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

(DS461)

Responses of the United States To the Panels' Questions for the Third Parties Following the Panels' Meeting

April 6, 2018

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Brazil – Retreaded Tyres (AB)	Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, WT/DS332/AB/R, adopted 17 December 2007
Chile – Price Band System (Panel)	Panel Report, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, WT/DS207/R, adopted 23 October 2002, as modified by Appellate Body Report WT/DS207AB/R
China – Raw Materials (AB)	Appellate Body Reports, *China – Measures Related to the Exportation of Various Raw Materials*, WT/DS394/AB/R / WT/DS395/AB/R / WT/DS398/AB/R, adopted 22 February 2012
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EC – Approval and Marketing of Biotech Products (Panel)	Panel Reports, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R / WT/DS292/R / WT/DS293/R / Add.1 to Add.9 and Corr.1, adopted 21 November 2006
EC – Bananas III (US) (Panel)	Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas, Complaint by the United States*, WT/DS27/R/USA, adopted 25 September 1997, as modified by Appellate Body Report WT/DS27/AB/R
EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US) (AB)	Appellate Body Reports, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Second Recourse to Article 21.5 of the DSU by Ecuador*, WT/DS27/AB/RW2/ECU, adopted 11 December 2008, and Corr. 1 / *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Article 21.5 of the DSU by the United States*, WT/DS27/AB/RW/USA and Corr. 1, adopted 22 December 2008

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US – Upland Cotton (AB)	Appellate Body Report, *United States – Subsidies on Upland Cotton*, WT/DS267/AB/R, adopted 21 March 2005
US – Wool Shirts and Blouses (Panel)	Panel Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/R, adopted 23 May 1997, upheld by Appellate Body Report WT/DS33/AB/R
US – Zeroing (Article 21.5 – EC) (AB)	Appellate Body Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing") – Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS294/AB/RW and Corr.1, adopted 11 June 2009

1 THE PANEL'S TERMS OF REFERENCE

1.1 Questions for All Third Parties

1. In paragraph 24 of its written rebuttal as complainant, Colombia noted as follows (footnotes omitted):

> ***The premise of the "closely connected" test is that the measure being considered is not a measure taken to comply. Yet, in this proceeding, Panama has repeatedly characterized the customs bond and the special import regime as "measures taken to comply." This is inherently contradictory. The customs bond and the special import regime cannot, at the same time, be the measure taken to comply and a "closely connected" measure. Thus, Panama's argument is logically flawed and therefore fails.***

Please comment on the above-mentioned statement from Colombia.

1. As the United States explained in its third party submission, Article 21.5 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU) establishes that the terms of reference of a panel established under that provision extend to the "existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings" in the original proceeding.[1] This includes measures "taken in the direction of, or for the purpose of achieving, compliance" and measures that negate compliance.[2] Therefore, where Members disagree about whether a particular measure is within the terms of reference of a panel established under Article 21.5, the question is whether the measure forms part of, or undermines the existence of, the "measure taken to comply."

2. The United States does not understand the "closely connected" analysis to which the question refers to operates such that a measure that does *not* fall within the bounds described in DSU Article 21.5 could come within the scope of a proceeding under that provision. Rather, for the "closely connected" analysis to be relevant to an assessment of whether a particular measure falls within the terms of reference of a panel established under Article 21.5, the analysis must go to whether the measure is a "measure taken to comply," within the meaning of Article 21.5. And, indeed, the "closely connected" analysis has been applied in this way, including in *US – Zeroing (Article 21.5 – EC)*, which Colombia cites in the paragraph quoted in the question.[3]

3. The Appellate Body in *US – Zeroing (Article 21.5 – EC)* did not suggest that measures other than a "measure taken to comply" could be within the terms of reference of the compliance

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[1] *See* U.S. third party submission, paras. 7-8, 11-12.

[2] *US – Softwood Lumber IV (Article 21.5 – Canada) (AB)*, paras. 66-67 (emphasis omitted); *US – Zeroing (Article 21.5 – EC) (AB)*, para. 202.

[3] *See* Colombia's second submission as complainant, paras. 23-24; Panama's first submission as respondent, paras. 32, 42; *US – Zeroing (Article 21.5 – EC) (AB)*, para. 207.

panel.[4] Rather, it explained that measures other than the *declared* "measure taken to comply" could, in fact, be measures taken to comply and within the panel's terms of reference. Indeed, it stated explicitly that the panel's task was 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 Dispute Settlement Body (DSB) "for [the panel] to characterize such other measures as 'taken to comply' and, consequently," within the panel's terms of reference.[5] The Appellate Body took the same approach to the "close connection" analysis in *US – Softwood Lumber IV*.[6]

4. Thus, the Appellate Body approach in *US – Zeroing* assists in examining whether an undeclared measure undermines the movement towards compliance from the declared measure taken to comply. The Panel should examine in this light Panama's argument that Decree 1745 is part of the "measure taken to comply" and that this is clear from its "close connection" with the DSB recommendations and rulings in the original proceeding and with Decree 1744, the declared measure taken to comply.[7]

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[4] *See US – Zeroing (Article 21.5 – EC) (AB)*, para. 207 (stating that, where the implementing Member and the complaining Member disagreed over the scope of the measure taken to comply, the "compliance panel should seek to determine whether" measures other than the declared measure taken to comply "are particularly closely connected to the measures the implementing Members asserts are 'taken to comply,' and to the recommendations and rulings of the DSB, so as to fall within the purview of the compliance panel").

