INTERPRETATION OF ARTICLE V OF GATT 1994 BY THE WTO PANEL

(Summary of the Panel Report drawn up by the International Road Transport Union (IRU); WTO Document WT/DS366/R dated 27.04.2009)[1]/

A. INTERPRETATION OF ARTICLE V OF GATT 1994 AS A WHOLE

Panel's overall opinion

The Panel considers (paragraphs 7.389 and 7.444 of the Panel Report) that the provisions of Article V should be analysed:

"… in accordance with the principles of treaty interpretation set for the in the Vienna Convention on the Law of Treaties. In particular, the Panel will consider Article V: 2 in accordance with its ordinary meaning in its context and in light of its object and purpose where necessary".

Furthermore, the Panel also admits (paragraphs 7.389 and 7.444) that:

"To the extent the meaning of any terms in Article V … are unclear", the Panel may also resort to supplementary means of interpretation, including the* travaux preparatoires *to inform its interpretation".

However, having reviewed the preparatory work, the Panel reached the conclusion that: ***"… the preparatory work related to … Article V is not of assistance"*** (paragraph 7.395) and that it "***… does not offer any conclusive guidance regarding interpretation"*** (paragraph 7.469)***.***

B. INTERPRETATION OF THE TITLE OF ARTICLE V OF GATT 1994

a/ Wording of the title Article V

"Freedom of Transit".

b/ Panel's opinion

According to the Panel (paragraph 7.387):

"As its title indicates, Article V of the GATT 1994 thus generally addresses matters related to "freedom of transit" of goods. This includes protection from unnecessary restrictions, such as limitations on freedom of transit, or unreasonable charges or delays (via paragraphs 2-4), and the extension of Most-Favoured-Nation (MFN) treatment to Members' goods which are "traffic in transit" (via paragraph 2 and 5) or "have been in transit" (via paragraph 6)".

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[1]/ The Panel – the first dispute settlement instance between the Members of the World Trade Organization (WTO) – reviewed a dispute opposing Panama [including the Colón Free Zone (CFZ) located at the entrance to the Panama Canal nearest the Atlantic Ocean, which comes under Panama's legal system] and Colombia (both countries being Members of WTO) .
The first country reproaches the other for breach of the freedom of transit set out in Article V of the GATT 1994 and discrimination – in relation to those from other Members - against certain goods (textiles, apparel, footwear) originating in Panama and transiting via Colombia.
In ruling on this dispute, the Panel has expressed opinions which, although they primarily concern the two countries in question, have universal scope and relate to all WTO Members

C. INTERPRETATION OF ARTICLE V: 1 OF GATT 1994

a/ Wording of Article V: 1

"1. Goods (including baggage), and also vessels and other means of transport, shall be deemed to be in transit across the territory of a contracting party when the passage across such territory, with or without trans-shipment, warehousing, breaking bulk, or change in the mode of transport, is only a portion of a complete journey beginning and terminating beyond the frontier of the contracting party across whose territory the traffic passes. Traffic of this nature is termed in this article "traffic in transit"."

b/ Panel's opinion

In the Panel's opinion (footnote N° 680) ***"Taken as a whole and read objectively, Article V:1 appears plainly definitional in purpose. In its entirety, this provision defines when goods qualify as being "in transit across the territory of a contracting party"."***

D. INTERPRETATION OF ARTICLE V: 2 OF THE GATT 1994

a/ Wording of Article V: 2

"2. There shall be freedom of transit through the territory of each contracting party, via the routes most convenient for international transit, for traffic in transit to or from the territory of other contracting parties.
No distinction shall be made which is based on the flag of vessels, the place of origin, departure, entry, exit or destination, or on any circumstances relating to the ownership of goods, of vessels or of other means of transport."

b/ Preliminary observations by the Panel

According to the principles set out in the Vienna Convention, the Panel considers the wording "traffic in transit" in Article V: 2 ***"in light of the context provided by Article V:1".***

It therefore reaches the conclusion (paragraph 7.396) that:

"… the definition of "traffic in transit" provided in Article V:1 seems sufficiently clear on its face. When applied to Article V:2, "freedom of transit" must thus be extended to all traffic in transit when the goods' passage across the territory of a Member is only a portion of a complete journey beginning and terminating beyond the frontier of the Member across whose territory the traffic passes. Freedom of transit must additionally be guaranteed with or without trans-shipment, warehousing, breaking bulk, or change in the mode of transport".

