.43. Thus, in order to be able to import goods regulated by Decree No. 2218/2017 at prices equal to or below the thresholds prescribed in that Decree (see paragraph 2.34 above), importers are required to submit a set of documents to the customs authority at least one month in advance of the arrival of the goods in Colombian territory. Likewise, such importation requires the physical presence of the importer, the legal representative or the agent of the importing company, as appropriate, during the process of customs inspection or examination of the goods. If the importer does not submit the required documents or does so extemporaneously, the goods cannot be released.

2.44. Pursuant to Article 4, paragraph 3, of the above-mentioned Decree No. 2218/2017, the importation of goods owned by foreign companies or persons not resident in the country, which have been introduced from abroad to International Logistical Distribution Centres[59] for distribution in their entirety to the rest of the world, is exempted from the special measures provided for in that Decree.[60]

2.45. Article 9 of Decree No. 2218/2017 prohibits the reshipment of goods subject to this Decree when they do not meet the requirements set out in Article 4.[61]

2.3.3.3.2 Entry controls

2.46. Article 5 of Decree No. 2218/2017 provides for the possibility of establishing customs controls on the entry of goods in the following terms:

> ARTICLE 5. Entry controls. In accordance with risk management system criteria, the Special Administrative Unit of the National Customs and Excise Directorate (DIAN) may establish customs controls on the entry of goods referred to in this Decree. If measures restricting entry come to be established, they must be duly supported and justified in accordance with the analysis and technical report stemming from the same risk management system.

2.47. Thus, the DIAN may establish customs controls on the entry of goods subject to the decree, in accordance with criteria based on the Colombian risk management system.

3 PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

3.1. Colombia requests that the Panel find that it has complied with the DSB's recommendations and rulings in the original proceeding to bring its measures into conformity with its obligations under the GATT 1994.[62]

3.2. Panama requests that the Panel, considering the enactment and entry into force of Decree No. 2218/2017 in the course of this proceeding and the fact that the measures challenged by Panama are governed by that regulation, should adopt:

a. Findings on the measures with the characteristics contained in Decree No. 1745/2016; and

b. Findings and recommendations on the measures with the characteristics contained in Decree No. 2218/2017.[63]

3.3. In particular, Panama requests the Panel to find that:

a. The specific bond and the special import regime are Colombian "measures taken to comply" within the meaning of Article 21.5 of the DSU.[64]

[59] The International Logistical Distribution Centres are public warehouses authorized by the DIAN, located in ports, airports or specialized logistical infrastructures, when the latter have authorized arrival sites, in which foreign or domestic goods may be entered for storage, as may goods in the final stages of a suspensive procedure or a processing and/or assembly procedure, which are to be distributed by reshipment, importation or exportation. (Decree No. 390/2016 (Exhibit PAN-4), Articles 111 *et seq*. and Colombia's response to Panel question No. 14, paras. 52-54.)

[60] Decree No. 2218/2017 (Exhibit PAN-43), Article 4, para. 3.

[61] Ibid. Article 9.

[62] Colombia's first written submission as complainant, para. 39; first written submission as respondent, para. 139; second written submission as complainant, para. 138; and second written submission as respondent, para. 162.

[63] Panama's response to Panel question No. 49.

[64] Panama's first written submission as respondent, para. 90; second written submission as complainant, para. 285; and second written submission as respondent, para. 473.

b. The specific bond requirement is inconsistent with Article XI:1 of the GATT 1994.[65]

c. The specific bond requirement does not meet the requirements of Article 13 of the Customs Valuation Agreement.[66]

d. The specific bond is not administered in a uniform, impartial and reasonable manner, contrary to Colombia's obligations under Article X:3(a) of the GATT 1994.[67]

e. The special import regime is inconsistent with Article XI:1 of the GATT 1994.[68]

f. The special import regime is inconsistent with Articles 1, 2, 3, 5, 6 and 7(f) and (g) of the Customs Valuation Agreement.[69]

g. The special import regime gives rise to an administration of Articles 493 and 486 of Decree No. 390/2016 that is not uniform, impartial and reasonable, contrary to Colombia's obligations under Article X:3(a) of the GATT 1994.[70]

h. The special import regime results in the application of substantial penalties for minor infringements, in a manner inconsistent with Article VIII:3 of the GATT 1994.[71]

i. Colombia has failed to demonstrate that the requirements of the specific bond and the special import regime are justified under Article XX of the GATT 1994.[72]

3.4. Consequently, Panama requests the Panel to find that Colombia has not brought its compliance measures into conformity with its obligations under the GATT 1994 and to make the relevant recommendations in accordance with Article 19 of the DSU.[73]

4 ARGUMENTS OF THE PARTIES

4.1. The arguments of the parties are reflected in their executive summaries, provided to the Panel in accordance with paragraph 18 of the Working Procedures adopted by the Panel (see Annexes B-1 and B-2).

5 ARGUMENTS OF THE THIRD PARTIES

5.1. The arguments of Ecuador, the European Union, Honduras, Japan and the United States are reflected in their executive summaries, provided in accordance with paragraph 20 of the Working Procedures adopted by the Panel (see Annexes C-1, C-2, C-3, C-4 and C-5). Australia, China, Guatemala, India, Indonesia, Kazakhstan, Korea, the Russian Federation, Singapore and Chinese Taipei did not submit written or oral arguments to the Panel.

[65] Panama's first written submission as complainant, para. 73; first written submission as respondent, para. 90; second written submission as complainant, para. 285; and second written submission as respondent, para. 473.

[66] Panama's second written submission as respondent, para. 473.

[67] Panama's first written submission as respondent, para. 90; second written submission as complainant, para. 285; and second written submission as respondent, para. 473.

[68] Panama's first written submission as complainant, para. 73; first written submission as respondent, para. 90; second written submission as complainant, para. 285; and second written submission as respondent, para. 473.

[69] Panama's second written submission as respondent, para. 473.

[70] Panama's first written submission as respondent, para. 90; second written submission as complainant, para. 285; and second written submission as respondent, para. 473.

[71] Panama's second written submission as respondent, para. 473.

[72] Panama's second written submission as complainant, para. 285; and second written submission as respondent, para. 473.

[73] Panama's first written submission as complainant, para. 74; first written submission as respondent, para. 91; second written submission as complainant, para. 286; and second written submission as respondent, para. 474.

6 INTERIM REVIEW

6.1 Introduction

6.1. On 26 June 2018, the Panel submitted its Interim Report to the parties. On 10 July 2018, Panama informed the Panel that it did not intend to request the review of any precise aspects of the Interim Report. Colombia did submit written requests for the review of some precise aspects of the Interim Report. Neither of the parties requested an interim review meeting. On 17 July 2018, Panama submitted comments on Colombia's requests for review.

6.2. In accordance with Article 15.3 of the DSU, this section of the Panel Report sets out the Panel's response to the requests made by Colombia and the comments submitted thereon by Panama at the interim review stage. The Panel modified aspects of its Report in the light of Colombia's requests where it considered that it was appropriate to do so, as explained below. The Panel also corrected a number of typographical and other non-substantive errors, including those identified by Colombia with respect to footnote 235 and paragraphs 2.7, 7.142 and 7.157.

6.2 Colombia's specific requests for review

6.2.1 Descriptive part

6.3. Colombia suggests amending the wording of footnote 52 to paragraph 2.29 as follows: "The observers are ~~members of Colombian private industry~~] natural persons with knowledge of and experience in a productive economic sector". Colombia also suggests referring to Exhibit PAN-64 in the plural. Panama opposes the request, indicating that the description of the observers as members of Colombian private industry stems from Colombian customs law and that the amendment would make it appear that the import operations observers could be linked to the DIAN. The Panel declines to make the amendments suggested by Colombia. In the Panel's view, the relevance of the role of the observers for this dispute lies in the fact that they are representatives of industry and not in their being natural persons with knowledge of and experience in the sector. As for Exhibit PAN-64, it is a single exhibit containing various documents, not various exhibits.

6.2.2 The question of which measures are the ones "taken to comply" in the present proceedings

6.4. With respect to paragraph 7.67, Colombia suggests amending the wording of the last sentence as follows: "In all cases, moreover, ~~there is the presumption~~ it is considered that imports at or below the level of the thresholds have a high risk of being unlawful in nature". Panama opposes this request, citing submissions from Colombia in which it is expressly indicated that it is suspicions that are involved. Panama therefore requests that the original language be maintained or that the word "presumption" be changed to "suspicion". The Panel notes that the sentence in question refers to Colombia's arguments. It therefore accepts Colombia's request for review, making the necessary adjustments to reflect this fact.

6.5. With respect to paragraph 7.72, Colombia suggests amending the wording of the first sentence as follows: "The fact that Decrees No. 1744/2016 and No. 1745/2016 are constructed around ~~the presumption that~~ imports at or below the level of the thresholds ~~are~~ having a high risk of being unlawful in nature". Panama opposes this request for the same reasons as described in the preceding paragraph. The Panel considers that, in this paragraph, a "suspicion" can indeed be referred to given that, as Panama points out, it is the term used by Colombia in its submissions and this assessment follows from the preceding paragraphs. Consequently, the Panel decides to adjust the text by replacing the term "presumption" with "suspicion". The Panel also sees no difficulty in accepting Colombia's request to include the words "a high risk of being".

6.2.3 Panama's claims under Article XI:1 of the GATT 1994

6.6. With respect to paragraph 7.260, Colombia suggests that the Panel amend the wording to indicate that the limited flexibility of the regime is "alleged". Panama has made no objection to this. The Panel accepts Colombia's request for review, making the necessary adjustments to the wording of paragraph 7.260.

7 FINDINGS

7.1 Preliminary issues

7.1.1 Introduction

7.1. It is a distinguishing feature of the present proceedings under Article 21.5 of the DSU that, as described in section 1.1 above, they have been initiated by both parties.[74] This complicates the situation because there are two different panel requests in which the measures at issue and the claims are not the same.

7.2. The problem that forms the subject of the terms of reference in the present proceedings resides mainly in the fact that the parties are faced with the question of which measures are the ones taken by Colombia to comply with the recommendations and rulings of the DSB within the meaning of Article 21.5 of the DSU. Whereas Colombia argues that the only "measure taken to comply" is the replacement of the compound tariff by an *ad valorem* one via Decree No. 1744/2016, Panama maintains that the specific bond and the special import regime with the characteristics envisaged in Decree No. 1745/2016, and subsequently in Decree No. 2218/2017, are also "measures taken to comply".

7.3. The Panel's first task will therefore be to settle the question of which measures are the ones that Colombia has taken to comply. If from this analysis it is concluded that the specific bond and the special import regime with the characteristics envisaged in Decree No. 1745/2016 fall within the Panel's terms of reference, it will be necessary to examine whether, as claimed by Panama, the specific bond and the special import regime with the characteristics envisaged in Decree No. 2218/2017, which replaces and repeals Decree No. 1745/2016, are likewise within the Panel's terms of reference. This also raises the question of whether, as Panama requests, findings should be made with regard to the measures regulated by Decree No. 1745/2016, as well as findings and recommendations concerning those regulated by Decree No. 2218/2017.

7.4. Together with these fundamental issues relating to the Panel's terms of reference, this section also addresses the question of whether the claims made by Panama in its panel request fall within the terms of reference of the panel established at the request of Colombia. Moreover, Colombia's objections relating to the claims made by Panama under Article VIII:3 of the GATT 1994 and Article 7.2(g) of the Customs Valuation Agreement will also be examined.

7.5. The analysis begins with the question of the measure or measures "taken to comply" by Colombia.

7.1.2 The question of which measures are the ones "taken to comply" in the present proceedings

7.1.2.1 Arguments of the parties

7.1.2.1.1 Colombia

7.6. Colombia maintains that the compliance measure is Decree No. 1744/2016. In its opinion, the customs bond and the customs formalities of Decree No. 1745/2016 are very different in nature from the compound tariff declared to be inconsistent[75] and fall outside the scope of these proceedings. For Colombia, the Article 21.5 procedure is limited to an assessment of "the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings of the DSB" and, therefore, the scope of the "measures taken to

[74] Although this situation could be described as exceptional in the light of previous practice, there are precedents; for example, in *EC – Bananas III* and, more recently, *US – Tuna II (Mexico)*. In *EC – Bananas III*, the European Communities initiated its own proceeding under Article 21.5, without the assistance of the complainant (United States). In the parallel case, Ecuador (another of the complainants) initiated a proceeding under Article 21.5. In *US – Tuna II (Mexico)*, both the United States and Mexico initiated Article 21.5 proceedings which were dealt with jointly. Recently, there has been a case in which only the responding party instituted a compliance proceeding (*India – Agricultural Products (Article 21.5 – India)*).

[75] Colombia's first written submission as respondent, para. 19; and opening statement at the meeting of the Panel as complainant, para. 13.

comply" must be determined with reference to the said recommendations and rulings and the original measures at issue.[76]

7.7. Colombia points out that the measure which formed the subject of the findings of inconsistency has been withdrawn, resulting in the achievement of the "first objective of the dispute settlement mechanism" in accordance with Article 3.7 of the DSU.[77] Colombia stresses that the recommendations and rulings of the DSB referred exclusively to the compound tariff applied to imports of certain items of apparel and footwear. That tariff has been repealed and replaced by new tariffs established by Decree No. 1744, the decree which Colombia has notified as the measure taken to comply.[78] According to Colombia, Panama, in its first written submission, in describing the result of the original proceeding, acknowledges that the DSB's recommendations relate exclusively to the compound tariff.[79] Given that Panama does not link the measures challenged with the recommendations and rulings of the DSB, the Panel should conclude that it has not been demonstrated that the measures challenged fall within the scope of Article 21.5.[80]

7.8. For Colombia, the text of Decree No. 1745/2016 clearly shows that its purpose is to strengthen aspects of the administration and implementation of Colombia's customs procedures to combat money laundering, terrorism and unfair competition. There is nothing in the text of the decree to indicate that it is a measure taken to comply with the recommendations and rulings of the DSB. Colombia maintains that independent discussions of the decrees confirm that Decree No. 1744/2016 was adopted to comply with the recommendations and rulings of the DSB and that other measures intended for that purpose were not considered.[81] Colombia argues that in the meeting no reference was made to the DSB's recommendations and rulings when Decree No. 1745/2016 was being discussed. In agreement with the representative of the DIAN, the measures were established to strengthen the risk management system and customs controls in the face of situations where there was a suspicion of customs fraud. The Committee recommended the adoption of the measures of this Decree "*as a policy matter*".[82]

7.9. According to Colombia, Decree No. 1745/2016 is significantly different in nature from the compound tariff at issue in the original proceeding and from the tariffs of Decree No. 1744/2016. Decree No. 1745/2016 establishes customs control measures and does not directly impose import tariffs. Even if this Decree, as a customs measure, might be relevant in the context of tariff collection, it is not a measure that regulates tariffs and their levels, which is the subject of the original measure and the measure taken to comply.[83]

7.10. Colombia maintains that Panama makes no attempt to link the challenged measures with the recommendations and rulings of the DSB and fails to make a *prima facie* case that Decree No. 1745/2016 is a "measure taken to comply". In the opinion of Colombia, Panama's argument appears to be based on unconvincing ideas: the Article 21.3(c) proceedings and the claim that the challenged measures pursue the same policy objective as the original measure.[84] Colombia notes that in the arbitration process Panama admitted that measures other than repeal or amendment of the compound tariff would not have the necessary links with the DSB's recommendations and rulings to constitute a "measure taken to comply".[85] For Colombia, there is no consistency between Panama's assertion during the arbitration and its argument that the bond and the customs formalities are closely related to the recommendations and rulings of the DSB. The decision taken by the Arbitrator with respect to this argument is not relevant to this proceeding.[86] For Colombia, recourse to the award of the Article 21.3(c) Arbitrator is out of place, since the latter's

[76] Colombia's first written submission as respondent, paras. 15-18; and second written submission as respondent, para. 39.

[77] Colombia's opening statement at the meeting of the Panel as complainant, para. 15.

[78] Colombia's first written submission as respondent, paras. 21-23; and second written submission as respondent, paras. 18-20.

[79] Panama's first written submission as complainant, para. 12.

[80] Colombia's first written submission as respondent, para. 24.

[81] Colombia's first written submission as respondent, paras. 25 and 28-30; and second written submission as complainant, paras. 17-18.

[82] Colombia's first written submission as respondent, paras. 26-27; and second written submission as complainant, paras. 19-20. (emphasis added)

[83] Colombia's first written submission as respondent, para. 33.

[84] Colombia's first written submission as respondent, para. 34.

[85] Award of the Arbitrator, *Colombia –Textiles (Article 21.3(c))*, para. 3.23.

[86] Colombia's first written submission as respondent, paras. 35-36; second written submission as complainant, paras. 21-22; and second written submission as respondent, paras. 36-38.

terms of reference are very limited and concern only the determination of the reasonable period of time for the implementation of the recommendations and rulings of the DSB. They do not include the determination of a measure as "taken to comply" within the meaning of Article 21.5 of the DSU.[87]

7.11. Colombia argues that to accept that a new measure should be included in this proceeding solely because it shares a policy objective with the original measure would set a dangerous precedent. It would be an excessively broad interpretation of the scope of Article 21.5. The existence of a common objective is not a sufficient basis for such a characterization, since Members can adopt numerous measures to pursue a similar policy objective. Colombia has a broad, comprehensive and multidisciplinary regime for fighting money laundering, of which the compound tariff formed part. It would be a misuse of Article 21.5 to allow any measure adopted by Colombia for that purpose to be challenged in compliance proceedings.[88]

7.12. Colombia adds that, when a measure is declared to be inconsistent with WTO rules, the DSU expressly recognizes the right of the responding Member to a reasonable period of time in which to implement the DSB's recommendations and rulings, and even if this period proves to be insufficient or it is not possible to comply within it, the possibility of offering compensation, before being subject to the suspension of concessions or other obligations.[89] If the Panel were to find that Decree No. 1745/2016 is inconsistent with Article XI:1 of the GATT 1994, Colombia would be unfairly deprived of the right to a reasonable period of time to bring the Decree into conformity and negotiate compensation before becoming subject to the suspension of concessions or other obligations.[90]

7.13. Colombia maintains that Panama can initiate new proceedings at any time if it wishes to challenge the WTO consistency of Decree No. 1745/2016. At this time, however, it is trying to bypass the rights and procedures established by the DSU by challenging Decree No. 1745/2016.[91]

7.14. Colombia maintains that, in the original proceeding, Panama asked the Panel to make a suggestion for the implementation of the recommendations and rulings of the DSB in accordance with Article 19.1 of the DSU, and specifically that it suggest the introduction of a "capping mechanism that ensures the observance of the relevant bound tariffs, or a return to the *ad valorem* tariff system, without exceeding the limits of 35% and 40% *ad valorem* depending on the product".[92] Decree No. 1744/2016 repealed the compound tariff and established new tariffs that do not exceed Colombia's Schedule of Concessions, as Panama requested. In attempting to challenge the measures of Decree No. 1745/2016, Panama is seeking to obtain a remedy that it did not seek in the original proceeding.[93]

7.15. Colombia explains that the "matter" in the proceeding initiated by Colombia consists of the measures and claims set out in document WT/DS461/17, in which Colombia explained that by means of Decree No. 1744/2016 it had replaced the compound tariff with an *ad valorem* one that did not exceed Colombia's bound tariffs and, consequently had brought the measure into conformity with its obligations. The document in question mentions only the measure under Decree No. 1744/2016 and the claims that were the subject of the recommendations and rulings of the DSB (that is, Articles II:1(a) and II:1(b) of the GATT 1994). Consequently, the terms of reference of the Panel entrusted with the proceeding initiated by Colombia are limited to examining the consistency of the measure taken to comply (Decree No. 1744/2016) with Articles II:1(a) and II:1(b) of the GATT 1994. Any other measures and claims are excluded from the terms of reference of the Panel in the proceeding initiated by Colombia (including the claims under Article X:3(a) and Article XI:1 of the GATT 1994).[94]

[87] Colombia's first written submission as respondent, para. 37.

[88] Colombia's first written submission as respondent, paras. 38-39; second written submission as complainant, para. 33; second written submission as respondent, para. 32; and opening statement at the meeting of the Panel as complainant, para. 20.

[89] Colombia's first written submission as respondent, paras. 40-41.

[90] Colombia's first written submission as respondent, para. 42; and opening statement at the meeting of the Panel as complainant, para. 21.

[91] Colombia's first written submission as respondent, paras. 43 and 46.

[92] Panel Report, *Colombia – Textiles*, para. 7.593.

[93] Colombia's first written submission as respondent, paras. 44-45.

[94] Colombia's second written submission as complainant, paras. 4-8 and 12-14; and opening statement at the meeting of the Panel as complainant, para. 23.

7.16. Colombia acknowledges the existence of the "close nexus" theory established by the Appellate Body. However, Colombia considers that in this case the DSB's recommendations were limited to the compound tariff and therefore bear no relation to the measures implemented through Decree No. 1745/2016. Colombia adds that Panama has failed to establish the existence of a close connection between the measure it seeks to challenge in the Article 21.5 proceedings, the measure declared as taken to comply, and the recommendations and rulings of the DSB.[95]

7.17. According to Colombia, the use of the "close nexus" test by Panama is contradictory since the premise of this test is that the measure examined is not a measure taken to comply. However, Panama repeatedly describes the specific bond and the special import regime as "measures taken to comply". Colombia maintains that these measures cannot simultaneously be measures taken to comply and "closely related" measures.[96] In any event, even if Panama had adduced that these measures are "closely related" measures and not "measures taken to comply", it would still have failed to establish that they fall within the scope of the present proceedings.[97] Colombia contests Panama's line of argument with respect to the elements of the "close nexus" theory (timing, nature and effects).

7.18. As far as timing is concerned, Colombia maintains that the mere fact that a measure is introduced after the adoption of the DSB's recommendations and rulings does not mean that it is a "measure taken to comply". The fact that an instrument is adopted after the DSB's recommendations enter into effect does not necessarily mean that that instrument automatically falls within the scope of Article 21.5. That would convert any measure introduced after the DSB's recommendations and rulings into a measure taken to comply, which would include a possibly unlimited number of measures and leave the responding Member forever subject to Article 21.5 proceedings. Likewise, the adoption of an instrument on the same day as the measure taken to comply does not convert the former into another measure taken to comply. It is not reasonable to assert that any legislative or regulatory activity that takes place on the same day comprises measures taken to comply. This approach would encompass a broad range of measures bearing no relation to the recommendations and rulings of the DSB.[98]

7.19. With regard to "nature", for Colombia the nature of the measures is substantially different and Panama is trying to circumvent this difference by means of an erroneous characterization of the measures. Colombia considers the fact that the two measures were introduced under different legal regimes to be further evidence of their different nature. Decree No. 1744/2016 is a tariff measure that establishes import tariffs and was adopted under Colombia's tariff code. On the other hand, Decree No. 1745/2016 is a customs measure whose purpose is to establish a mechanism for strengthening the risk management and customs control system, and was adopted under a different legal regime (Law No. 1762 of 2015).[99] Moreover, in its opinion, the fact that the decrees were examined by the Committee on Customs, Tariffs and Foreign Trade (Triple A Committee) does not mean that they are similar in nature, since this Committee has jurisdiction over a wide range of trade policy instruments. In fact, they were examined by the Committee under different powers. Decree No. 1744/2016 was examined under the powers conferred on the Triple A Committee by paragraph 1 of Article 1 of Decree No. 3303/2006, and Decree No. 1745/2016 was examined in accordance with paragraph 2.[100] Moreover, the drafting history of the two decrees demonstrates that the Triple A Committee examined them separately and the minutes clearly indicate that the Committee considered that Decree No. 1744/2016 was being proposed to comply with the DSB's recommendations and rulings.[101] Colombia contends that the coverage of the two decrees is not the same: Decree No. 1744/2016 applies to all the products classified in Chapters 61 and 62 and in headings 64.01-64.05, whereas Decree No. 1745/2016 only applies to the products classified in Chapters 61, 62 and 64 that are imported at prices below certain thresholds. Likewise, Colombia

[95] Colombia's response to Panel question No. 57, paras. 254-257; comments on Panama's response to Panel question No. 57; and additional written submission, para. 12.

[96] Colombia's second written submission as complainant, para. 24; and second written submission as respondent, para. 17.

[97] Colombia's second written submission as complainant, paras. 23 and 25.

[98] Colombia's second written submission as complainant, paras. 26-27; second written submission as respondent, para. 30; response to Panel question No. 57; comments on Panama's response to Panel question No. 57, para. 255; and additional written submission, para. 13.

[99] Colombia's second written submission as complainant, para. 29; and second written submission as respondent, para. 34.

[100] Decree No. 3306/2006 (Exhibit COL-6), Article 1.

[101] Colombia's second written submission as complainant, para. 30.

points out that the thresholds of the two measures are very different and that different rationales were used for determining them. The tariff thresholds are fixed in accordance with those bound by Colombia within the WTO for imports above the threshold, whereas the thresholds of the customs control measure were determined by taking into account the historical level of imports over a seven-year period.[102]

7.20. Colombia argues that WTO Members adopt a variety of measures in furtherance of a similar policy objective. An excessively broad interpretation of the scope of Article 21.5 would seriously undermine the rights of Members by subjecting them to the possibility of suspension of concessions without a reasonable period of time for broad categories of measures and would have a "chilling effect" on the right of Members to regulate. The fact that a measure pursues the same public policy objective is not a sufficient reason to consider that a measure is one taken to comply. Governments adopt a variety of measures that pursue the same public policy objective. Under this interpretation, each of these measures could fall within the scope of Article 21.5.[103]

7.21. With regard to effects, Colombia maintains that Panama does not provide any information concerning the "banking costs" of the customs bonds or of the so-called "logistical hindrances" of the special import regime.[104] Nor does it offer any support for the assertion that the banking costs and the logistical hindrances have trade-restrictive effects. Being uncorroborated, these claims do not constitute a basis for the Panel to examine the "effects" in assessing whether the customs bond and the special import regime are measures taken to comply. Colombia notes that neither the Appellate Body nor the original panel referred to Decree No. 1745/2016, much less to its effects.[105]

7.22. For Colombia, an opinion similar to that of Panama was rejected by the compliance panel in *US − Large Civil Aircraft (2nd complaint)*. That panel observed that "the close nexus test is not satisfied by merely identifying any links at all between the 'undeclared' measure and the declared measures taken to comply or the DSB recommendations and rulings".[106]

7.23. Colombia contends that in the previous cases in which it was determined that measures were "closely related", the links between the measures were significantly stronger. For example, administrative decisions adopted in the same anti-dumping or countervailing duty proceedings as the measure found to be inconsistent in the original proceedings[107], an import quarantine measure applied at sub-federal level after a similar quarantine measure at federal level had been found to be inconsistent[108] and a loan[109] to a company that had had been the recipient of a grant which had been found to constitute a subsidy in the original proceedings.[110]

7.1.2.1.2 Panama

7.24. Panama maintains that the "measure taken to comply" goes beyond the measure declared by Colombia and that the requirement of a specific bond and the application of a special import regime to imports of textiles and footwear at prices equal to or lower than those determined by Colombia in Decree No. 1745/2016 form part of the "measure taken to comply".[111]

7.25. Panama considers that the designation of certain measures by the responding party as "measures taken to comply" is not determinative of the compliance panels' terms of reference, since

[102] Colombia's second written submission as complainant, para. 31; comments on Panama's response to Panel question No. 57; and additional written submission, para. 15.

[103] Colombia's second written submission as complainant, para. 32; second written submission as respondent, para. 31; response to Panel question No. 57, para. 256; comments on Panama's response to Panel question No. 57; and additional written submission, para. 14.

[104] Panama provides more information in this respect in its last submission as respondent.

[105] Colombia's second written submission as complainant, para. 34; and second written submission as respondent, para. 35.

[106] Colombia refers to the panel report in *US − Large Civil Aircraft (2nd complaint) (Article 21.5 − EU)*, para. 7.67. (Second written submission as complainant, paras. 2-4).

[107] Appellate Body Reports, *US − Zeroing (EC) (Article 21.5 − EC)*, paras. 230-235; and *US − Softwood Lumber IV (Article 21.5 − Canada)*, paras. 83-85.

[108] Panel Report, *Australia − Salmon (Article 21.5 − Canada)*, para. 7.10(22).

[109] Panel Report, *Australia − Automotive Leather II (Article 21.5 − US)*, paras. 6.4-6.5.

[110] Colombia's second written submission as complainant, para. 4.

[111] Panama's first written submission as respondent, para. 32; and opening statement at the meeting of the Panel, para. 37.

the latter may also encompass measures that the Member in question does not consider to serve that purpose. In Panama's opinion, the measures taken to comply are not limited to those which "move in the direction of, or have the objective of achieving, compliance", so that even actions which move away from or impair compliance may be "measures taken to comply". Thus, these measures must be assessed "in their totality", for which purpose panels should assess them in their full context, including how they are introduced into, and how they function within, the particular system of the Member concerned. With respect to their enactment, for example, declarations of government agencies indicating that an undeclared measure was introduced to comply with the recommendations and rulings of the DSB may constitute evidence that the measure in question forms part of the "measures taken to comply".[112]

7.26. Panama considers that an "undeclared measure" should be considered to be a "compliance measure" if there is an especially close link to the "declared measure". According to Panama, all the third parties that have replied to Panel questions agree on this point.[113] In practice, Panama observes, such a connection has been determined between the two measures in terms of timing, nature and effects, as well as between the measures and the recommendations and rulings of the DSB.[114]

7.27. Thus, for Panama, the specific bond and the special import regime are "closely related" to the measure declared by Colombia and the recommendations and rulings of the DSB, and would therefore form part of the "measures taken to comply."[115] Where timing is concerned, Panama points out that Decrees No. 1744/2016 and No. 1745/2016 were issued simultaneously on 2 November 2016 (4 months and 11 days after the adoption of the DSB's rulings and recommendations), so that the measures contained in the two decrees are closely related as regards the time of their appearance.

7.28. With regard to their nature, Panama maintains that the measures are "closely related" to each other and to the recommendations and rulings of the DSB, since the two decrees: (a) were recommended by the same Colombian regulatory body (Triple A Committee) and at the same 299th session of 7 October 2016[116]; (b) apply to the same products[117]; and (c) are being applied to achieve the public policy objective pursued by the old Decree No. 456/2014 (which contained the compound tariff declared inconsistent). For Panama, Decrees No. 1744/2016 and No. 1745/2016 are two sides of the same coin. The preamble to Decree No. 1745/2016 indicates that one of its underlying purposes was the need to implement new mechanisms that make it possible to counteract "behaviour [that] adversely affects the industrial and commercial sector as a result of unfair competition with organizations which, among other things, evade the payment of customs taxes" and that its adoption was necessary in order to "achieve on a continuing basis the policy objective pursued by the measures provided for in Decree 456 of 2014 and its amendments".[118] For its part, the third preambular paragraph of Decree No. 1744/2016 states that its adoption is necessary in view of the pending expiration of the "application period provided for in Article 5 of Decree 456 of 2014" and "to achieve on a continuing basis the policy objective pursued by means of that measure".[119]

[112] Panama's first written submission as respondent, paras. 22-23 and 41; and second written submission as complainant, paras. 8 and 24-26 (referring to Appellate Body Reports, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 204; *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 67; and *US – Upland Cotton (Article 21.5 – Brazil)*, para. 202).

[113] Panama's response to Panel question No. 57 (referring to Ecuador's third-party response to Panel question No. 6, and the third-party responses of the United States, Japan and the European Union to Panel question No. 1).

[114] Panama's response to Panel question No. 57 (referring to the Appellate Body Reports, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 77; and *US – Zeroing (EC) (Article 21.5 – EC)*, para. 204.)

[115] Panama's first written submission as respondent, paras. 42-48; second written submission as complainant, paras. 10-12 and 16; Panama's second written submission as respondent, paras. 90-101; and Panama's opening statement at the meeting of the Panel, paras. 39-40.

[116] Decree No. 1745/2016 (Exhibit PAN-2), seventh preambular paragraph, and Decree No. 1744/2016 (Exhibits COL-1/PAN-1), second preambular paragraph.

[117] Decree No. 1744/2016 (Exhibits COL-1/PAN-1), Articles 1-2, and Decree No. 1745/2016 (Exhibit PAN-2), Article 2.

[118] Panama's second written submission as complainant, paras. 12 and 20-23.

[119] Decree No. 1744/2016 (Exhibits COL-1/PAN-1), third preambular paragraph; Panama's first written submission as complainant, para. 14; and second written submission as respondent, paras. 71-72.

7.29. Panama notes that on its website the DIAN stresses that it is "combating the smuggling and underinvoicing of clothing and footwear by applying Decrees 1744 and 1745"[120] and, with reference to certain measures, indicates that they were adopted "for the purpose of implementing Decrees 1744 and 1745". According to Panama, the DIAN recognizes that Decrees No. 1744/2016 and No. 1745/2016 are a "single package" intended to combat "the smuggling and underinvoicing of clothing and footwear".[121] Likewise, on the same day the decrees were adopted, the Colombian Minister of Trade, Industry and Tourism referred to these instruments as being used in conjunction, asserting that "the measures we are drafting … will enable us effectively to combat the illegal practices but, at the same time, we have taken good care to avoid any adverse effect on formal trade and to comply fully with the instructions of the WTO".[122]

7.30. Panama considers the fact that Decree No. 1744/2016 imposes a tariff, whereas Decree No. 1745/2016 imposes customs measures, to be irrelevant as far as the analysis of the nature of the measures is concerned. According to Panama, the nature of a measure is related to its basic or inherent characteristics, or to its character or qualities. Panama points out that, according to the statements made by Colombia in the original proceedings and in the arbitration process, a basic or inherent characteristic of the compound tariff of Decree No. 456/2014 was the protection of public morals through the campaign against money laundering and compliance with Colombian anti-money laundering legislation. In these compliance proceedings Colombia maintains that the measures of Decree No. 1745/2016 share the same inherent characteristic of protecting public morals and securing compliance with Colombian anti-money-laundering legislation. Accordingly, for Panama, the measures contained in Decree No. 1745/2016 are identical in nature to the measures in Decree No. 456/2014.[123]

7.31. Panama also points out that Decree No. 1745/2016 contains customs verification measures for the collection of the tariff in Decree No. 1744/2016, so that from a narrowly tariff perspective as well, the measures of Decree No. 1745/2016 and the tariffs of Decree No. 1744/2016 are "closely related" with respect to their nature.[124]

7.32. With regard to effects, Panama argues that the trade restrictiveness, mitigated by the new tariff, continues to have an undermining effect through the measures of Decree No. 1745/2016. In the original proceedings, Colombia argued that "the compound tariff leads to an increase in the unit price of apparel and footwear imports, thereby reducing the artificially high profit margin."[125] Panama considers that the costs and logistical obstacles linked with the posting of a specific bond and the special customs regime are currently increasing import costs and, in some cases, completely deterring importers.

7.33. Panama also notes that "the adoption of the strategies" envisaged in the two Decrees No. 1745/2016 and No. 2218/2017 was based on the recommendation of the Inter-Institutional Commission against Smuggling, at its special session on 24 August 2016.[126] In the minutes of that special session[127] it is explained that the need to implement these "strategies" is closely connected with the recommendations and rulings of the DSB and, according to Panama, it is made clear that the customs measures of Decree No. 1745/2016 combined with the tariff measures of Decree No. 1744/2016 together constitute the compliance measure taken by Colombia to comply with the recommendations and rulings of the DSB. Panama points out that in the minutes, among other things, it is proposed to work on strategies that are to be implemented by taking into account three ranges or thresholds.[128]

[120] Extract from the DIAN web page (Exhibit PAN-10).
[121] Panama's second written submission as complainant, paras. 14-15.
[122] Panama's second written submission as respondent, paras. 72 and 97; and "*Dos decretos que fortalecen control aduanero de calzado y ropa*", *El Espectador* (Exhibit PAN-46).
[123] Panama's second written submission as complainant, paras. 30-31.
[124] Panama's second written submission as complainant, para. 32.
[125] Appellate Body Report, *Colombia – Textiles*, para. 5.88 (referring to Panel Report, *Colombia – Textiles*, para. 7.410).
[126] Decree No. 1745/2016 (Exhibit PAN-2), sixth preambular paragraph and Decree No. 2218/2017 (Exhibit PAN-43), sixth preambular paragraph.
[127] Communications between the parties in the Article 21.3(c) arbitration (Exhibit PAN-83), and minutes of the special session of the Inter-Institutional Commission against Smuggling (Minutes COL-ARB-02).
[128] Panama's response to Panel question No. 57.

7.34. Moreover, Panama points out that the information submitted by Colombia itself demonstrates that the tariff measure would have a close connection with these customs measures. The minutes of the Triple A Committee session mention "customs verification measures" that form part of the tariff collection control mechanism. Nevertheless, adds Panama, neither Decree No. 1744/2016 nor Colombia's description of the measure contain any reference to these customs verification measures. Thus, the "customs verification measures" mentioned in the Triple A Committee session would have to be the measures of Decree No. 1745/2016 discussed and adopted at the same session.[129]

7.35. According to Panama, Colombia misunderstands the jurisprudence of the close connection when it claims that the "measures taken to comply" cannot simultaneously be "closely connected measures". Panama explains that it is using the jurisprudence on the "close connection" to demonstrate that the specific bond and the special import regime are measures taken to comply. That is to say, if it is determined that an undeclared measure has the "close connection" it has to be understood that the measure is a "measure taken to comply" and will fall within the scope of Article 21.5 of the DSU.[130] According to Panama, if Colombia's position that only those measures whose explicit purpose is compliance with the recommendations and rulings of the DSB could be considered "measures taken to comply", the Appellate Body's jurisprudence on the "close connection" would have no utility.[131] According to Panama, maintaining that a tariff can have a close connection only with a tariff would allow Members easily to evade the compliance disciplines of Article 21.5 of the DSU by changing the "type" or "wrapping" of the measure, in an attempt to achieve compliance by means of one measure while the general conclusion of compliance with WTO law is undermined by means of another measure. For these reasons, if Colombia's restrictive reading of Article 21.5 of the DSU were to be followed, the scope of these proceedings would be very limited and lead to their becoming a mockery, together with the principle of prompt compliance with the recommendations and rulings of the DSB.[132]

7.36. Panama considers it unconvincing and inappropriate that Colombia should have changed its position at different stages of the same dispute.[133] Panama notes that during the binding arbitration under Article 21.3(c) of the DSU, Colombia explained that its compliance measure would consist in the joint application of tariff measures and non-tariff measures of a customs nature, in order to deal with money laundering, and that it would therefore have recourse to two "mutually supportive decrees". Colombia indicated that action should not be limited to terminating the measure, but that attention should also be paid to other requirements for achieving specific public policy objectives. In fact, the Arbitrator disagreed with Panama's argument that those aspects related to combating money laundering were "extraneous" to the recommendations and rulings of the DSB and agreed with Colombia that the "reasonable period of time in the present dispute should include the time needed to enact both the tariff measure and the customs measure".[134] In Panama's opinion, the Arbitrator determined the reasonable period of time on the understanding that compliance included both aspects.[135]

7.37. According to the Appellate Body, the evaluation of the "measures taken to comply" in their totality includes their context and the way in which these measures are introduced.[136] It has therefore indicated that statements by government agencies constitute evidence of a measure forming part of the measures taken to comply.[137]

7.38. Moreover, so argues Panama, Colombia maintained a double standard with regard to the value of what was argued during arbitration, since in paragraphs 35 and 36 of its first written

[129] Panama's second written submission as complainant, paras. 13-14 and 19.
[130] Panama's second written submission as respondent, paras. 103-106.
[131] Panama's second written submission as complainant, paras. 25-26.
[132] Panama's comments on Colombia's response to Panel question No. 57.
[133] Panama's second written submission as complainant, paras. 34 and 36.
[134] Award of the Arbitrator, *Colombia – Textiles (Article 21.3(c))*, paras. 3.34 and 3.41-3.42 and Annex A; and integrated executive summary of Colombia, paras. 1 and 3.
[135] Panama's first written submission as complainant, para. 13; first written submission as respondent, paras. 37-39; second written submission as complainant, section II.D; and second written submission as respondent, para. 71.
[136] Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 67.
[137] Panama refers to Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 202. (Panama's first written submission as respondent, paras. 38-39.)

submission as respondent it mentions Panama's arguments during arbitration and then, in paragraph 37 of the submission, maintains that referring to those arguments is "inapposite".[138]

7.39. Panama regards as irrelevant Colombia's argument according to which accepting that a common policy objective brings a new measure within the scope of compliance proceedings would set a "dangerous precedent". For Panama, only those measures having a "close connection" with the declared measure and the recommendations and rulings of the DSB could be regarded as measures taken to comply.[139]

7.40. Panama considers that Colombia is mistaken in suggesting that including within the terms of reference of a compliance panel a measure which was not a subject of the original proceedings deprives it of its rights to a reasonable period of time for compliance (Article 21.3 of the DSU) and to compensation negotiations (Article 22.2 of the DSU). The automatic right to a reasonable period of time arises only in the event of immediate compliance not being feasible.[140] Moreover, argues Panama, the DSU does not establish a reasonable period of time for compliance or the possibility of negotiating compensation for "measures taken to comply". These rights do not exist at this stage of the process. The period was previously granted to introduce these measures and expired on 22 January 2017 and the negotiations to seek mutually acceptable compensation were conducted without bearing fruit.[141]

7.41. Panama points out that Colombia does not explain what it is referring to when it alleges that Panama is seeking to obtain a remedy that goes beyond what it was seeking to obtain in the original proceedings. The one and only remedy sought by Panama is that Colombia should fulfil its WTO obligations.[142] Panama explains that, in the original proceedings, Panama requested as a remedy the removal of the illegal tariff. This suggestion was rejected by the panel and the Appellate Body, since the Member responsible for implementing the recommendations and rulings of the DSB enjoys a measure of discretion in choosing the means and method of implementation.[143] However, the measures adopted by Colombia raise new concerns with regard to their consistency with the covered agreements, which did not previously exist. The Appellate Body has observed that "an Article 21.5 panel could not properly carry out its mandate to assess whether a 'measure taken to comply' is fully consistent with WTO obligations if it were precluded from examining claims additional to, and different from, the claims raised in the original proceedings".[144]

7.42. With respect to the panel requested by Colombia, Panama observes that its mandate is to examine "the matter referred to the DSB by Colombia" in document WT/DS461/24. Among other things, Panama points out that in that document Colombia made express reference to the disagreement with Panama and Panama's concerns relating to Colombian compliance. Thus, this disagreement and concerns have always been present (including through being expressly mentioned by Colombia) and form an integral part of the "matter" before the panel requested by Colombia.[145] According to Panama, there is no limitation that restricts the assessment solely to the measures and claims that formed the subject of the original proceedings. Former panels have examined measures not mentioned in a panel request as being measures closely related to those expressly mentioned. Thus, on the basis of its request, Colombia should have "reasonably expected that any further measures it [Colombia] would take to comply [with the recommendations and rulings] could be scrutinized by the Panel".[146] The mandate in Article 11 of the DSU for the panel to make an "objective assessment of the matter" means that the panel requested by Colombia should, at the very least, establish the nature of Panama's disagreement and verify whether there is any basis for it. Panama

[138] Panama's second written submission as complainant, paras. 40-41.
[139] Ibid. paras. 43-46.
[140] Panama refers to Award of the Arbitrator, *Peru – Agricultural Products (Article 21.3(c))*, para. 3.28. (Panama's second written submission as complainant, paras. 47-49.)
[141] Panama's second written submission as complainant, paras. 50-52.
[142] Ibid. paras. 53-54.
[143] Panama refers to Award of the Arbitrator, *US – Stainless Steel (Mexico) (Article 21.3(c))*, para. 42. (Panama's second written submission as complainant, para. 55.)
[144] Panama cites Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 79. (Panama's second written submission as complainant, paras. 55-56; and second written submission as respondent, paras. 27-29.)
[145] Panama's second written submission as respondent, paras. 16-26; and opening statement at the meeting of the Panel, para. 36.
[146] Panama refers to Panel Report, *Australia – Salmon (Article 21.5 – Canada)*, para. 7.10. (Panama's second written submission as respondent, para. 24.)

considers that "so blunt" an approach would not enable the compliance panel requested by Colombia to discharge its obligations under Article 11 of the DSU, since it would not be able fully to assess the matter of Colombian compliance. An objective and complete assessment of compliance would not be possible if the panel could not assess the compliance of the undeclared measures with WTO provisions other than Article II of the GATT. Such an assessment would be based on an incomplete and indeed skewed or partial framework, since it would have been defined solely by one of the parties to the dispute.[147]

7.43. For Panama it is logical that questions of compliance with respect to undeclared measures should be covered by the terms of reference of the panel requested by Colombia. It is a general principle of law that no distinctions should be made where the law does not make any. In this respect, there is no objective reason either in the Understanding or in pure logic to make a distinction in coverage between undeclared measures and questions of compliance derived from those same measures.[148]

7.44. In Panama's view, trying to exclude "undeclared measures" from the Panel's terms of reference when the disagreement between the parties turned on those measures (and in any case it had been found that "closely connected measures" were involved) would be inconsistent with the requirement under Article 3.10 of the DSU that Members engage in "an effort to resolve" the dispute, and with the objective of Articles 3.3 and 21.1 to ensure "prompt compliance" with decisions.[149] Panama contends that it is a fiction that the panels have different terms of reference. For Panama, it is the same panel with the same members, with harmonized procedures as regards the submission of documents and evidence and the holding of meetings, and faced with a single substantive matter. In any event, both the specific bond and the special import regime, as well as the claims under Articles X:3(a) and XI:1 of the GATT and under Articles 1, 2, 3, 5 and 7 of the Customs Valuation Agreement, form part of the terms of reference of the panel requested by Panama.[150]

7.45. Panama argues that the measures of Decrees No. 1744/2016 and No. 1745/2016 are the continuation of the former compound tariff. Colombia has devised a mechanism akin to that tariff, which is activated when import prices fall below certain thresholds prescribed by Colombia, as with the compound tariff. The effect of the new measures is the same: they combine a price-sensitive component (an *ad valorem* duty) with a price-insensitive component (specific duty or specific bond and documentary requirements) for the purpose of discouraging imports of products at competitive prices in order to protect the domestic industry, using as justification the aim of combating money laundering.[151] According to Panama, in adopting Decree No. 456/2014 and Decrees No. 1744/2016 and No. 1745/2016 Colombia based itself on the same conceptual and diagnostic framework: that there would be certain thresholds which determine what is a real value and what is an "artificially low" value, because imports which enter at "artificially low prices" are used for money laundering.[152] The decrees have the same structure: they use thresholds for determining which values are real and which are "artificially low". This activates measures, which originally consisted of a compound tariff that imposed an *ad valorem* levy and a specific levy and now consist of an *ad valorem* tariff (via Decree No. 1744/2016) and multiple requirements involving specific charges (via Decree No. 1745/2016), which together impose a burden greater than that of the specific levy of Decree No. 456/2014, because of the costs associated with the new measures.[153]

7.46. According to Panama, the two decrees have the same policy objective: to combat money laundering within the framework of customs risk management (as indicated in the preamble to Decree No. 1745)[154] and the same effects: making imports of textiles and footwear at competitive prices more expensive and limiting imports. In the original proceedings, Colombia argued that Decree No. 456/2014 was making money laundering operations more expensive and thus discouraging them. In the compliance proceedings, the differential tariff together with the specific charges of Decree No. 1745/2016 increase the costs of imports at competitive prices, thereby

[147] Panama's opening statement at the meeting of the Panel, paras. 36 and 44.
[148] Panama's opening statement at the meeting of the Panel, paras. 42-43.
[149] Panama's second written submission as respondent, para. 25; and opening statement at the meeting of the Panel, para. 44.
[150] Panama's second written submission as respondent, paras. 30-36; and opening statement at the meeting of the Panel, para. 46.
[151] Panama's second written submission as respondent, paras. 40-41.
[152] Ibid. paras. 42-45.
[153] Ibid. paras. 47-52.
[154] Panama's second written submission as respondent, paras. 55-57.

discouraging their entry into Colombia and making them commercially unviable for traders. In fact, in 2017, the DIAN publicly announced as "good results" the reduction of imports for at least the footwear sector "thanks to measures such as Decree 1745".[155]

7.47. Panama argues that Colombia decided to split up its measure as a result of the declaration by the Appellate Body, transferring the matter of the "illegality" of imports below the threshold from the strictly tariff context to one in which there is no conflict with Article II of the GATT. Thus, Decree No. 1744/2016 responds to the rulings and recommendations of the DSB with respect to Article II of the GATT, while Decree No. 1745/2016 responds to all those of Colombia's policy considerations that sought to justify the restrictions on imports created by the compound tariff.[156]

7.1.2.2 Analysis by the Panel

7.48. As indicated in paragraph 7.5 above, the Panel's first task will be to settle the question of which measure is the one taken by Colombia to comply or whether there is more than one. Colombia argues that the only "measure taken to comply" is the replacement of the inconsistent compound tariff by an *ad valorem* one via Decree No. 1744/2016. In its opinion, the recommendations and rulings of the DSB related exclusively to the compound tariff, which has been repealed and replaced by new *ad valorem* tariffs established by Decree No. 1744/2016, the decree which Colombia has notified as the measure taken to comply.[157] For its part, Panama does not dispute that the new *ad valorem* tariffs established by Decree No. 1744/2016 constitute a measure taken by Colombia to comply; however, for Panama, the specific bond and the special import regime with the characteristics envisaged in Decree No. 1745/2016 are also measures taken to comply with the DSB's recommendations and rulings.[158]

7.49. It should be pointed out that, ultimately, it is for the Panel and not the parties to decide which are the measures taken to comply.[159] Although Colombia's designation of a measure as one "taken to comply", or not, is relevant, it cannot be conclusive.[160] Hence, although characterizing an act by Colombia as a measure taken to comply when the latter maintains otherwise is not something that should be done lightly, "a panel, in examining the factual and legal circumstances within which the implementing Member takes action, may properly reach just such a finding in some cases".[161] If it were otherwise, an implementing Member would be able to avoid proceedings under Article 21.5 of the DSU simply by deciding what measures to notify, or not to notify, to the DSB.[162] Conversely, nor is it up to the original complaining party alone, in this case Panama, to determine what constitutes the "measure taken to comply".[163]

7.50. There is a close connection between a panel's terms of reference and the request for its establishment.[164] In proceedings initiated under Article 21.5 of the DSU, as in the original dispute

[155] Panama refers to "*Se redujo en más del 90% el ingreso de calzado subfacturado en Colombia*", *Vanguardia* (Exhibit PAN-50). (Panama's second written submission as respondent, paras. 58-61.)

[156] Panama's second written submission as respondent, paras. 63, 69 and 74.

[157] Colombia's first written submission as respondent, paras. 21-23; and second written submission as respondent, paras. 18-20.

[158] Panama's first written submission as respondent, para. 32; and opening statement at the meeting of the Panel, para. 37.

[159] The Appellate Body in *EC − Bed Linen (Article 21.5 − India)* indicated that "[w]e agree with the Panel that it is, ultimately, for an Article 21.5 panel − and not for the complainant or the respondent − to determine which of the measures listed in the request for its establishment are 'measures taken to comply'". (Appellate Body Report, *EC − Bed Linen (Article 21.5 − India)*, para. 78.)

[160] Appellate Body Report, *US − Softwood Lumber IV (Article 21.5 − Canada)*, para. 73. See also ibid. para. 77 and Appellate Body Report, *US − Zeroing (EC) (Article 21.5 − EC)*, para. 204.

[161] Appellate Body Report, *US − Softwood Lumber IV (Article 21.5 − Canada)*, para. 74.

[162] Panel Report, *Australia − Automotive Leather II (Article 21.5 − US)*, para. 6.4. See also Appellate Body Report, *US − Softwood Lumber IV (Article 21.5 − Canada)*, para. 74 and footnote 111.

[163] Appellate Body Reports, *EC − Bed Linen (Article 21.5 − India)*, para. 78; and *US − Softwood Lumber IV (Article 21.5 − Canada)*, para. 73. See also Panel Reports, *Australia − Automotive Leather II (Article 21.5 − US)*, para. 6.4; and *Australia − Salmon (Article 21.5 − Canada)*, para. 7.10(22).

[164] The legal basis governing the panel request is Article 6.2 of the DSU, which states in relevant part that panel requests "shall identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly". As summarized by the Appellate Body in *China − Raw Materials*, Article 6.2 serves a "pivotal function" in WTO dispute settlement and sets out "two key requirements" that a complainant must satisfy in its panel request, namely: (a) the identification of the specific measures at issue; and (b) the provision of a brief summary of the legal basis of the complaint, i.e. the claims, sufficient to present the problem clearly. (Appellate Body Reports, *China − Raw Materials*, para. 219.) To be

settlement proceedings[165], the "matter" referred to the panel consists of two elements: the specific measures at issue and the legal basis of the complaint (that is, the claims).[166] Thus, the panel request defines and limits the scope of the dispute and hence the scope of the panel's jurisdiction. This means that *only* the measures identified in the panel request may be examined by the panel and *only* in relation to their consistency with the provisions of the WTO agreements expressly mentioned in the request.

7.51. The complexity in the case of DSU Article 21.5 proceedings resides in the fact that the panel's terms of reference are defined in relation not only to the panel request but also to the DSB's recommendations and rulings in the original proceedings. This is because of the wording of Article 21.5 of the DSU, which calls for the application of the dispute settlement procedures and recourse to the original panel wherever possible "[w]here there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings". Thus, although Article 6.2 of the DSU is, in general, applicable to requests for the establishment of a panel under Article 21.5, it is necessary to adapt the requirements of Article 6.2, applicable to the original panel request, to the Article 21.5 panel request.[167]

7.52. In an Article 21.5 procedure, the "specific measures at issue" are measures "that have a bearing on compliance with the recommendations and rulings of the DSB".[168] This indicates that the requirements of Article 6.2 of the DSU, as they apply to an Article 21.5 panel request, "must be assessed in the light of the recommendations and rulings of the DSB in the original panel proceedings that dealt with the same dispute".[169] However, when the measures actually "taken" by the implementing Member are broader than the DSB's recommendations and rulings, there is no reason why the scope of the DSB's recommendations and rulings should necessarily limit the scope of the "measures taken to comply".[170] In fact, the scope of the Article 21.5 dispute settlement proceedings *cannot* be reduced to the issue of whether or not the respondent has implemented the DSB recommendation.[171] On the contrary, these "proceedings involve, in principle, not the original measure, but rather a new and different measure which was not before the original panel".[172]

7.53. In the present proceedings it is questioned whether the specific bond and the special import regime with the characteristics envisaged in Decree No. 1745/2016 are part of the Panel's terms of reference. There seems to be no doubt that they qualify as "specific measures at issue" in accordance with the requirements of Article 6.2 of the DSU since, as noted in section 1.1.2 above, they are identified in Panama's panel request.

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precise, the Appellate Body maintains that the "matter" referred to the panel consists of two elements: (a) the specific measures at issue; and (b) the legal basis of the complaint (or the claims). (Appellate Body Report, *Guatemala − Cement I*, para. 72.)

[165] Appellate Body Reports, *Guatemala − Cement I*, para. 72; *US − Carbon Steel*, para. 125; and *US − Continued Zeroing*, para. 160.

[166] Appellate Body Report, *EC − Bed Linen (Article 21.5 − India)*, para. 78. See also Appellate Body Report, *US − Upland Cotton*) *(Article 21.5 − Brazil)*, para. 201.

[167] In *US − FSC (Article 21.5 − EC II)*, the Appellate Body stated the following:

> The Appellate Body has, to date, not been called upon to determine the precise scope of the phrase "these dispute settlement procedures" in Article 21.5 and how it relates to Article 6.2 of the DSU. We do not consider it necessary, for purposes of resolving the present dispute, to determine the precise scope of this phrase. However, we are of the view that the phrase "these dispute settlement procedures" does encompass Article 6.2 of the DSU, and that Article 6.2 is generally applicable to panel requests under Article 21.5. At the same time, given that Article 21.5 deals with compliance proceedings, Article 6.2 needs to be interpreted in the light of Article 21.5. In other words, the requirements of Article 6.2, as they apply to an original panel request, need to be adapted to a panel request under Article 21.5.

(Appellate Body Report, *US − FSC (Article 21.5 − EC II)*, para. 59 (footnotes omitted)).
See also Appellate Body Report, *US − Zeroing (Japan) (Article 21.5 − Japan)*, para. 109.

[168] Appellate Body Report, *US − FSC (Article 21.5 − EC II)*, para. 61. See also Appellate Body Report, *US − Zeroing (Japan) (Article 21.5 − Japan)*, para. 109.

[169] Appellate Body Report, *US − FSC (Article 21.5 − EC II)*, para. 61. See also Appellate Body Report, *US − Zeroing (Japan) (Article 21.5 − Japan)*, para. 109.

[170] Appellate Body Report, *US − Upland Cotton (Article 21.5 − Brazil)*, para. 202.

[171] Appellate Body Report, *Canada − Aircraft (Article 21.5 − Brazil)*, para. 40.

[172] Ibid. para. 41. See also Appellate Body Reports, *Mexico − Corn Syrup (Article 21.5 − US)*, paras. 78 and 80; and *EC − Bed Linen (Article 21.5 − India)*, para. 79.

7.54. The doubt that arises with respect to these measures is whether they are "measures taken to comply" or, at least, measures "inextricably linked" and "clearly connected"[173] to the measure declared to have been taken to comply by Colombia under Article 21.5 of the DSU, as Panama claims. In this respect, the Appellate Body has concluded that "[i]t will ordinarily be necessary to consider first whether the measure at issue is in itself a measure taken to comply. Only if that analysis cannot provide a clear answer, is the analysis of *US − Softwood Lumber IV (Article 21.5 − Canada)* of application"[174], that is to say, the analysis according to which it is determined whether the measure at issue not declared by the original respondent as a measure taken to comply is "inextricably linked" and "clearly connected" to the measure declared as having been taken to comply by the original respondent.[175] The Appellate Body has stressed that the reasoning in *US − Softwood Lumber IV (Article 21.5 − Canada)* concerned the identification of measures closely connected with the declared "measure taken to comply" so as to avoid circumvention.[176] Therefore, "if the measure at issue is found to constitute in itself a measure taken to comply, it will not be necessary to establish a 'particularly close relationship' of the measure at issue to the declared measure taken to comply in order to subject the measure at issue to the scope of Article 21.5 of the DSU".[177]

7.55. In the present case, the only measure taken to comply "declared" by Colombia as such is the *ad valorem* tariff imposed by Decree No. 1744/2016. Panama does not dispute that this tariff constitutes a measure taken to comply. However, Panama maintains that the specific bond and the special import regime with the characteristics envisaged in Decree No. 1745/2016 are also measures taken to comply, although they have not been "declared" as such by Colombia.

7.56. The task of determining whether a measure at issue is a measure taken to comply by the original respondent when the latter denies it and has declared that another measure is the only measure taken to comply is not an easy one. Other panels, in similar situations, have opted to examine whether the measure at issue in question satisfies the test identified by the Appellate Body for establishing whether such a measure is "inextricably linked" and "clearly connected"[178] to the measure "declared" by the respondent as a measure taken to comply. In fact, some measures with a particularly close relationship to the declared "measure taken to comply" and to the recommendations and rulings of the DSB may also be susceptible to review by a panel acting under Article 21.5 of the DSU. Determining whether this is the case requires a panel to scrutinize these relationships, which may, depending on the particular facts, call for an examination of *the timing, nature and effects* of the various measures. This also requires a panel to examine the factual and legal background against which the measure declared by Colombia to constitute the "measure taken to comply" has been adopted. Only then is a panel in a position to take a view as to whether there are sufficiently close links to characterize the specific bond and the special import regime with the characteristics envisaged in Decree No. 1745/2016 as measures "taken to comply".[179]

7.57. Panama has relied on the above-mentioned parameters, *timing, nature and effects*, to make the case that both measures are measures taken to comply.[180]

7.58. The *timing* of a measure is a relevant factor in determining whether it is sufficiently closely connected to a Member's implementation of the recommendations and rulings of the DSB.[181] Thus, the fact that a measure is adopted simultaneously with, shortly before, or shortly after specific actions introduced by Members with a view to implementing the recommendations and rulings of

[173] Appellate Body Report, *US − Softwood Lumber IV (Article 21.5 − Canada)*, paras. 81 (referring to Panel Report, *US − Softwood Lumber IV (Article 21.5)*, para. 4.41) and 90.

[174] Appellate Body Reports, *EC − Bananas III (Article 21.5 − Ecuador II) / EC − Bananas III (Article 21.5 − US)*, para. 244.

[175] Appellate Body Report, *US − Softwood Lumber IV (Article 21.5 − Canada)*, paras. 81 (referring to Panel Report, *US − Softwood Lumber IV (Article 21.5 − Canada)*, para. 4.41) and 90.

[176] Appellate Body Reports, *US − Upland Cotton (Article 21.5 − Brazil)*, para. 205; and *EC − Bananas III (Article 21.5 − Ecuador II) / EC − Bananas III (Article 21.5 − US)*, para. 245.

[177] Appellate Body Reports, *EC − Bananas III (Article 21.5 − Ecuador II) / EC − Bananas III (Article 21.5 − US)*, para. 245.

[178] Appellate Body Report, *US − Softwood Lumber IV (Article 21.5 − Canada)*, paras. 81 (referring to Panel Report, *US − Softwood Lumber IV (Article 21.5 − Canada)*, para. 4.41) and 90.

[179] Appellate Body Report, *US − Softwood Lumber IV (Article 21.5 − Canada)*, para. 77. See also Appellate Body Report, *US − Zeroing (EC) (Article 21.5 − EC)*, para. 207.

[180] See paras. 7.26-7.32 above.

[181] Appellate Body Reports, *US − Softwood Lumber IV (Article 21.5 − Canada)*, para. 84; and *US − Zeroing (EC)* (*Article 21.5 − EC)*, para. 225.

the DSB may provide support for a finding that those measures are closely connected. Conversely, there might be situations where the fact that the alleged "closely connected" measure was taken a considerable time before the adoption of the recommendations and rulings of the DSB will be sufficient to sever the connection between that measure and a Member's implementation obligations.[182]

7.59. As Panama points out[183], Decrees No. 1744/2016 and No. 1745/2016 were issued on the same day, 2 November 2016, more than four months after the adoption of the rulings and recommendations of the DSB and, coincidentally, on the same day as the signing of the arbitrator's award in the arbitration under Article 21.3(c) of the DSU. Bearing in mind the observation by the Appellate Body that the timing of a measure is a relevant factor in determining whether it is sufficiently closely connected to a Member's implementation of the recommendations and rulings of the DSB, the Panel considers that the measures contained in the two Decrees are closely related with regard to their timing.

7.60. Likewise, the two Decrees were recommended at the same session (the 299th session of 7 October 2016) of the same Colombian regulatory body (Triple A Committee).[184]

7.61. The *nature or subject matter* of the measure is also relevant to this examination. In previous proceedings consideration was given, within the nature analysis, to the fact that the related measures involved the same products[185] and the use of the same methodology; this was the precise issue that was challenged in the original dispute, and which was the subject of the DSB rulings and recommendations.[186]

7.62. In this respect, Decrees No. 1744/2016 and No. 1745/2016 apply to the same products[187], namely, the products classified in Chapters 61, 62 and 64 (specifically headings 64.01, 64.02, 64.03, 64.04 and 64.05 and subheading 6406.10.00.00) of the Colombian Customs Tariff.

7.63. Moreover, as the decrees themselves make clear, they seek to achieve the same public policy objectives as those pursued by the former Decree No. 456/2014. As Panama points out, the declared objective of the compound tariff of Decree No. 456/2014 was to protect public morals by combating money laundering and to secure compliance with Colombia's anti-money laundering legislation.[188] The preambles to Decrees No. 1744/2016 and No. 1745/2016 are explicit in this respect.

7.64. On the one hand, the preamble to Decree No. 1744/2016 reads as follows:

> Whereas, taking into account the fact that the implementation period provided for in Article 5 of Decree 456 of 2014, as extended by Decrees 515 of 2016 and 1229 of 2016,

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[182] Appellate Body Report, *US − Zeroing (EC) (Article 21.5 − EC)*, para. 225. Although "[a]s a whole, Article 21 deals with events *subsequent* to the DSB's adoption of recommendations and rulings in a particular dispute". (Appellate Body Report, *US − Softwood Lumber IV (Article 21.5 − Canada)*, para. 70 (original emphasis). See also Appellate Body Report, *US − Zeroing (EC) (Article 21.5 − EC)*, para. 222). The timing of a measure cannot be determinative of whether it bears a sufficiently close nexus with a Member's implementation of the recommendations and rulings of the DSB so as to fall within the scope of a compliance proceeding. Since compliance with the recommendations and rulings of DSB can be achieved *before* the recommendations and rulings of the DSB are adopted, a compliance panel may have to review events pre-dating the adoption of those recommendations and rulings in order to resolve a disagreement as to the 'existence' or 'consistency with a covered agreement' of such measures". (Appellate Body Report, *US − Zeroing (EC) (Article 21.5 − EC)*, para. 224.)

[183] Panama's first written submission as respondent, paras. 42-43; second written submission as complainant, para. 12; and second written submission as respondent, para. 95.

[184] Decree No. 1745/2016 (Exhibit PAN-2), seventh preambular paragraph; and Decree No. 1744/2016 (Exhibits COL-1/PAN-1), second preambular paragraph.

[185] Appellate Body Report, *US − Zeroing (EC) (Article 21.5 − EC)*, para. 240.

[186] In *US − Zeroing (EC) (Article 21.5 − EC)*, the methodology in question was zeroing in the calculation of margins of dumping. (Appellate Body Report, *US − Zeroing (EC) (Article 21.5 − EC)*, para. 241 (citing Panel Report, *US − Zeroing (EC) (Article 21.5 − EC),* para. 8.104)). Similarly, in *US − Softwood Lumber IV (Article 21.5 − Canada)*, the Appellate Body found that the product that was subject to the three countervailing duty proceedings was the same, and the "pass-through" methodology adopted by the USDOC was the same in two cases. (Appellate Body Report, *US − Softwood Lumber IV (Article 21.5 − Canada)*, para. 83).

[187] Decree No. 1744/2016 (Exhibits COL-1/PAN-1), Articles 1 and 2; and Decree No. 1745/2016 (Exhibit PAN-2), Article 2.

[188] Panama's second written submission as complainant, paras. 30-31.

> expires on 1 November 2016, it is necessary to implement the exception provided for in Article 2, paragraph 2, of Law 1609 of 2013, *in order to achieve on an ongoing basis the policy objective pursued by this measure*.[189]

7.65. Likewise, the preamble to Decree No. 1745/2016 states that:

> Whereas, taking into account the fact that the implementation period envisaged in Article 5 of Decree 456 of 2014, as extended by Decrees 515 and 1229 of 2016, expires on 1 November 2016, it is necessary immediately to implement the exception provided for in Article 2, paragraph 2 of Law 1609 of 2013, to the effect that *the customs measures provided for in this Decree are applied in order to achieve on an ongoing basis the policy objective pursued by the measures provided for in Decree 456 of 2014 and its amendments*.[190]

7.66. On its website the Colombian DIAN emphasizes that it "combats the smuggling and underinvoicing of clothing and footwear by implementing Decrees 1744 and 1745"[191] and, with reference to certain measures, notes that they were adopted "for the purpose of giving effect to Decrees 1744 and 1745".[192] This language shows that the DIAN considers Decrees No. 1744/2016 and No. 1745/2016 to be measures having the same target, namely, to combat "the smuggling and underinvoicing of clothing and footwear". This view appears to be reinforced by the statements made by Colombian authorities in this respect. For example, on the same day the decrees were adopted, Colombia's Minister of Trade, Industry and Tourism referred to Decrees No. 1744/2016 and No. 1745/2016 as instruments to be applied jointly, asserting that "the measures we designed will enable us to combat illegal practices effectively, but at the same time we were careful not to adversely affect formal trade and to comply fully with the WTO mandate".[193]

7.67. In addition, this Panel considers that the structure or methodology used in the decrees is a reflection of their shared nature. Both Decree No. 456/2014, which was examined in the original proceedings and Decrees No. 1744/2016 and No. 1745/2016 establish tariffs or special measures applicable to imports of certain products at a declared price equal to or lower than certain predetermined thresholds. That is to say, the three decrees operate in accordance with thresholds established by Colombia on the basis of which special treatment is generated for the imports concerned.[194] In all cases, moreover, Colombia considers that imports at or below the level of the thresholds have a high risk of being unlawful in nature.

7.68. The Panel considers that the fact that Decrees No. 1744/2016 and No. 1745/2016 were introduced under different legal regimes (the former in accordance with the Colombian Tariff Code and the latter under Law No. 1762/2015), as indicated by Colombia, does not affect the above-mentioned linkage. Likewise, the fact that one measure (Decree No. 1744/2016) is an exclusively tariff measure whereas the other (Decree No. 1745/2016) consists of customs control measures does not necessarily mean that they are unrelated in nature, as Colombia maintains. The Panel agrees with Panama in considering that Decree No. 1745/2016 contains customs verification measures for collecting the tariff in Decree No. 1744/2016, so that even from a strictly tariff perspective, the measures of Decree No. 1745/2016 and the tariffs of Decree No. 1744/2016 are "closely related" in nature.[195]

7.69. As far as *effects* are concerned, in previous proceedings consideration was given to whether the effects of the measure were undermining the implementation of the DSB's recommendations

[189] Decree No. 1744/2016 (Exhibits COL-1/PAN-1), third preambular paragraph. (emphasis added)
[190] Decree No. 1745/2016 (Exhibit PAN-2), eighth preambular paragraph. (emphasis added)
[191] Extract from the DIAN web page (Exhibit PAN-10).
[192] Panama's second written submission as complainant, para. 15.
[193] "*Dos decretos que fortalecen control aduanero de calzado y ropa*", *El Espectador* (Exhibit PAN-46).
[194] This is also the understanding of the European Union, as a third party, which notes that the new mechanism is similar to that of the compound tariff, since it is also activated when the prices of imports fall below certain thresholds fixed by Colombia. Moreover, for the European Union, the measures of the two decrees are Colombia's response to the recommendations and rulings of the DSB. If the compound tariff had not been declared inconsistent and unjustified under Article XX there would have been no reason to replace it with new measures. (European Union's third-party written submission, paras. 11-20.)
[195] Panama's second written submission as complainant, para. 32.

with respect to the measure originally challenged.[196] In fact, although there are some limits to the scope of the compliance proceedings, "these limits should not allow circumvention by Members by allowing them to comply through one measure, while, at the same time, negating compliance through another".[197]

7.70. With respect to effects, Panama argues that the trade restrictiveness mitigated by the new tariff is again having an undermining effect through the measures of Decree No. 1745/2016. In the original proceedings, Colombia argued that "the compound tariff leads to an increase in the unit price of apparel and footwear imports, thereby reducing the artificially high profit margin".[198] In Panama's opinion, the new measures have the same effect: they combine a price-sensitive component (an *ad valorem* duty) with a price-insensitive component (specific duty or the requirement of a specific bond and documentary requirements) for the purpose of discouraging the importation of products at competitive prices in order to protect the domestic industry, using as justification the aim of combating money laundering.[199]

7.71. According to Panama's reasoning, the Panel should conclude that the specific bond and the special import regime are restrictive in nature so that these measures may be regarded as connected with the measure taken to comply declared by Colombia. The analysis of the effects of the measure at issue to establish its connection with the measure declared does not require such a prior finding. The Panel's analysis should instead be concentrated on establishing whether not considering the specific bond and the special import regime to be part of the Panel's terms of reference would enable Colombia to circumvent the recommendations and rulings of the DSB.

7.72. The fact that Decrees No. 1744/2016 and No. 1745/2016 are constructed around the suspicion that imports at or below the level of the thresholds have a high risk of being unlawful in nature means that the effect of the specific bond and the special import regime under Decree No. 1745/2016 is the same as the effect that the compound tariff had. This effect can be better understood if the *ad valorem* tariff of Decree No. 1744/2016 is also taken into account. The Panel agrees with the European Union that the combination of a price-sensitive aspect (*ad valorem* tariff) and a price-insensitive one (bond and documentary requirements) could have the same effect as the compound tariff system.[200]

7.73. Furthermore, the Panel considers that, if it were determined that the measures contained in Decree No. 1745/2016 were inconsistent with the covered agreements, those measures could actually undermine the implementation of the DSB's recommendations with respect to the measure originally challenged. That is, if, as Panama maintains, the non-tariff elements of the measures were to operate, for example, as restrictions on the importation of the restrictive products, the objective sought by means of the recommendations and rulings of the DSB in the original proceedings would not be achieved in practice. The limits of the compliance proceedings should not allow circumvention by Members by allowing them to comply through one measure, while, at the same time, negating compliance through another.[201] Consequently, the Panel considers that the measures would also be related with respect to their effects.

7.74. Once the timing, nature and effects have been examined, the Panel should likewise examine the *factual and legal background* that formed the basis for the adoption of the measure which Colombia has declared to constitute the "measure taken to comply". Only then will it be possible to take a view as to whether there are sufficiently close links to characterize the specific bond, together with the special import regime with the characteristics provided for in Decree No. 1745/2016, as "measures taken to comply".[202]

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[196] In *US − Zeroing (EC) (Article 21.5 − EC)*, the Appellate Body examined whether the use of zeroing in subsequent determinations could undermine implementation in respect of original investigations. (Appellate Body Report, *US − Zeroing (EC) (Article 21.5 − EC)*, para. 250.)

[197] Appellate Body Report, *US − Softwood Lumber IV (Article 21.5 − Canada)*, para. 71.

[198] Appellate Body Report, *Colombia − Textiles*, para. 5.88 (referring to Panel Report, *Colombia − Textiles*, para. 7.410).

[199] Panama's second written submission as respondent, paras. 40-41.

[200] European Union's third-party written submission, para. 16.

[201] Appellate Body Report, *US − Softwood Lumber IV (Article 21.5 − Canada)*, para. 71.

[202] Appellate Body Report, *US − Softwood Lumber IV (Article 21.5 − Canada)*, para. 77. See also Appellate Body Report, *US − Zeroing (EC) (Article 21.5 − EC)*, para. 207.

7.75. There is factual and legal background that enables this Panel to determine that the measures contained in Decrees No. 1744/2016 and No. 1745/2016 are closely related. First of all, the adoption of the two decrees was recommended by the same Colombian authority, the Triple A Committee, and at the same session (299th session held on 7 October 2016). This is confirmed by the preambles to the two decrees.

7.76. On the one hand, the preamble to Decree No. 1744/2016 reads as follows:

> Whereas, having examined the recommendation made by the Committee on Customs, Tariffs and Foreign Trade at its 299th session of 7 October 2016, the National Government resolved to establish … [.][203]

7.77. On the other hand, in the preamble to Decree No. 1745/2016 it is stated that:

> Whereas the Committee on Customs, Tariffs and Foreign Trade at its 299th session of 7 October 2016 recommended the adoption of the measures incorporated in the present Decree.[204]

7.78. In the minutes of the said 299th session of the Triple A Committee it is stated that "[t]he Ministry presented a proposal for the collection of the tariff for imports of these goods, based on the definition of a price threshold".[205] According to the minutes, this proposal considered an MFN tariff, a tariff bound with the WTO, and customs verification measures. The Panel notes that these latter customs measures are not contained in Decree No. 1744/2016. Therefore, it can only be concluded that, as indicated by Panama, these have to be the measures of Decree No. 1745/2016. In addition, the Panel observes that according to the minutes:

> Once the topics submitted by the DIAN and the Ministry of Trade, Industry and Tourism had been discussed, the Committee recommended, as a policy matter, the adoption of customs measures that make it possible to exercise more effective control over imports of clothing and footwear products, in particular those imports where the values declared are abnormal, inexplicably low or unjustifiable in relation to the thresholds established. It also recommended that the tariff measures applied to these products be adjusted to comply with the recommendations and rulings of the WTO Dispute Settlement Body.[206]

7.79. Moreover, the Panel notes that the preamble to Decree No. 1745/2016 mentions that the adoption of the strategies envisaged therein was also recommended by another Colombian authority, the Inter-Institutional Commission against Smuggling, at a special session held on 24 August 2016.[207] A reading of the minutes of that special session shows that the measures of Decree No. 1745/2016 are clearly related to the recommendations and rulings of the DSB in the original proceedings. In this connection, after a brief summary of the original proceedings, the minutes state the following:

> Taking into account the above, since the WTO's decision became known, the Ministry of Trade, Industry and Tourism and the DIAN have been working on a series of preliminary strategies for implementing the recommendations of the DSB but which at the same time are effective against the use of imports of footwear, textiles and clothing to launder money. Today these strategies are being presented for consideration by the members of the Commission in order to be discussed and, if appropriate, considered among the possible implementation measures in relation to the WTO.[208]

7.80. Further on in the minutes it is noted that the situation has led the DIAN on a preliminary basis to decide that work could be done on strategies that should be implemented by taking into account three ranges or thresholds, and mention is made of different customs strategies that could be applied to imports below the first threshold. These strategies include, *inter alia*, "[i]ntervening in the import

[203] Decree No. 1744/2016 (Exhibits COL-1/PAN-1), second preambular paragraph. (emphasis added)
[204] Decree No. 1745/2016 (Exhibit PAN-2), seventh preambular paragraph. (emphasis added)
[205] Minutes of the Triple A Committee's 229th session (Exhibit COL-4), p. 7.
[206] Ibid. p. 8.
[207] Decree No. 1745/2016 (Exhibit PAN-2), sixth preambular paragraph.
[208] Communications between the parties in the arbitration under Article 21(c), Minutes of the special session of the Inter-Institutional Commission against Smuggling, p. 4. COL-ARB-02 (Exhibit PAN-83).

operation in the process of inward clearance on the basis of criteria derived from the customs risk control system", "[s]trengthening the role of the observer with respect to advance declarations", and "[i]ntensifying the work of identifying enterprises that have performed inward clearance at obviously low prices, for the purpose of carrying out a comprehensive analysis and generating inputs which make it possible to frame special cases for transmission to the Financial Information and Analysis Unit (UIAF) and the Attorney General's Office".[209]

7.81. For all of the above reasons, the Panel concludes that the specific bond and the special import regime with the characteristics provided for in Decree No. 1745/2016 are "inextricably linked" and "clearly connected" to the measure declared by Colombia as having been taken to comply, that is to say, the *ad valorem* tariff imposed by Decree No. 1744/2016.

