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**COLOMBIA – ANTI-DUMPING DUTIES ON FROZEN FRIES  
FROM BELGIUM, GERMANY AND THE NETHERLANDS**

ARBITRATION UNDER ARTICLE 25 OF THE DSU

AWARD OF THE ARBITRATORS

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**ABBREVIATIONS USED IN THIS AWARD**

<b>Abbreviation</b>	<b>Description</b>
Agreed Procedures	Agreed Procedures for Arbitration under Article 25 of the DSU, notified by the parties to the Dispute Settlement Body on 20 April 2021 (WT/DS591/3/Rev.1)
Anti-Dumping Agreement	Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994
BCI	business confidential information
Customs Valuation Agreement	Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994
DIAN	National Directorate for Taxes and Customs
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
FEDEPAPA	Colombian Federation of Potato Producers
GATT 1994	General Agreement on Tariffs and Trade 1994
MINCIT	Colombia's Ministry of Trade, Industry and Tourism
MPIA	Multi-Party Interim Appeal Arbitration Arrangement
Panel Report	Final Panel Report as circulated to Members on 10 October 2022 in <i>Colombia – Anti-Dumping Duties on Frozen Fries from Belgium, Germany and the Netherlands</i> , attached to the Notification of an Appeal by Colombia under Article 25 of the DSU, paragraph 5 of the Agreed Procedures, and Rule 20 of the Working Procedures for Appellate Review (WT/DS591/7 and WT/DS591/7/Add.1)
Vienna Convention	Vienna Convention on the Law of Treaties, done at Vienna, 23 May 1969, UN Treaty Series, Vol. 1155, p. 331
WTO	World Trade Organization

**CASES CITED IN THIS AWARD**

Short title	Full case title and citation
<i>Argentina – Poultry Anti-Dumping Duties</i>	Panel Report, <i>Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil</i> , <a href="#">WT/DS241/R</a> , adopted 19 May 2003, DSR 2003:V, p. 1727
<i>Canada – Welded Pipe</i>	Panel Report, <i>Canada – Anti-Dumping Measures on Imports of Certain Carbon Steel Welded Pipe from the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu</i> , <a href="#">WT/DS482/R</a> and Add.1, adopted 25 January 2017, DSR 2017:I, p. 7
<i>China – HP-SSST (Japan) / China – HP-SSST (EU)</i>	Appellate Body Reports, <i>China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from Japan / China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from the European Union</i> , <a href="#">WT/DS454/AB/R</a> and Add.1 / <a href="#">WT/DS460/AB/R</a> and Add.1, adopted 28 October 2015, DSR 2015:IX, p. 4573
<i>China – Raw Materials</i>	Appellate Body Reports, <i>China – Measures Related to the Exportation of Various Raw Materials</i> , <a href="#">WT/DS394/AB/R</a> / <a href="#">WT/DS395/AB/R</a> / <a href="#">WT/DS398/AB/R</a> , adopted 22 February 2012, DSR 2012:VII, p. 3295
<i>Colombia – Anti-Dumping Duties on Frozen Fries from Belgium, Germany and the Netherlands</i>	Final Panel Report as circulated to Members on 10 October 2022 in <i>Colombia – Anti-Dumping Duties on Frozen Fries from Belgium, Germany and the Netherlands</i> , attached to the Notification of an Appeal by Colombia under Article 25 of the DSU, paragraph 5 of the Agreed Procedures, and Rule 20 of the Working Procedures for Appellate Review ( <a href="#">WT/DS591/7</a> and <a href="#">WT/DS591/7/Add.1</a> )
<i>Costa Rica – Avocados (Mexico)</i>	Panel Report, <i>Costa Rica – Measures Concerning the Importation of Fresh Avocados from Mexico</i> , <a href="#">WT/DS524/R</a> and Add.1, adopted 31 May 2022
<i>EC – Bed Linen</i>	Panel Report, <i>European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India</i> , <a href="#">WT/DS141/R</a> , adopted 12 March 2001, as modified by Appellate Body Report WT/DS141/AB/R, DSR 2001:VI, p. 2077
<i>EC – Fasteners (China)</i>	Appellate Body Report, <i>European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China</i> , <a href="#">WT/DS397/AB/R</a> , adopted 28 July 2011, DSR 2011:VII, p. 3995
<i>EC – Fasteners (China) (Article 21.5 – China)</i>	Appellate Body Report, <i>European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China – Recourse to Article 21.5 of the DSU by China</i> , <a href="#">WT/DS397/AB/RW</a> and Add.1, adopted 12 February 2016, DSR 2016:I, p. 7
<i>EC – Salmon (Norway)</i>	Panel Report, <i>European Communities – Anti-Dumping Measure on Farmed Salmon from Norway</i> , <a href="#">WT/DS337/R</a> , adopted 15 January 2008, and Corr.1, DSR 2008:I, p. 3
<i>EC – Selected Customs Matter</i>	Appellate Body Report, <i>European Communities – Selected Customs Matters</i> , <a href="#">WT/DS315/AB/R</a> , adopted 11 December 2006, DSR 2006:IX, p. 3791
<i>EC – Tube or Pipe Fittings</i>	Panel Report, <i>European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil</i> , <a href="#">WT/DS219/R</a> , adopted 18 August 2003, as modified by Appellate Body Report WT/DS219/AB/R, DSR 2003:VII, p. 2701
<i>EU – Biodiesel (Argentina)</i>	Panel Report, <i>European Union – Anti-Dumping Measures on Biodiesel from Argentina</i> , <a href="#">WT/DS473/R</a> and Add.1, adopted 26 October 2016, as modified by Appellate Body Report WT/DS473/AB/R, DSR 2016:VI, p. 3077
<i>EU – Fatty Alcohols (Indonesia)</i>	Appellate Body Report, <i>European Union – Anti-Dumping Measures on Imports of Certain Fatty Alcohols from Indonesia</i> , <a href="#">WT/DS442/AB/R</a> and Add.1, adopted 29 September 2017, DSR 2017:VI, p. 2613
<i>Guatemala – Cement II</i>	Panel Report, <i>Guatemala – Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico</i> , <a href="#">WT/DS156/R</a> , adopted 17 November 2000, DSR 2000:XI, p. 5295
<i>Korea – Dairy</i>	Appellate Body Report, <i>Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products</i> , <a href="#">WT/DS98/AB/R</a> , adopted 12 January 2000, DSR 2000:I, p. 3
<i>Korea – Pneumatic Valves (Japan)</i>	Appellate Body Report, <i>Korea – Anti-Dumping Duties on Pneumatic Valves from Japan</i> , <a href="#">WT/DS504/AB/R</a> and Add.1, adopted 30 September 2019, DSR 2019:XI, p. 5637

Short title	Full case title and citation
<i>Korea – Pneumatic Valves (Japan)</i>	Panel Report, <i>Korea – Anti-Dumping Duties on Pneumatic Valves from Japan</i> , <a href="#">WT/DS504/R</a> and Add.1, adopted 30 September 2019, as modified by Appellate Body Report WT/DS504/AB/R, DSR 2019:XI, p. 5935
<i>Mexico – Anti-Dumping Measures on Rice</i>	Appellate Body Report, <i>Mexico – Definitive Anti-Dumping Measures on Beef and Rice, Complaint with Respect to Rice</i> , <a href="#">WT/DS295/AB/R</a> , adopted 20 December 2005, DSR 2005:XXII, p. 10853
<i>Mexico – Anti-Dumping Measures on Rice</i>	Panel Report, <i>Mexico – Definitive Anti-Dumping Measures on Beef and Rice, Complaint with Respect to Rice</i> , <a href="#">WT/DS295/R</a> , adopted 20 December 2005, as modified by Appellate Body Report WT/DS295/AB/R, DSR 2005:XXIII, p. 11007
<i>Mexico – Steel Pipes and Tubes</i>	Panel Report, <i>Mexico – Anti-Dumping Duties on Steel Pipes and Tubes from Guatemala</i> , <a href="#">WT/DS331/R</a> , adopted 24 July 2007, DSR 2007:IV, p. 1207
<i>Morocco – Definitive AD Measures on Exercise Books (Tunisia)</i>	Panel Report, <i>Morocco – Definitive Anti-Dumping Measures on School Exercise Books from Tunisia</i> , <a href="#">WT/DS578/R and Add.1</a> , circulated to WTO Members 27 July 2021, appealed on 28 July 2021
<i>US – Oil Country Tubular Goods Sunset Reviews</i>	Appellate Body Report, <i>United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina</i> , <a href="#">WT/DS268/AB/R</a> , adopted 17 December 2004, DSR 2004:VII, p. 3257
<i>US – Shrimp II (Viet Nam)</i>	Panel Report, <i>United States – Anti-Dumping Measures on Certain Shrimp from Viet Nam</i> , <a href="#">WT/DS429/R</a> and Add.1, adopted 22 April 2015, upheld by Appellate Body Report WT/DS429/AB/R, DSR 2015:III, p. 1341
<i>US – Softwood Lumber V</i>	Panel Report, <i>United States – Final Dumping Determination on Softwood Lumber from Canada</i> , <a href="#">WT/DS264/R</a> , adopted 31 August 2004, as modified by Appellate Body Report WT/DS264/AB/R, DSR 2004:V, p. 1937

Parties:	Arbitrators:
Colombia	José Alfredo Graça Lima, Chairperson
European Union	Alejandro Jara
	Joost Pauwelyn
Third Parties:	
Brazil	Japan
China	Russian Federation
Honduras	Türkiye
India	United States

## 1 INTRODUCTION

1.1. This Arbitration concerns certain issues of law and legal interpretations developed in the Panel Report, *Colombia – Anti-Dumping Duties on Frozen Fries from Belgium, Germany and the Netherlands*.<sup>1</sup> These issues of law and legal interpretations relate to the Panel's findings regarding the consistency with the Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement) of the anti-dumping duties imposed by Colombia on certain frozen potato products originating in Belgium, Germany, and the Netherlands.