[5] *US – Zeroing (Article 21.5 – EC) (AB)*, para. 229 ("As we have noted earlier, in determining whether measures that are ostensibly *not* 'taken to comply' with the recommendations and rulings of the DSB have a particularly close connection to the declared measure 'taken to comply', and to the recommendations and rulings of the DSB, a panel is required to scrutinize the links, in terms of *nature*, *effects*, and *timing*, between those measures, the declared measures 'taken to comply', and the recommendations and rulings of the DSB. Only then is a panel in a position to determine whether there are sufficiently close links for it to characterize such other measures as 'taken to comply' and, consequently, to assess their consistency with the covered agreements.").

[6] *See US – Softwood Lumber IV (Article 21.5 – Canada) (AB)*, para. 77 ("Article 21.5 of the DSU confirms that a panel's mandate under Article 21.5 of the DSU is not necessarily limited to an examination of an implementing Member's measure declared to be 'taken to comply'. . . . 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. Determining whether this is the case requires a panel to scrutinize these relationships . . . Only then is a panel in a position to take a view as to whether there are sufficiently close links for it to characterize such an other measure as one 'taken to comply' and, consequently, to assess its consistency with the covered agreements in an Article 21.5 proceeding."); *id*. para. 90 (finding that the "Panel properly included the pass-through analysis in the First Assessment Review in its examination of the 'measures taken to comply' because of the close connection that the Panel found to exist between that pass-through analysis and both the [declared measures taken to comply].").

[7] *See* Panama's first submission as respondent, paras. 32, 42.

2. In paragraph 17 of its written rebuttal as respondent, Colombia noted as follows (footnotes omitted):

> ***Panama's argumentation remains internally contradictory. On the one hand, Panama characterizes the customs bond and the customs formalities of Decree 1745 as "measures taken to comply". On the other hand, Panama seeks to apply the case law about "closely connected" measures to the customs bond and the customs formalities. However, by definition, "closely connected" measures are not "measures taken to comply". Thus, Panama's own internally contradictory argumentation undermines its allegation the customs bond and the customs formalities are "measures taken to comply".***

Please comment on the above-mentioned statement from Colombia.

5. As explained above, the critical inquiry, for purposes of assessing whether an instrument other than the declared "measure taken to comply" is within the terms of reference of an Article 21.5 panel, is whether the instrument is, in fact, part of the "measure taken to comply with the recommendations and rulings" in the original proceeding. The Appellate Body report in *US – Zeroing* did not suggest a different standard. To the contrary, it confirms that the appropriate analysis is whether a measure "ostensibly *not* 'taken to comply'" has "sufficiently close links" with the recommendations and rulings of the DSB and the declared measure taken to comply for it to be, in fact "taken to comply" and, therefore, within the panel's terms of reference.[8] For example, it may be relevant to examine whether an undeclared measure undermines the movement towards compliance from the declared measure taken to comply.

3. How relevant for 21.5 Panels are the parties' statements delivered within the framework of Article 21.3(c) of the DSU arbitrations? Would your conclusion also apply to the decision of the arbitrator in his/her award?

6. The decision of the arbitrator in a proceeding under Article 21.3(c) of the DSU is a public document. There is, therefore, no bar to parties' alluding to it as evidence in a subsequent Article 21.5 proceeding.

7. However, the Panels in these proceedings must assess the probative value of the award, and the statements it contains, in accordance with their obligation under Article 11 of the DSU. That is, the Panels must themselves make an "objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements." The findings of an arbitrator in a DSU Article 21.3(c) proceeding would not be binding on a subsequent Article 21.5 panel with respect to matters within the panel's terms of reference, nor should a panel hesitate to depart from such findings if it does not agree. Rather, they would be relevant and probative only by virtue of the panel's independent analysis of the facts and reasoning set out in the decision.

8. In this regard, the United States agrees with Colombia that the arbitrator in the DSU Article 21.3(c) proceeding was not competent to determine the scope of the "measure taken to

[8] *US – Zeroing (Article 21.5 – EC) (AB)*, para. 229.

comply," within the meaning of Article 21.5 of the DSU.[9] To the contrary, the Panels in these proceedings must conduct such an assessment independently, based on the argumentation and evidence before them.