7.82. In addition, although the Panel recognizes that the statements made by the parties in an arbitration proceeding under Article 21.3(c) of the DSU are not binding in subsequent procedures, it seems relevant to point out that during the arbitration under that article Colombia stated that it would "carry out the administrative processes required to enact the measures modifying the compound tariff and implementing improvements to Colombia's customs control and supervision procedures" and that "[t]wo mutually supportive decrees would have to be issued. One regarding the adjustment of tariffs and the other establishing the customs measures".[210]

7.83. The Panel observes that one of the arguments used by Colombia against the consideration of the specific bond and the special import regime as part of the Panel's terms of reference is that it would seriously impair its rights by subjecting it to the possibility of suspension of concessions without a reasonable period of time.[211] The Panel considers that, after the original proceedings, Colombia was given a "reasonable period of time" to implement the recommendations and rulings of the DSB and that in the review of its measure it could have confined itself to replacing the compound tariff with an *ad valorem* one. However, Colombia decided to adopt, in addition, the specific bond and the special import regime. In these circumstances, the lack of a new "reasonable period of time" does not give rise to the serious impairment of its rights alleged by Colombia. Moreover, it is a characteristic of compliance proceedings that "no reasonable period of time for implementation is available if the new measure taken to comply with the DSB's recommendations and rulings is found to be WTO-inconsistent".[212]

7.1.2.3 Conclusion

7.84. For the reasons given above, the Panel concludes that the specific bond and the special import regime with the characteristics described in Decree No. 1745/2016 are "inextricably linked" and "clearly connected" to the measure declared by Colombia as taken to comply, that is to say, the tariffs imposed by Decree No. 1744/2016.

7.85. Once it has been concluded that the specific bond and the special import regime with the characteristics described in Decree No. 1745/2016 fall within the Panel's terms of reference, another problem arises as a result of the fact that the Decree in question has been repealed and replaced by Decree No. 2218/2017, as explained in Section 7.1.3.2.1 below. According to Panama, the specific bond and the special import regime with the characteristics provided for in Decree No. 2218/2017, which replaces and repeals Decree No. 1745/2016, are also within the Panel's terms of reference. This likewise raises the question of whether findings should be made with regard to a repealed measure, as Panama requests.

[209] Communications between the parties in the arbitration under Article 21.3(c), Minutes of the special session of the Inter-Institutional Commission against Smuggling, pp. 6-7. COL-ARB-02 (Exhibit PAN-83).
[210] Award of the Arbitrator, *Colombia – Textiles (Article 21(c)*, para. 3.27.
[211] Colombia's first written submission as respondent, para. 38.
[212] Appellate Body Report, *US – Upland Cotton*) *(Article 21.5 – Brazil)*, para. 207.

7.1.3 The question of which measures are the ones on which the Panel should rule

7.1.3.1 Arguments of the parties

7.1.3.1.1 Panama

7.86. Panama considers that the Panel could and should make findings and recommendations concerning the measures in question on the basis of Decree No. 2218/2017.[213] For Panama, the fact that a regulation is introduced after a panel has been established does not deprive the panel of procedural competence to rule on what has been defined as the measure at issue, regardless of the formal "raiment" in which that measure may be clad. Otherwise, adds Panama, the respondents could easily manipulate the outcome of disputes.[214]

7.87. Panama points out that Decree No. 2218/2017 merely replaces Decree No. 1745/2016 without changing the essence of the compliance measures, with regard to their nature as customs controls. Panama asserts that it would be wrong to say that Decree No. 2218/2017 is a new "measure", since it is merely a new "legislative act" that prolongs the applicability of already existing measures. Panama maintains that the debate does not revolve around a "new measure", since the measures challenged by Panama have always been the same: the specific bond and the special import regime. For Panama, since the essence of these measures was not changed by the adoption of Decree No. 2218/2017, they continue to be the same undeclared compliance measures, and Decree No. 2218/2017 constitutes the legislative instrument with respect to which the Panels should make rulings and recommendations.[215]

7.88. Panama states that the Appellate Body in *Chile – Price Band System* confirmed that panels may consider a measure that is the subject of legislative amendment in the course of the proceedings, provided that three requirements are met: (a) that the legislative amendment does not alter the essence of the measure; (b) that the panel's terms of reference are sufficiently broad to include amendments to a measure; and (c) that it may be relevant to examine whether the inclusion of any changes to a panel's terms of reference is necessary to secure a positive solution to the dispute.[216]

7.89. Panama maintains that the first requirement would be met in this case since the issuance of Decree No. 2218/2017 did not change the essence of the measures at issue which remain essentially the same in substance. For Panama, the present situation is very similar to that which arose in the original proceedings when Colombia replaced Decree No. 074/2013 with Decree No. 456/2014. In that instance, the original panel considered that the legislative change introduced by Decree No. 456/2014 had not given rise to a change in the essence and character of the measure. Panama maintains that, similarly, the amendments introduced by Decree No. 2218/2017 did not change the essence of Decree No. 1745/2016 for the following reasons: (a) both decrees provide for a specific bond and a special import regime; (b) both decrees apply to the same range of products, with new products added under the second decree; (c) the two decrees contain the same or very similar regulations; (d) both decrees were issued by the President of the Republic of Colombia or delegated bodies with presidential functions citing the same basis in law; (e) the two decrees have practically identical titles and were adopted by the President of the Republic of Colombia on the basis of a recommendation issued by the Triple A Committee; (f) the two decrees are similar in validity since they are to remain in force indefinitely; (g) in the course of the proceedings before the panels, Colombia affirmed that both decrees pursue the same objective, namely, to combat underinvoicing and money laundering; and (h) Decree No. 2218/2017 replaces and repeals Decree No. 1745/2016.[217]

7.90. Panama asserts that the second requirement established in *Chile – Price Band* System is met, since the terms of reference of the panels are broad enough to include amendments to a measure. Panama points out that in its request it explicitly included "any amendments, extensions or

[213] Panama's response to Panel question No. 52.
[214] Panama's response to Panel question No. 53 and comments on Colombia's response to Panel question No. 53.
[215] Panama's opening statement at the meeting of the Panel, para. 40; and comments on Colombia's response to Panel question No. 53.
[216] Panama's response to Panel question No. 52.
[217] Panama's response to Panel question No. 52.

additions" to Decree No. 1745/2016 and that, because Decree No. 2218/2017 amends, extends or adds to Decree No. 1745/2016, Decree No. 2218/2017 is explicitly covered by the terms of reference of the panel requested by Panama. Panama adds that, in specifying the legal consequences of non-compliance with the special import regime, Decree No. 2218/2017 refines the provisions of Decree No. 1745/2016. Panama also maintains that the text of Decree No. 2218/2017 itself establishes that the decrees are closely related to each other, since Decree No. 2218/2017 replaces Decree No. 1745/2016, pursuant to Article 12 of Decree No. 2218/2017.[218]

7.91. With respect to the terms of reference of the panel requested by Colombia, Panama maintains that Decree No. 2218/2017 is implicitly covered under its terms of reference, since it is the legislative act in force that reflects the undeclared compliance measure, covered by virtue of the close nexus. Panama adds that it has demonstrated that the specific bond and the special import regime are compliance measures not declared by Colombia, so that a legislative change in those measures that does not affect their essence does not alter that demonstration.[219]

7.92. Panama considers that the third requirement established in *Chile – Price Band System* is met in this case since making findings with respect to the specific bond and special import regime on the basis of Decree No. 2218/2017 would be of help in securing a positive solution to the dispute. Panama considers that the usefulness of any finding would be limited if the panels were to ignore the amendments of Decree No. 2218/2017 and base themselves exclusively on the specific bond and special import regime in the way in which they were envisaged in the previous Decree No. 1745/2016.[220]

7.93. Panama maintains that continuous legislative changes during the proceedings place the complainant in a situation of uncertainty and procedural disadvantage as compared with the respondent, which always has the possibility of changing its measures to avoid a guilty verdict. For Panama, the position of the Appellate Body that a panel is not required to rule on measures that did not exist at the time it was established makes sense in order to safeguard the procedural interests of the complainant and spare it the obligation of constantly pursuing moving targets.[221] The premise of this position, according to Panama, is the protection of the procedural interests of the complainant, so that if the complainant consents to a panel examining the same measure on the basis of a new legislative instrument, the panel in question should carry out that examination.[222]

7.94. Panama maintains that if the Panels do not examine the measures in question under Decree No. 2218/2017, Panama would have to request a second compliance proceeding to assess the same measures, but with the clarifications or additions of Decree No. 2218/2017, which would be an inefficient use of resources and the dispute settlement system and contrary to fundamental principles such as that of achieving a satisfactory settlement of the matter in accordance with Article 3.4 of the DSU and prompt settlement and prompt compliance in accordance with Articles 3.3 and 21.1 of the DSU.[223]

7.95. Panama considers that the Panel should also make findings regarding the measures reflected in Decree No. 1745/2016, since these were the measures in force at the time of establishment of the panels. Panama states that the importance of making findings regarding the measures in force at the time of establishment of the panels resides in a complaining party not having to adjust its pleadings in the course of a dispute in order to contend with the variable content of a disputed measure. Panama considers that making findings regarding the measures on the basis of Decree No. 1745/2016 would lead to a positive solution to this dispute, since the legislative situation in Colombia with respect to imports of the products in question is changing constantly and there is a possibility of the Panel determining that it is not competent to make findings regarding the measures on the basis of Decree No. 2218/2017.[224]

[218] Idem.
[219] Panama's response to Panel question No. 52.
[220] Idem.
[221] Panama refers to the Appellate Body report in *Chile – Price Band System* and the panel report in *Argentina – Footwear (EC)*. (Panama's response to Panel question No. 54.)
[222] Panama's response to Panel question No. 54.
[223] Panama's response to Panel question No. 54.
[224] Panama's response to Panel question No. 52.

7.96. Panama maintains that the matter referred to the Panel consisted of the questions included both in Colombia's request and in Panama's request. Panama asserts that the matter referred to the Panel by Colombia in its request included Panama's concerns relating to Colombia's compliance with the recommendations and rulings of the DSB, and that Panama's request is explicit and describes the measures at issue as part of the matter.[225]

7.1.3.1.2 Colombia

7.97. Colombia maintains that the bond and the special regime established in Decree No. 2218/2017 are not compliance measures and therefore cannot be challenged under Article 21.5 of the DSU. Colombia states that, as explained with respect to Decree No. 1745/2016, the recommendations and rulings of the DSB are limited to the compound tariff and have no relationship with the measures implemented through Decrees No. 1745/2016 and No. 2218/2017.[226]

7.98. Colombia considers that, in the event that the Panel determines that the measures contained in Decrees No. 1745/2016 and No. 2218/2017 form part of its terms of reference, it agrees with Panama that the Panel could and should formulate recommendations regarding the measures in question reflected in Decree No. 2218/2017. Moreover, Colombia considers that the Panel should avoid making findings and recommendations regarding Decree No. 1745/2016, since it is no longer in force. Colombia requests the Panel to find that, as it is not in force, Decree No. 1745/2016 cannot cause nullification or impairment.[227]

7.99. Colombia acknowledges that panels, within the framework of Article 21.5 of the DSU, have examined measures enacted after they were established when those measures incorporated the same conduct that was found to be WTO-inconsistent in the original proceedings. Colombia points out, however, that this interpretation is valid only with respect to those aspects of the new measure which are essentially identical with the previous measure and is not applicable to novel aspects of the measure.[228]

7.1.3.2 Analysis by the Panel

7.100. The Panel's next task is to determine which measures it should examine: the specific bond and the special import regime with the characteristics provided for in Decree No. 1745/2016, and therefore "repealed"; the specific bond and the special import regime with the characteristics provided for in Decree No. 2218/2017, and currently in force; or both. Panama has requested the Panel to make findings with regard to the repealed measures and findings and recommendations with regard to the measures in force.

7.1.3.2.1 The question of whether the Panel can make findings with regard to repealed measures

7.101. Panama requests the Panel to make findings with respect to the specific bond and the special import regime with the characteristics provided for in Decree No. 1745/2016. These measures, which are identified in Panama's panel request, were in force at the time of establishment of this Panel, but were repealed during the present proceedings. It is therefore necessary to examine whether the Panel is empowered to make findings with regard to repealed measures.

7.102. Although we are engaged in compliance proceedings under Article 21.5 of the DSU, leaving aside the question of which measures are "measures taken to comply", the requirements of Article 6.2 of the DSU are applicable for determining the scope of the terms of reference of compliance panels.[229] This provision requires that the specific measures at issue be "identified" in the panel request, but does not clarify whether they have to be in force at the time when the panel

[225] Panama's response to Panel question No. 53.
[226] Colombia's additional written submission, paras. 9 and 11.
[227] Colombia's comments on Panama's responses to Panel questions Nos. 49, 52 and 53.
[228] Colombia's response to Panel questions No. 53, paras. 241-242, and No. 54, paras. 243-244; and comments on Panama's response to Panel question No. 54.
[229] Appellate Body Reports, *US – FSC (Article 21.5 – EC II)*, para. 59 and *US – Zeroing (Japan) (Article 21.5 – Japan)*, para. 109.

makes it findings. In this respect, the fact that a measure has been repealed does not settle the question of whether a panel can examine claims with regard to that measure.

7.103. It is important to stress that the deference accorded to a Member's exercise of its judgment in bringing a dispute is not entirely boundless, so that where a measure expires or is repealed during the panel proceedings, the panel, in the exercise of its jurisdiction, must objectively assess whether the "matter" before it, within the meaning of Article 7.1 and Article 11 of the DSU, has been fully resolved or still requires to be examined.[230]

7.104. By virtue of Article 11 of the DSU, every panel has a margin of discretion in the exercise of its inherent adjudicative powers. Thus, within this margin of discretion, it is for the panel to decide how subsequent modifications to the measure at issue, including its repeal, are to be taken into account.[231]

7.105. It is therefore appropriate to assess whether the matter before the Panel has been fully resolved by the repeal of Decree No. 1745/2016. In this connection, the Panel observes that Decree No. 1745/2016 has been repealed and *replaced* by Decree No. 2218/2017, which also includes a specific bond and a special import regime. In fact, Panama is requesting the Panel to make findings (and recommendations) in this respect. This implies that, in order to determine objectively whether the repeal of Decree No. 1745/2016 has fully resolved the matter, it is first necessary to determine whether the specific bond and the special import regime with the characteristics provided for in Decree No. 2218/2017 fall within the Panel's terms of reference and, if so, whether the Panel should make findings in that respect.

7.1.3.2.2 The question of whether the specific bond and the special import regime with the characteristics provided for in Decree No. 2218/2017 fall within the Panel's terms of reference

7.106. As described in Section 7.1.3.2.1 above, Decree No. 2218/2017 not only repeals Decree No. 1745/2016 but replaces it, thereby replacing certain aspects of the specific bond and the special import regime. Thus, the repeal and replacement accomplished by Decree No. 2218/2017 may be likened to an amendment of Decree No. 1745/2016. Therefore, and in line with the approach of previous panels, the jurisprudence relating to amendments made after the establishment of a panel would also apply to superseding or replacement measures, such as Decree No. 2218/2017.[232]

7.107. It should be recalled in this respect that the Panel has powers to examine a legal instrument adopted after its establishment that amends a measure identified in the panel request, provided that the language of the panel request is broad enough to include the amended measure and the amendment does not change the "essence" of the measure identified.[233]

7.108. The Panel observes that the language of Panama's panel request explicitly provides for the inclusion in the panel's terms of reference of "any possible amendments, extensions or additions". Thus, Panama intended that the request should cover amended or replaced measures.

7.109. The Panel also observes that Decree No. 2218/2017 does not transform the specific bond and the special import regime into measures different from the specific bond and special import regime of Decree No. 1745/2016. Both measures continue to exist and entail the same legal consequences. In fact, as described in paragraphs 2.38-2.39 above, Decree No. 2218/2017 continues to envisage the requirement of a specific bond for the relevant products (with some changes in product coverage[234]), although some particular characteristics of the specific bond, such

[230] In *EU – PET (Pakistan)*, the Appellate Body used similar language to refer to measures that had expired. (Appellate Body Report, *EU – PET (Pakistan)*, para. 5.51.)

[231] Appellate Body Report, *EU – PET (Pakistan)*, para. 5.51.

[232] The panel in *China – Raw Materials* considered that the legal approach originally developed in connection with amendments enacted after a panel's establishment "should also apply to replacement measures that are of the same essence as original measures specifically identified in the Panel Request." (Panel Reports, *China – Raw Materials*, para. 7.16.)

[233] Appellate Body Reports, *Chile – Price Band System*, paras. 135-139; *EC – Chicken Cuts*, para. 157; and *EC – Selected Customs Matters*, para. 184.

[234] Whereas Decree No. 1745/2016 covers clothing and footwear classified in Chapters 61, 62 and 64 of the Colombian Customs Tariff when the declared f.o.b. price is lower than or equal to a certain threshold, Decree No. 2218/2017 covers fibres, yarns, fabrics, clothing and footwear of Chapters 52, 53, 54, 55, 56, 58,

as the amount, have been modified.[235] Likewise, Decree No. 2218/2017 continues to envisage a special import regime for the relevant products, although some specific aspects of the regime have been modified.[236] Thus, in the view of this Panel, the specific bond and the special import regime continue to exist with some of their characteristics modified, but with no change to their "essence".

7.110. Therefore, the Panel considers that the specific bond and the special import regime with the characteristics provided for in Decree No. 2218/2017 fall within the Panel's terms of reference, because the language of Panama's panel request is sufficiently broad and the essence of the original measures has not changed as a result of their being replaced.

7.1.3.2.3 The question of whether the Panel should rule on the measures with the characteristics of both decrees

7.111. Once it has been concluded that the specific bond and the special import regime with the characteristics provided for in Decree No. 2218/2017 fall within the Panel's terms of reference, the next step is to determine the measures on which findings should be made. It should be recalled that Panama is requesting that the Panel make findings with regard to the repealed measures and with regard to the measures that replace them.

7.112. In Section 7.1.3.2.1 above, it is explained that to determine whether the Panel should make findings concerning a repealed measure it should be objectively assessed whether the "matter" before it, within the meaning of Article 7.1 and Article 11 of the DSU, has been fully resolved through such repeal or has still to be examined.[237] The Panel believes that making findings on the repealed measures would not resolve the matter before it, precisely because of the replacement of the repealed measures with other measures that are of the same essence.

7.113. The Panel's conclusion is supported by the object and purpose of the dispute settlement system, as laid down in Articles 3.4 and 3.7 of the DSU, to secure a positive solution to the dispute.[238] Indeed, the Panel considers that it should examine the specific bond and the special import regime with the characteristics provided for in Decree No. 2218/2017 "to 'secure a positive solution to the dispute' and to make 'sufficiently precise recommendations and rulings so as to allow for prompt compliance'".[239] The Panel recalls that "[i]f the terms of reference in a dispute are broad enough to include amendments to a measure—as they are in this case—and if it is necessary to consider an amendment in order to secure a positive solution to the dispute—as it is here—then it is appropriate to consider the measure *as amended* in coming to a decision in a dispute".[240]

7.114. Panama requests that the Panel rule on both measures (repealed and replacement). Panama argues that making findings on the measures on the basis of Decree No. 1745/2016 would provide a positive solution to this dispute, because the regulatory situation in Colombia with respect to imports of the products in question is changing constantly and there is a possibility that the Panel might determine that it is not competent to make findings on the measures on the basis of

59, 60, 61, 62, 63 and 64 of the Customs Tariff, where the declared f.o.b. price is lower than or equal to the established threshold. Likewise, the thresholds of Decree No. 2218/2017 were adjusted using the same methodology as that used for establishing the thresholds of Decree No. 1745/2016.

[235] The specific bond provided for in Article 7 of Decree No. 1745/2016 is required for release of the goods covered by the decree; it must be provided by a bank or insurance company; its amount is 200% of the unit price of the established "threshold" multiplied by the quantity imported; it must be for a three-year term and its purpose will be to guarantee payment of such customs duties and penalties as may apply. As for the specific bond provided for in Article 7 of Decree No. 2218/2017, it is required for release of the goods covered by the decree if a dispute arises with respect to value in connection with the inspection or examination process; it must be provided by a bank or insurance company; its amount is 200% of the difference between the f.o.b. price declared by the importer and the result of multiplying the unit price of the established threshold by the quantity imported; and it must be for a three-year term.

[236] We note that the requirements concerning the presence of import operations observers and risk management are identical in both decrees, the differences in the customs formalities are very minor, and Decree No. 2218/2017 introduced a prohibition on the reshipment of the covered goods if they do not comply with the customs formalities.

[237] In *EU – PET (Pakistan)*, the Appellate Body used similar language to refer to measures that had expired. (Appellate Body Report, *EU – PET (Pakistan)*, para. 5.51.)

[238] Appellate Body Report, *Chile – Price Band System*, paras. 140-143.

[239] Appellate Body Report, *Chile – Price Band System*, para. 143.

[240] Appellate Body Report, *Chile – Price Band System*, para. 144. (original emphasis)

Decree No. 2218/2017.[241] The Panel is not convinced by this argument of Panama. First, the Panel has already determined that Decree No. 2218/2017 falls within its terms of reference, so that Panama's concern is baseless. Secondly, Panama has accepted that it is not necessary to make recommendations with regard to Decree No. 1745/2016, and has thus recognized that these measures are no longer producing effects. Moreover, in the Panel's opinion, Panama has not sufficiently demonstrated the risk of Colombia re-imposing the specific bond and the special import regime with the characteristics provided for in Decree No. 1745/2016. Therefore, the Panel considers that making findings on the repealed measures would amount to a purely academic exercise and that, in order to fulfil its mandate to resolve the matter before it, it must examine and make findings and, where appropriate, recommendations, with regard to the specific bond and the special import regime with the characteristics provided for in Decree No. 2218/2017 and not those provided for in Decree No. 1745/2016.

7.115. The Panel points out that, as indicated in paragraph 1.28 above, for the purpose of safeguarding Colombia's procedural rights, it gave the latter the opportunity to submit an additional written submission following the substantive meeting in order to respond to Panama's claims regarding the measures with the characteristics provided for in Decree No. 2218/2017. In fact, Panama had presented its claims relating to that Decree in its second written submission as respondent, at a point in the procedure at which the timetable for the Panel's proceedings did not provide for further written submissions from the parties. The Panel believed that Panama could not have presented these arguments earlier since Decree No. 2218/2017 entered into force during the period between the second written submission of the parties as complainant and the second written submission as respondent. Colombia made use of the opportunity provided by the Panel and on 20 April 2018 presented an additional written submission containing its arguments with respect to Decree No. 2218/2017.

7.1.3.3 Conclusion

7.116. As indicated in paragraph 7.110 above, the Panel considers that the specific bond and the special import regime with the characteristics provided for in Decree No. 2218/2017 fall within the Panel's terms of reference, because the language of Panama's panel request is sufficiently broad and the essence of the original measures has not changed as a result of their being replaced.

7.117. For the reasons set out above, the Panel concludes that, in order to fulfil its mandate to resolve the matter before it, it must examine and make findings and, where appropriate, recommendations with regard to the specific bond and the special import regime, with the characteristics provided for in Decree No. 2218/2017 and not those provided for in Decree No. 1745/2016.

7.1.4 The question of which claims are within the Panel's terms of reference

7.118. The Panel will now examine two issues: first, whether the claims included by Panama in its written submissions but not identified in its panel request form part of its terms of reference; and secondly, whether the claims included in Panama's panel request fall within the terms of reference of the panel established at Colombia's request.

7.119. As is the case with the measures, there is a close relationship between the claims that can be invoked in a compliance proceeding and the panel request. The task of a compliance panel consists of examining the "consistency with a covered agreement" of "measures taken to comply with the recommendations and rulings" of the DSB. This "task is circumscribed by the specific claims made by the complainant when the matter is referred by the DSB for an Article 21.5 proceeding".[242] That is to say that "[i]t is not part of the task of a panel under Article 21.5 to address a claim that has not been made".[243] Therefore, Panama may not invoke claims of inconsistency with provisions of WTO agreements that it did not include in its panel request. The Panel observes that Panama's panel request does not contain claims with respect to Article VIII:3 of the GATT 1994 nor with respect to Article 7.2(g) of the Customs Valuation Agreement. Given that Panama did not include these provisions in its panel request, they do not fall within this Panel's terms of reference.

[241] Panama's response to Panel question No. 52.
[242] Appellate Body Report, US – *Shrimp (Article 21.5 – Malaysia)*, para. 87.
[243] Ibid. para. 87.

7.120. The claims to be considered by the compliance panel are also determined by the "measure taken to comply". Thus, "[i]f a *claim* challenges a *measure* which is not a "measure taken to comply", that *claim* cannot properly be raised in Article 21.5 proceedings".[244] The claims in relation to the specific bond and the special import regime included by Panama in its panel request would fall within its terms of reference, as this Panel has considered that they are closely connected with the measure declared by Colombia as having been taken to comply.

7.121. The problem resides in the objection raised by Colombia with regard to the consideration of the claims made in Panama's panel request by the panel established at Colombia's request. The Panel recalls that if the original complainant considers that the measure taken to comply is inconsistent with provisions of the WTO agreements not covered in the request for the establishment of a panel by the implementing Member, it may file its own request for the establishment of a panel under Article 21.5 identifying those provisions that it considers should be examined by the Article 21.5 panel. It would then be for the compliance panel to determine whether the implementing measure violates the WTO agreements in ways different from the original measure or whether certain claims fall outside the scope of Article 21.5 proceedings.[245] Indeed, the original respondent that has taken a "measure taken to comply" cannot be expected to speculate as to the violations that could possibly be raised against its measure by other Members, and this is not what the original respondent is expected to do if it initiates Article 21.5 panel proceedings.[246]

7.122. In the present proceedings, Panama has filed a panel request that includes those claims which it considers relevant in relation to the measures taken to comply. To accept Colombia's position would mean that the Panel would be creating an artificial situation within which two different decisions would exist, one related to Colombia's panel request, limited to the claims considered by the original panel, and one related to Panama's request, with all the claims made by Panama. That might lead, among other things, to a possible contradiction in the decisions, with one determining that Colombia has brought its measures into conformity with the recommendations and rulings of the DSU, and the other determining that Colombia has not yet done so. The Panel therefore rejects Colombia's argument.

7.123. A final matter for examination in relation to the claims made by Panama is Colombia's argument according to which the Panel could not accept Panama's arguments regarding the inconsistency of Colombia's measures under the Customs Valuation Agreement because they were included in its submissions as respondent. In particular, Colombia maintains that the consequence of Panama having presented its arguments with respect to the claims of inconsistency with the Customs Valuation Agreement for the first time in its second written submission as respondent is that the claims must remain outside the Panel's terms of reference.[247] Colombia contends that Panama's claims with respect to the Customs Valuation Agreement lie outside the terms of reference of the panel requested by Colombia because they would not be part of the "matter" submitted for consideration by the panel in the corresponding panel request. For Colombia, these claims are not directed against Decree No. 1744/2016 and were not identified by Colombia in its panel request, so that there is no legal underpinning that would allow Panama to broaden the terms of reference of the Panel by presenting claims in its written submission as respondent.[248] The Panel recalls its conclusion according to which the inclusion by Panama of such claims in its panel request is sufficient for them to be considered as part of the terms of reference of the panel established at Colombia's request, since they refer to measures closely connected with the measure declared by Colombia as taken to comply.

7.124. In its first written submission as respondent, Panama refers for the first time to its claims under the Customs Valuation Agreement.[249] Subsequently, in its second written submission as respondent, Panama develops its arguments concerning the inconsistency with the Customs Valuation Agreement of the specific bond and the special import regime. However, as

[244] Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 78. (original emphasis)
[245] Appellate Body Reports, *Canada/US – Continued Suspension*, para. 354.
[246] Appellate Body Reports, *Canada/US – Continued Suspension*, para. 353.
[247] Colombia's comments on Panama's response to Panel question No. 56.
[248] Colombia's second written submission as complainant, para. 14; additional written submission, para. 28; response to Panel question No. 56, para. 250; and comments on Panama's response to Panel question No. 56.
[249] Panama's first written submission as respondent, para. 66.

Panama points out, it presented the same arguments as complainant in its initial oral statement at the meeting with the Panel.[250]

7.125. In the light of the foregoing, the Panel rejects Colombia's objection and considers Panama's claims under the Customs Valuation Agreement to fall within the Panel's terms of reference for both proceedings.

7.1.4.1 Conclusion

7.126. For all of the above reasons, the Panel concludes that Panama's claims with respect to Articles VIII:3 of the GATT 1994 and 7.2(g) of the Customs Valuation Agreement do not fall within the Panel's terms of reference, since Panama did not include them in its request for the establishment of a panel.

7.127. The Panel also concludes that Panama's claims included in its panel request fall within the Panel's terms of reference in both proceedings.

7.128. Below, the Panel proceeds to examine whether, as Colombia requests, the *ad valorem* tariff imposed by Decree No. 1744/2016 is consistent with Article II:1 of the GATT 1994. The Panel's examination will continue with the analysis of Panama's claims regarding the alleged inconsistency of the specific bond and the special import regime with the characteristics of Decree No. 2218/2017 under Articles XI:1 and X:3(a) of the GATT and Articles 1, 2, 3, 5, 6 and 7.2(f) of the Customs Valuation Agreement. Should the Panel find the specific bond or the special import regime or both to be inconsistent with any of these provisions, it will consider the defence put forward by Colombia under subparagraphs (a) and (d) of Article XX of the GATT 1994.

7.2 The question of whether the tariffs of Decree No. 1744/2016 are consistent with Article II.1(a) and Article II.1(b), first sentence, of the GATT 1994

7.2.1 Introduction

7.129. In its panel request, Colombia indicated that, by means of Decree No. 1744/2016, it has replaced the compound tariff declared inconsistent with Articles II.1(a) and Article II.1(b), first sentence, of the GATT 1994, with an *ad valorem* tariff that does not exceed the tariff rates bound in the WTO. Colombia maintains that it has thereby brought the measure subject to the DSB's recommendations into conformity with its WTO obligations.[251]

7.130. In this connection, Colombia has identified the tariffs applicable under Decree No. 1744/2016 as the measure taken to comply with the recommendations of the DSB and has requested, with respect to this Decree, that this Panel find that Colombia has complied with the DSB recommendations and rulings in the original proceedings.[252] For its part, Panama does not question that the tariffs provided for in Decree No. 1744/2016 are a measure taken to comply[253] nor does it make claims against these tariffs.[254]

7.131. This section will focus on Colombia's request with respect to Decree No. 1744/2016 that the Panel find that Colombia has complied with the recommendations and rulings of the DSB in the original proceeding.

[250] Panama's response to Panel question No. 55.
[251] Colombia's request for the establishment of a panel, WT/DS461/17, p. 2.
[252] Colombia's first written submission as complainant, para. 39.
[253] See, for example, Panama's second written submission as complainant, para. 5.
[254] Panama's response to Panel question No. 51.

7.2.2 Arguments of the parties

7.2.2.1 Colombia

7.132. Colombia states that on 2 November 2016 it issued Decree No. 1744/2016, which repealed the compound tariff and modified the tariffs applicable to imports of the products classified in Chapters 61, 62 and 63 and certain headings of Chapter 64.[255]

7.133. Colombia maintains that the bound rate in its Schedule of Concessions for products classified in Chapters 61 and 62 is 40% and that Decree No. 1744/2016 sets an *ad valorem* MFN tariff of 40% for imports of products classified in Chapters 61 and 62 of the Colombian Customs Tariff when the declared f.o.b. import price is less than or equal to US$10 per gross kilogram. Colombia maintains that the tariff is consistent with the levels bound in Colombia's Schedule of Concessions and is therefore in conformity with the provisions of the first paragraph of Article II.1(b) of the GATT 1994.[256]

7.134. Colombia also states that in those cases where the import price of the products classified in Chapters 61 and 62 exceeds US$10, as in the case of imports of products classified in Chapter 63, the MFN tariff will be that specified in Decree No. 4927/2011, or any amending decree, which contains the Colombian Customs Tariff. Colombia maintains that in no case does the tariff rate applied to such products exceed the tariff rates bound in Colombia's Schedule of Concessions, and that, therefore, the tariffs envisaged in Decree No. 1744/2016 are consistent with the first paragraph of Article II:1(b) of the GATT 1994.[257]

7.2.2.2 Panama

7.135. For its part, Panama does not question that the tariffs applicable to the relevant products, contained in Decree No. 1744/2016, are a measure taken to comply[258], nor does it bring claims against those tariffs.[259] In fact, Panama accepts that the imports covered are subject to an *ad valorem* tariff at the level bound by Colombia with the WTO.[260]

7.2.3 Analysis by the Panel

7.136. Before beginning its legal analysis, the Panel considers it appropriate to make two clarifications, the first with respect to its terms of reference and the second with respect to its function.

7.137. The Panel observes, first, with respect to its terms of reference, that Decree No. 1744/2016 is the measure declared by Colombia as taken to comply with the rulings and recommendations of the DSB[261] and that Panama does not question that the tariffs provided for in Decree No. 1744/2016 are part of the measures taken to comply.[262] In this respect, the Panel recalls its findings in paragraphs 7.114 and 7.116 above that Decree No. 1744/2016 is one of the measures taken to comply with the recommendations and rulings of the DSB. Therefore, the Panel considers that Decree No. 1744/2016 falls within its terms of reference.

7.138. Secondly, with respect to its function, the Panel notes that Panama does not refute Colombia's claim that the tariffs provided for in Decree No. 1744/2016 are consistent with Article II:1(b) of the GATT 1994. However, the lack of a refutation of Colombia's claim on the part of Panama does not exempt the Panel from its obligation under Article 11 of the DSU to make an objective assessment of the matter before it.

7.139. In this connection, the Panel observes that, as has consistently been recognized within the WTO's dispute settlement system, the burden of proving a challenged measure's inconsistency with

[255] Colombia's first written submission as complainant, para. 19.
[256] Colombia's first written submission as complainant, para. 30.
[257] Colombia's first written submission as complainant, paras. 31-32.
[258] See, for example, Panama's second written submission as complainant, para. 5.
[259] Panama's response to Panel question No. 51.
[260] Panama's response to Panel question No. 51.
[261] Colombia's request for the establishment of a panel, WT/DS461/17, p. 2.
[262] See, for example, Panama's second written submission as complainant, para. 5.

the invoked provisions of the covered agreements lies initially on the complaining party and, once the complaining party has established a *prima facie* case for such inconsistency, the burden moves to the defending party, which must in turn refute the claimed inconsistency.[263] It has also been consistently recognized that the burden of proof falls on the party who asserts a fact, whether the claimant or the respondent.[264]

7.140. These compliance proceedings create a special situation due to the fact that Colombia, as the respondent in the original proceedings, initiated its own proceedings under Article 21.5 of the DSU, claiming that its measure declared as taken to comply had corrected the inconsistencies found in the original proceedings. Therefore the burden of establishing a *prima facie* case for the claimed consistency rests with Colombia.

7.141. In line with the above, the Appellate Body has considered that in Article 21.5 proceedings the original respondent has an onus to show that its implementing measure has cured the defects identified in the DSB's recommendations and rulings[265] and that, to this end, the original respondent must give a clear description of its implementing measure and an adequate explanation regarding how this measure rectifies the inconsistencies found in the original proceedings, so as to place the panel in a position to make an objective assessment of the matter and, in the absence of rebuttal, to rule in favour of the original respondent.[266]

7.142. Considering these principles, and in keeping with the approach adopted by other panels[267], even in the absence of any refutation on the part of Panama it is for the Panel to satisfy itself that Colombia has discharged the burden of showing that Decree No. 1744/2016 is consistent with Article II:1(b) of the GATT 1994 and with Article II:1(a) of the GATT 1994.

7.143. Having clarified its terms of reference and its function, the Panel points out that, in the absence of claims by Panama against Decree No. 1744/2016, the only relevant legal provisions with respect to that Decree are those that were the subject of findings of inconsistency on the part of the panel in the original proceedings, that is, Article II:1(a) and Article II:1(b), first sentence, of the GATT 1994.

7.144. Therefore it will be the Panel's task to determine whether, as Colombia claims, the tariffs provided for in Decree No. 1744/2016 are consistent with Article II:1(b) of the GATT 1994 and with Article II:1(a) of the GATT 1994.

7.145. Article II:1(a) of the GATT 1994 reads as follows:

> Each contracting party shall accord to the commerce of the other contracting parties treatment no less favourable than that provided for in the appropriate Part of the appropriate Schedule annexed to this Agreement.

7.146. As for the first sentence of Article II:1(b) of the GATT, it reads as follows:

> The products described in Part 1 of the Schedule relating to any contracting party, which are the products of territories of other contracting parties, 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.

7.147. While Article II:1(a) of the GATT 1994 requires Members to accord to the commerce of other Members treatment no less favourable than that provided for in their Schedule of Concessions[268], the first sentence of Article II:1(b) prohibits Members from subjecting the products of other

[263] Appellate Body Reports, *EC – Hormones*, para. 98 and *US – Wool Shirts and Blouses*, p. 16.
[264] Appellate Body Report, *US – Wool Shirts and Blouses*, pp. 14-18.
[265] Appellate Body Reports, *US/Canada – Continued Suspension*, para. 362.
[266] Idem.
[267] This approach has been used by other panels. See, for example, Panel Reports, *US – Shrimp (Ecuador)*, para. 7.11 and *US – Shrimp (Thailand)*, para. 7.21.
[268] Appellate Body Report, *Argentina – Textiles and Apparel*, para. 47.

Members, on importation, to ordinary customs duties in excess of those set forth in their Schedule of Concessions.

7.148. The first sentence of Article II:1(b) of the GATT 1994 prohibits a specific type of practice which will always be inconsistent with Article II:1(a), namely, the imposition of ordinary customs duties in excess of those set forth in the Schedule of Concessions. Therefore, if a measure is inconsistent with Article II:1(b) of the GATT 1994, it will necessarily be inconsistent with Article II:1(a).[269]

7.149. As already explained in paragraphs 7.152-7.154 above, Decree No. 1744/2016 establishes a tariff of 40% on imports of products classified in Chapters 61 and 62 of the National Customs Tariff when the declared f.o.b. price is less than or equal to US$10 per gross kilogram.

7.150. Decree No. 1744/2016 also establishes a tariff of 35% on imports with a declared f.o.b. price lower than or equal to US$6 per pair for headings 64.01, 64.02 and 64.04; US$7 per pair for heading 64.05; US$10 per pair for heading 64.03; and US$5 per gross kilogram for subheading 6406.10.00.00 ("uppers").[270]

7.151. In addition, for imports of products classified in Chapters 61, 62 and 64 of the Customs Tariff which are not subject to the tariff established in Decree No. 1744/2016, the tariff applicable will be that provided for in Decree No. 4927/2011. The tariffs applicable in that decree for Chapters 61 to 64 never exceed 15% *ad valorem*.[271]

7.152. On the other hand, as the Panel found in the original proceedings, the duties bound by Colombia's Schedule LXXVI, its Schedule of Concessions, are 40% *ad valorem* for all subheadings of Chapters 61, 62 and 63, except for those in subheading 6305.32, and for subheadings 6405.20 and 6406.10; and 35% *ad valorem* for headings 64.01, 64.02, 64.03, 64.04 and 64.05, except for subheading 6405.20, and for subheading 6305.32.[272]

7.153. The Panel finds that the tariffs envisaged in Decree No. 1744/2016 in no case exceed the bound *ad valorem* tariffs of 35% and 40% in Colombia's Schedule of Concessions. Accordingly, the tariffs envisaged in Decree No. 1744/2016 are consistent with Colombia's obligation, under the first sentence of Article II:1(b) of the GATT 1994, not to subject the products in question to ordinary customs duties in excess of those set forth in its Schedule of Concessions.

7.154. Furthermore, because the finding of inconsistency with Article II:1(a) of the GATT 1994 in the original proceedings derived from the finding of inconsistency with the first sentence of Article II:1(b) of the GATT 1994, and in the absence of separate claims with respect to Article II:1(a) of the GATT 1994, the Panel also finds that the tariffs envisaged in Decree No. 1744/2016 are consistent with Colombia's obligation, under Article II:1(a) of the GATT 1994, to accord to the commerce of the other Members treatment no less favourable than that provided for in its Schedule of Concessions.

7.2.4 Conclusion

7.155. For the reasons set out above, the Panel concludes that Colombia has demonstrated that the tariffs provided for in Decree No. 1744/2016 are not inconsistent with Colombia's obligations under Articles II:1(a) and II:1(b), first sentence, of the GATT 1994.

[269] Appellate Body Report, *Argentina – Textiles and Apparel*, para. 45. See also Panel Reports, *EC – IT Products*, para. 7.747; *EC – Bananas III (Article 21.5 – Ecuador II)*, para. 7.394; *EC – Chicken Cuts (Brazil)*, para. 7.63; and *EC – Chicken Cuts (Thailand)*, para. 7.63.

[270] See para. 2.7 above.

[271] See para. 2.7 above.

[272] Panel Report, *Colombia – Textiles*, para. 7.133.

7.3 Panama's claims under Article XI:1 of the GATT 1994

7.3.1 Introduction

7.156. Panama has challenged both the specific bond and the special import regime, claiming that they constitute restrictions on importation in contravention of Article XI:1 of the GATT 1994.[273] Colombia considers that Panama has failed to demonstrate that either of the two measures is inconsistent with Article XI:1.[274]

7.157. The Panel will begin by examining the relevant legal provision and the applicable legal test. It will then analyse Panama's claims with respect to the specific bond, starting with a summary of the arguments of the parties and continuing with a legal analysis of each of the aspects challenged by Panama. Finally, the Panel will examine Panama's claims with respect to the special import regime, again beginning with a summary of the arguments of the parties and continuing with an analysis of each of the aspects challenged by Panama.

7.3.2 The text of Article XI:1 of the GATT 1994

7.158. The relevant part of Article XI of the GATT 1994 reads as follows:

General Elimination of Quantitative Restrictions

> 1. No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.

7.159. By its terms, Article X:1 "lays down a general obligation to eliminate quantitative restrictions" and prohibits Members "to institute or maintain prohibitions or restrictions other than duties, taxes, or other charges, on the importation, exportation, or sale for export of any product destined for another Member".[275]

7.3.3 Legal test provided for in Article XI:1 of the GATT 1994

7.160. In the past, panels have examined alleged inconsistencies with Article XI:1 of the GATT 1994 by conducting a two-stage analysis. They have first examined whether the complainant has demonstrated that the measure at issue is a measure of the same kind as those covered by Article XI:1 and, if this has been demonstrated, have subsequently examined whether the complainant has demonstrated that the measure at issue constitutes a prohibition or restriction on importation (or exportation).[276] Not all previous panels have considered a finding under this first stage to be necessary. By way of example, in *Argentina – Import Measures*, the panel considered that what is relevant in examining a measure within the context of Article XI:1 of the GATT 1994 is whether the measure prohibits or restricts commerce and not the means by which that prohibition or restriction is made effective.[277] In any event, the analysis must be carried out on a case-by-case

[273] Panama's request for the establishment of a panel, WT/DS461/22.

[274] Colombia's first written submission as respondent, section B; second written submission as complainant, para. 87; and second written submission as respondent, para. 81.

[275] Appellate Body Report, *Argentina – Import Measures*, para. 5.216.

[276] Panel Reports, *Argentina – Import Measures*, para. 6.244; and *India – Autos*, para. 4.119 (referring to GATT Panel Report, *Japan – Semi-conductors*, para. 104). See also Panel Report, *India – Quantitative Restrictions*, para. 5.142.

[277] The Panel reasoned as follows:

> The expression "whether made effective through quotas, import or export licences or other measures" used in Article XI:1 of the GATT 1994 implies that the provision covers all measures that constitute import "prohibitions or restrictions" regardless of the means by which they are made effective. The reference to "quotas, import or export licences" is only indicative of some means by which import prohibitions or restrictions may be made effective. This does not imply that the scope of Article XI:1 of the GATT 1994 is limited to prohibitions or restrictions that are made effective through quotas or import or export licences. What is relevant when examining a measure under Article XI:1 of the GATT 1994 is whether a measure prohibits or restricts trade, rather than the means by which such prohibition or restriction is made effective. In light of this

basis, taking into account the import (or export) formality or requirement at issue and the relevant facts of the case.[278]

7.161. Previous panels have considered that, in order to determine whether a measure falls within the scope of Article XI:1 of the GATT 1994, it is necessary to examine the "nature" of the measure.[279] The text of Article XI:1 begins by excluding various measures from its scope, namely, "duties, taxes or other charges". Article XI:1 goes on to indicate that its scope extends to "quotas, import or export licences", together with a residual category of "other measures".[280] With reference to this latter category of other measures, other panels have found that the concept of import restriction includes any measure that results in "any form of limitation imposed on, or *in relation to* importation".[281] However, although the expression "other measures" suggests that the coverage of Article XI:1 is broad, the scope of application of this provision is not unfettered since it excludes "duties, taxes and other charges", and "Article XI:2 of the GATT 1994 further restricts the scope of application of Article XI:1 by providing that the provisions of Article XI:1 shall not extend to the areas listed in Article XI:2".[282]

7.162. Article XI:1 also stipulates that the prohibition or restriction should be "made effective through" quotas, import or export licences, or other measures. This has led to the interpretation that Article XI:1 covers measures through which a prohibition or restriction is produced or becomes operative.[283]

7.163. The term "prohibition" has been defined as a "legal ban on the trade or importation of a specified commodity", and the term "restriction" as "[a] thing which restricts someone or something, a limitation on action, a limiting condition or regulation", and, thus, generally, as something that has a limiting effect.[284] As to whether a restriction is "on importation", the Panel agrees with previous panels that "in the context of Article XI:1 [of the GATT 1994] the expression "restriction… on importation" [may thus be appropriately read as] meaning a restriction "with regard to" or "in connection with" the importation of the product ".[285]

7.164. As indicated by its title, "*General Elimination of Quantitative Restrictions*", Article XI relates to "quantitative" restrictions. The use of the word "quantitative" indicates that only prohibitions and restrictions that limit the quantity or size of an imported (or exported) product are included within

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reasoning, the Panel will commence by examining the claims raised by the complainants under Article XI:1 of the GATT 1994 *irrespective* of whether this measure constitutes an import licence. (Panel Report, *Argentina – Import Measures*, para. 6.363.)

This approach was also used by the panel in *Indonesia – Import Licensing Regimes*. (Panel Report, *Indonesia – Import Licensing Regimes*, paras. 7.55 and 7.76.)

[278] Appellate Body Report, *Argentina – Import Measures*, para. 5.245.

[279] Panel Report, *Brazil – Retreaded Tyres*, para. 7.372. See also Panel Report, *Indonesia – Import Licensing Regimes*, para. 7.42.

[280] Panel Report, *Argentina – Hides and Leather*, para. 11.17. See also Panel Report, *Argentina – Import Measures*, para. 6.246 (referring to GATT Panel Report, *Japan – Semi-conductors*, para. 104, and to Panel Report, *Argentina – Hides and Leather*, para. 11.17.)

[281] Panel Report, *Colombia – Ports of Entry*, para. 7.227 (referring to Panel Report, *India – Autos*, paras. 7.254-7.263 and 7.265 and to Panel Report, *Brazil – Retreaded Tyres*, para. 7.371). (original emphasis)

[282] Appellate Body Report, *Argentina – Import Measures*, para. 5.219.

[283] The Appellate Body reasoned as follows:

> Article XI:1 of the GATT 1994 prohibits prohibitions or restrictions other than duties, taxes, or other charges "made effective through quotas, import or export licences or other measures". The Appellate Body has described the word "effective", when relating to a legal instrument, as "in operation at a given time". We note that the definition of the term "effective" also includes something "[t]hat is concerned in the production of an event or condition". Moreover, the Appellate Body has described the words "made effective", when used in connection with governmental measures, as something that may refer to a measure being "operative", "in force", or as having "come into effect". In Article XI:1, the expression "made effective through" precedes the terms "quotas, import or export licences or other measures". This suggests to us that the scope of Article XI:1 covers measures through which a prohibition or restriction is produced or becomes operative.

(Appellate Body Report, *Argentina – Import Measures*, para. 5.218 (referring to Appellate Body Reports, *China – Raw Materials*, para. 356 and *US – Gasoline*, p. 23) (footnotes omitted)).

[284] Appellate Body Report, *Argentina – Import Measures*, para. 5.217 (referring to Appellate Body Report, *China – Raw Materials*, para. 319).

[285] Panel Report, *India – Autos*, para. 7.257. See also Panel Reports, *Argentina – Import Measures*, para. 6.458 and *Indonesia – Import Licensing Regimes*, para. 7.43.

the scope of this provision.[286] Thus, Article XI:1 of the GATT 1994 only covers those prohibitions or restrictions that have a limiting effect on importation (or exportation). Previous panels have also similarly interpreted the concept of "restrictions" and have concluded that Article XI:1 is applicable to conditions that are "limiting" or have a "limiting effect".[287] As regards how to elucidate the limiting effects of a measure, "[the] limitation [on importation or exportation] need not be demonstrated by quantifying the effects of the measure at issue"[288]; rather, such effects can "be demonstrated through the design, architecture and revealing structure of the measure at issue considered in its relevant context".[289]

7.165. Some panels, in examining whether certain measures have a limiting effect on importation, have focused on whether those measures limited the competitive opportunities available for the imported products. Thus, panels have attributed importance to such factors as the existence of uncertainty affecting exportation, whether the measures affect investment plans, whether they restrict access to import markets or make importation prohibitively costly or unpredictable, whether they constitute disincentives for imports, or whether there are unfettered or undefined powers to refuse an import licence.[290]

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[286] The Appellate Body in *Argentina – Import Measures* considered that:

> The use of the word "quantitative" in the title of Article XI of the GATT 1994 informs the interpretation of the words "restriction" and "prohibition" in Article XI:1, suggesting that the coverage of Article XI includes those prohibitions and restrictions that limit the quantity or amount of a product being imported or exported. This provision, however, does not cover simply any restriction or prohibition. Rather, Article XI:1 refers to prohibitions or restrictions "on the importation … or on the exportation or sale for export". Thus, in our view, not every condition or burden placed on importation or exportation will be inconsistent with Article XI, but only those that are limiting, that is, those that limit the importation or exportation of products. Moreover, this limitation need not be demonstrated by quantifying the effects of the measure at issue; rather, such limiting effects can be demonstrated through the design, architecture, and revealing structure of the measure at issue considered in its relevant context.

(Appellate Body Report, *Argentina – Import Measures*, para. 5.217 (referring to Appellate Body Reports, *China – Raw Materials*, paras. 319-320) (footnotes omitted)).

[287] In *India – Quantitative Restrictions* the panel observed that the ordinary meaning of the word "restriction" is "a limitation on action, a limiting condition or regulation" (Panel Report, *India – Quantitative Restrictions*, para. 5.128). In *India – Autos*, the panel endorsed the interpretation of the term "restriction" used by the panel in *India – Quantitative Restrictions*, and concluded that "any form of *limitation* imposed on, or in relation to importation constitutes a restriction on importation within the meaning of Article XI:1" (Panel Report, *India – Autos*, para. 7.265 (original emphasis). This panel also asserted that the expression "limiting condition" used by the panel in *India – Quantitative Restrictions* "is helpful in identifying the scope of the notion in the context of the facts before it. That phrase suggests the need to identify not merely a condition placed on importation, but a condition that is limiting, i.e. that has a limiting effect. In the context of Article XI, that limiting effect must be on importation itself." (Panel Report, *India – Autos*, para. 7.270.) The panels in *Brazil – Retreaded Tyres*, *Dominican Republic – Import and Sale of Cigarettes* and *Colombia – Ports of Entry* cited with approval key passages in the reports *India – Quantitative Restrictions* and *India – Autos* which clarified this rule. (Panel Reports, *Brazil – Retreaded Tyres*, para. 7.371; *Dominican Republic – Import and Sale of Cigarettes*, paras. 7.252 and 7.258; and *Colombia – Ports of Entry*, paras. 7.233-7.235.) See also Panel Report, *Indonesia – Import Licensing Regimes*, paras. 7.45 and 7.47-7.50.

[288] Appellate Body Report, *Argentina – Import Measures*, para. 5.217 (referring to Appellate Body Reports, *China – Raw Materials*, paras. 319-320.)

[289] Appellate Body Report, *Argentina – Import Measures*, para. 5.217 (referring to Appellate Body Reports, *China – Raw Materials*, paras. 319-320.)

[290] For example, in *Argentina – Hides and Leather*, the panel stated that "Article XI:1, like Articles I, II and III of the GATT 1994, protects competitive opportunities of imported products, not trade flows". (Panel Report, *Argentina – Hides and Leather*, para. 11.20.) In *Brazil – Retreaded Tyres*, the panel found a violation of Article XI.1 in which the fines did not *per se* impose a restriction on importation, but acted as an absolute disincentive to importation by penalizing it and making it "prohibitively costly". (Panel Report, *Brazil – Retreaded Tyres*, para. 7.370.) In *Colombia – Ports of Entry* the panel, referring to previous cases in which Article XI.1 of the GATT 1994 had been discussed, affirmed that that provision was applicable to "measures which create uncertainties and affect investment plans, restrict market access for imports or make importation prohibitively costly, all of which have implications on the competitive situation of an importer". (Panel Report, *Colombia – Ports of Entry*, para. 7.240 (referring to GATT Panel Reports, *EEC – Minimum Import Prices* and *Canada – Provincial Liquor Boards (EEC)*; and to Panel Reports, *Argentina – Hides and Leather* and *Brazil – Retreaded Tyres*)). In *China – Raw Materials*, the panel, albeit in relation to export restrictions and in a finding which the Appellate Body declared of no legal effect due to concerns related to the terms of reference (Appellate Body Reports, *China – Raw Materials*, paras. 234 and 235), examined a licensing system and found that "a licence requirement that results in a restriction additional to that inherent in a permissible measure would be inconsistent with GATT Article XI:1. Such restriction may arise in cases where licensing agencies have

7.166. Before beginning, the Panel takes note of Colombia's suggestion[291] that in analysing the consistency of the specific bond and the special import regime with Article XI:1 of the GATT 1994 the context provided by a series of provisions should be taken into account. In particular, Articles 13[292] and 17[293] of the Customs Valuation Agreement, Article 7.3[294] of the Trade Facilitation Agreement[295], Article VIII[296] of the GATT and the additional note to Article VI.1[297] of the GATT 1994.

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unfettered or undefined discretion to reject a licence *application*". (Panel Reports, *China – Raw Materials*, para. 7.957.) In *Argentina – Import Measures* the panel found that some of the measures adopted by Argentina were creating "uncertainty as to an applicant's ability to import, [did] not allow companies to import as much as they desire[d] or need[ed], but condition[ed] imports to their export performance and impose[d] a significant burden on importers that [was] unrelated to their normal importing activity". (Panel Report, *Argentina – Import Measures*, para. 6.479*;* finding upheld in Appellate Body Report, *Argentina – Import Measures*, para. 5.288.) Referring to the panel report in *Dominican Republic – Import and Sale of Cigarettes*, the panel in *Argentina – Import Measures* observed that "not every measure affecting the opportunities for entering the market would be covered by Article XI [of the GATT 1994], but only those measures that constitute a prohibition or restriction on the importation of products, i.e. those measures which affect the opportunities for importation itself". Panel Report, *Argentina – Import Measures*, para. 6.458 (referring to Panel Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 7.261). See also Panel Report, *Indonesia – Import Licensing Regimes*, para. 7.110.

[291] Colombia's response to Panel question No. 61; comments on Panama's response to Panel question No. 62.

[292] Article 13 reads as follows:

> If, in the course of determining the customs value of imported goods, it becomes necessary to delay the final determination of such customs value, the importer of the goods shall nevertheless be able to withdraw them from customs if, where so required, the importer provides sufficient guarantee in the form of a surety, a deposit or some other appropriate instrument, covering the ultimate payment of customs duties for which the goods may be liable. The legislation of each Member shall make provisions for such circumstances.

[293] According to Article 17:

> Nothing in this Agreement shall be construed as restricting or calling into question the rights of customs administrations to satisfy themselves as to the truth or accuracy of any statement, document or declaration presented for customs valuation purposes.

[294] This Article provides in relevant part :

> 7.3.2 As a condition for such release, a Member may require:
> (a) payment of customs duties, taxes, fees, and charges determined prior to or upon arrival of goods and a guarantee for any amount not yet determined in the form of a surety, a deposit, or another appropriate instrument provided for in its laws and regulations; or
> (b) a guarantee in the form of a surety, a deposit, or another appropriate instrument provided for in its laws and regulations.
> 7.3.3 Such guarantee shall not be greater than the amount the Member requires to ensure payment of customs duties, taxes, fees, and charges ultimately due for the goods covered by the guarantee.
> 7.3.4 In cases where an offence requiring imposition of monetary penalties or fines has been detected, a guarantee may be required for the penalties and fines that may be imposed.
> 7.3.5 The guarantee as set out in paragraphs 3.2 and 3.4 shall be discharged when it is no longer required.

[295] Although Colombia recognizes that the Trade Facilitation Agreement is not in effect for Colombia as it has not deposited an instrument of acceptance, Colombia considers that its measures can be explained in the light of that instrument and that therefore it has to be taken into account. (Colombia's response to Panel question No. 61.)

[296] Article VIII of the GATT 1994 relating to fees and formalities connected with importation and exportation states in relevant part:

> 1. (a) All fees and charges of whatever character (other than import and export duties and other than taxes within the purview of Article III), imposed by contracting parties on or in connection with importation or exportation shall be limited in amount to the approximate cost of services rendered and shall not represent an indirect protection to domestic products or a taxation of imports or exports for fiscal purposes.
> (b) ...
> (c) The contracting parties also recognize the need for minimizing the incidence and complexity of import and export formalities and for decreasing and simplifying import and export documentation requirements.*

[297] The additional note to Article VI.2 and VI.3 of the GATT 1994, which provides as follows in relevant part:

> 1. As in many other cases in customs administration, a contracting party may require reasonable security (bond or cash deposit) for the payment of anti-dumping or countervailing duty pending final determination of the facts in any case of suspected dumping or subsidization.

In particular, Colombia maintains that these provisions explicitly authorize the use of customs bonds and formalities such as those contested by Panama.

7.167. For its part, Panama considers that the inconsistency of a measure with Article XI:1 of the GATT 1994 should be determined in the light of the limiting conditions which that measure imposes on imports within the meaning of Article XI:1 of the GATT 1994, regardless of how the measure is characterized.[298] However, Panama also considers that in some cases, the provisions of other covered agreements such as, for example, Article 7.3.3 of the Trade Facilitation Agreement can be used to interpret the scope of the restrictions covered by Article XI:1 of the GATT 1994. In the particular case of Article 7.3.3 of the Trade Facilitation Agreement, Panama argues that this provision explains that the coverage of a customs guarantee should not be greater than that required or necessary to ensure payment of the customs duties, taxes and other charges due for the goods secured.[299] Likewise, Panama considers that Articles I, II and III of the GATT 1994 could be context for interpreting the terms of Article XI:1 of the GATT 1994 given that they all have in common the purpose of protecting competitive opportunities for imported products.[300] For Colombia, the object and purpose of Articles I, II and III of the GATT 1994 are different and govern measures that are different in nature, have different purposes and produce a non-comparable effect.[301]

7.168. Although the parties and third parties[302] do not fully agree on the interpretative value that should be accorded to other provisions when examining whether a measure has limiting effects on importation inconsistent with Article XI:1 of the GATT 1994, the Panel recalls that "the provisions of the WTO covered agreements should be interpreted in a coherent and consistent manner, giving meaning to all applicable provisions harmoniously".[303] For example, Article VIII:1(c) has already been considered as context for the interpretation of Article XI:1 of the GATT 1994, and for what amounts to a restriction on importation within the meaning of the latter provision.[304]

7.169. In this respect, the Panel agrees that the findings under Article XI:1 of the GATT 1994 cannot have as a consequence the prohibition of bonds and other customs formalities permitted by other provisions of the covered agreements. Therefore the Panel will examine the context provided by other provisions of the covered agreements in the event that the Panel's interpretation might have such consequences.

7.3.4 The question of whether the specific bond is inconsistent with Article XI:1 of the GATT 1994

7.3.4.1 Arguments of the parties

7.3.4.1.1 Panama

7.170. Panama[305] claims that the specific bond constitutes a "restriction[]" on "importation" in violation of Article XI:1 of the GATT 1994, since its highly burdensome amount and the fact that it

[298] Panama's response to Panel question No. 61.
[299] Panama's response to Panel question No. 61.
[300] Panama's response to Panel question No. 62(b) (referring to Panel Reports, *Argentina – Hides and Leather*, para. 11.20, *and Colombia – Ports of Entry*, footnote 463).
[301] Colombia's comments on Panama's response to Panel question No. 62(b).
[302] United States' third-party written submission, para. 46; European Union's third-party response to Panel question No. 10, para. 25; and Japan's third-party response to Panel question No. 10, para. 20.
[303] Appellate Body Report, *Argentina – Import Measures*, para. 5.236 (referring to Appellate Body Reports, *EC – Seal Products*, para. 5.123; *US – Anti-Dumping and Countervailing Duties (China)*, para. 570; and *US – Upland Cotton*, para. 549 (citing Appellate Body Report, Arg*entina – Footwear (EC)*, para. 81 and footnote 72, referring, in its turn, to Appellate Body Reports, *Korea – Dairy Products*, para. 81; *US – Gasoline*, p. 28; *Japan – Alcoholic Beverages II*, p. 15; and *India – Patents (US)*, para. 45)).
[304] Appellate Body Report, *Argentina – Import Measures,* para. 5.233.
[305] The Panel notes that in Panama's first written submission as complainant, its first written submission as respondent, and its second written submission as complainant, Panama refers to Decree No. 1745/2016. After submitting Decree No. 2218/2017 as Exhibit PAN-43, Panama begins referring to that Decree. In this connection, Panama explained in paragraph 11 of its second written submission as respondent that "[f]or the sake of simplicity, Panama refers in a general manner in this rebuttal to the "specific bond" or the "special import regime", on the understanding that these are the same measures as are contained in Decrees No. 1745 and No. 2218. Any reference it may make to a measure of the specific decree (i.e. the specific bond of Decree No. 2218) is normally made to highlight specific aspects stemming from that decree." This summary of arguments uses the form in which Panama set forth its arguments, so that reference is at times made solely to

is required for each and every shipment act as a condition limiting importation of the textile and footwear products affected.[306]

7.171. Panama argues that Colombia imposes a "condition" on the importation of textiles and footwear with a declared f.o.b. price lower than or equal to the thresholds established in Decree No. 1745/2016 by introducing the requirement to post a specific bond for imports of those products. This condition must be fulfilled for release and importation of the goods, and it is not an automatic process since obtaining the bond is subject to conditions.[307] Panama considers that this condition limits imports of the relevant products because it has an adverse impact on their "competitive opportunities".[308] It also maintains that it nullifies competitive and import opportunities for importers which are ineligible for a bank or insurance guarantee and which, prior to Decree No. 1745/2016, could import by merely paying the tariff, irrespective of their financial rating.[309] The limiting nature of the condition stems, according to Panama, from its cost and burdensomeness, the uncertainty it creates in the import process and the arbitrariness of its coverage.[310]

7.172. For Panama, the specific bond is costly because posting it and keeping it in place for three years has a financial cost and a negotiation cost. The financial cost varies as it depends on the financing entity or insurance company issuing the bond, the importer's risk profile and the magnitude of the insured transaction.[311] In Panama's opinion, by imposing this cost on certain imports Colombia is replicating the effect of the compound tariff because it imposes charges which, if converted into tariffs, would exceed the bound tariff levels.[312] For Panama, the bond makes it prohibitively expensive to import the products affected by the measures.[313] Panama maintains that, although Decree No. 2218/2017 alters the bond's coverage, the cost of the bond remains excessive and discourages imports.[314]

7.173. Panama likewise argues that the obligation to post the specific bond also creates uncertainty because compliance with this obligation does not depend solely on the will of the importer but on the decision of a third party: the bank or insurance company that issues the bond subject to certain conditions. [315] For Panama, importers cannot ensure they will always meet these conditions, so that obtaining the bond, as well as not being an automatic process, becomes uncertain and, therefore, access for the goods may be restricted.[316] According to Panama, the uncertainty also stems from Colombia's continual and unexpected regulatory changes modifying both the list of products affected by the measure and the import requirements.[317]

7.174. Panama considers that, by virtue of its design, the specific bond is arbitrary because its coverage does not bear any relation to the obligations it seeks to guarantee. In this connection, Panama points out that the specific bond's coverage amounts to 200% of the threshold, rather than of the actual value of the goods, multiplied by the quantity imported (under Decree No. 1745/2016), or to 200% of the difference between the declared value and the threshold price, multiplied by the quantity imported (under Decree No. 2218/2017)[318], which results in an amount far greater than

Decree No. 1745/2016, these being arguments presented prior to the submission of Decree No. 2218/2017. However, the foregoing is without prejudice to the fact that arguments expressly referring to Decree No. 1745/2016 could also be applicable to Decree No. 2118/2017. Where that is the case, the Panel will address those arguments in its analysis concerning Decree No. 2218/2017.

[306] Panama's request for the establishment of a panel, WT/DS461/22.

[307] Panama's first written submission as complainant, para. 36; first written submission as respondent, para. 53; and second written submission as respondent, paras. 150-151.

[308] Panama's second written submission as respondent, para. 136.

[309] Ibid. paras. 161-162 and 171-172.

[310] Ibid. paras. 136 and 147.

[311] Panama's first written submission as complainant, para. 37; first written submission as respondent, para. 54; second written submission as complainant, para. 72; and second written submission as respondent, paras. 173-176.

[312] Panama's second written submission as respondent, para. 180.

[313] Ibid. para. 184.

[314] Ibid. para. 188.

[315] Panama's first written submission as complainant, para. 40; first written submission as respondent, para. 55; and second written submission as complainant, paras. 97-99.

[316] Panama's first written submission as complainant, para. 40; first written submission as respondent, para. 55; and second written submission as complainant, para. 100.

[317] Panama's second written submission as respondent, paras. 199-211.

[318] Ibid. para. 139.

the principal obligations that the bond seeks to cover.[319] Panama underlines that the bond lacks proportionality or substantiation, especially in the case of importers that already have a general bond for all their import operations, since the general bonds are constituted to cover the same obligations.[320] In such cases, Panama considers that when the obligations to be guaranteed go beyond the scope of the general bond, the specific bond should only cover the excess that is not already covered by the existing general bond.[321]

7.175. In response to Colombia's arguments, Panama points out that the specific bond is not permissible under WTO law *a priori*, that a claim in respect of the bond does not imply a particularly heavy burden of proof for the complainant, that claims under Article XI:1 do not require the effects of the measure to be quantified, and that there is a clear disproportion between the specific bond and the obligations it secures.

7.176. On whether the specific bond is permissible *a priori*, Panama doubts that the bond is permissible and, even if it were, does not consider that this leads to a higher burden of proof. In any event, Panama points out that even if the specific bond did fall within the scope of application of Article 7.3.4 of the Trade Facilitation Agreement, it would not be justified under that provision, since it is required in all circumstances, whether or not there is an offence.[322]

7.177. Concerning quantification of the effects of the measure, Panama argues that it has submitted evidence on the restrictive effects of the specific bond and the special import regime by explaining in detail how Decrees No. 1744/2016 and No. 1745/2016 perpetuate the restrictive effect of the compound tariff and by demonstrating that Decree No. 1745/2016 imposes specific charges stemming from the costs of the specific bond and the costs of the documentary and personal attendance requirements in the special import regime.[323] In any event, Panama considers that this requirement is at odds with Appellate Body jurisprudence, in particular in *Argentina − Import Measures*. For Panama, it is not necessary to quantify the effects, but to demonstrate the limiting effects "through the design, architecture, and revealing structure of the measure at issue considered in its relevant context".[324] Panama argues that the specific bond imposes limitations on the quantity of imports because, these being high-demand, low-priced products, the extra cost resulting from the bond has an impact on domestic demand and causes a contraction of the volume of low-priced imports.[325] Panama argues that the design, structure and architecture of the measure demonstrate that it imposes a condition limiting imports for the reasons mentioned above.[326]

7.178. On the disproportion between the specific bond and the obligations which the bond seeks to secure, Panama asserts that the customs duties, penalties and fines whose payment the bond seeks to cover do not need to be guaranteed; and that there can be consistency between the coverage of a bond and the actual contingencies to be covered only if the amount of the bond is set on a case-by-case basis, and not *a priori* on the basis of a predetermined quantity.[327] On the first point, Panama asserts that the specific bond of Decree No. 1745/2016 could not guarantee the payment of customs duties on the declared value (tariff and VAT) since these are paid at the time of importation, as a prior condition for withdrawal of the goods.[328] According to Panama, nor does it serve for instances of undervaluation of goods, since Colombian customs rules already provide for guarantees to address such cases; nor to cover penalties and fines, since bonds to cover the latter may only be required when an offence has been detected.[329] On the second point, Panama argues that the bond should not be based solely on the threshold, but the amount already paid on the basis

[319] Panama's first written submission as complainant, paras. 37-38; and first written submission as respondent, paras. 54 and 84. See also Panama's second written submission as respondent, paras. 196-197.
[320] Panama's first written submission as complainant, para. 39; and second written submission as respondent, paras. 139 and 192-193.
[321] Panama's second written submission as complainant, paras. 93-94; and second written submission as respondent, paras. 192-194.
[322] Panama's second written submission as complainant, paras. 61-66.
[323] Panama's second written submission as respondent, paras. 126-127.
[324] Panama's second written submission as complainant, paras. 69-70; and second written submission as respondent, para. 143.
[325] Panama's second written submission as complainant, para. 70.
[326] Ibid. paras. 69-70, 107 and 145.
[327] Ibid. para. 80.
[328] Panama's second written submission as respondent, para. 191.
[329] Panama's second written submission as complainant, paras. 83-84 and 86-87; and second written submission as respondent, para. 191.

of the declared value should be deducted.[330] Further, it adds that Colombia has failed to explain the reason justifying the rate of 200%.[331]

7.179. Panama concludes that Colombia limits competitive opportunities for textiles and footwear with declared f.o.b. prices equal to or lower than the thresholds of Article 3 of Decree No. 1745/2016 by imposing a requirement that has a significant cost, is burdensome and creates uncertainty. Accordingly, Panama claims that the obligation to post a specific bond is a "restriction" on importation inconsistent with Article XI:1 of the GATT.[332]

7.180. With respect to the adoption of Decree No. 2218/2017, Panama considers that the limitation on market access imposed by the bond has been extended in that it is applicable to a larger number of products. Even if the text of Decree No. 2218/2017 provides that the bond is only required in cases where there is a dispute concerning value, Panama maintains that, *de facto*, the specific bond is applicable to all imports below the thresholds, which are considered as "artificially low" prices, and therefore continues to be a "necessary condition" for importation.[333]

7.3.4.1.2 Colombia

7.181. Colombia[334] considers that Panama has failed to demonstrate that the specific bond is inconsistent with Article XI:1.[335] Colombia contends that customs bonds are permissible instruments under the WTO Agreements, such as for example Article 13 of the Customs Valuation Agreement or Article 7.3 of the Trade Facilitation Agreement.[336] Colombia also points out that the Ad note (to paragraphs 2 and 3) of Article VI of the GATT 1994 provides for the use of customs bonds in connection with anti-dumping or countervailing duty proceedings.[337] According to Colombia, the fact that customs bonds are permissible measures under WTO law means that they cannot in themselves constitute prohibited restrictions under Article XI:1 and that, should Panama wish to demonstrate otherwise, the burden on Panama should be a "particularly heavy burden to discharge".[338]

7.182. Colombia adds that Panama has failed to substantiate the limiting effect of the measures at issue on imports.[339] For Colombia, Panama has not offered any evidence of the "actual trade impact" of the specific bond, or that the specific bond limits the quantity or amount of the imported product[340], has not identified any quantitative limitation on imports of the products subject to the specific bond requirement, and has not provided evidence that the costs or uncertainty allegedly associated with the import process result in a limitation on the quantities or amounts of the products that may be imported.[341] Colombia points out that the costs to which Panama refers are applied and collected by private actors and, therefore, cannot be attributed to the Colombian Government. As the alleged restrictive effects of the bond stem from private actors, Colombia maintains that they

[330] Panama's second written submission as complainant, para. 85.
[331] Ibid. paras. 81 and 88.
[332] Panama's first written submission as complainant, para. 41; and first written submission as respondent, para. 56.
[333] Panama's second written submission as respondent, paras. 153-155.
[334] The Panel notes that in Colombia's first written submission as respondent and its second written submission as complainant, Colombia refers to Decree No. 1745/2016. After Panama submitted Decree No. 2218/2017 as Exhibit PAN-43, Colombia began referring to that Decree as well. This summary of arguments uses the form in which Colombia set forth its arguments, so that reference is at times made solely to Decree No. 1745/2016, these being arguments presented prior to the submission of Decree No. 2218/2017. However, the foregoing is without prejudice to the fact that arguments expressly referring to Decree No. 1745/2016 could also be applicable to Decree No. 2118/2017. Where that is the case, the Panel will address those arguments in its analysis concerning Decree No. 2218/2017.
[335] Colombia's first written submission as respondent, section B.
[336] Colombia's first written submission as respondent, paras. 53-56; second written submission as complainant, paras. 48-51; and second written submission as respondent, paras. 41-42.
[337] Colombia's first written submission as respondent, paras. 57-58; and second written submission as complainant, paras. 52-53.
[338] Colombia's first written submission as respondent, paras. 59-60; and second written submission as complainant, para. 55.
[339] Colombia's second written submission as respondent, para. 35.
[340] Colombia's first written submission as respondent, paras. 61-62; second written submission as complainant, para. 57; and second written submission as respondent, para. 44.
[341] Colombia's first written submission as respondent, para. 64; second written submission as respondent, paras. 53, 56, 57 and 74; and second written submission as complainant, paras. 59 and 65.

cannot form the basis for a claim that the bond constitutes a "restriction" within the meaning of Article XI:1.[342]

7.183. Colombia submits that Panama's arguments have not been corroborated, since Panama has failed to substantiate the limiting effect of the measures at issue on imports.[343] For Colombia, Panama has not offered any evidence of the "actual trade impact" of the specific bond, or that the specific bond limits the quantity or amount of the imported product, has not identified any quantitative limitation on imports of the products subject to the customs bond requirement, and has not provided evidence that the costs or uncertainty supposedly associated with the import process result in a limitation on the quantities or amounts of the products that may be imported.[344]

7.184. Further, Colombia argues that there is a relationship between the amount of the specific bond and the obligations it seeks to guarantee.[345] It adds that the imports subject to the specific bond are those suspected of having artificially low declared values, and that it is thus appropriate to use the threshold for the purposes of calculating the amount of the specific bond so as to ensure that importers do not avoid paying the applicable duties, fines or penalties.[346]

7.185. With respect to the application of the specific bond to importers that already have a general bond, Colombia explains that the latter bond may be insufficient in the case of a high level of imports at artificially low prices.[347]

7.186. With regard to the uncertainty that Panama claims is created by the specific bond, Colombia responds that the involvement of persons other than the importer is customary in commercial transactions and cannot be considered a restriction within the meaning of Article XI:1.[348] Colombia adds that Panama has failed to demonstrate that the requirements that the importer allegedly has to meet to obtain a customs bond are indeed requirements to obtain a customs bond.[349]

7.3.4.2 Analysis by the Panel

7.187. As indicated in paragraph 7.157 above, the Panel's task will be to determine whether, as Panama claims, the specific bond provided for in Article 7 of Decree No. 2218/2017 is inconsistent with Article XI:1 of the GATT 1994 because it constitutes a measure that has a limiting effect on the importation of certain products comprising fibres, yarns, fabrics, clothing and footwear[350] and limits the competitive opportunities of the importers and imported products.

7.188. The Panel notes that Panama has not defined the category of measures covered by Article XI:1 in which the specific bond would fall. In this regard, Colombia, without prejudice to its objection to the possible inconsistency of the specific bond[351], does not appear to have called into question the fact that the bond may fall within the scope of Article XI:1.

