

**RESOLUTION 083 OF 2018
EXPORT SUBSIDIES AND FISCAL BENEFITS FOR
UNDERTAKINGS ESTABLISHED IN DESIGNATED REGIONS OF
COLOMBIA**

**September 25, 2022
Athens, Greece**

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EXECUTIVE SUMMARY

Resolution 083 of 2018 was established to help implement the rural reform that was established in Colombia with the Peace Agreement. It seeks to authorize a mechanism that establishes export subsidies and fiscal benefits for undertakings established in designated regions of Colombia. The Resolution does not advance the subsidy to all milk producers in Colombia but only those producers in the Areas Most Affected by the Armed Conflict (“ZOMAC” by its acronym in Spanish). From the reading of the regulation, this measure allows the government to set a competitive export price for milk produced in the ZOMAC area, thereby defeating free market competition. It further confers a benefit because the ZOMAC Area producers are in a more advantageous position in the market than other market players. We argue that, considering the design and structure of the measure, the resolution does not intend to cause serious prejudice to the interests of other WTO members. Any supplier who exports from the ZOMAC Area will benefit from the measure without discrimination. Further, the measure does not impede any other producer's exportation or importation of milk.

However, we argue that is likely to qualify as a specific subsidy under Article 2 of the Subsidies and Countervailing Measures (SCM) Agreement as it is specific to a geographical location and a specific industry within Colombia. We also argue that it is a prohibited subsidy under Article 3 of the SCM because it is based on export performance. According to the regulation, it is only available to producers who produce milk in the ZOMAC area for export. WTO members may challenge this measure because its application is contrary to Colombia's WTO obligations by favoring certain Colombian nationals. Many of these obligations are contained within various provisions in the General Agreement on Tariffs and Trade (GATT), the WTO's foundational agreement governing parties' international trade in goods.

The measure covers raw milk that is to be exported from Colombia and supplied by the municipalities that are part of the ZOMAC areas, while products such as milk powder, UHT milk and cheese originating from other member states do not benefit. Under the GATT, particularly Articles III and XVI, there would likely be no violation because the products are considered like products¹.

Also, Colombia can likely defend its measure under Article XX(a) on public morality grounds, because it sought to reintroduce the farmers to legitimate and legal farming to discourage the illegal drug trade. Overall, it tried to ensure that the farmers in the ZOMAC area became integrated into the global economy. Alternatively, it can argue a defense under Article XXI national security exception because the measure was necessary to maintain the peace in the ZOMAC areas.

We conclude that the measure is more likely to be a prohibited subsidy. Additionally, we also conclude that this can be potentially justified by the available exceptions of Article XX(a), if sufficient evidence is presented, and Article XXI of the GATT.

INTRODUCTION

Resolution 083 of 2018, was established to contribute to the implementation of the rural reform that was established in Colombia with the Peace Agreement.² The Colombian peace process was a way to ensure that the people of Colombia got back their economic freedom.³

¹ Final Determination, Colombia Safeguards investigations Concerning Powdered, Milk Originating from the US-SB-249-0129, Pg. 27

² Preamble, Colombia Resolution 083 of 2018. (English translated version) “The municipalities included within the Zones Most Affected by the Conflict (ZOMAC) will be object of prioritization for the implementation of programs and policies that allow the structural transformation of the countryside and, consequently, the consolidation of a stable and lasting peace.”

The armed conflict in Colombia, which lasted more than 50 years, beginning - by some measures - in 1964 with the creation of the Revolutionary Armed Forces of Colombia (Fuerzas Armadas Revolucionarias de Colombia), the largest of the left-wing guerrilla groups operating in the country, gave rise to nearly 6.9 million internally displaced people, 87 percent of whom came from the countryside. The municipalities most affected saw 3 million hectares of forest lost, which account for 87 percent of the areas where coca plants have been grown in the country over the past decades.⁴

Colombia introduced a subsidy, in 2018 through this regulation, to ensure that people in the ZOMAC areas integrated back into Colombia's economy. A cessation of the conflict in the ZOMAC municipalities by the introduction of subsidies would provide the region with new and greater opportunities for integration into the global economy. Ideally, these subsidies could improve the situation of producers by sustainably including them over time into production chains that create added value, thus reducing the prevalent informality, which would justify the prioritization of implementing the mechanism described herein.

