PRINCIPLES GOVERNING INTERNATIONAL TRANSIT
ACCORDING TO ARTICLE V OF GATT 1994

Drawn up by the International Road Transport Union (IRU) based on the opinion of a
Panel appointed by the World Trade Organization

1. PRELIMINARY OBSERVATION

Article V of the GATT 1994 provides the most important provisions in the field of
international transit, including of road vehicles and the goods they carry.

For the first time since the 1947 GATT entered into force, breaches of freedom of transit
have been investigated at the request of a WTO Member by a Panel – the first instance
to settle disputes between the Members of the World Trade Organization (WTO).

The Panel’s findings were published in WTO document WT/DS366/R dated 27 April
2009.

By ruling on a dispute between two WTO Members (Panama and Colombia), the Panel
expressed opinions which, although they primarily concern the two countries in question,
have universal scope since the interpretation of GATT Article V provided on that occasion
by the Panel relates to all WTO Members.

GATT Article V can no longer be considered without the Panel’s interpretation. The
following review of its provisions therefore takes the Panel’s opinion into account 1/.

2. INTERPRETATION OF GATT ARTICLE V AS A WHOLE

The Understanding on Rules and Procedures Governing the Settlement of Disputes –
Annex 2 to the Agreement Establishing the WTO – specifies in its Article 3.2. that the
WTO Agreements must be applied and clarified “… in accordance with customary rules of
interpretation of public international law”.

The 1969 Vienna Convention on the Law of Treaties is the most important legal
instrument codifying the customary rules of interpretation of public international law. Their
binding force for all States, including those who have not ratified the Convention, has
been confirmed on several occasions2/ by the International Court of Justice, the United
Nations’ highest judiciary body.

Additionally, the WTO Panel considers (paragraphs 7.389 and 7.444 of the Panel Report,
WTO document WT/DS366/R dated 27.04.2009) that the provisions of Article V should
be analysed:

1/ Paragraph 7 of GATT Article V excludes air transport from its scope. Consequently, this paragraph will not
be reviewed in this presentation of Article V.

2/ Recently in a dispute between Mexico and the USA, although the latter country has not acceded to the
Vienna Convention (ICJ, Reports, 2004, Judgment of 31.03.2004, Avena and Other Mexican Nationals,
“... in accordance with the principles of treaty interpretation set forth in the Vienna Convention on the Law of Treaties”\(^3\), adding that, according to the Vienna Convention, Article V must be considered in accordance with:

“... its ordinary meaning in its context and in light of its object and purpose where necessary”.

Furthermore (paragraphs 7.389 and 7.444):

“To the extent the meaning of any terms in Article V ... are unclear”, one may “... also resort to supplementary means of interpretation, including the travaux preparatoires to inform its interpretation”.

However, having reviewed the preparatory work, the Panel concluded 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).

To complement this opinion by the Panel, one should observe that, although preparatory work may sometimes shed light on the true intentions of the Parties adopting a text or wording, they only prevail in relations between those Contracting Parties actually involved in this work or who have accepted it.

Indeed, in its judgment of 10 September 1929\(^4\), the Permanent Court of International Justice stressed this principle as follows:

“Whereas three of the Parties concerned in the present case did not take part in the work of the Conference which prepared the Treaty of Versailles; as accordingly, the record of this work cannot be used to determine, in so far as they are concerned, the import of the Treaty ...”

It is well known that the majority of WTO Members did not participate in the work to prepare the GATT 1947. Moreover, this preparatory work was not submitted to them for approval along with the text of the GATT 1994. Consequently, in consideration of the Members who were not involved in the preparatory work for the GATT 1947, one cannot decide on the scope of the provisions for the GATT 1994 based on such preparatory work.

\(^3\) Article 31 of the Vienna Convention provides, among other things, that:

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

a/ any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;

b/ any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty”.

Article 32 of the Vienna Convention further provides that:

“Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

a. leaves the meaning ambiguous or obscure; or

b. leads to a result which is manifestly absurd or unreasonable”.

\(^4\) Case relating to the territorial jurisdiction of the International Commission of the River Oder, Collection of Judgements, Series A., No 23, Order of Court, p. 42

3.1 TITLE OF ARTICLE V

3.1.1 Wording of the title
“Freedom of Transit”

3.1.2 Interpretation
The title of Article V affirms freedom of transit for goods. The notion and delineation of such freedom must be sought in the Article’s various paragraphs.