7.189. The Panel recalls that the prohibition of quantitative restrictions provided for in Article XI:1 refers explicitly to prohibitions or restrictions on the importation or exportation of a product "whether

[342] Colombia's second written submission as respondent, paras. 46-49.
[343] Ibid. para. 35.
[344] Colombia's second written submission as respondent, paras. 53, 56-57 and 74; and second written submission as complainant, para. 65.
[345] Colombia's first written submission as respondent, paras. 68-69; and second written submission as complainant, paras. 58-60.
[346] Colombia's first written submission as respondent, para. 73.
[347] Colombia's first written submission as respondent, para. 74; and second written submission as complainant, para. 64.
[348] Colombia's first written submission as respondent, para. 76; second written submission as complainant, paras. 62-63; and second written submission as respondent, para. 52.
[349] Colombia's first written submission as respondent, para. 77.
[350] As specified in the descriptive part, Article 2 of Decree No. 2218/2017 stipulates that the products covered are imports consisting of fibres, yarns, fabrics, clothing and footwear under Chapters 52, 53, 54, 55, 56, 58, 59, 60, 61, 62, 63 and 64 of the Customs Tariff for which the declared f.o.b. price is lower than or equal to the threshold established in Article 3 of that Decree.
[351] However, according to Colombia, because customs bonds are permissible measures under WTO law, they cannot in themselves constitute prohibited restrictions under Article XI:1 and, should Panama wish to demonstrate otherwise, the burden on Panama should be a "particularly heavy burden to discharge" (Colombia's first written submission as respondent, paras. 59-60; and second written submission as complainant, para. 55).

made effective through quotas, import … licences or other measures". Given the broad scope of the term "other measures" and in the absence of any discussion on this point between the parties, the Panel considers it appropriate to examine whether Panama has demonstrated that the specific bond is trade-restrictive.[352]

7.190. The Panel recalls that Panama claims that the requirement to post a specific bond in order to obtain release of the imports covered by Decree No. 2218/2017 constitutes a condition that limits imports of the products concerned. In Panama's opinion, this limitation arises because requiring such a bond has an adverse impact on "competitive opportunities"[353] for imports and nullifies opportunities to compete and import for importers that are ineligible for obtaining the bond.[354] Panama maintains that the limiting nature of this condition stems from its cost and burdensomeness, the uncertainty it creates in the import process, and the arbitrariness of its coverage.[355]

7.191. Undoubtedly, the requirement to post a specific bond to authorize release of the goods in specified situations[356] constitutes an import condition. However, the mere imposition of a condition on the import process does not imply a violation of Article XI:1 of the GATT 1994. Indeed, "not every condition or burden placed on importation … will be inconsistent with Article XI:1, but only those that are limiting, that is, those that limit the importation … of products".[357] While the conditions attached to the import of products often entail burdens on importation, it is no less certain that they constitute a "routine aspect of international trade".[358]

7.192. Accordingly, the Panel's analysis must not be confined to merely ascertaining the existence of an import condition, but must focus primarily on determining whether the said condition has the limiting effects on the importation of products that Panama claims. Specifically, that the limiting nature of the condition stems from its cost and burdensomeness, the uncertainty which it creates in the import process, and the arbitrariness of its coverage.[359] To this end, the Panel will examine the measure in question in terms of its design, architecture and revealing structure in its relevant context.[360]

7.193. As described in section 2.3.3.2 above, the specific bond consists in the requirement imposed on the importer of clothing and footwear classified under Chapters 52, 53, 54, 55, 56, 58, 59, 60, 61, 62, 63 and 64 of the Colombian Customs Tariff, when a valuation dispute arises, to post a specific bank or insurance company guarantee in order to obtain release of the imported goods when the declared f.o.b. price is lower than or equal to a certain threshold. The specific bond is set forth in Article 7 of Decree No. 2218/2017. From the wording of that text, the Panel may identify the following features in the design, architecture and structure of the specific bond:

a. *constitution* of the specific bond is necessary for obtaining the release of goods under the headings listed in Article 3 of Decree No. 2218/2017 only in cases where a dispute arises with respect to value in connection with the inspection or examination procedure that leads

[352] The Panel agrees with the panel in *Argentina – Import Measures* that what is relevant when examining a measure under Article XI:1 of the GATT 1994 is whether the measure prohibits or restricts trade, rather than the means by which such prohibition or restriction is made effective (Panel Report, *Argentina – Import Measures*, para. 6.363). This approach was also used by the panel in *Indonesia – Import Licensing Regimes* (Panel Report, *Indonesia – Import Licensing Regimes*, paras. 7.55 and 7.76).

[353] Panama's second written submission as respondent, para. 136.

[354] Ibid. paras. 161-162 and 171-172.

[355] Ibid. paras. 136 and 147.

[356] In the case of valuation disputes in connection with the inspection or examination process for imports of fibres, yarns, textiles, clothing and footwear under Chapters 52, 53, 54, 55, 56, 58, 59, 60, 61, 62, 63 and 64 of the Colombian Customs Tariff for which the declared f.o.b. price is lower than or equal to the threshold established in Article 3 of Decree No. 2218/2017 (Decree No. 2218/2017 (Exhibit PAN-43), Article 2). It should be pointed out that the parties disagree on whether the bond is required whenever the declared f.o.b. prices are lower than or equal to the established thresholds (Panama's position) or only when the prices are lower than or equal to the established thresholds and, in addition, a valuation dispute arises (Colombia's position).

[357] Appellate Body Report, *Argentina – Import Measures*, para. 5.217. See also Panel Report, *Argentina – Import Measures*, paras. 6.252-6.254 (referring to Panel Reports, *India – Autos*, para. 7.270 and *China – Raw Materials*, para. 7.917).

[358] Appellate Body Report, *Argentina – Import Measures*, para. 5.243.

[359] Panama's second written submission as respondent, paras. 136 and 147.

[360] Appellate Body Report, *Argentina – Import Measures*, para. 5.217 (referring to Appellate Body Reports, *China – Raw Materials*, paras. 319-320).

to delaying the final determination of customs value with explicit reference to Article 13 of the Customs Valuation Agreement;

b. the *type* of specific bond is confined to two categories: bank or insurance company guarantee[361];

c. the *amount* of the specific bond comes to 200% of the difference between the f.o.b. price declared by the importer and the result of multiplying the unit price of the threshold established in Article 3 of Decree No. 2218/2017 by the quantity imported;

d. the *duration* of the specific bond is three years;

e. the *purpose* of the specific bond is to guarantee payment of the customs taxes, penalties and interest that may apply; and

f. the *relationship* of the specific bond with a general bond is one of primacy, since having a general bond (or not being under the obligation to post one) does not exempt the importer from the obligation to post a specific bond in the cases indicated in (a) above.

7.194. Having identified the main features of the specific bond regime, the Panel will analyse Panama's claims in this regard.

7.3.4.2.1 The question of whether the specific bond is burdensome

7.195. Panama claims that the specific bond is *costly* and *burdensome* because posting it and maintaining it for three years entails a financial cost and a negotiation cost which is excessive and discourages imports below the thresholds.[362] In its arguments, Panama not only refers to the financial cost of posting the bond as excessive, and variable depending on the conditions laid down by the bank or insurance company issuing it, but also submits that its duration is excessive.

7.196. Colombia points out that Panama has not provided any evidence on the costs associated with the specific bond, and that its assertions are speculative. Colombia adds that if the costs are variable depending on factors such as the risk profile, then the costs are rationally related to such factors and thus cannot be excessive.[363] Colombia also argues that the costs to which Panama refers are applied and collected by private actors and therefore cannot be attributed to the Colombian Government. In its opinion, as the alleged restrictive effects of the bond stem from private actors, they cannot form the basis for a claim that the customs bond constitutes a "restriction" within the meaning of Article XI:1.[364]

7.197. Before proceeding, the Panel believes it expedient to address this argument by Colombia that the costs arising from posting such a bond with private actors cannot be attributed to the Colombian Government, and would thus lie outside the scope of Article XI:1. The Panel understands that this argument goes to the fact that only measures attributable to WTO Members, and not to private actors, may be examined by the Panel. Clearly, while the concept of "measure" subject to WTO dispute settlement under Article 3.3 of the DSU is broad, any measure challenged must meet the requirement of attribution to a Member in order to be subject to WTO dispute settlement.[365]

7.198. However, this does not exclude from scrutiny under the DSU those decisions of private actors that are not independent of a measure of a Member.[366] Indeed, "the intervention of some element

[361] Decree No. 2218/2017 explicitly rules out the possibility of the specific bond taking the form of a monetary deposit.

[362] Panama's second written submission as respondent, para. 188.

[363] Colombia's first written submission as respondent, paras. 64-67.

[364] Colombia's second written submission as respondent, paras. 46-49.

[365] Appellate Body Report, *Argentina – Import Measures*, paras. 5.100 et seq.

[366] Panel Report, *Indonesia – Import Licensing Regimes*, para. 7.6 and footnote 350. In that report, the panel also explained that in *Korea – Various Measures on Beef*, the measure at issue required retailers to make a choice as to what to sell. The panel found that "a government regulation contravenes [a Member's obligations] … if … it forces economic operators to make certain choices" (Panel Report, *Korea – Various Measures on Beef*, para. 635) (boldface original). This decision was upheld by the Appellate Body (Appellate Body Report, *Korea – Various Measures on Beef*, para. 146). In *Japan – Film*, the panel found that

of private choice does not relieve [a Member] of responsibility under the GATT 1994".[367] The Panel hence considers that the fact that the costs of the specific bond, a measure imposed by Decree No. 2218/2017, stem from importers negotiating with private entities would not exclude them from the scope of the examination.

7.199. The Panel thus proceeds with its analysis of the alleged burdensomeness of the financial costs linked to the posting of the specific bond. The Panel recalls that, in order to elucidate the limiting effects of a measure, "[the] limitation [on importation or exportation] need not be demonstrated by quantifying the effects of the measure at issue"[368]; rather, such limiting effects can be demonstrated through the design, architecture, and revealing structure of the measure at issue considered in its relevant context.[369]

7.200. Analysis of the wording of Article 7 of Decree No. 2218/2017 does not allow the Panel to conclude that the financial cost of posting the specific bond is excessively burdensome. The provision in question regulates only the formula to be used to determine the amount to be guaranteed, and not the costs, which will depend on each financial entity or insurance company. As Colombia points out, customs bonds are permissible measures under WTO law[370] and are instruments which Colombia uses in other situations in which a valuation dispute may arise concerning any imported product.[371] Consequently, Panama must demonstrate that this bond in particular is excessively burdensome such as to constitute a restriction on importation within the meaning of Article XI:1 of the GATT 1994.

7.201. With regard to the financial cost of posting the bond, the parties have presented different examples in which the relative weight of the bond in relation to the total cost of the import transaction varies significantly. In some, the bond represents a considerable relative weight in relation to the operation guaranteed; in others, a relatively low sum that might even not cover the obligations it seeks to guarantee.

7.202. Panama submits examples that show the cost of the specific bond provided for in Decree No. 1745/2016 as having a substantial weight in relation to the rest of the costs incurred in respect of the import transaction[372] and emphasizes that, despite the changes in the calculation of the bond introduced by Decree No. 2218/2017, the weight of the bond remains unchanged.[373] According to Panama, the costs incurred for posting the bond include: (a) payment of a premium or financial commission that varies from institution to institution; (b) payment of a stamp tax amounting to 0.5% on the value contained in the document; (c) value added tax (VAT); and (d) ancillary costs for processing of the request.[374] Panama uses the hypothetical example of a monthly commission of 0.75% on the total amount guaranteed plus VAT at 19%. If this 0.75% commission is multiplied by the duration of the guarantee (3 years, or 36 months), adding in the 19% VAT and the 0.5% stamp tax on the 36 months of commission, Panama contends that the effective tariff of the bank guarantee would come to 32.27% of the amount guaranteed for a period of three years.

"administrative guidance that creates incentives or disincentives largely dependent upon governmental action for private parties to act in a particular manner" may constitute a governmental measure (Panel Report, *Japan – Film*, para. 10.45 (citing GATT Panel Report, *Japan – Semi-conductors*, para. 109)).

[367] Appellate Body Report, *Korea – Various Measures on Beef*, para. 146.

[368] Appellate Body Report, *Argentina – Import Measures*, para. 5.217 (referring to Appellate Body Reports, *China – Raw Materials*, paras. 319-320.)

[369] Idem.

[370] Colombia's first written submission as respondent, paras. 59-60; and second written submission as complainant, para. 55.

[371] Colombia's response to Panel question No. 23, paras. 92-94.

[372] Exhibits PAN-18, PAN-19 and PAN-20 and Panama's second written submission as respondent, paras. 175-183.

[373] Panama's second written submission as respondent, para. 187.

[374] Ibid. para. 175.

Table 2: Example from Panama

Hypothetical example submitted by Panama	
Monthly commission for the 36-month period of validity of the bond	27 (0.75% monthly commission * 36 months) = 27)
VAT	5.13 (19% VAT on 27, i.e. the total commission)
Stamp tax	0.135 (0.5% stamp tax on 27, i.e. the total commission)
Total:	32.27% (32.265)

Source: Panama's second written submission as respondent, para. 176.

7.203. This percentage would be applied on the coverage required by Article 7 of Decree No. 2218/2017, i.e. 200% of the difference between the f.o.b. price declared by the importer and the result of multiplying the threshold unit price established in Article 3 of that Decree by the quantity imported.[375]

7.204. Colombia, for its part, maintains that the costs of the bond are significantly lower than those put forward by Panama and that the figures and calculations advanced by Panama are erroneous.[376] Colombia produces data on a real case of importation where the declared f.o.b. price lay below the thresholds in Article 3 of Decree No. 2218/2017, in which the weight of the premium in relation to the f.o.b. value is 1%[377]:

Table 3: Example from Colombia

Example submitted by Colombia	
F.o.b. value (US$)	14,830.40
Guaranteed value (US$)	10,659.20
Premium (US$)	203.92
Premium as a percentage of the f.o.b. value:	1.4%

Source: Colombia's oral statement at the Panel meeting as respondent, para. 26.

7.205. The examples provided by the parties confirm that the analysis of the degree of burdensomeness of the bond in relation to the import transaction for which it is to be posted cannot be carried out *in abstracto* but has to be made on a case-by-case basis

7.206. Beyond these conflicting examples, the Panel does not find in the record any explanation by Panama addressing how these additional costs translate into a limitation on imports. The Panel consequently has no evidence in the record to characterize the specific bond provided for in Article 7 of Decree No. 2281/2017 as "costly" or "burdensome" on account of excessive financial costs that go beyond routine costs inherent in the import process to the point of constituting a limiting condition on imports. The Panel recalls that the imposition of import conditions that may involve a charge is a routine aspect of international trade and does not necessarily imply any violation of Article XI:1 of the GATT 1994.[378]

7.207. Nor does the Panel have any arguments or factual elements allowing it to determine whether the formula established by Colombia to set the bond (200% of the difference between the declared f.o.b. value and the threshold price, multiplied by the quantity imported) results in a limitation on imports. While the jurisprudence has certainly established that it is not necessary to quantify the

[375] Panama points out that when the declared value is equal to the threshold, the coverage of the bond is zero. (Panama's second written submission as respondent, para. 187.)

[376] Colombia's statement at the meeting of the Panel as respondent, paras. 25-26.

[377] Actual cases of imports effected under the bond of the special regime (Exhibit COL-32). Colombia provides information on more actual cases governed by Decree No. 1745/2016.

[378] Appellate Body Report, *Argentina – Import Measures*, para. 5.217. See also Panel Report, *Argentina – Import Measures*, paras. 6.252-6.254 (referring to Panel Reports, *India – Autos*, para. 7.270 and *China – Raw Materials*, para. 7.917).

limiting effects to find a violation of Article XI:1, it has also been established that such quantification may constitute a relevant factual element in a panel's analysis under Article XI:1. In the present case, the Panel considers that the example submitted by Panama does not provide sufficient supporting evidence to conclude that the burdensomeness or cost of the specific bond in itself results in a limiting effect on imports.

7.208. Furthermore, as Colombia has explained[379], if there is a dispute concerning the value of the goods with a suspicion of underinvoicing, it is natural and logical that the amount of the bond be calculated on the basis of a reference value. In point of fact, the taxes and other charges would not be calculated on the basis of the declared value, but on the basis of corrected values, so there is *de facto* a prospect that the specific bond might not be sufficient to cover all the costs of release.

7.209. Therefore, in the Panel's opinion, Panama has failed to demonstrate that the costs arising from posting of the specific bond discourage imports of the products in question below the thresholds.

7.210. With regard to the three-year *duration* of the specific bond, Panama considers it to be excessive in comparison with other bonds provided for in Colombia's customs legislation. Colombia responds that the bond does not necessarily remain in place for three years, but is lifted when, following the valuation review by the Colombian authorities, the declared value is accepted.[380] According to Colombia, the duration is set on the basis of the time-frame within which the import declaration becomes firm, which is three years from the date of acceptance of the declaration. The Colombian customs authority thus has three years to issue a Special Customs Demand.[381]

7.211. The Panel notes that Panama questions the duration of the bond but fails to explain how the said duration impacts on the alleged restrictive nature of the bond within the meaning of Article XI:1 of the GATT 1994. Nor does Panama adduce arguments or evidence to substantiate the alleged limiting effects of the bond on importation on account of its duration. Conversely, Colombia's explanation to the effect that the duration is set on the basis of the time-frame within which the import declaration becomes firm appears reasonable. The Panel further notes that, although the duration of the bond is three years, it only has to be posted once, paying the premium and relevant expenses, but not the total amount guaranteed. It does not involve, for example, the retention of a sum of money to be refunded after three years, as would be the case for a cash deposit for the total value of the bond. Therefore, in the opinion of this Panel, Panama has failed to demonstrate that the requirement to post the specific bond for a duration of three years is excessive such as to result in a restriction on imports.

7.212. Consequently, the Panel rejects Panama's claim that the specific bond provided for in Article 7 of Decree No. 2218/2017 is "costly" or "burdensome" to the point of constituting a limiting condition on imports.

7.3.4.2.2 The question of whether the specific bond creates uncertainty

7.213. Panama contends that the specific bond creates uncertainty because it is to be posted when a valuation dispute is triggered in connection with the inspection or examination procedure and it is granted subject to the conditions laid down by a bank or insurance company.[382] Panama also points to additional uncertainty stemming from constant regulatory changes.[383]

7.214. The Panel takes note of the difference of opinion between the parties as to when the posting of the specific bond becomes obligatory. On the basis of the wording of Article 7 of Decree No. 2218/2017, the bond would only have to be posted in the event of a valuation dispute.

[379] Colombia's response to Panel question No. 18.

[380] Colombia's response to Panel question No. 18, para. 83 (referring to Article 254 of Decree No. 2685/1999 (Exhibit PAN-3) and Article 173 of Resolution No. 4240/2000 (Exhibit PAN-40)).

[381] Colombia's response to Panel question No. 20, para. 89.

[382] Panama's first written submission as complainant, para. 40; first written submission as respondent, para. 55; and second written submission as complainant, paras. 97-99.

[383] Panama's second written submission as respondent, paras. 199-211.

7.215. Panama contends, however, that in practice the specific bond is requested *a priori* for *all* transactions covered by Decree No. 2218/2017.[384] This would mean that the Colombian customs authorities would necessarily determine the existence of a valuation dispute whenever clothing and footwear classified under Chapters 52, 53, 54, 55, 56, 58, 59, 60, 61, 62, 63 and 64 of Colombia's Customs Tariff are imported below the relevant threshold. Panama finds support for this interpretation of how the specific bond functions in practice under Decree No. 2218/2017 in the fact that Colombia's own legislation stipulates that, in the case of ostensibly low prices, the declarant is requested to post a bond or to opt to adjust the import declaration to the actual negotiated price.[385]

7.216. Panama further refers the Panel to an inspection report which, in its opinion, shows that the bond is requested by virtue of the f.o.b. values of the imports lying below the thresholds in Article 3 of Decree No. 2218/2017, regardless of the existence of a valuation dispute.[386]

7.217. Colombia denies that the situation is as described by Panama.[387] In this respect, Colombia reported the following:

> According to the information supplied by the Subdirectorate for External Trade of the Customs Management Department, 138 import declarations were submitted at or below the thresholds established in Decree No. 2218/2017. Of these, 105 declarations, or 76%, obtained release, among which a valuation dispute arose for 12 imports, giving rise to the posting of 12 specific bonds. For the remaining 33 import declarations, or 24%, release was not authorized.
>
> Above the threshold, 60,866 import declarations were submitted according to information from the Economic Studies Unit.[388]

7.218. It does not appear to the Panel that the wording of the Colombian legislation to which Panama refers or the aforementioned inspection report offer convincingly substantiate Panama's assertion that the specific bond is necessarily required whenever clothing and footwear classified under Chapters 52, 53, 54, 55, 56, 58, 59, 60, 61, 62, 63 and 64 of Colombia's Customs Tariff are imported into Colombia below the relevant threshold. In point of fact, the data submitted by Colombia appear to contradict Panama's assertion.

7.219. Therefore, the Panel considers that Panama has failed to demonstrate that the posting of a specific bond under Article 7 of Decree No. 2218/2017 is required for all importation of the relevant products under the respective threshold. In any event, the Panel does not consider this aspect to be dispositive as to whether the specific bond, by allegedly causing uncertainty, constitutes a limiting condition on imports.

7.220. Another of the arguments put forward by Panama in respect of the alleged uncertainty created by the posting of the specific bond is the fact that the bond is granted subject to conditions set by a bank or insurance company.[389]

7.221. As in relation to the burdensomeness of the guarantee, Colombia responds that if Panama is arguing that the alleged restrictive effects of the bond stem from private actors, these cannot form the basis for a claim that the bond constitutes a "restriction" within the meaning of Article XI:1.[390]

7.222. In line with the Panel's conclusions in paragraphs 7.197-7.198 above, the intervention of some element of private choice does not relieve Colombia of responsibility under the GATT 1994.[391]

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[384] Panama's response to Panel question No. 52. See also Panama's comments on Colombia's response to Panel question No. 1.

[385] Panama's comments on Colombia's response to Panel question No. 1, para. 6 (referring to Decree No. 2685/1999 (Exhibit PAN-3), Article 128, point 5.1.3.).

[386] Panama's comments on Colombia's response to Panel question No. 8, para. 1 and response to Panel question No. 52 (referring to the Colombiana Kimberly Colpapel insurance policy (Exhibit COL-17)).

[387] Colombia's response to Panel questions Nos. 12, 15 and 21.

[388] Figures for imports of goods under Decree No. 2218/2017 (Exhibit COL-61).

[389] Panama's first written submission as complainant, para. 40; first written submission as respondent, para. 55; and second written submission as complainant, paras. 97-99.

[390] Colombia's second written submission as respondent, para. 51.

[391] Appellate Body Report, *Korea – Various Measures on Beef*, para. 146.

Hence, the fact that importers negotiate the bond with private entities would not exclude it from the scope of the review.

7.223. Coming back to examination of the alleged uncertainty caused by having to post the bond through private actors, the Panel observes that it is quite common for customs bonds to be issued by a bank or insurance company, and it is they that will set the conditions that the importer must fulfil to obtain the bond. As will be seen in greater detail in section 7.3.4.2.3 below, and as some third parties have pointed out, other provisions of WTO agreements provide for the possibility of requesting importers to post customs bonds.[392] This is the case in Article 13 of the Customs Valuation Agreement and Article 7 of the Trade Facilitation Agreement, where provision is made for posting guarantees in the form of sureties, deposits or other appropriate instruments provided for in the laws and regulations of the importing Member. In the Panel's opinion, a banking or insurance company bond is among the appropriate instruments provided for in Colombian legislation and in that of many other WTO Members. Thus, the Panel does not believe that the mere fact that the bond must be of one of the two types serves to create uncertainty.

7.224. The Panel understands that the fact that certain parties may not be able to fulfil certain conditions attached to the import process does not turn them *per se* into conditions having limiting effects on importation, in contravention of Article XI:1. As stated earlier, the imposition of import conditions that may involve a charge is a routine aspect of international trade and does not necessarily imply any violation of Article XI:1 of the GATT 1994.[393]

7.225. In this case, the Panel does not consider that Panama has sufficiently explained how the posting of a bond through a bank or insurance company creates uncertainty for importers of the products covered by Decree No. 2218/2017. Therefore, in the Panel's opinion, Panama has failed to demonstrate that the posting of the specific bond through a bank or insurance company constitutes a limitation on imports.

7.226. Another of the arguments put forward by Panama is the alleged additional uncertainty stemming from constant regulatory changes affecting the specific bond. Panama refers first to Decree No. 074 of 23 January 2013, which introduced the compound tariff on the importation of textiles, footwear and clothing, which was subsequently replaced by Decree No. 456 of 28 February 2014, declared inconsistent with WTO rules in the original proceedings. Panama then refers to Decrees No. 1744/2016 and No. 1745/2016 and to the latter's replacement by Decree No. 2218/2017.[394] The Panel notes, firstly, that the changes involved in these actions are changes relating to the measures at issue, i.e. Decrees No. 1744/2016, No. 1745/2016 and No. 2218/2017. In this respect, while Decrees No. 1744/2016 and No. 1745/2016 were issued on 2 November 2016, Decree No. 2218/2017 was issued on 27 December 2017, i.e. more than a year later. The Panel doubts, first of all, that the changes in the measures at issue can be considered as "constant". Secondly, the Panel does not consider that Panama has demonstrated that the said regulatory changes have created the uncertainty that Panama alleges.

7.227. Consequently, the Panel rejects Panama's claim that the specific bond provided for in Article 7 of Decree No. 2218/2017 creates uncertainty to the point of constituting a limiting condition on imports.

7.3.4.2.3 The question of whether the specific bond is arbitrary

7.228. Panama argues that the specific bond is *arbitrary* because it lacks proportionality, since its coverage bears no relation to the obligations it seeks to guarantee. Panama also argues that the lack of proportionality is more flagrant in those cases where the importer has already posted a general bond. The Panel will examine these arguments below.

7.229. With regard to the lack of proportionality in relation to the risk covered, Panama claims that the amount of the bond is not proportional to the obligations to be covered, as it is determined on

[392] European Union's third-party written submission, para. 25; third-party statement, para. 17; and United States' third-party written submission, paras. 45-47.

[393] Appellate Body Report, *Argentina – Import Measures*, para. 5.217. See also Panel Report, *Argentina – Import Measures*, paras. 6.252-6.254 (referring to Panel Reports, *India – Autos*, para. 7.270 and *China – Raw Materials*, para. 7.917).

[394] Panama's second written submission as respondent, paras. 199-211.

the basis of a fixed formula.[395] Panama points out that the coverage of the specific bond, which amounts to 200% of the difference between the declared value and the threshold price, multiplied by the quantity imported, is far greater than the principal obligations that the bond purports to cover.[396] Panama questions whether the specific bond is meant to guarantee payment of customs taxes and penalties. This is because, according to Panama, customs duties are paid before a valuation dispute is identified and bonds may not guarantee the payment of penalties before offences are detected.[397]

7.230. Colombia, on the other hand, considers that all the elements of the bond (insurable interest, insurable risk, amount of the insurable risk, parties involved, premium, etc.) have a direct relationship with the import operation that is being guaranteed and the value recorded in the corresponding customs declaration.[398] Colombia points out that, since the obligation that it is sought to guarantee (imposition of customs taxes, penalties and interest after a customs investigation) is a future and uncertain one[399], the guarantee is set on the basis of an indicative value, without there being total certainty that the bond will cover 100% of those obligations.[400]

7.231. The indicative value to which Colombia refers is the 200% prescribed in the regulation, and according to Colombia meets the criterion of sufficiency within the meaning of Article 13 of the Customs Valuation Agreement and Article 7 of the Trade Facilitation Agreement.[401] By way of example, Colombia indicates that in certain cases the penalties can be as high as 150 or 200% of the valuation of the imported goods.[402] Colombia also clarifies that the change in calculation of the value of the bond following the entry into force of Decree No. 2218/2017 results in a lower guarantee amount than had been provided for in Decree No. 1745/2016[403], and thus corresponds more accurately to the value that would be generated by the risk of non-payment of the customs duties.[404]

7.232. The Panel concurs with Colombia as to the difficulty of establishing *ex ante* a bond that seeks to guarantee future and uncertain aspects like duties and potential penalties and interest that will be payable once the valuation dispute is settled. The Panel considers that there is an element of uncertainty inherent in any valuation dispute, since it is not known at the start of the dispute what the final determination will be. This situation makes it difficult to be more precise at the time of setting the amount of the bond. The Panel appreciates that in the event of a dispute concerning the value of goods when there is a suspicion of underinvoicing, it is understandable that the amount of the bond be calculated on the basis of a reference value, since the duties and other charges would not be calculated on the basis of the declared value, but rather of corrected values, so there is *de facto* a possibility that the specific bond may not be sufficient to cover all the costs of release.

7.233. Therefore, in the Panel's opinion, Panama has failed to demonstrate the lack of proportionality of the coverage in relation to the obligations it seeks to guarantee.

7.234. Panama also argues that the lack of proportionality is more flagrant in the case of importers that already have a general bond to cover the same obligations.[405] Colombia, for its part, explains that the specific bond forms part of a special regime that it applies preferentially over the general regime of the Customs Statute.[406] According to Colombia, the specific bond and other bonds provided for in Colombia's customs system, including the general bond, are unrelated.[407] Colombia asserts

[395] Panama's response to Panel question No. 52.

[396] Panama's first written submission as complainant, paras. 37-38; and first written submission as respondent, paras. 54 and 84. See also Panama's second written submission as respondent, paras. 196-197.

[397] Panama's comments on Colombia's response to Panel question No. 9.

[398] Colombia's response to Panel question No. 9, para. 28.

[399] Ibid. para. 29.

[400] Ibid. para. 30.

[401] Colombia's response to Panel question No. 18, para. 74.

[402] Colombia's response to Panel question No. 9, para. 29.

[403] The Panel recalls that while in Decree No. 1745/2016 the coverage of the bond amounted to 200% of the threshold unit price multiplied by the quantity imported, in Decree No. 2218/2017 the coverage amounts to 200% of the difference between the f.o.b. price declared by the importer and the result of multiplying the threshold unit price.

[404] Colombia's response to Panel questions No. 13(c), para. 48 and 15(a)(i), para. 57 and comments on Panama's response to Panel question No. 52.

[405] Panama's first written submission as complainant, para. 39; and second written submission as respondent, paras. 192-193.

[406] Colombia's response to Panel question No. 15(a)(ii), para. 60.

[407] Colombia's response to Panel question No. 17(b), para. 69.

that the specific bond was explicitly linked to the valuation dispute guarantee, pursuant to Article 13 of the Customs Valuation Agreement and consistent with Article 17 of that same instrument.[408]

7.235. With respect to the relationship with other bonds, the fact that there are other bonds that cover similar situations does not necessarily imply that there is any duplication since, as Colombia indicated, they may apply to different products in different circumstances. In this instance, Colombia indicates that the specific bond is part of a special regime that prevails over the general regime. Nor does the fact that other guarantees display different characteristics in terms of their amount, duration, etc., support the conclusion that the coverage of the specific bond is arbitrary.

7.236. In the Panel's opinion, Panama has failed to explain how the allegedly arbitrary design of the bond has a limiting effect on imports. Consequently, the Panel rejects Panama's contention that the specific bond provided for in Article 7 of Decree No. 2218/2017 is arbitrary to the point of constituting a limiting condition on imports.

7.3.4.3 Conclusion

7.237. Having examined the reasons put forward by Panama to substantiate the alleged inconsistency of the specific bond with Article XI:1 of the GATT 1994, pertaining to its burdensomeness, the uncertainty it might create and its arbitrariness, as well as its design, architecture and revealing structure in its relevant context, the Panel considers that Panama has failed to adduce sufficient arguments and documentary evidence to enable it to find that the obligation to constitute a specific bond with the characteristics of Article 7 of Decree No. 2218/2017 has limiting effects on imports.

7.238. For the reasons set out above, the Panel concludes that Panama has failed to demonstrate that the specific bond provided for in Article 7 of Decree No. 2218/2017 has limiting effects on imports in a manner inconsistent with Article XI:1 of the GATT 1994.

7.3.5 The question of whether the special import regime is inconsistent with Article XI:1 of the GATT 1994

7.3.5.1 Arguments of the parties

7.3.5.1.1 Panama

7.239. Panama[409] claims that the special import regime constitutes a "restriction[]"on "importation" in violation of Article XI:1 of the GATT 1994, since the collective application of more onerous customs and tariff measures to textile and footwear products with prices lower than or equal to the thresholds established by Colombia has a paralysing effect on imports of the products concerned.[410]

7.240. Panama argues that the special import regime, by its design, structure and architecture, limits the capacity of certain importers and affects the competitive position of imported products priced at or below the thresholds, for the following reasons: (a) it excludes from the import process importers that do not obtain the specific bond; (b) it limits the capacity of importers by imposing burdensome requirements; (c) it ascribes a risk status to importers that declare goods at or below the established threshold price; (d) it requires the presence of the importer, its legal representative

[408] Colombia's comments on Panama's response to Panel question No. 52.

[409] The Panel notes that in Panama's first written submission as complainant, its first written submission as respondent, and its second written submission as complainant, Panama refers to Decree No. 1745/2016. After submitting Decree No. 2218/2017 as Exhibit PAN-43, Panama begins referring to that Decree. In this connection, Panama explained in paragraph 11 of its second written submission as respondent that "[f]or the sake of simplicity, Panama refers in a general manner in this rebuttal to the "specific bond" or the "special import regime", on the understanding that these are the same measures as are contained in Decrees No. 1745 and No. 2218. Any reference it may make to a measure of the specific decree (i.e. the specific bond of Decree No. 2218) is normally made to highlight specific aspects stemming from that decree." This summary of arguments uses the form in which Panama set forth its arguments, so that reference is at times made solely to Decree No. 1745/2016, these being arguments presented prior to the submission of Decree No. 2218/2017. However, the foregoing is without prejudice to the fact that arguments containing an express reference to Decree No. 1745/2016 could also be applicable to Decree No. 2118/2017. Where that is the case, the Panel will address those arguments in its analysis concerning Decree No. 2218/2017.

[410] Panama's request for the establishment of a panel, WT/DS461/22.

or its agent during the customs inspection or examination of the goods, with the attendant costs that this entails; (e) it authorizes the presence of an import operations observer paid by the local industry; (f) it prescribes a specific bond which entails a considerable cost; (g) it creates uncertainty in terms of the restriction on ports of entry; and (h) if the requirements of Article 4 are not met, it does not allow reshipment, recovery or legalization, with the result that the DIAN may dispose of the goods after a period of "legal abandonment".[411]

7.241. Panama argues that the component conditions of the special import regime impose significant monetary, logistical and, possibly, transaction costs on the import process. The costs stem from the requirement to post a specific bond of 200% of the threshold unit price multiplied by the quantity imported, valid for three years[412], together with the requirement to produce five documents and certificates one month in advance of importation for each shipment: (a) *translation costs* for the five documents and certificates[413]; (b) *apostille or legalization costs* for the five documents and certificates, as appropriate; (c) *logistical costs* of complying with the documentary and certification requirements involving various actors; (d) *banking cost* arising from the rates charged by Colombian banks; and (e) *additional costs* stemming from the required attendance of the importers themselves or the professional hired for the purpose during the physical inspection of the goods for the release authorization.[414] These costs are significant and have a restrictive effect on imports.[415] The aforementioned costs are recurrent, since they apply to each importation.[416]

7.242. In particular, regarding the costs associated with the translation requirement, Panama points to the lack of availability of official translators for certain languages in Colombia, which effectively restricts the importation of goods from countries with languages for which no official translator is available, as the submission of translated documentation is necessary for processing the entry of goods into Colombia.[417] Panama adds that the lack of availability of official translators in the importer's city has an impact on processing time and cost.[418] Panama does not deem it reasonable to require official translations from languages for which there are no official translators in Colombia, and to require them multiple times, as in the case of certification of the existence of the supplier, when they have been submitted recently.[419] Panama also calls into question the fact that such translations are only requested for imports covered by Decrees No. 1745/2016 and No. 2218/2017.[420]

7.243. With respect to the costs associated with the certification requirement, Panama considers that they are costs arising from unnecessary red tape since the information appears in other import documents.[421] Panama points out that to the costs of certification *per se* must be added the hidden logistical costs (i.e. planning and logistical organization costs and implementation costs) which push up the transaction costs even further.[422]

[411] Panama's first written submission as complainant, para. 56; and second written submission as respondent, paras, 219 and 232. See also Panama's first written submission as complainant, para. 55.
[412] Panama's second written submission as respondent, para. 280.
[413] Panama's first written submission as complainant, para. 57; and second written submission as respondent, paras. 241-246.
[414] Panama's first written submission as complainant, paras. 57-58 and 60; first written submission as respondent, para. 60; second written submission as complainant, para. 149; and second written submission as respondent, paras. 281-285.
[415] Panama's first written submission as complainant, para. 61; and second written submission as respondent, para. 281.
[416] Panama's first written submission as complainant, paras. 57-58; and first written submission as respondent, para. 60.
[417] Panama's second written submission as complainant, paras. 124-125. See also Panama's second written submission as respondent, para. 242.
[418] Panama's second written submission as complainant, para. 127. See also Panama's second written submission as respondent, para. 242.
[419] Panama's second written submission as complainant, para. 131; and second written submission as respondent, paras. 245-246.
[420] Panama's second written submission as respondent, para. 244.
[421] Panama's second written submission as complainant, paras. 134-136; and second written submission as respondent, para. 250.
[422] Panama's second written submission as complainant, paras. 142-143; and second written submission as respondent, para. 259.

7.244. Panama argues that these costs generated by the special import regime are unjustified and make importation more difficult and more expensive, adversely affecting the competitive position of the imported products.[423] The lack of justification concerns particularly importers with a general bond, which are requested to post an additional specific bond.[424]

7.245. Panama adds that, inasmuch as Colombia requires that the quantity, price and port of entry of the goods be set one month in advance of the importation, the special import regime deprives importers of flexibility to respond to changing market circumstances or external factors, which affects available competitive opportunities for the imported products.[425] According to Panama, this limiting condition stems from the *design* of the regime, in particular the requirement to complete the formalities of Article 4 of Decree No. 1745/2016.[426] Panama explains that Colombian customs law does not allow adjustments to the quantity with resubmission of the documentation. Prior authorization may only be granted by the DIAN.[427] Any change in quantity, price or port of entry that occurs during the 30 days prior to the importation results in non-authorization of release and subsequent importation of the goods.[428] Panama considers that extra costs are created for importers due to the penalties entailed by seizure of the goods[429], expropriation of the goods[430], or the amendment and submission of new documents.[431] These extra costs would have an impact on domestic demand such as to stifle exports.[432] Furthermore, the fact that the documentation has to be submitted one month in advance makes the importation commercially unviable in a high-turnover market such as Colombia's.[433]

7.246. In addition to the limitations which the special import regime entails on account of its high cost and rigidity, Panama argues that the uncertainty introduced by the regime gives rise to an additional limitation. Panama argues that the uncertainty stems from the frequent changes in Colombia's customs regulations, the introduction of possible restrictions on ports of entry[434], and the obtainment of certain documents and the necessary credit rating in order to obtain the specific bond.[435] With respect to the regulatory changes, Panama identifies the changeover from a compound tariff regime to a hybrid one that includes an *ad valorem* tariff and a special import regime, and the changes stemming from the adoption of Decree No. 2218/2017, which affect the products and tariff headings covered by the measures, the thresholds, the calculation of the specific bond and the penalties for failure to comply with the requirements set out in that Decree.[436]

7.247. Panama considers that the regime discourages the import of the relevant goods as it obliges importers to decide between importing under a costly and uncertain import process; modifying the declared values in order to pass the thresholds and avoid application of the regime; or not importing and looking for an alternative domestic supplier.[437] In Panama's opinion, the high turnover of imports of clothing and footwear reinforces the limiting condition of the regime.[438]

7.248. With respect to the nature of its claim, Panama explains, in response to Colombia, that the claim under Article XI:1 relating to the special import regime is distinct, independent and separate

[423] Panama's first written submission as complainant, para. 60; first written submission as respondent, para. 61; and second written submission as respondent, para. 250.
[424] Panama's first written submission as complainant, para. 60; and first written submission as respondent, para. 61.
[425] Panama's first written submission as complainant, paras. 62 and 67-68; and second written submission as respondent, para. 268.
[426] Panama's first written submission as complainant, para. 62; and first written submission as respondent, para. 62.
[427] Panama's second written submission as complainant, paras. 151-153.
[428] Panama's first written submission as complainant, para. 63.
[429] Panama's second written submission as complainant, para. 158; and second written submission as respondent, para. 269.
[430] Panama's second written submission as respondent, para. 271.
[431] Panama's first written submission as complainant, para. 65.
[432] Panama's second written submission as complainant, para. 158.
[433] Panama's second written submission as respondent, para. 272.
[434] Ibid. paras. 289-290.
[435] Ibid. para. 291.
[436] Ibid. paras. 286-288.
[437] Panama's first written submission as complainant, para. 69; and first written submission as respondent, para. 64.
[438] Panama's first written submission as complainant, para. 71; and first written submission as respondent, para. 64.

from the claim relating to the specific bond. Contrary to Colombia's assertion, Panama states that the viability of each of the two claims is not dependent on the other.[439]

7.249. In response to Colombia's statements on the burden of proof, Panama does not consider that there are "permissible" measures that call for a particular burden of proof in the event of claims against them.[440] Panama recalls that the Appellate Body in *Argentina – Import Measures* did not exclude formalities or requirements under Article VIII of the GATT 1994 from the scope of application of Article XI:1.[441]

7.250. Panama insists on the fact that the present dispute relates to measures that have limiting effects on importation comparable to the measures analysed by the panels in *Indonesia – Import Licensing Regimes* and *Indonesia – Chicken*, especially in regard to the requirement to set the quantity, price and port of entry of the goods one month in advance without any possibility to change them.[442]

7.251. Likewise, Panama maintains that Colombia is imposing a system of minimum import prices, equal to the thresholds in Article 3 of Decree No. 1745/2016, which is inconsistent with Article XI:1 of the GATT 1994. According to Panama, the regime adversely affects the conditions of competition for imports of products below the threshold because it creates a strong incentive for importers to purchase goods above the minimum import price so as to escape application of Decree No. 1745/2016.[443]

7.252. Lastly, Panama concludes that the conditions imposed by the special import regime are burdensome, are costly, give rise to unnecessary charges, introduce uncertainty, reduce flexibility and discourage importation. Therefore, Panama claims that the special import regime imposes a limiting condition on importation inconsistent with Article XI:1 of the GATT.[444]

7.3.5.1.2 Colombia

7.253. Colombia[445] argues that Panama has improperly challenged the same measure twice, since it is challenging under Article XI:1 both the specific bond and the special customs regime, of which the said bond is a component.[446]

7.254. Colombia considers that Panama has not made a separate claim against the special import regime excluding the specific bond. Thus, as Panama has failed to demonstrate that the specific bond is inconsistent with Article XI:1, and since the said bond is an integral part of the special import regime, the Panel must dismiss the claim against the special import regime.[447]

7.255. Colombia argues that customs formalities are permissible under WTO law and that, therefore, their imposition cannot in itself constitute a prohibited "restriction" under Article XI:1. According to Colombia, the duties, costs or administrative fees associated with those formalities

[439] Panama's second written submission as complainant, paras. 113-114; and second written submission as respondent, para. 224.
[440] Panama's second written submission as complainant, para. 118.
[441] Ibid. para. 119 (referring to Appellate Body Report, *Argentina – Import Measures*, para. 5.237).
[442] Panama's second written submission as complainant, paras. 160-163.
[443] Panama's second written submission as complainant, paras. 171-175; and second written submission as respondent, paras. 293-294.
[444] Panama's first written submission as complainant, para. 72; and first written submission as respondent, para. 65.
[445] The Panel notes that in Colombia's first written submission as respondent and its second written submission as complainant, Colombia refers to Decree No. 1745/2016. After Panama submitted Decree No. 2218/2017 as Exhibit PAN-43, Colombia began referring to that Decree as well. This summary of arguments uses the form in which Colombia set forth its arguments, so that reference is at times made solely to Decree No. 1745/2016, these being arguments presented prior to the submission of Decree No. 2218/2017. However, the foregoing is without prejudice to the fact that arguments expressly referring to Decree No. 1745/2016 could also be applicable to Decree No. 2118/2017. Where that is the case, the Panel will address those arguments in its analysis concerning Decree No. 2218/2017.
[446] Colombia's first written submission as respondent, para. 81; and second written submission as complainant, para. 67.
[447] Colombia's first written submission as respondent, paras. 83-84; second written submission as complainant, paras. 69-70; and second written submission as respondent, paras. 56-57.

cannot, "without more", give rise to a prohibited restriction under Article XI:1.[448] Panama has failed to demonstrate that these costs have a limiting effect on imports.[449] Colombia argues that, to prove a violation of Article XI:1 in respect of instruments that are permissible under WTO law, the burden on Panama should be a particularly heavy burden to discharge.[450]

7.256. On the requirement relating to the translation of certificates, Colombia argues that it is reasonable and that the fees involved are not charged by the Colombian Government.[451] Colombia considers that what is not reasonable is to expect there to be an official translator for every language in every port. Colombia remarks that the lack of official translators for certain languages cannot be attributed to the Colombian Government. In any event, Colombia points out that there is a procedure in place to solve the problems arising from the lack of an official translator in a given language.[452] Lastly, in respect of this requirement, Colombia maintains that the fact that translation is requested only for the import of certain products does not constitute a restriction within the meaning of Article XI:1.[453]

7.257. Regarding the requirement for certification of documents, Colombia argues that this is permissible under Article 8 of the GATT 1994, so this requirement and the associated costs do not constitute prohibited restrictions under Article XI:1.[454] Likewise, it points out that Panama refers to certification costs that are determined and collected by Panama itself, which thus cannot give rise to a restriction on the part of Colombia under Article XI:1. Colombia explains that this requirement is not unnecessary, since it is used to verify information contained in other documents; and considers that the fact that Panama referred to this requirement as a "charge" places the requirement outside the scope of application of Article XI:1.[455]

7.258. With respect to the requirement to indicate the type of economic relationship between the supplier and the importer, Colombia asserts that it does not necessarily imply the hiring of an external professional, with the attendant cost, and reiterates that this is necessary information that may affect the reliability of the customs information provided.[456]

7.259. In regard to the requirement that the importer, its legal representative or an agent be present during the inspection of the goods by Colombia's customs authorities, Colombia argues that this is intended to safeguard the importer's due process rights and to ensure that the importers are not in fact shell companies engaged in fraudulent operations. Colombia adds that Panama has failed to prove that this requirement imposes additional costs; and, in the event that costs are incurred, they are charged by private actors. Nor does Colombia consider that Panama has proven the limiting effects of this requirement on imports.[457]

7.260. As regards the allegedly limited flexibility of the special import regime, Colombia responds that the importer remains free to import the quantity it wants and to change this quantity.[458]

[448] Colombia's first written submission as respondent, paras. 85-86 and 92; second written submission as complainant, paras. 71-72; and second written submission as respondent, para. 59.
[449] Colombia's first written submission as respondent, para. 94.
[450] Colombia's first written submission as respondent, para. 87; and second written submission as complainant, para. 73.
[451] Colombia's first written submission as respondent, para. 89; and second written submission as complainant, para. 42.
[452] Colombia refers to Article 6 of Resolution No. 3269/2016, which stipulates in relevant part that: "Where the document is drawn up in a language for which there is no official translator certified in Colombia, the citizen shall request certification from the Ministry of Foreign Affairs that there is no official translator, in order to be able to submit the translation of the document carried out by another translator, whose signature must legalized before a public notary" (Colombia's second written submission as respondent, para. 64 (referring to Resolution No. 3269/2016 (Exhibit COL-10)).
[453] Colombia's second written submission as respondent, paras. 60-66.
[454] Colombia's first written submission as respondent, paras. 90-91; and second written submission as complainant, para. 76.
[455] Colombia's second written submission as respondent, paras. 67-69.
[456] Ibid. para. 70.
[457] Colombia's first written submission as respondent, paras. 95-96; second written submission as complainant, paras. 81-82; and second written submission as respondent, paras. 72-74.
[458] Colombia's first written submission as respondent, para. 97; and second written submission as complainant, para. 83.

7.261. Colombia states that the measures challenged by Panama are of a different nature and have different characteristics from the measures examined in *Indonesia − Import Licensing Regimes*, *Indonesia − Chicken* and *Peru − Agricultural Products*, so that there is no basis for the comparisons that Panama draws between those disputes and the present dispute.[459]

7.262. Colombia concludes by asserting that Panama has failed to establish that the special import regime in Decree No. 1745/2016 is inconsistent with Article XI:1 of the GATT 1994.[460]

7.3.5.2 Analysis by the Panel

7.263. As indicated in paragraph 7.157 above, the Panel's task consists in determining whether, as Panama claims, the special import regime provided for in Article 7 of Decree No. 2218/2017 is inconsistent with Article XI:1 of the GATT 1994 because it constitutes a measure that has a limiting effect on the importation of certain products consisting of fibres, yarns, fabrics, clothing and footwear[461] and limits the competitive opportunities of the importers and imported products. It is important to stress that Panama has challenged the special import regime as a whole[462], rather than the component requirements separately.

7.264. The Panel notes that Panama has not defined the category of measures covered by Article XI:1 in which the special regime would fall. In this regard, Colombia, without prejudice to its objection as to the possible inconsistency of the regime, does not appear to have called into question the fact that the special regime may fall within the scope of Article XI:1.

7.265. The Panel recalls in this respect that the prohibition of quantitative restrictions provided for in Article XI:1 refers explicitly to prohibitions or restrictions on the importation or exportation of a product "whether made effective through quotas, import … licences or other measures". Given the broad scope of the term "other measures" and in the absence of any discussion on this point between the parties, the Panel considers it appropriate to examine whether Panama has demonstrated that the special import regime is trade-restrictive.[463]

7.266. Panama argues that the special import regime, by its design, structure and architecture, limits the capacity of some importers and affects the competitive position of products imported at prices below or equal to the thresholds.[464] As previously explained, the Panel will keep in mind in its analysis that "not every condition or burden placed on importation … will be inconsistent with Article XI, but only those that are limiting, that is, those that limit the importation … of products".[465] While the conditions attached to the import of products often entail burdens on importation, it is no less certain that they are "a routine aspect of international trade".[466]

7.267. The Panel will proceed to examine the measure at issue on the basis of its design, architecture and revealing structure in its relevant context.[467]

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[459] Colombia's second written submission as respondent, paras. 75-80.

[460] Colombia's second written submission as complainant, para. 87; and second written submission as respondent, para. 81.

[461] As indicated in the descriptive part, Article 2 of Decree No. 2218/2017 stipulates that the products covered are imports consisting of fibres, yarns, fabrics, clothing and footwear under Chapters 52, 53, 54, 55, 56, 58, 59, 60, 61, 62, 63 and 64 of the Customs Tariff for which the declared f.o.b. price is lower than or equal to the threshold established in Article 3 of that Decree.

[462] See, for example, Panama's first written submission as complainant, para. 70 and second written submission as respondent, para. 33.

[463] The Panel agrees with the panel in *Argentina − Import Measures* that what is relevant when examining a measure under Article XI:1 of the GATT 1994 is whether the measure prohibits or restricts trade, rather than the means by which such prohibition or restriction is made effective. (Panel Report, *Argentina − Import Measures*, para. 6.363.) This approach was also used by the panel in *Indonesia − Import Licensing Regimes.* (Panel Report, *Indonesia − Import Licensing Regimes*, paras. 7.55 and 7.76.)

[464] Panama's first written submission as complainant, para. 56; and second written submission as respondent, paras. 219 and 232. See also Panama's first written submission as complainant, para. 55.

[465] Appellate Body Report, *Argentina − Import* Measures, para. 5.217. See also Panel Report, *Argentina − Import Measures*, paras. 6.252-6.254 (referring to Panel Reports, *India − Autos,* para. 7.270 and *China − Raw Materials*, para. 7.917).

[466] Appellate Body Report, *Argentina − Import Measures*, para. 5.243.

[467] Ibid. para. 5.217 (referring to Appellate Body Reports, *China − Raw Materials*, paras. 319-320).

7.268. As described in section 2.3.3.3 above, the special import regime challenged by Panama is composed of different elements governed by Articles 4 to 8 of Decree No. 2218/2017:

a. documentary and certification requirements (Article 4.1 of Decree No. 2218/2017);

b. presence of the importer, its legal representative or the importing company's agent during the process of customs inspection or examination of the goods (Article 4.2 of Decree No. 2218/2017);

c. possibility of establishing customs controls on entry of the goods (Article 5 of Decree No. 2218/2017);

d. participation of local observers in the import process (Article 6 of Decree No. 2218/2017);

e. posting of a specific bond in cases of valuation dispute to obtain release of the goods (Article 7 of Decree No. 2218/2017); and

f. incorporation of information concerning import operations in the risk management system (Article 8 of Decree No. 2218/2017).

7.269. Panama also refers to the provisions of Decree No. 2218/2017 relating to reshipment (Article 9) and seizure and confiscation (Article 10). As Panama itself acknowledges, these are not actually requirements linked to the import process, but rather the consequences ensuing from failure to comply with certain documentary requirements prescribed in Decree No. 2218/2017.[468] The Panel considers it necessary to examine these aspects, too, since they are part of the design and structure of the special import regime and, as such, may help us elucidate whether, as Panama argues, the special import regime has limiting effects on imports that constitute a violation of Article XI:1 of the GATT 1994.

7.270. Before examining each of the requirements that make up the special import regime challenged by Panama, the Panel will address the parties' discussion on the consequences of the fact that one of the requirements of the special import regime identified by Panama (the specific bond provided for in Article 7 of Decree No. 2218/2017) has also been challenged as an independent measure under Article XI:1 of the GATT 1994.

7.271. Indeed, Colombia maintains that Panama has improperly challenged the same measure twice under Article XI:1 since it is challenging the specific bond as such and as a component of the special import regime. For Colombia, Panama's claim against the special import regime is dependent on its claim with respect to the specific bond. Hence, Colombia contends that the claims in respect of the special import regime should be dismissed in the event that the Panel finds that the specific bond is not inconsistent with Article XI:1.[469]

7.272. Panama, for its part, considers that the claim under Article XI:1 in respect of the special import regime is distinct, independent and separate from the claim relating to the specific bond.[470]

7.273. In the Panel's opinion, as Panama argues, the specific bond, on the one hand, and the special import regime (including the bond), on the other, constitute different measures on which Panama may submit separate claims under Article XI:1 of the GATT 1994. It is not unusual for complainants to challenge a measure comprising various elements collectively and any of those elements separately.[471] In the instant case, Panama has challenged the special import regime, comprising several requirements, *collectively*, and only one of those requirements, the specific bond, separately. Hence the Panel considers that the findings with respect to one of the elements of the special import regime (i.e. the specific bond) do not preclude it from examining and making findings on the whole set of requirements that make up the special import regime. In this sense, the Panel considers it necessary to distinguish between the part and the whole: the fact that one part of a measure is not

[468] Panama's second written submission as respondent, para. 421.
[469] See paras. 7.253-7.254 above.
[470] See para. 7.248 above.
[471] See, for example, *Indonesia – Import Licensing Regimes*.

inconsistent with a particular provision does not necessarily imply that the whole of which it is a part will receive the same legal assessment in the light of that provision.

7.274. In view of the foregoing, the Panel will analyse the constituent elements of the special import regime so as to be able to assess whether, taken together, they constitute a measure inconsistent with Article XI:1 of the GATT 1994 as claimed by Panama.

7.3.5.2.1 Documentary and certification requirements

7.275. As described in section 2.3.3.3.1 above, Panama challenges as an integral part of the special import regime a series of documentary and certification requirements that the importer of the products covered by Decree No. 2218/2017 has to fulfil for each shipment at least one month in advance of the arrival of the goods on Colombian customs territory. Those requirements include certification of intention to sell, certification of the existence of the foreign supplier, list of distributors, declaration by the legal representative of the customs agency and declaration by the importer or the importer's legal representative, and they have to be submitted together with the identity and liability form.

7.276. Below, the Panel will describe each of the documentary and certification requirements contained in the special import regime challenged by Panama and the parties' comments as to whether the Colombian authorities have access to the requested information through other sources.

7.3.5.2.1.1 Certification of intention to sell

7.277. Article 4.1(a) of Decree No. 2218/2017 stipulates that the importer shall submit for each shipment, at least one month in advance of the arrival of the goods on Colombian customs territory, the identity and liability form accompanied by, among other documents, the following certification:

> Certification from the foreign supplier, apostilled or legalized, with an official translation into Spanish, providing evidence of the intention to sell to the importer in Colombia and indicating, where appropriate, the type of economic relationship with the importer in accordance with the Tax Statute, also providing the address, telephone number and email address of the supplier as well as the six-digit tariff subheading containing the detailed description of the products to be exported, the quantity, and their respective prices.

7.278. With respect to the information relating to the *intention to sell*, Panama states that it is found in the supporting documents accompanying every customs declaration for importation and must be presumed to be authentic and true unless there is evidence to the contrary.[472]

7.279. Colombia responds, for its part, that the information contained in the supporting documents is different from that requested in Article 4.1(a) in that it is the customs agency or the importer that registers the intention to sell in import declarations, whereas it is the exporter that issues the certification of intention to sell. Colombia deems it essential to have this certification from the exporter before the goods arrive in the country in order to detect and prevent operations linked to money laundering since, for example, it can help avoid the use of foreign companies without their knowledge or fictitious import companies in Colombia. Colombia adds that in the general customs regime the authenticity of the supporting documents is determined after the goods have been released, which would not enable money laundering operations to be prevented. Colombia emphasizes that the purpose of requiring this information before the goods arrive on Colombian customs territory is to compare the information provided by the importer with that provided by the exporter, which must be presumed to be authentic and true unless there is evidence to the contrary.[473]

7.280. With respect to the information relating to the *type of economic relationship* between the supplier/exporter and the importer, Panama states that this information is required in the Andean Declaration of Value (boxes 87, 88 and 89). Also, Panama notes that the fact that the information

[472] Panama's response to Panel question No. 48 (referring to Decree No. 390/2016 (Exhibit PAN-4), Article 215).

[473] Colombia's comments on Panama's response to Panel question No. 48.

on economic relationship refers to the Colombian Tax Statute probably implies recourse to the services of an expert.[474]

7.281. Colombia responds that this information is not available in other import documents under the general regime and that it is necessary in order to minimize the risks of money laundering using chains of related companies.[475] Colombia explains that the information contained in the Andean Declaration of Value has a different and more limited scope and purpose. Colombia identifies two main differences between the information contained in the Andean Declaration of Value and that required in Article 4.1(a) of Decree No. 2218/2017: (a) in the Andean Declaration of Value, it is the customs agency or the importer that indicates the economic relationship, whereas in the case of the requirement under Article 4.1(a) it is the exporter directly; and (b) the economic relationship criteria in the Andean Declaration of Value are different from those provided for in the Colombian Customs Statute, the latter being more specific and relevant for detecting and preventing money laundering through related companies acting as a front.[476] Colombia again stresses that a highly relevant aspect is that the information comes from the exporter and is used to compare it with that provided by the importer. Colombia considers that the assistance of an expert would not necessarily be required to comply with this requirement, and points to its right to exercise the supervisory authority of customs administrations pursuant to Article 10 of Decision No. 379 of the Andean Community.[477]

7.282. With respect to the *address, telephone number and email address of the supplier/exporter,* Panama states that this information is required in the import declaration[478] and points out that Colombia acknowledges that the information required by Article 4.1 of the decrees in question may be obtained from other documents, while disagreeing on the validity of the information those documents provide.[479] Colombia indeed recognizes that some of the information is available in the import declaration and its supporting documents, but invokes its right to be able to compare, through the exporter, the information provided by the importer.[480] As Colombia had mentioned before, one of the main differences is that the information contained in the import declaration is provided by the customs agency or the importer, whereas that required in Article 4.1(a) is provided directly by the foreign supplier/exporter. Moreover, the information relating to the requirement under Article 4.1(a) is received before the goods arrive, which makes it possible to activate the risk management system.[481]

7.283. With respect to the information on the *six-digit tariff subheading, detailed description of the product, quantity and price,* Panama states that it is required in the import declaration, in the Andean Declaration of Value and in the commercial invoices and other supporting documents.[482] While Colombia recognizes that some information is available in supporting documents submitted by the customs agency or the importer, it deems it necessary to request the information from the supplier/exporter in order to address possible false statements in the supporting documents accompanying import declarations and the Andean Declaration of Value. Furthermore, Colombia remarks that the information in the import declaration and the Andean Declaration of Value is insufficient, having a different purpose and scope.[483]

[474] Panama's response to Panel question No. 48.

[475] Colombia's response to Panel question No. 48.

[476] In this connection, Colombia compares, on the one hand, the criteria laid down in Article 15.4 of Decision No. 378 and box 49 of the Annex to Decision No. 379 with, on the other, those provided for in Article 260-1 of the Colombian Customs Statute (see Decision No. 378 (Exhibit COL-53), and Decision No. 379 (Exhibit COL-54)).

[477] Colombia's comments on Panama's response to Panel question No. 48.

[478] Panama's response to Panel question No. 48.

[479] Panama's comments on Colombia's response to Panel question No. 48.

[480] Colombia's response to Panel question No. 48 and comments on Panama's response to Panel question No. 48.

[481] Colombia's comments on Panama's response to Panel question No. 48.

[482] Panama's response to Panel question No. 48 (referring to boxes 59, 77, 78 and 91 of the import declaration and boxes 53, 54, 55, 57 and 58 of the Andean Declaration of Value).

[483] Colombia's response to Panel question No. 48 and comments on Panama's response to Panel question No. 48.

7.3.5.2.1.2 Certification of the existence of the foreign supplier

7.284. Article 4.1(b) of Decree No. 2218/2017 stipulates that the importer shall submit for each shipment, at least one month in advance of the arrival of the goods on Colombian customs territory, the identity and liability form accompanied by, among other documents, the following certification:

> Certification of the existence of the foreign supplier, apostilled or legalized, with an official translation into Spanish, which shall be issued by the entity in the country of export that keeps the official register of producers or traders. Should no such entity exist, the importer must testify to that fact under oath, which shall be deemed to have been taken with the signing of the document, without prejudice to the supervisory and inspection powers of the National Customs and Excise Directorate.

7.285. Panama states that this information is found in the invoices and other supporting documents accompanying the import declaration required under Article 215 of Decree No. 390/2106. Panama points out that the fact that this certification may be replaced by a declaration from the importer shows that the requirement is not imperative.[484]

7.286. Colombia responds that this information is not available in other import documents required for the general regime, and points to the need to obtain this information directly from the supplier/exporter before the goods arrive in Colombia in order to prevent criminal organizations from using in their import declarations the names of foreign companies without their consent or using foreign companies or importers that are shell companies.[485] Colombia emphasizes that the information in the import declaration or the supporting documents is information provided by the importer or the customs agency, whereas the information required by Article 4.1(b) of Decree No. 2218/2017 comes directly from the foreign supplier/exporter. Colombia again invokes its right to compare the information received from different sources for the purpose of preventing money laundering.

7.287. As regards the possibility that the information from the supplier/exporter, like that in the import declaration and supporting documents, may be falsified, Colombia explains that the probability of falsification is lower because the certification is issued by the "[e]ntity in the exporting country that keeps the official register of producers or traders" and, in addition, the document has to be apostilled. Colombia also disagrees with Panama on the added value of the apostille for the purposes of detecting and preventing document fraud. Whereas Panama considers that the apostille does not add any value in terms of avoiding fraud, Colombia maintains the opposite, since the apostille certifies not only the authenticity of the signature but also the capacity of the person signing the document and, where applicable, the identity of the seal or stamp the document bears. As to the option allowing a sworn statement in lieu of the certification issued by the entity in the exporting country that keeps the official register of producers or traders, Colombia asserts that this requirement may discourage imports based on registers of non-existent exporters and deter criminal organizations from using the names of companies in another country to engage in illegal activities.[486]

7.3.5.2.1.3 List of distributors

7.288. Article 4.1(c) of Decree No. 2218/2017 stipulates that the importer shall submit for each shipment, at least one month in advance of the arrival of the goods on Colombian customs territory, the identity and liability form accompanied by, among other documents, the following information:

> [L]ist of distributors of the goods in Colombia indicating their tax identification number (NIT), business name, address, telephone number and email address. [if the person importing the goods will be selling them in the same state]

7.289. Panama acknowledges that this information cannot be obtained by other means. Nonetheless, Panama considers that this information should not be required and that, in any event, it should not be made available to local import operations observers. Panama doubts whether the importers are able to indicate the final destination of the products one month before the goods arrive

[484] Panama's response to Panel question No. 48.
[485] Colombia's response to Panel question No. 48.
[486] Colombia's comments on Panama's response to Panel question No. 48.

in Colombia and points out that requesting this information creates unnecessary rigidity for importers.[487]

7.290. Colombia, first of all, draws a distinction between this requirement and the one provided for in Article 4.1(e) relating to the distribution chain. Then, Colombia explains that this information is necessary in order to verify the existence of the distributors, since there have been cases in which companies have faked the marketing of imported products with fictitious dealers in Colombia.[488] Colombia considers that this information deters criminals from using shell companies in its territory as well as enabling it to investigate possible offences. Colombia denies that this information is made available to the local import operations observer. Colombia considers it likely that the importers know who the potential distributors of their imports are, and reiterates that it does not ask for the final destination of the products in the marketing chain, but solely the distributors that will be dealing directly with the importer. Colombia concludes by specifying that the list of distributors can be corrected after it has been submitted.[489]

7.3.5.2.1.4 Declaration by the legal representative of the customs agency

7.291. Article 4.1(d) of Decree No. 2218/2017 stipulates that the importer shall submit for each shipment, at least one month in advance of the arrival of the goods on Colombian customs territory, the identity and liability form accompanied by, among other documents, the following declaration:

> Declaration signed by the legal representative of the Colombian customs agency for the goods, indicating their tax identification number (NIT), business name, address, telephone number and email address, where appropriate, certifying that they have conducted a background check on the customer for the importer for which they are to act as customs broker and established how long the parties have worked together.

7.292. Panama states that the NIT and the business name of the customs agency are required in the import declaration (boxes 25 and 26). Panama points out that when the declaration is submitted through a customs agency, the "customs mandate" will normally contain the NIT, business name and principal place of business as well as the identity card of the customs agency's legal representative. Further, Panama points out that the DIAN has access to the address, telephone number and email address of the customs agency's legal representative through the customs agency's entry in the Single Tax Register (RUT), since all customs users, including customs agencies, are obliged to register in the RUT. Regarding the customer background check, Panama asserts that the law presumes compliance with the obligation to "know the customer" without the need for those involved to have to confirm such compliance.[490] Moreover, customs agencies have the legal obligation to preserve for five years, from the date of submission and acceptance of the declaration, the supporting documents and official bank payment receipts and the customs mandate and power of attorney contract, where granted, which for Panama means that the DIAN has access to the relevant information on the relationship between customs agencies and importers.[491]

7.293. Colombia, for its part, states that the information in the import declaration is insufficient and that neither the customs mandate nor the information in the RUT contain a declaration to the effect that the customs agency has conducted a background check on the customer.[492] Colombia explains that Colombian regulations require that customs users obtain the requisite background information on the customer in order, *inter alia*, to prevent illicit activities on the part of customs agencies. According to Colombia, the certificate required by Article 4.1(d) ensures compliance with the regulations.[493]

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[487] Panama's response to Panel question No. 48.
[488] Colombia's response to Panel question No. 48.
[489] Colombia's comments on Panama's response to Panel question No. 48 (referring to the provisions of Decrees No. 2685/1999 and No. 390/2016 (Exhibits PAN-3 and PAN-4) and Articles 10 of Decree No. 1745/2016 and 11 of Decree No. 2218/2017 (Exhibits PAN-2 and PAN-43)).
[490] Decree No. 2685/1999 (Exhibit PAN-3), Article 27-1; Resolution 4240/2000 (Exhibit PAN-40), Article 14-3; and Circular No. 0170/2002 (Exhibit PAN-104), para. 5.2.
[491] Panama's response to Panel question No. 48.
[492] Colombia's comments on Panama's response to Panel question No. 48.
[493] Colombia's response to Panel question No. 48 and comments on Panama's response to Panel question No. 48.

7.3.5.2.1.5 Declaration by the importer or the importer's legal representative

7.294. Article 4.1(e) of Decree No. 2218/2017 stipulates that the importer shall submit for each shipment, at least one month in advance of the arrival of the goods on Colombian customs territory, the identity and liability form accompanied by, among other documents, the following declaration:

> Signed declaration by the importer or the importer's legal representative, certifying the following:
>
> > (i)That the value to be declared for the goods being imported corresponds to the price actually paid or payable.
> > (ii) The address of the storage facilities for the goods being imported.
> > (iii) Detailed information on the distribution and marketing chain in Colombia for the goods being imported.
> > (iv) That they are aware that the customs authority is entitled to submit the documents related to the import transaction to the Attorney General's Office and the Financial Information and Analysis Unit (UIAF).

7.295. In respect of the information on the *value of the goods*, Panama maintains that it is found in the import declaration (box 78), in the Andean Declaration of Value (box 83), and in the invoices and the supporting documents.[494] Colombia does not contest this, but points to the importance of having this information before the goods arrive in order to have time to examine the information in the light of its risk management system and to compare it *ex post facto* with the value indicated in the import declaration and the supporting documents.[495]

7.296. With reference to the *address of the storage facilities*, Panama considers that such detailed information should not be required, since the importers already provide information on the department or area of destination of the imports in the import declaration (box 56) and no similar information is requested for products of domestic origin.[496] Colombia, for its part, considers that this information, which is not recorded in the import declaration, is necessary to avoid cases where the company recorded in the import declaration as exporter does not exist or has no knowledge of the transaction, or to identify import companies that are shell companies or, although mentioned, are not participating in the import transaction. Likewise, Colombia clarifies that it does not request the address of the warehouses, as Panama says, but the address of the places where the goods remain stored pending delivery to the distributor.[497]

7.297. As far as the information on the *distribution and marketing chain* is concerned, Panama considers that this information should not be required, and that Colombia fails to explain how it is that the list of distributors is totally different from the information on the distribution chain.[498] According to Colombia, this requirement, which is not to be confused with the provisions of Article 4.1(c) (list of distributors), conforms to a legal mandate laid down in the new anti-smuggling statute.[499]

7.298. With regard to the declaration of awareness that the Colombian customs authority is entitled to submit the documents related to the import transaction to the Attorney General's Office and the Financial Information and Analysis Unit, Panama asserts that this information serves no purpose, since it repeats an objective fact, namely that Colombian criminal law applies to everyone.[500] According to Colombia, the importance of this declaration resides in the fact that it warns persons and customs agencies that are thinking of engaging in illicit transactions of the consequences thereof.[501]

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[494] Panama's response to Panel question No. 48.
[495] Colombia's comments on Panama's response to Panel question No. 48.
[496] Panama's response to Panel question No. 48.
[497] Colombia's comments on Panama's response to Panel question No. 48.
[498] Panama's response to Panel question No. 48 and comments on Colombia's response to Panel question No. 48.
[499] Colombia's comments on Panama's response to Panel question No. 48.
[500] Panama's response to Panel question No. 48.
[501] Colombia's comments on Panama's response to Panel question No. 48.

7.3.5.2.1.6 The question of whether the documentary and certification requirements contribute to the alleged limiting effect of the special import regime

7.299. Panama maintains that the contribution of the documentary and certification requirements described in the above sections to the limiting effect of the special import regime stems basically from three factors: (a) the costs involved (translation, legalization or logistics); (b) the rigidity they impose on the importer by obliging him to submit the documentation one month in advance; and (c) the fact that the information furnished by the documents required under Article 4.1 of Decree No. 2218/2017 may be obtained through other documents.[502]

7.300. Colombia responds that not only are the translation and certification requirements permissible under WTO law, but they are also reasonable.[503] Colombia asserts that the information furnished by the documents required under Article 4.1 of Decree No. 2218/2017 cannot be obtained through other documents requested in cases of imports subject to the general regime. This is because the information contained in the customs import declaration is not sufficient and does not have the same purpose and scope as that requested under Article 4.1 of Decree No. 2218/2017. In addition, Colombia stresses that the aim of the documentary requirements challenged by Panama is to corroborate the information contained in the customs declaration ahead of the arrival of the goods in Colombia, thus allowing it to conduct a prior risk analysis so that it may take action in cases of import transactions suspected of constituting money laundering.[504]

7.301. The Panel notes that there are significant differences between the parties in respect of specific aspects such as the lack of availability of official translators in Colombia for some languages, whether the same information required under Article 4.1 of Decree No. 2218/2017 is found in other documents, or whether having to submit the documents one month in advance really does deprive the importers of flexibility.

7.302. The Panel refers to Colombia's explanations on the procedure laid down in Colombia's regulations for cases where there is no certified official translator for a given language in Colombia[505] and the fact that Panama admits that not all the information required under Article 4.1 of Decree No. 2218/2017 is always available in an import document.[506] Nor does Panama question an aspect that Colombia qualifies as necessary, namely that the information be available in advance of the arrival of the goods in order to leave time to analyse it and trigger the alerts that may be necessary in each case.[507]

7.303. In the light of the foregoing, and focusing on the arguments submitted by Panama, which refer to the costs, the rigidity of having to submit documentation one month in advance and the availability of the information in other documents, the Panel considers that Panama has failed to sufficiently demonstrate the contribution of these documentary and certification requirements to the alleged limiting effect of the special import regime. The Panel also recalls that the existence of general requirements for the importation of goods is a routine aspect of international trade, as is the existence of special requirements for certain products, for purposes of risk analysis. Even if such requirements constitute additional burdens for the importer, they are part of day-to-day foreign trade operations.[508]

7.304. It should be made clear in this respect that the Panel makes no finding in relation to these documentary and certification requirements, but confines itself to analysing them in the context of a broader examination of the special import regime, as challenged by Panama, and its consistency

[502] Panama's first written submission as complainant, para. 72; first written submission as respondent, para. 65; and comments on Colombia's response to Panel question No. 48.
[503] Colombia's first written submission as respondent, paras, 89-91; and second written submission as complainant, paras. 75-76.
[504] Colombia's response to Panel question No. 48 and comments on Panama's response to Panel question No. 48.
[505] See footnote 452 above.
[506] See, for example, paras. 7.289 and 7.296-7.298 above.
[507] See, for example, Colombia's second written submission as respondent, para. 133.
[508] Appellate Body Report, *Argentina – Import Measures,* para. 5.217. See also Panel Report, *Argentina – Import Measures*, paras. 6.252-6.254 (referring to Panel Reports, *India – Autos*, para. 7.270 and *China – Raw Materials*, para. 7.917).

with Article XI:1 of the GATT 1994. The Panel will now move on the next element of the special import regime.

7.3.5.2.2 Presence of the importer, its legal representative or the importing company's agent during the customs inspection or examination (*aforo*) of the goods

7.305. As described in section 2.3.3.3.1 above, one of the elements of the special import regime challenged by Panama consists in the obligation for the importer, its legal representative or the importing company's agent to be present during the customs inspection or examination of goods imported below the thresholds in Article 3 of Decree No. 2218/2017. If they are not present, release of the goods will not be admissible or will not be authorized. This requirement is set forth in Article 4.2 of Decree No. 2218/2017.

7.306. Panama maintains that this requirement entails additional costs that are significant and recurrent, thus discouraging this type of imports.[509] Panama points out that, under the general import regime, their presence is only required in cases of physical examination, and not for the examination of documents.[510] Panama questions Colombia's claim that this requirement guarantees due process, considering that it is tantamount to admitting that due process is not guaranteed in other import transactions where the presence of the importer, its legal representative or the import company's agent is not required. Panama understands that this requirement and the explanation given by Colombia relating to guaranteeing due process are linked to the presence of the local observer during the inspection or examination process.[511]

7.307. Colombia responds that the costs or administrative burdens associated with customs formalities do not in themselves constitute prohibited restrictions under Article XI:1 of the GATT 1994, and considers that Panama has not succeeded in demonstrating the restrictive effects of this requirement.[512] Colombia argues that due process is guaranteed by allowing the importer, its legal representative or the importing company's agent to be present for the customs inspection or examination of the goods and, thus, to observe the implementation of the process, defend their position and provide information to the customs authorities, as appropriate. Colombia adds that fulfilment of this requirement enables it to verify that the companies involved in the import transaction are not shell companies or companies usurping the identity of other legally incorporated companies.[513] Colombia indicates that the physical presence of the declarant, which in the majority of cases is the importer, is required "since direct participation is permitted in Colombia".[514]

7.308. The Panel observes that Panama bases its entire argument in relation to this requirement on the fact that it implies an additional cost in the import process; a cost which, in its opinion, does not serve any purpose given that it is not requested in other import contexts. Colombia, for its part, does not deny that this requirement entails a cost, but considers it to be linked to a customs formality which is in itself not contrary to Article XI:1 of the GATT 1994.

7.309. The Panel does not find in the record sufficient explanation by Panama as to why and to what extent this requirement contributes to the limiting effect of the special import regime. Panama merely asserts that this requirement implies a cost, a fact that Colombia does not deny, but does not provide the Panel with sufficient evidence to conclude that the cost arising from this requirement exerts any limiting effect on importation. In the Panel's opinion, Panama has failed to sufficiently demonstrate the contribution of this requirement to the alleged limiting effect of the special import regime. The Panel also recalls that the existence of general requirements for the importation of goods is a routine aspect of international trade, as is the existence of special requirements for certain products, for purposes of risk analysis. Even if such requirements constitute additional burdens for the importer, they are part of day-to-day foreign trade operations. Therefore, the Panel does not

[509] Panama's first written submission as complainant, paras. 57-61; and first written submission as respondent, para. 60.

[510] Panama's comments on Colombia's response to Panel question No. 35 (referring to Article 218 of Decree No. 390/2016 (Exhibit PAN-4)).

[511] Panama's comments on Colombia's response to Panel question No. 35.

[512] Colombia's first written submission as respondent, paras. 85-86 and 92; second written submission as complainant, paras. 71-72; and second written submission as respondent, para. 59.

[513] Colombia's response to Panel question No. 35(a), paras. 189-191. Colombia indicates that cases have been reported where the companies entered on the import declaration as importer are fictitious or non-existent, or importers are named which are not involved in the import process.

[514] Colombia's response to Panel questions Nos. 35(d) and 35(e), paras. 194-195.

consider it necessary to pursue its analysis by examining the parties' disagreement as to whether or not this requirement fulfils the function of guaranteeing due process in the customs inspection or examination of goods imported under the thresholds, as Colombia explains.

7.310. It should be made clear in this respect that the Panel makes no finding in relation to this requirement, but confines itself to analysing it in the context of a broader examination of the special import regime, as challenged by Panama, and its consistency with Article XI:1 of the GATT 1994. The Panel will now move on the next element of the special import regime.