Specifically, this public policy establishes export subsidies and fiscal benefits for undertakings established in designated regions of Colombia, Areas Most Affected by the Armed Conflict ("ZOMAC" by its acronym in Spanish) and aims to ensure that these ZOMAC can be reintroduced back into the agricultural industry. It is estimated that in Colombia there are about 380,000 milk-producing units, which create approximately 600,000 jobs. The differential value per liter of milk between the domestic market paid to the supplier (\$1052) and the export price would be \$186. In the informal or illegal channel that predominates in ZOMAC, the price may be between \$500 and \$650 per liter.⁵ These figures are illustrative of the economic value the measure would bring to the ZOMAC area milk producers. The formal channel would offer more value to the milk producers necessary for economic development and reintegration.

The measure at issue establishes export subsidies and fiscal benefits for undertakings established in designated regions of Colombia. This measure is likely to be challenged under the WTO. However, we note that Colombia may be able to raise a defence under the national security and public morals exception.

1. WTO LAW ANALYSIS

1.1. Whether the measure is a subsidy according to the SCM Agreement

The measure likely constitutes a subsidy under Article 1.1 of the SCM Agreement because it generally confers a benefit. More specifically, it satisfies Article 1.1 (a) (2) & (b) of the SCM Agreement because it sets a competitive export price for milk produced in the ZOMAC area. This in effect confers an advantage to the milk producers because the government-set price of milk is not market driven. Colombia sets the competitive price that exporters must pay ZOMAC farmers. The system is calculated by a methodology established in the regulation. This section considers the possible violations of the SCM. A more in-depth analysis of possible violation of the GATT Article XVI is done further below in the GATT analysis.

A subsidy exists where a public body offers a financial contribution that confers a benefit that would otherwise not accrue in a free market.⁶ To determine whether the measure at issue is a

³ Bouvier, Virginia M. (2009). *Colombia: Building Peace in a Time of War*. Washington, D.C.: US Institute of Peace Press. p. 141.

⁴ Boosting agriculture as key to lasting peace in Colombia - <https://ciat.cgiar.org/annual-report-2017-2018/boosting-agriculture-as-key-to-lasting-peace-in-colombia/>

⁵ Annex, Colombia Regulation 083 of 2018

⁶ Appellate Body Report, *US – Carbon Steel (India)*, para. 4.8.

subsidy under Article 1 of the SCM Agreement, something of economic value needs to be transferred by a government to the advantage of a recipient.⁷

In this case, the government has set a competitive export price for milk⁸ produced in the ZOMAC area, thereby defeating the free market competition. It puts ZOMAC Area producers in a more advantageous position because the competitive price of milk for export ensures that the producers in the ZOMAC area earn more than they would otherwise in the normal market. The regulation defines the methodology to be used to calculate the Competitive Export Price. This considers variables such as the international price of milk powder, the TRM (the dollar to pesos exchange rate), the utilization factor (liters of raw milk needed to obtain a ton of milk powder), the cost of dry spraying the milk, and the cost of transportation⁹.

This calculation does not consider market dynamics present at the time in Colombia, such as the amounts of milk produced within the entire territory of Colombia, the market demand in Colombia and the amount of milk exported. It focuses only on what is the best possible price for milk produced in the ZOMAC area. As it will be further discussed below, the measure is likely to be considered a subsidy under the SCM agreement.

1.1.1. Whether the measure violates Article 2 of the SCM

We argue that this measure is likely to be a specific subsidy.

The regulation sets out that for a producer to qualify for the subsidy, they must be situated in the ZOMAC area of Colombia.¹⁰ Article 2.2 of the SCM provides that “a subsidy which is limited to certain enterprises located within a designated geographical region within the jurisdiction of the granting authority shall be specific.”

An Article 2 analysis should be “to determine whether the subsidy that was found to exist pursuant to Article 1.1 is specific.”¹¹ In particular, the Appellate Body in *US – Countervailing Measures (China)* stated, “the analysis of specificity focuses on the question of whether access to a subsidy is limited to a particular class of recipients.”¹² In *US – Anti-Dumping and Countervailing Duties (China)*, the Panel took the view that “any identified tract of land within the jurisdiction of a granting authority” may qualify as a “geographic region.”¹³

The regulation also specifies that the ZOMAC has two demarcations-- region 1 and region 2. Producers only qualify for the subsidy if they meet the set amounts of milk per day as outlined for each region. To qualify for the subsidy, producers in region 1 must produce a daily volume of more than 200 liters of milk, and region 2 producers must produce more than 100 liters daily¹⁴.

1.1.2. Whether the measure violates Article 3 of the SCM

The measure likely confers a benefit because it sets a price for milk that is not related to the market price. It is specific because it only applies to producers from the 2 regions of the ZOMAC area. Because it is only granted to certain producers, it could be prohibited under Article 3. The measure at issue depends on the raw milk being exported and is set out in the regulation in clear terms.¹⁵ The competitive export price is only granted to producers who

⁷ Appellate Body Report, *US – Softwood Lumber IV*, para. 51

⁸ Preamble, Colombia Resolution 083 of 2018, page 3

⁹ *Ibid*, page 3

¹⁰ Article 3(1), Colombia Regulation 083 of 2018

¹¹ Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.164.