In analysing this title, the Panel (paragraph 7.387 of the Panel Report) explains that freedom of transit:

“… 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 paragraphs 2 and 5) or “have been in transit” (via paragraph 6)”.

3.2 INTERPRETATION OF ARTICLE V: 1

3.2.1 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”.”

3.2.2 Interpretation
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”.”

The definition puts the goods and means of transport on an equal footing, which is logical as there can be no transit of goods without resorting to means of transport.

The passage of goods may be carried out directly across the transit country or countries via the same means of transport, or with trans-shipment from one means of transport to another, with a change in the mode of transport (unloading from a ship in a port and loading onto a truck or train wagon), with temporary warehousing of the goods (e.g. in a specialised warehouse), or by breaking bulk (i.e. by dividing the cargo). All these possibilities are subject to one condition only: transit has to be only a portion of a complete journey beginning and terminating beyond the frontier of the transit country.

Therefore, the Panel observes (paragraph 7.417) that the provisions of one Member’s legislation (Colombia in this instance), which prevent direct transit from another Member (Panama in this case) by stipulating an obligation for goods originating from that Member to be trans-shipped from one means of transport to another on its territory (Colombia) in order to exit said territory, are “in plain contravention of the definition given to the term of art “traffic in transit” in GATT Article V:1”.

3.3 INTERPRETATION OF ARTICLE V: 2

3.3.1 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."

3.3.2 Interpretation

3.3.2.1 Preliminary Observations

According to the principles set out in the Vienna Convention, the Panel considers that Article V: 2 must be examined "in light of the context provided by Article V:1".

Consequently, "When applied to Article V:2, the notion of "freedom of transit" outlined in Article V:1 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 also notes (paragraph 7.397) that: “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 clause) 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”.

3.3.2.2 Observations on the substance of Article V: 2

Article V: 2, first sentence

The Panel considers (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. ... 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”.

The Panel further stresses that:

“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”.

It follows therefrom that “unrestricted access” precludes the total or partial withdrawal of freedom of transit. Prohibiting or applying quantitative restrictions to transit (quotas) are thus irreconcilable with the notion of freedom of transit, as they go against “unrestricted access”.

The provisions of Article V: 2 require no further implementing legal act. They apply directly to relationships between WTO Member States. Any bilateral or multilateral agreement – in particular on transport – which departs from the provisions of Article V: 2, particularly if it subjects transit to authorisations, is in obvious breach of Article V: 2 of GATT 1994.

The fact that the goods have been trans-shipped, warehoused, break-bulked, or have changed modes of transport during a transit operation in no way alters freedom of transit
provided that the goods depart from the territory of the transit country. However, the use of these freedoms depends on the operators (traders, forwarders, carriers) themselves. Any interference from the transit country in this respect would be tantamount to a breach of freedom of transit.

The Panel logically considers that a Member's legislation introducing an obligation of trans-shipment of goods in transit from one transport mode to another is not only contrary to Article V:1, but also represents a “plain contravention” of the freedom of transit stipulated in the first sentence of GATT Article V: 2 (paragraph 7.417).

Consequently, the Panel rejects Colombia's contentions that:

- it is only possible for goods to enter on its territory from Panama by sea or air, as no road connects the countries, and they must therefore be trans-shipped 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-shipment does not inhibit freedom of transit, as trans-shipment will always be necessary for goods arriving from Panama (paragraph 7.372).

It seems that Colombia did not realise that goods loaded onto a Panamanian truck and carried from Panama by car-ferry could not pursue its journey on board the same truck from a Colombian sea port, bound for Venezuela or Ecuador and that, consequently, the obligation to trans-ship the goods onto another means of transport (truck or airplane) was a breach of freedom of transit.

As the first sentence of Article V: 2 introduces the wording “the routes most convenient for international transit”, freedom of transit therefore does not apply to all routes.

The Panel confirms this opinion (paragraph 7.400) as follows:

“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”.

Can one thus consider that each transit country is free to decide which of its routes are “most convenient for international transit”?

The Panel does not think so, and therefore considers that Colombia violated freedom of transit by selecting the port of Barranquilla and Bogota airport for transit from Panama, while simultaneously authorising transit originating from other countries through 11 sea ports and airports.