The Panel further notes that the wording "traffic in transit" is not used in the second sentence of Article V: 2.

However (paragraph 7.397), ***"In spite of the absence of an explicit reference to traffic in transit in this second sentence of Article V:2, the Panel believes that it is sufficiently clear from its text that the MFN*** (most-favoured-nation treatment) ***obligation in the second sentence is closely related to the obligation to extend freedom of transit, in the first sentence".***

In the Panel's view (paragraph 7.397), ***"…the second sentence complements and expands upon the obligation to extend freedom of transit, stating additionally that distinctions must not be made based on the nationality, or place of origin, departure, entry, exit or destination of the vessel transporting goods".***

c/ Substantive obligations set forth in Article V:2

Article V:2, first sentence

The Panel notes (paragraph 7.400) that ***"The opening text in Article V:2, first sentence*** ("There shall be freedom of transit through the territory of each contracting party...") ***introduces the obligation – the provision of "freedom of transit" by Members within their territory".***

According to the Panel, ***"The intermediate clause in Article V:2, first sentence*** ("... via the routes most convenient for international transit ...") ***imposes a limiting condition on the obligation – that freedom of transit should be provided on the most convenient routes".***

It follows therefrom that ***"a Member is not required to guarantee transport on necessarily any or all routes in its territory, but only on the ones "most convenient" for transport through its territory".***

According to the Panel: ***"The remainder of Article V:2, first sentence*** ("... for traffic in transit to or from the territory of other contracting parties") ***explains that "freedom of transit" must be provided for 'traffic in transit" entering and then subsequently departing from the Member's territory".***

Furthermore, ***"In light of the ordinary meaning of freedom and the text of Article V:2, … the provision of "freedom of transit" pursuant to Article V:2, first sentence requires extending unrestricted access via the most convenient routes for the passage of goods in international transit whether or not the goods have been trans-shipped, warehoused, break-bulked, or have changed modes of transport. Accordingly, goods in international transit from any Member must be allowed entry whenever destined for the territory of a third country".***

Article V:2, second sentence

The Panel ***"considers that the obligation in Article V:2, second sentence is clear on its face: Members shall not make distinctions between goods which are "traffic in transit" based on the flag of vessels; the place of origin, departure, entry, exit or destination of the vessel; or on any circumstances relating to the ownership of goods, of vessels or of other means of transport".***

Recalling that, the first sentence in Article V:2 addresses freedom of transit for goods in international transit, ***"As a complement to this protection, the Panel considers that Article V:2, second sentence further prohibits Members from making distinctions in the treatment of goods, based on their origin or trajectory prior to arriving in their territory, based on their ownership, or based on the transport or vessel of the goods".***

Accordingly, ***"… the Panel concludes that Article V:2, second sentence requires that goods from all Members must be ensured an identical level of access and equal conditions when proceeding in international transit".***

E. INTERPRETATION OF ARTICLE V: 6 OF THE GATT 1994

a/ Wording of Article V: 6

"6. Each contracting party shall accord to products which have been in transit through the territory of any other contracting party treatment no less favourable than that which would have been accorded to such products had they been transported from their place of origin to their destination without going through the territory of such other contracting party.
Any contracting party shall, however, be free to maintain its requirements of direct consignment existing on the date of this Agreement, in respect of any goods in regard to which such direct consignment is a requisite condition of eligibility for entry of the goods at preferential rates of duty or has relation to the contracting party's prescribed method of valuation for duty purposes".

b/ Panel's opinion

The Panel stresses that ***"the central issue is whether Article V:6 extends MFN*** (most-favoured-nation treatment) ***obligations to Members whose territory is the ultimate destination of the good in transit, or whether the obligation only extends to Members whose territory a good passes through intermediately in route to a final destination elsewhere".***

In this respect, by analysing the immediate context of paragraph 6, the Panel notes that the wording "traffic in transit" appears in paragraphs 1 to 5 of Article V. However, it is not used in paragraph 6.