1.2. The Panel was established on 29 June 2020 to consider a complaint by the European Union that, in imposing the above-mentioned duties, Colombia acted inconsistently with Articles 1, 2.1, 2.4, 2.4.1, 2.6, 3.1, 3.2, 3.4, 3.5, 3.6, 3.7, 3.8, 5.3, 5.8, 6.1.2, 6.2, 6.5, 6.5.1, 6.8, 6.9, 9.1, 9.2, 9.3, 11.1, 12.2, 12.2.2, and 18.1, and paragraphs 3 and 6 of Annex II to the Anti-Dumping Agreement, Article 10 of the Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994 (Customs Valuation Agreement), and Article VI of the General Agreement on Tariffs and Trade 1994 (GATT 1994).<sup>2</sup>

1.3. On 13 July 2020, the European Union and Colombia informed the Dispute Settlement Body (DSB) that they had agreed to procedures for arbitration under Article 25 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) in this dispute.<sup>3</sup> These procedures were subsequently revised on 20 April 2021 (Agreed Procedures), and were entered into by the parties "to give effect to communication JOB/DSB/1/Add.12", i.e. the Multi-Party Interim Appeal Arbitration Arrangement (MPIA) pursuant to Article 25 of the DSU, and "to decide any appeal from any final panel report as issued to the parties in [this] dispute".<sup>4</sup>

1.4. On 29 August 2022, the Panel issued the final Panel Report in English to the parties.<sup>5</sup> Following a communication from Colombia requesting the Panel to suspend its work in order to facilitate arbitration under the Agreed Procedures<sup>6</sup>, the Panel, on 13 September 2022, instructed the Dispute Settlement Registry to "transmit immediately the original English language version of the final Panel Report ... to the pool of [MPIA] arbitrators"<sup>7</sup>, pursuant to the Additional Working Procedures of the Panel to facilitate arbitration under Article 25 of the DSU (the Panel's Additional Working Procedures).<sup>8</sup> On 16 September 2022, the Panel transmitted the final Panel Report in the

<sup>1</sup> In accordance with paragraph 5 of the Agreed Procedures for Arbitration under Article 25 of the DSU (Agreed Procedures), the Panel Report in the three working languages of the WTO was attached to the Notification of an Appeal by Colombia under Article 25 of the DSU, paragraph 5 of the Agreed Procedures, and Rule 20 of the Working Procedures for Appellate Review circulated to Members when Colombia initiated these Arbitration proceedings. (WT/DS591/7 and WT/DS591/7/Add.1) (See para. 1.7 and *infra* fns 16 and 17)

<sup>2</sup> Request for the establishment of a panel by the European Union, WT/DS591/2 (European Union's panel request).

<sup>3</sup> WT/DS591/3.

<sup>4</sup> WT/DS591/3/Rev.1, para. 1. (fn omitted) (See Annex A-1 of the Addendum to this Award (WT/DS591/ARB25/Add.1))

<sup>5</sup> See Communication from the Panel, WT/DS591/6, p. 1.

<sup>6</sup> WT/DS591/6, p. 2. The Panel noted in its communication that "[a]ccording to paragraph 4 of the Agreed Arbitration Procedures 'such request by any party is deemed to constitute a joint request by the parties for suspension of the panel proceedings for 12 months pursuant to Article 12.12 of the DSU.'" (Ibid.)

<sup>7</sup> WT/DS591/6, p. 2.

<sup>8</sup> Additional Working Procedures of the Panel to facilitate arbitration under Article 25 of the DSU, WT/DS591/7/Add.1, Annex A-5.

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three working languages of the WTO to the parties, third parties, and the pool of MPIA arbitrators, pursuant to the Panel's Additional Working Procedures. On the same day, the Panel informed the DSB of its decision to grant the request to suspend the panel proceedings.<sup>9</sup>

1.5. In its Report, the Panel found that:

- a. with respect to the European Union's claims concerning the decision of Colombia's Ministry of Trade, Industry and Tourism (MINCIT) to initiate the underlying investigation:
  - i. the European Union had not established that Colombia acted inconsistently with Article 5.3 of the Anti-Dumping Agreement because MINCIT failed to verify that there was "sufficient" evidence to initiate the investigation with respect to the full range of products covered by tariff subheading 2004.10.00.00;
  - ii. the European Union had not established that Colombia acted inconsistently with its obligations under Article 5.3 because MINCIT did not have "sufficient" evidence demonstrating that the Colombian Federation of Potato Producers (FEDEPAPA) represented the domestic producers of the "like" product so as to justify initiating the underlying investigation;
  - iii. the European Union had established that Colombia acted inconsistently with Article 5.3 of the Anti-Dumping Agreement because, by failing to examine whether the use of third-country sales prices, instead of domestic sales prices, was "appropriate" in the specific facts and circumstances of the investigation at issue, MINCIT did not examine the "adequacy" of the evidence in the application to determine whether there is "sufficient" evidence to justify the initiation of the underlying investigation;
  - iv. the European Union had not established that Colombia acted inconsistently with its obligations under Article 5.3 because the evidence of injury examined and relied upon by MINCIT was insufficient to justify the initiation of the underlying investigation;
  - v. the European Union had not established that Colombia acted inconsistently with its obligations under Article 5.3 because the evidence of causal link examined and relied upon by MINCIT was insufficient to justify the initiation of the underlying investigation; and
  - vi. having found that Colombia acted inconsistently with its obligations under Article 5.3, the Panel did not consider it necessary to make additional findings concerning the European Union's claim under Article 5.8 of the Anti-Dumping Agreement in order to provide a positive resolution to the present dispute.<sup>10</sup>
- b. With respect to the European Union's claims concerning the confidential treatment of certain information by MINCIT:
  - i. the European Union had established that Colombia acted inconsistently with its obligations under Article 6.5 of the Anti-Dumping Agreement with respect to the redacted information in section d(i) of FEDEPAPA's revised application because MINCIT granted confidential treatment to this information without a showing of "good cause" by the applicant. Given this finding of inconsistency, the Panel did not consider it necessary to make further findings on the European Union's claim under Article 6.5.1 concerning the information in section d(i) of the revised application in order to provide a positive resolution to the present dispute;
  - ii. the European Union had not established that Colombia acted inconsistently with its obligations under Article 6.5 in respect of the information contained in

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<sup>9</sup> WT/DS591/6, p. 2.

<sup>10</sup> Panel Report, para. 8.1.a.