¹² Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.169.

¹³ Panel Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 9.144.

¹⁴ *Ibid*, Regulation 083 of 2018

¹⁵ Appellate Body Report, *Canada – Autos*, para. 100.

produce milk for export in the ZOMAC Area in Colombia. This price ensures that more milk is sold and is more competitive than milk from other parts of Colombia. We conclude that there is a possible violation of Articles 1, 2 and 3 of the SCM Agreement.

In addition to the arguments above, we consider that, in the alternative, there is potential violation of the GATT. This memo also considers possible arguments that could be made under the GATT.

1.2. Whether the Measure Violates Obligations Under GATT

1.2.1. Violation of Article III:4 of the GATT 1994

Article III of the GATT 1994 provides for National Treatment on Internal Taxation and Regulation. It generally provides that non-discrimination of products imported into a member state should be treated equally to that of the other domestic products. National treatment is one of the fundamental principles of the trading system in that no member state should introduce laws, regulations, or rules that would end up favouring domestic producers or traders.

In Article III:4, member states are specifically obligated not to tip the scales of trade by introducing inequality in the marketplace through internal regulations that would affect the sale, purchase, transportation, distribution, or use of products. However, the only exception that the article provides is the allowance of internal transportation charges which basically affects the entire state's economic operation rather than the transportation of a particular product, hence favourable treatment.

Resolution 083 provides that favourable treatment will be accorded to raw milk suppliers in the ZOMAC areas i.e., purchases of volumes of milk for export are made in accordance with the methodology for defining a competitive export price which is adopted in the Resolution 083.

In determining whether there is like products treatment we will be evaluating various questions below:

- i) If the products in question may be considered as like products and therefore the favourable treatment being offered would affect the imported powdered milk.
- ii) If Resolution 083 is a regulation affecting sale of milk from the ZOMAC area; or
- iii) Whether the imported powdered milk is accorded less favorable treatment than that accorded to like domestic raw milk, produced in the ZOMAC areas.

1.2.1.1. The dairy products in question may be considered like products

In analyzing the above, we look at the national treatment characterization to establish whether the products in question are “like.” The good in question is raw milk that is to be exported from Colombia. The consideration provided by the panel is that under this test, we must consider the competitive relationship between products. In the analysis of the likeness of the products, we will look at whether other similar products imported into Colombia from other member states are like, using the test developed in Japan — Alcoholic Beverages II.

The raw milk to be supplied is in the municipalities that are part of the Areas Most Affected by the Conflict (ZOMAC). The 083 regulation does not apply to rest of the areas from Colombia. Article 3.1 of the 083 regulation provides that the benefit will only be accorded to raw milk suppliers in ZOMAC areas. Products originating from other member states, such as the USA,

are long-life products such as milk powder, ultra-high temperature (UHT) milk and cheese. Milk powder has been the main imported product originating from the United States.

Likely, the favorable treatment is in breach of Article III of the GATT. Article III:4 of the GATT provides that the products of the territory of any member imported into the territory of any other member shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution, or use.

At first glance, based on the harmonized system, powdered milk and UHT fluid milk have a different tariff classification.¹⁶ Even if the products are considered like, the benefit of the regulation is accorded to certain parts of Colombia (ZOMAC areas) and not the entire member state as provided.

However, upon further evaluation, even if the two products (one powdered and one liquid) do not have the same physical features, we can conclude that the products are used by dairy processors for similar purposes. Generally, fresh milk is known to contain more B5 and B12 vitamins, phosphorus, and selenium in comparison to powdered milk, which helps maintain the health of the nervous system and plays a key role in enzyme function. UHT milk is milk that has been processed at ultra-high temperature (UHT). The sterilization is made through rapid heating of milk to a temperature of at least 135°C, keeping it there for a few seconds, and then quickly cooling it down to ambient temperature.

However, the end users can substitute the products should one not be found readily available because of its daily use. Secondly, in terms of functional likeness (end-uses), it is possible that the raw milk, milk powder and UHT milk do in fact perform the same function. They are all milk products, share some of the same properties, and could be used for similar end uses.

Rehydrated powder could be used similarly for liquid or UHT milk. The tastes and habits of the dairy processors' perception of the two products, once in liquid state, are generally similar.¹⁷

Therefore, for the purposes of Article III:4 of the GATT 1994, we argue that domestic raw milk and imported powdered milk could be considered "like products."