Accordingly, the Panel rejects the opinion according to which the scope of Article V: 6 should be restricted only to those goods which ***"… pass through a territory of a Member as a portion of a larger trajectory that begins and ends beyond the frontier of the Member across whose territory the goods pass"*** (paragraph 7.457). .

So as to ascertain which goods are actually included in the provisions of Article V: 6, the Panel refers to the immediate context provided by its second sentence (paragraph 7.458).

The Panel notes the inclusion in this sentence of the terms **"direct consignment"** as **"a requisite condition of eligibility for entry of the goods at preferential rates of duty"** and **"method of valuation for duty purposes"**. These terms are irrelevant for countries through which the goods pass in transit, since the terms **"eligibility for entry", "valuation"** and **"duty"** collection do not apply to goods in transit through a Member's territory as they are not normally subject to importation and customs valuation requirements (paragraph 7.459).

Given this analysis, ***"… the Panel thus considers that both the first and second sentences of Article V:6 apply to a Member's territory which serve as the final destination of the goods"*** provided that these goods have transited via other Member countries before reaching their country of destination (paragraphs 7.466 and 7.475).

On that occasion, the Panel rejects (paragraphs 7.452 and 7.467) the opinion according to which the second sentence of Article V: 6:

- is out of place, since Article V deals exclusively with goods in transit that would not be subject to customs duties

- is of historical relevance only, as its provisions are linked to historical preferential schemes that are no longer relevant today.

In this respect, the Panel recalls the opinion by the WTO Appellate Body (in the US – Gasoline case), which explained that:

"One of the corollaries of the 'general rule of interpretation' in the Vienna Convention is that interpretation must give meaning and effect to all the terms of a treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility".

In the Panel's view, treatment of language appearing in the second sentence as "out of place" or historically outdated seems inconsistent with the intent of the drafters of the GATT 1994, as it suggests reading an entire clause out of the Agreement. The Panel thus finds itself obliged to consider the text of Article V:6 in its entirety (paragraph 7.462).

c/ Substantive obligations set forth in Article V: 6 of the GATT 1994

Having established the obligations of Members with respect to goods that have been in transit, but have reached their final destination, the Panel considers the obligation to provide "treatment no less favourable" to those goods.

The Panel considers that the obligation in Article V:6 first sentence is straightforward: all treatment extended to goods that were transported from their place of origin to their destination without going through the territory of other contracting parties, must be extended to goods that have been transported from their place of origin, and passed through the territories of such other contracting countries as "traffic in transit" prior to reaching their final destination. Such "treatment" must strictly be "no less favourable" (paragraph 7.477).

On that occasion, the Panel stresses the differences between Article I:1 and Article V.6 of the GATT 1994.

The former broadly ensures that any advantage extended to a product of a particular origin must be extended immediately and unconditionally to the like product originating in or destined for the territories of all other Members.

The latter ensures treatment according to the most-favoured-nation clause based on the product's transit trajectory regardless of the existence of a like product of a different origin. In the Panel's view, the obligations in these two provisions are not the same and should not be treated as redundant (footnote n° 783).

F. RESTRICTION OF THE FREEDOMS SET FORTH IN ARTICLE V BY VIRTUE OF ARTICLE XX OF THE GATT 1994

a/ Chapeau of Article XX and text of Article XX d)

"Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: ...

d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices."

b/ Panel's opinion

The Panel based its examination of Article XX on various opinions by the WTO Appellate Body.