1.2 Questions for Australia, China, Ecuador, European Union, Guatemala, Honduras, India, Indonesia, Japan, Kazakhstan, Korea, Russia, Singapore, and Chinese Taipei

6. In paragraph 22 of its third party submission, the United States noted as follows (footnotes omitted):

> ***[D]efining the "matter" within a panel's terms of reference based on the measures as they existed at the time of panel establishment, as set out in the DSU, benefits all parties and the WTO dispute settlement system. It provides for adequate time for parties to submit and respond to argument and evidence. Further, it benefits all parties 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 a complaining or responding party to continually adjust their arguments throughout dispute settlement proceedings in order to deal with a disputed measure as a moving target.***
>
> ***Please comment on the abovementioned statement from the United States.***

9. As the United States explained in its third party submission, Articles 6.2 and 7.1 of the DSU establish that the DSB sets a panel's terms of reference by referring to it for examination the matter set out in the panel request.[10] Thus, "the measures included in a panel's terms of reference," and thus the measures on which the panel is charged by the DSB to make findings, "must be measures that are in existence at the time of the establishment of the panel" by the DSB.[11] For a panel established under Article 21.5 of the DSU, Articles 6.2 and 7.1, read together with Article 21.5, establish that the measures within the panel's terms of reference are the measure or measures taken to comply with the DSB recommendations and rulings, as those measures existed at the time of the panel's establishment.

10. For these Panels, that means that the measures within their terms of reference are Colombia's measure or measures taken to comply, as they existed on March 6 and July 19, respectively, when these Panels were established. Decree 2218 was enacted long after that time. Therefore, it is not within the Panels' terms of reference. Consistent with the findings of the

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[9] *See* Colombia's second submission as respondent, para. 38.

[10] *See* U.S. third party submission, paras. 3-8, 18-20.

[11] *EC – Chicken Cuts (AB)*, para. 156.

panel and Appellate Body in *EC – Custom Matters,* Decree 2218 would only be relevant to the Panel's examination of the matter referred to it by the DSB *if* Decree 2218 were evidence that were relevant to the legal situation as it existed on the date of panel establishment.[12] The legal situation existing on another, subsequent date is not relevant to the Panel's examination of "the matter" that the DSB tasked the Panels to examine when it established the Panel's terms of reference.

11. As the United States further explained in its third party submission and at the third party session of the Panels' meeting with the parties, this rule, in addition to being required by the text of the DSU, is fair to both complainants and respondents.[13] Respondents cannot evade review of measures in place at the time of panel establishment by changing measures during the course of a WTO proceeding. Complainants cannot obtain findings on new measures without engaging in the consultations process mandated by the DSU.

12. This does not mean, however, that a relevant subsequently enacted measure – different from the original measure but still inconsistent with the respondents' WTO obligations – would evade scrutiny. To the contrary, if a measure in place at the time of the panel's establishment is found inconsistent with a Member's WTO obligations, a panel must recommend pursuant to DSU Article 19.1 that the Member bring the measure into compliance with its obligations. If that Member enacts a similar or related measure after the time of the panel's establishment, whether by one day or one year, that later-in-time measure would be subject to the panel's recommendation to the extent it would be considered a "measure taken to comply." That is, the prospective effect of recommendations under Article 19.1 ensures that later-in-time measures that may perpetuate or negate compliance will not evade review by a compliance panel or an arbitrator.

13. Contrary to the EU's suggestion at the third party session, panels can make findings on expired measures within their terms of reference and, if they find such a measure inconsistent with the covered agreements, *must* make a recommendation. There is no provision in the DSU that permits a panel not to make findings on the matter referred to it by the DSB, or to change its own terms of reference once set by the DSB. To the contrary, as explained above, Articles 6 and 7 of the DSU establish that the Panel's task is to examine the "matter referred to the DSB", including the "specific measures at issue," as set out in the request for the panel's establishment in that dispute. The DSU thus provides no basis for a panel to refrain from making findings on a measure in existence at the time of its establishment because the measure has subsequently expired. Moreover, DSU Article 19.1 then requires, in mandatory terms, that where a panel "concludes that a measure is inconsistent with a covered agreement, it *shall recommend* that the

[12] *EC – Selected Customs Matters (AB)*, para. 259 (finding the panel had not erred in declining to consider three exhibits, which concerned a regulation enacted after panel establishment, because although they "might have arguably supported the view that uniform administration had been achieved by the time the Panel Report was issued, we fail to see how [they] showed uniform administration at the time of the establishment of the Panel").

[13] *See* U.S. third party submission, paras. 21-22.

Member concerned bring *the measure* into conformity with that agreement."[14] Thus, if a panel finds that a "measure" within its terms of reference is inconsistent with a covered agreement, it *must* recommend that the measure be brought into conformity with that agreement.