1.2.1.2. If Resolution 083 is a regulation affecting sale of milk from the ZOMAC Area

Our second point of analysis of Resolution 083 is to evaluate whether the regulation has affected the internal sale of milk in dairy and milk products in the processing industry. Laws or regulations are accepted as legally enforceable rules of conduct under the domestic legal system of WTO Members, as per the Panel in India – Solar Cells.

The Ministry of Agriculture and Rural Development and the Minister of Commerce, Industry and Tourism issued the regulation to incentivize the export of milk and milk products. Purchases of volumes of milk for export may be made in accordance with the methodology for defining a competitive export price, which is adopted in the resolution under Article 2 of the Regulation. Further, the department established the conditions for the promotion of exports of milk and milk products from the Areas Most Affected by the Conflict.

In analyzing whether the introduction of the regulation has affected the sales in the market, it would be important to understand the statistics that the regulation proposed to promote.

¹⁶ Tariff Classification Ruling (May 6, 2004), https://www.customsmobile.com/rulings/docview?doc_id=NY+K85307.

¹⁷ Final Determination, Colombia Safeguards investigations Concerning Powdered, Milk Originating from the US-SB-249-0129, Pg. 27

According to figures from the last 10 years of the National Agricultural Survey, it was estimated that in Colombia there are about 380,000 milk-producing units, which create approximately 600,000 jobs. Also, based on production figures generated by DANE, the primary sector of the dairy chain contributes about 0.83% of domestic GDP, while processing and marketing creates approximately 200,000 jobs and contributes 0.4 % of domestic GDP.

The regulation further provides that the imports of milk powder have been increasing since 2014 and that the most notable increase occurred in 2016, compared to 2015, when an increase of 88% was recorded, with milk powder being the main imported product originating from the United States. It is clear that the intention of the regulation is to directly reduce competition from other member states.

The idea of whether a regulation is “affecting” trade is evaluated in *China – Publications and Audiovisual Products*, where the Panel stated that the scope of “affecting” covers not only measures that directly regulates the sale of domestic and imported like products, but also measures that create incentives or disincentives with respect to the sale. In this case, the regulation’s intent is to create an incentive to the ZOMAC milk producers and disincentivize importers of milk powders, resulting in the price of raw milk being a consistent daily rate.

Additionally, the free trade agreement between Colombia and the US in 2012 led to the increase of US imports of powdered milk and as a result one may argue that this was one of the reasons that Colombia intended to introduce safeguards to protect products that are considered like in the market.¹⁸

Therefore, we conclude that Resolution 083 is a directive that affects the internal sale of milk products in the dairy processing market.

1.2.1.3. Whether imported powdered milk is accorded less favorable treatment than that accorded to like domestic raw milk produced in the ZOMAC areas.

The third and final analysis is to determine whether less favorable treatment was accorded to imported powdered milk than to like domestic raw milk produced in the ZOMAC areas.

Regulation 083, as mentioned above, established a methodology for defining a competitive export price,¹⁹ which is adopted in the resolution under Article 2. Further, the Resolution based its analysis on the milk-producing units, job creation and the location of the ZOMAC farmers. The resolution provides that only farmers from the ZOMAC areas supplying raw milk can benefit from the regulation. According to the Appellate Body in *Thailand – Cigarettes (Philippines)*, there should be a genuine relationship between the contested measure and its adverse effects on competitive opportunities. Further, the Panel in *Japan – Film* stated that the effective equality of competitive condition is a benchmark for establishing a “no less favorable treatment.”²⁰

As a result of this structure, the impact of Resolution 083 is that milk producers from the ZOMAC area can have reliable prices for their milk that is predictable, and any changes would be foreseeable despite price changes in other areas of the country or international market. In the case of imported powdered milk, any changes in international market prices or domestic

¹⁸ Bill Tomson, *Colombia Dairy Investigations has US Dairy Exporters concerned*, <<https://www.agripulse.com/articles/16420-colombia-trade-investigation-has-us-dairy-exporters-concerned>> (Accessed 19/9/2022)

¹⁹ **Competitive Export Price (‘PCE’)**. The price in Colombian pesos (‘\$COP’) that the purchasing agent will pay to the supplier of raw milk per exported liter or its equivalent in dairy products that are to be exported. The foregoing is based on the formula established in the Methodology Annex and in accordance with the information published every two weeks by the Price Monitoring Unit of the Ministry of Agriculture and Rural Development.

²⁰ Panel Report, *Japan — Measures Affecting Consumer Photographic Film and Paper*, WT/DS44/5, para 10.379.

changes which in this case is considered like products, will greatly affect their competitive nature in the market. This means that the products do not have equal opportunities for competition.