Annex 10 of the revised application because the European Union had not demonstrated: (a) that the applicant failed to show the necessary "good cause" for the confidential treatment requested; and (b) MINCIT did not objectively assess the showing of "good cause" as the basis of granting confidential treatment; and

- iii. the European Union had established that Colombia acted inconsistently with its obligations under Article 6.5.1 of the Anti-Dumping Agreement with respect to the information contained in Annex 10 of FEDEPAPA's revised application because MINCIT did not "require" the applicant to "furnish" non-confidential summaries of the confidential information contained in Annex 10; and, to the extent that this information was not susceptible of summary, a statement of the reasons as to why summarization was not possible was not provided.<sup>11</sup>
- c. With respect to the European Union's claims concerning the alleged use of "facts available" by MINCIT:
  - i. the European Union had established that Colombia acted inconsistently with its obligations under Article 6.8 of the Anti-Dumping Agreement because MINCIT disregarded the export prices that the exporters had provided in their questionnaire responses and, instead, elected to use export prices extracted from the National Directorate for Taxes and Customs (DIAN) database to make its dumping determination; and
  - ii. having found that Colombia acted inconsistently with its obligations under Article 6.8, the Panel did not consider it necessary to make additional findings as to whether Colombia also acted inconsistently with its obligations under paragraphs 3 and 6 of Annex II and Article 2.1 in order to provide a positive resolution to the present dispute.<sup>12</sup>
- d. With respect to the European Union's claims concerning MINCIT's assessment of the exporters' requests for adjustments:
  - i. the European Union had established that Colombia acted inconsistently with its obligation to make a "fair comparison" under Article 2.4 of the Anti-Dumping Agreement because MINCIT denied the product mix-related adjustments requested by Agrarfrost, Aviko, and Mydibel;
  - ii. the European Union's claim under Article 2.4 of the Anti-Dumping Agreement concerning Mydibel's packaging cost-related adjustment request fell within the Panel's terms of reference;
  - iii. the European Union had established that Colombia acted inconsistently with its obligation to make a "fair comparison" under Article 2.4 of the Anti-Dumping Agreement because MINCIT denied Mydibel's packaging cost-related adjustment request;
  - iv. the European Union had established that Colombia acted inconsistently with its obligation to make a "fair comparison" under Article 2.4 of the Anti-Dumping Agreement because MINCIT denied Agrarfrost's oil cost-related adjustment request; and
  - v. having found that Colombia acted inconsistently with its obligation to make a "fair comparison" under Article 2.4, the Panel did not consider it necessary to make additional findings as to whether Colombia also acted inconsistently with its

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<sup>11</sup> Panel Report, para. 8.1.b.

<sup>12</sup> Panel Report, para. 8.1.c.

obligations under the last sentence of Article 2.4 in order to provide a positive resolution to the present dispute.<sup>13</sup>

- e. With respect to the European Union's claims concerning MINCIT's injury and causation determinations:
- i. the European Union had established that Colombia acted inconsistently with its obligations under Articles 3.1, 3.2, 3.4, and 3.5 of the Anti-Dumping Agreement because MINCIT included in its injury and causation determinations imports from the exporters that were determined to have: (a) final *de minimis* margins of dumping (Clarebout (Belgium), Agristo (Belgium), and Other Companies (Belgium)); and (b) final *negative* margins of dumping (Ecofrost (Belgium) and Farm Frites (the Netherlands)); and
  - ii. having found that Colombia acted inconsistently with its obligations under Articles 3.1, 3.2, 3.4, and 3.5, the Panel was not called upon to make further findings with respect to the other grounds presented by the European Union in support of its claims challenging MINCIT's analysis of the "price effects" under Articles 3.2 and 3.1; the impact on domestic industry under Articles 3.4 and 3.1; and the causal link under Articles 3.5 and 3.1.<sup>14</sup>

1.6. The Panel, pursuant to Article 19.1 of the DSU, recommended that Colombia bring its measures into conformity with its obligations under the GATT 1994 and the Anti-Dumping Agreement.<sup>15</sup>

1.7. On 6 October 2022, Colombia notified the DSB of its decision to initiate an arbitration under Article 25 of the DSU through a "Notification of an Appeal" pursuant to Article 25 of the DSU, paragraph 5 of the Agreed Procedures, and Rule 20 of the Working Procedures for Appellate Review.<sup>16</sup> On the same day, Colombia filed its written submission. Colombia's Notice of Appeal, together with the Panel Report, was circulated to Members on 10 October 2022.<sup>17</sup>

1.8. Pursuant to paragraph 7 of the Agreed Procedures, we were selected to be the Arbitrators in these arbitration proceedings and we elected Mr José Alfredo Graça Lima as the Chairperson in this Arbitration.<sup>18</sup> On 12 October 2022, Members were informed of our appointment as Arbitrators and the election of the Chairperson.<sup>19</sup>

1.9. Following consultation with the parties at an organizational meeting held on 18 October 2022, and pursuant to paragraph 12 of the Agreed Procedures, we adopted, on 19 October 2022, the Additional Procedures for Arbitration under Article 25 of the DSU (Additional Procedures for Arbitration), including the Working Schedule.<sup>20</sup> In addition, in response to the parties' requests at the organizational meeting with regard to the treatment and handling of business confidential information (BCI) and public viewing of the hearing, and after requesting and receiving comments from the parties and third parties, we adopted, on 1 November 2022, the Additional Procedures for BCI Protection and Partial Public Viewing of the Hearing.<sup>21</sup>

1.10. In accordance with the Working Schedule contained in the Additional Procedures for Arbitration, the European Union filed its written submission on 24 October 2022. On 27 October

<sup>13</sup> Panel Report, para. 8.1.d.

<sup>14</sup> Panel Report, para. 8.1.e.

<sup>15</sup> Panel Report, para. 8.2.

<sup>16</sup> Hereafter referred to as "Colombia's Notice of Appeal".

<sup>17</sup> WT/DS591/7 and WT/DS591/7/Add.1.

<sup>18</sup> Paragraph 7 of the Agreed Procedures provides, *inter alia*, that "[t]he arbitrators shall be three persons selected from the pool of 10 standing appeal arbitrators composed in accordance with paragraph 4 of communication JOB/DSB/1/Add.12", that the selection "will be done on the basis of the same principles and methods that apply to form a division of the Appellate Body under Article 17.1 of the DSU and Rule 6(2) of the Working Procedures for Appellate Review, including the principle of rotation", and that "[t]he arbitrators shall elect a Chairperson."

<sup>19</sup> WT/DS591/8.

<sup>20</sup> Annex A-2 of the Addendum to this Award (WT/DS591/ARB25/Add.1).

<sup>21</sup> Annex A-3 of the Addendum to this Award (WT/DS591/ARB25/Add.1).

2022, Brazil, Japan, and the United States each filed a third party's written submission. On the same day, China and the Russian Federation each notified its intention to appear at the hearing.<sup>22</sup>

1.11. By letter of 2 November 2022, we invited the parties and third parties to a virtual pre-hearing conference to assist us in identifying the issues to be addressed at the hearing, and to avoid issues that were not within our mandate, were not necessary for the resolution of this dispute, or were not contested between the parties. In particular, we indicated our interest in discussing what specific issues of law and legal interpretations were to be addressed with respect to particular claims, and to explore which issues were necessary for the resolution of the dispute. In comments provided on 7 November 2022, Colombia expressed its concern that the proposed topics for the pre-hearing conference went beyond what was envisaged in paragraphs 12 and 13 of the Agreed Procedures, and requested that, also for reasons of due process, such issues be reserved for discussion only at the hearing.

1.12. At the virtual pre-hearing conference held on 9 November 2022, we clarified that the purpose of the conference was not to replace the hearing, but to signal to the parties what we would like to explore or focus on at the hearing, and to allow the parties an opportunity to limit their submissions should they so wish. Accordingly, we informed the parties and third parties of the sequence of questioning expected at the hearing, highlighted the topics referenced in our 2 November 2022 letter on which we sought clarification from the parties at the hearing, and provided certain logistical and practical information in relation to the partial public viewing. On 10 November 2022, a letter was sent to the parties and third parties containing the information conveyed at the virtual conference and certain logistical information regarding the hearing.

1.13. The hearing was held in person on 15 November 2022 at the premises of the WTO. The parties and six third parties (Brazil, China, Japan, the Russian Federation, Türkiye, and the United States) attended the hearing. The parties and five third parties<sup>23</sup> made oral statements and/or responded to questions. Pursuant to the Additional Procedures for BCI Protection and Partial Public Viewing of the Hearing, the opening statements of the European Union, the Russian Federation, and the United States were video recorded and subsequently posted for viewing by registered viewers on the WTO website.<sup>24</sup> On 16 November 2022, we held a discussion with the other members of the pool of MPIA arbitrators pursuant to paragraph 5 of the MPIA and paragraph 8 of the Agreed Procedures.<sup>25</sup>

1.14. Pursuant to the Additional Procedures for BCI Protection and Partial Public Viewing of the Hearing, a copy of the Award intended for issuance was provided in advance to the parties on 13 December 2022 to ensure that no BCI was included inadvertently. The final Award was issued to the parties in English on 19 December 2022 and notified to the DSB, the Council for Trade in Goods, and the Committee on Anti-Dumping Practices in the three working languages of the WTO on 21 December 2022, both within 90 days of the commencement of the Arbitration.

## **2 ARGUMENTS OF THE PARTIES**

2.1. The claims and arguments of the parties are reflected in the executive summaries of their written submissions. Colombia's Notice of Appeal and the executive summaries of the parties' written submissions are contained in Annexes B and C of the Addendum to this Award, WT/DS591/ARB25/Add.1.

## **3 ARGUMENTS OF THE THIRD PARTIES**

3.1. The arguments of the third parties that filed a written submission (Brazil, Japan, and the United States) are reflected in the executive summaries of their written submissions, and are contained in Annex D of the Addendum to this Award, WT/DS591/ARB25/Add.1.