The Panel also rejects Colombia’s opinion that Barranquilla and Bogota are the most convenient ports of entry for goods arriving from Panama (paragraph 7.592). According to the Panel, Panama has not provided any evidence to demonstrate that another transit route (e.g. Panama – Ecuador – Colombia – Venezuela) would be impossible, even if it is impractical (paragraph 7.422).

As a result, the State's obligation to guarantee freedom of transit does not extend to routes whose use would prove impossible. In contrast, routes which the transit State may consider impractical may not be closed to international transit for this reason. Indeed, the onus is not on the transit State, but on the operators to decide which routes are practical, and therefore the most convenient for transit of their goods.

In this respect, the Panel stresses (paragraph 7.604) that the Panamanian exporters' choice of port was substantially affected by the imposition of the port of Barranquilla and
Bogota airport for goods originating from Panama, while they were free – prior to the introduction of the Colombian prohibition – to carry out transit operations through other Colombian ports, in particular Cartagena sea port.

Although the obligation to grant freedom of transit only extends to the most convenient routes for international transit, one should not deduce, however, that the role of the transit country ends with acceptance of transit on such routes.

The Panel clearly stresses (paragraph 7.401) that the transit country is required “... to guarantee transport on necessarily" the most convenient routes for transit. As a consequence, this obligation is not met unless transit States adjust such routes to meet the needs of international transit.

In other words, the expression “the most convenient routes” is considered by the Panel in a dynamic sense, i.e. in that they must constantly remain “the most convenient” and not only at the time of their opening to international transit.

The wording “the most convenient" also implies that such routes should be the most practical for international transit, in particular as regards the itinerary and traffic flows.

**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 of Article V: 2 addresses freedom of transit for goods in international transit, the Panel considers that:

“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”.

In other words, the Panel recalls that Article V: 2 prohibits discrimination between international transit operations based on:

- the place of origin, departure, entry, exit or destination of the means of transport, or
- the place or origin of the goods, their itinerary prior to entry into the territory of the transit country or their ownership.

Means of transport and the goods carried must enjoy an identical level of access and equal conditions in all transit countries.

Incidentally, one might observe that the second sentence of Article V: 2 does not specify whether the principle of non-discrimination only relates to foreign goods and means of transport in transit, or whether this duty applies to all goods and means of transport in transit through the territory of a Member State. The immediate context of the first sentence of Article V: 2 would seem to imply that the second hypothesis applies.

In other words, a transit country may not make any distinction between foreign means of transport and their goods and domestic means of transport and their goods, provided that they enter, transit through and exit its territory.

As a result, foreign means of transport and their goods are entitled to national treatment when in transit through the territory of a Member State.
Having recalled the obligations arising from the second sentence of Article V: 2, the Panel can but disapprove (paragraph 7.430) of the measures initiated by Colombia in relation to Panama.

As the trans-shipment obligation only applies to goods originating in Panama, it is discriminatory since, according to the Panel, it is based on the goods' origin (i.e. goods originating in Panama) and based on their trajectory prior to arriving in Colombia (i.e. goods originating in a third country but having transited through Panama prior to arriving in Colombia).

3.4 INTERPRETATION OF ARTICLE V: 3

3.4.1 Wording of Article V:3

“3. Any contracting party may require that traffic in transit through its territory be entered at the proper custom house, but, except in cases of failure to comply with applicable customs laws and regulations, such traffic coming from or going to the territory of other contracting parties shall not be subject to any unnecessary delays or restrictions and shall be exempt from customs duties and from all transit duties or other charges imposed in respect of transit, except charges for transportation or those commensurate with administrative expenses entailed by transit or with the cost of services rendered”.

3.4.2 Interpretation

According to Article V: 3, each transit country may require that the goods in transit through its territory be entered at customs upon entry. Upon exit, another customs office confirms that the goods are leaving the territory of the transit country. This procedure is called “customs transit”.

Whereas “international transit” is defined as the passage of goods beginning and terminating beyond the frontier of the transit country (c.f. GATT Article V: 1), “customs transit” is considered as a circulation system whereby the goods are carried under the control of customs authorities between at least two customs offices.

The transit declaration made on entering the transit country includes essential information regarding in particular the goods, the means of transport, the route and the security measures taken by the customs authorities.

Its functioning can be based on national legislation or on an international agreement. The first case is a domestic customs transit operation and the second instance an international customs transit operation. As for the latter, there are several regional transit systems, and one universal regime of global scope based on the 1975 TIR Convention.