14. Numerous reports have found correctly that panels can and must make findings and recommendations on measures within their terms of reference that expire after the DSB has referred the matter to a panel for examination, and that recommendations have prospective effect, including on subsequent legal instruments.

15. With respect to the ability of panels to make findings concerning measures that expire during the course of the proceedings, the Appellate Body in the Article 21.5 proceeding in *EC – Bananas III* explained that: "The DSU nowhere provides that the jurisdiction of a panel terminates or is limited by the expiry of a measure at issue."[15] Therefore, "once a panel has been established and the terms of reference for the panel have been set, the panel has the competence to make findings with respect to the measures covered by its terms of reference."[16] The Appellate Body has made similar statements in other disputes,[17] and numerous panels have made findings on expired measures.[18]

16. Numerous panels have also, consistent with the mandatory text of DSU Article 19, made recommendations on measures found to be inconsistent with the covered agreements that expired

[14] DSU, article 19.1 (emphasis added).

[15] *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas (Article 21.5 – US) (AB)*, para. 270.

[16] *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas (Article 21.5 – US) (AB)*, para. 270.

[17] *See, e.g., US – Upland Cotton (AB)*, para. 270; *China – Raw Materials (AB)*, para. 263.

[18] *See, e.g.*,, GATT Panel Report, *EEC – Animal Feed Proteins*, para. 2.4; GATT Panel Report, *US – Canadian Tuna*, para. 4.3; *US – Wool Shirts and Blouses (Panel)*, para. 6.2; *Indonesia – Autos (Panel)*, para. 14.9; *Chile – Price Band System (Panel)*, para. 124; *Dominican Republic – Imports and Sale of Cigarettes (Panel)*, para. 7.344; *EC – IT Products*, paras. 7.166-167.

in the course of the proceeding.[19] And the Appellate Body has found, consistent with the text of Article 19, that this is appropriate. In *China – Raw Materials*, the Appellate Body found that, "it was appropriate for the Panel" to have recommended that the DSB request China to bring its measures into conformity with its WTO obligations, even though some of the measures on which the Panel's findings were based had expired during the course of the dispute.[20] The Appellate Body noted that, without a recommendation, the panel and Appellate Body reports "would not result in implementation obligations for a responding member, and in that sense would be merely declaratory," which would frustrate the aim of the dispute settlement mechanism of securing "a positive solution to the dispute."[21]

17. Panels and the Appellate Body have suggested in other reports that a panel *may* refrain from making findings or a recommendation on a measure that expired after the date of the panel's establishment.[22] However, in none of these reports did the panel or Appellate Body attempt to base its conclusion on the text of the DSU, or to explain the basis on which it considered it could depart from those legal requirements. Additionally, in several of the reports that the EU has cited in making this argument in previous disputes, the issue of whether panels can make findings and recommendations on measures that expired in the course of the panel proceedings was not before the panel or Appellate Body division at all and, therefore, any

[19] *See EC – IT Products*, para. 7.167 ("[W]e note that any repeal would have taken place after the panel was established and its terms or reference were set. Therefore, the Panel considers that it may make recommendations with respect to these measures."); *US – Wool Shirts and Blouses (Panel)*, paras. 6.2, 8.1 (finding that, in the absence of an agreement between the parties to terminate the proceedings, it appropriate to make findings and a recommendation concerning a measure that had been withdrawn); *Indonesia – Autos (Panel)*, paras. 14.9, 15.4 (agreeing with previous panels that "where a measure included in the terms of reference was otherwise terminated or amended after the commencement of panel proceedings," it was appropriate to make findings and a recommendation); *Dominican Republic – Imports and Sale of Cigarettes (Panel)*, paras. 7.340, 7.343, 8.2) (finding that, because "the amendments to the measure did not occur before, but after the date of the establishment of the Panel," in light of its terms of reference and its duties under the DSU, "it would be inappropriate to abstain from making findings with respect to [the measure at issue" and making a recommendation); *EC – Approval and Marketing of Biotech Products*, paras. 7.456, 7.449, 8.64).

[20] *See China – Raw Materials (AB)*, paras. 264-265.

[21] *See China – Raw Materials (AB)*, paras. 264.

[22] *See EU – Fatty Alcohol (AB)*, paras. 5.175-182 (rejecting the EU's argument that expiration of the measure necessarily resolves the dispute between the parties but suggesting that panels have some "discretion to decide how [they] take[] into account . . . . the repeal of the measure at issue"); *id.* paras. 5.198-208 (rejecting the EU's argument that panels are precluded from making findings and recommendations concerning expired measures but stating that "the expiry of the measure may affect what recommendations a panel may make"); *US – Poultry (China)*, paras. 7.51, 7.55 (where the panel made findings on an expired measure but the complaining party did not request, and the panel did not make, a recommendation on the measure); *Dominican Republic – Import and Sale of Cigarettes (Panel)*, paras. 7.363, 7.393, 7.419 (where the panel made findings on expired measures but declined to make recommendations).

