

COLOMBIA – INDICATIVE PRICES AND RESTRICTIONS ON PORTS OF ENTRY

(WT/DS366)

**Oral Statement of the United States
at the Third-Party Session of the First Substantive Meeting
of the Panel with the Parties**

May 22, 2008

Mr. Chairman, members of the Panel:

1. It is a pleasure to appear before you today to present the views of the United States concerning certain issues in this dispute. We would like to make a few brief points on Panama's claims related to Colombia's use of indicative prices and the proper legal interpretation of certain provisions of the *Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994* (the "Customs Valuation Agreement"). We recognize that many of the issues in this dispute are factual in nature, and from the outset we would like to emphasize that the United States takes no position as to whether Colombia has or has not complied with its obligations under the Customs Valuation Agreement.
2. This dispute raises an important issue concerning the proper application of the Customs Valuation Agreement. The provisions of the Agreement addressed by Panama have not previously been analyzed by a WTO dispute settlement panel nor by the Appellate Body, and the issue of indicative prices has not been a subject of a panel or Appellate Body report.
3. Reports of widespread use by WTO Members of indicative prices (or database prices) in connection with customs valuation are troubling and a source of serious concern. Reliance on

indicative prices or database prices as a substitute for following the customs valuation process prescribed by the Customs Valuation Agreement is inconsistent with the Agreement.

4. The United States welcomes the general agreement of Panama and Colombia in this dispute on the legal interpretation of the Customs Valuation Agreement. In particular, Panama and Colombia both note that “[t]he primary basis for customs value under this Agreement is ‘transaction value’ as defined in Article 1.”¹ Article 1 of the Agreement provides that “[t]he customs value of imported goods shall be the transaction value, that is the price actually paid or payable when sold for export to the country of importation” except under certain specified conditions. Where customs value cannot be determined under Article 1, Articles 2 through 7 of the Customs Valuation Agreement establish a hierarchical process for determining customs value on the basis of alternative means, including the transaction value of identical or similar goods (Articles 2 and 3), the unit price of identical or similar goods sold in the country of importation (Article 5), a computed price (Article 6), or other “reasonable means” (Article 7).²

5. Using an indicative price to determine customs value is not permitted under Articles 1 through 6 of the Customs Valuation Agreement. Each of these articles prescribes a specific methodology for determining customs value that excludes the possibility of using indicative prices. Only where customs value cannot be determined under Articles 1 through 6 may customs value be determined, under Article 7, “using reasonable means consistent with the principles and

¹ Customs Valuation Agreement, *General Introductory Commentary*, para. 1 (first sentence); First Written Submission of Panama, para. 90; First Written Submission of Colombia, para. 69.

² See, e.g., Customs Valuation Agreement, *General Introductory Commentary*, paras. 2-4.

general provisions of [the Customs Valuation Agreement] and of Article VII of GATT 1994 and on the basis of data available in the country of importation.”³

6. Article 7 goes on to prohibit certain practices, for example, the use of minimum customs values (Article 7.2(f)) and the use of arbitrary or fictitious values (Article 7.2(g)). If an indicative price is used to determine customs value, and it is impossible for imports to clear customs at any value lower than the indicative price, this would constitute a minimum value inconsistent with Article 7.2(f). If an indicative price is based on data insufficient to determine customs value under Articles 2 through 6 of the Customs Valuation Agreement, this would strongly suggest that the indicative price is arbitrary or fictitious, which would be inconsistent with Article 7.2(g).

7. While it is not necessary for the Panel to determine in this dispute the precise scope of what would be permissible under Article 7 of the Customs Valuation Agreement, in any event, the United States recalls that Colombia appears to agree with Panama that, as a general legal matter, substituting an indicative price for declared value to determine customs value would be inconsistent with Articles 1 through 7 of the Customs Valuation Agreement.⁴

8. In this dispute, Panama and Colombia differ primarily on the nature and extent of Colombia’s use of indicative prices, with Panama alleging that Colombia uses indicative prices to determine customs value and Colombia responding that it does not use indicative prices for that purpose. This is a factual matter on which the United States does not take a position. The United States looks forward to the Panel’s examination of these factual questions and to the Panel’s report.

³ Customs Valuation Agreement, Art. 7.1.

⁴ See First Written Submission of Colombia, paras. 68-74.

9. Mr. Chairman, I wanted to add one thought briefly on an issue related to DSU Article 6.2.

As I understood a comment by the EC in its third-party oral statement, the EC explained that it would be sufficient to satisfy DSU Article 6.2 to say in a panel request that a measure is challenged “as such” and “as applied,” without any further reference to those applications of the measure on which findings are sought. A preliminary reaction would be that the United States does not agree with the approach set out by the EC

10. Specifically, it is not clear that measures that are applications of another measure would themselves, if not identified in the panel request at all, be measures within the Panel’s terms of reference and therefore susceptible to findings and possible recommendations under DSU Article 19.1 by the Panel. We therefore invite the Panel to consider this issue further.

11. Mr. Chairman, members of the Panel, this concludes the U.S. oral statement. Thank you for your attention.