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<sup>22</sup> See Working Schedule, Additional Procedures for Arbitration. See also paragraphs 11 and 16 of the Agreed Procedures.

<sup>23</sup> These third parties were Brazil, China, Japan, the Russian Federation, and the United States.

<sup>24</sup> The video recording is available at [https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds591\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds591_e.htm).

<sup>25</sup> JOB/DSB/1/Add.12 and WT/DS591/3/Rev.1, respectively.

## 4 ANALYSIS OF THE ARBITRATORS

### 4.1 Issues on appeal

4.1. We address the following issues on the basis of claims raised on appeal by Colombia<sup>26</sup>:

- a. Whether it is permissible to interpret the phrase "where appropriate" in Article 5.2(iii) of the Anti-Dumping Agreement as granting "free choice" in the use of third-country sales prices as a basis for normal value; and whether the Panel erred under Articles 5.2(iii) and 5.3 of the Anti-Dumping Agreement by requiring an explanation as to why domestic sales prices were not used;
- b. Whether the Panel erred in finding that MINCIT acted inconsistently with Article 6.5 of the Anti-Dumping Agreement by granting confidential treatment to redacted information without a showing of "good cause";
- c. Whether the Panel erred in finding that the European Union's claim under Article 2.4 of the Anti-Dumping Agreement concerning an exporter's packaging costs fell within the Panel's terms of reference; and
- d. Whether it is permissible to interpret the term "dumped imports" in Articles 3.1, 3.2, 3.4, and 3.5 of the Anti-Dumping Agreement to include imports of exporters determined to have *de minimis* margins of dumping.

4.2. The Arbitrators take due note of paragraph 12 of the Agreed Procedures, which mandates that the Award in this Arbitration be issued within 90 days of the filing of the Notice of Appeal, and which permits the Arbitrators to "take appropriate organizational measures to streamline the proceedings". Paragraph 13 of the Agreed Procedures further provides that "the arbitrators may also propose substantive measures to the parties, such as an exclusion of claims based on the alleged lack of an objective assessment of the facts pursuant to Article 11 of the DSU". In a pre-appeal letter sent to the parties on 19 September 2022, we provided guidelines on, *inter alia*, the length of written submissions and hearings and the language of proceedings, and the parties were encouraged to be selective in the number of claims they submitted on appeal and to refrain from making claims under Article 11 of the DSU.<sup>27</sup> During these proceedings, Colombia agreed to conduct proceedings in English and explained to us that it had deliberately limited the claims on appeal and brought no claims under Article 11 of the DSU. The Arbitrators wish to acknowledge Colombia's efforts in this Arbitration in a manner facilitating the issuance of the Award in a timely manner.

### 4.2 Claim under Articles 5.2(iii) and 5.3 of the Anti-Dumping Agreement

#### 4.2.1 Introduction and Panel findings

4.3. Colombia challenges the Panel's finding that Colombia acted inconsistently with Article 5.3 of the Anti-Dumping Agreement because MINCIT initiated the investigation at issue without examining whether the applicant's use of third-country sales prices, instead of domestic sales prices, as a basis for normal value, was "appropriate".<sup>28</sup> Colombia focuses its appeal on the Panel's understanding of the phrase "where appropriate" in Article 5.2(iii)<sup>29</sup> and the Panel's disregard for the alleged "free choice" an applicant has in the selection of pricing information used as a basis for normal value at the initiation stage of an anti-dumping proceeding.

<sup>26</sup> Colombia's Notice of Appeal, Annex B-1.

<sup>27</sup> See Additional Procedures for Arbitration, Annex 2 (Annex A-2 of the Addendum to this Award (WT/DS591/ARB25/Add.1)).

<sup>28</sup> See Colombia's Notice of Appeal, para. 1 (referring to Panel Report, paras. 7.75, 7.78, 7.79, and 8.1.a.iii).

<sup>29</sup> Unless otherwise specified, all stand-alone references to provisions in this Award refer to Articles of the Anti-Dumping Agreement.

4.4. Articles 5.2(iii) and 5.3 of the Anti-Dumping Agreement provide:

Article 5

*Initiation and Subsequent Investigation*

5.2 An application under paragraph 1 shall include evidence of (a) dumping, (b) injury within the meaning of Article VI of GATT 1994 as interpreted by this Agreement and (c) a causal link between the dumped imports and the alleged injury. Simple assertion, unsubstantiated by relevant evidence, cannot be considered sufficient to meet the requirements of this paragraph. The application shall contain such information as is reasonably available to the applicant on the following:

...

(iii) information on prices at which the product in question is sold when destined for consumption in the domestic markets of the country or countries of origin or export (or, where appropriate, information on the prices at which the product is sold from the country or countries of origin or export to a third country or countries, or on the constructed value of the product) and information on export prices or, where appropriate, on the prices at which the product is first resold to an independent buyer in the territory of the importing Member;

...

5.3 The authorities shall examine the accuracy and adequacy of the evidence provided in the application to determine whether there is sufficient evidence to justify the initiation of an investigation.

(underlining added)

4.5. The Panel found "an explicit connection or link" between Articles 5.2(iii) and 5.3.<sup>30</sup> The Panel noted that, under Article 5.2(iii), the possibility of providing third-country sales prices and constructed value was, "*unlike the case of domestic sales prices*, textually limited to 'where' this is 'appropriate' and forms part of a parenthetical text".<sup>31</sup> For the purposes of an authority's examination under Article 5.3, the Panel found that the use of the phrase "where appropriate" implies, "at a minimum, the exercise of judgment as to the fitness, suitability, or 'appropriateness', of using third-country sales prices, *instead of domestic sales prices*, in light of the specific situation at hand".<sup>32</sup> The Panel therefore disagreed with Colombia's interpretation that the phrase "where appropriate" indicates "that an applicant enjoys complete 'free choice' to submit any information that it desires for calculating normal value", noting that it would deny any effect to the meaning or placement of "where appropriate", contrary to the principle of effective treaty interpretation.<sup>33</sup>

4.6. The Panel then examined the facts of the underlying investigation. The Panel noted that the Colombian Federation of Potato Producers (FEDEPAPA) "did not address why it elected to provide third-country sales prices rather than domestic sales prices as the basis for the normal value calculation", but simply stated that export prices to the United Kingdom from Belgium, France, Germany, and the Netherlands were used.<sup>34</sup> The Panel noted that FEDEPAPA further explained its specific choice of the United Kingdom for the third-country sales prices on the basis that it was a major producer, importer, and consumer of frozen precooked potatoes (perhaps the largest market in Europe), and that it formed part of the European Union, which would make export prices very close to those in the domestic markets of the countries covered by the application.<sup>35</sup> The Panel further noted that MINCIT simply recited the reasons provided by FEDEPAPA for choosing third-country sales prices to the United Kingdom. For the Panel, the record thus indicated "a complete absence of any explanation by FEDEPAPA or examination thereof by MINCIT as to *why*

<sup>30</sup> Panel Report, para. 7.63.

<sup>31</sup> Panel Report, para. 7.65. (emphasis original)

<sup>32</sup> Panel Report, para. 7.69. (emphasis original)

<sup>33</sup> Panel Report, para. 7.70.

<sup>34</sup> Panel Report, para. 7.73.

<sup>35</sup> Panel Report, para. 7.73.

domestic sales prices were not contained in the application and could not be used for purposes of initiation in the specific situation at hand".<sup>36</sup>

4.7. The Panel concluded that MINCIT had acted inconsistently with Article 5.3 because it did not examine whether the use of third-country sales prices, instead of domestic sales prices, was "appropriate", and therefore did not examine the "adequacy" of the evidence contained in the application to determine whether there was "sufficient evidence" to justify initiation.<sup>37</sup>

#### 4.2.2 Reviewing Colombia's claim in light of Article 17.6 of the Anti-Dumping Agreement

4.8. The parties agree that our assessment of whether the Panel's specific findings under Articles 5.2(iii) and 5.3 constitute a legal error must be guided by Article 17.6.<sup>38</sup> This is the case even though Colombia did not file a separate claim on appeal under Article 17.6. Article 17.6 is relevant and applies to any interpretation of the Anti-Dumping Agreement, including ours under Articles 5.2(iii) and 5.3.

### Article 17

#### *Consultation and Dispute Settlement*

17.6 In examining the matter referred to in paragraph 5:

(i) in its assessment of the facts of the matter, the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned;

(ii) the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.