Therefore, raw milk supplied from the ZOMAC areas are accorded beneficial treatment and will cause the price of imported powdered milk to be significantly higher, essentially discouraging it from the market. Hence, the imported raw milk is accorded less favorable treatment than that accorded to like domestic raw milk from ZOMAC areas.

In conclusion, Resolution 083 is a regulation affecting the international sale of like raw milk which is accorded less favorable treatment. It is in violation of Article III:4 of the GATT 1994.

1.2.2. The Measure is inconsistent with Article XVI of the GATT

The subsidy introduced by Colombia aims to ensure that people in the areas most affected by the Armed Conflict are reintroduced back to the agricultural industry by creating approximately 600,000 jobs. Colombia's intention is to put a stop to the war by improving the economic situation of the people in the ZOMAC area and incentivizing them to leave the illegal drug business. Colombia likely does not intend to cause serious prejudice to the interests of any other member both under the SCM Agreement and under the GATT.²¹

The general criteria for the determination of the existence of a subsidy have been discussed in the Committee on Subsidies and Countervailing Measures and were discussed in the Committee on Trade in Agriculture. Article XVI provides that members ought to notify other members should they maintain any subsidy including any form of income or price support, which operates directly or indirectly to increase exports of any product from which it is determined that there is serious prejudice to the interests of any other members. Accordingly, members should seek to avoid the use of subsidies on the export of primary products but may do so if it is not applied in a manner which the member results in having more than an equitable share of world export trade in that product.

Additionally, interpretative Note 2 Ad paragraph 3 of Article XVI corresponds to paragraph 1 of Article 27 of the Havana Charter, which considers credit programmes to be subsidies and need to be notified under Article XVI:1 of the General Agreement. Through resolution 083, Colombia announces its intention and provides a detailed analysis through its provisions on how the measure will be implemented without intention to increase its equitable share of world export trade in that product.

Article XVI provides that members should seek to avoid the use of subsidies on the export of primary products – in this case, raw milk suppliers from ZOMAC. If, however, a member grants, directly or indirectly, any form of subsidy which operates to increase the export of any primary product from its territory, such subsidy should not be applied in a manner which results in that member having more than an equitable share of world export trade in that product, taking into account the shares of the member in such trade in the product over a certain period, and any special factors which may affect such trade.

Further to our analysis above, the Panel in US- Upland Cotton found that because the term “serious prejudice” is used in Articles 5(c) and 6.3(c) of the SCM Agreement in the same sense as in Article XVI:1 of GATT 1994, its findings of serious prejudice under SCM Articles 5(c)/6.3(c) would also be conclusive for a finding of serious prejudice under GATT Article XVI:1.

²¹ DS267: United States — Subsidies on Upland Cotton

The subsidy introduced by Colombia aims to ensure that people in the ZOMAC areas integrate back into society's economy. The differentiated effect caused by the armed conflict suffered by the ZOMAC municipalities implies that the cessation of the conflict by introducing the subsidies will provide them with new and greater opportunities for integration into the global economy. These can improve the situation of producers by including them in a sustainable manner over time into production chains that create added value, thus reducing the prevalent informality, because only 48% of the milk in Colombia is collected and sold through the formal market channels,²² which justifies the prioritization of implementing the mechanism described herein.

1.2.3. Recourse to Article XX and XXI of the GATT for SCM and GATT Violations.

We argue that measures taken within a regulator's mandate, in a non-discriminatory manner, motivated by increasing awareness of the existential dangers are a valid exercise of the State's regulatory or 'police' powers and does not constitute violations under the WTO agreements.²³ If the measure is found to be inconsistent with the GATT and the SCM, the measure is likely to fall under GATT Articles XXI and XX (a) exception, which we argue in the alternative to Article XXI.

The preambular paragraph of article XX indicates the intention of members to allow a big margin of regulatory control as they implement the obligations under the covered agreements. This allows members to depart from their obligations if they have legitimate reasons.²⁴

The overarching reason is that Colombia has a right to regulate, and this right exists within the framework of the WTO legal system. This exception is inherently available to the state and not a right that should emanate from the provisions of a treaty.²⁵

Article 32.1 of the SCM Agreement underlines that '*no specific action against a subsidy of another Member can be taken except in accordance with the provisions of the GATT 1994, as interpreted by this Agreement.*' Accordingly, the SCM Agreement 'interprets' or elaborates on the provisions of the GATT 1994. The footnote to this provision specifies that 'this paragraph is not intended to preclude action under other relevant provisions of GATT 1994, where appropriate. This reaffirms the right of WTO Members to take actions under other relevant provisions of the GATT 1994, including Article XX on general exceptions.'²⁶