discussion of the matter was dicta.[23] Finally, even where the Appellate Body has suggested that panels *may* refrain from making a recommendation on a measure within their terms of reference that have since expired, it has consistently rejected the argument that panels are *precluded* from making findings and recommendations on such measures.[24]

18. In this dispute, the measures within the Panels' terms of reference are the "measures taken to comply" as they existed at the time the Panels were established. These measures cannot include Decree 2218, as it was enacted long afterwards.[25] Consistent with Articles 6.2, 7.1, and 11 of the DSU, the Panels should make an "objective assessment of the matter before it," including the "conformity with the relevant covered agreements" of the measures within their terms of reference. If one or both of the Panels find that a measure within its terms of reference is inconsistent with a provision of the covered agreements raised by the relevant party in its Panel request, this would demonstrate that the original panel's recommendation under DSU Article 19 has not been satisfied. The alleged WTO-inconsistency of any allegedly related measure enacted after the establishment of the Panels would not alter this conclusion and therefore (in addition to not being within the Panels' terms of reference) would not be necessary to resolve in this proceeding.

1.3 Questions for Australia, China, Ecuador, European Union, Guatemala, Honduras, India, Indonesia, Kazakhstan, Korea, Russia, Singapore, Chinese Taipei, and the United States

7. In paragraph 10 of its third party submission, Japan noted as follows (footnote omitted):

> ***It is well established that when a measure that purportedly was not taken to comply with the DSB's recommendations and rulings has sufficiently close links to a measure that was taken to comply, the former will also fall within the scope of a compliance panel's review. Japan notes that the Appellate Body has laid out a set of criteria that compliance panels 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").***

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[23] *See US – Certain EC Products (AB)*, paras. 8-11, 61, 79, 82 (showing that: (1) the issue of whether it was appropriate for the panel to make recommendations regarding an expired measure was not raised on appeal so the Appellate Body's statements on the issue are dicta; and (2) that even the dicta concerned, *not* a measure that expired in the course of panel proceedings, but a measure that had expired prior to the establishment of the panel); *US – Upland Cotton (AB)*, paras. 271-272 (showing that the Appellate Body merely referenced the *US – Certain EC Products* report in dicta after resolving the issue on appeal, rendering that reference further dicta).

[24] *EU – Fatty Alcohol (AB)*, para. 5.201.

[25] *See* U.S. third party submission, para. 20.

Please comment on the above-mentioned statement from Japan.

19. The quoted paragraph concerns the analysis a panel should conduct when a party alleges that a measure other than the "declared" "measure taken to comply" is within the terms of reference of an Article 21.5 panel. As the United States explained above, the relevant inquiry is whether the undeclared measure is, in fact, a "measure taken to comply" under DSU Article 21.5. The DSB recommendations and rulings in the original proceeding are naturally the starting point for this analysis.[26]

20. The Appellate Body's approach in *US – Zeroing (Article 21.5 – EC)* and other disputes 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. The Appellate Body in *US – Zeroing (Article 21.5 – EC)* explained that the relevant inquiry was 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 its terms of reference.[27] In conducting this analysis, the Appellate Body analyzed the links, "in terms of nature, effects, and timing," between the declared measure taken to comply and the DSB recommendations and rulings, on the one hand, and the measure the complaining Member asserted was an undeclared measure taken to comply, on the other.[28]

21. In this dispute, Panama claims that a measure other than the declared measure taken to comply, namely Decree 1745, is, in fact, a "measure taken to comply," within the meaning of Article 21.5.[29] As the United States explained in its written submission, various factors may be relevant to assessing the relationship between Decree 1745 and the DSB recommendations and rulings in the original proceeding, in order to assess whether Decree 1745 is a "measure taken to comply within the meaning of Article 21.5 of the DSU."[30] These factors could include the timing, nature, and effects of Decree 1745.

1.4 Questions for Australia, China, Ecuador, Guatemala, Honduras, India, Indonesia, Japan, Kazakhstan, Korea, Russia, Singapore, Chinese Taipei, and the United States

8. In paragraphs 11-13 of its third party submission, the European Union noted as follows (footnote omitted):

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[26] *See US – Upland Cotton (Article 21.5 – Brazil) (AB)*, para. 202; *US – Zeroing (Article 21.5 – EC) (AB)*, para. 200.

[27] *US – Zeroing (Article 21.5 – EC) (AB)*, para. 229.

[28] *See US – Zeroing (Article 21.5 – EC) (AB)*, para. 229.

[29] *See* Panama's first submission as respondent, paras. 31-48; Panama's second submission as respondent, paras. 37-134.

[30] *See* U.S. third party submission, para. 16.

The European Union 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.

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.

Thus, 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.

Please comment on the above-mentioned statement from the European Union.