4.9. Article 17.6(i) concerns the assessment of the facts of the matter. It charges panels with determining whether an investigating authority's establishment of the facts was "proper", and the evaluation of those facts was "unbiased and objective". So long as those elements are met, the evaluation shall not be overturned, "even though the panel might have reached a different conclusion". As the Panel in this case put it, this means that "a panel examining an investigating authority's determination should not conduct a *de novo* review of the evidence, nor substitute its own judgment for that of the investigating authority."<sup>39</sup> In this light, the Panel stated that the "applicable standard of review" for examining the European Union's claim under Articles 5.2(iii) and 5.3 is "to consider whether an unbiased and objective investigating authority could have determined that the application and the revised application that FEDEPAPA submitted to MINCIT contained 'sufficient' evidence – based upon an examination of the 'accuracy' and 'adequacy' of the evidence – to justify the initiation of an anti-dumping investigation into imports of frozen fries from Belgium, Germany, and the Netherlands".<sup>40</sup> We agree with the Panel in this respect.

<sup>36</sup> Panel Report, para. 7.75 (emphasis added by the Panel). Colombia argued that MINCIT relied upon third-country sales prices in the same way as in an anti-dumping proceeding relating to imports of the same product to Brazil wherein the Brazilian authority had also provided reasons why the applicant in that investigation unsuccessfully attempted to obtain domestic sales prices. The Panel, however, rejected Colombia's argument, noting that there was nothing on the record, as there had been in the Brazilian investigation, indicating that FEDEPAPA attempted to obtain, or otherwise faced difficulties in obtaining, domestic sales prices. (Panel Report, para. 7.77)

<sup>37</sup> Panel Report, para. 7.78.

<sup>38</sup> Parties' responses to questioning at the hearing.

<sup>39</sup> Panel Report, para. 7.4.

<sup>40</sup> Panel Report, para. 7.14 (referring to Panel Reports, *Argentina – Poultry Anti-Dumping Duties*, para. 7.60; *Mexico – Steel Pipes and Tubes*, paras. 7.26 and 7.32; *US – Softwood Lumber V*, para. 7.79; and *Guatemala – Cement II*, para. 8.31).

4.10. Article 17.6(ii), in turn, concerns matters of legal interpretation. The first sentence requires that panels "shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law". The second sentence provides that, where a panel finds that a relevant provision admits of more than one permissible interpretation, it must find the authority's measure to be in conformity with the Agreement "if it rests upon one of those permissible interpretations".

4.11. The Panel stated that whether a provision admits of more than one "permissible" interpretation (under the second sentence) depends on whether more than one such interpretation emerges after the Panel has examined the relevant provision under customary rules of interpretation of public international law (under the first sentence). Accordingly, the Panel stated that the "starting point" of its interpretative analysis required an interpretation of the relevant provision under treaty interpretation rules, including Articles 31 and 32 of the Vienna Convention on the Law of Treaties (Vienna Convention).<sup>41</sup>

4.12. Our approach to the interpretation claims in this appeal differs. We do not begin the interpretative exercise by focusing solely on the first sentence of Article 17.6(ii), as this in our view pays insufficient regard to the immediate context of this sentence, namely Article 17.6(i) and the second sentence of Article 17.6(ii). Each of these provisions must be understood in a manner granting special deference to investigating authorities under the Anti-Dumping Agreement.<sup>42</sup> The second sentence of Article 17.6(ii) mandates panels to defer to and accept an authority's measure as soon as it "rests upon" a "permissible" interpretation. As we have noted, Article 17.6(i) prevents a panel from conducting a *de novo* assessment of the facts on record; an authority's establishment and evaluation of facts must be allowed to stand so long as it is "proper" and "unbiased and objective", and this is the case "even though the panel might have reached a different conclusion".

4.13. Reading these provisions together, we aim to integrate the elements of interpretation under Article 17.6(ii). As a result, we will begin by asking ourselves whether Colombia's proposed interpretation of the phrase "where appropriate" in Article 5.2(iii) – reflected in MINCIT's decision to initiate its investigation, in part, on the basis of third-country sales prices – is a "permissible" one. As a yardstick for "permissibility", the first sentence of Article 17.6(ii) refers us to the customary rules of treaty interpretation. However, we will not engage in our own, *de novo* interpretation of the terms "where appropriate" so as to arrive at what we consider to be the "final" or "correct" application of Articles 31 and 32 of the Vienna Convention. Instead, we will ask whether a treaty interpreter, using the method for treaty interpretation set out in the Vienna Convention – that is, an interpretation "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose" and, where appropriate, "supplementary means of interpretation" – could have reached Colombia's interpretation. And this even though we, as *de novo* treaty interpreters, might have reached a different conclusion.

4.14. Our approach assumes, as the second sentence does, that different treaty interpreters applying the same tools of the Vienna Convention may, in good faith and with solid arguments in support, reach different conclusions on the "correct" interpretation of a treaty provision.<sup>43</sup> This may

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<sup>41</sup> Panel Report, para. 7.286.

<sup>42</sup> To do otherwise would correspond to a standard interpretative exercise applicable to any WTO Agreement and would fail to give effect to the unique character of Article 17.6 as it applies to the Anti-Dumping Agreement. Had the drafters considered that Article 17.6 was simply reflective of a conventional approach to Vienna Convention treaty interpretation, it is hard to see why they would have added the provision and why, in a separate decision, they mandated that the "standard of review in paragraph 6 of Article 17 ... shall be reviewed after a period of three years with a view to considering the question of whether it is capable of general application." (Decision on Review of Article 17.6 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994)

<sup>43</sup> See Ian Sinclair, *The Vienna Convention on the Law of Treaties*, 2nd edn (Manchester Press, 1984), p. 153 ("review of recent international case law on treaty interpretation reveals only too clearly that widely differing results can still be achieved even if a conscientious effort is being made to apply the Convention rules"); and D. McRae, "Treaty Interpretation by the WTO Appellate Body: The Conundrum of Article 17(6) of the Anti-Dumping Agreement", in E. Cannizzaro (ed.), *The Law of Treaties Beyond the Vienna Convention* (Oxford University Press, 2011), Chapter 10, p. 179 ("the Vienna Convention rules are not primary rules of obligation; they are secondary rules telling states and adjudicators how to go about the process of interpretation. They do contain obligations within them, for example, not to resort to preparatory work unless the result is ambiguous or manifestly absurd. They do not, however, dictate any particular result. They are facilitative not disciplinary and do not 'instruct the treaty interpreter to find a single meaning of the treaty' as a former Appellate Body

be particularly true for the Anti-Dumping Agreement, which was drafted with the understanding that investigating authorities employ different methodologies and approaches. Treaty interpretation is not an exact science and applying the Vienna Convention's method does not magically and inevitably lead to a single result. In most cases, treaty interpretation involves weighing, balancing, and choice.

4.15. Thus, the ultimate question for us when testing a proposed interpretation is to draw a line beyond which an interpretation is no longer "permissible" under the Vienna Convention method for treaty interpretation. Dictionary meanings support the idea that the search for "permissible" interpretations differs from an attempt to find one's own – "final" and "correct" – interpretation.<sup>44</sup> Rather, the question is whether someone else's interpretation is "permitted", "allowable", "acceptable", or "admissible" as an outcome resulting from a proper application of the interpretative process called for under the Vienna Convention. Obviously, not just any interpretation put forward by an authority can be accepted as "permissible". The interpretative process under the Vienna Convention sets out an outer range beyond which meanings cannot be accepted. Just as permissible interpretations cannot be limited to a single "final" and "correct" answer as determined by a given tribunal, not all interpretations have the required degree of solidness or analytical support for them to be given deference as "permissible" within the bounds of the Vienna Convention method for treaty interpretation.