The Panel stresses (paragraph 7.510) that, according to the opinion of the Appellate Body in the case US – Gasoline, in order for the protection of Article XX to extend to a measure, the latter must, in the case in point:

- come under Article XX d) (first condition), and
- also satisfy the requirements imposed by the opening clauses of Article XX (second condition).

FIRST CONDITION

The Appellate Body has explained (paragraph 7.511) that two elements must be satisfied in order for a measure to be provisionally justified under paragraph (d) of Article XX:

First, the measure must be one designed to "secure compliance" with laws or regulations that are not themselves inconsistent with some provision of the GATT 1994.

Second, the measure must be "necessary" to secure such compliance.

Any Member who invokes Article XX(d) as a justification has the burden of demonstrating that these two requirements are met.

Regarding the first requirement, according to the Appellate Body (case US – Shrimps), any Member therefore has the burden (paragraph 7.514) of:

- identifying such laws or regulations,
- establishing that those laws or regulations are not themselves WTO-inconsistent, and
- demonstrating that the particular measure at issue is itself designed to secure compliance with the relevant laws or regulations.

Concerning the second requirement, the Appellate Body is of the opinion (case Korea – Various Measures on Beef) that, in order to be considered "necessary" to secure compliance, a measure does not need to be "indispensable", but should constitute something more than strictly "making a contribution to". Semantically speaking, a "necessary" measure is located significantly closer to the pole of "indispensable" than to the opposite pole of simply "making a contribution to" (paragraph 7.546).

In this respect, the Appellate Body explained (paragraph 7.547) that several criteria should be taken into consideration. It considers that an interpreter assessing a measure claimed to be necessary to secure compliance of a WTO-consistent law or

regulation may take into account the relative importance of the common interests or values that the law or regulation to be enforced is intended to protect. The more vital or important those common interests or values are, the easier it would be to accept as "necessary" a measure designed as an enforcement instrument.

However, there are also other aspects to be considered in evaluating that measure as "necessary". One should therefore check whether the measure contributes to the realization of the end pursued - the securing of compliance with the law or regulation at issue. The greater the contribution, the more easily a measure might be considered to be "necessary".

Another aspect is the proposed measure's restrictive effects on international commerce. A measure with a relatively slight impact upon imported products might more easily be considered as "necessary" than a measure with intense or broader restrictive effects.

In sum, determination of whether a measure, which is not "indispensable", may nevertheless be "necessary" within the contemplation of Article XX(d), involves in every case a process of weighing and balancing a series of factors which prominently include the contribution made by the compliance measure to the enforcement of the law or regulation at issue, the importance of the common interests or values protected by that law or regulation, and the accompanying impact of the law or regulation on imports or exports. The weighing and balancing of factors should be conducted through consideration of the factors individually and in relation to each other (paragraph 7.548).

Finally, the Appellate Body clarifies (paragraph 7.549) that a measure will not be considered "necessary" if an alternative measure which a Member could reasonably be expected to employ to meet the same objectives is available to it. However, the Appellate Body stresses that the complaining Member has the burden to identify such an alternative measure.

SECOND CONDITION

The Panel decided, in the framework of the case referred to it, not to examine the provisions of the chapeau to Article XX.

G. CONSISTENCY OF THE COLOMBIAN MEASURE WITH GATT ARTICLE V

a/ Colombian measures

The textiles, apparel and footwear arriving directly from Member countries may enter at any of 11 eligible ports[2]/ (on the condition the goods did not first transit through Panama), and proceed in international transit (paragraphs 7.369 and 7.539). In contrast, the same goods arriving from Panama can only enter and clear customs at Bogotá or Barranquilla (paragraph 7.539).