1.2.3.1. The Measure's objectives are justified under Article XXI of the GATT

In Colombia almost a quarter of a million citizens have been killed over the last 54 years, most of them civilians, in a war of insurgents. Colombia has been fighting a war with two leftist rebel groups since they were officially founded in 1964, after a long period of civil war known as La Violencia. The FARC, or Revolutionary Armed Forces of Colombia, and ELN, or National Liberation Army, also battled paramilitary groups, leaving civilians caught in the middle. The measures introduced by Colombia ensure that the people trapped in this war find alternative economic activities to help facilitate an end to the war. While the WTO encourages trade liberalization, an Article XXI exception allows countries to protect their security interests. Arguably, Colombia's actions could be justified under that exception, because it is attempting to end the war and prevent further violence that could harm its civilians.²⁷

²² Colombia Resolution 083 of 2018

²³ *Cbentura Corporation v Canada*, Award, Ad hoc — UNCITRAL Arbitration Rules, IIC 451, 266.

²⁴ Appellate Body Report, *US – Gasoline*, p. 24.

²⁵ Appellate Body Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, paragraph 222.

²⁶ Amicus Curiae Submissions, Panel Stage- *Canada – Renewable Energy*,

²⁷ Reuters, Helen Murphey, Colombia report reveals deadly extent of five-decade conflict, <https://www.reuters.com/article/colombia-conflict-idINDEE96N0HM20130724>, accessed on 18th September 2022

Article XXI(b)(iii) of the GATT provides that “*nothing in this Agreement shall be construed to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests taken in time of war or other emergency in international relations.*” The interpretation of this provision by the panel is that Article XXI applied to any action which the member taking it considered necessary for the protection of its essential security interests and that the Panel, both by the terms of Article XXI and by its mandate.

The measure discriminates unjustifiably if it does so without any rational connection between the reasons given for the discriminatory treatment and the objective of the measure. Colombia’s stated objective with this measure according to its preamble is that Article 64 of the Political Constitution establishes that it is a duty of the State “to improve the income and the quality of life of farmers deteriorated due to the armed conflict in the ZOMAC municipalities.” The application of the subsidy is necessary to maintain the livelihood of the people in the ZOMAC municipalities and any discrimination could therefore be justified.

i) Protection of its Essential Security Interest Taken in Time of War

Generally, Members are given discretion to take security measures, under Article XXI(b) of the GATT. This exception allows a member to introduce any measure that secures their interests. The discussions on national security can be evaluated to understand how the provision on security exceptions should be interpreted (the interpretation of the provision). One way to determine whether the exception can be invoked is through an objective assessment by a WTO panel in the Russian Transit case.²⁸ In the Russian Transit case, the Panel found that the measures at issue fall under subparagraph (iii) of Article XXI of the GATT because of the international situation between Russia and Ukraine. The Panel in the Russia-Traffic and Transport case concluded that Russia’s actions were objectively taken in time of an “emergency in international relations and that that the exception applies to international or non-international conflict (consistent with Geneva Convention.”

As for the discretion accorded to a member under the chapeau, the Panel found that “essential security interests” could be generally understood as referring to essential functions of the state. The specific interests at issue will depend on the situation faced by a country. Previous panels i.e., in EC – Bananas III²⁹ and the Appellate Body have stated that a general object and purpose of the WTO Agreement, as well as of the GATT 1994, is to promote the security and predictability of the reciprocal and mutually advantageous arrangements and the substantial reduction of tariffs and other barriers to trade.

In Colombia, the application of the price setting measure was in the context of the decades-long war between insurgents within its state. In Colombia’s case, even if the imposed measure is contrary to its obligations under the GATT, without the imposition of the subsidy, the conflict-stricken areas would continue being in a dire state for an undefined period.

Since WTO Members must apply Article XXI(b)(iii) in good faith, Colombia has demonstrated that the objective of imposing the subsidy aims to ensure that people in the areas most affected by the Armed Conflict are reintroduced back to the agricultural industry by creating approximately 600,000 jobs. Colombia does not intend to cause serious prejudice to the interests of any other member both under the SCM Agreement and under the GATT.

In evaluating the purpose of the regulation, the Government of Colombia went ahead to introduce a plan through Article 1.1.4 of Decree 1625 of 2016 stating that the Areas Most Affected by the Armed Conflict (ZOMAC) are the set of municipalities that are most affected by the Armed Conflict, in accordance with the provisions of section number 6 of Article 236

²⁸ DS512: Russia — Measures Concerning Traffic in Transit

²⁹ EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US), para. 433

of Law 1819 of 2016. In the regulation, it was determined that it was necessary for the stabilization of the peace in Colombia.