22. As discussed in the U.S. response to Questions 1 and 7, above, Article 21.5 of the DSU describes the measures within an Article 21.5 panel's terms of reference. Measures other than the declared "measure taken to comply" cannot be excluded from the scope of compliance proceedings if they are, in fact, part of the "measure taken to comply," within the meaning of Article 21.5 (including measures that should have been taken to comply but were not). The DSB recommendations and rulings in the original proceeding are the starting point for identifying the "measures taken to comply."[31] Depending on the facts of the dispute, factors such as the timing, nature, and effects of a measure, may be relevant to assessing whether it is a "measure taken to comply" and within an Article 21.5 panel's terms of reference.

3. ARTICLE XX OF THE GATT 1994

3.1. Questions for Australia, China, Ecuador, European Union, Guatemala, Honduras, India, Indonesia, Kazakhstan, Korea, Russia, Singapore, Chinese Taipei, and the United States

12. In paragraph 7 of its third party submission, Japan argues as follows:

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

[31] *See US – Upland Cotton (Article 21.5 – Brazil) (AB)*, para. 202; *US – Zeroing (Article 21.5 – EC) (AB)*, para. 200.

to why the measure's narrow product scope is "necessary" or for combatting money laundering.

Please comment on the above-mentioned statement from Japan.

23. In paragraph 7 of its third party submission, Japan suggests that, under Article XX(a), Colombia bears the burden to explain why the measure at issue applies only to certain categories of products and, in particular, show that the measure's "product scope is 'necessary' or for combatting money laundering."[32] This suggestion is inconsistent with the correct interpretation of Article XX(a) of the GATT 1994.

24. GATT 1994 Article XX(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." Thus, 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."[33] In these proceedings, only the second element is in dispute.[34]

25. To meet the "necessary" standard of Article XX(a), a responding Member must show that there is "a genuine relationship of ends and means between the objective pursued and the measure at issue"[35] and that this contribution is such that the measure may be considered "necessary."[36] As part of this analysis, a panel should analyze the "trade-restrictiveness of the measure," balanced against the measure's contribution to its objective.[37] The more trade-restrictive a measure is, the greater should be its contribution to the covered objective for it to be considered "necessary."[38] In analyzing whether a measure is "necessary", a panel may also consider any less trade-restrictive alternative measures proposed by the complaining Member.[39]

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[32] Japan's third party submission, para. 7.

[33] *EC – Seal Products (AB)*, para. 5.169.

[34] *See* Panama's first submission as respondent, para. 37; Panama's second submission as respondent, paras. 393-394; *see also Colombia – Textiles (AB)*, para. 6.6.

[35] *Brazil – Retreaded Tyres (AB)*, para. 210; *EC – Seal Products (AB)*, para. 5.180 (citing *EC – Seal Products (Panel)*, para. 7.633).

[36] *Korea – Various Measures on Beef (AB)*, para. 161 (finding this level of contribution is, on a continuum between "making a contribution to" and "indispensable," "located significantly close to the pole of 'indispensable' than to the opposite pole of simply 'making a contribution to.'"); *Brazil – Retreaded Tyres (AB)*, para. 141.

[37] *EC – Seal Products (AB)*, para. 5.169; *Korea – Various Measures on Beef (AB)*, para. 163.

[38] *Korea – Various Measures on Beef (AB)*, para. 162; *Colombia – Textiles (AB)*, para. 5.103.

[39] *Brazil – Retreaded Tyres (AB)*, para. 156; *Colombia – Textiles (AB)*, para. 5.102.

26. However, one of the fundamental principles of Article XX, including Article XX(a), is that it reflects the right of a responding Member "to achieve its desired level of protection with respect to the objective pursued."[40] Thus, for a measure to be "necessary" within the meaning of Article XX(a), it does not need to *fully* achieve the relevant 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. Further, to be relevant to the "necessary" analysis, any alternative measures that a complaining Member proposes must be not only less trade-restrictive than the measure at issue but must also achieve the "level of protection with respect to the objective pursued" chosen by the responding Member and reflected in the measure at issue.[41]

27. The Appellate Body addressed this issue explicitly in its report in *EC – Seal Products*. In that dispute, Canada argued that the EU could not justify its restrictions on the sale of seal products on public morals grounds because they addressed only the moral risk associated with seal hunts and not that associated with "slaughterhouses and other terrestrial wildlife hunts."[42] The Appellate Body rejected this argument. It explained that "under Article XX(a) . . . Members have the right to determine the level of protection they consider appropriate, which suggests that Members may set different levels of protection even when responding to similar interests of moral concern."[43] Therefore, although the moral issues posed by seal hunts and terrestrial hunts might be the same, the EU was *not* "required by Article XX(a) . . . to address such public morals concerns in the same way."[44]

28. The same logic applies to Colombia's approach to money laundering in this dispute. To show that the measures at issue are "necessary" to the objective of combatting money laundering, Colombia does not need to explain why the measure concerns only textiles and apparel products (although Colombia has put forward an explanation on this point[45]). Further, Colombia certainly does not need to show, as Japan suggests, that the scope of the measure is "necessary" to combatting money laundering. Rather, what must be "necessary" – in the sense of making a contribution to the objective that, balanced against the measure's trade-restrictiveness, rises to the level of being "necessary" – is the measure itself.