#### **4.2.3 Whether it is permissible to interpret the phrase "where appropriate" in Article 5.2(iii) of the Anti-Dumping Agreement as granting "free choice" in the use of third-country sales prices as a basis for normal value**

4.16. Colombia maintains that the "core legal issue in this appeal is the meaning of the phrase 'where appropriate' in Article 5.2(iii) of the Anti-Dumping Agreement.<sup>45</sup> Colombia considers that the Panel erred in its interpretation of this phrase by denying discretion to the applicant in the "free choice"<sup>46</sup> of what pricing information to include in its application, and by requiring an explanation by the applicant and justification by the investigating authority of the reasons for not using domestic sales prices as a source for normal value.<sup>47</sup> Colombia further alleges that the Panel erred in its contextual consideration of Article 2.2 – which refers to third-country sales prices and constructed normal value as conditional alternatives to domestic sales prices in a dumping determination – leading the Panel to import a strict hierarchy from that provision into the selection of pricing information at the initiation stage under Article 5.2(iii).<sup>48</sup>

4.17. The European Union maintains that the core legal issue is not the interpretation of the phrase "where appropriate" in Article 5.2(iii), but rather whether the investigating authority, in accordance with Article 5.3, examined the evidence provided in the application to determine if it was adequate and sufficient to justify the initiation of the investigation.<sup>49</sup> For the European Union, the Panel correctly applied interpretative rules<sup>50</sup>, and did not disregard or misinterpret the requirements under

member has written ... Under this view, an interpretation is authoritative not because of the application of the Vienna Convention, but rather because of the authority of the tribunal that made the choice amongst the various possible interpretations. In this light, the existence of one or more permissible interpretations in any interpretative exercise is the norm rather than the exception. It is based on the view that the core of interpretation is choice."). (fns omitted)

<sup>44</sup> According to the Oxford English Dictionary online, <https://www.oed.com/view/Entry/141213?redirectedFrom=permissible-eid>, "permissible" means "[t]hat can or ought to be permitted; allowable". The French version of the Anti-Dumping Agreement uses the term "interprétation admissible"; in the *Dictionnaires Le Robert* online, <https://dictionnaire.lerobert.com/definition/admissible>, "admissible" means "[q]u'on peut admettre". The Spanish version of the Anti-Dumping Agreement uses the term "interpretaciones admisibles"; in the *Diccionario de la lengua española, Real Academia Española* online, <https://dle.rae.es/admisible?m=form>, "admisible" means "[q]ue puede admitirse". In the Oxford French to English Dictionary online, <https://premium.oxforddictionaries.com/translate/french-english/admissible>, "admissible" means "acceptable" and "admissible". Similarly, in the Oxford Spanish to English Dictionary online, <https://premium.oxforddictionaries.com/translate/spanish-english/admisible>, "admisible" means "acceptable" (all definitions accessed on 2 December 2022).

<sup>45</sup> Colombia's written submission, para. 4.23.

<sup>46</sup> Colombia's written submission, para. 4.42. See also *ibid.*, para. 4.19 (stating that "[t]he applicant may thus freely decide whether to rely on domestic sales price, third-country sales prices, or constructed normal value.").

<sup>47</sup> Colombia's written submission, paras. 4.18-4.19 and 4.24.

<sup>48</sup> Colombia's written submission, paras. 4.19, 4.43-4.44, and 4.70-4.77.

<sup>49</sup> European Union's written submission, para. 30.

<sup>50</sup> European Union's written submission, paras. 36 and 40.

Articles 5.2(iii) and 5.3.<sup>51</sup> The European Union also disagreed with Colombia that the Panel's interpretation leads to empty formalism or an unworkable substantive test.<sup>52</sup>

4.18. The reading of Article 5.2(iii) advanced by Colombia poses an immediate interpretative difficulty as it seeks to minimize the significance of the meaning and placement of the phrase "where appropriate". Article 5.2(iii) specifies three types of product prices for normal value: (i) domestic sales; (ii) third-country sales; and (iii) constructed normal value. The structure of the sentence, however, does not place these three sources of prices on equal footing. Rather than simply listing the three in sequence, third-country sales prices and constructed normal value, but not domestic sales prices, are qualified by the phrase "where appropriate".

4.19. Article 5.3, in turn, provides the lens through which this pricing information is to be examined at the initiation stage of an anti-dumping investigation. Specifically, Article 5.3 provides that investigating authorities "shall examine the accuracy and adequacy of the evidence provided in the application to determine whether there is sufficient evidence to justify the initiation of an investigation". As Colombia and certain third parties submit in this case, examining the sufficiency of evidence for initiation does not require the same quantity and quality of evidence as that required under Article 2.2, which sets out more explicit and detailed requirements when determining normal value during the investigation phase.<sup>53</sup> Moreover, Article 5.3 does not require an explanation as to how an authority's examination is carried out.<sup>54</sup> Article 5.2, which provides that "[s]imple assertion, unsubstantiated by relevant evidence, cannot be considered sufficient" and limits what must be contained in an application to "information as is reasonably available to the applicant", confirms this relatively low evidentiary threshold at the initiation stage.

4.20. When we read Articles 5.2(iii) and 5.3 together, in accordance with the Vienna Convention method for treaty interpretation, we cannot accept Colombia's interpretation as a "permissible" one. First, the fact that the phrase "where appropriate" only applies to third-country sales prices and constructed normal value signifies that only these prices require an authority to "examine" their "appropriateness" to initiate an investigation. We note that, with regard to such an assessment, Colombia does not take issue with the Panel's proposed definitions of "where appropriate" as "[i]n a or the case in which, in the circumstances in which", or "[s]pecially fitted or suitable".<sup>55</sup> Colombia also agrees that Article 5.3 requires an investigating authority to examine an application to determine that there is sufficient evidence to initiate an investigation, albeit limited to assessing whether the evidence is "accurate" and "adequate" as a matter of substance.<sup>56</sup>

4.21. Second, the fact that the phrase "where appropriate" attaches to third-country sales prices and constructed normal value indicates to us that, as a general matter, domestic sales prices are to be accorded greater evidentiary value since an assessment as to "appropriateness" with regard to such prices is not required.<sup>57</sup> Colombia argues that the fact that the language in Article 5.2(iii) "stands in stark contrast" to the detailed language in Article 2.2 "strongly suggests" that the drafters did not intend the "strict hierarchy" in Article 2.2 to apply in the context of Article 5.2.<sup>58</sup> We agree. However, recognizing the evidentiary value of domestic sales prices does not amount to importing the requirements or a "strict hierarchy" from Article 2.2 into Article 5.2(iii). As noted, in the context of initiation of an investigation under Article 5.3, all that is required is that the evidence in the

<sup>51</sup> European Union's written submission, paras. 43-48.

<sup>52</sup> European Union's written submission, paras. 49-50 (referring to Colombia's written submission, paras. 4.84-4.87).

<sup>53</sup> Colombia's written submission, paras. 4.19 and 4.43-4.44; Brazil's third party's written submission, paras. 3-6; Japan's third party's written submission, para. 21; United States' third party's written submission, paras. 6 and 8. See also Panel Report, *Guatemala – Cement II*, para. 8.35.

<sup>54</sup> Panel Report, *EC – Bed Linen*, para. 6.198.

<sup>55</sup> Colombia's written submission, para. 4.23 (quoting Panel Report, para. 7.69). Colombia maintains the same meaning is conveyed by the French phrase "le cas échéant" and the Spanish phrase "cuando proceda". (Ibid.)

<sup>56</sup> Colombia's written submission, paras. 4.20, 4.52, and 4.79.

<sup>57</sup> Similarly, the appearance in Article 5.2(iii) of the phrase "where appropriate" before the reference to "prices at which the product is first resold to an independent buyer" in the importing Member suggests that greater evidentiary value attaches to "information on export prices". Although, like Colombia, we see no reason to import the strict hierarchy from Article 2 into the selection of pricing information at the initiation stage under Article 5.2(iii), we disagree with Colombia that Article 2.3 grants the authority discretion in its use of constructed export prices, since such reliance is conditioned on there being no export price or an export price that is unreliable. (Colombia's written submission, para. 4.48)

<sup>58</sup> Colombia's written submission, paras. 4.43-4.44.

application must be *sufficient*. Indeed, as Brazil argued before us, Article 5.2 does not demand the submission of the *best* information available, but only that information which is *reasonably available* to the applicant.<sup>59</sup> Thus, when MINCIT was faced with an application that advanced third-country sales prices, Articles 5.2(iii) and 5.3, when read together, required an examination of the "appropriateness" of that evidence, bearing in mind that the use of domestic sales prices would not have attracted such an assessment.

4.22. Accordingly, we do not see how a treaty interpreter, using the method for treaty interpretation set out in the Vienna Convention, could have reached Colombia's understanding of the phrase "where appropriate". We agree with the Panel that Colombia's interpretation of "where appropriate" as granting an applicant "free choice" in the selection of normal value prices "would deny any effect to the meaning or placement of the term 'where appropriate', contrary to the principle of effectiveness in treaty interpretation".<sup>60</sup> At the hearing, Colombia indicated that the phrase is not redundant because it is meant precisely to signal that the strict hierarchy set out in Article 2.2 is not to be imported into the selection of pricing information under Article 5.2(iii). However, this would seemingly have been accomplished had the phrase "where appropriate" simply not featured in the provision. While we agree with Colombia and third parties when they argue that the strict hierarchy in Article 2.2 cannot be imported into Articles 5.2(iii) and 5.3 given that Article 2.2 requires a more stringent evidentiary standard for the investigation phase of an anti-dumping proceeding, the meaning and placement of the phrase "where appropriate" can only be given effect if it indicates, as we have suggested, some duty on MINCIT to examine the sufficiency of third-country sales prices in light of an evidentiary preference for domestic sales prices.

