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Page: 1/3

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

RECOURSE TO ARTICLE 21.5 OF THE DSU BY COLOMBIA

REQUEST FOR CONSULTATIONS

The following communication, dated 27 February 2017, from the delegation of Colombia to the delegation of Panama and to the Chairperson of the Dispute Settlement Body, is circulated in accordance with Article 21.5 of the DSU.

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Pursuant to Articles 21.5 and 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) and Article XXII of the General Agreement on Tariffs and Trade 1994 (GATT 1994), my authorities have instructed me to request consultations with the Government of Panama regarding the existence of measures taken to comply with the recommendations and rulings of the Dispute Settlement Body in the dispute *Colombia – Measures Relating to the Importation of Textiles, Apparel and Footwear* (DS461).

Colombia takes the view that Article 21.5 of the DSU is silent with respect to the obligation to request consultations under Article 4 of the DSU. Consequently, such consultations cannot be interpreted as a mandatory procedural remedy, the less so since in the present case, Panama initiated proceedings for the suspension of the application of concessions or other obligations to Colombia in the absence of any determination as to Colombia's compliance with the recommendations and rulings of the DSB or of nullification or impairment affecting Panama.

Consequently, Panama's assertions before the Dispute Settlement Body on 20 February of this year, which I shall revert to in this document, place Colombia in the difficult situation of having to request these consultations in the aforementioned terms in spite of the interpretation referred to earlier, aware of the need to stress its good faith in these proceedings while at the same time avoiding the procedural and contentious hurdles posed by the opposing party.

Indeed, as notified by Colombia to the WTO, the measure examined in this dispute ceased to exist as of 2 November 2016. Since that date, Colombia has not applied compound tariffs to imports of apparel and footwear, and the tariffs expressed in *ad valorem* terms that Colombia now applies do not exceed the bound level in its schedule.

Pursuant to Article 4.4 of the DSU, I shall proceed to describe the reasons for this request, including identification of the measure at issue and an indication of the legal basis for the complaints:

On 22 June 2016, the DSB adopted the Appellate Body Report and the Panel Report (as modified by the Appellate Body) in the dispute *Colombia – Measures Relating to the Importation of Textiles, Apparel and Footwear* (DS461).

The DSB found, for imports of products classified in Chapters 61, 62, 63 and 64 (except for heading 64.06 but including tariff line 6406.10.00.00) of Colombia's Customs Tariff, that in the instances identified in the Panel Report, the compound tariff exceeded the bound tariff rate in

Colombia's Schedule of Concessions, and was therefore inconsistent with Article II:1(a) and (b) of the GATT 1994.

The DSB also found that although the measure at issue was "designed" to protect public morals in Colombia within the meaning of Article XX(a) of the GATT 1994, Colombia had failed to demonstrate that the compound tariff was a measure "necessary to protect public morals" within the meaning of Article XX(a) of the GATT 1994. Similarly, the DSB found that although the measure at issue was "designed" to secure compliance with laws or regulations which are not inconsistent with the GATT 1994, namely, Article 323 of Colombia's Criminal Code, within the meaning of Article XX(d) of the GATT 1994, Colombia had not demonstrated that the compound tariff was a measure "necessary to secure compliance with laws or regulations which are not inconsistent" with the GATT 1994, within the meaning of Article XX(d) of the GATT 1994.

Colombia replaced the compound tariff with an *ad valorem* tariff that does not exceed Colombia's WTO bound tariffs, and in that sense, it has brought the measure subject to the DSB's recommendations into compliance with its WTO obligations. However, Panama does not agree with Colombia that Decree 1744 replacing the compound tariff is consistent with the covered agreements and brings Colombia into compliance with the GATT 1994.

Decree 1744 of 2 November 2016 was issued by the Colombia Government in order to modify the tariffs applicable to imports of products classified in Chapters 61, 62 and 63 of the Customs Tariff, and certain items in Chapter 64.