Resorting to the TIR system serves to avoid, among other things, resorting to national guarantee and documentation systems, by foreseeing the use of an internationally acknowledged document and guarantee system. As it extends to multimodal transport, it protects all transport modes carrying goods in international transit, either separately or in cooperation, from “unnecessary delays or restrictions”.

Article V: 3 does not give the possibility of interfering in the functioning of customs transit systems governed by national or international instruments. However, according to the procedures foreseen by WTO, it does serve to judge whether their application allows the international transit of goods and means of transport on the territory of a WTO Member State to comply with Article V. If not, the functioning of the customs transit system in question must be adjusted to the requirements of Article V.

Regardless of which (national, regional, universal) customs transit system is used, GATT Article V: 3 requires that any traffic in regular transit be exempt from “customs duties and from all transit duties or other charges”.
Although the word “regular” is not mentioned in the text of Article V: 3, it is implied from the wording “except in cases of failure to comply with applicable customs laws and regulations”.

According to Article V: 3, charging a fee amounting to “customs duty” or “transit duty” is prohibited.

So as to prevent the introduction of fanciful denominations for customs or transit duties to bypass the provisions of Article V: 3, the latter also foresees a prohibition from “all other charges”.

In other words, any charge may be disputed if, despite semantic ingenuity and a fancy denomination, the amount can be considered tantamount to tax revenue.

Exemption from “customs duties and from all transit duties or other charges” does not mean that no charge at all may be applied.

Article V: 3, in fine, allows “charges for transportation” or those commensurate with “administrative expenses entailed by transit” or with the “cost of services rendered”.

GATT fails to define these expressions.

In accordance with the Vienna Convention, they must therefore be understood according to the ordinary meaning of these words.

Therefore, the wording “charges for transportation” may be considered as the outlay incurred by someone (sender) to carry the goods, via whatever means, from one place to another, under the provisions of a contract of carriage.

If bulk goods or cargo grouped in a container or a truck loaded with goods are carried across a transit country, i.e. in a rail wagon from that country, “charges for transportation” are allowed accordingly under Article V: 3.

The wording “administrative expenses entailed by transit” refers to expenses borne by the administration due to transit which, indeed, gives rise to expenditure for the transit country. The latter may therefore justifiably require payment of charges relating to such expenditure, in particular to cover administrative costs and part of the costs to build and maintain the roads used by the transit operation.

Therefore, charges may not amount to any form of transit duty or any other tax revenue, which is prohibited by Article V: 3, but may be applied by the administration of a transit country to cover costs effectively incurred due to transit.

The wording “cost of services rendered” refers both to the cost and to the service rendered. The cost is not an arbitrary amount as it arises in particular from the cost of labour, for use of the infrastructure and/or of the equipment of the party providing the service.

The term “service” is wide and may include any service provided at the request of the operator (trader, forwarder, carrier). If, for instance, the customs of a transit country perform checks outside normal office hours, they are entitled to reimbursement of the “cost of services rendered”, i.e. of actual expenses incurred in respect of this intervention.

Article V: 3 additionally requires transit countries not to subject transit operations to “unnecessary delays or restrictions”.

The term “unnecessary” has not been defined. The French and Spanish versions of this article use the words “inutiles” and “innecesarias” respectively.

According to § 3, Article 33 of the Vienna Convention, “The terms of the treaty are presumed to have the same meaning in each authentic text”. Thus the words
“unnecessary, inutiles and innecesarias” have a common meaning and cannot refer to anything else than “unnecessary”.

The scope of the term "unnecessary" in GATT Article V: 2 may be deduced by opposition to the word “necessary” in GATT Article XX d).

The Appellate Body, when reviewing in detail the scope of the wording “necessary” (see examination of Article V: 6 below), took the view, among other things, that a measure cannot be considered as “necessary” if an alternative measure “which [a Member] could reasonably be expected to employ and which is not inconsistent with other GATT provisions” is available to it.

For instance, an escort imposed on goods in transit should be considered “unnecessary” if the transit country can simultaneously rely on another measure to protect its interests, such as a guarantee extended in the framework of an international transit system covering customs duties and taxes payable should the goods be illegally released to the market on its territory.