4.23. We also find unavailing Colombia's other arguments regarding the level of discretion it reads into Article 5.2(iii). For instance, Colombia points to provisions in several WTO agreements where the phrase "where appropriate" appears in order to support its view that the phrase denotes a discretionary choice.<sup>61</sup> Given the very different agreements and circumstances in which the phrase appears, in relation to different decision makers in different settings, we are unable to discern that they support a generalized understanding of the phrase to grant "free choice" in the selection of pricing information under Articles 5.2(iii) and 5.3, as argued by Colombia.

4.24. Accordingly, we see no reason to disturb the Panel's view that an authority's examination of the sufficiency of evidence under Article 5.3 "requires, at the very least, an exercise of judgment as to the suitability or appropriateness of using third-country sales prices, instead of domestic sales prices, in the specific situation before it".<sup>62</sup>

#### **4.2.4 Whether the Panel erred under Articles 5.2(iii) and 5.3 of the Anti-Dumping Agreement by requiring an explanation as to why domestic sales prices were not used as a basis for normal value**

4.25. Colombia further contends that the Panel erred under Articles 5.2(iii) and 5.3 of the Anti-Dumping Agreement by requiring FEDEPAPA to explain *why* it did *not* use domestic sales prices.<sup>63</sup> For Colombia, this constitutes legal error because the relevant provisions do not mandate such an explanation, and leads to empty formalism or an unworkable substantive test.<sup>64</sup>

4.26. The European Union maintains that the Panel was correct not to require an explanation by the applicant as a matter of interpretation under Article 5.3, but rather noted that there was no explanation from FEDEPAPA on the record as to why domestic sales prices were not provided.<sup>65</sup>

4.27. We observe from the Panel's consideration of this issue that MINCIT requested FEDEPAPA to submit information on "[a] definition of the normal value selected for the purpose of determining the dumping margin ... that is to say, the price of the product under consideration set by Belgium".<sup>66</sup>

<sup>59</sup> Brazil's third party's written submission, para. 7. See also Japan's third party's written submission, para. 19; and United States' third party's written submission, paras. 6-7.

<sup>60</sup> Panel Report, para. 7.70.

<sup>61</sup> Colombia's written submission, paras. 4.45-4.46.

<sup>62</sup> Panel Report, para. 7.70.

<sup>63</sup> Colombia's written submission, paras. 4.18-4.19 and 4.24.

<sup>64</sup> Colombia's written submission, paras. 4.50-4.65 and 4.84-4.89.

<sup>65</sup> European Union's written submission, paras. 24-28.

<sup>66</sup> Panel Report, para. 7.72 (quoting MINCIT's deficiency letter to FEDEPAPA (Panel Exhibit EU-9a)).

In its revised application, FEDEPAPA indicated that it was using export prices to the United Kingdom as a basis for normal value, adding that the United Kingdom (like the countries covered by the application) was a member of the European Union and subscribed to the free movement of goods within a common market. This, FEDEPAPA explained, "would make the prices of exports from these countries to the British market very close to those in the domestic market of the country that is the subject of this application".<sup>67</sup> Finally, we know that MINCIT repeated in its notice of initiation FEDEPAPA's rationale for the use of export prices to the United Kingdom.<sup>68</sup> The Panel concluded from this that the record indicates "a complete absence of any explanation by FEDEPAPA or examination thereof by MINCIT as to *why* domestic sales prices were not contained in the application and could not be used for purposes of initiation in the specific situation at hand".<sup>69</sup>

4.28. The Panel's analysis represents, in our view, an overly stringent application of the legal standard. As the Panel itself acknowledged, the task is to consider whether an unbiased and objective investigating authority, based on an examination of the "accuracy" and "adequacy" of the evidence, could have determined that the application contained "sufficient evidence" to initiate the investigation.<sup>70</sup> To satisfy Articles 5.2(iii) and 5.3 in the present case, MINCIT was required to examine the "appropriateness" and "sufficiency" of the United Kingdom export prices in light of the evidentiary value of domestic sales prices. Given that the authority had asked the applicant to define the normal value selected with reference to domestic sales prices for Belgium, and that the applicant then explained that it was relying on export prices to the United Kingdom, which formed part of a common market with the relevant countries (like Belgium) and therefore represented prices that were "very close" to domestic sales prices, we consider that factual findings by the Panel demonstrate that there was a proper basis in the application for MINCIT to have examined the "appropriateness" and "sufficiency" of those export prices because the information was framed in terms of their evidentiary value vis-à-vis domestic sales prices.<sup>71</sup> We recall that, for the purpose of initiating an investigation under Article 5.3, the quantity and quality of evidence needed is necessarily lower than what is required to impose anti-dumping measures.<sup>72</sup> The information need not be the *best* evidence, only that which is *sufficient* to initiate an investigation. Moreover, as Colombia noted, MINCIT ultimately relied on domestic sales prices as the basis for normal value in its final determination.<sup>73</sup>

4.29. We also take note of the Panel's recognition that FEDEPAPA had included as an annex in its application a Brazilian investigating authority's initiation decision in its anti-dumping investigation on frozen potatoes, in which it was explained that the Brazilian applicant was unable to obtain the internal price within the relevant European Union member States, and that, because the United Kingdom was part of the European Union's single market, its prices were an appropriate basis for normal value.<sup>74</sup> This provides an additional indicator of what was contained in the application before MINCIT that could have informed its examination of the "appropriateness" and "sufficiency" of using export prices to the United Kingdom in relation to domestic sales prices.

#### 4.2.5 Conclusion

4.30. Taking due account of the special standards set out in Article 17.6 of the Anti-Dumping Agreement, we conclude that Colombia's interpretation of the phrase "where appropriate" in Article 5.2(iii) is not a permissible one; that is, one that a treaty interpreter, using the Vienna Convention method for treaty interpretation, could have reached. Accordingly, we see no basis to disturb the Panel's articulation of the legal standard that an authority's examination of the

<sup>67</sup> Panel Report, para. 7.73 (quoting revised application (Panel Exhibit EU-10)).

<sup>68</sup> Panel Report, para. 7.74 (referring to notice of initiation (Panel Exhibit EU-1a)).

<sup>69</sup> Panel Report, para. 7.75. (emphasis original)

<sup>70</sup> See Panel Report, para. 7.14 (referring to Panel Reports, *Argentina – Poultry Anti-Dumping Duties*, para. 7.60; *Mexico – Steel Pipes and Tubes*, paras. 7.26 and 7.32; *US – Softwood Lumber V*, para. 7.79; and *Guatemala – Cement II*, para. 8.31).

<sup>71</sup> Arguably, sales to the United Kingdom did not, at the time, constitute sales to a distinct market since the United Kingdom was part of the customs union of the European Union. The Anti-Dumping Agreement does not clarify how the concept of a "third country" is to be understood where multiple countries comprise a customs territory or single market. In any event, this interpretative question is not before us.

<sup>72</sup> See paras. 4.19-4.21 above; and Panel Report, *Morocco – Definitive AD Measures on Exercise Books (Tunisia)*, para. 7.353 ("[A] number of panels have recognized that the quantity and quality of evidence provided at the complaint stage would necessarily be lower than the evidence required to impose anti-dumping measures."). See also Colombia's written submission, paras. 4.66-4.69 and 4.78-4.80.

<sup>73</sup> Colombia's written submission, para. 4.8.

<sup>74</sup> Panel Report, fn 176 to para. 7.76.

sufficiency of evidence under Article 5.3 "requires, at the very least, an exercise of judgment as to the suitability or appropriateness of using third-country sales prices, instead of domestic sales prices, in the specific situation before it".<sup>75</sup>

4.31. At the same time, we find that the Panel applied this standard in an overly stringent manner to MINCIT's examination of the evidence in the circumstances before it. Given that Article 5.3 requires that an investigating authority must find "sufficient evidence" in the application to initiate an investigation, we consider that relevant factual findings by the Panel show that the application, which MINCIT examined, reflected information on the use of third-country sales prices that was framed in terms of their evidentiary value vis-à-vis domestic sales prices, and we therefore do not see that an assessment of "appropriateness" required that an additional explanation be provided or examined as to *why* domestic sales prices were *not* used. We therefore disagree with the Panel that an unbiased and objective authority could not have found that the evidence in FEDEPAPA's application was "sufficient" to initiate the investigation.

4.32. On the basis of the above, we reverse the Panel's findings in paragraphs 7.75, 7.78, 7.79, and 8.1.a.iii of its Report, and find that relevant factual findings by the Panel demonstrate that MINCIT satisfied its duty under Articles 5.2(iii) and 5.3 of the Anti-Dumping Agreement, for the purpose of initiating an investigation, by examining the "appropriateness" of third-country sales prices consisting of export prices to the United Kingdom, including, in particular, their sufficiency vis-à-vis domestic sales prices. Accordingly, we find that the European Union has not established that Colombia acted inconsistently with Article 5.3 of the Anti-Dumping Agreement.