This Decree sets an *ad valorem* MFN tariff of 40% for imports of products classified in Chapters 61 and 62 of the Customs Tariff of the Republic of Colombia when the declared f.o.b. import price is less than or equal to ten (10) US dollars per gross kilogram. This tariff is equal to the bound tariff in Colombia's Schedule LXXVI, Part I - Most-Favoured-Nation Tariff, Section II - Other Products, annexed to the GATT 1994. In cases where the import price for these products exceeds ten (10) US dollars, the MFN tariff will be as provided in Decree 4927 of 2011 or any amending decree, containing the Customs Tariff of the Republic of Colombia, and as such neither of the two mentioned levies will exceed Colombia's bound tariffs.

As regards imports of products classified under tariff headings 6401, 6402, 6403, 6404 and 6405 of the Customs Tariff of the Republic of Colombia, an MFN tariff of 35% *ad valorem* is applied when the declared f.o.b. import price is less than or equal to prices that vary between six (6) US dollars and ten (10) US dollars per pair, in accordance with the said Decree. For imports of products classified under subheading 6406.10.00.00, an MFN tariff of 35% *ad valorem* will be applied when the declared f.o.b. price is less than or equal to five (5) US dollars per gross kilogram. These tariffs are equal to the tariff bound in Colombia's Schedule LXXVI, Part I - Most-Favoured-Nation Tariff, Section II - Other Products, annexed to the GATT 1994. In cases where the import price for these products exceeds the above-mentioned prices, the MFN tariff will be as provided in Decree 4927 of 2011 or any amending decree, and as such neither of the two mentioned levies will exceed Colombia's bound tariffs.

For imports of the other products that were covered by the compound tariffs introduced by Decree 456 of 2014, including the products classified in Chapter 63 of the Customs Tariff and those classified under the headings of Chapter 64 not mentioned above, the applicable tariff, as from 2 November, is the MFN *ad valorem* tariff set forth in Decree 4927 of 2011 or any amending decree, and as such it will not exceed Colombia's bound tariffs.

As indicated in document WT/DS461/17, Colombia was obliged to request the establishment of a panel because Panama requested authorization to suspend the application to Colombia of concessions or other obligations without first referring the matter to the panel under Article 21.5. Moreover, on several occasions Colombia urged Panama to conclude a sequencing agreement, something which Panama has thus far refused to do.

Colombia regrets that at the DSB meeting of 20 February 2017, Panama opposed the establishment of a panel under Article 21.5 of the DSU, arguing that there had been no consultations. Certain Members described Panama's opposition as inappropriate in that it prevented the establishment of a panel in these proceedings based on the premise that there had been no request for consultations by Colombia. Other Members qualified it as a procedural remedy that was contrary to Article 3.10 of the DSU in that it reflected a contentious strategy that sought

to block Colombia's right to demonstrate its compliance with the recommendations and rulings of the DSB.[1]

As already mentioned, this request is without prejudice to Colombia's position that the holding of consultations prior to the establishment of a panel under Article 21.5 of the DSU is not a prerequisite when, as in this case, the complainant refuses to initiate proceedings under that provision in circumstances in which there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings. It is also without prejudice to Colombia's position that even if they were necessary, Colombia and Panama have held extensive consultations on this matter and on Decree 1744.[2]

I look forward to your reply to this request for consultation. I propose that they be held in Geneva, Switzerland, on 1, 2 or 3 March 2017, on the WTO premises.

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[1] See the minutes of the DSB meeting of 20 February 2017.

[2] For example, the meeting between the Vice Ministers of Trade of Colombia and Panama held in Bogota on 8 February 2017, and the constant telephone communication at that level between the capitals. Furthermore, on 9 February 2017, the Ministers of Foreign Affairs and the Ministers of Trade of the two countries met in Cartagena to hold consultations on this matter. Finally, on 22 February 2017 Colombia formally submitted to Panama a proposal for a sequencing agreement, recognizing the specificities of the current situation in the dispute, a proposal to which Panama has not responded.