29. The Appellate Body report in the original proceeding does not suggest a contrary interpretation.[46] In the original proceeding, the Appellate Body found that the panel's findings

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[40] *EC – Seal Products (AB)*, para. 5.261; *Brazil – Retreaded Tyres (AB)*, para. 156; *US – Gambling (AB)*, para. 308.

[41] *See EC – Seal Products (AB)*, para. 5.261; *Colombia – Textiles (AB)*, para. 5.115.

[42] *EC – Seal Products (AB)*, para. 5.196.

[43] *EC – Seal Products (AB)*, para. 5.200.

[44] *EC – Seal Products (AB)*, para. 5.200.

[45] *See* Colombia's first submission as respondent, paras. 111-112; Colombia's second submission as respondent, paras. 105-106.

[46] *See* EU's oral statement, para. 20.

indicated that the original measure may provide "*at least some* contribution" to its objective of combatting money laundering but provided no insight as to the degree of that contribution.[47] At the same time, the panel's findings established that the trade-restrictiveness of the original measure was "undeniable" and that the measure might be "highly trade restrictive."[48] On this basis, the Appellate Body found it was unable to complete the analysis and find that the measure was "necessary" within the meaning of Article XX(a).[49] The Appellate Body did not suggest that Colombia had failed to sufficiently justify the scope of the measure or to show that the *scope* was "necessary" to the measure's objective under Article XX(a).

13. In paragraph 8 of its third party submission, Japan argues as follows:

> ***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 constitutes arbitrary or unjustifiable discrimination under the chapeau of Article XX. In this regard, Japan views that the assessment of whether certain regulatory distinctions are rationally related to a policy objective under the calibration test is relevant to the assessment of whether a discriminatory measure constitutes "arbitrary or unjustifiable discrimination" under the Article XX chapeau.***
>
> ***Please comment on the above-mentioned statement from Japan.***

30. In paragraph 8 of its third party submission, Japan suggests that the chapeau of Article XX of the GATT 1994 requires the Panels to engage in a free-ranging assessment of whether any aspect of Colombia's measure is arbitrary or unjustifiable in any way. In support of this suggestion, Japan cites the "calibration test" employed in the *US – Tuna II* dispute. However, Japan's submission appears to misstate the legal standard of the chapeau as well as the content of the "calibration test," which, in any event, is not applicable in this dispute.

31. The chapeau of Article XX provides that, to be justified under Article XX, a measure provisionally justified under one of the subparagraphs must not be 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 a measure is applied consistently with the Article XX chapeau involves a two-step analysis: (1) whether the measure's application results in "discrimination" under the chapeau, *i.e.*, "discrimination between countries where the same conditions prevail," and, if so, (2) whether such discrimination is arbitrary or unjustifiable" or constitutes a "disguised restriction on trade."[50]

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[47] *See Colombia – Textiles (AB)*, para. 5.107.

[48] *See Colombia – Textiles (AB)*, paras. 5.111-112.

[49] *Colombia – Textiles (AB)*, para. 5.116.

[50] *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.342; *EC – Seal Products (AB)*, paras. 5.299, 5.303.

32. Thus, the first step of the chapeau analysis entails an assessment of whether a measure "results in discrimination" between countries where the "conditions" are relevantly "the same."[51] The "conditions" relevant to this analysis are those that relate "to the particular policy objective under the applicable subparagraph."[52] Discrimination results "when countries in which the same conditions prevail are differently treated."[53] Once "discrimination" is found, the assessment of whether it is "arbitrary or unjustifiable" should "focus on the cause of the discrimination or the rationale put forward to explain its existence.'"[54] One of the "most important factors" in this regard is "whether the discrimination can be reconciled with, or is rationally related to, the policy objective with respect to which the measure has been provisionally justified under one of the subparagraphs of Article XX."[55]

33. Japan's argument at paragraph 8 of its third party submission omits the first element of the chapeau analysis. This seems to be a result of Japan's focus on the "calibration test" applied in *US – Tuna II*. However, that test is not appropriate to the situation in this dispute. First, the "calibration" analysis was not put forward as a generally applicable approach to the Article XX chapeau. Rather, the Appellate Body in *US – Tuna II* found that, based on the arguments of the parties and the particular facts of the dispute, it was an appropriate way of assessing whether the U.S. tuna measure was applied consistently with the chapeau requirements.[56] Second, in *US – Tuna II*, 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.[57] Thus, even if the "calibration" test were a generally applicable approach to the "arbitrary and unjustifiable discrimination" standard, which it is not, it would not displace the first step of the chapeau analysis.