In Russia — Measures Concerning Traffic in Transit making this analysis, the Panel emphasized that it was for the respondent to determine the "necessity" of the measures for the protection of its essential security interests. This conclusion followed by logical necessity for the Panel if the adjectival clause "which it considers" was to be given legal effect.

Therefore, the exemption is justified in that Colombia's intention of introducing the Regulation was for purposes of national security.

ii) *Alternatively, any discrimination is justified by the measure's objectives under Article XX of the GATT*

Article XX is an exception that countries can argue for certain regulations that protect the health and safety of plants, humans, animals, and public morality. We argue that the exception is available to violations of both the SCM and the GATT.

1.2.4. Justified under Article XX(a)

We hold that the measures taken by Colombia were '*necessary to protect public morals*,'³⁰ because it seeks to reintroduce the ZOMAC area, which now hosts a milk-producing industry, into the national and international legal market. Further, it is a replacement of illegal substance farming with legal trade.

a. Definition of Public Morals

We argue that Article XX(a) exception on public morals is a possible defense because members have a broad scope within which to define and apply for themselves the concept of public morals.³¹ This is rooted in the fact that each member has their own systems and values. Colombia is more likely to choose to argue the public morals exception because it gives them a broader scope and more deference.

Public morals denote "standards of right and wrong conduct maintained by or on behalf of a community or nation."³² Colombia's history fits within the context of Article XX(a). The measure ensures that the communities that were long outside the mainstream market are integrated to create a more cohesive and prosperous country. It is an intervention by the government to ensure the gains of the peace process are not eroded by the lack of access to resources by the farmers which might lead to a relapse to the pre-armed conflict scenario. This measure provides an incentive for exportation of milk and milk products from the ZOMAC Area and discourages illegal markets and drugs.³³ The public morality exception is an important justification in WTO law. It entrenches the right of the state to regulate. It protects the sovereignty of member states in the multilateral trading system. It allows members to define and apply in good faith, measures necessary to protect essential moral interests of the society.³⁴ The scope of the exception is extremely broad; however, the GATT has important built-in protection mechanisms that ensure the exception is not abused. This includes the requirement that the measure is not discriminatory and a restriction on international trade.³⁵

³⁰ GATT, Article XX(a).

³¹ Appellate Body Reports, *EC – Seal Products*, para. 5.199.

³² *Ibid*, *EC- Seal Products*, para 5.199.

³³ Article 4(1), Regulation 083 of 2018.

³⁴ Pelin Serpin, *The Public Morals Exception After the WTO Seal Products Dispute: Has The Exception Swallowed The Rules?* Columbia Business Law Review, 2016.

³⁵ Chapeau, Article XX, GATT.

b. The Test of Article XX (a)

For the measure to pass the test in Article XX(a) of the GATT, Colombia will need to demonstrate that the measure is necessary to protect public morals.³⁶ As a requirement in case law, the measure's content, structure, and expected operation is indeed to protect public morals.³⁷ Further Colombia must demonstrate that the measure is necessary and least restrictive to trade.

There are several reasons why this exemption might apply to the measure at issue. This measure is specific to the ZOMAC area and designed to help integrate farmers back into the mainstream economy by discouraging the farming of illegal substances. The incentivized production of milk through government price setting ensures that Colombia can recover from its difficult past. The subsidy is an incentive for more production of milk and milk products for export. The competitive price is set to ensure that producers who qualify and are granted the subsidy can produce and export more milk. The subsidy may be the most effective way to help encourage the production of milk to replace the old systems and farming products which are illegal and injurious to the community and members of the WTO. Illegal drug crop farming does not only harm Colombia, but also perpetuates the international drug market which is very difficult for Colombia to attempt to control.

Panels have also recognized that measures targeting money laundering, bridging the digital divide, or promoting social inclusion and fraud prevention were measures related to public morals. In the Panel's view, a measure may be found to pursue a public morals objective even if it has economic aspects.³⁸

The measure in issue is likely necessary to protect public morals because it would allow producers of milk in the ZOMAC Area to earn more from participating in the legitimate dairy market. Further, the producers who already have farming skills will have a source of livelihood, defraying the possibility of going back to the growing and sale of illegal crops.