7.3.5.2.3 Authorized entry controls

7.311. As described in section 2.3.3.3.2 above, one of the elements of the special import regime challenged by Panama consists in the possibility of Colombia putting in place customs controls on the entry of goods imported at prices below the thresholds in Article 3 of Decree No. 2218/2017, which could lead to establishing measures restricting entry, whenever they are duly justified on the basis of the risk management system. This requirement is set forth in Article 5 of Decree No. 2218/2017.

7.312. Panama maintains that the possibility of establishing "measures restricting entry" constitutes a "monitoring" requirement which creates uncertainty regarding the conditions of entry of goods and which, when assessed together with the rest of the requirements in the special import regime, discourages importation of the products covered by Decree No. 2218/2017 at prices equal to or lower than the thresholds established in that Decree.[515]

7.313. Colombia indicates that the customs controls to which Article 5 of Decree No. 2218/2017 refers include a set of measures designed to combat money laundering, the financing of terrorism, unfair competition and smuggling which are implemented at different stages of the customs control process.[516] According to Colombia, the "measures restricting entry" referred to in Article 5 of Decree No. 2218/2017 come within the DIAN's authority to carry out all actions it considers necessary on the basis of its risk management criteria, be they controls, authorizations, physical inspections and documentary examinations for goods that are entering via specified places, laboratory analysis, scans, police operations, etc.[517]

7.314. The Panel observes that Panama founds its arguments in respect of this requirement on the alleged uncertainty that is created for importers by the possibility of Colombia deploying "measures restricting entry" of goods with declared f.o.b. prices below the thresholds. However, Panama fails to explain why and to what extent this possibility contributes to the limiting effect of the special import regime. The Panel considers that the mere possibility that a measure restricting entry may be adopted, *in abstracto*, without further explanation or substantiation, does not constitute a sufficiently solid basis to conclude that the requirement creates such uncertainty as to contribute, together with the rest of the challenged requirements in the special import regime, to limiting imports. Therefore, in the Panel's opinion, Panama has failed to sufficiently demonstrate the contribution of this requirement to the alleged limiting effect of the special import regime.

7.315. As with the previous requirements, the Panel makes no finding in relation to this requirement, but confines itself to analysing it in the context of a broader examination of the special

[515] Panama's response to Panel question No. 50, and comments on Colombia's response to Panel question No. 36. Specifically, Panama ascribes the uncertainty and lack of predictability to two factors: "the conditions of geographical access to the Colombian market, and the transport costs associated with such access".

[516] Colombia's response to Panel question No. 37(a), para. 200. By way of example, Colombia mentions possible applicable measures such as prior checks (physical or non-intrusive recognition of the goods and means of transport entering Colombian customs territory in order to detect goods that are undeclared or whose importation is prohibited); checks during the customs clearance process (physical or documentary inspection in order to verify the data contained in customs declarations, the existence and legal requirements of supporting documents, the nature of the goods, their description, state, quantity, weight, verification of origin, tariff classification and collection of samples, among others); and subsequent checks or inspection (verifications, studies, investigations seeking to establish customs compliance on the part of foreign trade operators, declarants, the accuracy of the data recorded in customs declarations submitted by a declarant during a specified period of time) (Ibid. para. 204).

[517] Colombia's response to Panel question No. 37(b), para. 206.

import regime, as challenged by Panama, and its consistency with Article XI:1 of the GATT 1994. The Panel will now move on the next element of the special import regime.

7.3.5.2.4 Import operations observers

7.316. As described in section 2.3.3.3.1 above, one of the elements of the special import regime challenged by Panama consists in the presence of observers from local industry in the process of inspection or examination of goods imported below the price thresholds in Article 3 of Decree No. 2218/2017. The role of these observers is to analyse the information provided to them by the DIAN[518], generate alerts to the customs authority, and observe the implementation of the inspection or examination process. This requirement is set forth in Article 6 of Decree No. 2218/2017.

7.317. For Panama, the import operations observer has access to commercially sensitive information contained in the import declaration and its supporting documents, without any measures being applied to ensure confidentiality. Also, Panama points out that Colombia has failed to demonstrate that the local observers are present in import operations for clothing, textiles and footwear above the price thresholds in Article 3 of Decree No. 2218/2017.[519]

7.318. Colombia indicates that observers are also present for import operations above the thresholds and imports of other products apart from those covered by Decree No. 2218/2017.[520] Colombia explains that it is the trade associations which request the presence of observers, and that the DIAN is the body responsible for authorizing such presence on the basis of a list put forward by the trade associations to the Joint National Commission on Tax and Customs Management.[521] According to Colombia, the recommendations of these observers are not binding on customs officials and the information on import operations that is provided to the observers is not subject to any confidentiality protection mechanism given that in Colombia "the information in customs declarations is not subject to the duty of reserve".[522]

7.319. The Panel understands that the role of the import observers is not exclusive to the special import regime instituted by Decree No. 2218/2017, but has existed since before that in the general import regime in force.[523] Indeed, the role of import observers is mentioned in various provisions of Colombian customs legislation without restricting their presence to the imports covered by Decree No. 2218/2017. For example, Article 4 of Resolution No. 2199/2005 states the following:

> *Authorization*: The Subdirectorate for External Trade shall, by means of a reasoned resolution, authorize Import Operations Observers, indicating the type of goods on which they will work, the customs jurisdictions in which they will operate and the period of validity of the authorization, on the basis of the lists of eligible officials approved by the Joint National Commission on Tax and Customs Management.
>
> Import Operations Observers may start performing duties within the scope of their competence, subject merely to presentation of the authorizing resolution duly accrediting them and prior coordination with the respective Customs or Tax and Customs Administrator.
>
> The Observers' authorization may be cancelled before the term of its period of validity, at the request of the trade association, the Joint National Commission on Tax and

[518] The information that the DIAN provides to the observers:
[S]hall consist of the entries in the Import Declarations submitted by importers of products under tariff headings 61, 62 and 64 of the Customs Tariff, comprising the Form number, Tax identification number of the importer, Surnames and name or business name of the importer, Tax identification number of the declarant, Business name of the authorized declarant, Type of declaration, Name of the exporter or foreign supplier, Code of country of provenance, Exchange rate, Tariff subheading, Code of country of origin, Agreement code, Gross weight in kilograms, Net weight in kilograms, Physical unit code, Quantity, F.o.b. value in US$, Customs value, Self-assessment and description of the goods, Declaration acceptance number and Date.
(Article 1 of Resolution No. 000017/2017 (Exhibit COL-46)
[519] Panama's comments on Colombia's response to Panel question No. 38.
[520] Colombia's response to Panel questions Nos. 38(b) and 38(c), paras. 210-211.
[521] Colombia's response to Panel questions Nos. 35(d), para. 212 and 38(e), para. 214.
[522] Colombia's response to Panel questions Nos. 38(a), para. 209 and 38(f), para. 215.
[523] Decree No. 2685/1999 (Exhibit PAN-3), Article 74-1 (article added by Decree No. 2373/2004).

> Customs Management or the Director-General of the National Customs and Excise Directorate, and the cancellation shall be notified to the Observer and to the trade association which nominated him/her.[524]

7.320. Article 183 of Decree No. 390/2016, for its part, provides as follows:

> *Import and/or export observers*. The National Customs and Excise Directorate may allow the presence of observers during the course of the import and/or export examination process, at specific authorized points of entry and/or exit, as well as in such cases as may be determined by the National Customs and Excise Directorate.
>
> The observers shall be selected from lists of candidates put forward by the trade associations, approved by the Joint National Commission on Tax and Customs Management (or whichever service is acting on its behalf).
>
> The observer's duties shall be confined to closely observing the implementation of the process of examination of a specified type of goods. The customs authority must safeguard the legal confidentiality of information, taking into account the terms of Article 497 of this Decree, and observers shall be given such access to information as may be determined by the National Customs and Excise Directorate.
>
> The observer shall provide collaboration and cooperation required by the customs authority, including the technical report where appropriate, on the tariff classification, description, identification, quantity, weight and price of the goods, among other aspects.
>
> The National Customs and Excise Directorate shall regulate the requirements governing participation in this process.[525]

7.321. The Panel considers this point to be relevant, in that Panama, in arguing its claim as to the restrictive nature of the special import regime, draws numerous comparisons with the general customs regime. In this connection, from the evidence submitted, the role of import observers is also framed within the general regime.

7.322. In any event, even if the presence of the import observer were confined to the imports covered by Decree No. 2218/2017, Panama has failed to explain how such presence during the process of inspection or examination of the goods and the fact that the observers have access to certain information relating to import operations within their area of operation might prompt the Panel to find the special import regime to have a limiting effect. Therefore, in the Panel's opinion, Panama has failed to sufficiently demonstrate the contribution of this requirement to the alleged limiting effect of the special import regime.

7.323. As with the previous requirements, the Panel makes no finding in relation to this requirement, but confines itself to analysing it in the context of a broader examination of the special import regime, as challenged by Panama, and its consistency with Article XI:1 of the GATT 1994. The Panel will now move on the next element of the special import regime.

7.3.5.2.5 Incorporation of information on certain import operations in the risk management system

7.324. As described in section 2.3.3.3 above, one of the elements of the special import regime challenged by Panama consists in the incorporation in the risk management system of import operations for goods under the headings listed in Article 3 of Decree No. 2218/2017 at prices lower than or equal to the threshold in that article. This requirement is set forth in Article 8 of Decree No. 2218/2017.

7.325. Panama points out that the act of importing certain products at competitive prices stigmatizes the importers of those products since their risk profile and rating are affected even

[524] Resolution No. 2199/2005 (Exhibit PAN-63).
[525] Decree No. 390/2016 (Exhibit PAN-4).

though the imports in question are not being underinvoiced or serving as a means of money laundering.[526]

7.326. Colombia explains that the information incorporated in the risk management system is based on the information contained in the import declarations and alerts.[527] According to Colombia, the consequences of being part of the system relate to the foreign trade operators' risk profiles and ratings.[528]

7.327. The Panel does not find in the record any explanation by Panama as to why the incorporation of information on certain import operations in the risk management system contributes to the limiting effect of the special import regime. Nor does it find evidence allowing it to reach any conclusion in that regard or indicating what effects on the risk profile and rating are associated with incorporation in the risk management system. Panama does not adduce arguments or evidence of the alleged "stigma" attached to importers of goods at declared f.o.b. prices below the thresholds, nor of the limiting effects of this stigma on importation. Moreover, it is usual for customs administrations of the Members to feed their databases with information on import operations, for the purposes of risk analysis. Therefore, in the Panel's opinion, Panama has failed to sufficiently demonstrate the contribution of this requirement to the alleged limiting effect of the special import regime.

7.328. As with the previous requirements, the Panel makes no finding in relation to this requirement, but confines itself to analysing it in the context of a broader examination of the special import regime, as challenged by Panama, and its consistency with Article XI:1 of the GATT 1994. The Panel will now move on the next element of the special import regime.

7.3.5.2.6 Specific bond

7.329. A final element identified by Panama as being an integral part of the special import regime is the specific bond provided for in Article 7 of Decree No. 2218/2017. Unlike the other elements of the special import regime, Panama has challenged the specific bond separately. The Panel recalls that, after examining the latter claim in detail in section 7.3.4 above, the Panel found that Panama had failed to make a *prima facie* case that the specific bond provided for in Article 7 of Decree No. 2218/2017 is inconsistent with Article XI:1 of the GATT 1994. Therefore, as it has not been demonstrated that the requirement to post a specific bond has limiting effects on imports, the Panel does not consider it necessary to examine this requirement anew with a view to determining whether it contributes to the alleged limiting effects of the special import regime.

7.3.5.2.7 Consequences of non-compliance with certain requirements provided for in Decree No. 2218/2017

7.330. As previously mentioned, the special import regime contains provisions on reshipment (Article 9 of Decree No. 2218/2017) and seizure and confiscation (Article 10 of Decree No. 2218/2017) of the imported goods. These provisions govern the consequences of failure to comply with certain requirements provided for in Decree No. 2218/2017.[529] More specifically, Article 9 stipulates that non-compliance with the requirements of Article 4 of Decree No. 2218/2017 results in prohibition of reshipment of the imported goods. Similarly, Article 10 provides that non-compliance with one or other of the requirements of Decree No. 2218/2017 results in seizure of the goods, which may not under any circumstances be legalized or retrieved.

7.331. Panama claims that the consequences of failing to comply with certain requirements, such as not allowing reshipment of the goods, are disproportionate. Panama further emphasizes that mere failure to comply with one or more of the requirements of Decree No. 2218/2017 does not turn the import transactions in question into illicit transactions and that, even so, they are subjected to measures such as prohibition of reshipment of the goods.

7.332. Colombia, for its part, explains that the prohibition of reshipment only applies to imports below the price thresholds in Article 3 of Decree No. 2218/2017 which have failed to meet any of

[526] Panama's comments on Colombia's response to Panel question No. 39.
[527] Colombia's response to Panel question No. 39(a), para. 216.
[528] Colombia's response to Panel question No. 39(b), para. 218.
[529] Decree No. 2218/2017 (Exhibit PAN-43).

the requirements set forth in that Decree. According to Colombia, this requirement responds to some high-risk importers' practice of asking for extensions of storage periods and making requests for reshipment so that, once approved, the goods enter Colombia through other ports. Colombia considers that the prohibition of reshipment does not limit the quantities or volumes of imported goods, but constitutes a sanction provided for in Colombian customs law to deal with fraudulent practices.[530]

7.333. The Panel notes that the wording of Articles 9 and 10 of Decree No. 2218/2017 appears to leave little room for doubt as to the consequences of non-compliance with certain requirements: (a) no reshipment of goods with declared f.o.b. prices below the thresholds which do not meet the documentary and certification requirements provided for in Article 4 of the Decree (Article 9); and (b) goods with declared f.o.b. prices below the thresholds which do not meet the requirements provided for in Decree No. 2218/2017 will be seized (without any possibility of subsequent legalization or retrieval).

7.334. The parties appear to differ on whether it is possible to amend or correct non-compliance.[531] It can be inferred from Colombia's responses that, in the event of non-compliance with the documentary and certification requirements: (a) corrections may be made to the documentation submitted to the customs authorities pursuant to Decrees No. 2685/1999 and No. 390/2016[532]; and (b) there can be no rectification of errors pertaining to documentation not submitted or submitted outside the deadline; this results in the non-admissibility or non-authorization of release, and the goods consequently remain in a state of legal abandonment.[533]

7.335. In cases of legal abandonment of goods, the Panel notes that the general regime established in Decrees No. 2685/1999 and No. 390/2016 provides for the possibility of retrieving them by submitting a declaration of legalization.[534] If the deadline for retrieval passes without a declaration of legalization having been submitted, the DIAN may dispose of the goods, which become government property.[535]

7.336. Analysing Colombia's customs legislation submitted by the parties and, in particular, Decrees No. 2685/1999 and No. 390/2016, the Panel notes that Colombia has regulated other situations, beyond those provided for in Decree No. 2218/2017, in which imported goods are not reshipped or retrieved.[536]

7.337. Panama's principal claim refers to the lack of proportionality between the prescribed penalties (no reshipment, legalization or retrieval of seized goods) and the infringements that give rise to those penalties, which, according to Panama, may be very minor and easy to deal with, for example, a missing document relating to the import transaction or late presentation thereof.

7.338. Leaving aside the fact that, contrary to what Panama has claimed, small errors can be corrected, in the Panel's opinion the severity of punishments for failure to comply with domestic law is a prerogative of governments, and all importers have to know that they may face possible sanctions if they fail to comply with particular customs obligations. The sanctions laid down in the legislation of the WTO Members are not identical. In fact, in some countries customs fraud is punishable by imprisonment; while in others, the punishment may take the form of monetary penalties or other mechanisms. Thus, it is not the Panel's place to dictate to Colombia what type of punishment should be included in its legislation.

[530] See para. 2.45 above.

[531] In its response to Panel question No. 33 and its additional written submission relating to Decree No. 2218/2017, Colombia asserts that documentation may indeed be corrected or supplemented ("certain kind of minor errors in the import documents") pursuant to Article 234 of Decree No. 2685/1999 (Exhibit PAN-3). Panama asserts that it is not possible to make corrections (Panama's first written submission as complainant, paras. 62-68; second written submission as complainant, paras. 150-158; and second written submission as respondent, paras. 268-269 and 337-338).

[532] Colombia's response to Panel question No. 33, para. 182.

[533] Colombia's response to Panel question No. 34, paras. 183-184.

[534] Decree No. 2685/1999 (Exhibit PAN-3), Article 115, para. 1 and Article 231.

[535] Decree No. 2685/1999 (Exhibit PAN-3), Article 115, para. 1 and Decree No. 390/2016 (Exhibit PAN-4), Article 211.

[536] Decree No. 390/2016 (Exhibit PAN-4), Articles 140 and 229.

7.339. In any event, the Panel does not find in the record sufficient factual elements to allow it to enter into an assessment of the proportionality of the penalties in relation to the events that trigger them. Nor does it find any explanation from Panama of the extent to which the existence of these penalties contributes to the limiting effect on importation of the special import regime. What is more, the Panel considers that the establishment of penalties is usually geared primarily to discouraging non-compliance with certain rules. While it undoubtedly cannot be ruled out that a very strict penalty regime might create such rigidity as to ultimately discourage imports, the Panel considers that Panama has failed to present arguments or sufficient evidence to allow it to conclude that the provisions relating to reshipment (Article 9) and seizure and confiscation (Article 10) contribute to the special import regime exerting limiting effects on imports.

7.340. Therefore, in the Panel's opinion, Panama has failed to sufficiently demonstrate the contribution of these penalties to the alleged limiting effect of the special import regime.

7.341. As in the previous cases, the Panel makes no finding in relation to the consequences of non-compliance, but confines itself to analysing it in the context of a broader examination of the special import regime, as challenged by Panama, and its consistency with Article XI:1 of the GATT 1994. The Panel will now move on the next element of the special import regime.

7.3.5.2.8 Collective assessment of the elements of the special import regime challenged by Panama

7.342. In the previous sections, the Panel has analysed separately each of the different elements of the special import regime challenged by Panama: the documentary and certification requirements; the presence of the importer, its legal representative or the importing company's agent during the customs inspection or examination of the goods; entry controls; the presence of observers from local industry during the process of inspection or examination of the goods; the incorporation of information on certain import transactions in the risk management system; the specific bond; and, in addition, the sanctions relating to reshipment and seizure and confiscation.

7.343. The Panel recalls that if an import formality or requirement does not itself limit the importation of products independently of the limiting effects of another restriction, then that import formality or requirement cannot be said to produce the limiting effect and, thus, it will not amount to a "restriction" captured by the prohibition in Article XI:1.[537]

7.344. In all cases, the Panel has taken the view that Panama has failed to sufficiently demonstrate how these elements contributed to the alleged limiting effect on imports of the special import regime. When it comes to examining the elements collectively, the Panel again considers that Panama has failed to submit sufficient arguments or evidence to explain why it considers that the interaction of all the elements of the special import regime identified results in an import regime that has limiting effects on imports.

7.3.5.3 Conclusion

7.345. Having examined the set of claims submitted by Panama to substantiate that the special import regime is inconsistent with Article XI:1 of the GATT 1994, the Panel considers that Panama has failed to present sufficient arguments and documentary evidence to allow it to reach a finding that the special import regime comprising the elements described in Articles 4 to 10 of Decree No. 2218/2017 has limiting effects on imports.

7.346. For the reasons set out above, the Panel concludes that Panama has failed to demonstrate that the special import regime provided for in Articles 4 to 10 of Decree No. 2218/2017 has limiting effects on imports in a manner inconsistent with Article XI:1 of the GATT 1994.

[537] Appellate Body Report, *Argentina – Import Measures,* para. 5.244.

7.4 Panama's claims under Article X:3(a) of the GATT 1994

7.4.1 Introduction

7.347. Panama claims that both the specific bond and the special import regime are not administered in a uniform, impartial and reasonable manner, so that these measures are inconsistent with Article X:3(a) of the GATT 1994.[538] Colombia replies that Panama has failed to demonstrate that Colombia administers a legal instrument described in Article X:1 of the GATT 1994 in a non-uniform, partial or unreasonable manner.[539]

7.348. The Panel will begin by examining the relevant legal provision and the applicable legal standard. It will go on to clarify the scope of Panama's claims under this provision. It will then analyse Panama's claims with respect to the specific bond, beginning with a summary of the arguments of the parties and continuing with a legal analysis of each of the aspects challenged by Panama. Finally, it will examine Panama's claims with respect to the special import regime, likewise beginning with a summary of the arguments of the parties and continuing with an analysis of each of the aspects challenged by Panama.

7.4.2 The text of Article X:3(a) of the GATT 1994

7.349. Article X:3(a) of the GATT 1994 provides in relevant part:

> Publication and Administration of Trade Regulations
>
> 3.(a) Each contracting party shall administer in a uniform, impartial and reasonable manner all its laws, regulations, decisions and rulings of the kind described in paragraph 1 of this Article.

7.350. This provision obliges Members to administer in a uniform, impartial and reasonable manner a series of legal instruments as defined in Article X:1 of the GATT 1994. This obligation relates to "certain minimum standards for transparency and procedural fairness in the administration of trade regulations...".[540] Hence, allegations of violation of this provision are serious and "should not be brought lightly, or in a subsidiary fashion".[541]

7.4.3 The legal standard provided for in Article X:3(a) of the GATT 1994

7.351. In the Panel's opinion, in order to substantiate a claim of inconsistency with Article X:3(a) of the GATT 1994, the complaining party must demonstrate the following three elements: (a) existence of a legal instrument of the kind described in Article X:1 of the GATT 1994; (b) that the legal instrument in question is being administered by the respondent; and (c) that the administration of that legal instrument by the respondent is not uniform, impartial or reasonable. In fact, as is explained in paragraph 7.359 below, it would be sufficient to prove that the legal instrument is not administered in any of the three manners (uniformly, impartially or reasonably) to reach a conclusion of inconsistency with this provision. The Panel reviews below each of the three elements mentioned.

7.4.3.1 The question of whether the legal instrument identified by the complainant is of the kind described in Article X:1 of the GATT 1994

7.352. The first step in the Panel's analysis centres on establishing whether the complainant has identified a law, regulation, judicial decision or administrative ruling of the kind referred to in Article X:1 of the GATT 1994. This provision refers to "[l]aws, regulations, judicial decisions and administrative rulings of general application, made effective by any [Member], pertaining to the classification or the valuation of products for customs purposes, or to rates of duty, taxes or other charges, or to requirements, restrictions or prohibitions on imports or exports or on the transfer of payments therefor, or affecting their sale, distribution, transportation, insurance, warehousing

[538] Panama's request for the establishment of a Panel, WT/DS461/22.
[539] Colombia's second written submission as complainant, para. 89; and second written submission as respondent, para. 82.
[540] Appellate Body Report, *US – Shrimp*, para. 183.
[541] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 217.

inspection, exhibition, processing, mixing or other use", and to "[a]greements affecting international trade policy which are in force between the government or a governmental agency of [a Member] and the government or governmental agency of [another Member]".

7.353. The phrase "laws, regulations, judicial decisions and administrative rulings" reflects an intention on the part of the drafters to include a wide range of measures that have the potential to affect trade and traders. The instruments covered by Article X:1 of the GATT 1994 range from imperative rules of conduct to the exercise of influence or an authoritative pronouncement by certain authoritative bodies, and the coverage of Article X:1 of the GATT 1994 therefore extends to instruments with a degree of authoritativeness issued by certain legislative, administrative or judicial bodies.[542]

7.4.3.2 The question of whether the legal instrument identified by the complainant is being "administered" by the respondent

7.354. If the examination under the first step reveals that the legal instrument identified by the complainant is of the kind described in Article X:1 of the GATT 1994, the Panel would be called upon to consider whether the complainant has demonstrated that the legal instrument in question is being "administered" by the respondent.

7.355. It is important to emphasize that the obligation in Article X:3(a) of the GATT 1994 refers to the "*administration*"[543] of the rules identified by the complainant, rather than to their substantive content.[544] Therefore, the requirements of uniformity, impartiality and reasonableness do not relate to the laws, regulations, judicial decisions and administrative rulings themselves, but rather to the administration of those laws, regulations, decisions and rulings.[545]

7.356. Although normally the administration of a legal instrument is revealed by the way in which it is put into practice by the relevant authorities, there are occasions where the legal instrument concerned is administered by means of another legal instrument. In that case it is necessary to distinguish between the legal instrument being administered and the legal instrument that regulates the application or implementation of that instrument. While the substantive content of the legal instrument being administered is not challengeable under Article X:3(a), it is possible to challenge the legal instrument that regulates the application or implementation of the legal instrument being administered, if it is alleged that the legal instrument regulating such application or implementation leads to a lack of uniform, impartial or reasonable administration of the legal instrument being administered.[546]

7.357. Accordingly, it is possible to challenge a legal instrument *as such* under Article X:3(a) of the GATT 1994, when the substantive content of that legal instrument regulates the application or implementation of rules covered by Article X:1 of the GATT 1994. In order to prove that the legal instrument identified is inconsistent *as such* with Article X:3(a) of the GATT 1994, the complainant must demonstrate that the provisions of that legal instrument *necessarily lead* to a lack of uniform, impartial, or reasonable administration. For that purpose, it would not be sufficient for the complainant to merely to cite the provisions of the legal instrument identified; rather, it must discharge the burden of substantiating how and why those provisions necessarily lead to impermissible administration of the legal instrument of the kind described in Article X:1 of the GATT 1994.[547]

7.358. The administrative processes that govern the application of legal instruments of the kind described in Article X:1 of the GATT 1994 may constitute relevant evidence for establishing whether a legal instrument is administered in a manner consistent with Article X:3(a) of the GATT 1994.[548] Likewise, Article X:3(a) may cover violation claims based on an administrative process. In such

[542] Panel Reports, *EC – IT Products*, paras. 7.1026-7.1027.

[543] The Panel observes that, whereas the Spanish text of Article X:3(a) of the GATT 1994 uses the term "aplicará", the term "shall administer" is used in the English text and the term "appliquera" is used in the French text.

[544] Appellate Body Report, *EC – Poultry*, para. 115. See also Appellate Body Report, *EC – Selected Customs Matters*, para. 219.

[545] Appellate Body Reports, *EC – Bananas III*, para. 200 and *EC – Selected Customs Matters*, para. 219.

[546] Appellate Body Report, *EC – Selected Customs Matters*, paras. *200-201.*

[547] Idem.

[548] Appellate Body Report, *EC – Selected Customs Matters*, para. 225.

cases, and similarly to when a legal instrument is challenged *as such*, it is not sufficient that the complainant merely recites the features of the administrative process. The complainant will also have to show how and why those features *necessarily lead* to impermissible administration of the legal instrument of the kind described in Article X:1 of the GATT 1994.[549]

7.4.3.3 The question of whether the legal instrument identified by the complainant is not being administered in a uniform, impartial or reasonable manner by the respondent

7.359. If the second stage review reveals that the complainant has shown that the legal instrument in question is being "administered" by the respondent, the Panel would be called upon to examine whether the complainant has shown that the administration by the respondent of the legal instrument identified by the complainant is not uniform, impartial or reasonable. The Panel agrees with previous panels that the requirements of uniformity, impartiality and reasonableness are legally independent and that the administration of the relevant rules must satisfy each and every one of these criteria.[550] This means that it would be sufficient that the complainant demonstrate that the administration of the legal instrument is not uniform or impartial or reasonable, in order for the Panel to be required to find that the instrument is inconsistent with Article X:3(a) of the GATT 1994.

7.360. With regard to the requirement of *uniform administration*, the Panel observes that the term "uniform" is defined as "of one unchanging form, character, or kind; that is or stays the same in different places or circumstances, or at different times".[551] The Panel agrees with previous panels that this requirement of uniform administration relates to "uniformity of treatment in respect of persons similarly situated"[552] and to the fact that "their laws are applied consistently and predictably".[553]

7.361. With regard to the requirement of *impartial administration*, the term "impartial" is defined as "not favouring one party or side more than another; unprejudiced, unbiased; fair".[554] The Panel agrees with previous panels in considering that this requirement of impartial administration relates to an "application or implementation of the relevant laws and regulations in a fair, unbiased and unprejudiced manner".[555, 556]

7.362. Lastly, with respect to the requirement of *reasonable administration*, the Panel observes that the term "reasonable" is defined as "in accordance with reason", "not irrational or absurd", "proportionate", "sensible", "not asking for too much", "within the limits of reason, not greatly less or more than might be thought likely or appropriate" and "articulate".[557] The Panel agrees with previous panels in considering that this requirement of reasonable administration relates to "administration that is equitable, appropriate for the circumstances and based on rationality".[558] The analysis of a claim of violation of the requirement of reasonableness entails a consideration of the factual circumstances specific to each case, for which purpose it is necessary to examine the features of the administrative act at issue, in the light of its objective, cause or the rationale behind it.[559]

7.4.4 Preliminary issue

7.363. Before beginning the analysis of Panama's claims under Article X:3(a) of the GATT 1994 with respect to the specific bond and the special import regime, the Panel needs to clarify the scope of

[549] Ibid. para. 226.
[550] Panel Report, *Argentina – Hides and Leather*, para. 11.86.
[551] Panel Report, *US – COOL*, para. 7.876 (referring to *The Shorter Oxford English Dictionary* (Sixth Edition), Oxford University Press, Vol. II, p. 3440 (2007)).
[552] Panel Rreport, *US – Stainless Steel (Korea)*, 6.51.
[553] Panel Report, *Argentina – Hides and Leather*, para. 11.83. See also Panel report, *US – COOL*, para. 7.876.
[554] Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.899 (referring to *The New Shorter Oxford Dictionary* (Fifth Edition), Oxford University Press, Vol. I, page 1325 (2002)).
[555] Panel Report, *Thailand – Cigarettes (Philippines),* para. 7.899.
[556] Panel Report, *China – Raw Materials,* para. 7.694. (The Appellate Body declared the Panel's analysis moot and of no legal effect on procedural grounds.)
[557] Panel Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 7.385 (referring to *The New Shorter Oxford English Dictionary* (Fifth Edition), Oxford University Press, Vol. II, page 2496 (2002)).
[558] Panel Reports, *China – Raw Materials*, para. 7.696. (The Appellate Body declared the Panel's analysis moot and of no legal effect on procedural grounds.)
[559] Panel Report, *US – COOL*, para. 7.851.

those claims. Colombia requests the Panel to reject Panama's claims under this provision because the measure which, according to Panama, is being administered does not fall within the Panel's terms of reference, as it is not mentioned in any of the panel requests and is not a measure taken to comply with the recommendations and rulings of the DSB stemming from the original proceedings.[560]

7.364. The Panel will begin by examining Panama's Panel request, in which it puts forward its claims under Article X:3(a) of the GATT 1994 in the following manner:

> (iii) Insofar as the security for release of the goods is not applied in a uniform, impartial and reasonable manner, this measure is inconsistent with Article X:3(a) of the GATT 1994.
>
> ...
>
> (iii) Insofar as the customs and tariff regime applicable to goods whose prices are less than or equal to the thresholds established by Colombia is not applied in a uniform, impartial and reasonable manner, this measure is inconsistent with Article X:3(a) of the GATT 1994.

7.365. Panama is therefore apparently challenging the consistency of the specific bond and the special import regime with Article X:3(a), because they are allegedly not administered in a uniform, impartial and reasonable manner.

7.366. In its written submissions, Panama has defined its claims differently: Panama asserts that Colombia's general customs legislation is contained in Decrees No. 2685/1999 and No. 390/2016, and that Decree No. 390/2016 is administered by means of Decrees No. 1745/2016 and No. 2218/2017 in a manner that is not uniform, not impartial and not reasonable.[561] Together with this new configuration of its claims, Panama still includes arguments in which the challenged administration is that of the specific bond and the special import regime.

7.367. In the Panel's opinion, the change of language used by Panama when arguing that the administration of Decree No. 390/2016 by Decrees No. 1745/2016 and No. 2218/2017 is inconsistent with Article X:3(a) transforms the nature of the claim, since it no longer appears to be speaking of the administration as such of the specific bond and the special import regime in accordance with the language of the panel request.

7.368. The Panel recalls that there is a close link between the terms of reference of a panel and the request for its establishment submitted by the complaining party. Article 6.2 of the DSU provides, in relevant part, that panel requests shall "identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly".[562] Taken together, the specific measures at issue and the claims constitute the "matter referred to the DSB", which is the basis for the terms of reference of panels under Article 7.1 of the DSU.[563] Fulfilment of these requirements "is not a mere formality"[564], so that errors in the panel request cannot be "cured"

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[560] Colombia's additional written submission, paras. 30-31 and 94; opening statement as complainant at the meeting of the Panel, paras. 17-18; and opening statement as respondent at the meeting of the Panel, para. 45.

[561] Panama's first written submission as respondent, paras. 76-78; second written submission as complainant, paras. 271-273; second written submission as respondent, para. 301; and response to Panel question No. 63.

[562] The legal basis governing the panel request is Article 6.2 of the DSU. As outlined by the Appellate Body in *China – Raw Materials*, Article 6.2 serves a "pivotal function" in WTO dispute settlement and sets out "two key requirements" that a complainant must satisfy in its panel request, namely: (a) the identification of the specific measures at issue; and (b) the provision of a brief summary of the legal basis of the complaint, i.e. the claims, sufficient to present the problem clearly. (Appellate Body Reports, *China – Raw Materials*, para. 219.) In particular, the Appellate Body holds that the "matter" referred to the Panel consists of two elements: (a) the specific measures at issue; (b) the legal basis of the complaint (or the claims). (Appellate Body Report, *Guatemala – Cement I*, para. 72.)

[563] Appellate Body Reports, *Guatemala – Cement I*, para. 72; *US – Carbon Steel*, para. 125; and *US – Continued Zeroing*, para. 160.

[564] Appellate Body Reports, *China – Raw Materials*, paras. 219-220 and 233 (referring to Appellate Body Reports, *Brazil – Desiccated Coconut*, p. 25; *US – Carbon Steel*, paras. 125-126; *Australia – Apples*, para. 416;

subsequently and, therefore, the measures not identified and claims not included or included deficiently in the panel request cannot be the subject of consideration by the Panel.[565]

7.369. In this case, the Panel concludes that Panama's claim that Decree No. 390/2016 is applied in a manner inconsistent with Article X:3(a) of the GATT 1994 through Decree No. 2218/2017 does not fall within the Panel's terms of reference. Therefore, the Panel will limit its analysis to the claims made by Panama under Article X:3(a) of the GATT 1994, as defined in its panel request.

7.370. The Panel now turns to consider the question of whether, as Panama alleges, the administration of the specific bond is inconsistent with Article X:3(a) of the GATT 1994.

7.4.5 The question of whether the administration of the specific bond is inconsistent with Article X:3(a) of the GATT 1994

7.4.5.1 Arguments of the parties

7.4.5.1.1 Panama

7.371. Panama claims that the specific bond requirement is not administered by Colombia in a uniform, impartial and reasonable manner in accordance with Article X:3(a) of the GATT 1994.[566]

7.372. Panama asserts that Colombia's general customs legislation is contained in Decrees No. 2685/1999 and No. 390/2016, and that Decree No. 1745/2016[567] is a special rule within Colombian customs legislation, which establishes specific requirements for imports of textiles and footwear under headings 61, 62 and 64, with prices equal to or below the established thresholds. Panama indicates that it is challenging Decree No. 1745/2016 as a legal instrument that governs the administration of the specific bond requirement, but not the requirement of the bond as such.[568]

7.373. Panama argues, more specifically, that Article 8 of Decree No. 390/2016 is administered by Decrees No. 1745/2016 and No. 2218/2017. Panama contends that Decree No. 390/2016 is the Tax Statute of Colombia and is therefore a regulation of general application covered by Article X:1 of the GATT 1994. Panama states that Decree No. 390/2016 establishes the guidelines that are to govern the interaction between the customs administration and the interested parties in the import and

Guatemala – Cement I, paras. 72-73; *US – Continued Zeroing*, para. 160; *US – Zeroing (Japan) (Article 21.5 – Japan)*, para. 107; and *EC and certain member States – Large Civil Aircraft*, para. 786.)

[565] Although defects in the panel request cannot be "cured" in the parties' subsequent submissions, these submissions, and in particular the first written submission of the complainant, can be consulted to confirm the meaning of the terms used in the panel request. (Appellate Body Reports, *China – Raw Materials*, para. 220 (referring to Appellate Body Report, *EC – Fasteners (China)*, para. 562, referring in turn to Appellate Body Reports, *EC and certain member States – Large Civil Aircraft*, para. 642; *EC – Bananas III*, para. 143; and *US – Carbon Steel*, para. 127)).

[566] Panama's first written submission as respondent, para. 76; second written submission as complainant, para. 271; second written submission as respondent, para. 335; and opening statement at the meeting of the Panel, para. 20.

[567] The Panel notes that in Panama's first written submission as complainant, its first written submission as respondent, and its second written submission as complainant, Panama refers to Decree No. 1745/2016. After submitting Decree No. 2218/2017 as Exhibit PAN-43, Panama begins referring to that Decree. In this connection, Panama explained in paragraph 11 of its second written submission as respondent that "[f]or the sake of simplicity, Panama refers in a general manner in this rebuttal to the "specific bond" or the "special import regime", on the understanding that these are the same measures as are contained in Decrees No. 1745 and No. 2218. Any reference it may make to a measure of the specific decree (i.e. the specific bond of Decree No. 2218) is normally made to highlight specific aspects stemming from that decree." This summary of arguments uses the form in which Panama set forth its arguments, so that reference is at times made solely to Decree No. 1745/2016, these being arguments presented prior to the submission of Decree No. 2218/2017. However, the foregoing is without prejudice to the fact that arguments expressly referring to Decree No. 1745/2016 could also be applicable to Decree No. 2118/2017. Where that is the case, the Panel will address those arguments in its analysis concerning Decree No. 2218/2017.

[568] Panama's first written submission as respondent, paras. 76-78; and second written submission as complainant, paras. 271-273.

export of goods in Colombia, for which reason the way in which the customs administration handles this interaction is a matter of application of the Customs Statute.[569]

7.374. Panama argues that, in the context of the general provisions of the Customs Statute, Article 8 of Decree No. 390/2016 establishes the so-called guarantee mechanism as an accessory obligation to the customs obligation, to ensure payment of duties and taxes, penalties and interest deriving from the failure to comply with a customs obligation.[570] Panama points out that the same rule does not stipulate how the guarantee is to be applied, but entrusts that function to the DIAN, so that any act prescribing the type of guarantee that is to be posted is an act of administration of the Customs Statute.[571]

7.375. Panama adds that these decisions, which in normal circumstances should be the subject of discretionary application, on a case-by-case basis, by the DIAN, are now taken *a priori* by Decrees No. 1745/2016 and No. 2218/2017. Panama points out that Article 7 of both Decrees gives practical effect to Article 8 of Decree No. 390/2016, by specifying the type of guarantee that must be posted in respect of imports covered by these decrees in order to ensure payment of any duties and taxes, penalties and interest that may apply, as a consequence of non-compliance with the obligations and responsibilities set out in Colombia's Customs Statute.[572]

7.376. Panama argues that, in any case, if the Panel were to consider that Decrees No. 1745/2016 and No. 2218/2017 are not of the nature of acts administering Article 8 of Decree No. 390/2016, this would mean that Decrees No. 1745/2016 and No. 2218/2017 would impose a substantive requirement (i.e. posting of a specific bond for relevant imports) and, at the same time, the specific parameters for its administration (i.e. the requirement that the specific bond be provided by a banking entity or insurance company; and that it be valid for three years; and the amount of coverage). Panama considers that the fact that the substantive requirement and the parameters for its administration are in the same instrument should not affect the applicability of Article X:3(a) to Decrees No. 1745/216 and No. 2218/2017. Panama adds that the application of Articles XI:1 and X:3(a) of the GATT 1994 is not mutually exclusive.[573]

7.377. Panama contends that there are two levels of administration of Article 8 of Decree No. 390/2016: a first level of administration, which concerns the determination and regulation of the kind of guarantee that must be posted, i.e., the specific bond; and a second level of administration which concerns the administrative processes and specific procedures for obtaining the specific bond, which is delegated to third parties (banks or insurance companies).[574]

7.378. With regard to the *first level of administration,* Panama alleges first of all, that the specific bond requirement is not administered in a uniform manner, since it applies solely to textiles and footwear of headings 61, 62 and 64 with prices equal to or lower than the thresholds established in Article 3 of Decree No. 1745/2016, and not to imports of other products in a similar situation, such as spirits and cigarettes. Panama considers that, in order to administer the specific bond requirement uniformly, the importation of all products in a similar situation, namely those that can be used by criminal organizations that engage in customs fraud, should be made subject to the same requirement. Panama argues that it would appear that the only reason why Colombia does not apply the specific bond requirement to imports of these other products is because the measure at issue was designed to address the needs of the beneficiary industrial sectors.[575]

[569] Panama's second written submission as respondent, para. 301, and response to Panel question No. 63.
[570] Panama's second written submission as respondent, para. 302, and response to Panel question No. 63.
[571] Panama's second written submission as respondent, para. 303, and response to Panel question No. 63.
[572] Panama's second written submission as respondent, paras. 304-305; and response to Panel question No. 63.
[573] Panama's second written submission as respondent, paras. 306-308; and response to Panel question No. 63.
[574] Panama's second written submission as respondent, para. 309.
[575] Panama's first written submission as respondent, paras. 80-83; second written submission as complainant, paras. 275-278; second written submission as respondent, paras. 312-313; and opening statement at the meeting of the Panel, para. 21.

7.379. Panama also alleges a lack of uniform administration, since the coverage of the specific bond does not apply uniformly. Panama maintains that when goods have a real f.o.b. price lower than the threshold, an overestimation of the product's value is obtained by multiplying the quantity by the threshold. In Panama's opinion, since the real (lower) value of the goods is ignored when calculating the bond, and the (higher) threshold price is used, an artificially high base price is obtained which must then be multiplied by 200%, so that Colombia treats in the same manner products with a different value, i.e. products in different situations. Panama does not consider that the establishment of fixed parameters for determining the coverage of the bond is consistent with an administration to guarantee principal obligations with various amounts, as occurs with the entry of imports at different prices.[576]

7.380. Panama also alleges a lack of uniform administration due to the fact that the specific bond is activated on the basis of thresholds established for individual four-digit tariff headings, despite the existence within each heading of a multiplicity of diverse products of differing nature and differing quality, for which reason Colombia applies the same treatment to products as dissimilar as men's and boys' suits, ensembles, jackets, blazers, trousers, bib and brace overalls, breeches and shorts, all of which have as their only common feature the fact of coming under heading 62.03.21.[577]

7.381. Panama claims, secondly, that the specific bond requirement is not applied impartially, owing to the use of the figure of 200% to calculate the coverage of the bond. Panama contends that the percentage is fixed irrespective of the characteristics and possible contingencies of each transaction, and that to take it for granted that the value of the customs taxes together with possible penalties will always be equivalent to 200% of the threshold price multiplied by the corresponding quantity of shipped goods is prejudicial and inequitable.[578]

7.382. Panama claims, thirdly, that the specific bond requirement is not administered in a reasonable manner, since a specific bond has to be constituted in cases where a general bond is provided. Panama asserts that legal persons recognized as Regular Customs Users (UAP) will be able to post a general bond to cover all their transactions as UAP with the DIAN, so that there is no apparent reason why it might be appropriate to the circumstances that the UAP should additionally post a specific bond.[579]

7.383. Panama also alleges a lack of reasonable administration, owing to the fact that the specific bond of Decree No. 2218/2017 covers the difference in prices and not the difference between the taxes already paid and the taxes payable on the basis of the threshold. Panama asserts that, for that reason, a much higher amount is guaranteed than is appropriate to ensure payment of the customs taxes, penalties and interest that may apply.[580]

7.384. With regard to the *second level of administration*, Panama claims, firstly, that the specific bond requirement is not administered uniformly, since Colombia delegates the processing and management of the specific bond to banking entities and insurance companies, omitting to establish general criteria for observance by these third parties of the requirements for applying for the bond, and the considerations relevant to its approval. Panama contends that, as a result, each banking entity or insurance company by itself determines the management fees, the credit requirements applicable to the importer and the relevant factors for determining whether to approve or refuse the granting of the bond.[581]

7.385. Panama claims, secondly, that the specific bond requirement is not administered reasonably, because the guarantee has to come from a bank or insurance company. Panama sees no reason why importers should have to lodge a bank or insurance guarantee instead of, for example, a cash deposit, or not be given the opportunity to choose the kind of guarantee they wish to lodge in order

[576] Panama's first written submission as respondent, para. 84; second written submission as complainant, para. 279; and second written submission as respondent, paras. 314-315.

[577] Panama's opening statement at the meeting of the Panel, para. 21.

[578] Panama's written submission as respondent, paras. 85-86; second written submission as complainant, paras. 280-281; second written submission as respondent, paras. 316-318; and opening statement at the meeting of the Panel, para. 23.

[579] Panama's first written submission as respondent, paras. 87-88; second written submission as complainant, paras. 282-283; and second written submission as respondent, paras. 319-320.

[580] Panama's second written submission as respondent, paras. 325-328.

[581] Ibid. paras. 330-331.

to provide sufficient guarantee of payment of the principal debt, as is allowed by Article 221.3.2 of Decree No. 390/216.[582]

7.4.5.1.2 Colombia

7.386. Colombia maintains that Panama has failed to demonstrate that Colombia administers a legal instrument of the kind described in Article X:1 of the GATT 1994 in a non-uniform, partial or unreasonable manner.[583, 584]

7.387. Colombia maintains that, although Panama submitted claims against Article 8 of Decree No. 390/2016, the latter does not form part of the Panel's terms of reference since it is not included in any of the panel requests. Colombia adds that the Customs Statute of Colombia, and in particular Article 8 of Decree No. 390/2016, is not a measure taken to comply with the recommendations and rulings of the DSB stemming from the original proceedings, as it was published before the Appellate Body report in the original proceedings was circulated, and is not currently in force.[585]

7.388. Colombia asserts that, as is acknowledged by Panama, when a Party challenges a legal instrument that administers another measure, the latter measure is excluded from the scope of Article X:3 (a) of the GATT 1994. Colombia argues that Panama's claim is directed against the customs guarantee of Decree No. 1745/2016, but Panama neither explains nor demonstrates that Decree No. 1745/2016 administers another legal instrument. Colombia adds that, in Panama's own description of the operation of the customs guarantee established in Decree No. 1745/2016, it does not characterize Decree No. 1745/2016 as an instrument administering requirements established in other instruments, rather, it describes Decree No. 1745/2016 as the measure establishing the requirements.[586]

7.389. Colombia adds that general and specific bonds have been provided for in customs legislation since well before the DSB decision, since Decree No. 2685/1999 already entailed a customs guarantee regime. Colombia states that each of the special guarantees provided for in Colombia legislation operates independently of the general regime. In Colombia's view, Article 8 of Decree No. 390/2016 and Decrees No. 1745/2016 and No. 2218/2017 have separate applications and the one is not dependent on the other. Colombia notes that Article 8 of Decree No. 390/2016 states that "[f]or each of the types of guarantee listed in this article the special rules in force governing each of them are to be applied", so that Article 8 allows the application of special rules such as Decree No. 1745/2016 and Decree No. 2218/2017.[587]

7.390. For these reasons, Colombia requests that the Panel find that Panama has failed to establish that Decree No. 1745/2016 falls within the scope of Article X:3(a) of the GATT 1994.[588]

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[582] Ibid. paras, 332-333.

[583] Colombia's second written submission as complainant, para. 89; and second written submission as respondent, para. 82.

[584] The Panel notes that in Colombia's first written submission as respondent and its second written submission as complainant, Colombia refers to Decree No. 1745/2016. After Panama submitted Decree No. 2218/2017 as Exhibit PAN-43, Colombia began referring to that Decree as well. This summary of arguments uses the form in which Colombia set forth its arguments, so that at times reference is made solely to Decree No. 1745/2016, these being arguments presented prior to the submission of Decree No. 2218/2017. However, the foregoing is without prejudice to the fact that the arguments expressly referring to Decree No. 1745/2016 could also be applicable to Decree No. 2118/2017. Where that is the case, the Panel will address those arguments in its analysis of Decree No. 2218/2017.

[585] Colombia's additional written submission, paras. 30-31 and 94; opening statement as complainant at the meeting of the Panel, paras. 17-18; and opening statement as respondent at the meeting of the Panel, para. 45.

[586] Colombia's second written submission as complainant, paras. 90-92; and second written submission as respondent, paras. 83-85.

[587] Colombia's additional written submission, paras. 96-97.

[588] Colombia's second written submission as complainant, para. 94; and Panama's second written submission as respondent, para. 86.

7.391. Colombia maintains that, in any event, even if Decree No. 1745/2016 fell within the scope of Article X:3(a), it would be consistent with that provision.[589]

7.392. With respect to the requirement of uniform administration, Colombia contends that in *Argentina – Hides and Leather* the Panel dismissed the complaining party's argument that it was improper for Argentina to construct a special set of procedures for administering its export laws for only one type of product (hides), and held that, as all exports of hides were uniformly subject to the same procedures, there was no non-uniform administration.[590]

7.393. Colombia maintains that the same logic applies in the context of the customs bond requirement, since the requirement applies to all apparel and footwear under certain value thresholds, and all importers of these products can expect treatment of the same kind, in the same manner, both over time and in different places and with respect to other persons.[591]

7.394. Colombia thus affirms that the comparison with other products is not appropriate because it is not required by Article X:3(a) of the GATT 1994. Colombia also contends that textiles, clothing and footwear imported at prices below the thresholds differ from other products because of the high risk of their being used to launder money through underinvoicing, for which reason they require differential treatment, and uniformity of treatment does not require identical results when the facts differ.[592]

7.395. Colombia adds that the guarantees established by Decrees Nos. 1745/2016 and 2218/2017 operate in a standardized and uniform manner since importers have available the entire bank and insurance guarantee market operating in Colombia, and the rules for obtaining such legal guarantees are clearly defined and are not the fruit of a whim or arbitrary approach on the part of the administration. Colombia also contends that the goods subject to the guarantee and the thresholds are clearly defined in the decrees.[593]

7.396. With regard to the requirement of impartial administration, Colombia asserts that Panama has not explained why it considers the measure to be partial and, more specifically, why the fact that the percentage set out in the bond requirement is fixed means that the requirement is not impartial. Colombia maintains, therefore, that Panama has not discharged its burden of substantiating how and why those provisions necessarily lead to administration that is not impartial. Colombia adds that the measure applies equally to all importers of covered apparel and footwear.[594]

7.397. Colombia also contends that the specific bond applies impartially to all importers of the covered goods, irrespective of their origin, so that it does not favour any one country or party more than another, and is unprejudiced, unbiased and fair. Colombia argues that textiles, clothing and footwear imported at prices below the thresholds differ from other imports because they are at high risk of being used for money laundering through underinvoicing, and require differential treatment. Colombia also argues that a rigorous and objective method was used to determine the thresholds, and that there is no evidence that that method was designed to favour any country in particular.[595]

7.398. With regard to the reasonable administration requirement, Colombia maintains that the criteria for determining the amount to be guaranteed, including the figure of 200%, are based on reasonableness and sufficiency, in the light of the possible risks that may arise if the customs taxes and any penalties that may apply are not collected. Colombia adds that the nature of general bonds is totally different from that of the specific bond, since where imports at artificially low prices constitute an important share of total imports, the general bond would be insufficient, and this makes it necessary to request special bonds even when the importer has a general bond. Colombia asserts that it used specific examples, in COL-22, COL-18 and COL-17, to show how general bonds might

[589] Colombia's second written submission as complainant, para. 94 and second written submission as respondent, para. 87.

[590] Colombia's second written submission as complainant, paras. 96-97; second written submission as respondent, paras. 89-90; and additional written submission, para. 101.

[591] Colombia's second written submission as complainant, para. 98; second written submission as respondent, para. 91; and additional written submission, para. 104.

[592] Colombia's additional written submission, para. 105.

[593] Colombia's additional written submission, para. 103.

[594] Colombia's second written submission as complainant, paras. 99-100 and second written submission as respondent, paras. 92-93.

[595] Colombia's additional written submission, paras. 111-112.

not be sufficient to cover the payment of the customs taxes and penalties that might apply, and that the penalties to be imposed could amount to 150% of the assessed value of the goods.[596]

7.399. Colombia points out that the specific bond meets the requirement of reasonableness, when its features are examined in the light of its objective, which is to guarantee the payment of any customs taxes and penalties that may be due, and considering the high risk that exists that the goods to be imported at ostensibly low prices are used for money laundering.[597]

7.400. With respect to Panama's claims concerning the requirements of uniform and reasonable administration as regards the *second level of administration,* Colombia maintains that Panama does not specify the uniformity criterion to which it refers; that the fact that the bond is provided by insurance or banking entities is a logical consequence of the nature of the instrument (insurance contract); and that if this type of instrument were prohibited by Article X:3(a) of the GATT 1994, Article 13 of the Customs Valuation Agreement, Article VII of the GATT 1994 and Article 7 of the Trade Facilitation Agreement would be inapplicable. Colombia adds that bonds are an instrument used by many customs administrations around the world to guarantee payment of tariffs and other taxes, and that bank guarantees and policies for the fulfilment of legal provisions are appropriate instruments for the granting of bonds *vis-à-vis* customs authorities, which are widely used by importers and traders. Colombia also alleges that the financial system operates freely and that the insurance companies and banks grant similar treatment in respect of persons similarly situated, depending on the risk.[598]

7.4.5.2 Analysis by the Panel

7.401. As indicated in paragraph 7.351. above, the Panel's task will be to determine whether, as alleged by Panama, the specific bond is not administered by Colombia in a uniform, impartial and reasonable manner in accordance with Article X:3(a) of the GATT 1994.[599]

7.402. As is explained in section 7.4.3.1 above, the Panel will begin by examining whether Panama has identified a legal instrument of the kind described in Article X:1 of the GATT 1994. If so, it will determine whether Panama has demonstrated that the legal instrument identified is being administered by Colombia. If the answer to the latter question is also affirmative, it will examine whether Panama has demonstrated that the legal instrument identified is not being administered in a uniform, impartial or reasonable manner.

7.4.5.2.1 The question of whether the legal instrument identified by Panama is of the kind described in Article X:1 of the GATT 1994

7.403. The first question that the Panel has to consider is whether the legal instrument identified by Panama is of the kind described in Article X:1 of the GATT 1994. Panama has identified two instruments: first, Decree No. 390/2016 and, alternatively, Decree No. 2218/2017 itself.

7.404. With regard to Decree No. 390/2016, Panama explains that the Decree contains the Customs Statute of Colombia and that it is therefore a regulation of general application covered by Article X:1 of the GATT 1994.[600] As was observed in section 7.4.4 above, the possible inconsistency of the administration of the general customs regime with Article X:3(a) of the GATT 1994 does not fall within the Panel's terms of reference. Irrespective of the foregoing, the Panel observes that Decree No. 390/2016 is a legal instrument "establishing the customs statute".[601] Article 1 thereof, entitled "Scope", indicates that the Decree "regulates the legal relationships established between the customs administration and parties involved in the entry, duration, transfer and exit of goods to and

[596] Colombia's second written submission as complainant, paras. 101-103; second written submission as respondent, paras. 94-95; and additional written submission, paras. 119-123.
[597] Colombia's additional written submission, para. 118.
[598] Colombia's additional written submission, paras. 124-127.
[599] Panama's first written submission as respondent, para. 76; second written submission as complainant, para. 271; second written submission as respondent, para. 335; and opening statement at the meeting of the Panel, para. 20.
[600] Panama's second written submission as respondent, para. 301, and response to Panel Question No. 63.
[601] Decree No. 390/2016 (Exhibit PAN-4).

from the [Colombian] customs territory.[602] In this respect, Decree No. 390/2016 undoubtedly falls within the scope of Article X:1.

7.405. Panama identifies another alternative instrument in case the Panel were to consider that Decree No. 2218/2017 governing the specific bond is not of the nature of an act administering Article 8 of Decree No. 390/2016. According to Panama, that instrument would be Decree No. 2218/2017 itself, which imposes at the same time a substantive requirement and the specific parameters for its administration.[603]

7.406. Decree No. 2218/2017 is a legal instrument "adopting measures for the prevention and control of customs fraud in connection with imports of fibres, yarns, fabrics, clothing and footwear".[604] Article 1 thereof, entitled "Purpose", states that the Decree "establishes mechanisms to strengthen the risk management system and customs control in the face of possible situations of customs fraud associated with imports of fibres, yarns, fabrics, clothing and footwear, irrespective of the country of origin and/or provenance".[605]

7.407. In the Panel's opinion, by establishing mechanisms to strengthen the risk management system and customs control in the face of possible situations of customs fraud associated with imports of fibres, yarns, fabrics, clothing and footwear, Decree No. 2218/2017 also falls within the "laws, regulations, judicial decisions and administrative rulings of general application [which Colombia has brought into force], pertaining to the classification or the valuation of products for customs purposes, or to rates of duty, taxes or other charges, or to requirements, restrictions or prohibitions on imports or exports or on the transfer of payments therefor, or affecting their sale, distribution, transportation, insurance, warehousing inspection, exhibition, processing, mixing or other use".

7.408. For the foregoing reasons, the Panel considers that Panama has discharged the initial burden of identifying a legal instrument of the kind described in Article X:1 of the GATT 1994.

7.4.5.2.2 The question of whether the legal instrument identified by Panama is being "administered" by Colombia

7.409. Having established that the legal instruments identified by Panama are of the kind described in Article X:1 of the GATT 1994 and, therefore, fall within the scope of Article X:3(a), the Panel will examine whether Panama has demonstrated that those instruments are being "administered" by Colombia.

7.410. As was observed in section 7.4.4 above, the possible inconsistency of the administration of the general customs regime through the specific bond with Article X:3(a) of the GATT 1994 does not fall within the terms of reference of the Panel. Irrespective of the foregoing, Panama's argument that Article 8[606] of Decree No. 390/2016, which regulates customs guarantees, is administered by

[602] Idem.
[603] Panama's second written submission as respondent, paras. 306-308, and response to Panel Question No. 63.
[604] Decree No. 221/2017 (Exhibit PAN-43).
[605] Idem.
[606] Article 8 of Decree No. 390/2016 states the following in relevant part:
Scope. The guarantee is an obligation ancillary to the customs obligation, which is used to ensure payment of duties and taxes, penalties and interest resulting from non-compliance with a customs obligation provided for in this decree.
Guarantees shall be managed through the electronic information services, under the terms and conditions laid down by the National Customs and Excise Directorate.
Guarantees may be comprehensive or specific. Comprehensive guarantees cover the obligations assumed by the declarant or foreign trade operator, in respect of various operations or customs formalities; specific guarantees support compliance with obligations in connection with one particular operation or formality.
Guarantees may take one of the following forms:
1. Monetary deposit or any other means of payment authorized by the National Customs and Excise Directorate.
2. Insurance company guarantee.
3. Bank guarantee.

Decree No. 2218/2017 is not convincing.[607] In fact, Article 8 of Decree No. 390/2016 states that "[the] guarantee is an obligation ancillary to the customs obligation, which is used to ensure payment of duties and taxes, penalties and interest resulting from non-compliance with a customs obligation provided for in this decree."[608] This article also states that guarantees may be comprehensive or specific and that they may take the form of a monetary deposit, an insurance company guarantee, a banking institution guarantee, an open promissory note with letter of instructions, a mercantile trust guarantee, an endorsement of securities as collateral, or another form of guarantee that provides sufficient security for compliance. It also stipulates that for each of the guarantees listed in that provision, "the special rules in force governing each of them shall apply" and that the DIAN "shall determine the type of guarantee that is to be constituted in accordance with the corresponding customs obligation."

7.411. Article 7 of Decree No. 2218/2017, which governs the specific bond, prescribes that "[in] the case of goods covered by the scope of application of this decree, if the valuation dispute arises in connection with the inspection or examination procedure, and it becomes necessary for that reason to delay the final determination of the customs value of the goods... the importer may secure release by posting a guarantee sufficient to ensure payment of any customs taxes, penalties and interest that may apply." As explained in section 2.3.3.2 above, this provision prescribes the particular features of the guarantee, i.e. that it will be accorded on a value equivalent to 200% of the difference between the f.o.b. price declared by the importer and the result of multiplying the established threshold unit price by the quantity imported; that it must be from a bank or insurance company; and that it will have a term of three years.

7.412. The Panel observes that, even though Article 8 of Decree No. 390/2016 provides for guarantees to ensure the payment of duties, taxes, penalties and interest stemming from a customs obligation, and the form such guarantees may take, it does not specifically create a guarantee that has to be administered. In fact, the same article provides for special rules to govern each of the said guarantees and empowers the DIAN to establish the type of guarantee that is to be constituted.

7.413. This Panel considers, on the other hand, that it is Decree No. 2218/2017 itself which creates a specific bond to be administered by the Colombian customs authorities. In other words, this specific bond exists, in substance, by virtue of Decree No. 2218/2017, and not by virtue of Article 8 of Decree No. 390/2016.

7.414. In effect, Decree No. 2218/2017 creates a special regime for a certain group of products, namely, yarns, fibres, fabrics, clothing, made up textile articles and footwear priced at or below the thresholds, which contains a set of special rules applicable to the import of such products, rules which include the specific bond.[609] This special regime exists by virtue of Decree No. 2218/2017 and

> 4. Open promissory note with letter of instructions, only for declarants and foreign trade operators authorized or graded by the National Customs and Excise Directorate in accordance with the provisions of Article 35 of this decree.
> 5. Mercantile trust guarantee.
> 6. Endorsement of securities as collateral.
> 7. Any other form of guarantee that provides sufficient security for the payment of duties and taxes, penalties, and interest, where applicable, as required by the National Customs and Excise Directorate.
> For each of the types of guarantee listed in this article, the special rules in force governing each of them are to be applied.
> The National Customs and Excise Directorate shall determine the type of guarantee that is to be posted in accordance with the corresponding customs obligation. In any event, in the case of disputes concerning value, origin or tariff classification, only guarantees in monetary deposit form shall be accepted, when persons with a high risk profile are involved.
> ...
> Anyone who has posted a comprehensive guarantee shall not, as long as it remains in force, be obliged to post specific guarantees, except where guarantees replacing a precautionary measure are concerned.

[607] Panama's second written submission as respondent, para. 301; and response to Panel question No. 63.

[608] Decree No. 390/2016 of (Exhibit PAN-4), Article 8.

[609] Decree No. 2218/2017 is a decree "adopting measures for the prevention and control of customs fraud in connection with imports of fibres, yarns, fabrics, clothing and footwear". Article 1 of the Decree, entitled "Purpose", provides that the Decree "establishes mechanisms to strengthen the risk management and customs control system in the face of possible situations of customs fraud associated with imports of fibres, yarns, fabrics, clothing and footwear, irrespective of the country of origin and/or provenance."

not by virtue of Decree No. 390/2016. Thus, the administration by the DIAN of this special import regime, including the administration of the specific bond, constitutes an administration of Decree No. 2218/2017, and not an administration of Decree No. 390/2016.

7.415. In addition to the above, the Panel observes that Colombia submitted an official letter from the DIAN Directorate of Legal Management, addressed to the Foreign Trade Directorate of the Colombian Ministry of Industry and Tourism[610], which lists the articles of Decree No. 390/2016 in force at 9 April 2018. The list does not include Article 8 of the latter Decree. Panama has not refuted this evidence submitted by Colombia.

7.416. Panama has argued that, in any event, if the Panel were to consider that Decree No. 2218/2017 is not of the nature of an act administering Article 8 of Decree No. 390/2016, this would mean that Decree No. 2218/2017 would impose a substantive requirement and, at the same time, the specific parameters for its administration.[611]

7.417. The Panel notes in this connection that Panama has challenged Decree No. 2218/2017, under Article X:3(a) of the GATT 1994, as a legal instrument governing the administration of the specific bond, but not the manner in which the Colombian customs authorities apply or administer the bond in practice. In fact, Panama has submitted no evidence as to how the Colombian customs authorities administer the specific bond requirement in practice. In other words, Panama argues that various aspects of the specific bond, as contained in Decree No. 2218/2017 itself, give rise to the non-uniform, partial and unreasonable administration of the specific bond.

7.418. The Panel recalls that, as was explained in paragraphs 7.356. -7.357. above, it is possible to challenge a legal instrument *as such* under Article X:3(a) of the GATT 1994, when the substantive content of that legal instrument regulates the application or implementation of the rules covered by Article X:1 of the GATT 1994, but that, in order to establish such a claim, the complainant must discharge the burden of substantiating how and why those provisions *necessarily lead* to impermissible administration of the legal instrument in question. Therefore, the Panel cannot disregard the possibility that some aspects of the specific bond, as contained in Decree No. 2218/2017, may necessarily lead to the non-uniform, non-impartial or unreasonable administration of that legal instrument and, in particular, of the specific bond.

7.419. For this reason, the Panel will now consider whether Panama has demonstrated that the challenged aspects of the specific bond contained in Decree No. 2218/2017 *necessarily lead* to impermissible administration of the specific bond contained in Decree No. 2218/2017.

7.4.5.2.3 The question of whether the specific bond in Decree No. 2218/2017 is not being administered uniformly, impartially and reasonably

7.4.5.2.3.1 Introduction

7.420. As previously explained, Panama has made a series of claims of inconsistency with Article X:3(a) of the GATT 1994, with respect to various aspects of the specific bond contained in Decree No. 2218/2017.

7.421. The Panel observes that Panama has identified two levels of administration with respect to the specific bond: (a) a first level, which, according to Panama, concerns the determination and regulation of the type of bond required; and (b) a second level, which, according to Panama, concerns the administrative processes and actual procedures for obtaining the specific bond.[612]

7.422. Without entering into an examination of the relevance of the classification used by Panama, and with a view to facilitating the analysis of the various claims that have been made, the Panel will use the classification proposed by Panama for the purposes of its analysis.

[610] Official letter on Decree No. 390/2016 (Exhibit COL-58).
[611] Panama's second written submission as respondent, paras. 306-308, and response to Panel question No. 63.
[612] Panama's second written submission as respondent, para. 309.

7.4.5.2.3.2 Panama's claims with respect to the "first level of administration"

Claim with respect to the lack of uniform administration

7.423. Panama makes various claims according to which the specific bond requirement is not administered uniformly because: (a) it only applies to the importation of textiles and footwear classified in Chapters 61, 62 and 64 of Colombia's Customs Tariff at prices equal to or lower than the established thresholds; (b) the amount of coverage of the bond disregards the real value of the goods and uses the threshold price; and (c) the bond is activated on the basis of thresholds established per four-digit tariff heading. The Panel will examine each of these arguments below.

7.424. With respect to the first argument, Panama claims that the administration of the specific bond requirement is not uniform because it only applies to the importation of textiles and footwear classified in Chapters 61, 62 and 64 of the Colombian Customs Tariff at prices equal to or lower than the established thresholds. Panama argues that this bond does not apply to the importation of other similarly situated products, as is the case with spirits and cigarettes, which can also be used by criminal organizations that engage in customs fraud.[613]

7.425. For its part, Colombia maintains that the specific bond requirement is administered uniformly, because it is applied to the importation of all apparel and footwear below specified threshold values, and all importers of these products can expect treatment of the same kind, in the same manner, both over time and in different places and with respect to other persons.[614]

7.426. Colombia adds that the factual assumptions applicable to the textiles and footwear sector are substantially different from those of other sectors exposed to illicit trade. According to Colombia, the specific bond is of particular importance for counteracting money laundering through underinvoicing, while other kinds of smuggling call for different strategies. Colombia asserts that Panama's claim disregards the technical process and the practical reasons that led to the measure being designed to have a limited scope of application. Colombia also maintains that the Colombian authorities have been unable to establish that money laundering, as opposed to customs fraud, is involved in other kinds of underinvoicing, and that Colombia has demonstrated its problem with the laundering of money through the underinvoicing of footwear, textiles and clothing.[615]

7.427. Panama's argument with respect to the lack of uniformity of the specific bond appears to relate to the lack of uniformity in the Colombian customs legislation, due to the fact that Colombia does not apply the specific bond requirement to other products which, according to Panama, are similarly situated. As observed in section 7.4.4 above, the possible inconsistency of the administration of the general customs regime with Article X:3(a) of the GATT 1994 does not fall within the Panel's terms of reference. Moreover, as explained in paragraph 7.410 above, Panama's argument according to which Article 8 of Decree No. 390/2016 is being administered through Decree No. 2218/2017 is not convincing.

7.428. Therefore, the Panel will confine itself to analysing Panama's argument according to which it is the content of Decree No. 2218/2017 that is not uniformly administered. In this respect, as previously explained, the Panel agrees with other previous panels in considering that the requirement of uniformity means "uniformity of treatment in respect of persons similarly situated"[616] and that the laws are applied consistently and predictably.[617] In the specific circumstances of the present dispute, this uniform administration obligation imposed by Article X:3(a) of the GATT 1994 requires Colombia to apply the specific bond requirement in Decree No. 2218/2017 consistently and predictably, by according uniform treatment to all the operations covered by that Decree which are in a similar situation. It does not appear to this Panel that the uniform administration requirement of Article X:3(a) of the GATT 1994 obliges Colombia to

[613] Panama's first written submission as respondent, paras. 80-83; second written submission as complainant, paras. 275-278; second written submission as respondent, paras. 312-313; and opening statement at the meeting of the Panel, para. 21.
[614] Colombia's second written submission as complainant, para. 98; second written submission as respondent, para. 91; and additional written submission, para. 104.
[615] Colombia's additional written submission, para. 130.
[616] Panel Report *US – Stainless Steel (Korea)*, para. 6.51.
[617] Panel Report *Argentina – Hides and Leather*, para. 11.83.

impose the specific bond requirement on other products not included in the scope of application of Decree No. 2218/2017 which, in Panama's opinion, are in a similar situation.

7.429. The Panel recalls that, in any case, the obligation in Article X:3(a) of the GATT 1994 relates to the administration of the laws and regulations rather than to their substantive content.[618] Accordingly, the uniformity requirement does not relate to the substance of Decree No. 2218/2017 but to its administration. In this connection, in the Panel's opinion, a claim with respect to the coverage of products subject to the specific bond would have to do with a substantive characteristic of the specific bond rather than with the way in which the specific bond is administered.[619]

7.430. For these reasons, the Panel rejects Panama's argument that the specific bond requirement is not administered uniformly because of the product coverage.

7.431. Panama also claims that the specific bond requirement is not being administered uniformly, because its amount of coverage is not uniformly applied. Panama maintains that if the goods have a real f.o.b. price below the threshold, multiplying the quantity by the threshold gives an overestimated value for the product. For Panama, since for the calculation of the bond the real (lower) value of the goods is disregarded and the (higher) threshold price is used, an artificially high base price is obtained, which must then be multiplied by 200%, so that Colombia is treating in the same way products with a different value, that is, in different situations.[620]

7.432. For its part, Colombia points out that the measure was modified by Decree No. 2218/2017 and that, under this new decree, the value of the bond is determined in accordance with the difference between the import value and the threshold, so that Panama's claim is not relevant in the light of the new measure.[621]

7.433. The Panel observes that Panama challenges the coverage amount of the specific bond, because "the real (lower) value of the goods is disregarded and the (higher) threshold price is used." Firstly, it should be made clear that what Panama describes as the "real value" of the goods is actually the declared value of the goods, which might not be their "real value" in the event of underinvoicing or overinvoicing. The Panel understands that this argument relates to the specific bond with the characteristics described in Decree No. 1745/2016, which, as described in section 2.3.2.2 above, amounted to 200% of the threshold unit price multiplied by the quantity imported. The Panel recalls that, for the reasons set out in section 7.1.3.2 above, the Panel has decided to rule only on the specific bond with the characteristics described in Decree No. 2218/2017.

7.434. The Panel also observes that, as described in section 2.3.3.2 above, the specific bond provided for in Decree No. 2218/2017 no longer has the characteristic challenged by Panama, since the coverage now amounts to 200% of the difference between the f.o.b. price declared by the importer and the result of multiplying the unit price of the threshold. Thus, taking into consideration the f.o.b. price declared by the importer, which Panama has described as the "real value" of the goods, Panama's argument that the "real value" of the goods is disregarded no longer has any basis in fact.

7.435. The Panel recalls that, in any event, the obligation in Article X:3(a) of the GATT 1994 relates to the administration of the laws and regulations, rather than to their substantive content.[622] Therefore the uniformity requirement does not relate to the substance of Decree No. 2218/2017, but to its administration. In the opinion of the Panel, a claim with respect to the amount of coverage of the specific bond has to do with a substantive characteristic of the specific bond rather than with the way in which the specific bond is administered.[623]

[618] Appellate Body Report, *EC − Poultry*, para. 115. See also Appellate Body Report, *EC − Selected Customs Matters*, para. 219.

[619] Appellate Body Reports, *EC − Bananas III*, para. 200 and *EC − Selected Customs Matters*, para. 219.

[620] Panama's first written submission as respondent, para. 84; second written submission as complainant, para. 279; and second written submission as respondent, paras. 314-315.

[621] Colombia's additional written submission, para. 131.

[622] Appellate Body Report, *EC − Poultry*, para. 115. See also Appellate Body Report, *EC − Selected Customs Matters*, para. 219.

[623] Appellate Body Reports, *EC − Bananas III*, para. 200 and *EC − Selected Customs Matters*, para. 219.

7.436. Accordingly, this Panel rejects Panama's argument that the specific bond requirement is not administered uniformly because of its amount of coverage.

7.437. Panama also argues that the specific bond requirement is not administered uniformly because it is activated on the basis of thresholds established per four-digit tariff heading, despite the fact that each heading covers a variety of products that differ in nature and quality, so that Colombia is treating dissimilar products in the same way.[624]

7.438. As previously explained, the Panel considers that the uniform administration obligation requires Colombia to apply the specific bond requirement in Decree No. 2218/2017 consistently and predictably, by according uniform treatment to all the covered operations in a similar situation.

7.439. It does not seem to the Panel that the uniform administration requirement of Article X:3(a) of the GATT 1994 obliges Colombia to achieve a greater level of detail in the tariff headings with regard to the respective thresholds upwards of four digits. In other words, the Panel does not consider that the fact that Colombia has fixed the thresholds with respect to tariff headings necessarily gives rise to the non-uniform administration of the specific bond contained in Decree No. 2218/2017, within the meaning of Article X:3(a) of the GATT 1994.

7.440. In any event, the Panel recalls that the obligation in Article X:3(a) of the GATT 1994 relates to the administration of the laws and regulations, rather than to their substantive content.[625] Therefore, the uniformity requirement does not relate to the substance of Decree No. 2218/2017, but to its administration. In this respect, in the Panel's opinion, a claim with regard to the determination of the thresholds has to do with a substantive characteristic of the specific bond rather than with the way in which the specific bond is administered.[626]

7.441. In the light of the foregoing, the Panel rejects Panama's argument that the specific bond requirement is not administered uniformly because it is activated on the basis of thresholds established per four-digit tariff heading.

7.442. For all the above reasons, with respect to the aspects of the specific bond which Panama characterizes as the "first level of administration", the Panel concludes that Panama has failed to demonstrate that the specific bond requirement in Decree No. 2218/2017 is being administered in a non-uniform manner, inconsistent with Article X:3(a) of the GATT 1994.

Claim with respect to the lack of impartial administration

7.443. Panama claims that the specific bond requirement is not administered impartially, because of the use of the 200% percentage for calculating the coverage amount. Panama argues that the percentage is fixed independently of the characteristics and possible contingencies of each transaction, and that to assume that the value of the customs taxes together with any penalties will always be equivalent to 200% of the threshold multiplied by the quantity of the goods in the corresponding shipment is prejudiced and unfair.[627]

7.444. For its part, Colombia maintains that Panama has not explained why the fact that the percentage established in the specific bond requirement is fixed means that the requirement is not impartial, and Panama has therefore failed to discharge the burden of substantiating how and why those provisions necessarily lead to an administration that is not impartial. Colombia adds that the measure is applied equally to all importers of the apparel and footwear covered.[628]

7.445. As previously explained, the Panel agrees with past panels in considering that the impartial administration requirement in Article X:3(a) relates to the administration of the relevant laws and

[624] Panama's opening statement at the meeting of the Panelg, para. 21.
[625] Appellate Body Report, *EC – Poultry*, para. 115. See also Appellate Body Report, *EC – Selected Customs Matters*, para. 219.
[626] Appellate Body Reports, *EC – Bananas III*, para. 200 and *EC – Selected Customs Matters*, para. 219.
[627] Panama's first written submission as respondent, paras. 85-86; second written submission as complainant, paras. 280-281; second written submission as respondent, paras. 316-318; and opening statement at the Panel meeting, para. 23.
[628] Colombia's second written submission as complainant, paras. 99-100; and second written submission as respondent, paras. 92-93.

regulations in a just, fair, objective, unbiased and unprejudiced manner.[629] Therefore, the impartial administration obligation imposed by Article X:3(a) of the GATT 1994, in the specific circumstances of this dispute, requires Colombia to administer the specific bond requirement in Decree No. 2218/2017 in a just, fair, objective, unbiased and unprejudiced manner.

7.446. In this respect, the Panel observes that Panama challenges the coverage amount of the specific bond, due to the fact that it is equal to 200% of the threshold multiplied by the quantity of the goods in the corresponding shipment. This Panel believes that this argument relates to the specific bond with the characteristics described in Decree No. 1745/2016, which amounted to 200% of the threshold unit price multiplied by the quantity imported. The Panel recalls that, for the reasons given in section 7.1.3.2 above, the Panel has decided to rule only on the specific bond with the characteristics described in Decree No. 2218/2017.

7.447. The Panel observes that the specific bond provided for in Decree No. 2218/2017 no longer has the characteristic challenged by Panama, since, as described in section 2.3.3.2 above, the coverage now amounts to 200% of the difference between the f.o.b. price declared by the importer and the result of multiplying the threshold unit price. For these reasons, Panama's argument no longer has any basis in fact.