34. The United States considers that the hypothetical proposed by the European Union in paragraph 52 of its third party submission suffers from a similar flaw. The EU suggests that Colombia's measure may treat two categories of products – genuine low price products and

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[51] *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.301; *EC – Seal Products (AB)*, para. 5.299.

[52] *EC – Seal Products (AB)*, para. 5.300; *see id.* para. 5.299 ("The question is thus whether the conditions prevailing in different countries are *relevantly* 'the same'").

[53] *EC – Seal Products (AB)*, para. 5.303; *US – Shrimp (AB)*, para. 165.

[54] *EC – Seal Products (AB)*, para. 5.303; *Brazil – Retreaded Tyres (AB)*, para. 226.

[55] *EC – Seal Products (AB)*, para. 5.306; *US – Shrimp (AB)*, para. 165

[56] *US – Tuna II (Article 21.5 – Mexico) (AB)*, paras. 7.329-330; *see id.*, para. 7.344.

[57] *See US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.342 (finding: (1) "the amended tuna measure excludes most Mexican tuna products from access to the dolphin-safe label by virtue of the disqualification of tuna caught by setting on dolphins, while granting conditional access to such label to tuna products from the United States and other countries"; and (2) "the same conditions between countries prevail, namely, the risk of adverse effects on dolphins arising from tuna fishing practices"); *id.* para. 7.343 (after finding that the measure resulted in "discrimination" under the chapeau, turning to "consider whether the discrimination is arbitrary or unjustifiable").

under-valued products used for money laundering – "similarly" even though they represent "different situations" and that this may constitute "discrimination."[58] However, as the EU acknowledges, that is not the standard of the Article XX chapeau.[59] Rather, the chapeau concerns discrimination "between countries where the same conditions prevail." The EU's hypothetical of genuinely low priced products and under-valued products has no connection to the national origin of the two alleged categories of products, and thus does not suggest that the measure is discriminating "between countries where the same conditions prevail."

35. In assessing Colombia's claims under Article XX, the United States thus respectfully suggests that the Panels ground their analysis in the text of the chapeau itself and in the relevant arguments of the parties.

14. In your view, would Article XX of the GATT 1994 be available to justify a violation of a provision of the Customs Valuation Agreement?

36. As the United States explained in its third party submission, Panama raised claims under the Customs Valuation Agreement (CVA) only in its second submission as respondent.[60] None of its submissions as complainant raised such claims. Panama advanced three arguments as to why these claims are within the terms of reference of one or both Panels in these proceedings. For the reasons explained in the U.S. third party submission, all of these arguments are flawed.[61]

37. Because the claims under the CVA are not within the Panels' terms of reference, the Panels need not reach the abstract question of whether Article XX of the GATT 1994 could be available to justify an inconsistency with the CVA, as reaching it is not necessary to resolve the dispute between the parties. Articles 3.3, 3.4, and 3.7 of the DSU establish that the purpose of the dispute settlement system, including the recommendations and rulings of the DSB, is to achieve a positive solution to a dispute between Members.[62] Any findings with respect to the applicability of the CVA under such circumstances would be merely advisory, and WTO Members have not given to WTO adjudicators the authority to render interpretations not

[58] *See* EU's third party submission, para. 52.

[59] *See* EU's third party submission, para. 52.

[60] U.S. third party submission, para. 24; Panama's second submission as respondent, paras. 421-472.

[61] *See* U.S. third party submission, paras. 24-33.

[62] *See* DSU Articles 3.3 (prompt settlement), 3.4 (satisfactory settlement), 3.7 ("The aim of the dispute settlement mechanism is to secure a positive solution to the dispute").

necessary to assist the DSB in making recommendations under the DSU.[63] Rather, the "exclusive authority" to provide "authoritative interpretation" of the covered agreements is reserved to the Members acting in the Ministerial Conference or General Council.[64] Therefore, the Panels should decline to address the issue.[65]

[63] DSU Articles 7.1 (panel's terms of reference: "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)"), 11 (function of panels: "The function of panels is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements. Accordingly, a panel should make … such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements.").

[64] DSU Article 3.9 ("The provisions of this Understanding are without prejudice to the rights of Members to seek authoritative interpretation of provisions of a covered agreement through decision-making under the WTO Agreement or a covered agreement which is a Plurilateral Trade Agreement."); WTO Agreement Article IX:2 ("The Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements. In the case of an interpretation of a Multilateral Trade Agreement in Annex 1, they shall exercise their authority on the basis of a recommendation by the Council overseeing the functioning of that Agreement. The decision to adopt an interpretation shall be taken by a three-fourths majority of the Members.").

[65] *E.g.*, *Argentina – Import Measures (AB)*, para. 5.194; *Turkey – Rice*, para. 7.141; *EC – Bananas III (US) (Panel)*, para. 7.186.