Colombia submits that it is only possible for goods to enter its territory from Panama by sea or air, as no road connects the countries, thereby necessitating that the goods undergo trans-shipment in a sea port or airport in order to enter Colombia and proceed in international transit (paragraph 7.372). As such, a requirement to undergo trans-

[2]/ Barranquilla, Bogota, Bucaramanga, Buenaventura, Cali, Cartagena, Cúcuta, Ipiales, Leticia, Medellin and San Andrés.

shipment does not inhibit freedom of transit, as trans-shipment will always be necessary for goods arriving from Panama (paragraph 7.372).

According to Colombia, Barranquilla sea port and Bogota airport, are the most convenient ports of entry for goods arriving from Panama; in addition, they are among the most modern and important ports of that country (paragraph 7.592). Appointing Barranquilla and Bogota for textile, apparel and footwear imports from Panama has had no negative effects as the value of imports increased during the measure's implementation (paragraph 7.591).

Accordingly, Colombia concludes (paragraph 7.373) that, in accordance with its international obligations, freedom of transit is guaranteed on its territory for all merchandise from all countries (including Panama).

Panama argues that the circumstances prevailing in most cases cannot justify a failure to accord freedom of transit in all cases (paragraph 7.411). As an example, it submits that goods may be shipped from Panama, arrive in Ecuador, then transit through Colombia by truck with Venezuela as a final destination. Now the transit of such goods through Colombian territory would be prohibited.

b/ Panel's opinion

Inconsistency of Colombian legislation with the provisions of Article V: 1 of the GATT 1994

The Panel considers that the provisions of the applicable customs regulations in Colombia, according to which goods must compulsorily be transferred between means of transportation that will be used to remove the goods from Colombia, are in plain contravention of the definition of "traffic in transit" given in GATT Article V: 1 (paragraph 7.417).

Inconsistency of Colombian legislation with the provisions of Article V: 2, first sentence, of the GATT 1994

The Panel recognizes that as indicated by Colombia, most, if not all of the subject goods shipped from Panama, arrive in Colombia via sea or air transport, and thus undergo trans-shipment before proceeding in international transit or importation (paragraph 7.424).

Whereas Panama has not sufficiently demonstrated the possibility let alone the practicality of goods arriving in Colombia via a route through Ecuador, nor has Colombia provided any evidence to demonstrate that such a route is impossible, even if it is impractical (paragraph 7.422).

Accordingly, the Panel confirms its preliminary findings that applicable Colombian legislation denies freedom of transit to *all* [3/] textiles, apparel and footwear that are traffic in transit arriving from Panama (paragraph 7.416) and that the violation of that freedom is clear (paragraph 7.417).

[3/] This term is highlighted in the Panel Report.

Inconsistency of Colombian legislation with the provisions of Article V: 2, second sentence, of the GATT 1994

The Panel also observes that Colombian legislation is inconsistent with the second sentence of GATT Article V:2. (paragraph 7.430).

In this respect, the Panel recalls that this sentence prohibits Members from making distinctions in the treatment of goods, based on their origin or trajectory prior to arriving in their territory, on their ownership, or on the transport or vessel of the goods (paragraph 7.428).

Since the trans-shipment obligation is imposed on goods arriving from Panama, it is based (paragraph 7.429) on the goods' origin (i.e. the goods originated in Panama), and on their trajectory prior to arriving in Colombia (i.e. the goods originated in a third country but transited through Panama prior to arriving in Colombia).

Inconsistency of Colombian legislation with the provisions of Article V: 6 of the GATT 1994

The Panel recalls (paragraph 7.480) that Colombian legislation mandates simultaneous entry and customs clearance at Barranquilla seaport or Bogota airport of all textiles, apparel and footwear arriving from Panama. It notes that the restriction applies exclusively to textile, apparel and footwear goods originating in or arriving from Panama (both Panamanian goods and those produced by other Member States). In contrast, the same goods originating in and arriving from other Member countries may be entered and cleared in 11 eligible Colombian sea ports and airports.