7.448. In any event, and as previously explained in analysing Panama's claim concerning the lack of uniform administration of the specific bond, the Panel considers that a claim with respect to the coverage amount of the specific bond has to do with a substantive characteristic of the specific bond rather than with the way in which the specific bond is administered.

7.449. For these reasons, the Panel rejects Panama's argument that the specific bond requirement is not administered impartially, because of the coverage amount.

7.450. In conclusion, with respect to the aspects of the specific bond which Panama describes as the "first level of administration", the Panel finds that Panama has failed to demonstrate that the specific bond requirement in Decree No. 2218/2017 is administered in a manner that is not impartial, inconsistently with Article X:3(a) of the GATT 1994.

Claim with respect to the lack of reasonable administration

7.451. Panama claims that the specific bond requirement is not administered reasonably, because: (a) a specific bond has to be constituted in cases in which there is a general bond; and (b) the amount of the specific bond of Decree No. 2218/2017 covers the difference in prices and not the difference between the taxes already paid and the taxes payable on the basis of the threshold. The Panel will examine each of these arguments below.

7.452. With respect to the first argument, Panama claims that the specific bond requirement is not administered reasonably because a specific bond has to be constituted in cases in which there is a general bond. Panama argues that the legal persons recognized as regular customs users (UAP) will be able to post a general bond that will cover all their transactions as a UAP with the DIAN, so that there is no apparent reason why it might be appropriate to the circumstances for the UAP also to have to lodge a specific bond.[630]

7.453. For its part, Colombia maintains that where imports at artificially low prices constitute an important share of total imports, the general bond would be insufficient. Colombia asserts that it has made clear with concrete examples, in COL-22, COL-18 and COL-17, how general bonds might not be sufficient to cover the payment of customs taxes and any penalties that might apply, and that the penalties to be imposed could amount to 150% of the assessed value of the goods.[631]

7.454. In this respect, Panama responds that Colombia implicitly recognizes that where it is not a matter of cases in which artificially low prices constitute an important share of total imports, the

[629] Panel Reports, *Thailand – Cigarettes (Philippines)*, para. 7.899; and *China – Raw Materials*, para. 7.694. (The Appellate Body declared the panel's analysis moot and of no legal effect on procedural grounds.)

[630] Panama's first written submission as respondent, paras. 87-88; second written submission as complainant, paras. 282-283; and second written submission as respondent, paras. 319-320.

[631] Colombia's second written submission as complainant, paras. 101-103; and second written submission as respondent, paras. 94-95.

specific bond contingencies would normally be covered by the coverage of the general bond.[632] Panama adds that even if because of the magnitude of the textiles and footwear transactions a producer with a general bond was unable to cover the amount of the specific bond, there is no reason why that producer should be required to surrender the whole of the specific bond if part of the amount covered could still be covered by the general bond.[633]

7.455. As previously explained, the Panel agrees with past panels in considering that the reasonable administration requirement relates to "administration that is equitable, appropriate for the circumstances and based on rationality".[634] Therefore the obligation concerning reasonable administration imposed by Article X:3(a) of the GATT 1994, in the specific circumstances of this dispute, requires Colombia to administer the specific bond requirement in Decree No. 2218/2017 in a manner that is equitable, appropriate for the circumstances and based on rationality.

7.456. The Panel recalls that Panama has challenged Decree No. 2218/2017 as a legal instrument that governs the administration of the specific bond, so that it is for Panama to satisfy the obligation to substantiate how and why the fact of requiring a specific bond when there is already a general bond necessarily leads to unreasonable administration.

7.457. The Panel understands that, on some occasions, the general bond could be sufficient to cover all of an importer's transactions with the DIAN as a UAP. However, as Colombia has explained and Panama appears not to have contested, on other occasions, the bond could be insufficient. Moreover, as Colombia has explained, the general bond is cross-cutting in its application, is an import processing facility accorded to a certain type of importer, and is intended to ensure the total payment of the duties, taxes, penalties and interest that result from non-compliance with a customs requirement. On the other hand, the specific bond, although also intended to ensure the total payment of duties, taxes, penalties and interest that may apply, seeks to confront the problem of money laundering in specific sectors.[635] In the Panel's opinion, the fact that Colombia additionally requires the specific bond is not sufficient to conclude that the administration of that specific bond is not appropriate for the circumstances or is not based on rationality. In other words, Panama's argument according to which the fact of requiring the specific bond in cases in which there is already a general bond necessarily leads to unreasonable administration of the specific bond is unconvincing.

7.458. For these reasons, the Panel rejects Panama's argument that the specific bond requirement is not being administered reasonably because the specific bond is required in those cases in which there is already a general bond.

7.459. With respect to the second argument, Panama alleges lack of reasonable administration because the amount of the specific bond in Decree No. 2218/2017 covers the difference in prices and not the difference between the taxes already paid and the taxes payable on the basis of the threshold. Panama asserts that, because of this, an amount much greater than that appropriate for ensuring the payment of customs taxes, penalties and interest payable is being guaranteed.[636]

7.460. As already explained, this Panel considers that a claim with respect to the amount of coverage of the specific bond has to do with a substantive characteristic of the specific bond rather than with the way in which the specific bond is administered.

7.461. Assuming that the amount of coverage of the specific bond can be seen as a question of administration, the Panel observes that Panama appears to suggest that a "reasonable" amount for the specific bond would be that which covered the difference between the taxes already paid and the taxes payable, on the basis of the threshold. The Panel recalls that, from Colombia's point of view, the values of the transactions covered by the specific bond are subject to a suspicion of underinvoicing for money laundering. Therefore, they could be subject to a valuation dispute and the correction of the declared prices. Panama's argument appears to disregard the fact that at the time of posting the specific bond it is impossible to know what will be the exact amount of the taxes payable if the declared prices are corrected, apart from the need to cover any penalties and interest

[632] Panama's second written submission as respondent, paras. 321-322.
[633] Panama's second written submission as respondent, paras. 323-324.
[634] Panel Reports, *China – Raw Materials*, para. 7.696. (The Appellate Body declared the Panel's analysis to be moot and of no legal effect on procedural grounds.)
[635] Colombia's response to Panel question No. 17(b), para. 70.
[636] Panama's second written submission as respondent, paras. 325-328.

that might be incurred, which are also unknown at the time of posting the specific bond. Therefore, the Panel considers that Panama has failed to demonstrate that the amount of coverage of the bond chosen by Colombia necessarily gives rise to the unreasonable administration of Decree No. 2218/2017.

7.462. For these reasons, the Panel rejects Panama's argument that the specific bond requirement is not being administered reasonably because of its amount of coverage.

7.463. In conclusion, with respect to the aspects of the specific bond that Panama characterizes as the "first level of administration", the Panel concludes that Panama has failed to demonstrate that the specific bond requirement in Decree No. 2218/2017 is administered unreasonably, in a manner inconsistent with Article X:3(a) of the GATT 1994.

7.4.5.2.3.3 Panama's claims with respect to the "second level of administration"

Claim with respect to the lack of uniform administration

7.464. Panama claims that the specific bond requirement is not administered uniformly because Colombia delegates the processing and management of the specific bond to banks and insurance companies, while omitting to establish general criteria for observance by these third parties of the requirements for applying for the specific bond and the considerations relevant to its approval. Panama maintains that, consequently, each bank or insurance company determines for itself the management charges, the credit requirements for the importer, and the relevant factors for determining whether the granting of a specific bond should be approved or refused.[637]

7.465. Colombia maintains that Panama does not specify the uniformity criterion in question. Colombia explains that the fact that the bond is provided by insurance companies or banks is a logical consequence of the nature of the instrument (insurance contract) and that if instruments of this kind were prohibited by Article X:3(a) of the GATT, then Article 13 of the Customs Valuation Agreement, Article VII of the GATT 1994 and Article 7 of the Trade Facilitation Agreement would be inapplicable. Colombia also maintains that the financial system operates freely and that insurance companies and banks accord similar treatment in respect of persons similarly situated, depending on the risk.[638]

7.466. The Panel agrees with other previous panels in considering that the uniformity requirement calls for "uniformity of treatment in respect of persons similarly situated"[639] and consistent and predictable application of the laws.[640] Thus, the obligation concerning uniform administration imposed by Article X:3(a) of the GATT 1994, in the specific circumstances of this dispute, requires Colombia to administer the specific bond requirement in Decree No. 2218/2017 consistently and predictably, by according uniform treatment to all the covered products that are in a similar situation.

7.467. The Panel is not convinced that the fact of requiring that the specific bond for guaranteeing the payment of customs obligations be obtained from a bank or an insurance company is intrinsically inconsistent or unpredictable and therefore inconsistent with Members' obligations. A bank or insurance company bond is established by means of a contractual relationship between private parties, and it is customary for the bank or insurance company to scrutinize the particular situation of the applicant in order to decide, firstly, whether to grant a bond and, secondly, the amount it will charge for that service. It does not seem to the Panel that, in the light of Panama's arguments and in the specific circumstances of this dispute, the requirement that the specific bond be administered uniformly can be interpreted as requiring that Colombia establish a level of specific financial regulation for banking or insurance institutions or limit the freedom of those financial institutions to take decisions with respect to their potential customers, for the purpose of ensuring uniformity of specific treatment. It is the Panel's opinion that in these circumstances uniformity of treatment relates to requiring the same kind of bond, that is, a bank or insurance company bond, for all transactions covered by the obligation to post the bond.

[637] Panama's second written submission as respondent, paras. 330-331.
[638] Colombia's additional written submission, paras. 124-127.
[639] Panel Report *US – Stainless Steel (Korea)*, para. 6.51.
[640] Panel Report *Argentina – Hides and Leather*, para. 11.83.

7.468. Therefore, the Panel rejects Panama's argument that the specific bond requirement is not administered reasonably because Colombia delegates the processing and management of the specific bond to banks and insurance companies.

7.469. In conclusion, with respect to the aspect of the specific bond which Panama describes as being the "second level of administration", this Panel concludes that Panama has failed to demonstrate that the specific bond requirement in Decree No. 2218/2017 is administered in a non-uniform manner, inconsistently with Article X:3(a) of the GATT 1994.

Claim with respect to the lack of reasonable administration

7.470. Panama claims that the specific bond requirement is not administered reasonably because of the requirement that the bond be obtained from a bank or insurance company. For Panama, there is no reason why importers should have to lodge a bank or insurance company bond rather than, for example, a monetary deposit, or not be given the opportunity to choose the kind of bond they wish to lodge in order to provide a sufficient guarantee of payment of the principal obligation, as allowed by Decree No. 390/2016.[641]

7.471. Colombia maintains that bonds are an instrument used by many of the world's customs authorities to ensure the payment of tariffs and other taxes and that bank bonds and policies covering compliance with legal provisions are suitable instruments, widely used by importers and traders, for providing guarantees vis-à-vis the customs authority.[642]

7.472. As previously explained, the Panel agrees with past panels in considering that, in the specific circumstances of this dispute, the reasonable administration obligation imposed by Article X:3(a) of the GATT 1994 requires Colombia to administer the specific bond requirement in Decree No. 2218/2017 in a manner appropriate for the circumstances and based on rationality.

7.473. The Panel recalls that the obligation contained in Article X:3(a) of the GATT 1994 relates to the administration of laws and regulations, rather than to their substantive content.[643] Accordingly, the uniformity requirement relates not to the substance of Decree No. 2218/2017, but to its administration. In this respect, a claim with regard to the kind of bond requested has to do with a substantive characteristic of the specific bond rather than with the way in which the specific bond is administered.[644] Even if it could be seen as a question of administration, the Panel observes that Colombia has explained why it considers that requiring the specific bond to be obtained from a bank or insurance company could help in achieving the objective of Decree No. 2218/2017 as follows: "[t]he request for bonds in the knowledge that there is a prior risk study by the insurance company or bank is effective in combating technical smuggling by underinvoicing, customs fraud and money laundering, because the importers have to undergo a personal risk investigation by the insurance company or bank."[645] Moreover, the Panel agrees with Colombia that bank and insurance company bonds are instruments used by many of the world's customs authorities to ensure the payment of customs obligations. In the light of these explanations, the Panel does not find any lack of rationality in the regulatory choice made by Colombia.

7.474. Therefore, the Panel rejects Panama's argument that the specific bond requirement is not administered reasonably because the bond has to be obtained from a bank or insurance company.

7.475. In conclusion, with respect to the aspect of the specific bond which Panama describes as the "second level of administration", this Panel concludes that Panama has failed to demonstrate that the specific bond requirement in Decree No. 2218/2017 is administered unreasonably, in a manner inconsistent with Article X:3(a) of the GATT 1994.

[641] Panama's second written submission as respondent, paras. 332-333.
[642] Colombia's additional written submission, paras. 124-127.
[643] Appellate Body Report, *EC – Poultry*, para. 115. See also Appellate Body Report, *EC – Selected Customs Matters*, para. 219.
[644] Appellate Body Reports, *EC – Bananas III*, para. 200; and *EC – Selected Customs Matters*, para. 219.
[645] Colombia's response to Panel question No. 19(c), para. 86.

7.4.5.2.4 Conclusion concerning the consistency of the administration of the specific bond with Article X:3(a) of the GATT 1994

7.476. For all the reasons given above, the Panel concludes that Panama has failed to demonstrate that the specific bond provided for in Article 7 of Decree No. 2218/2017 is administered in a non-uniform, non-impartial or unreasonable manner, inconsistently with Article X:3(a) of the GATT 1994.

7.4.6 The question of whether the administration of the special import regime is inconsistent with Article X:3(a) of the GATT 1994

7.4.6.1 Arguments of the parties

7.4.6.1.1 Panama

7.477. In its panel request, Panama claimed that the special import regime is not applied in a uniform, impartial and reasonable manner, and is therefore inconsistent with Article X:3(a) of the GATT 1994.[646] Subsequently, Panama argued that the administration of the risk management system and customs controls via the special import regime is inconsistent with Article X:3(a) of the GATT 1994.[647]

7.478. Panama maintains that Decree No. 390/2016 is the Colombian Customs Statute and therefore a regulation of general application covered under Article X:1 of the GATT 1994. Panama asserts that, by means of the special import regime, Colombia administers Articles 493 and 486 of Decree No. 390/2016, which govern the risk management system and customs control.[648]

7.479. Panama argues that the text of Article 1 of Decree No. 1745/2016 and Decree No. 2218/2017 makes it clear that their purpose is to give practical effect to the risk management system and customs control, where it is a question of imports covered by the corresponding decrees.[649]

7.480. Panama points out that the administration of the risk management system and customs controls comprises two levels: a first level, which concerns the determination and regulation of the mechanisms for strengthening the risk management system and customs control in the face of possible customs fraud situations associated with the relevant imports, that is, the requirements of the special import regime such as documentary requirements, the participation of import operations observers in customs controls, the limitation of the importer's capacity for action or horizontal rigidity of the regime, and the specific bond; and a second level, which concerns the specific administrative processes for satisfying these requirements, such as, for example, the procedures necessary for establishing a specific bond, which partially involves the intervention of third parties (banks or insurance companies, translators, lawyers and registry offices).[650]

7.481. With respect to the *first level of administration*, Panama claims, first of all, that the risk management system and customs controls are not administered uniformly because, given that the thresholds are determined on the basis of conversations between government officials and the private sector, the customs risk management system is administered arbitrarily. Panama notes that, for fixing the thresholds, Colombia uses the four-digit tariff heading, despite knowing that each heading comprises a multiplicity of relevant products, so that Colombia is according the same treatment to dissimilar products which have in common only the fact that they all fall under heading 62.03.[651]

[646] Panama's request for the establishment of a panel, WT/DS461/22.
[647] Panama's second written submission as respondent, para. 339.
[648] Panama's second written submission as respondent, paras. 340-344; and response to Panel question No. 63.
[649] Panama's second written submission as respondent, paras. 345-346; and response to Panel question No. 63.
[650] Panama's second written submission as respondent, para. 348.
[651] Panama's second written submission as respondent, para. 351.

7.482. Panama also claims that applying the specific bond requirement only to imports with prices equal to or lower than the thresholds and not to imports of other products liable to underinvoicing and smuggling, means that the specific bond is not being uniformly administered.[652]

7.483. Panama maintains that concerns that Colombia is treating products with different values in the same way are also generated by the application of the system of risk management and customs controls, since when the value of the imported goods is less than the threshold price, Colombia disregards the real (lower) value of the goods and uses the (higher) threshold price, to obtain an artificially high base price which must then be multiplied by 200%.[653]

7.484. Secondly, Panama claims that the risk management system and customs controls are not administered impartially, because of the participation of import operations observers in the customs control of the covered goods under Article 3 of Decrees No. 1745/2016 and No. 2218/2017.[654] Panama maintains that the lack of inherent fairness of this aspect is sufficient to demonstrate the existence of partial administration, due to the following:

a. the import operations observer represents the interests of the local industry association[655];

b. the fees of the import operations observer are borne by the industry association so that there is a contractual relationship, which places it objectively in a situation of conflict of interest and seriously compromises the impartiality of any action taken during customs controls on the relevant goods[656];

c. considering the observer's experience and knowledge, it is reasonable to assume that his or her alerts, technical opinions and recommendations will be taken seriously into account by the customs officer responsible for customs inspection in his assessment of the goods[657];

d. the DIAN is obliged to inform the Joint Commission (which includes the association) about the actions of the import operations observers[658];

e. an expert representing the associations can submit an alert, technical opinion or recommendation to the customs officer responsible for customs inspection systematically as part of the decision-making structure[659];

f. the import operations observers are able to raise alerts to the customs authority, closely observe the conduct of the process of inspection or examination of the goods, offer technical opinions and make recommendations they consider relevant to the inspector in charge, so that the probability of the domestic industry interfering in the process of verification of the imported goods is high[660];

g. the import operations observer forms part of the DIAN's decision-making mechanism, since the powers granted to the observer by the Colombian legislation contribute to the DIAN's decision-making with respect to the release of the goods[661]; and

h. Panama has concerns with respect to the use which the import operations observer might make of certain confidential information contained in some of the supporting documents for the import declaration, such as the list of distributors and the certification of value, storage and distribution.[662]

[652] Ibid. para. 352.
[653] Panama's second written submission as respondent, para. 353.
[654] Ibid. paras. 354-358.
[655] Panama's second written submission as respondent, para. 359.
[656] Ibid. para. 360.
[657] Ibid. paras. 361-363.
[658] Panama's second written submission as respondent, para. 364.
[659] Panama's second written submission as respondent, para. 365.
[660] Panama's second written submission as respondent, paras. 366-367.
[661] Ibid. para. 368.
[662] Ibid. para. 369.

7.485. With respect to the specific bond requirement as an element of the special regime, Panama also argues that Colombia's presumption that the value of the customs taxes together with any penalties (principal obligations) will always be equivalent to 200% of the threshold multiplied by the quantity of goods in the corresponding shipment is a biased and unfair opinion and therefore results in impartial administration.[663]

7.486. Thirdly, Panama claims that the risk management system and customs controls are not administered in a reasonable manner because the requirement for an apostilled or legalized official translation of the certification of existence abroad for each shipment is unreasonable. For Panama, there is no apparent reason why such certification should be required for each shipment or why copies should not be acceptable.[664]

7.487. Panama also alleges lack of reasonable administration because the requirement to provide certification of intention to sell is unreasonable. Panama considers that the sales invoices already ensure that the supplier declared by the importer is really the source of the imported products and are much more relevant for obtaining this information than the certification of intention to sell because they provide evidence of the final outcome of the transaction.[665]

7.488. Furthermore, Panama claims lack of reasonable administration due to the rigidity of the special import regime, since importers cannot make changes in the quantity, price or port of entry any later than 30 days before importation and since, in the event of these parameters being modified, a declaration of correction will not be accepted, and the goods will be seized. Panama questions what would be the sense of requiring such detailed information with respect to the quantity and price of the goods 30 days in advance, considering that the advance declaration serves to give early notice of the same information.[666]

7.489. In addition, Panama maintains that the special regime set out in Decree No. 2218/2017 is worse, owing to the fact that non-compliance with the documentary requirements results in the seizure of the goods, without the possibility of their being legalized, recovered or reshipped, so that a minor error can result in the loss of the goods.[667]

7.490. With respect to the specific bond requirement as an element of the special import regime, Panama maintains that this requirement is not being administered reasonably, since it is necessary to post a specific bond in those cases in which there is already a general bond.[668]

7.491. With respect to the *second level of administration* of the risk management system and customs controls, Panama claims that the risk management system and customs controls are not being administered reasonably because Colombia is delegating the processing and management of the specific bond to banks and insurance companies, while omitting to establish general criteria for compliance by these third parties with the requirements for applying for a specific bond and the factors relevant for its approval.[669]

7.4.6.1.2 Colombia

7.492. With respect to Panama's claim concerning the uniform administration requirement, Colombia maintains that the methodology for calculating the thresholds was based on the use of technical criteria and was not, as asserted by Panama, agreed with the private sector. Colombia states that the methodology was socialized with the private sector, but at no point was determined jointly with the private sector, and the criteria used were not the result of chance.[670]

7.493. Colombia also maintains that the factual circumstances in the textile and footwear sector are substantially different from those in other sectors exposed to illicit trading. Colombia maintains that the specific bond is of special importance for fighting money laundering through underinvoicing

[663] Panama's second written submission as respondent, para. 371.
[664] Panama's second written submission as respondent, paras. 372-373.
[665] Panama's second written submission as respondent, para. 374.
[666] Panama's second written submission as respondent, paras. 375-381.
[667] Panama's second written submission as respondent, paras. 382-387.
[668] Panama's second written submission as respondent, para. 388.
[669] Panama's second written submission as respondent, para. 390.
[670] Colombia's additional written submission, para. 129.

and that other kinds of smuggling require different strategies. Colombia asserts that Panama's claim disregards the technical process and practical reasons that led to the measure being designed to have a limited scope of application. Colombia also submits that the Colombian authorities were unable to establish that money laundering, if not customs fraud, is involved in other types of underinvoicing, and that Colombia has demonstrated its problem with money laundering through the underinvoicing of footwear, textiles and clothing.[671]

7.494. Colombia also points out that the measure was modified by Decree No. 2218/2017 and that, under this new Decree, the value of the bond is determined in accordance with the difference between the import value and the threshold, so that Panama's claim is not relevant in the light of the new measure.[672]

7.495. With respect to Panama's claim concerning the impartial administration requirement, Colombia maintains that Article 183 of Decree No. 390/2016 establishes that the import operations observers do not represent the interests of traders opposed to importers or exporters, and that the trade associations which propose such observers are also importers or exporters of the goods. Colombia adds that the observers are selected from lists of candidates submitted by the associations, approved by the Joint National Commission for Tax and Customs Management and that their function is limited to closely observing the conduct of the process of evaluating a specific type of goods and providing their collaboration and cooperation when requested by the customs authority, including a technical report with respect to the tariff classification of the product, the identification and description of the product, and the quantity, weight and price of the goods. Colombia indicates that, in short, the observer provides support for the customs inspector in carrying out the examination process.[673]

7.496. Colombia adds that the function of the import operations observers is geared to offering support for the work of combating smuggling, underinvoicing and any other kind of practice that might constitute customs fraud, and that if what Panama means to say is that the risk management system is discriminatory because it detects those presenting a risk of committing customs fraud by means of underinvoicing and money laundering, it would be right, but this kind of discrimination is not contrary to WTO rules.[674]

7.497. Colombia also asserts that the role of the observers has been envisaged in the Colombian customs legislation since well before Decree No. 390/2016; that the observers are available for all sorts of operations and are not restricted to any particular sector; that the use of observers is totally voluntary; that they operate at the request of the importing trade association; that the association pays their fees; and that in no way do they constitute a requirement for the importation of goods. Colombia argues that, for these reasons, the role of the observer in the importation of goods covered under Decrees No. 1745/2016 and No. 2218/2017 does not favour one party or one side more than another, is objective, unbiased, fair and just, as evidenced by Exhibits COL-16 and COL-21.[675]

7.498. With respect to Panama's claim concerning the reasonable administration requirement, Colombia states that it has amply demonstrated the necessity and reasonableness of the requirement for an apostilled or legalized official translation of the "certification of existence abroad" for each shipment in its fight against illicit trading. Colombia maintains that it is important to have certification of existence because many front companies abroad offer to carry out fictitious transactions and customs cooperation is currently insufficient to verify the existence of a foreign supplier.[676]

7.499. With regard to the requirement to furnish certification of intention to sell, Colombia says that it has shown that the sales invoice can easily be forged and does not provide the degree of certainty that Colombia seeks to ensure in controlling its imports, and that numerous abuses in connection

[671] Colombia's additional written submission, para. 130.
[672] Colombia's additional written submission, para. 131.
[673] Colombia's additional written submission, paras. 133-135.
[674] Colombia's additional written submission, paras. 136-137.
[675] Colombia's additional written submission, paras. 138-139.
[676] Colombia's additional written submission, para. 141.

with the provision of false information in import documents have led Colombia to request more information.[677]

7.500. With respect to Panama's argument concerning the rigidity of the system, Colombia maintains that under the Colombian customs regime it is possible to correct and amend a certain kind of minor errors in the import documents, so that Panama is misreading the legislation in question, in particular Article 234 of Decree No. 2685/1999, which permits the correction of the import declaration.[678]

7.501. With regard to reshipment not being permitted and the seizure of the goods, Colombia maintains that Panama is forgetting that these goods are used for the purpose of carrying out illicit trading operations and that allowing reshipment of the goods would lead to the same goods entering through a different Colombian port with false papers. Colombia adds that, considering that the objective of the measure and the reason for it is the control of goods deriving from illegal transactions, the prohibition on reshipment is reasonable in the light of its objective, cause and basis. Colombia adds that if Panama's claim is that the risk management system is unreasonable because it makes it possible to detect violators of Colombian customs law, Panama's argument simply demonstrates the risk that Colombia is trying to prevent, namely that of there being importers who go on deliberately violating the Colombian legislation by laundering money and doing violence to society.[679]

7.4.6.2 Analysis by the Panel

7.502. As indicated in paragraph 7.143 above, the Panel's task will be to determine whether, as Panama claims, the special import regime is not applied in a uniform, impartial and reasonable manner and is therefore inconsistent with Article X:3(a) of the GATT 1994.[680]

7.503. As explained in section 7.4.3.1 above, the Panel will begin by examining whether Panama has identified a legal instrument of the kind described in Article X:1 of the GATT 1994. If so, it will proceed to determine whether Panama has demonstrated that the legal instrument identified is being administered by Colombia. If the reply to this last question is also affirmative, it will examine whether Panama has demonstrated that the legal instrument identified is not being administered in a uniform, impartial or reasonable manner.

7.4.6.2.1 The question of whether Panama has identified a legal instrument of the kind described in Article X:1 of the GATT 1994

7.504. The first question to be examined by the Panel is whether the legal instruments identified by Panama are of the kind described in Article X:1 of the GATT 1994. As the Panel has already explained with respect to the specific bond, Panama has identified Decree No. 390/2016 and, in the alternative, Decree No. 2218/2017, as legal instruments of the kind described in Article X:1 of the GATT 1994.[681]

7.505. For the same reasons as set out in its analysis concerning the specific bond in Section 7.4.5.2.1 above, the Panel considers that Panama has met its initial burden of identifying a legal instrument of the kind described in Article X:1 of the GATT 1994.

7.4.6.2.2 The question of whether the legal instrument identified by Panama is being "administered" by Colombia

7.506. Having established that the legal instruments identified by Panama fall within those described in Article X:1 of the GATT 1994 and hence within the scope of Article X:3(a), the Panel will examine whether Panama has demonstrated that those instruments are being "administered" by Colombia.

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[677] Colombia's additional written submission, para. 142.
[678] Colombia's additional written submission, para. 143.
[679] Colombia's additional written submission, paras. 144-146.
[680] Panama's request for the establishment of a panel, WT/DS461/22.
[681] Panama's second written submission as respondent, paras. 340-344; and response to Panel question No. 63.

7.507. As observed in Section 7.4.4 above, the possible inconsistency of the administration of the general customs regime through the special import regime with Article X:3(a) of the GATT 1994 does not fall within the Panel's terms of reference. Irrespective of the foregoing, Panama's argument that, by means of the special import regime, Colombia is administering Articles 493 and 486 of Decree No. 390/2016, which regulate the risk management system and customs control, is not convincing.[682] Panama argues that the text of Article 1 of Decrees No. 1745/2016 and No. 2218/2017 makes it clear that their purpose is to give practical effect to the risk management system and customs control, where it is a question of imports covered by the corresponding decrees.[683]

7.508. With respect to customs control, Article 486 of Decree No. 390/2016[684] provides that customs control comprises a series of measures to be applied in order to ensure fulfilment of the regulations within the remit of the customs administration, that customs controls shall bear on foreign trade operations and the parties involved therein, and that such controls shall be carried out selectively, using the most effective technological means, inspection equipment and risk management techniques.

7.509. Article 486 further provides that customs controls may in particular consist in examining goods, taking samples, verifying customs declaration data and the existence and authenticity of supporting documents, examining the accounts and other records of foreign trade operators, inspecting means of transport, inspecting luggage and goods carried by persons, and carrying out investigations and other similar acts.

7.510. Article 1 of Decree No. 2218/2017, entitled "Purpose", provides that the said Decree "establishes mechanisms for strengthening the system of risk management and customs control in the face of possible situations of customs fraud associated with imports of fibres, yarns, textiles, clothing and footwear, irrespective of the country of origin and/or provenance."

7.511. The Panel notes that, although Article 486 defines the term customs controls and describes the form that such customs controls can take, it does not specifically establish a form of customs control that has to be applied.

7.512. In the Panel's opinion, it is Decree No. 2218/2017 itself which establishes a special system of customs control to be applied by the Colombian customs authorities with respect to imports of the products covered. In other words, the customs control system that applies to imports of the products covered exists, in essence, by virtue of Decree No. 2218/2017, and not by virtue of Article 486 of Decree No. 390/2016, as Panama claims.

7.513. With respect to the risk management system, Article 493 of Decree No. 390/2016[685] provides that the DIAN: a) may use risk management practices and procedures in order to prevent

[682] Panama's second written submission as respondent, paras. 340-344; and response to Panel question No. 63.

[683] Panama's second written submission as respondent, paras. 345-346; and response to Panel question No. 63.

[684] Article 486 of Decree No. 390/2016 provides as follows:
Customs control. Customs control comprises a series of measures to be applied in order to ensure fulfilment of the regulations within the remit of the Customs Administration.
Customs controls shall bear on foreign trade operations and the parties involved therein. Such controls shall be those that are essential to achieve the institutional objectives and shall be carried out selectively, using the most effective technological means, inspection equipment and risk management techniques to optimize the administrative effort. Electronic techniques shall be used for exchanging information between customs administrations and with other official bodies.
Customs controls may in particular consist in examining goods, taking samples, verifying customs declaration data and the existence and authenticity of supporting documents, examining the accounts and other records of foreign trade operators, inspecting means of transport, inspecting luggage and goods carried by persons, and conducting investigations and other similar acts.

[685] Article 493 of Decree No. 390/2016 provides as follows:
Risk management system. The National Customs and Excise Directorate may use risk management practices and procedures with a view to preventing or combating the use or directing of trade for purposes which undermine national security or breach customs legislation.
To this end, and with due observance of the rules on habeas data and the handling of personal information, the National Customs and Excise Directorate shall use databases for holding

or combat the use or directing of trade for purposes which undermine national security or breach customs legislation; b) shall use databases for holding information on, among other things, operations and persons acting before it, in order to assess the security of the foreign trade logistics chain; and c) shall, in implementing the risk management system to ensure the enforcement of customs obligations, focus its control activities on high-risk operations. Article 493 of Decree No. 390/2016 accordingly allows for the implementation of risk-monitoring mechanisms, establishment of control measures at goods entry and exit points, and use of other duly recognized international mechanisms.

7.514. Specifically with respect to, among other things, the control of money laundering, Article 493 of Decree No. 390/2016 provides for monitoring of the cross-border movement of high-risk goods and allows for controls to be carried out within the framework of multilateral agreements ratified by the Colombian Government.

7.515. The Panel observes that, although Article 493 authorizes the DIAN to use risk management practices and procedures and provides for the form that such risk management can take, it does not specifically establish a form of risk management that has to be applied.[686]

7.516. In the Panel's view, it is Decree No. 2218/2017 itself which establishes a special risk management methodology to be applied by the Colombian customs authorities. In other words, the risk management methodology that applies to imports of the products covered exists, in essence, by virtue of Decree No. 2218/2017, and not by virtue of Article 486 of Decree No. 390/2016.

7.517. Decree No. 2218/2017 establishes a special regime for a specific group of products, namely yarns, fibres, textiles, clothing, made up textile articles and footwear with prices below the thresholds, which contains a set of special rules applicable to the import of said products and including a special risk management and customs control methodology. This special regime exists by virtue of Decree No. 2218/2017 and not by virtue of Decree No. 390/2016, as Panama claims. Hence, the administration by the DIAN of this special import regime constitutes an administration of Decree No. 2218/2017, and not an administration of Decree No. 390/2016.

7.518. Panama has argued, at least with respect to the specific bond, that, in any case, if the Panel were to consider that Decree No. 2218/2017 is not an act administering Decree No. 390/2016, this would mean that Decree No. 2218/2017 imposes a substantive requirement and, at the same time, the specific parameters for its administration.

7.519. The Panel notes in this regard that Panama has, under Article X:3(a) of the GATT 1994, challenged Decree No. 2218/2017 as a legal instrument which regulates the application of the special import regime, and not the way in which the Colombian customs authorities apply or administer that regime in practice. In fact, Panama has not furnished evidence as to how the Colombian customs

information on, among other things, operations and persons acting before the Entity, in order to assess the security of the foreign trade logistics chain.
In implementing the risk management system, the National Customs and Excise Directorate shall, with a view to ensuring the enforcement of customs obligations, focus its control activities on high-risk operations, in the interests of safeguarding and facilitating international trade. It may accordingly implement risk-monitoring mechanisms, establish control measures at goods entry and exit points, and use other duly recognized international mechanisms.
With respect to environmental protection, health protection, agricultural health, border security, preventing the proliferation of weapons, controlling money laundering and the funding of terrorism, the cross-border movement of high-risk goods shall be monitored. Such monitoring may be carried out within the framework of multilateral agreements ratified by the Colombian Government.
Any allusion that other customs regulations may make to the risk administration system is to be understood as referring to the risk management system established in this Decree.
Paragraph. The risk management system of the National Customs and Excise Directorate may be coordinated with the risk management systems of the other control bodies related to customs and foreign trade operations, such as Migración Colombia, ICA [Colombian Agricultural Institute], INVIMA [National Food and Drug Surveillance Institute] and the National Police.

[686] The Panel notes that whereas Article 493 of Decree No. 390/2016 provides that any allusion that other customs regulations may make to the risk administration system is to be understood as referring to the risk management system established in that decree, it does not see in said decree a risk management system to be administered within the meaning of Article X:3(a) of the GATT 1994.

authorities apply the special import regime in practice. Panama argues that various aspects of the special import regime, in Decree No. 2218/2017, give rise to the non-uniform, partial or unreasonable administration of the risk management and customs control system under that regime.

7.520. The Panel recalls that it is possible to challenge a legal instrument *as such* under Article X:3(a) of the GATT 1994, when the substantive content of that legal instrument regulates the administration of the rules covered by Article X:1 of the GATT 1994, but that, to establish its claim, the complainant must discharge the burden of substantiating how and why those provisions *necessarily lead to* impermissible administration of the legal instrument in question. The Panel cannot therefore exclude that some aspects of the special import regime in Decree No. 2218/2017 might necessarily lead to the non-uniform, non-impartial or unreasonable administration of that legal instrument, and, in particular, of its risk management and customs control system. An examination therefore follows as to whether Panama has demonstrated that the aspects of the special import regime in Decree No. 2218/2017 that it is challenging *necessarily lead to* impermissible administration of the provisions governing that regime, as contained in Decree No. 2218/2017.

7.4.6.2.3 The question of whether the special import regime in Decree No. 2218/2017 is not being administered uniformly, impartially and reasonably

7.4.6.2.3.1 Introduction

7.521. As previously explained, Panama has made a series of claims of inconsistency with Article X:3(a) of the GATT 1994, with respect to various aspects of the customs control and risk management system of the special import regime, as contained in Decree No. 2218/2017.

7.522. As in the case of the specific bond, Panama has identified two levels of administration with respect to the customs control and risk management system of the special import regime: (a) a first level of administration, which, according to Panama, concerns the determination and regulation of the mechanisms for strengthening the risk management system and customs control in the face of possible customs fraud situations associated with the relevant imports, that is, the requirements of the special import regime such as documentary requirements, the participation of import operations observers, the horizontal rigidity of the regime, and the specific bond; and (b) a second level of administration, which, according to Panama, concerns the specific administrative processes for satisfying these requirements, such as, for example, the procedures necessary for establishing a specific bond, which partially involves the intervention of third parties (banks or insurance companies, translators, lawyers and registry offices).[687]

7.523. Without entering into an examination of the relevance of the classification used by Panama, and with a view to facilitating the analysis of the various claims that have been made, the Panel will use the classification proposed by Panama for the purposes of its analysis.

7.4.6.2.3.2 Panama's claims with respect to the "first level of administration"

Claim with respect to the lack of uniform administration

7.524. Panama makes various claims according to which the special import regime, insofar as the risk management system and customs controls are concerned, is not being administered uniformly because: a) the thresholds are determined on the basis of conversations between government officials and the private sector; b) the thresholds are determined on the basis of four-digit tariff headings; c) the specific bond applies only to the importation of textiles and footwear classified under headings 61, 62 and 64 of Colombia's Customs Tariff at prices equal to or lower than the established thresholds; and d) the amount of coverage of the bond disregards the real value of the goods and uses the threshold price. The Panel will examine each of these arguments below.

7.525. With respect to the first argument, Panama claims that the administration of the risk management system and customs controls of the special import regime is not uniform because,

[687] Panama's second written submission as respondent, para. 348.

given that the thresholds are determined on the basis of conversations between government officials and the private sector, the customs risk management system is administered arbitrarily.[688]

7.526. For its part, Colombia maintains that the methodology was based on the use of technical criteria and was not, as asserted by Panama, agreed with the private sector. Colombia states that the methodology was socialized with the private sector, but at no point was determined jointly with the private sector and the criteria used were not the result of chance.[689]

7.527. As previously explained, the Panel agrees with past panels in considering that the uniformity requirement commits Members to "uniformity of treatment in respect of persons similarly situated"[690] and to consistent and predictable application of the laws.[691]

7.528. It is this Panel's understanding that Panama's argument with respect to the lack of uniformity of the risk management system and customs controls relates to the lack of uniformity in the Colombian customs legislation, owing to the fact that, in Panama's view, the thresholds of the special import regime were established arbitrarily. As observed in Section 7.4.4 above, the possible inconsistency of the administration of the general customs regime with Article X:3(a) of the GATT 1994 does not fall within the Panel's terms of reference. Moreover, as explained in paragraph 7.507 above, Panama's argument according to which Articles 483 and 496 of Decree No. 390/2016 are being administered through Decree No. 2218/2017 is not convincing.

7.529. In the Panel's opinion, the obligation concerning uniform administration in the specific circumstances of this dispute requires Colombia to administer the risk management and customs control system of the special import regime in Decree No. 2218/2017 consistently and predictably, by according uniform treatment to all the covered operations that are in a similar situation. It does not seem to the Panel that the uniform administration requirement of Article X:3(a) of the GATT 1994 obliges Colombia to establish the thresholds of the special import regime in a particular manner.

7.530. Furthermore, the Panel considers that the fact that Colombia announces the thresholds, which correspond to the commercial risk profiles determined by the DIAN, may help to give greater predictability to the special import regime.

7.531. As to the evidence submitted by Panama, the Panel does not consider that a newspaper article relating to textiles, which reports that Colombia's Minister of Trade, Industry and Tourism stated that "[t]he Government and textile companies are exploring tools to assist the sector in the area of customs control, as has been done in the clothing sector"[692] is sufficient evidence to establish that the thresholds are determined on the basis of conversations between government officials and the private sector.

7.532. In any event, as already explained above, a claim with respect to the determination of the thresholds has to do with a substantive characteristic of the special import regime rather than with the way in which that regime is administered.

7.533. For the above reasons, the Panel rejects Panama's argument that the risk management system and customs controls of the special import regime are not uniformly administered because

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[688] Panama presents as evidence an article published in the *Vanguardia* newspaper dated 17 August 2017, referring solely to textiles (yarns), in which the following is stated:

> "The Government and textile companies are exploring tools to assist the sector in the area of customs control, as has been done in the clothing sector", said the Minister.
> Textile companies and the Government will work with the DIAN on the decree, which will set a price threshold for the importation of textile products such that those entering below the specified threshold will be subject to control by the customs authorities.
> The Minister went on to explain that "[t]he limit has not yet been set, but the Ministry is working on it as of now. In due course, the draft decree will be published for 15 days for comments by the various stakeholders, after which, following any observations and adjustments, it will be forwarded for the respective signatures".

("New decree on customs control for textiles to be issued", *Vanguardia* (Exhibit PAN-65)).

[689] Colombia's additional written submission, para. 129.

[690] Panel Report, *US – Stainless Steel (Korea)*, para. 6.51.

[691] Panel Report, *Argentina – Hides and Leather*, para. 11.83.

[692] "New decree on customs control for textiles to be issued", Vanguardia (Exhibit PAN-65).

the thresholds are determined on the basis of conversations between government officials and the private sector.

7.534. Panama also argues as to a lack of uniformity in the administration of the risk management system and customs controls because the thresholds are determined on the basis of four-digit tariff headings. According to Panama, Colombia accords the same treatment to dissimilar products which have as their only common feature the fact of coming under heading 62.03.[693] The Panel recalls that it has already addressed a similar argument with respect to the specific bond. For the same reasons as set out in paragraphs 7.439-7.441 above, in the context of the claims relating to the specific bond, the Panel rejects Panama's argument.

7.535. Panama also claims that the fact of applying the specific bond requirement only to imports with prices equal to or lower than the thresholds and not to imports of other products liable to underinvoicing and smuggling, means that the specific bond, as an aspect of the special import regime, is not being administered uniformly.[694] The Panel refers to its findings on this matter in paragraphs 7.427-7.430 above, in the context of the claims concerning the specific bond, which are equally applicable to consideration of the bond as part of the special import regime. The Panel therefore rejects Panama's argument, in the context of the claims concerning the risk management system and customs controls, that the specific bond requirement is not administered in a uniform manner, owing to the fact that it applies solely to textiles and footwear under headings 61, 62 and 64 with prices equal to or lower than the thresholds, and not to other products similarly situated.

7.536. Panama maintains that concerns that Colombia is treating products with different values in the same way are also generated by the application of the system of risk management and customs controls, since when the value of the imported goods is less than the threshold price, Colombia disregards the real (lower) value of the goods and uses the (higher) threshold price, to obtain an artificially high base price which must then be multiplied by 200%.[695] For the same reasons as set out in paragraphs 7.433-7.436 above in connection with the claims concerning the specific bond, the Panel rejects Panama's argument, in the context of the claims concerning the risk management system and customs controls, that the specific bond requirement is not being administered uniformly because of the bond's amount of coverage.

7.537. In conclusion, with respect to the aspects of the special import regime which Panama characterizes as the "first level of administration", the Panel concludes that Panama has failed to demonstrate that the risk management system and customs controls of the special import regime, as contained in Decree No. 2218/2017, are administered non-uniformly, in a manner inconsistent with Article X:3(a) of the GATT 1994.

Claim with respect to the lack of impartial administration

7.538. Panama makes various claims according to which the special import regime is not being administered impartially owing to: a) the participation of import operations observers in customs controls; and b) the use of the 200% percentage for calculating the coverage amount of the specific bond as part of the special import regime. The Panel will examine each of these arguments below.

7.539. With respect to the first argument, Panama claims that the risk management system and customs controls are not administered impartially, because of the participation of import operations observers in the customs control of the covered goods under Article 3 of Decrees No. 1745/2016 and No. 2218/2017.[696] Panama maintains that the lack of inherent fairness of this aspect is sufficient to demonstrate the existence of partial administration.[697]

7.540. For its part, Colombia maintains that Article 183 of Decree No. 390/2016 establishes that the import operations observers do not represent the interests of traders opposed to importers or exporters, and that the trade associations which propose such observers are also importers or exporters of the goods. Colombia adds that the observers are selected from lists of candidates submitted by the associations, approved by the Joint National Commission for Tax and Customs

[693] Panama's second written submission as respondent, para. 351.
[694] Ibid. para. 352.
[695] Panama's second written submission as respondent, para. 353.
[696] Panama's second written submission as respondent, paras. 354-358.
[697] Ibid. paras. 359-369.

Management and that their function is limited to closely observing the conduct of the process of evaluating a specific type of goods and providing their collaboration and cooperation when requested by the customs authority, including a technical report with respect to the tariff classification of the product, the identification and description of the product, and the quantity, weight and price of the goods. Colombia indicates that, in short, the observer provides support for the customs inspector in carrying out the examination process.[698] Colombia argues that the role of the observer in the importation of goods covered under Decrees No. 1745/2016 and No. 2218/2017 does not favour one party or one side more than another, is objective, unbiased, fair and just, as evidenced by Exhibits COL-16 and COL-21.[699]

7.541. The Panel observes that, pursuant to Article 6 of Decree No. 2218/2017[700], the DIAN shall provide the import operations observers with certain information established by the DIAN itself. Pursuant to Resolution No. 000017 of 22 March 2017[701], issued by the DIAN itself, that information, which is located in the records of the import declarations submitted by the importers of the covered products, consists in: form number, the importer's tax identification number (NIT), the importer's family name and first name or business name, the declarant's tax identification number, business name of the authorized declarant, type of declaration, name of the exporter or supplier abroad, code of the country of provenance, exchange rate, tariff subheading, code of the country of origin, agreement code, gross weight in kilograms, net weight in kilograms, physical unit code, quantity, f.o.b. value in dollars, customs value, self-assessment and description of the goods, declaration acceptance number and date.

7.542. Article 6 of Decree No. 2218/2017 also indicates that the observer "shall provide cooperation and collaboration required by the customs authority, including the technical report, where appropriate, on the tariff classification, identification, quantity, description, weight and price of the goods, among other aspects".

7.543. Furthermore, Article 6 of Decree No. 2218/2017 specifies that the role of the observer "shall be confined to analysing the information and generating alerts to the customs authority, as well as closely monitoring the conduct of the inspection or examination process" with respect to the covered goods. It also specifies that the customs authority shall safeguard the confidentiality of the information, taking into account the content of other relevant legal provisions.

7.544. Article 183 of Decree No. 390/2016[702] and Article 74-1 of Decree No. 2685/1999[703], for their part, specify that the observers shall be selected from lists of candidates submitted by the trade associations, approved by the Joint National Commission for Tax and Customs Management, chaired by Colombia's Minister of Finance.

7.545. As previously explained, the Panel agrees with past panels in considering that the impartial administration requirement in Article X:3(a) relates to the administration of the relevant laws and

[698] Colombia's additional written submission, paras. 133-135.
[699] Colombia's additional written submission, paras. 138-139.
[700] Article 6 of Decree No. 2218/2017 provides as follows:
Import Operations Observers. The National Customs and Excise Directorate shall provide the Import Operations Observers with information to be constituted by resolution of that entity, which shall be issued within sixty (60) calendar days following the entry into force of this Decree; the resolution in question shall also establish the procedure for the provision of the information to the observers.
The observer shall provide cooperation and collaboration required by the customs authority, including the technical report, where appropriate, on the tariff classification, identification, quantity, description, weight and price of the goods, among other aspects.
For the purposes of this Decree, the role of the observer shall be confined to analysing the information and generating alerts to the customs authority, as well as closely monitoring the conduct of the inspection and examination process with respect to goods under the headings listed in Article 3 of this Decree.
The customs authority shall safeguard the confidentiality of the information, taking into account the provisions of the Political Constitution and Laws 863 of 2003 and 1712 of 2014 and other amending or supplementary rules.
[701] Article 1 of Resolution No. 000017/2017 (Exhibit COL-46).
[702] Decree No. 390/2016 (Exhibit PAN-4).
[703] Decree No. 2685/1999 (Exhibit PAN-3).

regulations in a just, fair, objective, unbiased and unprejudiced manner.[704] Therefore, the impartial administration obligation imposed by Article X:3(a) of the GATT 1994, in the specific circumstances of this dispute, requires Colombia to administer its special import regime in Decree No. 2218/2017 in a just, fair, objective, unbiased and unprejudiced manner.

7.546. The Panel recalls that Panama has challenged Decree No. 2218/2017 as an instrument which governs the administration of the special import regime, so that it is for Panama to discharge the burden of substantiating how and why the existence of the role of the observers necessarily leads to non-impartial administration of the special import regime in Decree No. 2218/2017.

7.547. On the basis of the relevant legal provisions, this Panel notes five important characteristics of the role of the import operations observers:

a. They are selected from lists of candidates submitted by the trade associations and approved by the Joint National Commission for Tax and Customs Management.

b. Their function is confined to analysing the information provided by the DIAN and generating alerts to the customs authority, as well as closely monitoring the conduct of the inspection or examination process with respect to the covered goods.

c. As part of those functions, when so requested by the customs authority, they may submit technical reports on the tariff classification, identification, quantity, description, weight and price of the goods, among other aspects.

d. Observers receive detailed information consisting in the importer's personal particulars and information on the products to be imported.

e. The customs authority is duty bound to safeguard the confidentiality of the confidential information, pursuant to Colombia's relevant legislation.

7.548. The Panel also notes that the import operations observers do not decide whether goods are to be subject to the special import regime. In other words, the observers are not empowered to have any say in the operations until the goods are declared to be below the thresholds and have physically arrived in Colombia. When goods are presented to them, there is already, for the Colombian authorities, a suspicion of underinvoicing. Their participation does not, therefore, determine that the special import regime is to be applied.

7.549. The Panel understands that Panama has concerns as to the interests of the import operations observers, their capacity to influence and how the information received is used. However, in the Panel's opinion, the characteristics of the role of the import operations observers, as presented in the relevant legislation, are not sufficient to demonstrate that the existence of that role necessarily leads to non-impartial administration of the special import regime in Decree No. 2218/2017. To be able to determine whether the intervention of the import operations observers leads to non-impartial administration of the special import regime, the Panel would require evidence as to the manner in which the observers are selected in practice, how they cooperate with the customs authority in practice, how they are able to influence the actions of the customs officers, etc. Panama has not provided relevant evidence in that regard. The Panel recalls that claims of violation of Article X:3(a) are serious and "should not be brought lightly"[705], for which reason it rejects Panama's argument that the risk management system and the customs controls of the special import regime are not administered impartially because of the participation of import operations observers.

7.550. With respect to the specific bond requirement as an element of the special import regime, Panama also claims that Colombia's presumption that the value of the customs taxes together with any penalties (principal obligations) will always be equivalent to 200% of the threshold multiplied

[704] Panel Reports, *Thailand – Cigarettes (Philippines)*, para. 7.899 and *China – Raw Materials*, para. 7.694. (The Appellate Body declared the Panel's analysis moot and of no legal effect on procedural grounds.)

[705] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 217. See also Appellate Body Report, *US – Shrimp*, para. 183.

by the quantity of goods in the corresponding shipment is a biased and unfair opinion and therefore results in impartial administration.[706]

7.551. For the same reasons as set out in paragraphs 7.445-7.449 above in relation to the claims concerning the specific bond, the Panel rejects Panama's argument, in the context of the claims concerning the risk management and customs control system, that the specific bond requirement is not administered impartially, because of the coverage amount.

7.552. In conclusion, with respect to the aspects concerning the special import regime which Panama characterizes as the "first level of administration", the Panel concludes that Panama has failed to demonstrate that the risk management system and customs controls of the special import regime in Decree No. 2218/2017 are administered in a non-impartial manner, inconsistently with Article X:3(a) of the GATT 1994.

Claim with respect to the lack of reasonable administration

7.553. Panama makes various claims according to which the special import regime is not administered reasonably owing to: (a) the requirement for an apostilled or legalized official translation of the certification of existence abroad for each shipment; (b) the requirement to provide certification of intention to sell; (c) its rigidity, since importers cannot make changes in the quantity, price or port of entry any later than 30 days before importation and since, in the event of these parameters being modified, a declaration of correction will not be accepted and the goods will be seized; and (d) the requirement to furnish a specific bond in those cases in which there is already a general bond. The Panel will examine each of these arguments below.

7.554. Panama claims that the risk management system and customs controls are not being reasonably administered because the requirement for an apostilled or legalized official translation of the certification of existence abroad for each shipment is unreasonable. For Panama, there is no apparent reason why such certification should be required for each shipment or why copies should not be acceptable.[707]

7.555. Colombia states that it has amply demonstrated the necessity and reasonableness of the requirement for an apostilled or legalized official translation of the "certification of existence abroad" for each shipment in its fight against illicit trading. Colombia maintains that it is important to have certification of existence because many front companies abroad offer to carry out fictitious transactions and customs cooperation is currently insufficient to verify the existence of a foreign supplier.[708]

7.556. As previously explained, the Panel agrees with past panels in considering that the reasonable administration requirement relates to "administration that is equitable, appropriate for the circumstances and based on rationality".[709] Therefore, the obligation concerning reasonable administration imposed by Article X:3(a) of the GATT 1994, in the specific circumstances of this dispute, requires Colombia to administer its special import regime in Decree No. 2218/2017 in a manner that is appropriate for the circumstances and based on rationality.

7.557. The Panel recalls that Panama has challenged Decree No. 2218/2017 as an instrument which governs the administration of the special import regime, so that it is for Panama to discharge the burden of substantiating how and why the requirement to obtain an apostilled or legalized official translation of the certification of existence abroad for each shipment necessarily leads to unreasonable administration of the special import regime in Decree No. 2218/2017.

7.558. In the Panel's opinion, the fact of requiring an apostilled or legalized official translation of the certification of existence abroad for each shipment does not appear to be inherently unreasonable and as such inconsistent with WTO obligations. Panama considers it unreasonable for Colombia to impose this requirement, when it could opt not to require certification for each shipment or to accept copies of the certification. The Panel understands that Panama would prefer that its

[706] Panama's second written submission as respondent, para. 371.
[707] Panama's second written submission as respondent, paras. 372-373.
[708] Colombia's additional written submission, para. 141.
[709] Panel Reports, *China – Raw Materials*, para. 7.696. (The Appellate Body declared the Panel's analysis moot and of no legal effect on procedural grounds.)

commercial operators not have to comply with the requirement to submit an apostilled or legalized official translation of the certification of existence abroad for each shipment. However, it does not find this argument to be sufficient to establish that the requirement in question necessarily leads to unreasonable administration of the risk management and customs control system of the special import regime.

7.559. Furthermore, Colombia has explained that it is important to have a certificate of existence abroad since many front companies abroad offer to carry out fictitious transactions. In the light of this explanation, the Panel does not consider the imposed requirement to be inappropriate for the circumstances or not to be based on rationality.

7.560. For the above reasons, the Panel rejects Panama's argument that the risk management system and customs controls of the special import regime are not being reasonably administered because of the requirement to obtain an apostilled or legalized official translation of the certification of existence abroad for each shipment.

7.561. Panama also alleges lack of reasonable administration of the special import regime because of the requirement to provide certification of intention to sell. Panama considers that the sales invoices already ensure that the supplier declared by the importer is really the source of the imported products and are much more relevant for obtaining this information than the certification of intention to sell because they provide evidence of the final outcome of the transaction.[710]

7.562. Colombia says that it has shown that the sales invoice can easily be forged and does not provide the degree of certainty that Colombia seeks to ensure in controlling its imports, and that numerous abuses in connection with the provision of false information in import documents have led Colombia to request more information.[711]

7.563. The Panel recalls once again that it is for Panama to discharge the burden of substantiating how and why the requirement to provide certification of intention to sell necessarily leads to unreasonable administration of the special import regime in Decree No. 2218/2017.

7.564. As in the previous instance, the Panel does not find the fact of requiring certification of intention to sell to be inherently unreasonable or incoherent and as such inconsistent with WTO obligations. Panama considers it unreasonable for Colombia to impose this requirement, when it could opt not to pursue this requirement and be satisfied with a sales invoice. The Panel understands that Panama would prefer that its commercial operators not have to comply with the requirement to submit certification of intention to sell. However, in its opinion, this argument is insufficient to establish that the requirement in question necessarily leads to unreasonable administration of the risk management and customs control system of the special import regime.

7.565. Furthermore, Colombia has explained that the sales invoice, as an alternative suggested by Panama, can easily be forged and does not provide the degree of certainty that Colombia seeks to ensure in controlling its imports, and that numerous abuses in connection with the provision of false information in import documents have led Colombia to request more information. In the light of this explanation, the Panel does not consider the imposed requirement to be inappropriate for the circumstances or not to be based on rationality.

7.566. For these reasons, the Panel rejects Panama's argument that the risk management and customs control system is not administered reasonably because of the requirement to provide certification of intention to sell.

7.567. Panama also alleges lack of reasonable administration due to the rigidity of the special import regime, since importers cannot make changes in the quantity, price or port of entry any later than 30 days before importation and since, in the event of these parameters being modified, a declaration of correction will not be accepted and the goods will be seized. Panama questions what would be the sense of requiring such detailed information with respect to the quantity and price of the goods 30 days in advance, considering that the advance declaration serves to give early notice of the same information.[712] Comparing it with the regime that is governed by Decree No. 1745/2016, Panama

[710] Panama's second written submission as respondent, para. 374.
[711] Colombia's additional written submission, para. 142.
[712] Panama's second written submission as respondent, paras. 375-381.

maintains that the special regime set out in Decree No. 2218/2017 is worse, owing to the fact that non-compliance with the documentary requirements results in the seizure of the goods, without the possibility of their being legalized, recovered or reshipped, so that a minor error can result in the loss of the goods.[713]

7.568. Colombia maintains that under the Colombian customs regime it is possible to correct and amend a certain kind of minor errors in the import documents, so that Panama is misreading the legislation in question, in particular Article 234 of Decree No. 2685, which permits the correction of the import declaration.[714]

7.569. With regard to reshipment not being permitted and the seizure of the goods, Colombia maintains that Panama is forgetting that these goods are used for the purpose of carrying out illicit trading operations and that allowing reshipment of the goods would lead to the same goods entering through a different Colombian port under false papers. Colombia adds that, considering that the objective of the measure and the reason for it is the control of goods deriving from illegal transactions, the prohibition on reshipment is reasonable in the light of its objective, cause and basis. Colombia adds that if Panama's claim is that the risk management system is unreasonable because it makes it possible to detect violators of Colombian customs law, Panama's argument simply demonstrates the risk that Colombia is trying to prevent, namely that of there being importers who go on deliberately violating the Colombian legislation by laundering money and doing violence to society.[715]

7.570. The Panel recalls that Panama has challenged Decree No. 2218/2017 as an instrument which governs the administration of the special import regime, so that it is for Panama to discharge the burden of substantiating how and why the requirement for information on the quantity, price or port of entry of the goods, 30 days in advance and with subsequent modifications to that information not being permitted, necessarily leads to unreasonable administration of the special import regime in Decree No. 2218/2017.

7.571. In the Panel's opinion, the fact of requiring information on the quantity, price or port of entry of the goods, 30 days in advance and with no subsequent modifications to the information being permitted, does not appear to be inherently unreasonable or incoherent and as such inconsistent with WTO obligations. Panama considers it unreasonable for Colombia to impose this requirement, when it could opt not to require this information 30 days in advance or to allow modifications to the information prior to the arrival of the goods in Colombia. The Panel understands that Panama would prefer that its commercial operators not have to comply with this requirement. However, it does not find this argument to be sufficient to establish that the requirement in question necessarily leads to unreasonable administration of the risk management and customs control system of the special import regime.

7.572. Furthermore, Colombia has explained that the purpose of imposing these documentary requirements is to corroborate, before the arrival of the goods in Colombia, the information contained in the customs declaration, thereby enabling it to conduct a prior risk analysis so that it may take action in cases of import operations suspected of constituting money laundering, and that it is possible to correct and amend a certain kind of minor errors in the import documents.[716] In the light of this explanation, the Panel does not consider the imposed requirement to be inappropriate for the circumstances or not to be based on rationality.

7.573. For these reasons, the Panel rejects Panama's argument that the risk management system and customs controls of the special import regime are not being administered reasonably because of the requirement to provide information on the quantity, price or port of entry of the goods 30 days in advance and because subsequent modifications to that information are not permitted.

7.574. As regards the consequences in the event of failure to submit or the extemporaneous submission of the documents, the Panel does not consider that the requirement of reasonableness makes it incumbent on WTO Members to establish a certain level of penalties for failure to comply

[713] Ibid. paras. 382-387.
[714] Colombia's additional written submission, para. 143.
[715] Colombia's additional written submission, paras. 144-146.
[716] Colombia's response to Panel question No. 48, paras. 231-232; and comments on Panama's response to Panel question No. 48.

with customs obligations. In the Panel's opinion, each WTO Member has the sovereign freedom to establish the level of penalties it deems appropriate for non-compliance with customs obligations.

7.575. For the above reasons, the Panel rejects Panama's argument that the risk management system and customs controls of the special import regime are not administered reasonably because of the consequences of non-compliance.

7.576. Panama also alleges lack of reasonable administration of the special import regime because of the requirement to constitute a specific bond in cases in which there is a general bond.[717] The Panel has already had the opportunity to examine and reject this line of argument by Panama in the context of the claims concerning the specific bond and therefore refers to its reasoning in paragraphs 7.455-7.458 above.

7.577. In conclusion, with respect to the aspects concerning the special import regime which Panama characterizes as the "first level of administration", the Panel finds that Panama has failed to demonstrate that the risk management system and customs controls of the special import regime in Decree No. 2218/2017 are administered unreasonably, in a manner inconsistent with Article X:3(a) of the GATT 1994.

7.4.6.2.3.3 Panama's claims with respect to the "second level of administration"

Claim with respect to the lack of reasonable administration

7.578. Panama only presents an argument concerning the lack of reasonable administration of the special import regime under Article X:3(a) of the GATT 1994 with respect to the second level of administration. In particular, Panama claims that the risk management system and customs controls are not administered reasonably, because Colombia delegates the processing and management of the specific bond to banks and insurance companies, while omitting to establish general criteria for observance by these third parties of the requirements for applying for the specific bond and the considerations relevant to its approval.[718]

7.579. Colombia maintains that the fact that the bond is provided by insurance companies or banks is a logical consequence of the nature of the instrument (insurance contract); and that if instruments of this kind were prohibited by X:3(a) of the GATT 1994, then Article 13 of the Customs Valuation Agreement, Article VII of the GATT and Article 7 of the Trade Facilitation Agreement would be inapplicable. Colombia also maintains that the financial system operates freely, and that insurance companies and banks accord similar treatment in respect of persons similarly situated, depending on the risk.[719]

7.580. As previously explained, the Panel agrees with past panels in considering that the obligation concerning reasonable administration imposed by Article X:3(a) of the GATT 1994, in the specific circumstances of this dispute, requires Colombia to administer the specific bond requirement in Decree No. 2218/2017 in a manner that is appropriate for the circumstances and based on rationality.

7.581. The Panel is not convinced that the fact of requiring that the specific bond for guaranteeing the payment of the customs debts be obtained from a bank or an insurance company is intrinsically unreasonable and therefore inconsistent with WTO Members' obligations. A bank or insurance company bond is established by means of a contractual relationship between private parties, and it is customary for the bank or insurance company to scrutinize the particular situation of the applicant in order to decide, firstly, whether to grant a bond and, secondly, the amount it will charge for that service. Similarly to Panama's claim with respect to a lack of uniform administration, it does not seem that, in the light of Panama's arguments and in the specific circumstances of this dispute, the requirement that the specific bond be administered reasonably can be interpreted as requiring that Colombia establish a level of specific financial regulation for banking or insurance institutions or limit the freedom of those financial institutions to take decisions with respect to their potential customers.

[717] Panama's second written submission as respondent, para. 388.
[718] Panama's second written submission as respondent, para. 390.
[719] Colombia's additional written submission, paras. 124-127.

7.582. For the above reasons, the Panel rejects Panama's argument that the risk management system and customs controls of the special import regime are not administered reasonably because Colombia delegates the processing and management of the specific bond to banks and insurance companies.

7.583. In conclusion, with respect to the aspect concerning the special import regime which Panama characterizes as the "second level of administration", the Panel notes that Panama has failed to establish that the risk management system and customs controls of the special import regime in Decree No. 2218/2017 are administered unreasonably, in a manner inconsistent with Article X:3(a) of the GATT 1994.

7.4.6.2.4 Conclusion concerning the consistency of the administration of the special import regime with Article X:3(a) of the GATT 1994

7.584. For all the reasons given above, the Panel concludes that Panama has failed to demonstrate that the special import regime provided for in Articles 4 to 10 of Decree No. 2218/2017 is administered in a non-uniform, non-impartial or unreasonable manner, inconsistently with Article X:3(a) of the GATT 1994.

7.5 Panama's claims under the Customs Valuation Agreement

7.585. Panama has made claims of inconsistency with the Customs Valuation Agreement with respect to the special import regime and the specific bond. In particular, Panama claims that: (a) the special import regime is inconsistent with Articles 1, 2, 3, 5, 6 and 7.2 (f) of the Customs Valuation Agreement because it operates in practice as an incentive to raise the prices of the goods artificially, introducing *de facto* minimum customs values in violation of those provisions; and that (b) the specific bond is inconsistent with Article 13 of the Customs Valuation Agreement insofar as it is imposed because "it becomes necessary to delay the determination of the value" of the goods, since it would exceed the amount necessary "to cover the ultimate payment of customs duties for which the goods may be liable".[720]

7.586. The Panel will begin by examining the claims relating to the special import regime.

7.5.1 Panama's claims under Articles 1, 2, 3, 5, 6 and 7.2(f) of the Customs Valuation Agreement

7.5.1.1 Arguments of the parties

7.5.1.1.1 Panama

7.587. Panama claims that the special import regime is an instrument created to address import valuation, and that the thresholds reflect what Colombia considers in effect to be a minimum, but genuine, import value, irrespective of the application of the methodologies provided for in Articles 1, 2, 3, 5, 6 and 7 of the Customs Valuation Agreement. Panama maintains that Colombia is rejecting *a priori* any declared value that is equal to or lower than the thresholds it has itself established.[721]

7.588. According to Panama, the facts indicate that Colombia authorizes the release of the goods only if payment of the customs duties is assured for a hypothetical value that is not based on the application of any of the valuation methods provided for in the Customs Valuation Agreement. This would result in a customs valuation for the establishment of a guarantee for customs duties that are to be paid, without this valuation being adjusted to the case-by-case analysis required, based on the particular conditions of each sale. Panama does not consider that Members have given "carte blanche" for the national authorities to establish amounts of coverage not subject to any discipline. Panama maintains that if that were the case, the disciplines of the Customs Valuation Agreement could easily be circumvented by requiring guarantees with a coverage that bears no relation to the primary obligation that has to be guaranteed.[722]

[720] Panama's request for the establishment of a panel, WT/DS461/22, sections II.A(ii) and II.D(ii).
[721] Panama's second written submission as respondent, paras. 436 and 450.
[722] Panama's opening statement at the meeting of the Panel, paras. 26 and 29.

7.589. Panama bases part of its argument on the conclusions of the panel report in *Colombia – Ports of Entry*, as it considers that the system of reference prices (indicative prices) in that dispute has the same characteristics in terms of product scope and lack of sensitivity to product differences or the specific circumstances of transactions as in this case.[723] In Panama's view, the thresholds do not reflect any of the valuation methods set out in the Customs Valuation Agreement or take into account the individual circumstances of the imports. According to Panama, an importer declaring a value equal to or lower than the thresholds would inevitably be made subject to prohibitive consequences for importation, and its options would be even more limited than in *Colombia – Ports of Entry*, as "correction" and re-exportation would be impossible.[724] Consequently, Panama contends that either customs duties are collected on the basis of a value higher than the thresholds, or the goods are not imported into Colombian customs territory. In practice, customs duties should not be collected on the basis of a value equal to or below the thresholds, which amounts to saying that the thresholds operate as "minimum prices" that are inconsistent with Article 7.2(f) of the Customs Valuation Agreement.[725] Panama therefore claims that by its design, structure and architecture, the special import regime would penalize the importation of products for which the price actually paid or payable, or another price resulting from the application of other valuation methods, is equal to or below the thresholds.[726]

7.590. Panama adds that, in the context of this market, importing goods at higher prices would certainly be a commercially viable option. Panama would not, however, consider this a legally viable option for importers. In any case, Panama suggests that if Colombia were to contend that such "overvaluation" or "correction" took place with a view to avoiding the application of the special import regime, it would take this as an acknowledgement that the effect of this regime is such that it has led importers to ignore the "price actually paid or payable" for their goods and accept the minimum value given by the thresholds.[727]

7.591. Panama also puts forward arguments regarding the specific bond, as, in its understanding, this bond is systematically required on the basis of the thresholds for all imports, and is required in consideration of the final collection of customs duties.[728] Panama takes the view that if a customs authority considers it necessary to delay the final determination of the customs value, and thus to require a guarantee if the importer decides to withdraw the goods, the establishment of this guarantee must be subject to the disciplines of the Customs Valuation Agreement, in particular Articles 1, 2, 3, 5, 6 and 7.[729] In this respect, Panama states that the determination of the coverage of the specific bond takes not the slightest account of the substantive provisions governing the determination of the value of the goods. Panama points out that in *Colombia – Ports of Entry*, the panel confirmed that the customs authorities were required to apply the valuation methods on a case-by-case basis, so as to reflect the particular conditions of the sale in question.[730]

7.592. Panama sees no reason why this principle does not apply to the determination of the coverage of a guarantee under Article 13 of the Customs Valuation Agreement. Panama notes, however, that this case-by-case consideration is impossible to observe when coverage is required *a priori* for the specific bond, as this coverage is predetermined on a fixed basis in the text of Article 7 of Decree No. 2218/2017, which, by definition, does not take into consideration the particular circumstances of each import. Panama takes the view that without making this evaluation, the Colombian authorities would not have the necessary information to implement the valuation methods of the Customs Valuation Agreement and establish whether or not it is necessary to delay the valuation, and determine the appropriate scope of the guarantee.[731] In Panama's view, establishing two absolute, fixed and unique factors (both the figure of 200% and the threshold amount) for a range of products and transactions of different types, with no possibility of adjusting them to the

[723] Panama's second written submission as respondent, paras. 454-455 (referring to Panel Report, *Colombia – Ports of Entry*, paras. 7.142 and 7.150).
[724] Panama's second written submission as respondent, para. 456.
[725] Ibid. para. 457.
[726] Ibid. para. 458.
[727] Panama's second written submission as respondent, paras. 459-460.
[728] Ibid. para. 461.
[729] Panama's comments on Colombia's response to Panel question No. 61.
[730] Panama refers to Panel Report, *Colombia – Ports of Entry*, para. 7.142. (Panama's second written submission as respondent, para. 462.)
[731] Panama's second written submission as respondent, paras. 463-464.

circumstances of each transaction, would not allow for the use of the valuation methods provided for in the Customs Valuation Agreement.[732]

7.593. Independently of this, Panama notes that Article 222 of Resolution No. 4240[733] regulates the time of valuation under Colombian law, which would be the date of physical inspection or the date when the import declaration is submitted. Panama therefore maintains that by establishing *a priori* that the coverage shall be established on the basis of criteria that do not form part of the case-by-case analysis, Colombia is acting inconsistently with Articles 1, 2, 3, 5, 6 and 7 of the Customs Valuation Agreement.[734]

7.5.1.1.2 Colombia

7.594. Colombia argues that Panama's claim would not be supported by these provisions. According to Colombia, while Articles 1 to 7 of the Customs Valuation Agreement establish customs valuation methods, they do not regulate the time of the valuation or establish the exclusive criteria that could result in a customs authority delaying the valuation; nor do they regulate the amount of the guarantees that may be required by a customs authority. Colombia emphasizes that Decrees No. 1745/2016 and No. 2218/2017 bear no relation to valuation methods and that the Colombian customs authorities correctly apply the methods established in the Customs Valuation Agreement.[735]

7.595. According to Colombia, the methodologies established in Article 1 *et seq*. of the Customs Valuation Agreement concerning transaction value are applicable to valuation disputes arising during the process of inspection or examination referred to in Decree No. 2218/2017. Therefore, Panama's assertion that the special import regime is an instrument created to address import valuation and that the thresholds reflect a minimum import value regardless of the provisions of the Customs Valuation Agreement is incorrect. Colombia maintains that the thresholds established in Decrees No. 1745/2016 and No. 2218/2017 do not constitute a price standard or minimum prices, and do not judge the acceptability of the declared price.[736]

7.5.1.2 Analysis by the Panel

7.596. The Panel's task is to determine whether, as Panama alleges, the special import regime with the characteristics described in Decree No. 2218/2017 is inconsistent with Articles 1, 2, 3, 5, 6 and 7.2(f) of the Customs Valuation Agreement because it operates in practice as an incentive to raise the prices of the goods artificially, introducing *de facto* minimum customs values in violation of these provisions.[737] Colombia submits that Panama's claim would not be supported by these provisions because Decree No. 2218/2017 does not relate to valuation methods.[738]

7.597. The Panel therefore notes that the parties disagree with respect to the application of Customs Valuation Agreement Articles 1, 2, 3, 5, 6 and 7.2(f) to the special import regime, specifically on the question of whether Colombia would be conducting a customs valuation by using the thresholds in Decree No. 2218/2017. Given that the provisions invoked by Panama (Articles 1, 2, 3, 5, 6 and 7.2(f) of the Customs Valuation Agreement) establish the various valuation methods permitted under the Customs Valuation Agreement, it will be necessary to begin by resolving whether Colombia's use of the thresholds constitutes customs valuation. If, indeed, the Panel were to determine that it did not constitute customs valuation, the provisions invoked by Panama would not be applicable, as maintained by Colombia.

[732] Panama's opening statement at the meeting of the Panel, para. 28.
[733] Article 222 provides that "[f]or the purpose of determining the customs value of imported goods, the time of valuation shall be taken to be the date of physical inspection prior to release or, failing that, the date of submission of the import declaration". (Resolution No. 4240/2000 (Exhibit PAN-40)).
[734] Panama's comments on Colombia's response to Panel question No. 61.
[735] Colombia's additional written submission, paras. 160-161 and 171; and statement as respondent at the meeting of the Panel, paras. 52-53.
[736] Colombia's additional written submission, paras. 169-170.
[737] Panama's request for the establishment of a panel, WT/DS461/22, section II.D(ii).
[738] Colombia's additional written submission, paras. 160-161 and 171; and statement as respondent at the meeting of the Panel, paras. 52-53.

7.5.1.2.1 The question of whether the use of the thresholds of Decree No. 2218/2017 constitutes customs valuation

7.598. As indicated above, Articles 1, 2, 3, 5, 6 and 7.2(f) of the Customs Valuation Agreement establish the various valuation methods permitted under the Agreement. Broadly speaking, these valuation methods are to be used in sequential order, with the transaction value holding primacy as a valuation method (Article 1). Where the transaction value of the imported goods cannot be used, the valuation methods provided for in Article 2 (transaction value of identical goods), Article 3 (transaction value of similar goods), Article 5 (deductive method) and Article 6 (computed value) must be used. Pursuant to Article 7 of the Agreement, if the customs value cannot be determined using these valuation methods, the customs authorities have to determine the value using reasonable means consistent with the principles and general provisions of the Customs Valuation Agreement and the GATT 1994 and on the basis of data available in the country of importation. In any event, the value may not be based on certain elements listed in paragraph 2 of the Article, which include "minimum customs values" (Article 7.2(f)).

7.599. Regarding what is meant by "customs valuation", the Panel notes that the Customs Valuation Agreement does not provide a definition for this concept. The term "customs value of imported goods" is, however, defined in Article 15.1(a) of the Agreement as "the value of goods for the purposes of levying *ad valorem* duties of customs on imported goods". The Panel agrees with the analysis made by a previous panel in that "customs valuation" should be understood as the process of determining the monetary worth or price of imported goods for the purpose of levying customs duties.[739] Therefore, the two central aspects within the concept of customs valuation are (a) the value of the goods, which is used (b) for the purposes of levying *ad valorem* customs duties.[740]

7.600. The Panel will examine whether the thresholds established in Decree No. 2218/2017 represent the "value of the goods" and whether Colombia's customs authorities collect customs duties on the basis of these thresholds.

7.601. The Panel notes that, according to Panama, there would be only two possible scenarios when the declared f.o.b. import price for products subject to Decree No. 2218/2017 is equal to or below the thresholds set out in that decree: either customs duties are collected on the basis of a value higher than the thresholds, or the goods do not enter Colombian territory.[741]

7.602. On examination, it is seen that the text of Decree No. 2218/2017 does not provide that payable customs duties shall be calculated on the basis of the thresholds, or that these thresholds shall replace the declared values for obtaining the transaction value. According to Article 3 of the decree, as examined above in paragraph 2.35. of this Report, the thresholds are used to determine whether the measures contemplated in the decree have to be applied to a particular import, that is,

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[739] In *Colombia – Ports of Entry*, the panel reasoned as follows:

> The Panel notes that the *Customs Valuation Agreement* does not provide a definition for customs valuation. Article 15 of the *Customs Valuation Agreement* does however include a definition of "customs value". The term "customs value of imported goods" is defined in Article 15.1(a) of the *Customs Valuation Agreement* as "the value of the goods for the purposes of levying *ad valorem* duties of customs on imported goods". The Panel believes that this definition of customs value is useful in understanding what customs valuation means within the *Customs Valuation Agreement*. Following Article 31 of the *Vienna Convention on the Law of Treaties*" ("VCLT"), the Panel shall look at the ordinary meaning of the relevant concepts present in this definition.
>
> The Panel will first assess the concept of "valuation" which is defined as "[t]he action of estimating or fixing the monetary value of something" or as "[t]he process of determining the value of a thing or entity". The term "value", in turn, is defined in the *Oxford English Dictionary* as "[t]hat amount of a commodity, medium of exchange, etc., considered to be an equivalent for something else" and the term "value" is defined in the *Black's Law Dictionary* as "[t]he monetary worth or price of something; the amount of goods, services or money that something will command in an exchange".
>
> In light of the dictionary definitions of valuation and value, as well as the definition of customs value provided in Article 15 of the *Customs Valuation Agreement*, the Panel considers that the ordinary meaning of the concept of customs valuation is straightforward. Essentially, customs valuation involves the process of determining the monetary worth or price of imported goods for the purpose of levying customs duties.

