

*Colombia – Measures Relating to the Importation of Textiles,
Apparel and Footwear
(DS461)*

(AB-2016-1)

**Third Participant Oral Statement
of the United States of America**

April 4, 2016

Madam Chair, members of the division:

1. Thank you for this opportunity to present the views of the United States. We will address two interpretative issues arising in this dispute, namely the interpretation of Article XX(a) of the GATT 1994 and the distinction between legal appeals and appeals under Article 11 of the DSU.

I. Article XX(a) of the GATT 1994

2. Regarding Article XX of the GATT 1994, subparagraph (a) provides that, subject to the requirements of the chapeau, the GATT 1994 does not prevent Members from adopting or enforcing any measure “necessary to protect public morals.” The Appellate Body in *EC – Seal Products* confirmed that a Member asserting an Article XX(a) defense must establish two elements: (1) that “it has adopted or enforced the measure to ‘protect public morals’”; and (2) “that the measure is ‘necessary’ to protect such public morals.”¹ Colombia argues that the Panel erred in several respects in its analysis of the first element, including by importing aspects of the necessity and chapeau standards into its analysis² and by failing to consider certain evidence relating to the measure’s objective.³

3. As the Appellate Body made clear in *EC – Seal Products*, a panel examining the first element of Article XX(a) should conduct an objective analysis of a measure based on the evidence before it, including the “texts of statutes, legislative history, and other evidence regarding the structure and operation of the measure.”⁴ A panel “should take into account the Member’s articulation of the objective or the objectives it pursues through its measures,” although it “is not bound by that Member’s characterization of such objective(s).”⁵

¹ *EC – Seal Products (AB)*, para. 5.169.

² Colombia Appellant Submission, paras. 120-126, 176-181, 182-186.

³ Colombia Appellant Submission, paras. 195-197.

⁴ *EC – Seal Products (AB)*, para. 5.144.

⁵ *EC – Seal Products (AB)*, para. 5.144.

4. With respect to the Panel’s analysis of whether the objective of the challenged measure is “to protect public morals,” the United States agrees with Colombia that the level of a measure’s contribution to its purported objective is generally relevant to a panel’s analysis of the second element of Article XX(a) – necessity – rather than the first. While it is appropriate for a panel to analyze the structure and operation of a measure under the first element, the focus of that analysis should be on whether a measure was “adopted or enforced” to protect the relevant public moral, not whether it actually makes a sufficient contribution to doing so. To the extent that the Panel’s application of the first element of Article XX(a) focused on the measure’s contribution to the stated objective, the United States agrees with Colombia that such application would constitute legal error.

5. The United States also agrees with Colombia that the fact that a challenged measure contains exceptions unrelated to and inconsistent with its alleged objective does not necessarily lead to the conclusion that the measure was not adopted or enforced “to protect public morals.” Indeed, whether exceptions to a challenged measure may undermine its contribution to the purported objective is instead generally relevant to a panel’s analysis under the necessary element or the Article XX chapeau. The panels in *EC – Seal Products* and *US – Gambling* both found that exceptions that were found not to relate to the covered objective of the measure did not preclude a finding that the measures were taken “to protect public morals.”⁶

6. The United States notes that Colombia’s Article 11 appeal concerning the Panel’s treatment of exhibits COL-34 and -35 also would seem to be relevant to the Panel’s analysis under the first element of Article XX(a). These exhibits, a press article and minutes of a government meeting, contain statements by Colombian officials suggesting that Decree 456

⁶ See *EC – Seal Products (Panel)*, para. 7.631 (upheld by the Appellate Body); *US – Gambling (Panel)*, para. 6.487 (upheld by the Appellate Body).

seeks to combat money laundering.⁷ Colombia asserts that the Panel “dismissed” these exhibits “on the improper ground that [they] post-dated the initiation of the disputes.”⁸ The United States agrees that it would have been error for the Panel to decline to consider this evidence solely on these grounds. As the Appellate Body has found, a “panel is not precluded from assessing a piece of evidence for the mere reason that it pre-dates or post-dates its establishment.”⁹ It is not clear, however, that the Panel “dismissed” the evidence, rather than simply taking its date into account in the Panel’s weighing of the evidence.¹⁰ Nevertheless, we agree with Colombia that these exhibits reflect the type of evidence that panels generally would consider under the first element of Article XX(a).

II. Article 11 of the DSU

7. With respect to Article 11 of the DSU, the Appellate Body consistently has found that “[i]n most cases . . . an issue will *either* be one of application of the law to the facts *or* an issue of the objective assessment of facts, and not both.”¹¹ Colombia appears to have raised several claims alleging both types of error.¹² Members should strive to be clear about the nature of the error for which they seek appellate review and avoid a proliferation of alternative claims and arguments. As we have noted in the past, this approach to appellate argumentation does not assist the Appellate Body in its efforts to issue its report within the 60 or 90 day time periods in DSU Article 17.5.

⁷ See *Colombia – Textiles (Panel)*, para. 7.394.

⁸ Colombia’s Appellant Submission, para. 196.

⁹ *EC – Selected Customs Matters (AB)*, para. 188.

¹⁰ See *Colombia – Textiles (Panel)*, para. 7.394.

¹¹ *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.217; *US – Large Civil Aircraft (AB)*, para. 872.

¹² See Colombia’s Appellant Submission, paras. 34-39, 61, 91, 280, 300.

III. Conclusion

8. This concludes the U.S. oral statement. We thank the Division for its consideration of these views and look forward to participating in this oral hearing.