3.5 INTERPRETATION OF ARTICLE V: 4

3.5.1 Wording of Article V: 4

“All charges and regulations imposed by contracting parties on traffic in transit to or from the territories of other contracting parties shall be reasonable, having regard to the conditions of the traffic”.

3.5.2 Interpretation

Whereas under Article V: 3, “applicable customs laws and regulations” may not give rise to “unnecessary” restrictions and “delays”, Article V: 4 foresees that “All charges and regulations imposed … on traffic in transit” must be “reasonable”.

Although the wording “reasonable” is not defined in Article V: 4, its ordinary meaning is “not extreme or excessive, moderate, fair” and a synonym of “rational”. However, it is not enough for a measure to be “reasonable”, i.e. “rational” per se. According to Article V: 4, it should be so “having regard to the conditions of the traffic”.

If a transit country with e.g. a dozen customs offices on its borders restricts this number to 2 offices to bring together the best specialists in order to better fight customs fraud (as was the case of Colombia), this measure, which is reasonable in itself, becomes disproportionate considering the intense traffic passing through these dozen offices and, consequently, should be considered unreasonable “having regard to the conditions of the traffic”.

The term “reasonable” should also be interpreted in light of other paragraphs of Article V. Thus any measures taken by a transit country to restrict freedom of transit or the choice of the most convenient routes for transit are unreasonable, and therefore contrary to Article V: 4.

3.6 INTERPRETATION OF ARTICLE V: 5

3.6.1 Wording of Article V: 5

“With respect to all charges, regulations and formalities in connection with transit, each contracting party shall accord to traffic in transit to or from the territory of any other contracting party treatment no less favourable than the treatment accorded to traffic in transit to or from any third country”.

3.6.2 Interpretation

Article V: 5 introduces a most-favoured-nation clause which foresees that, in the field of charges, regulations and formalities in connection with transit to or from other Members,
each transit country shall accord treatment no less favourable than the treatment accorded to traffic in transit to or from any third country.

As the International Court of Justice stressed, the objective of such a clause is

“... to establish and to maintain at all times fundamental equality without discrimination among all of the countries concerned”5/.

In other words, as regards the issues covered by Article V: 5, each WTO Member has the same obligation to put other Members on an equal footing. However, treatment accorded to transit from Member countries must not necessarily be based on that granted to the most favoured Member but, according to Article V: 5, on the treatment extended to any third country, even a non-Member, if the latter enjoys even more favourable treatment.

As for transportation charges, Annex 1 to GATT, note ad Article V specifies that “With regard to transportation charges, the principle laid down in paragraph 5 (most-favoured-nation clause) refers to like products being transported on the same route under like conditions.”

This explanation is hardly surprising. Indeed, one must compare the comparable.

3.7 INTERPRETATION OF ARTICLE V: 6

3.7.1 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.

3.7.2 Interpretation

Article V: 6 may have two different interpretations.

According to the first, the obligation to apply most-favoured-nation treatment only relates to transit countries. According to the second, this obligation also extends to the country of destination when the goods have transited via other countries before reaching the latter’s territory.

Faced with these two interpretations, the Panel analyses the context of Article V: 6. On that occasion, it notes that the wording “traffic in transit” appears in paragraphs 1 to 5 of Article V, but is not used in paragraph 6.

Based on this, the Panel rejects the first interpretation which restricts the scope of Article V: 6 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 (paragraph 7.458) to the immediate context provided by its second sentence.

5/ Case concerning rights of nationals of the United States of America in Morocco, Judgment of 27 August 1952, ICJ, Reports 1952, p. 192
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, on that territory, 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" having been in international transit (paragraphs 7.466 and 7.475).

In other words, the obligations arising from:
- paragraphs 1 to 5 of Article V of GATT 1994 apply to WTO Member transit countries
- paragraph 6 of Article V of GATT 1994 apply to WTO Member importing countries, provided that the goods have transited via other Member countries before their final arrival in the former countries.

It follows therefrom that all treatment extended to goods that were transported from their place of origin to their destination without going through the territory of a Member, must also be extended to goods that have been transported from their place of origin, and passed through the territories of other Members as "traffic in transit" prior to reaching their final destination. According to the Panel, such "treatment" must strictly be "no less favourable" (paragraph 7.477).