Since the restriction is imposed on goods of all origins that have passed through Panama prior to their arrival in Colombia as their final destination, while the restriction would not apply to those same goods, had they not entered Panama, the Panel concludes that Colombia does not extend "treatment no less favourable" to goods arriving from Panama in comparison to the same goods had they been transported from their place of origin to Colombia without transiting through Panama. Accordingly, the Panel finds that Colombian measures in question are inconsistent with the obligation to Members as stated in the first sentence of Article V:6 of the GATT 1994 (paragraphs 7.480 and 7.481).

Inconsistency of Colombian legislation with the provisions of Article XX of the GATT 1994

The Panel recalls that Colombia incidentally stressed that the Colombian measures disputed by Panama were justified under Article XX (d).

Indeed, Colombia argues that the ports of entry measure is a temporary measure necessary to secure compliance with its customs laws and regulations. The country faces problems of smuggling and under-invoicing, which are particularly acute with respect to imports from Panama.

Colombia argues that a clear link exists between the problems of customs fraud and smuggling and criminal activities such as money-laundering and drug trafficking (paragraph 7.483).

Colombia considers (paragraph 7.488) that its ports of entry measure:

- ensures compliance with Colombian legislation, which is not inconsistent with the provisions of the GATT 1994
- is necessary to fight illegal and criminal activities, such as tax evasion and smuggling
- makes a material contribution to customs control through limiting the entry of goods from Panama to two customs offices and by allowing for the specialization of customs officials in the fight against customs fraud. On that occasion, Colombia stresses that the situation regarding illegal and criminal activities in respect of Panama is unique from that of other countries.
- does not have a significant negative impact on trade.

Finally, Colombia stresses (paragraphs 7.489 and 7.490) that:
- there are no reasonably available alternative measures to achieve compliance with Colombian legislation
- the measure in question is not applied in a manner which constitutes “arbitrary” or “unjustifiable” discrimination, or a disguised restriction on trade.

Panama claims that protection of its domestic industry was the real reason why Colombia introduced the measure in question (paragraph 7.496).

Panama also considers the measure "arbitrary" and "unjustifiable" in the sense of GATT Article XX (paragraph 7.497).

The Panel recognises that combating under-invoicing and money laundering associated with drug trafficking is a relatively more important reality for Colombia than for many other countries (paragraph 7.566). However, this fight should comply with the rules set forth by the WTO Agreements.

Based on the various above-mentioned opinions by the Appellate Body, the Panel finds that:

- Colombia has not met its burden to demonstrate that each of the requirements within the ports of entry measure contributes to enforcement of its customs laws. As the arguments and evidence provided by Colombia are of a general nature, it is not possible to evaluate, for instance, the extent to which the restriction on goods’ entry to Bogota and Barranquilla contributes to enforcement of customs regulations (paragraph 7.507)
- Colombia has failed to meet its burden to substantiate that the ports of entry measure has contributed to reducing smuggling and under-invoicing (paragraphs 7.585, 7.588 and 7.614)
- the statistics provided by Colombia show that the Panamanian exporters' choice of port was substantially affected by the imposition of the ports of entry measure (paragraph 7.604). Indeed, by introducing this measure, Colombia has excluded the port of Cartagena, which was previously extremely important for the transit of the goods in question arriving from Panama
- Colombia has not met its burden to establish provisionally that the ports of entry measure is "necessary" to secure compliance with Colombian customs enforcement laws and regulations (paragraphs 7.609 and 7.619)
- Panama has not met its burden to identify possible alternatives.

Given the above findings, the Panel considers that the ports of entry measure is not justified under Article XX (d) of the GATT 1994. Consequently, it does not see the need

to examine whether the measure in question complies with the provisions of the chapeau of Article XX.

H. CONCLUSIONS BY THE PANEL

In conclusion, the Panel:

- upholds Panama's claims that the Colombian ports of entry measure is inconsistent with the first and second sentences of Article V:2 and the first sentence of Article V:6 of the GATT 1994

- rejects Colombia's defence that the ports of entry measure is justified under Article XX(d) of the GATT 1994

- recommends that Colombia bring its measures into conformity with its obligations under the WTO Agreements.

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