(Panel Report, *Colombia – Ports of Entry*, paras. 7.81-7.83 (footnotes omitted)).

[740] This conclusion is also reached in Panel Report, *Colombia – Ports of Entry*, para. 7.84.

[741] Panama's second written submission as respondent, para. 457.

whether the special import regime has to be applied.[742] As analysed in section 2.3.3.3 above, this regime considers a number of aspects, including additional documentary and certification requirements, the presence of import operations observers and the provision of the specific bond. In the Panel's opinion, none of the aspects of the special import regime refer to the determination of the customs value of imported goods within the meaning of Article 15.1 of the Customs Valuation Agreement.

7.603. Regarding Panama's references to the panel report in *Colombia – Ports of Entry*, the Panel notes that there are certain key differences between the role of the thresholds of Decree No. 2218/2017 and the role of the indicative prices in that dispute. The main difference is that under Decree No. 2218/2017, importers of goods are not required to pay customs duties in an amount determined on the basis of the thresholds, as was the case with the indicative prices in that dispute. On the contrary, in the present case, the *ad valorem* customs duties to be paid by an importer are to be determined in accordance with the general rules of Colombian customs law.

7.604. Thus, the Panel does not consider there to be an *a priori* rejection of any declared value equal to or below the thresholds established in the decree, nor does it consider that the special import regime imposes on the imports concerned customs duties higher than those due. The Panel finds no support for Panama's assertion that the thresholds established in the decree operate as minimum prices. The Panel considers that Panama has failed to provide evidence to demonstrate that importers of the products classified in Decree No. 2218/2017 whose declared f.o.b. price was equal to or below the established thresholds, have been required to pay *ad valorem* customs duties higher than those that would be payable according to the respective transaction value or another price resulting from the application of the valuation methods of the Customs Valuation Agreement.

7.605. As mentioned above in paragraph 7.217, Colombia's DIAN reported that since the entry into force of Decree No. 2218/2017, a total of 105 import declarations with declared prices equal to or below the thresholds established in the decree (corresponding to 76% of total imports with values equal to or below the thresholds) have obtained release authorization from the Colombian authorities and that valuation disputes have arisen in only 12 of those cases.[743] In the Panel's view, this means that in all the other cases where no valuation dispute arose, the value declared by the importer was ultimately the value accepted as the customs value and used to determine the *ad valorem* customs duties payable. The existence of these imports would thus appear to prove that the thresholds established in Decree No. 2218/2017 do not operate as "minimum prices".[744]

7.606. In light of the foregoing, it is the Panel's understanding that the final amount of the *ad valorem* customs duties accruing from the importation of the products classified in Decree No. 2218/2017 with a declared f.o.b. price equal to or below the thresholds established therein, does not depend on these thresholds. Therefore, the thresholds do *not* constitute *the value* of the goods, which is used for the purposes of *levying ad valorem* customs duties.

7.607. Panama also argues that if a customs authority considers it necessary to delay the final determination of customs value and to require a guarantee for the withdrawal of the goods, the establishment of this guarantee should be subject to the disciplines of Articles 1, 2, 3, 5, 6 and 7 of the Customs Valuation Agreement. In that case, Colombia would be in violation of this obligation, since, according to Panama, the coverage of the specific bond would have been predetermined on the basis of fixed absolute factors, without taking into account the specific circumstances of each import.[745]

7.608. While there is a link between the guarantee and the valuation methods insofar as the final amount of the customs duties in respect of which the guarantee assures payment will have to be determined in accordance with these valuation methods, the Panel does not find any provision in the text of the relevant articles of the Customs Valuation Agreement that requires a Member's

[742] This is also noted by Panama when stating that "[t]he result of this comparison in the sense that the declared value is equal to or lower than the threshold, will necessarily lead to the application of [the] special import regime". (Panama's second written submission as respondent, para. 452.)

[743] Figures for goods imports under Decree No. 2218/2017 (Exhibit COL-61).

[744] Furthermore, during the period November-December 2017, the DIAN reported 802 clothing and footwear declarations below the respective thresholds. Only 49 of these declarations are the subject of ongoing valuation dispute investigations. (Colombia's response to Panel question No. 6(a), para. 20, and 6(c), para. 22; and List of 802 import declarations (Exhibit COL-39)).

[745] Panama's second written submission as respondent, paras. 463-464.

customs authorities to use the valuation methods established in Articles 1, 2, 3, 5, 6 and 7 of the Agreement in order to determine the coverage of a guarantee that permits goods to be withdrawn. The Panel is therefore not convinced by Panama's argument that a customs valuation is being conducted for the establishment of the specific bond.

7.609. The Panel takes the view that the provision of a valuation dispute guarantee must be requested, by definition, before the final value of the goods has been clarified in accordance with the valuation methods established in the above-mentioned Articles. In the same way, Article 13 of the Customs Valuation Agreement, for example, refers to the possibility of withdrawing imported goods upon the posting of a guarantee "[i]f, in the course of determining the customs value of imported goods, it becomes necessary to delay the final determination of such customs value". As mentioned above in paragraph 7.232, in the event of a dispute concerning the value of the goods where there is a suspicion of underinvoicing, the amount of the guarantee is understandably calculated on the basis of an approximate reference value. In view of the foregoing, it is the Panel's understanding that the determination of the coverage of the specific bond does not correspond to customs valuation and does not therefore need to be subject to the valuation methods of Articles 1, 2, 3, 5, 6 and 7 of the Customs Valuation Agreement.

7.5.1.3 Conclusion

7.610. For the reasons set out above, the Panel concludes that Panama has failed to demonstrate that the thresholds established in Decree No. 2218/2017 represent the "value of goods" by virtue of which Colombia's customs authorities collect customs duties, or that the use of the thresholds corresponds to a customs valuation operation or that the special import regime operates as an incentive to raise the prices of goods artificially.

7.611. The Panel therefore concludes that the special import regime provided for in Articles 4 to 10 of Decree No. 2218/2017 does not fall within the scope of Articles 1, 2, 3, 5, 6 and 7.2(f) of the Customs Valuation Agreement in the manner described by Panama. Consequently, the Panel rejects Panama's claims under each of those articles.

7.5.2 Panama's claims under Article 13 of the Customs Valuation Agreement

7.5.2.1 Arguments of the parties

7.5.2.1.1 Panama

7.612. Panama claims that the specific bond is inconsistent with Article 13 of the Customs Valuation Agreement insofar as it is imposed because "it becomes necessary to delay the determination of the value" of the goods, in that it would exceed the amount necessary "to cover the ultimate payment of customs duties for which the goods may be liable".[746]

7.613. Regarding the inconsistency of the specific bond described in both decrees with Article 13 of the Customs Valuation Agreement, Panama argues that the specific bond requirement and the bond's coverage would not be in keeping with the case-by-case approach required by that article. Panama argues that the coverage of the specific bond would not meet the requirement to cover the "ultimate payment of customs duties for which the goods may be liable". In Panama's view, this provision does not foresee the possibility of requiring a guarantee beyond that which relates to the payment of customs duties. The 200% coverage required by Colombia would exceed the scope of Article 13, as it would not take into account the circumstances of each and every case.[747] According to Panama, Article 13 would not authorize the requirement of a guarantee to cover penalties, for example, and Article 7.3.4 of the Trade Facilitation Agreement would allow for a customs guarantee to be required to cover penalties only "[i]n cases where an offence ... has been detected".[748]

7.614. For Panama, the use of the threshold as reference value is not in keeping with specific import characteristics and is not therefore a valid reference value for determining the coverage of the guarantee. In Panama's view, if the threshold were the relevant criterion for determining acceptable

[746] Panama's request for the establishment of a panel, WT/DS461/22, section II.A(ii).
[747] Panama's second written submission as respondent, para. 468.
[748] Ibid. para. 469; and Panama's opening statement at the meeting of the Panel, para. 30. (emphasis original)

values, the coverage of the specific bond would have to be established for the amount of the duties to be levied on the basis of a value slightly higher that the threshold, minus the customs duties paid on the basis of the declared value. Panama concludes that, in that case, the coverage amount would be less than the coverage of 200% of the threshold price for the quantity imported (Decree No. 1745/2016), or 200% of the difference between the threshold price and the value declared for the imported quantity (Decree No. 2218/2017).[749]

7.615. Lastly, Panama also notes that Colombia might not require the collection of customs duties for products entering from countries with which Colombia has signed economic integration agreements. If the reason for the specific bond were the need to ensure due payment of customs duties, there would be no need to require this bond for imports to Colombia that receive duty-free treatment, as those customs duties would not exist.[750]

7.5.2.1.2 Colombia

7.616. Colombia maintains, first of all, that Article 13 should be understood in the context of Article 17 of the Customs Valuation Agreement, which stipulates that nothing in the Agreement may be read as restricting the rights of customs administrations to check information presented in relation to value.[751]

7.617. Colombia cites the panel report in *US − Certain EC Products*, stating that this clarified that "Article 13 of the Customs Valuation Agreement allows for a guarantee system when there is uncertainty regarding the customs value of the imported products, but is not concerned with the level of tariff obligations as such".[752]

7.618. Colombia adds that the guarantee under Decree No. 2218/2017 is also based on the criterion of sufficiency. The uncertain future event of Decree No. 2218/2017 corresponds to the customs taxes and penalties that may apply. The insured event is the potential payment of obligations that forms part of the condition of uncertainty and that takes place after the release of the goods, and for a period of up to three years, which ensures that the DIAN has effective control. As with any other insurance contract, the future and uncertain event may result in the payment of an amount less than, equal to or greater than the maximum amount of the guarantee.[753]

7.619. Colombia goes on to say that as with any other insurance contract, the future and uncertain event is indeterminate, which is why a maximum reference value is needed; in this case, the maximum reference value is the legal provision of 200%. This percentage is an indicator, as it is impossible, when a dispute arises, to determine with millimetric precision *a priori* what the value to be paid might be in the hypothetical event of a penalty being imposed for an administrative customs offence, or an official value correction or revision assessment in accordance with the procedure set forth in the customs regulations. Colombia adds that in Decree No. 2218/2017, the amount of the guarantee is reduced, which means that in some cases where the penalty is very high, it may not be possible to cover the total payment of penalties.[754]

7.620. Colombia states that to read Article 13 of the Customs Valuation Agreement as a provision that prohibits guarantees to cover other duties or penalties is very limited. The fact that Article 13 contemplates the use of guarantees expressly for the payment of customs duties does not mean that the use of guarantees to cover other taxes or penalties is prohibited. This reading would be logical, since the purpose of the guarantee is to ensure that any obligations the importer may have towards the customs authority are met.[755]

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[749] Panama's second written submission as respondent, paras. 470-471.
[750] Panama's opening statement at the meeting of the Panel, para. 31.
[751] Colombia's additional written submission, para. 174; and opening statement as respondent at the meeting of the Panel, para. 55. Article 17 of the Customs Valuation Agreement reads as follows:
> Nothing in this Agreement shall be construed as restricting or calling into question the rights of customs administrations to satisfy themselves as to the truth or accuracy of any statement, document or declaration presented for customs valuation purposes.

[752] Colombia's additional written submission, para. 176 (citing Panel Report, *US − Certain EC Products*, para. 6.77).
[753] Ibid. paras. 178-179.
[754] Ibid. paras. 184-186.
[755] Colombia's additional written submission, para. 188.

7.621. Colombia adds that Members have not interpreted Article 13 in such a restrictive manner. The Trade Facilitation Agreement is not in force for Colombia, and yet it is clear to Colombia that its measures can also be explained in the light of that instrument. Article 7.3 of the Trade Facilitation Agreement establishes that: "As a condition for such release, a Member may require [...] a guarantee in the form of a surety, a deposit, or another appropriate instrument provided for in its laws and regulations". Article 7.3.3 provides that: "Such guarantee shall not be greater than the amount the Member requires to ensure payment of customs duties, taxes, fees, and charges ultimately due for the goods covered by the guarantee". Article 7.3.4 elaborates on this notion by addressing penalties and, regarding this particular aspect, stipulates that a guarantee may be required for any penalties and fines imposed by the customs authority, establishing that: "In cases where an offence requiring imposition of monetary penalties or fines has been detected, a guarantee may be required for the penalties and fines that may be imposed". In Colombia's view, this shows that WTO Members have recognized that the customs authorities may require a guarantee not only to cover the payment of customs duties, but also to cover taxes, fees and charges, and penalties. In short, Colombia contends that its measures fulfil the obligation to establish the guarantee and its operation, while enabling these guarantees to serve the purpose of covering customs duties and the penalties that may result from offences committed during the conduct of these proceedings.[756]

7.622. Colombia maintains that claiming that Article 7.3.4 of the Trade Facilitation Agreement allows a customs guarantee to be imposed to cover penalties only in "cases where an offence [...] has been detected" is an interpretation inconsistent with the very nature of a guarantee, the purpose of which is to cover the eventuality provided for in the insurance contract. Customs offences cannot be detected in advance, as the procedure required would be costly. The above-mentioned provisions cannot be read to mean that the customs authority predicts the final value to be paid. The most it can do is to make a reasonable estimate of what that final value would be, which in the case under examination is established through the Colombian measures. A customs authority is not required to perfectly anticipate the results of a value determination that has not yet been concluded, insofar as it entails the application in time of an exhaustive valuation methodology.[757]

7.623. Colombia concludes that Article 13 of the Customs Valuation Agreement and Article 7.3 of the Trade Facilitation Agreement expressly permit the use of guarantees to cover the payment of tariffs, taxes and penalties.[758]

7.5.2.2 Analysis by the Panel

7.624. The Panel's task is to determine whether, as Panama claims, the specific bond is inconsistent with Article 13 of the Agreement on Customs Valuation insofar as it is imposed because "it becomes necessary to delay the determination of the value" of the goods, in that it would exceed the amount necessary "to cover the ultimate payment of customs duties for which the goods may be liable".[759] Colombia contends that WTO Members are entitled to require a guarantee for payment of customs duties, fees and charges, and penalties, and that the specific bond is based on the sufficiency criterion to cover these obligations.

7.625. The Panel will begin by examining the relevant legal provision and the applicable legal standard.

7.5.2.2.1 Text of Article 13 of the Customs Valuation Agreement

7.626. Article 13 of the Customs Valuation Agreement stipulates the following:

> If, in the course of determining the customs value of imported goods, it becomes necessary to delay the final determination of such customs value, the importer of the goods shall nevertheless be able to withdraw them from customs if, where so required, the importer provides sufficient guarantee in the form of a surety, a deposit or some other appropriate instrument, covering the ultimate payment of customs duties for

[756] Colombia's additional written submission, para. 189; and opening statement as respondent at the meeting of the Panel, para. 59.
[757] Colombia's additional written submission, para. 190; and Colombia's opening statement as respondent at the meeting of the Panel, para. 60. (emphasis original)
[758] Colombia's closing statement as respondent at the meeting of the Panel, para. 1.
[759] Panama's request for the establishment of a panel, WT/DS461/22, section II.A(ii).

which the goods may be liable. The legislation of each Member shall make provisions for such circumstances.

7.627. This provision therefore enables importers to withdraw goods in situations where their value is questioned, through the provision of a guarantee.

7.5.2.2.2 The legal standard under Article 13 of the Customs Valuation Agreement

7.628. Article 13 of the Customs Valuation Agreement enables importers to withdraw imported goods on which a determination is pending, upon provision of sufficient guarantee where so required by the customs authority.[760] In customs administration, security is required upon entry of merchandise when there is some uncertainty about the actual amount of liability that may be lawfully owed by the importer. Such a security is intended to provide a protection against the non-payment risk that might arise from the differences between the amount collected at the time of importation and the liability that may be finally determined.[761]

7.629. The Panel notes that the Article 13 guarantee is not concerned with the level of tariff obligations as such, since the guarantee is provided specifically when there is uncertainty regarding the ultimate actual amount of the customs duties due, for the purpose of securing their payment.[762]

7.630. It follows from the text of Article 13 of the Customs Valuation Agreement that the guarantee must be sufficient, take the form of a surety, a deposit or some other appropriate instrument, and cover the ultimate payment of customs duties for which the goods may be liable.

7.631. The Panel will analyse whether the specific bond fails to meet the requirements of Article 13 of the Customs Valuation Agreement.

7.5.2.2.3 The question of whether the specific bond is inconsistent with Article 13 of the Customs Valuation Agreement

7.632. Article 13 of the Customs Valuation Agreement gives importers the right to withdraw goods from customs even where it has been necessary "to delay the final determination of such customs value". The Panel notes that Panama does not claim that this possibility does not exist for importers or that the Colombian customs authorities do not allow such withdrawal. Panama's claims relate to the second aspect of this article. That is, the obligation of importers to provide sufficient guarantee in the form of a surety, a deposit or some other appropriate instrument, covering the ultimate payment of customs duties for which the imported goods may be liable, where so required.

7.633. As stated in paragraph 7.630 above, the guarantee must be sufficient, take the form of a surety, a deposit or some other appropriate instrument, and cover the ultimate payment of customs duties for which the goods may be liable. The focus of Panama's claims is that the coverage of the specific guarantee would not meet the requirement of "covering the ultimate payment of customs duties for which the goods may be liable". Panama considers that the calculation of the guarantee's coverage does not take into account the circumstances of each case. Panama also claims that Article 13 of the Customs Valuation Agreement does not foresee the possibility of requiring a guarantee amount beyond that which relates to the payment of customs duties, to cover possible penalties, for example. Regarding the latter claim by Panama, the Panel observes that Panama refers

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[760] In *Thailand – Cigarettes (Philippines)*, the panel reasoned that:

> The determination to impose a guarantee under Article 13 of the Customs Valuation Agreement is not a mandatory procedural step that needs to be taken to arrive at a final customs value. Rather, as the text of Article 13 stipulates, a guarantee is a tool in the form of a surety or a deposit that enables importers to withdraw their goods from customs when it becomes necessary for a customs office to delay the final determination of the customs value of the imported goods. The guarantee should also be sufficient to cover the customs duties for which the goods may ultimately be liable.
>
> In this context, we consider that the imposition of a guarantee is a distinct decision purported to play a specific role, namely to secure the payment of final customs duty.

(Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.1039.)

[761] Appellate Body Report, *US – Shrimp (Thailand) / US – Customs Bond Directive*, para. 221.

[762] Panel Report, *US – Certain EC Products*, para. 6.77.

to provisions of the Trade Facilitation Agreement to interpret the obligations under Article 13 of the Customs Valuation Agreement.

7.634. Colombia, for its part, claims that the fact that Article 13 of the Customs Valuation Agreement contemplates the use of guarantees expressly for the payment of customs duties does not mean that the use of guarantees to cover other taxes or penalties is prohibited. A textual analysis of the provision and the absence of exceptions or prohibitions therein would appear to indicate that, as argued by Colombia, such a prohibition does not exist. Furthermore, an analysis of the immediate context of Article 13, that is, the other provisions of the Customs Valuation Agreement, supports such a conclusion.

7.635. Panama requests that the Panel interpret the scope of Article 13 of the Customs Valuation Agreement taking into account the wording of Article 7.3.4 of the Trade Facilitation Agreement. According to Panama, this would lead the Panel to conclude that Article 13 of the Customs Valuation Agreement should be interpreted as prohibiting the imposition of guarantees that cover possible penalties in cases where an offence has not yet been detected. Leaving aside the question of whether a provision of the Trade Facilitation Agreement may serve as context for the interpretation of a provision of the Customs Valuation Agreement when one of the parties has not ratified the former, it does not seem to the Panel that the wording of Article 7.3.4 supports Panama's conclusion. Indeed, the article in question provides that "[i]n cases where an offence requiring imposition of monetary penalties or fines has been detected, a guarantee may be required for the penalties and fines that may be imposed." The provision allows a guarantee to be required where an offence has been detected. It does not indicate that a guarantee may be required only in that situation.

7.636. The Panel agrees with Colombia in that the fact that Article 13 of the Customs Valuation Agreement contemplates the use of guarantees expressly for the payment of customs duties does not mean that the use of guarantees to cover other taxes or penalties is prohibited under that article.

7.637. Regarding Panama's claims relating to the calculation of the coverage of the guarantee, the Panel reiterates that, in accordance with Article 7 of Decree No. 2218/2017, the amount of the specific bond corresponds to 200% of the difference between the declared f.o.b. price and the result of multiplying the unit price of the respective threshold by the quantity imported. In the Panel's view, this shows that the amount of the specific bond is not a fixed value for all cases, but that it actually varies for each import, since a key element in its calculation is the difference between the declared f.o.b. price and the respective threshold. As is logical, the declared f.o.b. price is specific to each import and does not depend on the customs authorities, which makes it a factor determined on a case-by-case basis.

7.638. Panama maintains that the use of the threshold as a reference value is not in keeping with specific import characteristics and that it is not therefore a valid reference value for determining the coverage of the guarantee. According to Panama, if the threshold were the relevant criterion for determining acceptable values, the coverage of the specific bond would have to be established for the amount of the duties to be levied on the basis of a value slightly higher than the threshold, minus the customs duties paid on the basis of the declared value.

7.639. In this regard, the Panel notes that, as indicated above, Article 13 of the Customs Valuation Agreement refers to "sufficient" guarantee. Colombia in fact claims that the guarantee under Decree No. 2218/2017 is based precisely on the criterion of sufficiency. In this respect, Colombia explains that the future event insured by the guarantee is the payment of customs taxes and any penalties that may apply, and that, as with any other insurance contract, the future and uncertain event may result in the payment of an amount less than, equal to or greater than the maximum amount of the guarantee.[763]

7.640. The Panel echoes the Appellate Body's ruling in this respect in that "in customs administration, security is required upon entry of merchandise when there is some uncertainty about the actual amount of liability that may be lawfully owed by the importer".[764] Strictly speaking, practically any hypothetical exercise could demonstrate that the guarantee will hardly ever coincide

[763] To support this assertion, Colombia provides an actual example of a clothing import under heading 62.10 with a declared f.o.b. price lower than the respective threshold. (Colombia's additional written submission, paras. 180-183; and Colombiana Kimberly Colpapel insurance policy (Exhibit COL-17)).

[764] Appellate Body Report, *US – Shrimp (Thailand) / US – Customs Bond Directive*, para. 221.

exactly with the amount ultimately payable by an importer. As pointed out by Colombia, it is impossible, when a dispute arises, to determine with millimetric precision *a priori* what the value to be paid might be in the hypothetical event that a penalty were to be imposed. It cannot be excluded that in some cases where penalties are very high, the guarantee might not cover their payment. This would occur in particular where the difference between the declared f.o.b. price and the respective threshold was small. In this regard, it should be noted that, according to Colombia, the penalties for non-compliance in certain cases can be as high as 150% or 200% of the assessed value of the imported goods.[765]

7.641. The Panel recalls that Article 13 of the Customs Valuation Agreement is not concerned with the level of tariff obligations pending determination, but merely allows for a guarantee system when there is uncertainty regarding the customs value of the respective goods. The Panel also reiterates the arguments already made in section 7.5.1.2.1 above, to the effect that, for the reasons explained therein, the determination of the coverage of the specific bond, while linked to the value of the goods, is not a customs valuation operation. Hence, the determination of its coverage cannot be expected to coincide exactly with the customs duties ultimately due.

7.642. Furthermore, the Panel is not convinced by Panama's argument that the specific bond should not be required for goods from countries with which Colombia has signed economic integration agreements. The products might not be covered by the agreement or might not be entirely exempt from duties. It may also be that the final determination of the origin of imported goods forms part of the customs valuation process and is therefore pending at the time when the guarantee is requested. This means that there will not necessarily be certainty as to the applicability of the respective exemptions at that particular time. Furthermore, it should be noted that the specific bond under Decree No. 2218/2017 also serves to cover any possible penalties and that imports of goods from countries with which Colombia has signed economic integration agreements may also be subject to penalties if an offence is detected.

7.643. The foregoing is particularly important if it is considered that the provisions of the Customs Valuation Agreement are to be understood in the context of Article 17 of that Agreement. That is, that none of these provisions should be construed "as restricting or calling into question the rights of customs administrations to satisfy themselves as to the truth or accuracy of any statement, document or declaration presented for customs valuation purposes".

7.5.2.3 Conclusion

7.644. For all the reasons given above, the Panel concludes that Panama has failed to demonstrate that the specific bond provided for in Article 7 of Decree No. 2218/2017 is inconsistent with Article 13 of the Customs Valuation Agreement.

8 CONCLUSIONS AND RECOMMENDATION

8.1. For the reasons set forth in this Report, the Panel concludes as follows:

8.2. With respect to its terms of reference, the Panel concludes that:

a. the specific bond and the special import regime with the characteristics described in Decree No. 1745/2016 are "inextricably linked" and "clearly connected" to the measure declared by Colombia as taken to comply, that is, the tariffs imposed by Decree No. 1744/2016;

b. the specific bond and the special import regime with the characteristics provided for in Decree No. 2218/2017 fall within the Panel's terms of reference, as the language of Panama's panel request is sufficiently broad and the replacement of the original measures has not changed their essence;

c. in order to fulfil its mandate to resolve the matter before it, it has to examine and make findings and, where appropriate, recommendations, concerning the specific bond and the

[765] Colombia's response to Panel question No. 9, para. 29.

special import regime with the characteristics provided for in Decree No. 2218/2017, not the characteristics provided for in Decree No. 1745/2016;

d. Panama's claims regarding Article VIII:3 of the GATT 1994 and Article 7.2(g) of the Customs Valuation Agreement do not fall within the Panel's terms of reference, as Panama did not include these provisions in its panel request; and

e. Panama's claims in its panel request fall within the Panel's terms of reference in both proceedings.

8.3. With regard to Decree No. 1744/2016, the Panel concludes that Colombia has demonstrated that the tariffs provided for in that Decree are not inconsistent with Colombia's obligations under Articles II:1(a) and II:1(b), first sentence, of the GATT 1994.

8.4. Regarding Panama's claims under XI:1 of the GATT 1994, the Panel concludes that:

a. Panama has failed to demonstrate that the specific bond provided for in Article 7 of Decree No. 2218/2017 has limiting effects on imports in a manner inconsistent with Article XI:1 of the GATT 1994; and

b. Panama has failed to demonstrate that the special import regime provided for in Articles 4 to 10 of Decree No. 2218/2017 has limiting effects on imports in a manner inconsistent with Article XI:1 of the GATT 1994.

8.5. With regard to Panama's claims under Article X:3(a) of the GATT 1994, the Panel concludes that:

a. Panama's claim that Decree No. 390/2016 is administered in a manner inconsistent with Article X:3(a) of the GATT 1994 through Decree No. 2218/2017 does not fall within the Panel's terms of reference;

b. Panama has failed to demonstrate that the specific bond provided for in Article 7 of Decree No. 2218/2017 is administered in a non-uniform, non-impartial or unreasonable manner, inconsistently with Article X:3(a) of the GATT 1994; and

c. Panama has failed to demonstrate that the special import regime provided for in Articles 4 to 10 of Decree No. 2218/2017 is administered in a non-uniform, non-impartial or unreasonable manner, inconsistently with Article X:3(a) of the GATT 1994.

8.6. Regarding Panama's claims under the Customs Valuation Agreement, the Panel concludes as follows:

a. the special import regime provided for in Articles 4 to 10 of Decree No. 2218/2017 does not fall within the scope of application of Articles 1, 2, 3, 5, 6 and 7.2(f) of the Customs Valuation Agreement in the manner described by Panama. The Panel therefore rejects Panama's claims under each of those Articles; and

b. Panama has failed to demonstrate that the specific bond provided for in Article 7 of Decree No. 2218/2017 is inconsistent with Article 13 of the Customs Valuation Agreement.

8.7. In view of the foregoing, having found that the tariffs provided for in Decree No. 1744/2016 are not inconsistent with Colombia's obligations under Articles II:1(a) and II:1(b), first sentence, of the GATT 1994, and that Panama has failed to demonstrate that the specific bond and the special import regime are inconsistent with the WTO Agreement, the Panel concludes that Colombia has implemented the recommendations and rulings of the DSB in *Colombia – Measures Relating to the Importation of Textiles, Apparel and Footwear* to bring its measure into conformity with its obligations under the WTO Agreement.

8.8. Having found that Panama has failed to demonstrate that Colombia has acted inconsistently with its obligations under the WTO Agreement, the Panel considers that no recommendation under Article 19.1 of the DSU is necessary, and makes none.

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WORLD TRADE ORGANIZATION

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

RECOURSE TO ARTICLE 21.5 OF THE DSU BY COLOMBIA

RECOURSE TO ARTICLE 21.5 OF THE DSU BY PANAMA

REPORT OF THE PANELS

Addendum

This addendum contains Annexes A to C to the Report of the Panels to be found in document WT/DS461/RW.

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LIST OF ANNEXES

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WORKING PROCEDURES OF THE PANELS

ANNEX B

ARGUMENTS OF THE PARTIES

ANNEX C

ARGUMENTS OF THE THIRD PARTIES

ANNEX A

WORKING PROCEDURES OF THE PANELS

ANNEX A-1

Harmonized Working Procedures of the Panels[1]

Adopted on 15 September 2017

1. In its proceedings, the Panel shall follow the relevant provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). In addition, the following harmonized Working Procedures shall apply.

General

2. The deliberations of the Panel and the documents submitted to it shall be kept confidential. Nothing in the DSU or in these Working Procedures shall preclude a party to the dispute (hereafter "party") from disclosing statements of its own positions to the public. Members shall treat as confidential information submitted to the Panel by another Member which the submitting Member has designated as confidential. Where a party submits a confidential version of its written submissions to the Panel, it shall also, upon request of a Member, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public.

3. The Panel shall meet in closed session. The parties, and Members having notified their interest in the dispute to the Dispute Settlement Body in accordance with Article 10 of the DSU (hereafter "third parties"), shall be present at the meetings only when invited by the Panel to appear before it.

4. Each party and third party has the right to determine the composition of its own delegation when meeting with the Panel. Each party and third party shall have the responsibility for all members of its own delegation and shall ensure that each member of such delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceedings.

5. The Panel shall hold a joint substantive meeting and shall issue a single report concerning both proceedings.

Submissions

6. Before the joint substantive meeting of the Panel with the parties, each party shall submit to the Panel a first written submission, and subsequently a written rebuttal, in which it presents the facts of the case and its arguments, in accordance with the timetable adopted by the Panel.

7. Should a party wish to request a preliminary ruling, it shall do so at the earliest possible opportunity and in any event no later than in its first written submission to the Panel. If one of the parties requests such a ruling from the Panel in its capacity as complainant, the other party shall respond to the request in its first written submission as respondent. If one party requests such a ruling in its capacity as respondent, the other party shall submit its response to the request prior to the joint substantive meeting, within the period specified by the Panel. Exceptions to this rule may be granted upon a showing of good cause.

8. Each party shall submit all factual evidence to the Panel no later than during the joint substantive meeting, except with respect to evidence necessary for answering questions or making comments on answers provided by the other party. The Panel may grant exceptions to this rule where good cause is shown. Where such exception has been granted, the Panel shall accord the other party a period of time for comment, as appropriate, on any new factual evidence submitted after the joint substantive meeting.

9. Where the original language of exhibits submitted to the Panel is not a WTO working language, the submitting party or third party shall at the same time submit a translation of such exhibits into a WTO working language. The Panel may grant reasonable extensions of time for the translation of

[1] To facilitate understanding of these Working Procedures, the term "Panel" will be used in the singular where appropriate.

such exhibits upon a showing of good cause. Any objection as to the accuracy of a translation shall be raised promptly in writing, no later than the next filing following the submission which contains the translation in question. Any objection shall be accompanied by a detailed explanation of the grounds of objection and an alternative translation.

10. In order to facilitate the work of the Panel, each party and third party is invited to make its submissions in accordance with the WTO Editorial Guide for Panel Submissions, attached in annex, to the extent that it is practical to do so.

11. To facilitate the maintenance of a single record for both proceedings and maximize the clarity of submissions, each party and third party shall sequentially number its exhibits throughout the course of both proceedings. For example, exhibits submitted by Colombia could be numbered COL-1, COL-2, etc., without distinguishing between proceedings. If the last exhibit in connection with the first submission as complainant was numbered COL-5, the first exhibit of its next submission as either complainant or respondent would be numbered COL-6.

Questions

12. The Panel may at any time pose questions to the parties and third parties, orally during the joint substantive meeting or in writing.

Joint substantive meeting

13. Each party shall provide to the Panel the list of members of its delegation in advance of the meeting and no later than 5 p.m. on the previous working day.

14. The joint substantive meeting shall be conducted as follows:

a. The Panel shall first invite Colombia to make an opening statement to present its case as complainant. Then Panama, as respondent, shall be invited to present its point of view. Subsequently, the Panel shall invite Panama to make an opening statement to present its case as complainant. Then Colombia, as respondent, shall be invited to present its point of view. This order may be modified by the Panel should it deem it necessary to do so in light of the development of the proceedings.

   Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. Each party shall make available to the Panel and the other party the final version of its opening and closing statements, preferably at the end of the meeting, and in any event no later than 5 p.m. on the first working day following the meeting.

b. After the conclusion of the statements, the Panel shall give each party the opportunity to ask the other party questions or to make comments through the Panel. Each party shall then have an opportunity to answer such questions orally. Each party shall send in writing, within a time-frame to be determined by the Panel, any questions to the other party to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to the questions of the other party within a deadline to be determined by the Panel.

c. The Panel may subsequently pose questions to the parties. Each party shall then have an opportunity to answer such questions orally. The Panel shall send in writing, within a time-frame to be determined by it, any questions to the parties to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

d. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, following the order of statements set forth in (a.) above.

Third parties

15. The Panel shall invite each third party to transmit to the Panel a written submission prior to the joint substantive meeting of the Panel with the parties, in accordance with the timetable adopted by

the Panel. Those Members that have reserved their third-party rights in both proceedings shall have the opportunity to present their comments jointly in that submission.

16. Each third party shall also be invited to present its views orally during a session of the joint substantive meeting, set aside for that purpose. Each third party shall provide to the Panel the list of members of its delegation in advance of this session and no later than 5 p.m. on the previous working day.

17. The third-party session shall be conducted as follows:

a. For logistical reasons, all third parties may be present during the entirety of this session even if they have not reserved their third-party rights in both proceedings under Article 21.5 of the DSU.

b. The Panel shall first hear the arguments of the third parties in alphabetical order. Third parties present at the third-party session and intending to present their views orally at that session, shall provide the Panel, the parties and other third parties with provisional written versions of their statements before they take the floor. Third parties shall make available to the Panel, the parties and other third parties the final versions of their statements, preferably at the end of the session, and in any event no later than 5 p.m. on the first working day following the session.

c. After the third parties have made their statements, the parties may be given the opportunity, through the Panel, to ask the third parties questions for clarification on any matter raised in the third parties' submissions or statements. Each party shall send in writing, within a time-frame to be determined by the Panel, any questions to a third party to which it wishes to receive a response in writing.

d. The Panel may subsequently pose questions to the third parties. Each third party shall then have the opportunity to answer such questions orally. The Panel shall send in writing, within a time-frame to be determined by it, any questions to the third parties to which it wishes to receive a response in writing. Each third party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

Descriptive part

18. The description of the arguments of the parties and third parties in the descriptive part of the single Panel report shall consist of integrated executive summaries provided by the parties and the third parties, which shall be attached as annexes to the report. These executive summaries shall not serve in any way as a substitute for the submissions of the parties and the third parties in the Panel's examination of the case.

19. Each party shall provide a single integrated executive summary of the facts and arguments as presented to the Panel in its written submissions and oral statements concerning both proceedings, in accordance with the timetable adopted by the Panel for its work. This summary may also include a summary of the replies to questions. These summaries shall not exceed 30 pages each. The Panel shall not summarize the parties' replies to the questions in the descriptive part, nor shall it annex them to its report.

20. Each third party shall submit an integrated executive summary of its arguments as presented to the Panel in its written submission and its statement concerning both proceedings, as appropriate, in accordance with the timetable adopted by the Panel for its work. This summary may also include a summary of the replies to questions, where applicable. The integrated executive summary to be provided by each one of the third parties shall not exceed six pages.

Interim review

21. Following issuance of the interim report, each party may submit a written request for a review of precise aspects of the interim report and request a further meeting with the Panel, in accordance

with the timetable adopted by the Panel. The right to request such a meeting shall be exercised no later than at the time the written request for review is submitted.

22. In the event that no further meeting with the Panel is requested, each party may submit written comments on the other party's written request for review, in accordance with the timetable adopted by the Panel. Such comments shall be limited to commenting on the other party's written request for review.

23. The interim report, like the final report prior to its official circulation, shall be kept strictly confidential and shall not be disclosed.

Service of documents

24. The following procedures regarding service of documents shall apply:

a. Each party and third party shall submit all documents to the Panel by filing them with the DS Registry (office No. 2047).

b. Each party and third party shall file two paper copies of all documents it submits to the Panel. The DS Registrar shall stamp the documents with the date and time of the filing. The paper version shall constitute the official version for the purposes of the record of the dispute.

c. Each party and third party shall also provide an electronic copy of all documents it submits to the Panel at the same time as the paper versions. The written submissions of the parties and the third parties shall, wherever possible, be submitted in Microsoft Word format. In cases where, owing to their size, it is not possible to send the documents by email, they shall be submitted on a USB key, CD-ROM or DVD. In this case, four USB keys, CD-ROMs or DVDs shall be filed. Electronic copies shall be sent by email to DSRegistry@wto.org, with a copy to ****.****@wto.org, ****.****@wto.org, ****.****@wto.org, ****.****@wto.org and ****.****@wto.org. If USB keys, CD-ROMS or DVDs are provided, they shall be filed with the DS Registry.

d. Each party shall serve any document submitted to the Panel directly on the other party. Each party shall, in addition, serve on all third parties its written submissions in advance of the joint substantive meeting with the Panel. Each third party shall serve any document submitted to the Panel directly on the parties and all other third parties. Each party and third party shall confirm, in writing, that copies have been served as required at the time it provides each document to the Panel.

e. Each party and third party shall file its documents (paper copies and, where necessary, USB keys, CD-ROMs and/or DVDs) with the DS Registry and serve copies on the other party (and third parties where appropriate) by 5 p.m. (Geneva time) on the dates established by the Panel.

f. The Panel shall provide the parties with an electronic version of the descriptive part, of the interim report and of the final report, as well as of other documents as appropriate. When the Panel transmits to the parties or third parties both paper and electronic versions of a document, the paper version shall constitute the official version for the purposes of the record of the dispute.

25. The Panel reserves the right to modify these procedures, as necessary, after consultation with the parties.

ANNEX B

ARGUMENTS OF THE PARTIES

ANNEX B-1

INTEGRATED EXECUTIVE SUMMARY OF COLOMBIA

I. INTRODUCTION

1. The Dispute Settlement Body (DSB)'s recommendations and rulings in the original proceedings were concerned with a compound tariff that was found to exceed Colombia's bound tariffs. Colombia repealed the compound tariff; and its new tariffs do not exceed its tariff commitments. Colombia is, therefore, in full compliance with the DSB's recommendations and rulings.

2. The original dispute concerned the imposition by Colombia of a compound tariff on the importation of certain apparel and footwear classified under Chapters 61 through 64 of Colombia's Customs Tariff.[1] In the original proceedings, the original panel and the Appellate Body found that the compound tariff exceeded the bound tariff rates in Colombia's Schedule of Concessions in the instances identified in the Panel Report, and was, therefore, inconsistent with Articles II:1(a) and II:1(b) of the General Agreement on Tariffs and Trade 1994 (GATT 1994).[2] On 2 November 2016, Colombia replaced the compound tariff provided for by Decree 456 with new tariffs established by Decree 1744.[3] Decree 1744 established an *ad valorem* tariff that does not exceed Colombia's World Trade Organization (WTO) bound tariffs. Consequently, Colombia has brought the measure found to be inconsistent with the GATT 1994 into conformity with its WTO obligations by removing the measure found to be inconsistent by the DSB and by establishing a new tariff with a rate that does not exceed the bound rate in Colombia's Schedule of Concessions.

3. The customs bond and the customs formalities challenged by Panama in these compliance proceedings are not "measures taken to comply" with the DSB's recommendations and rulings in the original proceedings. These measures therefore fall outside the scope of these Article 21.5 proceedings, and, are not proper subjects of the Panel's compliance review. Even assuming *arguendo* that the measures challenged by Panama are properly within the Panel's jurisdiction, Colombia submits that these measures are not only consistent with Article XI:1 of the GATT 1994, but expressly permitted under the Covered Agreements (the Customs Valuation Agreement, Agreement on Trade Facilitation, and the Anti-Dumping Agreement). Furthermore, Panama's claims that the customs bond and the customs formalities constitute prohibited restrictions under Article XI:1 of the GATT 1994 are based on speculative allegations. Panama fails to substantiate its claims with evidence and ultimately fails to substantiate the allegations that the customs bond and customs formalities have a limiting effect on imports. Moreover, even under the assumption that the customs bond and customs formalities are inconsistent with Article XI:1 of the GATT 1994, they are justified under Article XX, subparagraphs (a) and (d), of the GATT 1994.

II. FACTUAL BACKGROUND

4. The original dispute concerned the imposition by Colombia of a compound tariff on the importation of certain apparel and footwear classified under Chapters 61 through 64 of Colombia's Customs Tariff.[4] The compound tariff under Decree 456 was 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. The original panel found, and the Appellate Body upheld, that the compound tariff was inconsistent with Articles II:1(a) and II:1(b), first sentence, of the GATT 1994.[5]

5. On 2 November 2016, the Colombian Government issued Decree 1744 of 2016, which repealed the compound tariff and modified the tariffs applicable to imports of products classified in Chapters 61, 62 and 63 and certain items in Chapter 64. Decree 1744 sets an *ad valorem* MFN tariff of 40% for imports of products classified in Chapters 61 and 62 of the Customs Tariff of the Republic of Colombia when the declared f.o.b. import price is less than or equal to ten ($10) US dollars per gross kilogram. This tariff is equal to the bound tariff in Colombia's Schedule. As regard to imports

[1] Original Panel Report, para. 2.1.
[2] Original Appellate Body Report, para. 6.3; and Original Panel Report, paras. 8.2-8.4.
[3] Decree 1744 (Exhibit COL-1).
[4] Original Panel Report, para. 2.1.
[5] Original Panel Report, paras. 8.2 and 8.4; and Original Appellate Body Report, para. 6.3.

of products classified under tariff headings 6401, 6402, 6403, 6404, and 6405, an MFN tariff of 35% *ad valorem* is applied when the declared f.o.b. import price is less than or equal to prices that vary between six ($6) US dollars and ten ($10) US dollars per pair.[6] For imports of products classified under subheading 6406.10.00.00, an MFN tariff of 35% *ad valorem* will be applied when the declared f.o.b. price is less than or equal to five ($5) US dollars per gross kilogram. These tariffs are equal to the tariff bound in Colombia's Schedule. In cases where the import price for these products exceeds the above-mentioned prices, the MFN tariff is provided in Decree 4927 of 2011 (as amended by Decree 2153 of 2016) or any amending decree. Imports of the other products that were covered by the compound tariffs introduced by Decree 456 of 2014 are subject to the MFN *ad valorem* tariff set forth in Decree 4927 of 2011 (as amended by Decree 2153 of 2016) or any amending decree.[7]

III. BURDEN OF PROOF

6. It is a "generally-accepted canon of evidence" that "the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence."[8] To make out a *prima facie* case of breach of a WTO Agreement, the complaining party must provide both adequate evidence and legal argument tying the alleged facts to a legal claim.[9] As in original proceedings, it is for the complaining party to establish in Article 21.5 proceedings that the respondent party has failed to bring itself into compliance with the DSB recommendations and rulings. Accordingly, Panama, as the complaining party, bears the burden of demonstrating that Colombia has failed to comply with the DSB recommendations and rulings. Failure of Panama to make out a *prima facie* case must lead to the dismissal of its claims.

7. In *US / Canada – Continued Suspension*, the Appellate Body considered that in Article 21.5 proceedings, the original respondent has a limited burden of proof. The original respondent must "show that its implementing measure has cured the defects identified in the DSB's recommendations and rulings".[10] For this purpose, it is sufficient for the original respondent to provide "a clear description of its implementing measure, and an adequate explanation regarding how this measure rectifies the inconsistencies found in the original proceedings, so as to place the Article 21.5 panel in a position to make an objective assessment of the matter and, in the absence of rebuttal, to rule in favour of the original respondent".[11] In accordance with the Appellate Body's guidance in *US / Canada – Continued Suspension*, Colombia has demonstrated in these proceedings that Decree 1744 "has cured the defects identified in the DSB's recommendations and rulings" and, as a result, Colombia's tariffs for the relevant products are in compliance with its Schedule of Concessions.

IV. COLOMBIA HAS BROUGHT THE COMPOUND TARIFF INTO COMPLIANCE WITH ITS WTO OBLIGATIONS

8. Colombia's bound rate in its Schedule of Concessions for products classified in Chapters 61 and 62 is 40%. Decree 1744 sets an *ad valorem* MFN tariff of 40% for imports of products classified in Chapters 61 and 62 of the Customs Tariff of Colombia when the declared f.o.b. import price is less than or equal to ten ($10) US dollars per gross kilogram. The *ad valorem* tariff is the only tariff imposed in such circumstances. In cases where the import price for products classified in Chapters 61 and 62 exceeds ten ($10) US dollars, the MFN tariff will be the one provided in Decree 4927 (as amended by Decree 2153 of 2016) or any amending decree, containing the Customs Tariff of the Colombia. Also, for import of products classified under Chapter 63, the applicable tariff is the MFN *ad valorem* tariff set forth in Decree 4927. In no case does the applied tariff rate exceed the tariff rates bound in Colombia's Schedule of Concessions. The tariffs are consistent with Colombia's obligations under Article II:1(b) of the GATT 1994.

9. Colombia's bound rate in its Schedule of Concessions for products classified in tariff headings 6401, 6402, 6403, 6404 and 6405 is 35%, except for 640520 which has a bound level of 40%. For

[6] Decree 1744 (Exhibit COL-1).
[7] Decree 1744 (Exhibit COL-1); Decree 4927 (Exhibit COL-2); and Decree 2153 (Exhibit COL-3).
[8] Appellate Body Report, *US – Wool Shirts and Blouses*, at p. 14. See also Panel Report, *China – Autos (US)*, para. 7.6.
[9] Appellate Body Report, *US – Gambling*, para. 140 (quoting Appellate Body Report, *US – Wool Shirts and Blouses*, at p. 16). (emphasis in original)
[10] Appellate Body Report, *US / Canada – Continued Suspension*, para. 362.
[11] Appellate Body Report, *US / Canada – Continued Suspension*, para. 362.

these tariff headings, Decree 1744 set an MFN tariff of 35% *ad valorem* which is applied when the declared f.o.b. import price is less than or equal to prices that vary between six ($6) US dollars and ten ($10) US dollars per pair. Colombia's bound rate in its Schedule of Concessions for products classified under subheading 6406.10.00.00 is 40%. For imports of products classified under this subheading, Decree 1744 set an MFN tariff of 35% *ad valorem* when the declared f.o.b price is less than or equal to five ($5) US dollars per gross kilogram. The tariffs are consistent with Colombia's obligations under Article II:1(b) of the GATT 1994.

10. In cases where the import price for these products exceeds the above-mentioned prices, the MFN tariff will be the one provided in Decree 4927 (as amended by Decree 2153) or any amending decree, and, as such, neither of the two mentioned levies will exceed Colombia's bound tariffs. Also for products classified in the headings of Chapter 64 not mentioned above, the applicable tariff is the MFN *ad valorem* tariff set forth in Decree 4927 (as amended by Decree 2153). These tariff rates do not exceed Colombia's Schedule of Concessions. Therefore, the tariffs applied by Colombia for Chapter 64 are consistent with Colombia's obligations under Article II:1(b) of the GATT 1994.

11. The original panel's finding that, in the circumstances it had identified, the compound tariff also accorded treatment less favourable than that envisaged in Colombia's Schedule of Concessions, in a manner inconsistent with Article II:1(a) of the GATT 1994 was entirely dependent on its finding under Article II:1(b).[12] As the tariffs set under Decree 1744 are consistent with the levels bound in Colombia's Schedule of Concessions and no longer result in a breach of Article II:1(b), Decree 1744 brings Colombia into conformity also with Article II:1(a) of the GATT 1994.

12. For the reasons set out above, Colombia respectfully requests the Panel to find that Colombia has complied with the DSB recommendations and rulings in the original proceedings.

V. TERMS OF REFERENCE

13. First, in the Article 21.5 proceedings initiated by Colombia, Panama challenges the customs bond and special import regime established in Decree 1745 of 2016 under Articles XI:1 and X:3(a) of the GATT 1994. The Panel's terms of reference in these Article 21.5 proceedings are confined to examining "the matter referred to the DSB by Colombia in document WT/DS461/17".[13] The "matter" in these Article 21.5 proceedings consists, in turn, of the measure(s) and claim(s) set out in Colombia's panel request, that is, document WT/DS461/17.[14] As regards to the measures, document WT/DS461/17 refers only to Decree 1744. In terms of claims, document WT/DS461/17 refers only to the claims that were the subject of the DSB's recommendations and rulings, namely, consistency with Articles II:1(a) and II:1(b) of the GATT 1994. Accordingly, the Panel in the Article 21.5 proceedings initiated by Colombia is limited to examining the consistency of the Decree 1744 with Articles II:1(a) and II:1(b) of the GATT 1994. Thus, the customs bond and special import regime established in Decree 1745 of 2016, as well as Panama's claims under Articles XI:1 and X:3(a) of the GATT 1994, fall outside of the Panel's terms of reference in these Article 21.5 proceedings initiated by Colombia.

14. Second, proceedings under Article 21.5 concern a disagreement as to the "existence" or "consistency with a covered agreement" of measures "taken to comply" with the recommendations and rulings of the DSB in the original proceedings. Therefore, proceedings under Article 21.5 do not concern just any measure, but rather, are limited to those measures that are taken to comply with the recommendations and rulings of the DSB.[15] The scope of the measures "taken to comply" must be determined by reference to the recommendations and rulings of the DSB in the original proceedings and to the original measures at issue.[16] In *EC − Bed Linen (Article 21.5 − India)*, the Appellate Body also agreed with the Panel that "if a claim challenges a measure which is not a 'measure taken to comply', that claim cannot properly be raised in Article 21.5 proceedings."[17]

15. The original dispute concerned the imposition by Colombia of a compound tariff on the importation of certain apparel and footwear classified under Chapters 61 through 64 of Colombia's

[12] Original Panel Report, para. 7.192.
[13] WT/DS461/24.
[14] Panel Report, Australia − Automotive Leather (Article 21.5 − US), para. 6.4.
[15] Appellate Body Report, Canada − Aircraft (Article 21.5 − Brazil), para. 36.
[16] Appellate Body Report, *US − Zeroing (EC) (Article 21.5 − EC)*, para. 201.
[17] Appellate Body Report, EC − Bed Linen (Article 21.5 − India), para. 78.

Customs Tariff.[18] The original panel and Appellate Body findings regarded the consistency of this compound tariff with Colombia's Schedule of Concessions. The DSB recommendations and rulings in the original proceedings concerned exclusively the compound tariff on the importation of certain apparel and footwear classified under Chapters 61 through 64 of Colombia's Customs Tariff. The compound tariff found to be inconsistent in the original proceedings has been repealed and replaced with an *ad valorem* tariff that is consistent with Colombia's bound tariffs in its Schedule of Concessions.

16. The Panel is precluded from examining the customs bond and special import regime established in Decree 1745 in both Article 21.5 proceedings because they are not measures taken to comply with the recommendations and rulings of the DSB. Panama makes no attempt to link the challenged measures to the DSB's recommendations and rulings and generally fails to make a prima facie case that Decree 1745 is a "measure taken to comply" within the meaning of Article 21.5 of the DSU. This failure should lead to the conclusion that Panama has failed to establish that the challenged measures fall within the scope of Article 21.5.[19] In fact, in the Article 21.3(c) proceedings, Panama recognized that measures other than repeal or modification of the compound tariff would not have the necessary links to the DSB's recommendations and rulings to constitute a "measure taken to comply".[20]

17. The drafting history of Decree 1744 confirms that it is the only measure taken to comply by Colombia. The minutes of the Triple A Committee meeting where the draft decree was considered clearly show that implementation of the DSB's recommendations and rulings was the very purpose of Decree 1744 and that no other implementation measures were considered.[21] No reference was made to the DSB's recommendations and rulings when the draft of Decree 1745 was considered.[22]

18. Panama's use of the "closely connected" test developed in *US – Zeroing (EC)* is contradictory. The premise of the "closely connected" test is that the measure being considered is not a measure taken to comply. Yet, Panama has repeatedly characterized the customs bond and the special import regime as "measures taken to comply".[23] This is inherently contradictory. Moreover, even if it were applicable, Panama would have failed to demonstrate that the customs bond and the special import regime are sufficiently connected to Decree 1744 so as to fall within the scope of these Article 21.5 proceedings.

19. Panama first alleges that Decree 1745 was enacted after the adoption of the DSB's recommendations and rulings.[24] The mere fact that a measure was enacted subsequent to the adoption of the DSB's recommendations and rulings does not make such measure a "measure taken to comply". Panama next refers to Decree 1745 having been adopted on the same day as Decree 1744.[25] Adoption of a law or regulation on the same day as the measure taken to comply does turn the former into another measure taken to comply.

20. The nature of Decree 1745 is significantly different to that of Decree 1744. Decree 1745 is a customs measure whereas Decree 1744 is a tariff measure. Indeed, the object of Decree 1744 is to establish import tariffs.[26] By contrast, the object of Decree 1745 is to establish a mechanism to strengthen the risk management and customs control system.[27] Also, Decree 1744 was adopted pursuant to Colombia's tariff code, that is, Decree 4927 and subsequent amendments.[28] By contrast, Decree 1745 was adopted pursuant to Law 1762 of 2015.[29] That the two measures are enacted pursuant to different legal frameworks is further evidence of their different nature. The fact that

[18] Original Panel Report, para. 2.1.

[19] The Appellate Body has noted that the complaining party "bears the burden of establishing that its claims are properly before the Panel" (Panel Report*, Korea - Certain Paper (Article 21.5 - Indonesia)*, para. 6.4).

[20] Award of the Arbitrator, *Colombia – Textiles (Article 21.3(c))*, para. 3.23 (referring to Panama's submission (English translation), para. 125).

[21] Exhibit COL-4.

[22] Exhibit COL-4.

[23] See, for example, Panama's First Written Submission (Article 21.5 – Colombia), para. 32.

[24] Panama's First Written Submission (Article 21.5 – Colombia), para. 42.

[25] Panama's First Written Submission (Article 21.5 – Colombia), para. 43.

[26] Exhibit PAN-1.

[27] Exhibit PAN-2, Article 1.

[28] Exhibit PAN-1.

[29] Exhibit PAN-2.

both Decrees 1744 and 1745 were reviewed by the Triple A Committee does not mean that the two decrees are similar in nature. The Triple A Committee has jurisdiction over a broad range of trade policy instruments.[30]

21. The product coverage of both decrees is not identical. Decree 1744 applies to all products under HS chapters 61 and 62 and headings 64.01-6405.[31] Meanwhile, Decree 1745 applies only to apparel and footwear classified under chapters 61, 62, and 64 that are imported at prices below certain thresholds.

22. Panama also errs in arguing that a common objective between the measure challenged in the original proceedings and Decree 1745 is an appropriate basis to characterize the latter as a measure taken to comply. WTO Members take numerous measures that pursue a similar policy objective. The compound tariff was taken with the objective of fighting money laundering. Colombia has a broad, comprehensive and multi-disciplinary regime to fight money laundering, of which the compound tariff was a part. It would be a misuse of Article 21.5 to allow Panama to challenge in compliance proceedings any measure taken by Colombia to fight money laundering since the adoption of the DSB's recommendations and rulings in the original proceedings.

23. Panama refers to the alleged "effects", arguing that the "restrictiveness to trade that is being mitigated by the new tariff is again undermined by the various measures contemplated in Decree No. 1745".[32] Panama then alleges "banking costs" linked to the customs bond and "logistical hindrances" resulting from the special import regime.[33] Yet, these allegations are entirely unsubstantiated. Panama does not provide any information about the "banking costs" of the customs bonds or of the so-called "logistical hindrances" of the special import regime. Nor does Panama provide any support for its assertion that the "banking costs" or "logistical hindrances" have trade restrictive effects. Given that Panama's allegations are unsubstantiated, they do not provide a basis for the Panel to consider "effects" in assessing Panama's claim that the customs bond and special import regime are measures taken to comply.

24. In sum, Panama has failed to establish that the customs bond and special import regime are "measures to comply" within the meaning of Article 21.5 of the DSU. Consequently, Panama's claims against the customs bond and special import regime fall outside of the scope of both Article 21.5 proceedings for this reason, and should be dismissed by the Panel.

25. Allowing Decree 1745, a measure that was not the subject of the original proceedings, to be reviewed in these Article 21.5 proceedings would deprive Colombia of its rights under the DSU. Should the Article 21.5 Panel find that Decree 1745 is inconsistent with the GATT 1994, Colombia would be unfairly denied the right to a reasonable period of time to bring the Decree into compliance. In addition, Colombia would be denied the right to negotiate compensation before being subject to the suspension of concessions or other obligations.

26. Lastly, Panama's claims under the Customs Valuation Agreement and Article VIII of the GATT 1994 are outside of the Panel's terms of reference and they do not form part of the "matter" before the Panel. In any event, Colombia's measures are consistent with the Customs Valuation Agreement and Article VIII of the GATT 1994.

VI. PANAMA HAS FAILED TO DEMONSTRATE THAT THE CUSTOMS BOND OR THE CUSTOMS FORMALITIES ESTABLISHED IN DECREE 1745 IS INCONSISTENT WITH ARTICLE XI:1 OF THE GATT 1994

A. Panama has failed to establish that the customs bond is a prohibited "restriction" under Article XI:1

27. Customs bonds are routinely used to guarantee the payment of customs duties and are expressly recognized as permissible instruments by the WTO agreements. Article 13 of the Customs Valuation Agreement authorizes customs authorities to require a customs bond covering the ultimate payment of customs duties. The use of customs bonds is also specifically contemplated

[30] Decree 3303 de 2006, Article 1 (Exhibit COL-6).
[31] Exhibit PAN-1, Articles 1 and 2.
[32] Panama's First Written Submission, para. 46.
[33] Panama's First Written Submission, para. 47.

in the new Agreement on Trade Facilitation. Furthermore, the Ad note to Article VI:1 of the GATT 1994 provides for the use of customs bonds in connection with anti-dumping or countervailing duty proceedings. The Ad note also expressly recognizes that there are "many other cases in customs administration" where it is permissible for a Member to require reasonable security in the form of a bond or cash deposit.

28. These provisions provide contextual guidance for the interpretation of the term "restriction" in Article XI:1 of the GATT 1994. Because customs bonds are permissible measures under the GATT 1994 and other WTO agreements, the requirement of a customs bond, and any associated administrative burden, cannot in themselves constitute prohibited "restrictions" under Article XI:1 of the GATT 1994. Furthermore, Article VIII of the GATT 1994 recognizes that there may be fees associated with customs formalities. Thus, the fact that a customs bond has associated fees or costs cannot, without more, give rise to a prohibited "restriction" under Article XI:1 of the GATT 1994.

29. Article XI:1 only covers "those prohibitions or restrictions that have a limiting effect on the quantity or amount of a product being imported or exported".[34] Panama has failed to provide any evidence that the customs bond limits the quantity or amount of the imported product. The customs bond does not impose a limitation on the quantity or amount of products covered by the customs bond requirement that may be imported. Indeed, Panama has not identified any numerical quota or other quantitative limitation on imports of the products subject to the customs bond requirement.

30. Panama complains that the customs bond makes the import process for the subject merchandise "considerably costly".[35] Yet, Panama provides no evidence of the cost associated with the customs bond. The customs bond seeks to guarantee the payment of both the customs taxes and any fines or penalties imposed by customs authorities. There is a relationship between the amount of the customs bond and the obligations it seeks to guarantee.

31. Moreover, Panama also asserts that there is an alleged correlation between the conditions that affect an individual importer and the conditions that affect the importation of a product.[36] This argument suggests that Article XI:1 requires that equal conditions be maintained for all Colombian importers (particularly those that are not credit worthy). However, Panama fails to address why the customs formalities imposed on risky importers end up affecting the importation of these products. In addition, Article XI:1 refers to limitations on the importation of products, not to limitations on importation by particular importers. Limitations on importation by particular persons (or groups of persons) would be relevant to the Panels' analysis only to the extent that the limitations on individuals' ability to import are a limitation or a limiting condition on importation, or have a "limiting effect" on importation of the relevant products.[37]

32. Panama also asserts that the "cost is variable because it will depend on the criteria for issuance of each participating financial entity or insurance company, on the risk profile of the importer, and on the magnitude of the covered operation".[38] However, apart from some disconnected assumptions and random estimations, Panama offers no evidence that the cost is variable or of the factors that affect the costs of the customs bond. Panama's assertions are all entirely speculative. On the contrary, based on the evidence submitted by Colombia, it is clear that the value of the bond is quite low compared to the overall value of the operation:

[34] Appellate Body Report, *China – Raw Materials*, para. 320.
[35] Panama's First Written Submission (Article 21.5 – Colombia), para. 56.
[36] See Panama's Responses to the Panel's Questions, page 30.
[37] See United States ' Third Party Submission, para. 44.
[38] Panama's First Written Submission (Article 21.5 – Panama), para. 37.

Decree	1745/2016		2218/2017
Importer	IMPORTER 1	IMPORTER 2	IMPORTER 3
Heading	6402	6401	6210
Quantity	19130	18349	2240
Origin	Mexico	Ecuador	Mexico
Port of entry	Buenaventura	Ipiales	Buenaventura
Insurance Company	Confianza	Seguros del Estado	Bolívar
Threshold (USD)	$ 2,00	$ 3,00	$ 9,00
FOB Value (USD)	$ 31.972,40	$ 35.852,97	$ 14.830,40
Declared price (USD)	$ 1,67	$ 1,95	$ 6,62
Covered value (USD)	$ 76.520,00	$ 110.094,00	$ 10.659,20
Prime (USD)	$ 1.140,35	$ 990,89	$ 203,92
Prime percentage	3,57%	2,76%	1,4%

Source: COL-22, COL-18, COL-27.

33. Furthermore, there is an inherent contradiction in Panama's argument. If the costs are variable as Panama alleges, and if they depend on factors such as the risk profile of the importer and the magnitude of the covered operation, the costs would be rationally related to such factors and could not be excessive. After all, insurance companies and banks operate under market conditions.

34. Panama also asserts that there is "uncertainty" because of the involvement of a third party.[39] Yet, Panama's argument is entirely speculative. The only reason Panama offers for the alleged "uncertainty" is that obtaining the customs bond depends on a decision of the banking entity or insurance company.[40] Panama offers no evidence of any requirements imposed by these banking entities or insurance companies that create the uncertainty. There is nothing inherent in the involvement of third parties that generates uncertainty. Moreover, these types of bonds "for the fulfillment of legal obligations" are quite common in the Colombian financial market. More than 24 insurance companies in Colombia issue these bonds on a regular basis and they are quite common in the business operations of legal importers.[41]

35. In addition, Panama points to the customs bond being calculated on the basis of threshold levels rather than the values declared by importers.[42] Panama fails to mention that the imports subject to the customs bond are those that are suspected to have declared values that are artificially low. In such circumstances, it is entirely appropriate to use the threshold for purposes of calculating the value of a customs bond. In fact, if the value of the customs bond were calculated on the basis of the declared value, this would allow importers using artificially low prices to continue to avoid paying the full duties and any applicable fines or penalties. Panama also refers to importers who already have a global bond.[43] Panama fails to point out that not all importers of the product subject to the customs bond will have a global bond since it is only available to importers and exporters that undertake a large number of operations. Furthermore, where imports at artificially low prices constitute an important share of the total imports, the global bond would be insufficient, as has been already proved by Colombia.[44]

36. Panama alleges that the customs bond involves the payment of a premium or financial commission and the submission of certain documents, and also argues that the outcome of the application may be "favorable or unfavorable depending on the appreciation of the bank or insurance company".[45] Panama then refers to the commission allegedly charged by three Colombian financial entities.[46] The three Colombian financial entities to which Panama refers are privately owned, and thus the costs and documents to which Panama refers are charges and requirements determined

[39] Panama's First Written Submission (Article 21.5 – Colombia), para. 55.
[40] Panama's First Written Submission (Article 21.5 – Colombia), para. 55.
[41] Exhibit COL-14.
[42] Panama's First Written Submission (Article 21.5 – Panama), para. 39.
[43] Panama's First Written Submission (Article 21.5 – Colombia), para. 54.
[44] Colombia's Responses to the Panel's Questions, page 19.
[45] Panama's Second Written Submission (Article 21.5 – Panama), para. 72.
[46] Panama's Second Written Submission (Article 21.5 – Panama), para. 73.

and collected by private actors.[47] The fees that each bank charges for the customs bond are freely determined by each bank and are calculated based on the risk model of the financial entity and the risk profile of the applicant. Thus, the costs of the customs bond do not stem from Decree 1745, and the Colombian government does not provide administrative instructions or guidance to these private financial actors. Panama likewise complains that the customs bond guarantee "conditions the access of products to the will of a financial entity to the detriment of the predictability of the conditions for importation".[48] By Panama's own admission, the restrictive effects about which it complains result from the conduct of a private actor and not from government conduct. For these reasons, the cost and potential restrictive effects of the customs bond cannot be attributed to the Colombian government and, consequently, cannot provide a basis for a claim that the customs bond constitutes a "restriction" within the meaning of Article XI:1 of the GATT 1994.

37. Ultimately, Panama's claim that the customs bond is a prohibited "restriction" under Article XI:1 is entirely based on unsubstantiated assertions. For these reasons, Colombia respectfully requests that the Article 21.5 Panel find that Panama has failed to establish that the customs bond in Decree 1745 is inconsistent with Article XI:1 of the GATT 1994. Colombia also recalls that Decree 1745 is no longer in force.

B. Panama has failed to establish that the special import regime is inconsistent with Article XI:1

38. Panama challenges the special import regime separately from the customs bond requirement under Article XI:1 of the GATT 1994. However, the customs bond requirement is a component of the special import regime, as Panama has described it. Therefore, Panama is improperly challenging the same measure twice. Since the customs bond requirement is an integral part of the special import regime as described by Panama, and since Panama has not made a separate claim against the special import regime exclusive of the customs bond, Panama's claim against the special import regime must also fail.

39. In any event, customs formalities are a necessary component of international trade. While Article VIII:3 of the GATT 1994 and the Agreement on Trade Facilitation pursue the objective of reducing customs formalities, they recognize that such formalities are permissible. It follows that, because customs formalities are permissible measures under the GATT 1994 and other WTO agreements, the imposition of a customs formality, and any associated administrative burden, cannot in themselves constitute prohibited "restrictions" under Article XI:1 of the GATT 1994. Furthermore, Article VIII of the GATT 1994 recognizes that there may be fees associated with customs formalities. Thus, the fact that a customs formality has associated fees or costs cannot, without more, give rise to a prohibited "restriction" under Article XI:1 of the GATT 1994.

40. Panama alleges that the special regime makes the import process "considerably 'costly' or 'onerous'".[49] However, customs authorities have the right to require that importers comply with certain formalities as part of the import process. Article VIII of the GATT 1994 recognizes that such formalities may generate fees or charges, which are not prohibited.

41. Panama first refers to translation fees.[50] However, Panama's official language is Spanish[51], and Panama fails to explain why its exporter would seek to translate their export documentation. In any event, the fees for translation are not charged by the Colombian government. These are fees charged by private parties. The requirement to submit translated documents is entirely reasonable. WTO Members are not required to operate in a language other than their own.[52]

42. Panama also complains about the "lack of availability of official translators of certain languages" in Colombia and asserts that this is trade restrictive.[53] The premise underlying Panama's argument is that a Member may require official translations only if it ensures that there is an official

[47] Exhibits COL-9.
[48] Panama's Second Written Submission (Article 21.5 – Panama), heading III.6.
[49] Panama's First Written Submission (Article 21.5 – Colombia), para. 59.
[50] Panama's First Written Submission (Article 21.5 – Colombia), para. 60.
[51] Article 7 of Panama's Constitution (Exhibit COL-7).
[52] See, for example, Article 10.8 of the TBT Agreement and Article 1.1.2 of the Agreement on Trade Facilitation.
[53] Panama's Second Written Submission (Article 21.5 – Panama), para. 125.

translator for each and every language used in the world. The unreasonableness of this proposition is self-evident.[54] WTO Members cannot be expected to ensure that they designate an official translator for each language in the world in each of their ports before they can require official translations of documents that are to be submitted to the government. In any event, Panama fails to point out that Colombia's Ministry of Foreign Affairs has established procedures for situations where an official translator is not available.[55]

43. Panama also asserts that official translations are only required for footwear and apparel.[56] Panama, however, does not provide any explanation as to why the product coverage gives rise to a prohibited "restriction". Article XI:1 of the GATT 1994 does not include a requirement that all customs formalities be applied horizontally to all products. The fact that a measure applies to one or more categories of products does not turn that measure into a prohibited "restriction".

44. Panama then refers to alleged certification costs.[57] The certification of documents in connection with importation is a formality that is expressly permitted under Article VIII of the GATT 1994. Given that certification requirements are permitted and that Members are allowed to charge fees for their services, there is no support for Panama's contention that the certification requirement or its costs constitute prohibited restrictions under Article XI:1 of the GATT 1994. Colombia recalls that, during the negotiations of the Agreement on Trade Facilitation, some WTO Members proposed to eliminate certification requirements.[58] This proposal was ultimately unsuccessful. If such measures were already prohibited under Article XI:1, they would not have been any point to Members proposing to eliminate them in the context of the negotiations of the Agreement on Trade Facilitation.

45. Panama further alleges that an existence certificate costs US$ 30.[59] The fee of US$ 30 is charged by, and paid to, an agency of the Panamanian State, and thus Panama is improperly seeking to attribute to Colombia fees that are determined and collected by Panama itself. Panama equally complains about the fee charged by the Panamanian Ministry of Foreign Affairs for the apostille or legalization. Panama again improperly attempts to attribute to the Colombian government fees that are determined and collected by the Panamanian government. Fees determined and collected by the Panamanian government cannot give rise to a "restriction" that is "instituted or maintained by" Colombia under Article XI:1 of the GATT 1994.

46. Colombia notes that Panama describes the certification of intent to sell in Colombia as "a disguised charge on the importer".[60] Panama's argument is an admission that the certification is not inconsistent with Article XI:1 of the GATT 1994. This is because Article XI:1 only applies to "restrictions other than duties, taxes or other charges".[61] "Charges" are expressly excluded from the scope of Article XI:1.

47. Panama next makes vague references to so-called "logistical costs".[62] Despite the label, these "logistical costs" seem to simply refer to the effort it takes an importer to execute the formalities. As the formalities are allowed, the time that it may take an importer to execute the formalities must also be permissible. In any event, Panama fails to explain how the costs of the formalities have a limiting effect on imports. Panama is simply asking the Panel to assume from the existence of the formalities, and from the mere existence of a cost associated to the formality that there are limiting effects such that there is a prohibited restriction under Article XI:1. Under Panama's theory, all formalities imposed in connection with importation would constitute a prohibited restriction under Article XI:1 of the GATT 1994.

48. As to the requirement to indicate, where applicable, the economic relationship between the supplier and the importer, questioning the need for such information and arguing that it requires retaining a tax attorney or accountant[63], it is generally recognized that a relationship between the

[54] Panama's Second Written Submission (Article 21.5 – Panama), paras. 124-126 and 131.
[55] Exhibit COL-10.
[56] Panama's Second Written Submission (Article 21.5 – Panama), para. 132.
[57] Panama's First Written Submission (Article 21.5 – Colombia), para. 60.
[58] TN/TF/W/22 (United States and Uganda).
[59] Panama's Second Written Submission (Article 21.5 – Panama), para. 135.
[60] Panama's Second Written Submission (Article 21.5 – Panama), para. 142. (underlining added)
[61] Underlining added.
[62] Panama's First Written Submission (Article 21.5 – Colombia), para. 60.
[63] Panama's Second Written Submission (Article 21.5 – Panama), para. 142.

supplier and the importer may affect the reliability of the declared price.[64] Furthermore, there is no requirement in Article 4.1(a) of Decree 1745 to retain a tax attorney or accountant.

49. Panama additionally complains about the requirement that the importer, the importer's legal representative, or an agent be present during the inspection of the merchandise by Colombia's customs authorities. Panama has not challenged the right of Colombia's customs authorities to inspect the merchandise. The presence of the importer, his/her legal representative, or agent is intended to safeguard the importer's due process rights. It is also an important element to ensure that the entities listed as importers are not shell companies being misused to conceal irregular operations and to evade the customs authorities. The use of shell companies in trade-based money laundering operations is a practice that has been identified by law enforcement authorities.[65] While Panama claims this requirement imposes additional costs, it provides no evidence of such costs.[66] Panama has failed to provide any evidence as to how the mere presence of an individual acting for the interests of the importer during a customs inspection has limiting effects on the quantities of imports such that it constitutes a prohibited restriction under Article XI:1 of the GATT 1994.

50. Panama's allegation that the formalities limit the importer's flexibility is also unpersuasive.[67] The fact remains that it is the importer that decides the quantity of the products to import and the importer remains free to import as large a quantity of the products as it wants. The importer also retains the right to change the quantity of the imports. If the quantity changes after it has submitted the documentation, it is free to re-file the documentation. Panama provides no evidence of how the formality has limiting effects on the quantity of the product such that it constitutes a prohibited import restriction under Article XI:1 of the GATT 1994.

51. Finally, Panama alleges that the customs formalities established in Decree 1745 "discourage" imports of the relevant merchandise.[68] Panama supports its position by making the remarkable statement that importers may either comply with the formalities or "modify the declared values" of the merchandise they are importing.[69] Panama's statement acknowledges the problem that the customs bond and the formalities are seeking to address: importers of apparel and footwear declaring a customs value that does not represent the actual price paid for the goods being imported. The suggestion that an importer simply "modify" the declared price shows a rather disappointing disregard for the customs legislation of the importing country. Declaring a fictitious customs value, even if it is a higher one, involves a false statement in an official document and would constitute customs fraud. In any event, Panama's logic is flawed. If the importer modifies the customs value, it does not necessarily mean that it is importing lower quantities of the good in question.

52. For these reasons, Panama has failed to establish its claim that the special regime is inconsistent with Article XI:1 of the GATT 1994. Colombia therefore respectfully requests that the Panel reject Panama's claim.

VII. PANAMA HAS FAILED TO DEMONSTRATE THAT THE ADMINISTRATION OF THE CUSTOMS BOND ESTABLISHED IN DECREE 1745 IS INCONSISTENT WITH ARTICLE X:3(a) OF THE GATT 1994

A. Panama has failed to establish that decree 1745 falls within the scope of Article X:3(a)

53. The Appellate Body has stated that Article X:3(a) makes a distinction between the legal instrument being administered and the legal instrument that regulates the application or implementation of that instrument.[70] A party may challenge under Article X:3(a): (1) the manner in which legal instruments are applied or implemented in a particular case; and (2) the legal instruments that regulate such application or implementation.[71] As Panama acknowledges, where a

[64] Article 1 of the Customs Valuation Agreement.
[65] Original Exhibit COL-11.
[66] Panama's First Written Submission (Article 21.5 – Colombia), para. 60.
[67] Panama's First Written Submission (Article 21.5 – Colombia), para. 62.
[68] Panama's First Written Submission (Article 21.5 – Colombia), para. 64.
[69] Panama's First Written Submission (Article 21.5 – Colombia), para. 64.
[70] Appellate Body Report, *EC – Selected Customs Matters*, para.200.
[71] Appellate Body Report, *EC – Selected Customs Matters*, para. 200.

party challenges a legal instrument that administers another measure, the latter measure falls outside the scope of Article X:3(a).[72]

54. Panama's claim under Article X:3(a) is directed against the customs bond established in Decree 1745 (the "special bond" in Panama's terms).[73] Yet, Panama fails to explain, much less substantiate with evidence, that Decree 1745 "administer[s]" another legal instrument. Panama does not provide any explanation or evidence that Decree 1745 somehow "administer[s]" requirements in Decrees 2685 and 390. That Decree 1745 establishes a customs bond and that Decrees 2685 and 390 may also contemplate customs bond is insufficient to establish that the former "administer[s]" the latter within the meaning of Article X:3(a).

55. Colombia encourages the Panel to review Panama's description of the operation of the customs bond established in Decree 1745.[74] This description does not characterize Decree 1745 as an instrument that "administer[s]" requirements provided for elsewhere. In fact, Panama itself characterizes the customs bond requirement as emanating directly from Decree 1745 and makes no mention of Decree 1745 administering a requirement established in a separate legal instrument.[75]

56. For these reasons, Colombia respectfully requests that the Panel find that Panama has failed to establish that Decree 1745 falls within the scope of Article X:3(a).