Given that goods arriving from Panama (both Panamanian goods and those produced by other Members) had to compulsorily clear customs in Barranquilla or Bogota, while the same goods arriving from other Member countries could be declared in the 11 eligible sea ports and airports, the Panel had to reach the conclusion that Colombia does not extend "treatment no less favourable" to goods of third countries arriving from Panama in comparison to the same goods had they been transported from their place of origin to Colombia without circulating through Panama.

Accordingly, the Panel finds that the Colombian measures in question are inconsistent with the obligation of Members as stated in the first sentence of Article V: 6 of GATT 1994 (paragraphs 7.480 and 7.481).

When reviewing Article V: 6, instead, Colombia considers that the second sentence
- 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.

The Panel rejects such an opinion (paragraphs 7.452 and 7.467). In this respect, it recalls the opinion by the WTO Appellate Body (in the US – Gasoline) according to which:

"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 Agreement, as it suggests reading an entire clause out of the Agreement.

The Panel is therefore of the view that the text of Article V:6 should be considered in its entirety (paragraph 7.462).
Incidentally, one might add that the arguments put forward by both the Appellate Body and the Panel are firmly rooted in international case law, in particular that of the Permanent Court of International Justice and of the International Court of Justice.

In reviewing the significance of the gold clauses, the PCIJ stressed that:

“One argument against the efficiency of the provision for gold payments is that it is simply a clause of “style”, or a routine form of expression. This, in substance, would eliminate the word "gold" from the bonds. The contract of the Parties cannot be treated in such a manner. When the Brazilian Government promised to pay "gold francs", the reference to a well-known standard of value cannot be considered as inserted merely for literary effect, or as a routine expression without significance. The Court is called upon to construe the promise, not to ignore it. » 6/.

The ICJ also recalls that “It would indeed be incompatible with the generally accepted rules of interpretation to admit that a provision of this sort occurring in a special agreement should be devoid of purport or effect”7/.


4.1 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."

4.2 Interpretation

No freedom is unlimited. GATT thus foresees exceptions to enable WTO Members to introduce restrictions to freedom of transit and to limit certain facilities under specific circumstances.

In the framework of the dispute between Panama and Colombia, the Panel reviewed those restrictions which may be introduced under Article XX d). The Panel based its examination of this Article 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:

- 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.

6/ Judgment of 12 July 1929, Case concerning the payment in gold of Brazilian federal loans contracted in France, Series A No 21, p. 115-116.

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 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 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. According to the Appellate Body, 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, according to the Appellate Body, 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

Since, according to the Panel, Colombia failed to establish that it met the first condition – i.e. the requirements set forth by Article XX(d) and clarified by the Appellate Body – the Panel decided, in the framework of the case referred to it, not to examine the provisions of the chapeau to Article XX to ascertain whether Colombia met the second condition.

However, analysis of the chapeau serves to establish that any measures taken by a Member should not constitute “arbitrary or unjustifiable discrimination”, i.e. that they cannot apply only to specific Members when the problems targeted are not solely generated by transit from or to these Members.

Furthermore, such measures may constitute a “disguised restriction” neither on international transit from or to other Members, nor on international trade.

Indeed, any measures restricting transit, e.g. arriving from other Members, to favour one’s own industry or one’s own means of transport in a transit country, would be contrary to the chapeau of Article XX.

5. FINAL OBSERVATION

It is obvious that the freedoms provided by Article V are not “erga omnes” in nature, i.e. they are not applicable by all countries of the world. Therefore, if a WTO member may claim transit freedom from another WTO member, and the latter must offer such a freedom, a non-member cannot do so.

Consequently, a WTO Member may subject to quotas or other restrictions the means of transport and goods transiting via its territory, from and bound for countries which have not acceded to WTO, as the freedom of transit foreseen under Article V: 2 does not apply to such transport operations.

However, GATT Article V does apply to the means of transport of non-Member States when they carry goods in transit through a WTO Member State, from and/or bound for another WTO Member State.

It should also be noted that, where goods are carried by various means of transport, they may be eligible for the freedom of transit set forth in Article V provided that they meet the related requirements. However, in that case, the means of transport may not be “in transit”, but rather in bilateral traffic which may be subject to various regulations restricting its freedom of movement and, consequently, freedom of transit of the goods carried.

Finally, it is worth to repeat the basic rule of the GATT-game: the principles covering the member countries’ rights and obligations in accordance with Article V are applicable by all WTO members in their reciprocal relations.

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