The Appellate Body has stated, “the 'necessity' analysis involves weighing and balancing the relative importance of the societal interest or value at stake, the degree of contribution, and the degree of trade restrictiveness to determine whether the measure is 'necessary' to protect public morals.”³⁹

The loss of the ZOMAC area from formal and legal trade of acceptable legal goods opens a window of opportunity to slide back the gains made by Colombia in the recent past. It is recovering from a devastating war, which involved farmers in the ZOMAC engaged in the farming of illegal substances, and this measure seeks to help alleviate the need to participate in illegal trade. The measure attempts to promote farmers utilizing their already-existing farming skills to contribute to the economic development and stability of Colombia.

The protection of public morals is a highly important governmental interest, due to Colombia's difficult history of armed conflict, and Colombia has had to adopt this regulation within its territory.⁴⁰ We contend, therefore, that the measure at issue serves very important societal interests that can be characterized as “vital and important in the highest degree”⁴¹ to Colombia. It is extremely important for measures to be taken to protect Colombia, especially the ZOMAC area from sliding back to the farming of illegal substances and armed conflict.

³⁶ Appellate Body Reports, *Colombia – Textiles*, paras. 5.67-5.70. See also Panel Report, *US – Tariff Measures*, para. 7.125.

³⁷ Appellate Body Reports, *Colombia – Textiles*, paras. 5.67-5.70.

³⁸ Panel Report, *US – Tariff Measures*, paras. 7.136-7.137.

³⁹ Appellate Body Reports, *EC – Seal Products*, para. 5.169.

⁴⁰ Appellate Body Report, *China – Publications and Audiovisual Products*, p 244.

⁴¹ Panel Report, *US – Gambling*, paras. 6.489 and 6.492.

However, the amount of milk produced in Colombia is dependent on several factors including weather seasons, which inform production. The measure at hand does not solve this market gap in Colombia. The measure only ensures that the communities in the ZOMAC area can access the raw milk market with ease. It in no way affects the markets of importers because the production is not sufficient to cover local consumption and only exporters benefit from this. Further, the measure does not stop other milk farmers from non-designated areas from accessing the milk market in and out of Colombia.

The resolution is likely, however, not to wholly meet the necessity criteria. It is important to note that the substitution of illegal crop farming has not been very successful in Colombia. The signing of the peace agreement with FARC, the largest criminal armed group in Colombia, has not ended the problem of illegal crop farming. Other armed groups are positioned to take over the land left by FARC. They have further intimidated participation of farmers in the crop replacement program. The remaining groups have control in several parts of Colombia that continues to plant, harvest, and sell cocaine in Europe, USA, and South America⁴².

It has been noted that Colombia's government lacks the capacity to confront the industry that is protected by illegal armed groups with huge financial resources to corrupt state officials.⁴³ This defense would likely fail on the necessity test, unless Colombia produces evidence that the measure significantly reduces coca plant cultivation.

CONCLUSION

Resolution 083 of 2018 likely constitutes a specific and prohibited subsidy that is in violation of the SCM Agreement.

We argue that the measure does not constitute arbitrary or unjustified discrimination because differentiation in treatment is based on a rationale legitimately connected with the policy of Article XX(a) and XXI exceptions. The differentiation in treatment here is not only based on where the farmers are located. The regulatory framework relates to Colombia's policy of ensuring that people in the ZOMAC area are introduced back to the community through economical means.

Further, the differentiation in treatment did not occur "between countries where the same conditions prevail" because the relevant conditions for this analysis, i.e., people in the ZOMAC region, are entirely different between Colombia and a prospective complainant.

The measure could satisfy the public morality exception, as it seeks to reintegrate the producers into the formal market and reduce the threat of rolling back the progress made in the fight against illegal crops. Further, it encourages participation of milk producers, in the ZOMAC area, in formal channels of collection and sale of milk and milk products. However, for the argument on public morality to be effective, Colombia must demonstrate with evidence that the measure indeed reduces the farming and sale of coca in Colombia.

Finally, the Resolution 083 of 2018 is not a disguised restriction on international trade because the measure is genuinely enacted to improve the livelihood of the people in the ZOMAC region and made no misrepresentation of its purpose to abuse the rules under Article XXI.

For the reasons stated above, we conclude the following:

⁴² Insight Crime Website, <https://insightcrime.org/news/analysis/colombia-new-crop-substitution-plan-facing-old-obstacles-report/>.

⁴³ Colombia Reports Website, <https://colombiareports.com/colombia-drug-trafficking/>.

- I. While Resolution 083 of 20 is inconsistent with SCM Agreement Articles 1, 2 and 3, it is likely to be justified under Articles XX(a) (public morals) and XXI (national security) of the GATT.
- II. Colombia's application of Resolution 083 of 2018 is likely consistent with Colombia's obligations under GATT Article XVI (subsidies).
- III. The measure's likely GATT violations could potentially be justified under Article XX(a) and XXI of the GATT.

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