B. Decree 1745 is in any case consistent with Article X:3(a)

57. Even if Decree 1745 were to fall within the scope of Article X:3(a), it is consistent with the provision.

58. First, uniform administration requires that Members ensure that their laws are applied consistently and predictably, and uniformly between individual traders.[76] The panel in *US – Stainless Steel (Korea)* noted that the requirement of uniform administration of laws and regulations must be understood to mean uniformity of treatment in respect of persons similarly situated, and does not require identical results where relevant facts differ.[77] Article X:3(a) should not be read as a broad anti-discrimination provision, and should not be interpreted to require that all products be treated identically.[78] The panel in *Argentina – Hides and Leather* dismissed the complaining party's argument that it was improper for Argentina to construct a special set of procedures for administering its export laws for only one type of product (hides) while other products were treated differently.[79]

59. The same logic applies in the context of the customs bond requirement. The customs bond requirement applies to all apparel and footwear under certain value thresholds. All importers of these products can expect treatment of the same kind, in the same manner, both over time and in different places and with respect to other persons. Therefore, Colombia requests the Panel to find that the customs bond requirement does not lead to non-uniform treatment within the meaning of Article X:3(a).

60. Second, impartial administration has been considered to mean the application or implementation of the relevant laws and regulations in a fair, unbiased and unprejudiced manner.[80] Panama has not explained why it considers the measure to be partial, and more specifically, why the fact that the percentage set out in the bond requirement is fixed means that the requirement is not impartial. It has therefore not shown how and *why* those provisions necessarily lead to impartial administration. The measure applies equally to all importers of covered apparel and footwear, and Panama has not explained to what entity Colombia is partial to and what interests it is favoring in applying the measure. Therefore, Panama has not discharged its burden of substantiating how and

[72] Panama's First Written Submission (Article 21.5 – Colombia), para. 75.
[73] Panama's First Written Submission (Article 21.5 – Colombia), para. 76.
[74] See Panama's First Written Submission (Article 21.5 – Colombia), paras. 34-35.
[75] Panama's First Written Submission (Article 21.5 – Colombia), para. 34.
[76] Panel Report, *Argentina – Hides and Leather*, para. 11.83. See also Panel Reports, *China – Raw Materials*, para. 7.692; and *US – COOL*, para. 7.876.
[77] Panel Report, *US – Stainless Steel (Korea)*, para. 6.51.
[78] Panel Report, *Argentina – Hides and Leather*, para. 11.84.
[79] Panel Report, *Argentina – Hides and Leather*, paras. 11.58 and 11.85.
[80] Panel Report, Thailand – Cigarettes (Philippines), para. 7.899.

why those provisions necessarily lead to administration that is not impartial and has not made a *prima facie* case in this respect.

61. Third, reasonable administration means administration that is equitable, appropriate for the circumstances and based on rationality.[81] In previous disputes, the requirement of reasonable administration was understood as requiring the examination of the features of the administrative act at issue in the light of its objective, cause or the rationale behind it.[82] Panama's allegation of unreasonable treatment is confined to the requirement that a customs bond is required of holders of a global bond.[83] However, as already explained, where imports at artificially low prices constitute an important share of the total imports, the global bond would be insufficient. Thus, Panama has failed to show that Decree 1745 leads to unreasonable administration.

62. For the reasons set out above, Colombia respectfully requests that the Panel reject Panama's claim that the customs bond is inconsistent with Article X:3(a) of the GATT 1994.

VIII. EVEN IF THE CUSTOMS BOND AND THE SPECIAL IMPORT REGIME WERE INCOMPATIBLE WITH ARTICLES X:3(a) OR XI:1 OF THE GATT 1994, THEY ARE JUSTIFIED UNDER ARTICLE XX OF THE GATT 1994

A. The customs bond and customs formalities are measures necessary to protect public morals

1. The customs bond and the customs formalities in Decree 1745 are measures taken to protect public morals

63. Article XX(a) provides a justification for measures that are necessary to protect public morals.[84] Provisional justification under Article XX(a) requires a Member to demonstrate: (i) that it has adopted or enforced the measure "to protect public morals"; and (ii) that the measure is "necessary" to protect such public morals.[85]

64. The Appellate Body has interpreted the term "public morals" to denote standards of right and wrong conduct maintained by or on behalf of a community or nation.[86] The content of public morals can vary from Member to Member, depending upon a range of factors, including prevailing social, cultural, ethical, and religious values. Members should be given some discretion to define and apply for themselves the concept of public morals in their respective territories, according to their own systems and scales of values.[87] Members also have the right to determine the level of protection they consider appropriate.[88] Money laundering is one of the forms of public morals found to fall within the scope of Article XX(a).[89]

65. The Appellate Body has further found that a measure is designed to protect public morals if it is not incapable of protecting public morals, such that there is a relationship between the measure and the objective of protecting public morals.[90] To determine the existence of such relationship, a panel must examine evidence regarding the design of the measure, including its content, structure, and expected operation.[91]

66. A principal policy objective of Decree 1745 is to combat money laundering. In the case of Colombia, the fight against money laundering is a matter of "public morals", as recognized by the panel and the Appellate Body in the original proceedings.[92] The policy objectives of Decree 1745 are

[81] Panel Report, *China − Raw Materials*, para. 7.696.
[82] Panel Report, *US − COOL*, para. 7.851.
[83] Panama's First Written Submission (Article 21.5 − Colombia), para. 88.
[84] Original Appellate Body Report, para. 6.20.
[85] Appellate Body Report, *EC − Seal Products*, para. 5.169 (referring to Panel Report, *US − Gambling*, para. 6.455).
[86] Appellate Body Report, *US − Gambling*, para. 299.
[87] Panel Report, China − Publications and Audiovisual Products, para. 7.759.
[88] Appellate Body Report, *EC − Seal Products*, para. 5.119.
[89] Original Panel Report, para. 7.339.
[90] Original Appellate Body Report, para. 6.23.
[91] Original Appellate Body Report, para. 6.22.
[92] Original Panel Report, para. 7.339; and Original Appellate Body Report, para. 5.105.

set out in the Decree's preamble.[93] It explains that trade transactions are being utilized by criminal organizations to launder money, finance terrorism, and generate unfair competition. The Decree further explains that one of the modalities used by criminal organizations consists of using practices involving customs fraud. It adds that the footwear and apparel sectors have been significantly affected by money laundering and other illicit transactions and that, consequently, it is necessary to implement new mechanisms to control and counter this scourge. The minutes of the Triple A Committee confirm that one of the principal policy objectives of Decree 1745 is to fight money laundering.[94]

67. In short, Decree 1745 is a measure adopted to protect public morals within the meaning of Article XX(a) of the GATT 1994.

2. The customs bond and the customs formalities in Decree 1745 are necessary

68. The examination of "necessity" involves, in each case, a process of "weighing and balancing" the following factors: (i) the extent to which the measure sought to be justified contributes to the realization of the end pursued; (ii) the relative importance of the societal interest or values that the measure is intended to protect; and (iii) the trade-restrictiveness of the challenged measure.[95] After this preliminary analysis of necessity, this result must be confirmed by comparing the measure with its possible alternatives.[96] However, each Member has the right to determine the level of protection they consider appropriate, and the alternative suggested must be capable of achieving this level of protection.[97]

69. First, as to the importance of the interests protected, the objective of combating money laundering reflects societal interests that are vital and important in the highest degree.[98] Money laundering is linked to drug trafficking and the financing of criminal groups, so that the measures also seek to reduce the operational capacity of drug traffickers and criminal groups. The importance of the fight against money laundering as an objective of Colombian public policy is reflected in statements made by high-ranking officials.[99] Also, it has been recognized in other disputes that measures which address concerns relating to money laundering and organized crime protect values and interests that could be considered vital and important in the highest degree.[100]

70. Second, as to the contribution, the measures are capable of making a material contribution to combating money laundering, because they reduce the incentives for using imports of apparel and footwear at artificially low prices for money laundering purposes. The customs bond ensures the payment of duties and any fines or penalties on the importation of the goods, discourages under-invoicing, and allows the collection of fines in those instances.

71. The customs formalities provide information that permits customs authorities to undertake a more informed risk assessment, ensure that there is a legitimate relationship between the importer and the exporter, and also ensure that the supplier declared by the importer is actually the entity that supplied it with the products being imported. The certificate of existence and incorporation issued by the relevant national authority of the exporter's country helps confirm that the exporting company actually exists, and it not merely a shell company. The information of the distributors in Colombia allows the DIAN to assess whether the commercial activities claimed by the importer are real and not fictitious, and to keep a record of the shelter companies, people, partners, fiscal supervisors, and persons participating in the scheme. The signed statement by the legal representative of the importer certifying the accuracy of the commercial information provided to the DIAN, which acknowledges the legal right of the DIAN to send the customs information to other relevant governmental agencies, helps to identify precisely the person in charge of the importation

[93] Exhibit PAN-2.
[94] Exhibit COL-4.
[95] Appellate Body Report, *India – Solar Cells*, para. 5.59; and Original Appellate Body Report, paras. 5.71-5.73 and 5.77.
[96] Panel Report, *EC – Seal Products*, para. 7.630.
[97] Panel Report, *US – Gambling*, para. 6.465; and Appellate Body Report, *EC – Seal Products*, para. 5.279.
[98] Original Appellate Body Report, para. 5.105.
[99] National Planning Department, National Development Plan (2010-2014) (extracts) (Original Exhibit COL-33); and National Council for Economic and Social Policy, National Policy against Money Laundering and the Financing of Terrorism, 18 December 2013 (Original Exhibit COL-19).
[100] See Panel Report, *US – Gambling*.

and can be held as evidence of its participation in the operation. Some of these documents should be apostilled or legalized and have an official translation in Spanish. The purpose of the legalized/apostilled documents is to confirm that they are indeed issued by the relevant authority of the exporting country.

72. Panama argues that there is an alternative instrument that could also contribute to the fulfillment of these objectives.[101] As a matter of logic, the existence of an alternative measure that can contribute to the fulfillment of a particular objective does not in itself mean that the challenged measure is not apt to make a material contribution to the fulfillment of the same objective. Also, the assessment of contribution under the necessity test articulated by the Appellate Body evaluates the aptness of challenged measure and does not call for a comparison of its contribution with another measure.[102] Thus, in this particular context, that another measure can contribute to the objective does not exclude that the customs bond and customs formalities in Decree 1745 contribute to the fulfillment of the same objective.

73. Colombia also recalls that the Appellate Body has clearly rejected a requirement to quantify the contribution of the challenged measures, explaining that the analysis of contribution "can be done in either quantitative or in qualitative terms".[103] The Appellate Body has additionally observed that a measure may be justified under Article XX even if its contribution "is not immediately observable".[104] Therefore, Panama's attempt to require quantification of the contribution of the measure to the fulfillment of the objectives pursued is misplaced.[105]

74. Third, the measures are not trade restrictive in any way. Neither of the measures restricts the quantity of imports and therefore do not restrict trade. The measures do not impose any quantitative limits on imports, and are carefully calibrated to affect imports likely to be used for money laundering. Furthermore, the customs bond is a contingent liability. Thus, to the extent it is found to have any restrictive effects, those would be significantly lower than requiring the payment of duties.

75. Panama's allegations on the trade restrictiveness of the measure are unpersuasive. In the context of the customs bond, Panama merely lists features of the measures, but provides no analysis of how each of these features gives rise to trade restrictiveness.[106] Furthermore, Panama fails to make any link between these features and its conclusion that the customs bond is "highly trade restrictive".[107] In the context of the customs formalities, Panama's main complaint is that the measure encourages importers to shift from artificially low priced goods to higher priced goods.[108] Rather than demonstrating that the regime is "highly trade restrictive"[109], Panama's own assertion recognizes that, while the importer may vary the composition of the apparel and footwear goods it purchases, it can and will still import goods to Colombia. This scenario cannot reasonably be described as "highly trade restrictive".

76. As an alternative less restrictive measure, Panama refers to a customs bond required after a customs controversy has arisen, which Panama claims makes an equivalent contribution.[110] However, Panama has not demonstrated that the "valuation controversy" bond would make an equivalent contribution to reducing undervaluation and combatting money laundering. The effectiveness of Panama's proposal is limited by the resources of the customs administration and the possibility of human error. These factors create a risk that irregular transactions will not be detected and therefore the undervalued imports being used for money laundering purposes will be entered without the posting of a customs bond. This risk is not present in the case of the customs bond in Decree 1745 because it applies to all import transactions of the covered products.

[101] Panama's Second Written Submission (Article 21.5 − Panama), paras. 207, 208, 227, and 251.
[102] Appellate Body Report, *Brazil − Retreaded Tyres*, para. 156.
[103] Appellate Body Report, *Brazil − Retreaded Tyres*, para. 146.
[104] Appellate Body Report, *Brazil − Retreaded Tyres*, para. 151.
[105] Panama's Second Written Submission (Article 21.5 − Panama), para. 209 (referring to Original Appellate Body Report, para. 5.110).
[106] Panama's Second Written Submission (Article 21.5 − Panama), para. 213.
[107] Panama's Second Written Submission (Article 21.5 − Panama), para. 214.
[108] Panama's Second Written Submission (Article 21.5 − Panama), para. 239.
[109] Panama's Second Written Submission (Article 21.5 − Panama), para. 239.
[110] Panama's Second Written Submission (Article 21.5 − Panama), paras. 215-219.

77. Panama also proposes using the invoice as an alternative to the supplier's sales certificate.[111] This alternative also does not make an equivalent contribution because it does not address the risk that the information in the invoice may be inaccurate.[112] Manipulation of the information provided in the invoice is one of the practices used in trade-based money laundering. The supplier's sales certificate provides a means to confirm the information provided in the invoice. The other alternative measures proposed by Panama have an element in common, which is that the information would be supplied after the withdrawal of the merchandise.[113] Thus, Panama does not question the value of the information itself, but rather the moment when it is submitted. However, the submission of this information after withdrawal of the merchandise does not address the problem posed by shell companies, which are a technique used for trade-based money-laundering.[114] The use of shell companies allows criminal groups to evade the customs authorities' efforts to investigate and prosecute suspicious transactions after the merchandise has been withdrawn from customs. In such situations, the criminal groups will use a different shell company for subsequent imports. In sum, the alternative proposed by Panama does not make an equivalent contribution to the policy objectives pursued by Colombia.

78. For all these reasons, it is clear that both the customs bond and the special import regime are necessary to protect public morals in the meaning of Article XX(a).

B. The customs bond and special import regime are measures necessary to secure compliance with GATT-consistent laws and regulations

79. Article XX(d) provides a justification for measures that are necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of the GATT 1994. 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.[115] The necessity test under Article XX(d) proceeds along similar lines as the necessity test under Article XX(a).

80. Decree 1745 combats money laundering and therefore seeks to secure compliance with Article 323 of Colombia's Criminal Code, which addresses money laundering. In the original proceedings the Appellate Body recognized the link between undervaluation and money laundering in Colombia.[116] The Appellate Body also recalled the original 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."[117]

81. The customs bond and special import regime are also measures to secure compliance with Colombia's customs laws and regulations, including Decrees 390 of 2016[118] and 2685 of 1999.[119] As indicated in Article 1 of the Decree, its objective is to reinforce Colombia's risk management and customs control system.[120] Colombia's customs laws and regulations are consistent with GATT 1994.[121]

82. Colombia has established that Decree 1745 makes a contribution to the fight against money laundering, that the fight against money laundering involves vital and important interests of the highest degree in Colombia[122], and that the customs bond and formalities established under Decree 1745 do not have restrictive effects of trade. In the circumstances, Decree 1745 must be found to be a measure necessary to secure compliance with Article 323 of the Colombian Criminal Code. In addition, by guaranteeing the payment of the customs duties, taxes and possible penalties,

[111] Panama's Second Written Submission (Article 21.5 − Panama), paras. 247 and 251.
[112] Original Exhibit COL-11.
[113] Panama's Second Written Submission (Article 21.5 − Panama), paras. 248-251.
[114] Original Exhibit COL-11.
[115] Appellate Body Report, *Argentina − Financial Services*, para. 6.203.
[116] Original Appellate Body Report, para. 5.145.
[117] Original Appellate Body Report, para. 5.139 (referring to Original Panel Report, para. 7.512).
[118] Exhibit PAN-4.
[119] Exhibit PAN-3.
[120] Exhibit PAN-2.
[121] Appellate Body Report, *US − Carbon Steel*, para. 157; see also Panel Report, *Colombia − Ports of Entry*, paras. 7.531-7.532.
[122] Original Appellate Body Report, para. 5.105.

the customs bond contributes to guaranteeing customs obligations.[123] The customs formalities provide information to the customs authority that allows it to detect and control transactions that do not comply with Colombia's customs laws and regulations.

83. Panama has not provided any rebuttal arguments or evidence under subparagraph (d) of the Article XX and, consequently, the Panel should find that the customs bond and customs formalities in Decree 1745 are justified under Article XX(d) of the GATT 1994.

C. The customs bond and special import regime are compatible with the chapeau of Article XX of the GATT 1994

84. The chapeau of Article XX requires that 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. Whether discrimination is arbitrary or unjustifiable, however, depends on the cause or rationale of the discrimination, not on the effects of the discrimination.[124] The existence of a "disguised restriction on international trade" might be derived where a restriction on international trade, arising in the application of a measure provisionally justified under a specific paragraph of Article XX, would lead to that exception being abused or illegitimately used.[125]

85. The customs bond and the special import regime comply with the chapeau of Article XX of the GATT 1994, because they are not applied in a manner which constitutes a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade.

86. The customs bond and customs formalities established in Decree 1745 are applicable to imports from all origins. Moreover, customs bonds and customs formalities are legitimate instruments that are permitted under the GATT 1994 and the Agreement on Trade Facilitation. Furthermore, there is nothing concealed or unannounced about the customs bond and customs formalities. Both the customs and the customs formalities are set out in a decree that was published in Colombia's *Diario Oficial*.[126] Therefore, the customs bond and the customs formalities established in Decree 1745 are not "disguised restrictions" for purposes of the chapeau of Article XX of the GATT 1994.

87. In sum, the customs bond and customs formalities in Decree 1745 are consistent with the chapeau of Article XX of the GATT 1994.

IX. CONCLUSION

88. Colombia requests that the Article 21.5 Panels find that Colombia has implemented the recommendations and rulings of the DSB to bring its measures into conformity with its obligations under the GATT 1994.

[123] Panel Report, *US – Certain EC Products*, para. 6.41.
[124] Appellate Body Report, *Brazil – Retreaded Tyres*, paras. 226–228.
[125] Panel Report, *Brazil – Retreaded Tyres*, para. 7.320.
[126] Exhibits COL-12 and COL-13.

ANNEX B-2

INTEGRATED EXECUTIVE SUMMARY OF PANAMA

I. INTRODUCTION

1. More than a decade has passed since Panama called on Colombia to comply with its obligations under the agreements of the World Trade Organization (WTO) and cease causing impediments to trade. Not only has Colombia failed to heed these requests; it has continued exploring new subtle ways of hindering the international import trade. Panama considers this to be unacceptable and asks the Panels to find once again that Colombia is openly breaching its obligations to this international organization and that they issue recommendations and rulings on the inconsistency with WTO law of the specific bond and the special import regime imposed by Decrees Nos. 1745 and 2218.

2. The picture of compliance presented by Colombia in this dispute is incomplete. From a factual standpoint, Colombia refers to a tariff shift as the only measure of compliance, whereas it is clear that there are other Colombian compliance-related measures forming a complex system of customs control to restrict imports below certain thresholds. From the standpoint of the policies that are involved, Colombia alleges that this matter concerns its intention to combat underinvoicing and money laundering. However, it submits no item of evidence that the imports at issue have been condemned by judicial or administrative authorities as acts involving underinvoicing and the offence of money laundering. What Colombia fails to mention is that the establishment and maintenance of the measures at issue are underpinned by purposes of industrial protection, promotion of competitiveness, protection of jobs and policy coordination.

3. The regulatory regime provided for explicitly and organically in Colombian legislation is a regime that represents a major logistical challenge, expenditure of time and money, reputational and risk-management impact, ex-post control activities and possible criminal investigations in respect of money laundering and customs fraud.[1]

4. Panama considers that the special import regime is inconsistent with Articles VIII:3, X:3(a) and XI:1 of the General Agreement on Tariffs and Trade (the GATT 1994), and Articles 1, 2, 3, 5, 6 and 7 of the Customs Valuation Agreement (CVA). Panama also considers that the specific bond provided for in that regime is inconsistent with Articles X:3(a) and XI:1 of the GATT, and with Article 13 of the Customs Valuation Agreement. Panama observes that both these claims and the changes in regulatory instruments under the new Decrees No. 1786 and No. 2218, are duly covered by the collective terms of reference of these Panels. Panama is of the view that none of these measures is justified by Articles XX(a) and XX(d) of the GATT.

II. THE MEASURES CONTAINED IN DECREES NO. 1745 AND NO. 2218 AND PANAMA'S CLAIMS ARE COVERED BY THE PANELS' TERMS OF REFERENCE

5. Colombia has introduced regulatory changes affecting the already precarious competitive status of imports in the clothing and footwear sectors, to which the sectors of textiles, fibres and yarns ("imports") have now also been added. On 27 December 2017, Colombia issued Decree No. 2218, replacing Decree No. 1745, as the legal basis of the specific bond and the special import regime.[2]

6. Colombia seeks to shirk its obligations by arguing that Panama's claims are not covered by the Panels' terms of reference. Colombia argues that the mandate of the Panel requested by Colombia is confined to the measures and provisions contained in its panel request.[3] Hence, according to Colombia, the measures contained in Decree No. 1745 and Panama's claims under

[1] Customs Agency, Repremundo, "Arancel y medidas de importación confecciones y calzado – Dec. 1744 y 1745, de 2016", 29 November 2017, Exhibit PAN-91.

[2] Panama notes that Decree No. 1744 has also recently been amended by Decree No. 1786 of 2 November 2017 "partially amending the Customs Tariff" (Decree No. 1786), Exhibit PAN-45.

[3] Colombia's rebuttal as complainant, paras. 3-14.

Articles XI:1, X:3(a), VIII:3 of the GATT and Articles 1, 2, 3, 5, 6 and 7 of the Customs Valuation Agreement are not covered by the terms of reference of that Panel.[4]

7. However, Colombia's arguments are unconvincing. Panama considers that there is no procedural limitation preventing the panels from ruling on all the measures at issue and all the claims submitted by Panama. Both the measures contained in Decree No. 1745 and Panama's claims under the aforementioned provisions form part of the terms of reference of the Panel requested by Colombia and the Panel requested by Panama, except for Article VIII of the GATT, which only forms part of the terms of reference of the Panel requested by Colombia.

8. As is well-known, the terms of reference of the Panel requested by Colombia are set out in its request for the establishment of a compliance panel, document WT/DS461/17. This document, which contains the *matter* referred to the DSB by Colombia, includes the *ad valorem* tariff of Decree No. 1744, Article II of the GATT, as well as "[Panama's] concerns regarding Colombia's compliance with the DSB's recommendations and rulings", in particular, [Panama's] [dis]agree[ment] that Decree 1744 [...] is consistent with the covered agreements and brings the compound tariff into conformity with the GATT 1994".[5] These three issues, therefore, including Panama's disagreement, form part of the "matter" that has been referred to the Panel requested by Colombia, and fall within the terms of reference of that Panel. The mandate foreseen by Article 11 of the DSU in order for the Panel to make an "objective assessment of the matter" implies that the Panel requested by Colombia must, at the very least, determine the nature of Panama's disagreement, and verify whether it is well-founded.

9. Panama has complied with the requirement to give explicit expression to that disagreement in its respective submissions and to enable the Panel requested by Colombia to discharge its functions. As is well-known, Panama's position which gave rise to this disagreement is that the differential *ad valorem* tariff under Decree No. 1744 is not the only compliance measure, but that there are also the measures contained in Decree No. 1745, and that these measures are inconsistent with the GATT and the Customs Valuation Agreement for numerous reasons, as explained in its submissions as both respondent and complainant.

10. Panama likewise recalls that the terms of reference of a compliance panel are determined in the light of Articles 6.2 and 21.5 of the DSU taken together.[6] It is well-established that the requirements of DSU Article 6.2 must be interpreted in accordance with the scope and the function of the compliance proceedings[7], and that this function is one of examining *fully* the "consistency with a covered agreement" of the "measures taken to comply" with the recommendations and rulings of the DSB so as to ensure real and effective compliance.[8]

11. It is for this reason that the compliance panel requested by Colombia should examine the compliance measures *fully*, that is, both the declared compliance measures and those measures that are *not* declared but which have a particularly close relationship or close nexus, in terms of timing, nature and effects, to the declared compliance measure and the recommendations and rulings of the DSB in accordance with the Appellate Body's jurisprudence on the close nexus.[9] Panama sees no logical or legal impediment to prevent these jurisprudential criteria from being applied in this case.

12. In its previous submissions, Panama has demonstrated that the specific bond and the special import regime are "undeclared measures" with a particularly close relationship to Decree No 1744, in terms of timing, nature and effects, and to the recommendations and rulings of the DSB.[10] Accordingly, all these measures must be considered as compliance measures duly covered by the terms of reference of the Panel requested by Colombia. It should be noted that the regulatory changes recently adopted by Colombia by means of Decree No. 2218 do not affect the terms of

[4] Ibid., paras. 3-14.

[5] Colombia's compliance panel request, p. 2 and footnote 7.

[6] Panel Report, *Australia – Salmon (Article 21.5 – Canada)*, para. 7.10 referring to para. 4 of the preliminary ruling in respect of its terms of reference.

[7] Appellate Body Report, *US – Zeroing (Article 21.5 – Japan)*, para. 1.25.

[8] Appellate Body Report, Canada – Aircraft (Article 21.5 – Brazil), para. 41.

[9] Appellate Body Report, US – Softwood Lumber IV (Article 21.5 – Canada), para. 77; US – Zeroing (EC) (Article 21.5 – EC), para. 204.

[10] See Panama's first written submission as respondent, paras. 15-48; Panama's rebuttal as complainant, paras. 6-57 and Panama's rebuttal as respondent, paras. 37-134.

reference of the Panel requested by Colombia. Decree No. 2218 simply replaces Decree No. 1745 without changing the intrinsic nature of the compliance measures as customs controls. It has to be borne in mind that it is wrong to say that Decree No. 2218 is a new "measure"; it is simply a new "normative act"[11] which extends the validity of existing measures.

13. However, in demonstrating that Colombia's compliance measure is broader than the declared measure, it is only to be expected that concerns pertaining to compliance other than those raised in the text of Colombia's panel request would arise. Thus, with respect to all the controls, requirements and conditions of the special import regime, Panama has serious concerns regarding compliance under Articles XI:1, X:3(a), and XIII:3 of the GATT; and Articles 1, 2, 3, 5 and 7 of the Customs Valuation Agreement. These are not new concerns and the Colombia Panel can testify to their existence as early as the first occasion used by Panama to give its views as respondent, i.e. in its first written submission as respondent, on 29 November 2017.[12]

14. Such being the case, it is logical, without there being any contrary legal impediment in the DSU, that issues of compliance concerning undeclared measures should be covered by the mandate of the Panel requested by Colombia. In other words, and without prejudice to the fact that these issues form part of the "matter" referred to in Colombia's panel request as such, it may be asked what would be the point of accepting that certain undeclared measures form part of a panel's terms of reference in order subsequently to reject various compliance issues stemming from those same measures.

15. Furthermore, Panama considers that such a contrived approach would not help the compliance Panel requested by Colombia to relieve itself of its obligations under Article 11 of the DSU, inasmuch as it would not be able to evaluate *fully* the matter of compliance by Colombia.[13] An objective and full assessment of compliance could not be made if the Panel were unable to assess the compliance of the undeclared measures with WTO provisions other than Article II of the GATT. Such an assessment would be based on an incomplete and even skewed or biased framework, as it would have been defined exclusively by one of the parties to the dispute. In addition, an analysis of this nature would run counter to achieving a "satisfactory settlement" of the dispute in accordance with Article 3.4 of the DSU, and to achieving a "prompt settlement" and "prompt compliance" in accordance with Articles 3.3 and 21.1 of the DSU.[14]

16. In conclusion, Panama has no doubt that the measures contained in Decree No. 1745 and its claims under Articles XI:1, X:3(a), and XIII:3 of the GATT, as well as under Articles 1, 2, 3, 5 and 7 of the Customs Valuation Agreement are duly covered by the terms of reference of the Panel requested by Colombia.

17. Panama observes that, in any case, even if the Panel requested by Colombia were to consider that the measures under Decree No. 1745 do not form part of its terms of reference, these measures are nevertheless covered by the terms of reference of the Panel requested by Panama.[15] In its panel request, Panama identified the specific bond and the special import regime as "the specific measures at issue".[16] Similarly, even if the Panel requested by Colombia were to consider that Panama's claims under Articles X:3(a) and XI:1 of the GATT and under Articles 1, 2, 3, 5 and 7 of the Customs Valuation Agreement do not form part of the terms of reference of the Panel requested by Colombia, they are covered by the terms of reference of the Panel requested by Panama.[17] Thus, there is no procedural limitation preventing the Panels from ruling on the measures at issue and Panama's claims.

18. That having been said, Panama observes that Article VIII of the GATT is not identified in its compliance panel request. At the time it submitted that request, the requirements of Decree No. 1745 had been in force for only a few months and, as a matter of good faith, Panama saw no cause for concern. Doubts began to arise, however, when regulatory changes were introduced by Colombia. Already in its first submission as respondent, Panama placed on record its

[11] Panama's rebuttal as respondent, paras. 5 and 7.
[12] Panama's first submission as respondent, para. 66(a).
[13] Appellate Body Report, Canada – Aircraft (Article 21.5 – Brazil), para. 41.
[14] Panel Report, *Australia – Salmon (Article 21.5 – Canada)*, para. 7.10, referring to para. 27 of the preliminary ruling in respect of its terms of reference.
[15] WT/DS461/25 and WT/DS461/22.
[16] WT/DS461/22, paras. I.A. and I.D.
[17] WT/DS461/22, paras. II.A and II.D.

concern that the stringency of certain formalities represented a problem of compliance by Colombia with Article VIII:3 of the GATT.

19. However, the concern became critical with the entry into force of Decree No. 2218 of 27 December 2017, given the extreme nature of the legal effects of that regulation. As will be recalled, as soon as Panama learned of that regulatory measure, it communicated that information to the Panels and underscored its claim under Article VIII:3 at the earliest available opportunity: its rebuttal as respondent.[18] Panama could not have acted more quickly. In particular, Panama could not have included this claim in its compliance panel request, because the legal consequence underpinning the claim was a novel element of Decree No. 2218 that had not existed at the time the request was made. Even under these circumstances, Panama commented that, in view of the importance of this claim and of due process, Panama was placing itself at the disposal of the Panels in order, if appropriate, to look at additional options that the Panels might consider relevant in order to ensure the due engagement of the parties on this matter.[19]

20. Panama considers it important to specify that, although the regulatory action of Colombia has not changed the measure intrinsically, it has introduced features into the measure which have obliged Panama to react in respect of steps to prevent Colombia from presenting an imprecise picture of compliance. Panama has addressed this (unexpected) situation in good faith and with a cooperative attitude, seeking to adapt its submissions and arguments to the volatile and changing regulatory environment prevailing in Colombia in respect of yarns, textiles, apparel and footwear. Panama would be dismayed if, despite its actions being attuned to a moving target, its complaint concerning the violation of Article VIII:3 of the GATT were affected by procedural uncertainty regarding the precise limits of the terms of reference of a compliance panel requested by the original respondent. Thus, a measure obviously inconsistent with WTO law would circumvent the authority and jurisdiction of these courts, leaving Panama with no other remedy than having to bring a second Article 21.5 appeal under the Dispute Settlement Understanding, which would run counter to the system's objective of achieving "prompt settlements".

21. In conclusion, for the reasons set forth above, Panama requests the Panels to reject Colombia's claim that the measures in dispute and the corresponding claims of Panama do not form part of the terms of reference of the Panels.

III. THE SPECIFIC BOND AND THE SPECIAL REGIME ARE "COMPLIANCE MEASURES"

22. For the purposes of these proceedings, Colombia has conveniently decided to declare only the differential *ad valorem* tariff of Decree No. 1744 as the compliance measure and to deny the relevance of the measures contained in Decree No. 1745, as currently reflected in Decree No. 2218. However, this obvious attempt by Colombia to circumvent the compliance disciplines under Article 21.5 of the DSU is at odds with the facts and with the Appellate Body's "close nexus" jurisprudence.

23. The close nexus analysis has been used by numerous panels and the Appellate Body in the past to determine that an undeclared measure has a close nexus to the declared compliance measure, and is therefore duly covered by the mandate of the compliance panel.[20]

24. Thus, Panama considers that an "undeclared measure" must be considered as a "compliance measure" when it has a particularly close nexus to the "declared measure". All the third parties that submitted replies to the Panels' questions agree on this point.[21] In practice, this nexus has been determined in terms of timing, nature and effects as between the two measures, as well as between the measures themselves and the recommendations and rulings of the DSB.[22]

[18] Panama's rebuttal as respondent, paras. 9-10, 423-433.

[19] Panama's rebuttal as respondent, para. 12.

[20] See, inter alia, Australia − Salmon (Article 21.5 − Canada), US − Zeroing (EC) (Article 21.5 − EC), US − Upland Cotton.

[21] Ecuador's response to the Panels' question No. 6; United States' response to the Panels' question No. 1, para. 3; Japan's response to the Panels' question No. 1; European Union's response to the Panels' question No. 1, para. 1.

[22] Appellate Body Reports, US − Softwood Lumber IV (Article 21.5 − Canada), para. 77; US − Zeroing (EC) (Article 21.5 − EC), para. 204.

25. The nexus is clear in this dispute.[23] In particular:

- Colombia explained during the Article 21.3(c) proceedings that its compliance measure would consist in the combined implementation of tariff measures and customs measures, in order to address money laundering issues; and that it would therefore resort to the publication of "two 'mutually supportive decrees' as part of the implementation process";

- Colombia has argued that the specific bond of Decree No. 1745 is essential for charging the tariffs of Decree No. 1744 in Exhibit COL-4;

- the customs measures of Decree No. 1745 are a direct consequence of the recommendations and rulings of the DSB. Colombia has endeavoured to rectify the inconsistency with Article II of the GATT by means of Decree No. 1744, which imposes a purely ad valorem differential tariff. At the same time, Colombia seeks to address the same policy objectives that supported its attempted justification of the compound tariff under Articles XX(a) and (d) of the GATT by means of Decree No. 1745, which imposes customs "control" measures similar in effect to the specific component of the compound tariff in terms of its lack of sensitivity to price variations. As in the case of the compound tariff, Colombia, through these measures, limits access to the local market for imported products (in this instance in a manner contrary to Article XI:1 of the GATT), and seeks to justify the inconsistency of these measures with Articles XX(a) and (d) of the GATT;

- in terms of timing, Decrees Nos. 1744 and 1745 were adopted simultaneously on the same day following the adoption of the DSB recommendations;

- in terms of nature, the measures under Decrees Nos. 1744 and 1745 are analogous to the compound tariff of Decree No. 456, in the sense that they include a price-sensitive component, the ad valorem tariff of Decree No. 1744, and a specific component that is not price-sensitive.

[23] See, for example, Panama's rebuttal as complainant, paras. 6-57; Panama's rebuttal as respondent, paras. 37-134.

Decree No. 456	
Use of thresholds to apply tariff Presumption of unlawfulness below the threshold	
Ad valorem component (price sensitive) 10%	Specific component (not price sensitive) US$5 or US$3 (above or below threshold) US$5 or US$1.75 (above or below threshold)

Decree No. 1744
Use of thresholds to apply tariffs
Differential *ad valorem* tariff (price sensitive) 15% (above threshold) or 35-40% (below threshold)

Decree No. 1745 (Decree No. 2218)	
Presumption of unlawfulness below threshold	
Specific charges	Estimated costs
Specific bond	US$1.29-6.45/kg (depending on heading)
Certificate of supplier's existence	US$30/shipment
Nexus analysis	US$66.41/shipment
Translation of certificates	US$61.20/shipment
Apostille/legalization	US$20/shipment
Presence of importer or legal representative	US$292.18-2.058.57/shipment
Requirement of time-limits and list of customers make the importation process unwieldy	

- In addition, the measures at issue are activated with regard to certain thresholds established by Colombia and have the same public policy objective as Decree No. 456; moreover, these measures apply to the same relevant products and were issued by the same entity during the same session;

- Furthermore, on the same day that Decrees Nos. 1744 and 1745 were adopted, the Minister of Trade, Industry and Tourism of Colombia referred to these instruments collectively, stating that "the measures we have designed [Decrees Nos. 1744 and 1745] enable us to combat illegal phenomena efficiently, but at the same time we were careful not to adversely affect formal trade and to fully comply with the WTO mandate"24;

- It should be noted that these measures were designed "to achieve on an ongoing basis the policy objective pursued by the measures provided for in Decree 456 of 2014 and the amendments thereto"25, and that "the adoption of the strategies" envisaged in both

[24] Exhibit PAN-46.

[25] Eighth preambular paragraph of Decree No. 1745 (emphasis added). Similarly, the third preambular paragraph of Decree No. 1744 states that "taking into account the fact that the implementation period provided for in Article 5 of Decree 456 of 2014, extended by Decrees 515 of 2016 and 1229 of 2016, expires on 1 November 2016, it is necessary to enforce the exception provided for in Article 2, paragraph 2, of Law 1609 of 2013, in order to achieve on an ongoing basis the policy objective pursued by this measure". (emphasis added).

Decrees were adopted on the basis of the recommendation of the Inter-Institutional Commission against Smuggling at its special session on 24 August 201626; and,

- In terms of effects, Decree No. 1745 perpetuates the restrictive effect of the compound tariff by restricting imports of the relevant merchandise.

26. Moreover, Panama considers that it would *not* be appropriate for the Panels to determine whether Colombia has complied with the recommendations and rulings of the DSB, without reference to the existence of Decree No. 1745 and its respective amendments.[27] If the Panels were to work in this way, they would not be making an objective assessment of the facts as required by Article 11 of the DSU, since they would ignore an essential element of the facts relevant to compliance, thereby failing to perform their duty of examining the compliance measures "in their totality".[28]

27. Consequently, Panama considers that the measures challenged are "closely related" to the measure taken to comply and declared as such by Colombia, as well as to the recommendations and rulings of the DSB. In view of the foregoing, Panama reaffirms that the specific bond, as well as the special import regime, contained in Decree No. 1745, are "measures taken to comply" within the meaning of Article 21.5 of the DSU.

IV. THE SPECIFIC BOND AND THE SPECIAL IMPORT REGIME ARE RESTRICTIONS WITHIN THE MEANING OF ARTICLE XI:1 OF THE GATT

A. THE SPECIFIC BOND IS INCONSISTENT WITH ARTICLE XI:1 OF THE GATT

28. The specific bond imposed by Decree No. 1745, and currently in force under Decree No. 2218, is inconsistent with Article XI:1 of the GATT. It is an indispensable condition for the importation of fibres, yarns, textiles, apparel and footwear under Decrees No. 1745, and now No. 2218. This requirement has limited access to the Colombian market for such imports[29], has impaired and nullified competitive opportunities for imported products and importers[30], has affected the latter's investment plans, and has generated uncertainty and significant transaction costs.[31] At the outset, Colombia alleges that the specific bond, together with the other measures under Decree No. 1745, is designed to reduce incentives for importing apparel and footwear at "artificially low" prices[32], which is an explicit acknowledgement that the bond modifies the conditions of competition for imports in order to exert a restrictive effect on the latter.

29. The specific bond impedes access to the Colombian market for imports. Prior to Decree No. 1745, the prevailing regulatory conditions in Colombia, including the provisions of Decrees No. 2586[33], No. 4927[34], and No. 456[35], allowed market access to Colombia for subject goods with the tariff as the sole barrier.[36] Now, in addition to payment of the tariff, importers are required to obtain a specific bond and keep it in force for a period of three years.

30. Obtainment of the specific bond depends on certain documentary requirements being met; on the assessment of the applicant's creditworthiness, including its credit history, and the amount requested; and on the approval of a credit quota under the criteria laid down by the entities

[26] Sixth preambular paragraphs of Decrees No. 1745 and No. 2218, Exhibits PAN-2 and PAN-43, respectively.

[27] Panel Report, US − Large Civil Aircraft (second complaint)(Article 21.5 − EU), para. 7.74.

[28] Appellate Body Report, US − Softwood Lumber IV (Article 21.5 − Canada) para. 67 referring to Appellate Body Report, US − Shrimp (Article 21.5 − Malaysia) para. 87.

[29] Panama's first written submission as complainant, para. 40; Panama's first written submission as respondent, para. 53; Panama's rebuttal as complainant, para. 98.

[30] Panama's first written submission as complainant, paras. 37-39; Panama's first written submission as respondent, para. 54; Panama's rebuttal as complainant, paras. 71-95.

[31] Panama's first written submission as complainant, para. 40; Panama's first written submission as respondent, para. 55; Panama's rebuttal as complainant, paras. 96-104.

[32] Colombia's rebuttal as complainant, para. 119.

[33] Decree No. 2685, Exhibit PAN-3.

[34] Colombian Customs Tariff. Exhibit PAN-1 (original panel).

[35] Exhibit PAN-3 (original panel).

[36] The tariff and the sales tax constitute the category of "customs taxes" under Colombian law. Article 1 of Decree No. 2685, Exhibit PAN-3.

concerned.[37] It is not an automatic approval process. If the banking evaluator does not consider an applicant to be qualified, for whatever reasons, it will not obtain the specific bond, and will not therefore be able to import the products in question. Thus, the need to obtain the specific bond directly limits the capacity of importers to import and in this way affects the access of imported products to the Colombian market.

31. Panama understands that this bond is required in all cases, as there will always be a dispute regarding the value of imported products. Article 128(5) of Decree No. 2685 describes the valuation dispute as "the doubts raised during the physical or documentary customs inspection process with regard to the declared value of the imported goods, because this value is considered *low* according to DIAN risk management system indicators".[38] If the importer does not provide the specific bond required by Decree No. 2218, there can be no release, and hence no importation. Moreover, the fact that, on its face, the specific bond of Decree No. 2218 is meant to be covered by the scope of Article 13 of the Customs Valuation Agreement does not detract from its restrictive character. Rather, Colombia's use of this rule is a tacit acknowledgement that the specific bond constitutes a restriction which, if the conditions imposed by Article 13 of the Customs Valuation Agreement are fulfilled, would in Colombia's view be covered by this rule.

32. The specific bond nullifies competitive and import opportunities for importers ineligible for a bank or insurance guarantee. Not all persons that could previously import the affected products by merely paying the tariff will have the same eligibility for banking or insurance credit. Thus, the specific bond excludes *ab initio* this category of importers for reasons unrelated to their import capacity.

33. The facts support this assessment. In a context in which banks attach great value to low credit risk, and where the Colombian Government announces that the transactions in question pose a high risk of fraud and money laundering, it is not unlikely that the level of refusal of loan applications will be high, and that the only importers who qualify will be those that already have an approved line of credit with the bank, or new importers with an impeccable credit history, a solid business track record and promising cash-flow prospects. Not all low-cost importers in Colombia, which usually import such products, would be in a position to satisfy these creditworthiness requirements, which are unrelated to their mere import capacity. The remainder will not enjoy the right to import the products affected by the specific bond.

34. The specific bond impairs competitive import opportunities because it entails a substantial cost that limits imports. Importers' investment budget for the purchase of low-cost imports is reduced by the increase in import-related costs caused by the introduction of the specific bond. These costs have been duly documented by Panama. As was seen in *Brazil – Retreaded Tyres*[39], the costs of the bond are of a magnitude such as to make it prohibitively expensive to enter the products subject to the decrees. The relative cost far exceeds the magnitude of Colombia's bound and applied tariffs of 35% and 40% *ad valorem*. There is no doubt that the imposition of a tariff, particularly a high tariff, may have a very restrictive effect on imports.[40] Therefore, while it is reasonable to expect that an excessively high tariff will have a highly restrictive (or even prohibitive) effect on imports, *a fortiori* a measure that imposes a much more onerous economic burden on importers than a tariff equivalent to the bound tariff will have much greater restrictive effects on imports.

35. The specific bond imposes an unwarranted cost because there is no real need to cover customs or tax contingencies. The specific bond is a hollow requirement. A careful assessment of the operation of the import regime under Colombian law shows that there are no major obligations justifying the requirement of the specific bond:

- the customs taxes, including the tariff, have already been paid when the import declaration is submitted, so that they cannot be subject to coverage by the specific bond41, and if in any case there were a doubt about the customs value of the goods, there is a guarantee

[37] Panama's first written submission as complainant, paras. 37 and 40; Panama's first written submission as respondent, para. 55; Panama's rebuttal as complainant, paras. 96-104. See also PAN-16 and PAN-23.

[38] Article 128(5) of Decree No. 2685, Exhibit PAN-3. (emphasis added)

[39] Panel Report, *Brazil – Retreaded Tyres*, para. 7.372.

[40] Panel Report, *Colombia – Textiles*, para. 7.441.

[41] Panama's rebuttal as complainant, para. 83.

mechanism under Colombian law which deals with this situation, so that the specific bond becomes superfluous or unnecessary[42];

- sanctions cannot be the subject of guarantees unless an offence requiring imposition of monetary penalties or fines has been detected, as required by Article 7(3)(4) of the Trade Facilitation Agreement, or unless under Article 8 of Decree No. 390 a primary customs liability has to be insured.[43]

36. The lack of substantiation becomes even more clear from the requirement of the specific bond in the case of importers which already hold a comprehensive guarantee.

37. In addition, by virtue of its design, a specific bond covering a pre-established and fixed amount for each import cannot bear any relation to specific obligations for each operation. The criterion of 200% coverage of the threshold price is arbitrary, is established on a theoretical basis, is unrelated to real values, and has no capacity to provide equally valid coverage for each and every transaction involved. It is improbable that all transactions affected by the specific bond have the same characteristics with regard to the risk of non-compliance, such that the choice of a single number like 200% to define the amount to be guaranteed would bear a close relationship to all of them.

38. The specific bond affects predictability in the investment plans of importers, since it generates uncertainty at different levels. For importers whose situation is uncertain *vis-à-vis* the financial system, the specific bond requirement introduces an element of uncertainty in their investment plans, because they do not know whether or not they will be eligible for credit with a financial institution, and whether they will eventually be able to import. Moreover, Colombia's continual and unexpected regulatory changes generate legal uncertainty regarding which products are affected by the Colombian measures and what are the specific requirements for their importation. These uncertainties adversely affect importers' investment plans.

39. In view of the foregoing, it would appear that importers have two options: not to import; or to change their investment plans and import goods in a higher market segment. The second option seems to have been the one chosen by importers of textiles and footwear following the introduction of the compound tariff, as is shown by Colombia's reply, inasmuch as virtually all imports have entered above threshold levels. Panama considers that the introduction of the specific bond and its attendant costs involve a shift in imports towards those not restricted by this requirement but subject to higher costs. This means that the specific bond is a restrictive condition on the importation of the relevant products at competitive prices.

40. Consequently, the specific bond requirement provided for in Article 7 of Decrees No. 1745 and No. 2218 is inconsistent with Article XI:1 of the GATT.

B. THE SPECIAL IMPORT REGIME IS INCONSISTENT WITH ARTICLE XI:1 OF THE GATT

41. The special import regime imposed by Decree No. 1745, and now in force under Decree No. 2218, is inconsistent with Article XI:1 of the GATT. This regime consists of a blend of requirements, reports, legal consequences and, in general, disincentives which restrict imports priced at or below the thresholds of both decrees. The special import regime is presented as a set of "mechanisms to strengthen the customs risk management and control system in the face of possible situations involving customs fraud associated with imports" of products covered by each of the decrees.[44] In practice, however, these "mechanisms" have the effect of dissuading importers from buying imported products at competitive prices, in flagrant violation of Article XI:1 of the GATT. Panama has given this the title "special import regime". However, in an environment closer to the political and industrial level, both the Government itself and Colombian producers refer to it as the "customs ordeal".[45] This is so because, in the view of those familiar with Colombian customs processes, this regime involves a major logistical challenge, costs in terms of time and money, a reputational and risk management impact, post-clearance controls and possible criminal

[42] Ibid, para. 84.
[43] Ibid., paras. 86-87.
[44] Article 1 of Decree No. 1745, Exhibit PAN-2; Article 1 of Decree No. 2218, Exhibit PAN-43.
[45] Dinero, "El S.O.S de los empresarios para rescatar la industria de la confección", 18 January 2018, Exhibit PAN-90; Revista Industria y Comercio, "Los Retos del Comercio Exterior propuestos para el 2018", p. 36, Exhibit PAN-86.

investigations into money laundering and customs fraud.[46] In particular, this regime operates in the following manner.

42. *Prior* to importation, more than one month in advance, importers must produce a set of certificates and documents, requiring for their preparation the work or cooperation of third parties, such as the foreign supplier, the authority that apostilles or legalizes documents abroad, the official translator in Colombia, the customs broken in Colombia, and even the distributors and other marketers who would purchase the goods after importation. Compliance with these documentary requirements entails costs, time-limits, formalities, legalizations, official translations and the good will of third parties involved. This documentation has to be submitted to the DIAN one month before the arrival of the goods in Colombia.

43. However, in addition to the *ex ante* control, there is a control *during* the import process; where the self-declaration reflects a value not exceeding the thresholds, this value will be considered as "artificially low" by Colombia. This provides grounds for a customs inspection in the presence of an observer appointed and contracted by the industrial association concerned, which at any time may raise "fraud" alerts and submit "technical opinions" and "recommendations" to the agent of the DIAN. Moreover, the presence of the importer itself or a legal representative is required in order − according to Colombia − to ensure "due process". This substantiation put forward by Colombia in one of its submissions is now understood to mean that Colombia envisages the presence of an employee of the competent national authority at this inspection.

44. In addition, importation at or below threshold level necessarily implies an internal report on the importer in the DIAN risk assessment system, which has a reputational impact for the importer in terms of future imports and exports. In order to withdraw the goods, the importer will have to post a specific bond with a bank or insurance company, and once the bond has been granted, provide it to the DIAN. As is well-known, an internal clearance of the relevant bank or insurer is required to obtain this specific bond, and keeping it up to date entails a significant cost.

45. Finally, if all the necessary requirements were scrupulously satisfied, the goods would be released. However, in the event of non-compliance with the documentary or personal attendance requirements at the time of importation, neither preshipment, nor the "correction" of errors, nor again the "legalization" of the goods, or their recovery would be feasible. This means that, once the legal time-limit established in the Customs Statute has elapsed, the goods must be placed at the disposal of the DIAN.

46. As if this were not enough, *after* importation, the importer will have to maintain the specific bond for a period of three years. Apparently, it will also continue to be registered in Colombia's risk management system. The importer will be liable to inspection and verification with respect to the information provided before importation, including its distribution and marketing chain, with the possibility of being subject to criminal investigations by the Public Prosecutor's Office or the Financial Intelligence Unit.

47. The "customs ordeal" is in fact a bureaucratic torment having the clear and unambiguous aim of discouraging imports in order to benefit a domestic industry which faces serious problems of competitiveness and productivity, and which lobbies vigorously on the Colombian political scene for government intervention in the economy.[47] Some Colombian experts do not see this as the right way forward, and point out that "the future of the sector does not depend on the establishment or strengthening of protectionist measures".[48]

48. The special import regime has been highly successful for the Colombian Government. In the footwear sector, the DIAN reports substantial reductions in "illegal" imports of footwear, considered as "unfair" competition for Colombian businesses. The reduction was from 20 million to 1 million pairs in 2017. The Director of the DIAN states that "the good results are attributable to measures

[46] Customs Agency, Repremundo, "Arancel y medidas de importación confecciones y calzado − Dec. 1744 y 1745, de 2016", 29 November 2017, Exhibit PAN-91.

[47] El País, "Textileros salieron este martes a protestar por la crisis del sector", 3 October 2017, Exhibit PAN-92; El País, "Anuncian medidas para proteger al sector textil", 18 October 2017, Exhibit PAN-93; El Nuevo Siglo, Bogotá, "Aranceles: tela para proteger confecciones", Bogotá, 3 October 2017, Exhibit PAN-87.

[48] Fenalco, "Incremento de aranceles podría agravar situación del sector de confecciones y calzado", Bogotá, 24 August 2017, Exhibit PAN-95.

such as Decree 1745, which prevents the entry of footwear into the country at manifestly low prices", adding that:

> We must protect the footwear and leather goods sector, which generates a great deal of employment in the country. A year ago it was normal for the trade association to state that more than 20 million pairs of footwear were entering the country at ridiculously low prices, of less than one or two dollars, and thanks to the measure adopted that number fell to less than 1 million pairs. [...].[49]

49. It is not surprising that the special import regime has been so successful in restricting imports. It is a regime that was conceived, designed and structured precisely in order to limit conditions of access and competitive opportunities for imports on the Colombian market. The signals sent to importers have an intimidating effect for those that decide to import at prices equal to or below the thresholds of Decrees No. 1745 and No. 2218. Thus, the special import regime, by its design, structure and architecture:

- excludes certain importers from the import process at the outset (i.e. those not given credit approval by a bank or insurance company to obtain the specific bond required by Article 7 of Decrees No. 1745 and No. 2218[50]);

- limits the capacity of importers to close transactions when they consider it appropriate to do so − it is impossible to purchase imported merchandise for early delivery owing to the obligation framed in Article 4(1) to supply documents, and specify the port, quantity and price at least one month in advance of the arrival of the merchandise[51];

- limits the capacity of importers to close transactions with anyone they consider appropriate − it does not appear to be possible for the importer to diverge from the marketing chain reported to the DIAN as part of the requirements laid down by Article 4(1)[52];

- limits the capacity of importers to import with the frequency and pace required by market conditions, owing to the time taken and the burdens generated by the procedures necessary for assembling the documentation required by Article 4(1)[53];

- imposes documentary requirements that are difficult to meet, either in terms of direct costs (e.g. fees for official translations or legalizations), indirect costs linked to obtaining such documents (e.g. assessment of economic relationship for the "certification of intention to sell"[54], or background check on the customer for the "declaration by the customs broker")[55], or logistical costs (Article 4.1)[56];

- ascribes a risk status to importers "that declare goods … at or below the threshold price [since] they must be reported to the Operational Analysis Management Subdirectorate of the [DIAN] so that the information concerning such operations can be incorporated in the risk management system" (Article 8)[57];

- requires the presence of the importer, his legal representative or his agent (other than the customs broker) during the customs inspection or valuation of the goods, with the attendant costs that this entails (Article 4.2)[58];

- authorizes the presence, together with the importer, of an import operations observer, who is a natural person appointed and paid by the local trade association[59], who receives

[49] Vanguardia, "Se redujo en más del 90% el ingreso de calzado subfacturado en Colombia", 31 December 2017, Exhibit PAN-50.
[50] Decrees Nos. 1745 and No. 2218, Exhibits PAN-2 and PAN-43, respectively.
[51] Idem.
[52] Idem.
[53] Idem.
[54] Article 4(1)(a) of Decrees No. 1745 and No. 2218, Exhibits PAN-2 and PAN-43, respectively.
[55] Article 4(1)(d) of Decrees No. 1745 and No. 2218, Exhibits PAN-2 and PAN-43, respectively.
[56] Decrees No. 1745 and No. 2218, Exhibits PAN-2 and PAN-43, respectively.
[57] Idem.
[58] Idem.
[59] DIAN, "Fijan funciones para Observadores de Operaciones de Importación", Exhibit PAN-58.

detailed information from the DIAN concerning the imports[60] in order to "alert the customs authority"[61], "closely monitor the process of inspection or valuation of the goods"[62], issue "technical opinions, dealing with the tariff classification, description, identification, quantity, weight, value or other aspects of the products under investigation"[63], and "make any recommendations he may deem [ ] appropriate [ ] to the inspector who carried out the process. These reports [ ] shall be submitted to the inspectors and in turn to the office of foreign trade, which shall serve as support for the DIAN".[64]

- prescribes a specific bond to cover customs obligations, including penalties and interest payments, the constitution and maintenance of which entail a cost (Article 7)[65];

- creates uncertainty among importers regarding the introduction of a restriction on ports of entry, given that Article 5 of Decree No. 1745 requires the DIAN to establish designated import locations, while Article 5 of Decree No. 2218 grants discretion ("may establish") for the establishment of customs controls upon entry, and expressly envisages the possibility of limiting the entry of imports[66];

- if the goods do not meet the requirements of Article 4, their reshipment may not be undertaken (Article 9 of Decree No. 2118), nor may they be recovered[67] or legalized[68] (Article 10 of Decree No. 2218), and consequently, after the completion of a period of "legal abandonment", the goods may be disposed of by the DIAN.[69]

50. Colombia itself has acknowledged that the purpose of these measures is to reduce incentives so as to prevent importation at prices equal to or below the thresholds[70], i.e. to impose restrictive conditions in order to discourage imports. Consequently, the special import regime imposes a minimum import price scheme which is inconsistent with Article XI:1 of the GATT.

V. FAILURE TO COMPLY WITH THE REQUIREMENTS OF DECREE NO. 2218 RESULTS IN A PENALTY INCONSISTENT WITH ARTICLE VIII:3 OF THE GATT

51. Panama considers that, as a result of the combined operation of Articles 4 and 9 and the paragraph of Article 10 of Decree No. 2218, the special import regime is patently inconsistent with Article VIII:3 of the GATT. This provision is categorical and prohibits the imposition of substantial penalties for minor infringements. It will be recalled that, if the requirements of Decree No. 2218 are not fulfilled, by virtue of Article 10 the goods will be apprehended, i.e. seized[71]; nor can they be legalized or recovered, by virtue of the paragraph of the same provision.[72] Furthermore, if the non-compliance relates to the documentary requirements of Article 4, Article 9 provides that the importer may not reship its goods. In practical terms, a minor error in the context of compliance with the documentary requirements of Article 4, for example, the presentation of an ordinary translation, instead of an official translation, or the omission of some general information which otherwise would be contained in another document, would necessarily result in the non-importability of the goods with no possibility of legalization, recovery or reshipment, so that after a certain period

[60] Resolution No. 000017 (22 March), regulating Article 6 of Decree No. 1745 of 2 November 2016, Exhibit PAN-59.
[61] Article 6 of Decrees No. 1745 and No. 2218, Exhibits PAN-2 and PAN-43, respectively.
[62] Idem.
[63] Exhibit PAN-58.
[64] Idem.
[65] Decrees No. 1745 and No. 2218, Exhibits PAN-2 and PAN-43, respectively.
[66] Idem.
[67] According to Article 229 of Decree No. 390, "Goods of foreign origin, regarding which any customs obligation has not been satisfied, may be recovered by virtue of an initial declaration of correction or modification, with or without payment of the recovery value. The customs declaration covering recovered goods does not determine their ownership, nor does it remedy the illicit acts involved in their acquisition." Exhibit PAN-4.
[68] According to Article 229, point 2.3.2, third paragraph, "Where reference is made in other regulations to legalization or declaration of legalization, this expression must be understood to refer to the recovery of goods using an initial customs declaration or a declaration of correction or modification, in which a recovery value is assessed". Exhibit PAN-4.
[69] Article 211 of Decree No. 390, Exhibit PAN-4.
[70] Colombia's rebuttal as complainant, para. 73.
[71] See Articles 550, 561, 562 and 563 of Decree No. 390, Exhibit PAN-2.
[72] Article 229 and point 2.3.2 thereof, third paragraph, Exhibit PAN-4.

of time laid down in Decrees Nos. 2685 and 390 (Colombian Customs Statute), they would be kept at the disposal of the Colombian State. Obviously, this consequence stemming from the actual design, structure and architecture of the special import regime, in the context of Colombia's ordinary customs procedures, is a very substantial penalty for a relatively minor offence in violation of Article VIII:3 of the GATT.[73]

VI. THE SPECIFIC BOND AND THE SPECIAL IMPORT REGIME ARE *NOT* ADMINISTERED IN A UNIFORM, IMPARTIAL AND REASONABLE MANNER IN ACCORDANCE WITH ARTICLE X:3(A) OF THE GATT

52. Panama also considers that Article 8 of Decree No. 390 is *not* administered in accordance with Article X:3(a) of the GATT.[74] In addition, Panama challenges the administration of the risk management and customs control system, as provided for in Articles 493 and 486 of Decree No. 390, by means of the special import regime under Article X:3(a) of the GATT.

A. DECREES NO. 1745 AND NO. 2218 ADMINISTER ARTICLES 8, 493 AND 486 OF DECREE NO. 390

53. Panama recalls that the term "administer" within the meaning of Article X:3(a) refers to "putting into practical effect" a legal instrument of the kind described in Article X:1.[75] Decree No. 390 is Colombia's Customs Statue. It is therefore a "regulation of general application" covered by Article X:1 of the GATT. Article 1 of Decree No. 390 provides that this rule "regulates the legal relations established between the customs administration and parties involved in the entry, retention, transfer and exit of goods." Thus, the Customs Statute establishes the guidelines governing the interaction between the "customs administration" and the parties involved in the import and export of goods in Colombia. The manner in which the customs administration (DIAN) handles this interaction is a matter of application or management of the Customs Statute.

54. Decrees No. 1745 and No. 2218 administer Article 8 of Decree No. 390. In the context of the "general provisions" of the Customs Statute, Article 8 of Decree No. 390 establishes the so-called "bond" mechanism as "an obligation ancillary to the customs obligation, to enforce payment of duties and taxes, penalties and interest resulting from non-compliance with a customs obligation provided for in this Decree".

55. The same rule does not specify the way in which the "bond" is to be "administered", but entrusts that function to the DIAN: "[t]he National Customs and Excise Directorate shall establish the type of bond that is to be posted in accordance with the corresponding customs obligation" and "the special rules in force governing each of them are to be applied". Thus, any act establishing the "type of bond that is to be posted in accordance with" the relevant obligations is an act of "administration" of the Customs Statute.

56. Article 9 of Decree No. 390 confirms that the determination of the bond applicable to specific cases is an act of administration by ordering that "[a]ny bond … must have as its insurance-related purpose that of guaranteeing the payment of duties and taxes, penalties and any interest that may be due, as a consequence of non-compliance with the obligations and responsibilities set out [in the Customs Statute of Colombia]".[76]

57. However, these decisions which, in normal circumstances, should be applied on a discretionary case-by-case basis by the DIAN are now taken *a priori* by Decrees No. 1745 and No. 2218. Article 7 of both decrees "puts into practical effect" Article 8 of Decree No. 390. These special rules specify "the type of bond that is to be posted" in relation to the imports covered by these decrees to "guarantee the payment of duties and taxes, penalties, and any interest that may be due, as a consequence of non-compliance with the obligations and responsibilities set out [in the Customs Statute of Colombia]".[77] Therefore, these rules necessarily give rise to the administration of a specific type of guarantee (among those provided for in the Customs Statute] in a specific type of

[73] Article 211 of Decree No. 390, Exhibit PAN-4. Panama's rebuttal as respondent, paras. 269, 338, 383, 421-433.

[74] Panama's first written submission as respondent, paras. 76-89.

[75] Appellate Body Report, *EC – Selected Customs Matters*, para. 224 and Panel Report, *US – COOL*, para. 7.821.

[76] Article 9 of Decree No. 390, Exhibit PAN-4. See also Article 8 of Decree No. 2685, Exhibit PAN-3.

[77] Articles 3 and 10 of Decree No. 1745; Articles 3 and 11 of Decree No. 2218, Exhibits PAN-2 and PAN-43, respectively.

circumstance. Consequently, Colombia's argument that Articles 7 of Decrees No. 1745 and No. 2218 are not measures of "administration" covered by Article X:3(a) is incorrect.

58. Decrees No. 1745 and No. 2218 administer Colombia's risk management system. This system is defined in Articles 493 and 486 of Decree No. 390. As previously observed, Decree No. 390 is the Customs Statute of Colombia and is therefore a "regulation of general application" under Article X:1 of the GATT. Article 1 of Decrees No. 1745 and No. 2218, entitled "Purpose" provides that "this Decree establishes mechanisms to strengthen the risk management and customs control system in the face of possible [relevant] situations of customs fraud associated with imports".[78] Consequently, the text of Decrees No. 1745 and No. 2218 itself makes it clear that their purpose is "to put into practical effect" the risk management and customs control system with regard to imports covered by the corresponding decrees.[79]

59. If the Panels were to consider that Decrees No. 1745 and No. 2218 are not acts "administering Article 8 and Articles 493 and 486 of Decree No. 390, this would mean that Decrees No. 1745 and No. 2218 impose a substantive requirement (i.e. posting of a specific bond for relevant imports, as well as other requirements under the special import regime), and at the same time the specific parameters for its administration). The fact that the substantive requirement and the parameters for its administration are in the same instrument should not affect the applicability of Article X:3(a) to Decrees No. 1745 and No. 2218. Different characteristics of the specific bond may give rise to concerns of a different kind. Otherwise, WTO Members could easily evade their obligations under Article X:3(a) by combining the substantive characteristics and the parameters of administration in the same instrument. Furthermore, Panama recalls that the application of Article XI:1 and Article X:3(a) is not mutually exclusive.[80]

B. THE SPECIFIC BOND AND THE SPECIAL IMPORT REGIME NECESSARILY RESULT IN AN ADMINISTRATION THAT IS *NOT* UNIFORM, IMPARTIAL AND REASONABLE IN ACCORDANCE WITH ARTICLE X:3(A) OF THE GATT

60. The compliance measures necessarily result in a *non-uniform* administration inasmuch as they treat similarly situated goods differently.[81]

- Both the specific bond − which is administered by Article 8 of the Customs Statute − and the special import regime − which is administered by the risk management system − apply only to imports covered by Decrees No. 1745 and No. 2218, but not to imports of other products "similarly situated" with regard to the problem of underinvoicing and money laundering according to Colombia, as is the case for spirits and cigarettes.[82]

- We also note that the thresholds of Decrees No. 1745 and No. 2218 are established arbitrarily, on the basis of conversations between government officials and national trade associations.[83] The setting of thresholds is very important, since they determine whether or not the special import regime and the specific bond apply to imported goods. Furthermore, Colombia determines the thresholds on the basis of the four-digit tariff heading, despite being aware of the existence of multiple relevant products under each heading. Thus, Colombia applies the same treatment to products as dissimilar as men's or boys' suits, ensembles, jackets, blazers, trousers, bib and brace overalls, breeches and shorts, all of which have as their only common feature the fact of coming under heading 6203.[84]

- Moreover, with respect to the specific bond of Decree No. 1745, Colombia determines the coverage of the bond on the basis of fixed parameters: the value of the relevant threshold

[78] Article 1 of Decrees No. 1745 and No. 2218, Exhibits PAN-2 and PAN-43, respectively.
[79] Article 3 of Decrees No. 1745 and No. 2218, Exhibits PAN-2 and PAN-43, respectively.
[80] Panel Report, *Argentina − Hides and Leather*, para. 11.58. See also paras. 11.35, 11.101, 12.1 and 12.2.
[81] Panel Report, *US − Stainless Steel*, para. 6.51.
[82] Panama's rebuttal as complainant, para 279; Panama's rebuttal as respondent, para. 312.
[83] Exhibit PAN-65.
[84] Panama's rebuttal as respondent, para. 351.

multiplied by 200%. The fact of applying fixed parameters, ignoring the real values of goods below the thresholds, results by definition in a non-uniform administration.[85]

- It would appear that Colombia seeks to release itself from any responsibility for the administration of the procedures for obtaining the specific bond by delegating the task of carrying out this administrative process to third parties. Panama considers that Colombia's failure to establish general criteria for third parties' compliance with the requirements for applying for a specific bond, and the considerations relevant to its approval, necessarily gives rise to a non-uniform administration of the process leading to obtainment of the specific bond.[86]

61. Panama also considers that the compliance measures are necessarily administered partially, since they are biased and based on prejudices.[87]

- In particular, with regard to the special import regime, Panama considers that the powers granted to the "import operations observer" result in an unfair and biased administration of Colombia's risk management system. The import operations observer is neither more nor less than the representative of the national producers' associations, i.e. those in direct competition with the imported goods. The national associations select, approve and hire a technical expert who is empowered by the Colombian State to generate alerts so that certain goods may be inspected, to be present during the customs inspection, to prepare technical opinions, and to put forward recommendations to the DIAN official responsible for inspection of the goods. Subsequently, the DIAN informs the Joint Commission, which includes the national associations, about the activities of the import operations observer. If the import operations observer were a government employee, there would be a clear conflict of interest. Obviously, an employee of the trade association would issue opinions and recommendations in favour of the association and detrimental to the imported goods. These opinions and recommendations form part of the "decision-making structure" of the DIAN and contribute to the final decisions concerning release of the merchandise.[88]

- Apparently, the import operations observer would also not be subject to any liability if he were to use confidential information from the importers, including information related to the importers' distribution and marketing chain, received in the context of the import process. Thus, Colombia apparently allows the import operations observer to share this information with his supervisor, the national producers' association, the importer and the seller of imported goods. Failure to protect the confidential information of importers results in the partial administration of Colombia's risk management system.[89]

- With regard to the administration resulting from the specific bond, Panama considers that to take it for granted that the customs taxes and possible penalties will always be equivalent to 200% of the threshold price multiplied by the corresponding quantity of shipped goods is prejudicial and inequitable.[90]

62. Similarly, Panama considers that the compliance measures are not administered in a reasonable manner as they are neither appropriate to the circumstances nor based on rationality.[91]

- With regard to the administration of the risk management system, Panama notes that both Decree No. 1745 and Decree No. 2218 result in an administration that is not based on rationality. Under Decree No. 1745, goods not complying with the documentary requirements of Article 4 were seized, and the importers had to pay fines if they wished to recover and legalize their goods. This is inflexible and unreasonable. However, under Decree No. 2218, the importer does not have the option of legalizing the goods, or even of reshipping them to the supplier's country. After a period of time stipulated by the

[85] Panama's rebuttal as complainant, paras. 275-278; Panama's rebuttal as respondent, paras. 314-315.
[86] Panama's rebuttal as respondent, paras. 330-331, 390-391.
[87] Panel Reports, *China – Raw Materials*, para. 7.694 (footnotes omitted).
[88] Panama's rebuttal as respondent, paras. 355-368.
[89] Panama's rebuttal as respondent, paras. 369-370.
[90] Panama's rebuttal as respondent, paras. 318 and 371.
[91] Panel Reports, *China – Raw Materials*, para. 7.696.

Customs Statute, the goods fall into legal abandonment and pass into the hands of the DIAN. This procedure defies reason, and clearly constitutes unreasonable administration.[92]

- At the same time, the requirement to present certain documents results in unreasonable administration of Colombia's risk management system. How can it be appropriate to the circumstances to request for each shipment the certification of the existence of the foreign supplier, with an officially apostilled or legalized translation, and why cannot copies of this certificate be accepted? While the first certificate could satisfy the purpose of confirming the existence of the supplier's enterprise, additional certificates serve no purpose and are therefore inappropriate to the circumstances. Moreover, Panama considers that the requirement to submit the "certification of intention to sell"[93] is not reasonable. According to Colombia, this requirement fulfils the purpose of "ensuring that the supplier declared by the importer is really the entity that supplied the imported goods".[94] However, this purpose is already met by the sales invoices. Therefore, requiring the "certification of intention to sell"[95] is inappropriate to the circumstances.[96]

- With regard to the administration resulting from the specific bond, Panama considers that it is unreasonable to require a specific bond when a comprehensive guarantee is available. If a comprehensive guarantee were not sufficient to cover the requirements of Decree No. 1745 or Decree No. 2218, the coverage of the specific bond should be equivalent to the amount that would not be covered by the comprehensive guarantee. However, Colombia requires the constitution of the specific bond in all cases without taking into account the coverage already provided by the comprehensive guarantee.[97] In addition, the guarantee under Decree No. 2218 continues requiring coverage that goes beyond that which is necessary to ensure compliance with the primary obligations, in some cases covering three times the value guaranteed.[98]

- Lastly, by distancing itself from ordinary Colombian legislation, which prohibits importers from choosing which guarantee to provide in order to ensure payment of the definitive duties to which the goods may be liable, Colombia applies this requirement unreasonably. It would appear that entrusting the approval and granting of guarantees to third parties has the effect of creating an additional level of administrative bureaucracy which discourages importation of the relevant goods.[99]

63. In view of the foregoing, Panama argues that the specific bond and the special import regime necessarily result in an administration that is *not* uniform, impartial and reasonable in accordance with Article X:3(a) of the GATT.

VII. COLOMBIA HAS *NOT* DEMONSTRATED THAT THE SPECIFIC BOND AND THE SPECIAL REGIME ARE JUSTIFIED UNDER ARTICLES XX(A) AND XX(D) OF THE GATT

64. Contrary to what is claimed by Colombia, Panama considers that neither the special import regime nor the specific bond are justified by Article XX(a) and Article XX(d) of the GATT. It would be frivolous to assert that the measures in question were designed solely to protect public morals and to ensure domestic compliance with the Colombian Criminal Code. Furthermore, Panama considers that Colombia has *not* demonstrated that these measures are necessary to achieve its declared objectives of discouraging imports used for money laundering purposes. In fact, Colombia has not even identified the level of protection sought by these measures, and it is important to identify the level of protection of a measure in order even to consider its necessity.[100]

65. The specific bond is *not* necessary for the protection of public morals under Article XX(a). Colombia asserts that the specific bond ensures the payment of duties and any fines or penalties on the importation of the goods, since it discourages underinvoicing by allowing the collection of

[92] Panama's rebuttal as respondent, paras. 375-387.
[93] Article 4(1)(a) of Decrees No. 1745 and No. 2218, Exhibits PAN-2 and PAN-43, respectively.
[94] Colombia's written submission as respondent, para. 120.
[95] Article 4(1)(a) of Decrees No. 1745 and No. 2218, Exhibits PAN-2 and PAN-43, respectively.
[96] Panama's rebuttal as respondent, paras. 373-374.
[97] Panama's rebuttal as respondent, paras. 320-324.
[98] Panama's rebuttal as respondent, paras. 325-328.
[99] Panama's rebuttal as respondent, paras. 332-333.
[100] Japan's third-party submission, para. 6.

customs duties and fines when the goods are found to have been declared below their real value.[101] This mere assertion, without supporting evidence, cannot qualify as conclusive proof for the purpose of demonstrating "the extent of the measure's contribution" to the objective of Article XX(a). Even if the assertion had any probative value, it is obvious that it also does not provide Colombia with the level of proof required by this same Panel (and endorsed by the Appellate Body) in the initial proceedings, to the effect that Colombia should specify "the amount or proportion of goods imported below the thresholds that are actually used for money laundering purposes, as well as the extent to which [the measure] acts as a disincentive to money laundering" in order to demonstrate "with sufficient clarity the *degree* of contribution made by [the measure] to the objective of combating money laundering."[102]

66. Moreover, a measure can only *contribute* to achieving an objective if the objective has not yet been achieved, and the measure gives added value to the achievement of the objective. If that is not the case, the measure becomes a mere ornamental requirement with no real utility, in other words a hollow requirement for which there is no real necessity. Nor has Colombia shown why it is that a money laundering problem could not arise with imports priced above the thresholds. It is equally plausible that a money laundering problem could be caused by the overvaluation of imports. What is more, the measures at issue have the paradoxical effect of *discouraging* imports *below* the thresholds, while at the same time *encouraging* imports *above* the thresholds. It should be borne in mind that money laundering in Colombia is also carried out by means of the overvaluation of imports.[103] No similar controls are in place to ascertain that imports above the thresholds are not intended for these purposes. Consequently, given their effects on imports, and without prejudice to the demonstration incumbent on Colombia, the contribution that the measures could make to the fight against money laundering is ambivalent, and possibly nil. Therefore, Colombia has failed to demonstrate the degree of contribution made by the specific bond to achieving the objective of discouraging imports used for money laundering.

67. As regards the demonstration of the degree of restrictiveness of the specific bond on international trade, Colombia seeks to demonstrate that the measures challenged, including the specific bond, are not trade restrictive in any way.[104] Colombia asserts that the measures do not restrict the quantity of imports and therefore do not restrict trade.[105] However, as is well-known, a measure that does not impose quantitative limits on imports can nevertheless limit trade in a manner inconsistent with Article XI:1 of the GATT.[106] Colombia also says that the measures are carefully calibrated to affect imports likely to be used for money laundering.[107] There is no evidence whatsoever of such careful calibration. The measures penalize all imports priced at or below the thresholds, regardless of whether or not they can be used for money laundering. Colombia also argues that the specific bond is a contingent liability.[108] This mere assertion demonstrates nothing. Execution of the bond is dependent on circumstances, and in that sense it is "contingent". However, its monthly cost (as well as all the other costs associated with constitution and paperwork) are "actual liabilities" and tangible. Therefore, the assertion is factually open to dispute.

68. Moreover, the special import regime is also not necessary to protect public morals under Article XX(a). Colombia asserts that it is necessary because it provides information that permits the customs authorities to undertake a more informed risk assessment.[109] However, Colombia again bases itself on general and vague explanations, without reference to evidence, in order to seek to substantiate the "degree of contribution" of the measure to the objective of Article XX(a). None of these assertions meets the applicable standard for Colombia.[110] Additionally, Colombia addresses its obligation to demonstrate the degree of contribution as if the measure consisted solely of some of the documentary requirements under Article 4.1 of Decrees No. 1745 and No. 2218. Colombia offers no demonstration of the degree of contribution of other elements of the special import regime, such as:

[101] Colombia's rebuttal as complainant, para. 127.
[102] Appellate Body Report, *Colombia – Textiles*, para. 5.110.
[103] See Exhibit COL-10 in the proceedings before the original panel, p. 29.
[104] Colombia's rebuttal as complainant, para. 127.
[105] Idem.
[106] Appellate Body Report, *Argentina – Import Measures*, paras. 5.286, 5.288 and 6.3(c).
[107] Colombia's rebuttal as complainant, para. 126.
[108] Colombia's first written submission as respondent, para. 126.
[109] Colombia's rebuttal as complainant, paras. 121-125.
[110] Appellate Body Report, *Colombia – Textiles*, para. 5.110.

- the requirement of a declaration signed by the legal representative of the Customs Agency, certifying that they have carried out a background check on the customer[111];

- the exclusion of certain importers from the import process (i.e. those that have no credit rating to obtain the specific bond)[112];

- the limitation of the capacity of importers to close transactions *when* they deem it appropriate to do so because of the requirement to specify the port, quantity and price at least one month in advance of the arrival of the goods[113];

- the limitation of the capacity of importers to close transactions with *anyone* they consider appropriate, owing to the marketing chain that has to be reported to the DIAN[114];

- the limitation of the capacity of importers to import with the frequency and pace required by the market, owing to the burdensome and costly procedures necessary for fulfilment of the documentary requirements[115];

- the requirement of the presence of the importer, his legal representative or his agent during the customs inspection or the valuation of the goods, with the attendant costs that this entails[116];

- the authorization of the presence of an observer appointed and paid by the local industry to generate alerts to the customs authority and closely monitor the process of inspection and valuation of the goods[117];

- the uncertainty created among importers regarding the introduction of a restriction on ports of entry and customs controls that limit the entry of imports[118];

- expropriation of the merchandise if it does not meet the requirements of Article 4.[119]

69. Colombia has therefore failed to demonstrate the degree of contribution made by the special import regime to the achievement of the objective of discouraging imports used for money laundering.

70. Regarding the demonstration of the degree of trade restrictiveness of the special import regime, Colombia's arguments are the same as those with which it seeks to demonstrate the zero degree of restrictiveness of the specific bond. Colombia also mentions that, while importation *below* the thresholds is discouraged, the importer may continue importing *above* the thresholds, and that, for this reason, this measure cannot be described as a highly restrictive measure.[120] What Colombia fails to mention is that the special import regime challenged by Panama concerns the treatment of imports *below* the thresholds, not *above*. Consequently, the reference to the treatment of imports *above* the threshold to justify treatment *below* is inadequate. However, in asserting that importation *below* the thresholds is not feasible, Colombia concedes that the restrictiveness is so high that it obliges importers to modify their business and investment plans with a view to avoiding imports of goods *below* the thresholds since this "option" would put them out of business. As a result, importers would be obliged to "adjust" the terms of their trade relations with customary suppliers, thereby incurring higher transaction costs. In fact, therefore, Colombia imposes a *de facto* prohibition on imports *below* the thresholds. An import ban is "by design as trade-restrictive as can be".[121]

[111] Article 4(1)(d) of Decree No. 1745, Exhibit PAN-2.
[112] Decrees No. 1745 and No. 2218, Exhibits PAN-2 and PAN-43, respectively.
[113] Idem.
[114] Idem.
[115] Idem.
[116] Idem.
[117] Article 6 of Decrees No. 1745 and No. 2218, Exhibits PAN-2 and PAN-43, respectively.
[118] Decrees No. 1745 and No. 2218, Exhibits PAN-2 and PAN-43, respectively.
[119] Article 211 of Decree No. 390, Exhibit PAN-4.
[120] Colombia's rebuttal as respondent, para. 144, referring to Panama's rebuttal as complainant, para. 239.
[121] Panel Report, *Brazil – Retreaded Tyres*, para. 7.211, upheld by Appellate Body Report, *Brazil – Retreaded Tyres*, para. 150.

71. Consequently, and following the Appellate Body's line of reasoning in this dispute, Panama considers that "[g]iven 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"[122], the Panels should terminate their assessment of Colombia's defence under Article XX(a) at this stage.

72. In any event, Panama observes that, in the necessity analysis, both the degree of contribution and the degree of restrictiveness of the measures play a key role in "weighing and balancing" the different interests at stake. As for the policy objective, it will always be important.[123] It follows that the contribution made by the importance of the policy objective in the exercise of "weighing and balancing" is relatively invariable, and that the decisive factor is the interrelationship between the degree of contribution and the degree of restrictiveness of the measures. In this case, Panama considers that, although the alleged policy objective could be important, the contribution of the measures at issue is ambiguous or at best minimal, and in addition to this, the restrictiveness exhibited by the measures at issue is very high and in some cases absolute. Panama therefore considers that the measures at issue are not provisionally "necessary" to achieve their declared objective.

73. Panama suggests alternative measures that are less trade restrictive and which Colombia has not proved to be unavailable for addressing the concerns it faces:

Elements of the special import regime for which Colombia raised defences under Article XX(a)	Alternative less trade-restrictive measures that comply with the objectives claimed by Colombia and are reasonably available to Colombia
Specific bond	Valuation dispute bond
Supplier's certification of sale (officially translated and apostilled or legalized, as appropriate)	Sales invoices
List of distributors	Post-import list of distributors transmitted on a monthly basis to the DIAN
Certification of value, storage and distribution	Post-import certification transmitted monthly to the DIAN with respect to the distribution and marketing chain Notification of storage warehouses, where appropriate, following authorization of release
Certification of supplier's existence (officially translated and apostilled or legalized, as appropriate)	Annual presentation of an original certificate of the supplier's existence followed by presentation of copies of the certificate for subsequent shipments during the year in question

74. Colombia argues that the valuation dispute bond cannot be an alternative to the specific bond of Decree No. 1745, since it would not contribute with the same effectiveness to the objective of combating underinvoicing and money laundering, on account of two defects: the DIAN's resources and the possibility of human error. According to Colombia, if the valuation dispute bond were used, some irregular transactions might not be detected and the underinvoiced goods might be used to launder money.[124] However, it is the same Colombia that presents the bond under Decree No. 2218, of 27 December 2017, as a bond which, in its view, is "ad hoc or case by case", i.e. which would require for its administration human resources and value judgement (and probability of error), which it criticizes in the alternative put forward by Panama. Panama maintains its reservations about the way in which Colombia characterizes the bond under Decree No. 2218. However, it notes that it is Colombia's own actions and arguments that demonstrate that the specific bond of Decree No. 1745 is not "necessary" to achieve the proposed objectives. If this measure were necessary, Colombia would not have sought to present the appearance of a modification of the specific bond in Decree No. 2218.

[122] Appellate Body Report, *Colombia – Textiles*, para. 5.115.

[123] See, for example, Appellate Body Report, EC – Asbestos, para. 175; Panel Reports, Canada – Wheat Exports and Grain Imports, para. 6.224; Dominican Republic – Import and Sale of Cigarettes, para. 7.215; Brazil – Retreaded Tyres, para. 7.111.

[124] Panama's rebuttal as respondent, para. 125.

75. Consequently, Panama considers that Colombia has not demonstrated that the specific bond or the special import regime are necessary to protect public morals, and they are therefore not provisionally justified under Article XX(a) of the GATT.

76. The specific bond and the special import regime are *not* necessary under Article XX(d) of the GATT. Panama notes that Colombia wholly bases itself on the same arguments it put forward under Article XX(a) in order to argue the need for the specific bond and the special import regime under Article XX(d) of the GATT.[125] As Colombia develops no new argument beyond those already refuted by Panama in the context of Article XX(a), Panama considers that Colombia has failed to demonstrate that the specific bond and special import regime are necessary measures under Article XX(d) of the GATT for the same reasons, *mutatis mutandis*.

77. Colombia has *not* demonstrated that the specific bond and the special import regime meet the requirements of the *chapeau* of Article XX. In its rebuttal as complainant, Colombia presents *no* argument to illustrate how it is that the specific bond and the special import regime are applied in a manner such as not to constitute means of arbitrary or unjustifiable discrimination between countries where similar conditions prevail, or disguised restrictions on trade. Panama has already commented on this matter in a previous submission.[126] The Appellate Body has observed that the mere assertion that the measure in question complies with the requirements of the *chapeau* because it applies to all products is not sufficient to establish a *prima facie* defence under Article XX of the GATT.[127]

78. Without prejudice to the above, Panama considers that Colombia discriminates arbitrarily and unjustifiably against goods with prices below certain thresholds. Colombia assumes *a priori* that such goods have "artificially low prices" and that, in having low prices, they are used for underinvoicing and money laundering.[128] However, Colombia presents no evidence to substantiate this presumption of illegality. To date, Colombia has put forward no criminal sentence, no law, no statutory decision establishing that imports below the thresholds are illegal. What is more, with no evidence that an infringement or an offence has been committed. Colombia reports the importers of relevant goods as "subjects of risk" to the risk management system merely because they import goods at prices not agreeable to Colombia and the competition − domestic producers.

79. Moreover, in administering the measures under Decrees Nos. 1745 and 2218 on the basis of thresholds and ignoring the contingencies of each transaction, Colombia accords the same treatment to all transactions under the threshold. Thus, Colombia imposes the requirement of posting a specific bond to ensure payment of penalties on all transactions covered by Decrees Nos. 1745 and 2218, irrespective of whether infringements have been found in the relevant transaction.[129] Discrimination also occurs when dissimilar situations are treated in an identical manner.[130] It is arbitrarily discriminatory and unjustifiable for Colombia to require the posting of a specific bond in order to guarantee the payment of penalties in situations where no offences giving rise to penalties have been detected.

80. Similarly, Colombia also fails to explain in the context of the analysis of arbitrary or unjustifiable discrimination why it only applies the measures of Decree No. 1745 to apparel, footwear, textiles, fibres and yarns, and not to other products similarly situated[131], such as alcoholic beverages and cigarettes.[132] Even more importantly, according to the Report on the Estimated Level of Distortion in the Value of Colombian Imports 2016 (to which Colombia refers in Exhibit COL-38), underinvoiced imports of apparel and footwear account for only 6.1% of underinvoiced goods. Moreover, imports of textiles, fibres and yarns do not even figure among the ten types of goods most used for underinvoicing. On the contrary, according to the DIAN itself, the most commonly

[125] Colombia's rebuttal as complainant, paras. 133-134.
[126] Panama's rebuttal as complainant, paras. 255-261.
[127] Appellate Body Report, *Thailand − Cigarettes (Philippines)*, paras. 179-180.
[128] Panama's rebuttal as respondent, para.
[129] European Union's third-party submission, paras. 51-52. It should also be noted that the guarantee referred to in Article 7(3)(4) of the Trade Facilitation Agreement applies only in cases where an offence requiring imposition of penalties has been detected, and not for transactions in the abstract. See Panama's rebuttal as complainant, paras. 86-87.
[130] European Union's third-party submission, paras. 51-52, referring to Appellate Body Report, *Canada − Wheat Exports and Grain Imports*, para. 87.
[131] Japan's third-party submission, para. 7.
[132] Panama's rebuttal as complainant, para. 279; Panama's rebuttal as respondent, para. 312.

underinvoiced imports are motor vehicles, tractors, cycles, parts and accessories (Chapter 87 of the Colombian Customs Tariff); mineral fuels and oils and products thereof (Chapter 27 of the Colombian Customs Tariff); and boilers, turbines, aircraft and marine propulsion engines, machinery and parts (Chapter 84 of the Colombian Customs Tariff), among others.[133]

81. Panama also fails to understand how it is that Colombia exempts from the application of Decree No. 2218 goods "owned by foreign companies or persons not resident in the country, which have been introduced from abroad to international logistical distribution centres for distribution in their entirety to the rest of the world"[134] and "owned by natural or legal persons resident in Colombia and recognized by the National Customs and Excise Directorate as authorized economic operators or trusted users".[135] If it is assumed that the goods covered by Decrees No. 1745 and No. 2218 are undervalued, it would appear that Colombia has no problem when the undervaluation leads to prices that do not compete with domestic industry prices, or to a situation of money laundering outside Colombia, but generates economic activity in Colombia, for example, in Colombia's international logistical distribution centres. Panama does not see how the protection of public morals could admit of such an exception. It seems to Panama that this exception strengthens the theory that the measures at issue contain discriminatory, arbitrary and unjustifiable requirements, rather than responding to the appeals of a domestic industry in crisis.

82. Moreover, Panama notes that, apart from including a reference to Article X:3(a) in the title of its defence under Article XX of the GATT, Colombia provides no specific argument to justify the incompatibility of the application of Article 8 of Decree No. 390 under the provisions of Article XX or the *chapeau*. Colombia makes absolutely no reference to the "application" or "administration" of the Customs Statute by means of the specific bond in its defence under subparagraphs (a) and (d) of GATT Article XX. Colombia does not explain how the use of "200%" in relation to the coverage of the specific bond contributes to the protection of public morals under Article XX(a) or to securing compliance with other laws or regulations which are not inconsistent with the GATT. Nor does Colombia explain how it is that requesting the constitution of a comprehensive guarantee when a specific bond is already available contributes to the protection of public morals or to securing compliance with other laws or regulations which are not inconsistent with the GATT. In addition, Colombia makes no reference to the "application" or "administration" of the Customs Statute through the specific bond under its defence relating to the *chapeau*. Of course, the mention of Article X:3(a) in the title is not sufficient to justify a measure under Article XX of the GATT. Consequently, Colombia has not put forward a valid defence to justify the administration of Article 8 of Decree No. 390 in a manner that is not uniform, impartial and reasonable.

VIII. THE SPECIAL IMPORT REGIME AND THE SPECIFIC BOND ARE INCONSISTENT WITH ARTICLES 1, 2, 3, 5, 6, 7 AND 13 OF THE CUSTOMS VALUATION AGREEMENT (CVA)

83. Both in its panel request and in its first submission as respondent, Panama gave an indication of its concern that the special import regime, because of its burdensomeness, is in effect a means of circumventing the case-by-case application of transaction value and the other permitted valuation methods, contrary to the provisions of Articles 1, 2, 3, 5, and 6, or as a result of the application of the methods prohibited by Articles 7(b), (f) and (g) of the Customs Valuation Agreement (CVA). Moreover, in its panel request, Panama also expressed its position that the specific bond was inconsistent with Article 13 of the CVA. However, given that Colombia itself, through the third paragraph of Article 7 of Decree No. 1745, made the distinction between the specific bond imposed by that regulation and the guarantee required in its "valuation dispute" legislation, making it implicitly clear that the specific bond of the Decree was not a customs valuation dispute guarantee, Panama held back its claim on this point until the moment Decree No. 2218 was issued. The terms of Article 7 of Decree No. 2218 leave no room for uncertainty that the specific bond is a guarantee based on doubts about the value of the merchandise, for which reason Panama considers that the specific bond is inconsistent with Article 13 of the CVA.

[133] DIAN, Report on the Estimated Level of Distortion in the Value of Colombian Imports 2016, Exhibit PAN-106, page 28.
[134] Article 4, para. 3 of Decree No. 2218 (Exhibit PAN-43); Article 2 of Decree No. 436 (Exhibit PAN-84).
[135] Article 2 of Decree No. 436 (Exhibit PAN-84).

A. THE SPECIAL IMPORT REGIME IS INCONSISTENT WITH ARTICLES 1, 2, 3, 5, 6 AND 7 OF THE CUSTOMS VALUATION AGREEMENT

84. Panama is of the view that the thresholds established by Colombia in Decrees No. 1745 and No. 2218 are clearly "arbitrary or fictitious" values; the methodology for determining them has never been explained by Colombia, but their technical characteristics are questionable as they do not reflect an objective methodology and constitute the minimum above which the methodologies provided for in the CVA are taken into account. With these thresholds and with its position that the values they cover reflect "artificially low prices", Colombia's opening premise is one of doubt that the values of the imports in question are *not* the price "actually paid or payable" for the goods. Colombia's prejudice regarding the accuracy of the transaction value is not assuaged either by pre-import checks, and the documents submitted for that purpose, or by the DIAN inspection at the time of importation and thereafter. Colombia authorizes release of the goods only if payment of the customs duties is assured for a value that is not based on the application by Customs of any of the valuation methods provided for in the CVA. This results in a customs valuation for the establishment of a guarantee for customs duties that are to be paid, without this valuation being adjusted to the case-by-case analysis required by the Agreement, based on the particular conditions of each sale.[136]

85. The thresholds are established on a fixed basis, without adjustment or possibility of adjustment in the light of the specific characteristics of the products in question (e.g. products of high or low quality), or the particular circumstances of the transactions involved (e.g. sale of remaindered goods, promotion or market penetration operations, including operations between related companies). This is a fixed amount, therefore, unaffected by the specificities of the various imports in question, with no margin of discretion for the customs official to value the goods in the establishment of coverage on the basis of the valuation criteria foreseen in the CVA.

86. The inevitable result of an importer declaring a value equal to or less than these thresholds is to be made subject to prohibitive consequences for importation under this regime. The options available to an importer are limited. It is not clear that Colombia's existing customs procedures allow the declared value to be "corrected" or "adjusted" in order to pass the threshold. Moreover, the option of re-exporting the goods is also not a genuine option. Consequently, as things stand at present, the possible scenarios are that either customs duties are collected on the basis of a value higher than the thresholds, or the goods are not imported into Colombian customs territory.[137] In practice, therefore, customs duties should not be collected on the basis of a value equal to or below the thresholds. In fact, Colombia's reply to the question concerning levels of imports below or above the thresholds shows that the levels below are insignificant compared with total imports. This amounts to saying that the thresholds operate as "minimum prices" above which customs valuation in accordance with the CVA is indeed possible, but that this is not the case below the thresholds. These thresholds are inconsistent with Article 7.2(f) of the CVA.

87. By its design, structure and architecture, therefore, the special import regime is conceived in such a way as to penalize the importation of products for which the "price actually paid or payable" is equal to or below the thresholds. It also penalizes the importation of products with a declared value resulting from the application of any of the methods foreseen in Articles 2, 3, 5, 6 and 7 of the CVA.

88. However, in the context of a market characterized by its dynamism and high turnover, the option of discontinuing imports (even on a temporary basis) does not appear to be realistic. Importing goods at higher prices would certainly be a commercially viable option (and hence Panama's claim that the special import regime imposes a minimum price system inconsistent with Article XI:1 of the GATT). According to Colombia, Panama did not consider that the option of declaring an import value above the threshold that does not correspond to the price actually paid or payable for the goods would have been a legally viable option for importers. However, it would appear that the Colombian legal system, Article 128, point 5.1.3 of Decree No. 2685, permits such "overvaluation" or "correction" of the import value with a view to avoiding the application of the special import regime; Panama would take this as an indication that importers "may", "freely and voluntarily", ignore the "price actually paid or payable" for their goods and adjust to the minimum, arbitrary and fictitious value given by the thresholds, in violation of Articles 1, 7.2(f) and 7.2(g) of the CVA.

[136] Panel Report, *Colombia – Ports of Entry*, para. 7.142.
[137] Panel Report, *Colombia – Ports of Entry*, para. 7.150.

89. In addition, the specific bond is required in the light of the final collection of customs duties. However, the final determination of the bond is not based on the substantive obligations governing the final determination of customs value in the CVA. The determination of the coverage of the specific bond takes not the slightest account of the substantive provisions governing the determination of the value of the goods, in particular through application of the valuation methods established in the CVA "on a case by case basis, so as to reflect the particular conditions of the sale of the product in question."[138] This case by case consideration is impossible to observe when specific coverage is required *a priori* for the specific bond, on a fixed basis established prior to any importation (200% of the threshold price for the quantity imported, or 200% of the difference between the threshold price and the value declared for the imported quantity). Without making this evaluation, the Colombian customs authorities do not have the necessary information to implement the valuation methods provided for in Articles 1, 2, 3, 5, 6 and 7 of the CVA and to establish whether or not it is necessary to delay the valuation and the determination of the appropriate scope of the guarantee. For this reason, the special import regime is inconsistent with Articles 1, 2, 3, 5, 6 and 7.2(f) and (g) of the CVA.

B. THE SPECIFIC BOND IS INCONSISTENT WITH ARTICLE 13 OF THE CUSTOMS VALUATION AGREEMENT

90. With the issuance of Decree No. 2218, the specific bond would presumptively be a guarantee subject to the disciplines of Article 13 of the CVA. Panama considers that this change in perspective does not free the specific bond of its inconsistency with WTO law. Article 13 of the CVA requires that the determination as to the need to delay the final determination of customs value should be made on a case-by-case basis. However, in the case of Decree No. 1745, it is clear that the requirement of the specific bond and its coverage are not established on a case-by-case basis. Nor is this case-by-case approach adopted under Decree No. 2218, as Panama has already demonstrated, because the prices concerned are characterized by Colombia as "artificially" or "manifestly low".

91. Panama also finds problematical the fact that Article 13 allows the specific bond to be required only if the importer wishes to withdraw the goods, so that customs valuation may not be seen as an obstacle to importation. However, through its Article 7, Decree No. 1745 makes a specific bond a requirement for all imports, including those where the importer has no intention of withdrawing the goods and is prepared to leave the goods in customs for the latter to conclude the final determination already initiated. This requirement would also exist in all cases under Decree No. 2218.

92. Panama also notes that the coverage of the specific bond does not correspond to the requirement under Article 13 of the CVA that the guarantee should cover "the ultimate payment of customs duties for which the goods may be liable". This provision is clear and does not foresee the possibility of requiring a guarantee beyond that which relates to the payment of customs duties. Thus, Article 13 does not authorize the requirement of a guarantee to cover non-existent penalties, for example. In the same vein, Article 7(3)(4) of the Trade Facilitation Agreement allows for a customs guarantee to be required "[i]n cases where an offence … has been detected" (emphasis added). Therefore, the coverage of the guarantee provided for in Articles 7 of Decree No. 1745 and Decree No. 2218 exceeds the scope of Article 13 of the CVA.

93. In addition, as a subsidiary obligation, the specific bond must be sufficient to cover the ultimate payment of customs duties "for which the goods may be liable". Its coverage should therefore be in line with the coverage of the primary obligation. In this connection, the use of the threshold as reference value is not in keeping with the specific import characteristics and the methods of evaluation permitted by the CVA. It is not therefore a valid reference value for determining the coverage of the guarantee. Panama does not consider that Members have given "carte blanche" for the national authorities to establish amounts of coverage not subject to any discipline. If that were the case, the disciplines of the CVA could easily be circumvented by requiring guarantees with a coverage that bears no relation to the primary obligation that has to be guaranteed. In fact, echoing what was said by the United States in its third-party submission[139], Panama observes that Article 7.3 of the Trade Facilitation Agreement makes it clear that the amount of coverage of a customs guarantee "shall not be greater than the amount the Member requires to ensure payment of customs duties, taxes, fees, and charges ultimately due for the goods covered by the guarantee". Panama considers that the standard of "customs duties for which the goods may

[138] Panel Report, *Colombia – Ports of Entry*, para. 7.142.
[139] United States' third-party submission, para. 46.

be liable" in Article 13 of the CVA must be read in conjunction with the standard of the "the amount the Member requires to ensure payment of customs duties" in Article 7.3 of the Trade Facilitation Agreement. This balanced reading of the provisions in question calls for the application on a case-by-case basis of the valuation methods provided for in the CVA, instead of pre-established criteria of the kind foreseen in Decrees Nos. 1745 and 2218.

94. Panama also notes that the requirement of a specific bond to cover possible penalties is not included in Article 13 of the Customs Valuation Agreement. It is inappropriate, therefore, to rely on this provision as justification for requiring the specific bond for the payment of penalties, as is done by Colombia in Decree No. 2218. In addition, it has to be borne in mind that Article 7.3.4 of the Trade Facilitation Agreement allows a customs guarantee to cover penalties and fines *only* if the existence of an offence requiring the imposition of such penalties and fines has previously been detected.

95. In view of the foregoing, Panama considers that the specific bond under Articles 7 of Decree No. 1745 and Decree No. 2218 is inconsistent with Article 13 of the Customs Valuation Agreement.

IX. THE INCONSISTENCY OF THE SPECIFIC BOND AND THE SPECIAL IMPORT REGIME WITH THE CUSTOMS VALUATION AGREEMENT IS NOT JUSTIFIED UNDER ARTICLE XX OF THE GATT

96. Article XX of the GATT cannot be used to justify violations of the specific bond with regard to Article 13 of the CVA, and violations of the special import regime with regard to Articles 1, 2, 3, 5, 6 and 7 of the same Agreement. In order for Article XX to be able to justify a violation of the CVA, it would have to be understood that Article VII contains the same obligations as the CVA. That is not the case. Article VII is ambiguous and establishes only exhortative rules regarding the primacy of the transaction value ("should be") or of certain prohibited criteria ("should not be based on") (Article VII:2(a)), without however prescribing the sequence of methods or the case-by-case approach foreseen in the CVA. Although Article VII of the GATT may be considered as the basis on which Members have been devising stronger customs valuation disciplines, this rule does not contain the "positive obligations" that are in fact contained in Articles 1, 2, 3, 5, 6 and 7 of the CVA. Moreover, Article VII does not provide for the possibility of requiring a guarantee when an importer wishes to withdraw the goods from customs pending determination of the corresponding customs value. The *chapeau* of Article XX of the GATT textually limits the applicability of GATT exceptions to the provisions of that Agreement. It does not allow the coverage of such exceptions to be read as extending to other WTO agreements, all the more so if the obligations that are at issue in a dispute are not "enforceable" under the provisions of the GATT.

97. Moreover, none of the provisions of the CVA refers to Article XX of the GATT. Not even Article 17 of the CVA establishes the "exceptionality" sought by Colombia. This provision merely acknowledges that the customs authorities shall have the right to satisfy themselves as to the truth or accuracy of the information submitted in respect of customs valuation, without this implying disregard for the enforceability of the valuation methods provided for in the CVA. For these purposes, the corresponding authority could make use of the procedures set out in the "Decision Regarding Cases where the Customs Administrations Have Reasons to Doubt the Truth or Accuracy of the Declared Value". However, these procedures are far from bearing any resemblance to the content of Article 7 of Decrees No. 1745 and No. 2218. Therefore, Colombia would have no justification even for a defence under Article 17 of the CVA.

98. It should be noted that, when another WTO agreement is applicable under the CVA, its applicability is expressly provided for. For example, Article 19.1 of the CVA provides that the Dispute Settlement Understanding shall apply to consultations and the settlement of disputes under the CVA. This is not the case for Article XX of the GATT or any other exceptional rule contained in that Agreement.

99. Even if Article XX were applicable to violations of the CVA, Panama considers that there would be no justification for such violations on this legal basis, for the reasons given in respect of the invocation of Article XX on the inconsistency of the measures in question with the GATT in all Panama's communications, written and oral, as both complainant and respondent, including the replies to questions and Panama's comments on the replies of Colombia. Panama takes it that, pursuant to its position regarding claims of violation of the GATT, Colombia is invoking Articles XX(a) and XX(d) of the GATT as defence.

100. With regard to the violation of Article 13 of the CVA, the specific bond is not a measure necessary to combat money laundering resulting from a problem of underinvoicing. As Colombia explains in its replies to the questions of the panels, the incidence of valuation dispute investigations in relation to total imports is minimal (6.1% of imports under the threshold), and it is even negligible in relation to imports liable to underinvoicing (between 2.5% and 3% of imports as a whole), and there is not even any evidence at present of possible underinvoicing for the purpose of laundering money. A measure of this nature, therefore, like the specific bond, which has a highly trade-restrictive effect, with almost total suppression of trade subject to the thresholds (Colombia's response to question 6(b)), can in no way be considered a measure "necessary" to address this problem. It is a prohibitive measure which if anything creates the possibility of overvaluation of the goods (to avoid falling below the thresholds) and ultimately of money laundering. An alternative measure to address this problem is a guarantee applied on a case-by-case basis which has variable coverage according to the circumstances of each transaction.

101. In any event, Panama observes that there is no reason to exclude from the administration of the specific bond goods entering the international logistical distribution centres, since the same concerns relating to underinvoicing and money laundering may arise in these settings. The administration of the measure at issue would therefore necessarily give rise to discriminatory treatment as between situations where the same conditions (risk of money laundering through underinvoicing) prevail.

102. Nor does Panama consider, with regard to the violation of Articles 1, 2, 3, 5, 6 and 7 of the CVA, that the special import regime is a measure necessary to combat money laundering resulting from a problem of underinvoicing. For the same reasons as with respect to the bond, the incidence of valuation dispute investigations is minimal (6.1% of imports under the threshold) and it is negligible in respect of underinvoicing (between 2.5% and 3% of imports overall), while there is not even any evidence of possible underinvoicing leading to money laundering. In the circumstances, a measure with a highly trade-restrictive effect (or even a prohibitive effect with regard to certain imports) cannot be considered as a measure "necessary" to address this problem. Panama considers that random controls or some of the measures indicated in its previous submissions (Panama's rebuttal as complainant, paras. 201-261; Panama's rebuttal as respondent, paras. 392-420) are alternative, less trade-restrictive measures that would be available to Colombia.

103. In any event, Panama notes that there is no reason to exclude from the application of the special import regime goods entering the international logistical distribution centres, since the same concerns relating to underinvoicing and money laundering may arise in those settings.

X. CONCLUSION

104. In the light of all of the foregoing, Panama requests the Panels under Article 21.5 of the DSU to find that:

(i) in response to Colombia's objection, the specific bond and the special import regime, as well as all of Panama's claims are covered by the Panels' terms of reference;

(ii) the specific bond and the special import regime are Colombian "measures taken to comply" within the meaning of Article 21.5 of the DSU;

(iii) the specific bond requirement is inconsistent with Article XI:1 of the GATT, and does not meet the requirements of Article 13 of the Customs Valuation Agreement;

(iv) the special import regime is inconsistent with Article XI:1 of the GATT and with Articles 1, 2, 3, 5, 6 and 7(f) and (g) of the Customs Valuation Agreement;

(v) the specific bond requirement necessarily gives rise to an administration of Article 8 of Decree No. 390 that is not uniform, impartial and reasonable, contrary to the provisions of Article X:3(a) of the GATT;

(vi) the special import regime necessarily gives rise to an administration of Articles 493 and 486 of Decree No. 390 that is not uniform, impartial and reasonable, contrary to the provisions of Article X:3(a) of the GATT;

(vii) Colombia has not demonstrated that the requirements of the specific bond and the special import regime, and the administration to which they give rise, are justified under Articles XX(a) and (d) of the GATT;

(viii) the special import regime results in the application of substantial penalties for minor infringements, such as failure to comply with certain requirements of Decree No. 2218, in a manner inconsistent with Article VIII:3 of the GATT.

105. Consequently, Panama requests the Panels to find that Colombia has not brought its compliance measures into conformity with its obligations under the GATT and to make the relevant recommendations in accordance with Article 19 of the DSU.

ANNEX C

ARGUMENTS OF THE THIRD PARTIES

ANNEX C-1

INTEGRATED EXECUTIVE SUMMARY OF ECUADOR*

This statement constitutes Ecuador's opinion on the "Compliance Proceedings under Article 21.5 of the Understanding on Rules and Procedures Governing the Settlement of Disputes".

Bearing in mind that the current proceedings relate to the determination to be made by the original panel regarding the measures taken by Colombia to comply with the recommendations made by the Dispute Settlement Body (DSB) in *Colombia – Measures Relating to the Importation of Textiles, Apparel and Footwear (Colombia – Textiles)*, Ecuador considers it necessary to raise some legal points concerning the obligation incumbent on all Members to adhere to the provisions of the covered agreements, as a general matter, and in particular to the recommendations that may be addressed to a Member in a dispute settlement proceeding.

The Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) provides that "[p]rompt compliance with recommendations or rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all Members". The time factor is of fundamental importance in the dispute settlement system of the World Trade Organization (WTO), as it is in any other organization, since justice administered slowly cannot be considered and denominated as such.

Hence, with the aim of achieving a "prompt" and "effective" resolution of disputes, the procedure established in Article 21.5 is an expedited procedure inasmuch as the panel report must be circulated within a period of 90 days, in contrast to the nine months available to the original panel.[1]

As has been highlighted by the Appellate Body, Article 21.5 "promote[s] the prompt compliance with DSB recommendations and rulings and the consistency of "measures taken to comply" with the covered agreements by making it unnecessary for a complainant to begin new proceedings and by making efficient use of the original panelists and their relevant experience".[2]

The DSU states that compliance must be immediate but also recognizes that it is not always practicable to comply immediately with all rulings and recommendations. Consequently, Members have what is known as a "reasonable period of time" to bring the challenged measure into conformity with the provisions of the covered agreements that have been breached.

In that connection, the DSB is responsible for maintaining surveillance of the implementation of recommendations and rulings; however, the standard of implementation may prove to be subjective, and the DSU therefore envisages a procedure whereby the original panel may intervene to determine whether the necessary measures have been taken to secure compliance with the DSB's recommendations and rulings and, if so, whether those measures are consistent with the provisions of the WTO covered agreements.

For this procedure in particular, the point of contention appears to be that of determining what measures are to be assessed by the Panel as having been taken by Colombia to "comply" with the recommendations of the DSB, since Panama alleges that the Panel should also consider as a measure taken to comply the measure contained in Decree 1745, issued simultaneously with Decree 1744, and that the latter is identified by Colombia as the only measure taken to comply with the Panel's findings.

In this connection, Ecuador considers it important that the Panel take account, in its analysis, of the full scope of the letter and spirit of the DSU rule, as set out in the opinion expressed by the Appellate Body in its report[3], to the effect that compliance proceedings cannot be conducted in such a way as

* Ecuador requested that its oral statement be considered as its executive summary. The original statement was made in Spanish.

[1] Articles 3.3 and 21.1 of the DSU.

[2] Appellate Body Report, US – Upland Cotton (Article 21.5 – Brazil), para. 212, referring to Appellate Body Report, US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina), para. 151.

[3] Appellate Body Report, US – Zeroing (EC) (Article 21.5 – EC), para. 250, citing Appellate Body Report, US – Softwood Lumber IV (Article 21.5 – Canada), para. 71.

to allow a Member "to comply through one measure, while, at the same time, negating compliance through another". In order to prevent the avoidance of effective compliance with the determinations made by a panel, the designation of certain measures by the responding Member as "measures taken to comply" with the DSB's recommendations and rulings is not determinative of the compliance panel's mandate.[4] A compliance panel's mandate may cover both the measures that the responding Member designates as being "taken to comply" and those that the responding Member does not consider to have that purpose, but which the panel, following a careful legal analysis, considers to be relevant for clarifying all the existing variables that will enable it to establish beyond any doubt the compliance or non-compliance with the determinations made by the DSB.

Conclusion

Ecuador considers that the essential purpose of initiating a dispute settlement proceeding under the DSU is to achieve the thorough verification of compliance with the determinations made by the DSB regarding measures taken by the defending and losing Member to comply with the provisions of the covered agreements. This is the direction taken by the rulings and recommendations adopted by the DSB, prior to the determinations made by the original panel, and by the Appellate Body where applicable.

Thus, the Member to which the recommendations were addressed has a "reasonable period of time" to adopt compliance measures, for which reason Ecuador considers that such compliance measures must be directed towards a single objective, namely full adherence to the obligations stemming from the WTO covered agreements.

[4] Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 204.

ANNEX C-2

INTEGRATED EXECUTIVE SUMMARY OF THE UNITED STATES

THIRD PARTY WRITTEN SUBMISSION OF THE UNITED STATES OF AMERICA

I. Terms of Reference of Panels in These Proceedings

1. Articles 7.1 and 6.2 of the DSU reflect the standard terms of reference for a panel, and Article 21.5 contains a more specific focus on a disagreement as to a measure taken to comply. Under Article 7.1, when the DSB establishes a panel, it may give the panel standard terms of reference, which are "[t]o examine . . . the matter referred to the DSB" by the complainant in its panel request and "to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in that/those agreement(s)". Under Article 6.2, the "matter" consists of "the specific measures at issue" and "a brief summary of the legal basis of the complaint." Thus, the task of any panel, including one established pursuant to DSU Article 21.5, is examining the "matter" referred to the DSB in the complaining Member's panel request, with the "matter" consisting of the "specific measures at issue" and the "legal basis of the complaint."

2. With regard to the "legal basis of the complaint," this refers to the claims at issue in the proceeding. Where a single provision of a covered agreement contains multiple obligations, "a panel request might need to specify which of the obligations contained in the provision is being challenged." Claims must be "set out clearly in a panel request" and where a panel request fails to specify adequately a claim, such claim will not form part of a panel's terms of reference.

3. With regard to the "specific measures at issue," Articles 6.2 and 7.1 of the DSU establish the relevant time for identifying these measures in any panel proceeding is when the "matter [is] referred to the DSB." Thus, when the DSB establishes the panel and sets the panel's terms of reference, the measures subject to the panel's examination are those within "the matter" "referred to the DSB" when the panel was established. Accordingly, panels and the Appellate Body have recognized that the general rule set out by Articles 6.2 and 7.1 is that "the measures included in a panel's terms of reference" "must be [those] that are in existence at the time of the establishment of the panel" and that a panel's review should "focus[] on [the] legal instruments as they existed ... at the time of establishment of the panel."

4. DSU Article 21.5 further defines the terms of reference of panels established under that provision. It provides that an Article 21.5 panel's terms of reference are limited to assessing the "existence" or "consistency with a covered agreement" of "measures taken to comply." "Measures taken to comply" refers to "measures which have been, or should be, adopted by a Member to bring about compliance with the recommendations and rulings of the DSB." Thus, an Article 21.5 proceeding extends to measures that were "taken in the direction of, or for the purpose of achieving, compliance" and to measures that should have been so taken. Identifying the measure taken to comply involves examining "the factual and legal background against which relevant measures are taken." The DSB recommendations and rulings in the original proceeding are the starting point for identifying the "measures taken to comply."

5. Therefore, in contrast to original panel proceedings, a complaining Member's panel request may list some measures that, by definition, do not fall within an Article 21.5 panel's terms of reference or may fail to list some measures that nevertheless do fall within a panel's terms of reference. For example, the implementing Member may declare that a particular legal instrument is the "measure taken to comply" for purposes of an Article 21.5 proceeding. This declaration is "relevant" to an Article 21.5 panel's analysis of the "measure taken to comply" but is not "conclusive." Legal instruments other than the declared "measure taken to comply" may in effect be part of the "measure taken to comply" because of their relationship to the measure found WTO-inconsistent or effect on a Member's compliance.

6. In this dispute, with regard to the scope of measures taken to comply, Colombia suggests that Decree 1745 is not part of the "measure taken to comply" because the measures set out in Decree

1745 are different "in nature" from the original measure because the original measure was a tariff measure and the measures in Decree 1745 are not. As complainant, Colombia also argues that its panel request mentions only Decree 1744 and, therefore, it is the only measure within that Panel's terms of reference.

7. The United States does not consider that a measure taken to comply is necessarily limited to the type or kind of measure found in the original proceeding to be WTO-inconsistent. Rather, assessing whether a new measure has a sufficiently close relationship to the measure subject to the DSB recommendations (or to the declared measure taken to comply) is a fact-specific inquiry that may require examining "the timing, nature, and effects" of various measures. This analysis does not depend on whether a new measure is the same *type* of measure as the WTO-inconsistent measure. If it did, a Member could evade a DSB recommendation by simply changing the character of a measure. Thus, various factors may be relevant to assessing the relationship between Decree 1745 and the WTO-inconsistent measure subject to the DSB recommendation.

8. With regard to Colombia's other argument, the United States does not understand that the analysis of the "measure taken to comply" differs depending on which party initiated an Article 21.5 proceeding. As discussed above, one feature of Article 21.5 proceedings that is different from original proceedings is that, with regard to the measures within a panel's terms of reference, Article 21.5 sets out specific rules that may supersede the description of the challenged measure in the panel request. Thus, a complaining Member may not draw into an Article 21.5 proceeding a measure other than a "measure taken to comply" by referring to that measure in its panel request. Conversely, a Member may not constrain an Article 21.5 panel from assessing the effect on its claim of a "measure taken to comply" that the other party brings forward in the course of that proceeding simply by omitting that measure from its panel request.

9. Concerning Decree 2218 of 2017, as explained above, Articles 6.2 and 7.1 of the DSU set out the general rule that "the measures included in a panel's terms of reference," and thus those on which the panel makes findings, "must be . . . in existence at the time of the establishment of the panel." DSU Article 21.5 does not modify this rule. The Panels were established with standard terms of reference. Thus, it is the "measures taken to comply," as they existed on the dates of the Panels' establishment − March 6 and July 19, respectively − that are properly within the Panels' terms of reference. It is uncontested that Decree 2218 was enacted long after the Panels were established. Therefore, it is not part of the "matter" referred to the DSB. As such, it is not within the Panels' terms of reference, and the Panels should not make findings on it.

10. Indeed, these proceedings illustrate that, in addition to being consistent with the text of the DSU, defining the "matter" within a panel's terms of reference based on the measures as they existed at the time of panel establishment is the appropriate outcome. First, addressing "measures taken to comply" as a moving target leads to procedural unfairness and gaps in argumentation that can cause incoherent findings. Colombia has had no meaningful opportunity to respond to Panama's arguments or evidence on Decree 2218. Further, Panama has put forward no arguments or evidence that Decree 2218 forms part of the "measures taken to comply," simply presuming that it is within the Panels' terms of reference. Second, defining the "matter" within a panel's terms of reference based on the measures as they existed at the time of panel establishment benefits all parties, and the WTO dispute settlement system, by balancing the interests of complainants and respondents. Complainants may not obtain findings on substantively new measures introduced after the establishment of a panel. On the other hand, respondents may not avoid findings by altering or revoking measures after the date of panel establishment. As the Appellate Body has recognized, it does not serve the interests of the WTO dispute settlement system to require or allow parties to adjust their arguments throughout dispute settlement proceedings in order to deal with a disputed measure as a moving target.

11. With regard to the claims within the Panels' terms of reference, as explained above, a panel's terms of reference are generally to examine the "matter referred to the DSB" by the complaining Member. The claims falling within these terms of reference are those set out in the panel request. Both Panels in these proceedings were established with standard terms of reference. Thus, the terms of reference of the Panel established in the proceeding initiated by Colombia extend to the "matter raised by Colombia in document WT/DS461/17." The provisions mentioned in this document are Articles II:1(a) and (b), XX(a), and XX(d) of the GATT 1994, and the only obligations described relate to the imposition of customs duties not in excess of Colombia's bound rates. Therefore, these are the claims within the terms of reference of the Panel established pursuant to Colombia's request.

12. The argument that the terms of reference of an Article 21.5 panel extend to *any* inconsistency with any covered agreement, no matter the claims identified in the panel request, has no support in the text of the DSU, and Panama points to none. Further, as discussed above, it is refuted by Articles 7.1 and 6.2. The Appellate Body report in *EC − Bed Linen*, which Panama cites as supporting this argument, does not do so. In that dispute, the Appellate Body stated that the "complainant in Article 21.5 proceedings may well raise *new* claims, arguments and factual circumstances different from those raised in the original proceedings," due to differences between the original measure and the measure taken to comply. There was no suggestion, however, that the complainant could raise claims not raised in the panel request pursuant to which the compliance panel was established. Similarly, the Appellate Body did not suggest that a respondent in an Article 21.5 proceeding could raise claims not covered by the panel request.

13. The argument that the two Panels must have the same terms of reference because they are both considering the issue of compliance with the DSB recommendations and rulings in the original proceeding also has no support in the DSU. Even under the approach of the Appellate Body in *EC − Continued Suspension*, the terms of reference of Article 21.5 panels remain tied to the panel request pursuant to which they were established, even if there are two such panels in a dispute and their schedules are harmonized. The schedules of the two Panels in this proceeding have been harmonized and a combined set of working procedures adopted. But the proceedings remain distinct in terms of the panel requests and the parties' submissions. Thus, the terms of reference of the two Panels are not identical simply because the DSB referred two matters to the Panels pursuant to Article 21.5. And, indeed, they are not identical, as Colombia's panel request does not cover all the claims subsequently raised by Panama.

14. As to Panama's argument that all the claims it has raised as complainant are covered by the terms of reference of the Panel established pursuant to its own panel request, the United States has two points. First, the terms of reference of the Panel requested by Panama are governed by Panama's panel request. Therefore, the fact that Panama's panel request does not refer to Article VIII:3 of the GATT 1994 suggests that claims under that provision are not within that Panel's terms of reference. Further, for the provisions listed in Panama's panel request, the Panel will still have to consider whether the references meet the standard of DSU Article 6.2. Second, Panama's submissions as complainant are not part of the record in the proceeding initiated by Colombia simply because the proceedings are in the same dispute. Therefore, Panama's argument that *all* the provisions and arguments it has raised as respondent are within the terms of reference of the Panel established pursuant to Panama's panel request must be substantiated, for example, by reference to the working procedures of the Panels or to Panama's submissions as complainant. However, as the complainant, Panama seems not to have put forward argumentation concerning the claims under Article VIII:3 of the GATT 1994 and Articles 1, 2, 3, 5, 6, 7, and 13 of the CVA that it raised in its second submission as respondent.

II. Interpretation of Article XI:1 of the GATT 1994

15. The ordinary meaning of the term "restriction," in the context of Article XI:1, is "a limitation on action, a limiting condition or regulation." The panel in *India − Quantitative Restrictions* thus found that "[t]he scope of the term 'restriction' is . . . broad, as seen in its ordinary meaning." The panel in *India − Autos* reached the same conclusion, finding that "any form of limitation imposed on, or in relation to importation constitutes a restriction on importation within the meaning of Article XI:1." The Appellate Body endorsed this approach in *China − Raw Materials* and *Argentina − Import Measures*, finding that "restriction" refers to "[a] thing which restricts someone or something, a limitation on action, a limiting condition or regulation" and thus "refers generally to something that has a limiting effect."

16. A finding that a measure constitutes a restriction within the meaning of Article XI:1 does not require a showing that trade flows have been affected. Article XI:1 proscribes restrictions "on the importation" or "on the exportation" of any product, not restrictions on the *level* of imports or exports. The terms used reach the process of importing or exporting. Similarly, the Appellate Body in *Argentina − Import Measures* recently concluded that the "limiting effect" of a restriction under Article XI:1 "need not be demonstrated by quantifying the effects of the measure at issue; rather, such limiting effects can be demonstrated through the design, architecture, and revealing structure of the measure at issue considered in its relevant context."

17. On the other hand, it is not the case that any measure that makes importation more difficult is inconsistent with Article XI:1. As the Appellate Body recognized in *Argentina – Import Measures*, "not every condition or burden placed on importation or exportation will be inconsistent with Article XI, but only those that are limiting, that is, those that limit the importation or exportation of products." Numerous provisions of the covered agreements recognize that there may be formalities and fees associated with importation, which will inevitably place some burden on importation. Interpreting Article XI:1 as proscribing all such burdens would contradict the principle that the WTO Agreement is a single undertaking and, therefore, the provisions of the various covered agreements should be interpreted harmoniously.

18. Thus, the critical question in determining whether Panama has shown that the customs bond is inconsistent with Article XI:1 is whether it has shown that the measure imposes a limitation or limiting condition on importation, or have a "limiting effect" on importation, of products into Colombia. The Panels should reject arguments suggesting that any "conditions" placed on importation – including all importation fees and formalities – are necessarily inconsistent with Article XI:1. A showing that a measure is a "condition" on importation that imposes some burden or cost on importers is not sufficient to establish an Article XI:1 claim. On the other hand, Panama is correct that it is not necessary for it to demonstrate a measure's effect on trade flows in order to show it is inconsistent with Article XI:1.

19. Also, as Article XI:1 refers to the importation of "product[s] of . . . any other contracting party," the key inquiry is a measure's effect on the *products* of Members not on *importers* in Colombia. A number of Panama's arguments seem premised on the idea that Article XI:1 requires Colombia to maintain equal conditions for all Colombian importers (particularly those that are not credit worthy). This is incorrect. The text of Article XI:1 refers to limitations on the importation of *products*, not limitations on importation by particular importers. Limitations on importation by particular persons would be relevant to the Panels' analysis only to the extent that the limitations on individuals' ability to import are a limitation or limiting condition on importation, or had a "limiting effect" on importation, of the relevant products.

20. With respect to the argument that customs bonds are "permissible instruments" and thus not inconsistent with Article XI:1, the United States agrees that the existence of a customs bond is not sufficient to establish an Article XI:1 claim. The WTO agreements are a single undertaking and should be read harmoniously. If all customs bonds were inconsistent with Article XI:1, provisions of the covered agreements would be rendered meaningless. And because customs bonds inherently involve some burdens or costs on importers, the existence of some burden or cost imposed by a customs bond is not sufficient to establish that the bond is inconsistent with Article XI:1. The provisions of other covered agreements on customs bonds and import fees and formalities provide useful context for analyzing whether a customs bond rises to the level of being a "restriction" under Article XI:1. At a minimum, a customs bond that is *consistent* with such provisions would presumably not be inconsistent with Article XI:1.

21. Panama also argues that the special import regime is inconsistent with Article XI:1. In considering Panama's arguments, the Panels should assess which of them are probative of whether the special import regime imposes a limitation or limiting condition "on importation" or has a "limiting effect" on importation. A successful Article XI:1 claim requires a Member to show that the measure restricts importation of the relevant products; the existence of costs or difficulties for individual importers is not sufficient. On the other hand, the intervention of some element of private action does not relieve a Member of responsibility for the effects of a measure. If Panama shows that the special import regime necessarily results in costs and burdens that are a limitation or limiting condition on importation or have a "limiting effect" on importation of the covered products, the fact that private actors are involved in imposing or implementing these costs and burdens does not mean that the restriction does not stem from the challenged measure.

RESPONSES OF THE UNITED STATES TO THE PANELS' QUESTIONS TO THE THIRD PARTIES

Questions 1, 2, and 7

1. Article 21.5 of the DSU establishes that the question in assessing whether a measure is within the terms of reference of an Article 21.5 panel is whether it forms part of, or undermines the existence of, the "measure taken to comply." The "closely connected" analysis from *US – Zeroing*

does not suggest that measures other than a "measure taken to comply" could be within the terms of reference of a compliance panel. Rather, the report explains that measures other than the *declared* "measure taken to comply" can in fact be measures taken to comply and within the panel's terms of reference. It states that a panel's task is to determine whether "measures that are ostensibly *not* 'taken to comply'" have "sufficiently close links" with the declared measure taken to comply and the recommendations and rulings of the DSB "for [the panel] to characterize such other measures as 'taken to comply' and, consequently," within the panel's terms of reference. The Appellate Body took the same approach in *US − Softwood Lumber IV*. Thus, the "closely connected" analysis can assist an Article 21.5 panel in its analysis of whether a measure other than the declared "measure taken to comply" is within its terms of reference.

Question 12

2. One of the fundamental principles of Article XX is that it reflects the right of a responding Member "to achieve its desired level of protection with respect to the objective pursued." Thus, for a measure to be "necessary" under Article XX(a), it does not need to *fully* achieve its public morals objective. Similarly, a Member is not required to address all aspects of an objective together and equally because it chooses to address one aspect. The Appellate Body addressed this issue explicitly in its report in *EC − Seal Products*. Thus, contrary to Japan's suggestion, Colombia does not need to explain why the measures at issue concern only textiles and apparel products, or show that the measures' scope is "necessary" to combating money laundering, to meet the standard of Article XX(a).

Question 13

3. The first step of the Article XX chapeau analysis entails assessing whether a measure "results in discrimination" between countries where the "conditions" are relevantly "the same." Arguments by Japan and the EU ignore this step and thus misstate the chapeau legal standard.

4. Japan's argument omits this element of the chapeau analysis as a result of its focus on the "calibration test" applied in *US − Tuna II*. However, the "calibration test" was not put forward as a generally applicable approach to the chapeau. Rather, the Appellate Body found that, based on the arguments of the parties and the facts of the dispute, it was an appropriate way of assessing whether the U.S. tuna measure met the chapeau requirements. Moreover, the "calibration" analysis was applied *after* the complaining party demonstrated that the U.S. tuna measure discriminated between countries where the conditions were relevantly the same. Thus, even if the "calibration" test were a generally applicable approach to the "arbitrary and unjustifiable discrimination" standard, it would not displace the first step of the chapeau analysis.

5. The EU's argument that Colombia's measure may treat two categories of products "similarly" even though they represent "different situations" and that this may constitute "discrimination" suffers from a similar flaw. The chapeau concerns discrimination "between countries where the same conditions prevail," not merely discriminating among "different situations." The EU's hypothetical of genuinely low-priced products and under-valued products has no connection to the national origin of the two alleged types of products, and thus does not suggest that the measure discriminates "between countries where the same conditions prevail." The United States respectfully suggests that the Panels ground their analysis of Colombia's defenses in the text of the chapeau and the relevant arguments of the parties.

ANNEX C-3

INTEGRATED EXECUTIVE SUMMARY OF HONDURAS*

1. Honduras wishes to express its views on one aspect of this dispute that is of a systemic nature: the possibility that a Member could use the protection of public morals or the prosecution of offences under domestic law as a basis for imposing measures that affect international trade.

2. Honduras acknowledges that this possibility forms part of the public policy space available to every government for the management of its domestic affairs. However, Honduras considers that WTO panels should evaluate this type of argument with extreme care. The characterization of an international trade operation as a threat to public morals or to the domestic criminal justice system of a State is not a matter that should be taken lightly, since it should have the highest priority for the government making such an allegation. Because of this very priority, however, such a characterization should not be based solely on mere assertions or general explanations.

3. Honduras is of the opinion that, despite the deference that Panels and the Appellate Body may accord to governments in the characterization of their domestic affairs, because of the fact that commitments assumed towards other Members of this Organization are at stake, these organs must base their assessment on the evidence supplied by the parties and not just on the assertions made or on mere explanations, which may appear plausible but are not supported by documentation. Without evidence based on actual facts and not mere hypotheses, Panels should be reluctant to accept without scrutiny allegations that a form of corporate conduct is contrary to public morals or the domestic legal order of the government seeking to restrict imports.

4. Honduras considers that this standard of review is also applicable to the matter of the contribution of the measure to the proposed objectives and its degree of trade restrictiveness. Panels must carefully consider the explanatory material and evidence supporting these arguments. Particular attention must be paid to what Honduras would call the "collateral effects" of the measure. It must be assessed whether the measure's secondary effects on international trade would not give rise to the occurrence in a different form of the same problem that the measure is allegedly intended to prevent. If that is the case, the contribution of the measure should be called into question.

5. In the instant case, Honduras has serious doubts as to whether the restriction on imports below certain prices might not have the opposite effect of encouraging traders to manipulate their prices upwards, above the reference prices, which would also constitute a situation of customs fraud, and Honduras also has doubts as to whether this situation might not lend itself to the commission of a money laundering offence, which is meant to be prevented by the challenged measures. Honduras hopes that the Panel will examine this situation with the utmost care.

6. Honduras considers that Article XX of the GATT already provides ample public policy space for Members to pursue the domestic policies they deem necessary. Panels, and the Appellate Body in particular, should be extremely careful not to apply these rules in such a way as to loosen the existing standards even further.

* Honduras requested that its oral statement be considered as its executive summary. The original statement was made in Spanish.

ANNEX C-4

INTEGRATED EXECUTIVE SUMMARY OF JAPAN

I. ARTICLE 21.5 OF THE DSU

A. Measures Taken to Comply pursuant to Article 21.5 of the DSU

1. Compliance panels examine the existence or the WTO-consistency of "measures taken to comply" pursuant to the DSU Article 21.5. Both of the measures that Members declare as measures which have been, or should be, adopted to bring about compliance with the DSB's recommendations and rulings, and the measures that are closely connected to such measures and the DSB's recommendations and rulings, constitute such "measures taken to comply" under Article 21.5. While Japan does not take any specific position on the facts of this dispute, Japan considers that if the measures at issue (i.e., the customs bond and the special import regime) constitute "measures taken to comply" and are specified in the panel request, they fall within the scope of the compliance Panel.

2. In this regard, Japan is of the view that where a Member which was the respondent in the original proceeding has initiated a compliance proceeding with respect to its measures it refers to as "measures taken to comply" in its panel request, the other Member, which was the complainant in the original proceeding, will be free to initiate another compliance proceeding with regard to other measures in its panel request, if such measures truly constitute "measures taken to comply".

3. In the compliance panel proceeding initiated by the original respondent Member, the original complainant Member may refer to the measures other than those the original respondent Member referred to in order to prevent the panel from concluding that the original recommendations and rulings are fully implemented. However, in such a proceeding initiated by the original respondent Member, the panel should not make findings on the WTO-consistency of the measures other than those the original respondent Member referred to, because they are not specified as measures in the panel request.

B. The Close Nexus Test

4. The Appellate Body has laid out a set of criteria that a compliance panel should analyze when determining whether an undeclared measure taken to comply has sufficiently close links to the declared measures "taken to comply" with the DSB's recommendations and rulings to fall within the scope of a compliance proceeding ("close nexus test").[1] The determination requires a panel to "scrutinize the links, in terms of *nature*, *effects*, and *timing*, between those [undeclared] measures, the declared measures 'taken to comply', and the recommendations and rulings of the DSB."[2]

5. In this regard, Japan considers that in *US − Large Civil Aircraft (2nd Complaint) (21.5 − EC)*, the compliance panel applied the close nexus test by examining "nature" and "effects", but not "timing" while, in other parts of its analysis, the panel examined "nature", but not "effects" and "timing".[3] Japan considers that such inconsistent application of the close nexus test by compliance panels may lead to arbitrary determinations on the proper scope of compliance panels. Japan requests that the Panel apply the close nexus test in a holistic manner "based on a careful weighing and balancing of all of the close nexus factors—nature, effects, and timing."[4]

6. Japan notes that the application of the close nexus test in a holistic manner on "nature", "effects" and "timing" may involve the examination of factors relevant to said three elements. Japan considers that in examining the "nature" and "effects" of the measures, the Panel may want to look

[1] See e.g., Appellate Body Report, US − Zeroing (EC) (Article 21.5 − EC), para. 207.
[2] Appellate Body Report, *US − Zeroing (EC) (Article 21.5 − EC)*, para. 229.
[3] Panel Report, US − Large Civil Aircraft (2nd Complaint) (Article 21.5 − EC), paras. 7.76-7.79 and 7.162-7.168.
[4] Appellate Body Report, *US − Zeroing (EC) (Article 21.5 − EC)*, para. 262.

at the policy objective of the measures. The Panel may benefit from some articulation by the implementing member of the objectives of the measures that the member takes, yet if the Panel is to conduct a close nexus test, it should not rely on the mere assertions of the parties, and should not give disproportionate weight on the asserted objectives of the measures at issue.

II. ARTICLE XI OF THE GATT 1994

7. The text of Article XI:1 of GATT 1994 is very broad and comprehensive in its scope as it does not contain any qualification on the subject "prohibitions or restrictions" on the importation of products. Japan is aware that the Appellate Body in *Argentina – Import Measures* stated that "only [measures that] have a limiting effect on the importation [of products]"[5] can be found to be inconsistent with Article XI:1. Japan also notes that the Article does not specify any threshold for such "a limiting effect". While Article XI:1 refers to "prohibitions or restrictions … on the importation of any product," limitations on importation by a particular person fall within the scope of Article XI insofar as they produce any limiting effect.

8. In Japan's view, customs bond constitutes a limitation on the "importation" of products and, by nature it has a "limiting effect" thus would fall under prohibited measures under Article XI:1. However, measures prohibited under Article XI:1 may be justified pursuant to Article XX of the GATT 1994 to the extent that they serves legitimate public policy purposes, and other specific requirements under the provision are met. The imposition of customs bond on imports may be justified, under Article XX (d), to the extent "necessary to secure compliance with [certain WTO-consistent] laws or regulations."

III. ARTICLE XX(A) OF THE GATT 1994

9. What is at dispute is whether the customs bond and the special import regime under Decree 1745 are "necessary" to achieve the objective of combatting money laundering, that, in principle, falls under public morals purpose. While Japan is aware that the Appellate Body stated that "[m]embers have the right to determine the level of protection that they consider appropriate,"[6] Japan is of the view that the Member seeking to justify a measure under Article XX(a) of the GATT 1994 must identify the level of protection which it is pursuing through the measure. The Appellate Body has noted that when assessing whether a measure can be justified pursuant to Article XX, an analytical process entails a consideration of whether the measure has been adopted or enforced to achieve its objective, and whether the measure is necessary for achieving that objective.[7] It is only when the responding Member identifies the policy objective pursued by the measure that the Panel would be able to determine whether the measure is "necessary" to achieve the objective by engaging in a "holistic analysis of the relationship between the measure and the protection of public morals."[8] Japan is of the view that for a measure to be provisionally justified under Article XX(a) of the GATT 1994, it must be designed to meet the policy objective pursued by the measure.

10. In this regard, Japan notes that, while the relevant policy objective is to combat money laundering, it is not clear to Japan why the measure is limited to certain textiles, apparel, and footwear, rather than being more broadly applicable to all or most imports or sectors. As such, Japan considers that it would be important for the Panel to take into consideration the lack of a reasonable explanation as to why the measure's narrow product scope is "necessary" or for combatting money laundering.

11. Finally, Japan adds that the Panel should carefully assess the lack of explanation as to why the measure is limited to certain products in determining whether the measure complies with the chapeau of Article XX. The Appellate Body confirmed that the calibration test can be applied in the context of Article XX of the GATT. In *US – Tuna*, the Appellate Body relied on a "calibration test" and reviewed whether any differences in treatment under the measure at issue can be justified by

[5] Appellate Body Reports, *Argentina – Import Measures*, para. 5.241.
[6] Appellate Body Report, *EC – Seal Products*, para. 5.200; *see* Appellate Body Report, *Brazil – Retreaded Tyres*, para. 140.
[7] *See* Appellate Body Report, *EC – Seal Products*, para. 5.169.
[8] Appellate Body Report, *Colombia – Textiles*, para. 5.70.

reference to the policy objective pursued because such differences reflect the differences in, or are calibrated to, the different risks.[9]

12. While Japan does not take any specific position on the facts of this dispute, Japan believes that the Panel should carefully review whether the customs bond and custom formalities under Decree 1745 take into account different risks that may arise, depending on each transaction. If it is the case that a measure applies a single threshold of transaction prices, and thus does not calibrate it to any differences in the risks of money laundering arising from different transactions, it is possible that such a measure constitutes arbitrary or unjustifiable discrimination. By the same token, however, if a measure is not applicable uniformly to different product groups or countries, even though the risks do not differ, this may also run afoul of the requirements of the chapeau. In this situation, the responding Member must be able to explain the rationale for adopting a single and uniform measure or, by contrast, a measure that differentiates in a discriminatory way.

13. In this dispute, Colombia would have to explain why a measure setting a uniform price threshold, which by its design and structure may capture transactions that are not at all connected to money laundering, is rationally related to the measure's stated objective of combating money laundering. Colombia should also explain why it is reasonable to regulate low-value imports of this limited category of products and not other goods that may be easier or equally easy to be used for money laundering purposes. It is Japan's view that, in the absence of this type of rational explanation, a panel would normally need to find that a measure results in arbitrary or unjustifiable discrimination under the chapeau of Article XX of the GATT 1994, and consequently, it could not be justified.

[9] Appellate Body Report, *US – Tuna II (Mexico)(Article 21.5 – Mexico)*, paras. 7.153, 7.155, 7.239, 7.347.

ANNEX C-5

INTEGRATED EXECUTIVE SUMMARY OF THE EUROPEAN UNION

I. INTRODUCTION

1. The European Union (the EU) exercises its right to participate as a third party in this case because of its systemic interest in the correct and consistent interpretation and application of the provisions of the covered agreements at issue in this dispute, in particular the General Agreement on Tariffs and Trade (the GATT 1994), the Understanding on Rules and Procedures Governing the Settlement of Disputes (the DSU) and the Customs Valuation Agreement (CVA).

2. Whilst not taking a final position on all the facts of this case, the EU provides its views on certain legal claims and arguments advanced by the Parties to the dispute.

II. THE PANELS' TERMS OF REFERENCE

A. Whether Decree No. 1745 falls within the scope of the present compliance proceedings

3. The EU considers that subject to compliance proceedings can be both declared and undeclared measures taken to comply. A panel's mandate under Article 21.5 of DSU is not necessarily limited to an examination of an implementing Member's measure declared to be taken to comply, but may include a review of other measures which have close relationship to the recommendations and rulings of the DSB and the declared measure taken to comply.

4. In *EC − Bananas III (Article 21.5 - US)* the Appellate Body considered that it has to be analyzed first whether the measure at issue is in itself a measure taken to comply and only if that analysis cannot provide a clear answer, then the analysis of *US − Softwood Lumber IV (Article 21.5 − Canada)* is of application. In other words, if the measure at issue is found to constitute in itself a measure taken to comply, it will not be necessary to establish a "particularly close relationship" of the measure at issue to the declared measure taken to comply in order to subject the measure at issue to the scope of Article 21.5 proceedings.

5. The EU recalls that not only declared, but also undeclared measures can be reviewed by a panel in Article 21.5 proceedings. A panel's mandate under Article 21.5 of DSU is not necessarily limited to an examination of an implementing Member's measure declared to be taken to comply, but may include a review of other measures which have close relationship to the declared measure taken to comply and to the recommendations and rulings of the DSB.

6. Undeclared measures cannot be excluded *a priori* from the scope of compliance proceedings. Otherwise, the complainant would have to bring new procedures to challenge any measure with respect to which the respondent continues to deny compliance.

7. Accordingly, it is relevant to examine certain relevant aspects such as the timing, nature, and effects of the various measures in order to conclude if they have a sufficiently close relationship to the recommendations and rulings of the DSB and the declared measures taken to comply. The EU concurs with Japan in this regard.

8. With respect to the timing, the EU notes that both Decree No. 1744 and Decree No. 1745 were adopted on 2 November 2016, before the expiry of the RPT on 22 January 2017. While the first decree modified certain customs duties and brought them in line with the DSB recommendations and rulings, Decree No. 1745 instituted measures for the prevention and control of customs fraud in apparel and footwear imports.

9. The EU also notes that Colombia itself explained the link between the two future decrees in the RPT arbitration proceeding. The EU reckons that statements made by the parties within the framework of Article 21.3(c) of DSU arbitrations are relevant and may offer guidance to a panel. However, the EU considers that such statements are not dispositive.

10. In order to ascertain whether there is a close nexus, for instance, between an undeclared measure taken to comply and the DSB's recommendations and rulings, it is necessary to examine the 'design' of the measure, including its content, structure and expected operation. A panel needs to take into account objective factors in undertaking such an assessment, so as to enable it to analyse the nature, timing and effects of the measures at issue.

11. The EU also considers that the arbitrator's factual findings in Article 21.3(c) proceedings are relevant, but not dispositive. The purpose of Article 21.3(c) proceedings is to determine a reasonable period of time to comply, while the purpose of Article 21.5 proceedings is to determine if the respective party complied with the recommendations and rulings of the DSB.

12. The nature of the initial measure and of the new measure seems to be similar: Colombia's new mechanism is analogous to the previous compound tariff, as it is activated when the prices of the imports of apparel and footwear are below certain thresholds prescribed by Colombia itself, as was the case with the compound tariff. When this situation occurs, a higher *ad valorem* tariff is applied (within the bound limits - Decree No. 1744), together with several specific requirements (Decree No. 1745). For imports below the threshold there is in fact a presumption that they are of an illicit nature. Thus, the effect of this single package of measures seems to be the same as that of the compound tariff: it combines a price sensitive component (an *ad valorem* duty) with a price insensitive component (customs bonds and documentary requirements).

13. Furthermore, the objectives of the previous and the new measure are the same. The new measure has also as justification the fight against money laundering. In fact, with respect to the customs bond requirement and the special importation regime in Decree No. 1745 Colombia raises similar defenses under the general exceptions in Articles XX(a) and (d) as it did in the original proceedings with regard to the compound tariff in Decree No. 456.

14. With respect to the effects of the original measure and of Decree No. 1745, the EU notes that the measure at issue in the original proceedings covered the importation of apparel and footwear classified in Chapters 61, 62, and 64 of the Colombian Customs Tariff. At the same time, the new Decree No. introduces special customs controls for the importation of apparel and footwear classified in the very same chapters 61, 62, and 64 of the Colombian Customs Tariff. Furthermore, the goods initially subject to Decree No. 456 were those having artificially low prices, while the imports subject to the customs bonds requirements under Decree No. 1745 "are those that are suspected to have declared values that are artificially low". The effects of both the original measure and the new measure seem to be the limitation of imports of the targeted products.

15. Finally, the measures contained in Decrees No. 1744 and 1745 are the response of Colombia to the recommendations and ruling of the original panel and the Appellate Body with respect to the compound tariff in Decree No. 456. If the compound tariff had not been found incompatible with Article II of GATT and not justified under Article XX of GATT, there would have been no reason to replace Decree No. 456 with new measures. Therefore, Decrees No. 1744 and 1745 were adopted as a consequence of the recommendations and rulings in the original proceedings.

16. Thus, the EU considers that the Panels should follow the previous relevant guidance from the Appellate Body and ascertain whether the measures at issue are measures taken to comply or have a particularly close relationship with those measures, taking into account the factual configuration of the present case.

B. Whether Decree No. 2218 falls within the scope of the present compliance proceedings

17. The EU recalls that the Appellate Body in *US/Canada - Continued Suspension* referred to possible new violations, not covered in the implementing Member's Article 21.5 panel request. The EU considers that in a particular configuration like the one in the present proceedings, when the initial respondent is bringing first compliance proceedings, subsequently followed by the original complainant, the matter before the Panels is as described in both panel requests. It can be compared to the existence of one panel request consisting of two parts.

18. With regard to whether a measure adopted after the panel request is within a panel's terms of reference, the EU considers that it should be assessed on a case by case basis. Consultations requests must be consistent with Article 4.4 of DSU and panel requests must be consistent with Article 6.2 of DSU. A panel may examine in compliance proceedings declared measures taken to comply and undeclared measures taken to comply that satisfy the close nexus test (nature, timing and effects). However, all such measures must be within the panel's terms of reference. If an original complainant considers that a compliance panel request filed by an original respondent is incomplete, it must file its own panel request if it wishes to include other measures in the scope of the compliance proceedings.

19. Measures coming into existence during the course of compliance panel proceedings can only be within the terms of reference of the compliance panel if they are covered by specific language in the panel request that is consistent with Article 6 of DSU, or if either party files a modified panel request.

20. The EU notes that at page 7 of Panama's panel request there is a "catch-all" clause referring to "any possible amendments, extensions or additions, where applicable". However, even in the presence of such a catch-all clause, the new measure must remain "the same in essence" as the old measure, in order to be validly captured. Thus, the EU invites the Panels to assess whether Decree 2218, repealing Decree 1745 and containing largely identical provisions (albeit with certain important differences) can be considered an amendment, extension or addition which does not change the essence of the measure.

21. Furthermore, throughout its panel request Panama describes the security for release of goods and certain documentary and certification requirements, which are similar to a certain extent both under Decree 1745 and subsequently under Decree 2218.

22. In light of the above, the Panels will have to ascertain whether Colombia, as well as the third parties, received sufficient notice with regard to Panama's claims in the present dispute also with regard to the content of Decree 2218, in light of the terms of Panama's panel request.

23. Finally, should the Panels consider that Decree 2218 is within their terms of reference, then due process should be respected. Panama seems to have submitted Decree 2218 to the Panels' attention with the first procedural opportunity. The EU welcomes the possibility to comment on these aspects.

24. This being said, the EU shares the other third parties' "moving target" concerns and considers that it should be a case-by-case assessment in light of the existing relevant guidance from the Appellate Body.

III. ARTICLE XI OF GATT 1994

25. The EU agrees that Article XI:1 refers to restrictions on the importation of products. Different provisions of the GATT contain express references to products. As a matter of example, the non-discrimination provisions (MFN, national treatment) refer to 'like products' in the GATT 1994. However, the GATS, for instance, expressly refers to like services and service suppliers, while the GATT 1994 does not contain similar references to like products and like producers.

26. Previous panel reports shed light on the meaning of "restrictions" in Article XI:1. Those panels applied a legal test considering the implications on the competitive situation of an importer. Measures found in breach of Article XI:1 comprised measures which created uncertainties and affected investment plans, restricted market access for imports or made importation prohibitively costly. This is a rather broad interpretation, taking into account different circumstances that can act as limiting conditions on imports, discouraging importation.

27. Previous panels constantly based their findings on the design, structure of the measure and its potential to adversely affect importation, as opposed to a standalone analysis of the actual impact of the measure on trade flows.

28. The EU understands that in the present case Colombia requires the constitution of a customs bond covering 200% of the threshold price and the quantity of the respective goods with three-year validity.

29. Certain provisions of other WTO agreements are relevant in ascertaining whether customs bonds and import fees and formalities are consistent with Article XI:1 of GATT 1994. Customs bonds and customs formalities are in general legitimate instruments that are permitted under the GATT 1994, the CVA and the Agreement on Trade Facilitation (TFA). If applied in conformity with those provisions customs bonds are trade facilitating measures and not restrictions to trade.

30. However, if customs bonds and customs formalities are applied in a manner inconsistent with the relevant provisions of the CVA and TFA, then this may be a strong indication that they amount to restrictions within the meaning of Article XI of GATT 1994.

31. Indeed, customs bonds are permitted under different WTO agreements, in particular Article 13 of CVA and Article 7(3) of Trade Facilitation Agreement.

32. The EU notes that Article 13 of CVA refers to those situations when, in the course of determining the customs value of imported goods, it becomes necessary to delay the final determination of that customs value. In such circumstances, the importer of the goods is nevertheless able to withdraw the respective goods from customs if it provides sufficient guarantee in the form of a surety, a deposit or another appropriate instrument, covering the ultimate payment of customs duties for which the goods may be liable.

33. Thus, a customs bond requirement on all imports of the products at issue (whereas the importation price is below a certain threshold established by Colombia) would mean that it is necessary to delay the final determination of the customs value in all those cases. It establishes a presumption of illegality on all such imports, while each import should normally be treated in accordance with the relevant individual circumstances, as per Articles 1-7 of CVA.

34. The EU also notes that Article 7(3) of TFA differentiates between guarantees related to the payment of customs duties, taxes, fees, and charges ultimately due for the goods, and guarantees related to the detection of an offence requiring imposition of monetary penalties or fines. While the first type of guarantees may be imposed in all cases, in order to facilitate the release of goods prior to the final determination of customs duties, taxes, fees, and charges, the second type of guarantees are related to the detection of an offence.

35. In light of the above, a cumulative reading of Article 13 of CVA and Article 7(3) of TFA denotes that the role of those provisions is to facilitate trade and not to discourage importation. However, the EU could imagine situations when guarantees, whether in the form of customs bonds or in other forms, may rather discourage importation instead of facilitating trade. Take for instance the example of a prohibitively high guarantee, which has no link to the customs value of those goods, resulted from the application of Articles 1-7 of CVA. Such instances may very well amount to hindrances to importation, impacting on the competitive situation of importers.

36. Similarly to our understanding of the relationship between Article XI of GATT 1994 and other relevant provisions with respect to the customs bond requirement, the EU considers that other provisions of the GATT 1994 can offer useful context in understanding whether customs fees and formalities amount to restrictions within the meaning of Article XI.

37. Indeed, Article VIII of GATT 1994 mentions that all fees and charges shall be limited in amount to the approximate cost of services rendered and shall not represent an indirect protection to domestic products. It can be inferred that fees and charges which conform to Article VIII are not inconsistent with Article XI.

38. Similarly, Article 6(2) of TFA provides that fees and charges for customs processing shall be limited in amount to the approximate cost of the services rendered on or in connection with the specific import or export operation in question. Such fees and charges should not be inconsistent with Article XI.

IV. ARTICLE XX OF GATT 1994

39. Similarly to the original proceedings, Colombia attempts to justify the possible GATT violations under paragraphs (a) and (d) of Article XX of GATT 1994.

40. The EU does not dispute that combating money laundering (linked with drug trafficking and other criminal activities) is one of the policies designed to protect public morals in Colombia. In light of the Appellate Body Report in the original proceedings, it also seems that Decree No. 1745 is not "incapable" of addressing the purported objective of protecting the public morals. Accordingly, the Panels would have to closely look into the second element, of whether the measure at issue is "necessary" for the protection of public morals.

41. The EU notes that the initial critique from the Appellate Body with respect to the contribution of the initial measure to the objective of combating money laundering seems to be relevant also in the context of the measures taken to comply. Thus, Colombia may need to further clarify the degree of contribution of the measure at issue to the objective of combating money laundering.

42. As explained in the original proceedings, with regard to the possible alternative measures which may be WTO consistent or less trade restrictive while providing an equivalent contribution to the achievement of the objective pursued, a possible example of a WTO consistent measure is the targeting of under-invoicing more directly by applying the correct customs value to those artificially low priced imports. Thus, the money laundering operation may be frustrated, while not restricting at the same time imports which may be priced at a low level because of a different reason.

43. Colombia's measure applies to all relevant imports of textiles, apparel and footwear coming from all countries, if the price is below a certain threshold established by the Colombia authorities. However, the EU has doubts about the appropriateness of requiring bonds for certain imports based solely on their low declared customs values. The EU could imagine that there may be situations when there is a genuine low price of importation for some products which is not related to money laundering activities of the criminal groups.

44. The measures at issue may amount to a disguised restriction on international trade within the meaning of the *chapeau* of Article XX. Article 7(3) of TFA refers to the requirement of a guarantee linked to the imposition of penalties and fines only in cases where an offence has been detected, and not in all cases, on the basis of a sweeping presumption of illegality.

45. The EU also recalls that Members also enjoy a certain regulatory autonomy. In *EU - Seal Products*, when discussing Article XX(a) of GATT, Canada suggested that the EU must recognize the same level of animal welfare risk in seal hunts as it does in its slaughterhouses and terrestrial wildlife hunts. Thus, Canada appeared to argue that a responding Member must regulate similar public moral concerns in similar ways for the purposes of satisfying the requirement "to protect" public morals under Article XX(a). The Appellate Body disagreed.

V. CONCLUSIONS

46. The EU hopes that its contribution in the present case will be helpful to the Panels in objectively assessing the matter before them and in developing the respective legal interpretations of the relevant provisions of the covered agreements.

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