### 4.3 Claim under Article 6.5 of the Anti-Dumping Agreement

#### 4.3.1 Introduction and Panel findings

4.33. Colombia challenges the Panel's finding that Colombia acted inconsistently with its obligations under Article 6.5 of the Anti-Dumping Agreement with respect to certain redacted information in section d(i) of FEDEPAPA's revised application because MINCIT granted confidential treatment to this information without a showing of "good cause".<sup>76</sup> In Colombia's view, because FEDEPAPA never submitted a request for confidential treatment of the information at issue, and MINCIT never granted confidentiality to that information, the requirement under Article 6.5 to treat the information as confidential upon a showing of good cause was not triggered. Colombia further argues that the information at issue was in any event disclosed in other documents on the public record.

4.34. Article 6.5 of the Anti-Dumping Agreement provides:

#### Article 6

##### *Evidence*

6.5 Any information which is by nature confidential (for example, because its disclosure would be of significant competitive advantage to a competitor or because its disclosure would have a significantly adverse effect upon a person supplying the information or upon a person from whom that person acquired the information), or which is provided on a confidential basis by parties to an investigation shall, upon good cause shown, be treated as such by the authorities. Such information shall not be disclosed without specific permission of the party submitting it.

4.35. The Panel noted that Article 6.5 addresses confidential treatment by investigating authorities of two categories of information: that which is by nature confidential, and that which is submitted on a confidential basis by parties to an investigation. The Panel further noted that a showing of "good cause" is a "condition precedent for according confidential treatment to information submitted to an

<sup>75</sup> Panel Report, para. 7.70.

<sup>76</sup> See Colombia's Notice of Appeal, para. 2 (referring to Panel Report, paras. 7.126, 7.152.a, and 8.1.b.i).

authority"<sup>77</sup> and applies to both categories of information.<sup>78</sup> The Panel added that authorities are required to objectively assess the alleged "good cause" offered as the basis of the request for confidential treatment.<sup>79</sup>

4.36. The Panel then noted that the information at issue – contained in section d(i) of the revised application – concerned the injury alleged by FEDEPAPA with respect to the Colombian potato-processing industry.<sup>80</sup> As the Panel further observed, that section contained certain information that was redacted by the applicant<sup>81</sup>, but for which no showing of "good cause" had been offered by the applicant or requested by MINCIT.<sup>82</sup> Nonetheless, the Panel considered it "apparent that MINCIT treated this information as confidential, even in the absence of a showing of 'good cause' by the applicant".<sup>83</sup> The Panel rejected Colombia's argument that, given that the applicant never requested that the redacted information be treated as confidential, MINCIT did not grant such confidential treatment, and therefore Article 6.5 does not apply. The Panel instead found that "the fact that the applicant submitted information on a redacted basis without a showing of 'good cause' –coupled with the fact that MINCIT treated this information confidentially – demonstrates a lack of compliance with Article 6.5."<sup>84</sup>

4.37. The Panel further rejected Colombia's argument that the availability of the redacted information elsewhere on the record discharged MINCIT from complying with the obligations under Article 6.5. According to the Panel, there was no clear indication that the content of the redacted information was made available elsewhere on the record. In addition, the Panel rejected Colombia's assertion that the fact that the relevant tables, one of which was in the original application and non-redacted, share the same title, structure, and source of information was enough to show that the information in the original and revised applications were the same. The Panel therefore "disagree[d] with Colombia's argument that a joint reading of both applications 'clearly shows', and enables a reader to 'easily infer', that the redacted information in the revised application was, 'in reality', the *same* as the relevant information contained in the original application".<sup>85</sup>

### **4.3.2 Whether the Panel erred in finding that MINCIT acted inconsistently with Article 6.5 of the Anti-Dumping Agreement by granting confidential treatment to redacted information without a showing of "good cause"**

4.38. The core premise of Colombia's claim on appeal is that a "request" for confidentiality was required to trigger the obligations in Article 6.5.<sup>86</sup> Colombia argues that, since there was not an explicit request to treat certain redacted information in the revised application as confidential, MINCIT can neither be found to have accorded confidential treatment to the information nor to have failed to require a showing of good cause under Article 6.5.<sup>87</sup> In addition, Colombia maintains that the redacted information at issue was not treated as confidential as it was available in a non-redacted form elsewhere on the public record (i.e. the original application).<sup>88</sup>

4.39. The European Union responds that the Panel correctly found that, despite the absence of an explicit request, MINCIT did grant confidential treatment to the information in section d(i) of the revised application, and that other interested parties were prevented from viewing the information redacted from the revised application.<sup>89</sup>

<sup>77</sup> Panel Report, para. 7.115 (quoting Appellate Body Report, *EC – Fasteners (China)* (Article 21.5 – *China*), para. 5.38).

<sup>78</sup> Panel Report, para. 7.115 (referring to Appellate Body Report, *EC – Fasteners (China)*, para. 537; and Panel Report, *Guatemala – Cement II*, para. 8.219).

<sup>79</sup> Panel Report, para. 7.117 (referring to Appellate Body Report, *EC – Fasteners (China)* (Article 21.5 – *China*), paras. 5.39-5.40; and Panel Report, *Korea – Pneumatic Valves (Japan)*, paras. 7.427 and 7.440).

<sup>80</sup> Panel Report, para. 7.120.

<sup>81</sup> Panel Report, para. 7.120.

<sup>82</sup> Panel Report, para. 7.122.

<sup>83</sup> Panel Report, para. 7.122.

<sup>84</sup> Panel Report, para. 7.126.

<sup>85</sup> Panel Report, para. 7.125. (emphasis original)

<sup>86</sup> Colombia's written submission, paras. 5.12-5.13.

<sup>87</sup> Colombia's written submission, paras. 5.16-5.23.

<sup>88</sup> Colombia's written submission, paras. 5.26-5.28.

<sup>89</sup> European Union's written submission, paras. 61-63.

4.40. We do not understand Colombia to challenge the Panel's articulation of the legal standard with respect to Article 6.5 *per se*. As Colombia clarified at the hearing, it does not maintain that an explicit request for confidential treatment is *always* required to trigger the obligations under Article 6.5, but rather that, in the circumstances of this case, where the redacted information at issue, unlike other information provided, was not subject to such an explicit request, MINCIT could not be found to have acted inconsistently with Article 6.5.<sup>90</sup> We note that Article 6.5 does not itself refer to a "request", but rather provides that, when information "is provided on a confidential basis" by a party to an investigation, it shall be "treated as such" by the investigating authority upon a showing of "good cause".

4.41. The underlying facts set out by the Panel are as follows. After FEDEPAPA filed its original application in this dispute, MINCIT sent a letter requesting, *inter alia*, "[t]he identification and justification of confidential documents and a summary or non-confidential version of these documents".<sup>91</sup> FEDEPAPA, in its revised application, stated that "[t]he specific names of the domestic industry companies, all their financial information, and in general numerical, and any data that is classified as a trade secret, are confidential."<sup>92</sup> FEDEPAPA then submitted an annex of its revised application as confidential information (Annex 10) and redacted certain information in a separate section of the revised application (section d(i)), entitled "injury for the potato-processing industry".<sup>93</sup> MINCIT thereafter granted confidential treatment to "anything related to financial information or data considered to be part of trade secrets", but stated that the specific names of the companies in the domestic industry cannot be considered confidential.<sup>94</sup> Only the revised application with the redactions to section d(i) was on the public record.<sup>95</sup>

4.42. As we understand it, FEDEPAPA submitted both redacted and non-redacted versions of its revised application.<sup>96</sup> The redacted version contained redactions to two portions of the revised application: (i) section d(i), which concerned the alleged injury to the Colombia potato-processing industry; and (ii) Annex 10, which contained information on the three domestic companies on whose behalf FEDEPAPA filed its application.<sup>97</sup> However, as Colombia confirmed before the Panel, FEDEPAPA's explicit request for confidential treatment concerned Annex 10 only, and did not relate to section d(i).<sup>98</sup> Subsequently, however, the redactions to section d(i) of the revised application remained on the public record without any further action, including any showing of "good cause", being undertaken by FEDEPAPA or MINCIT.<sup>99</sup> Moreover, a non-redacted version of section d(i) of the revised application was never put on the public record.<sup>100</sup>

4.43. Article 6.5 states that a showing of good cause is required as soon as information was "provided on a confidential basis" by a party to an investigation, and that it was "treated as such" by the investigating authority. As we see it, the act of submitting information in both redacted and non-redacted forms indicates that such information was, in the language of Article 6.5, "provided on a confidential basis". Likewise, the fact that MINCIT allowed section d(i) of the revised application to remain on the public record in that redacted form indicates that such information was, in the language of Article 6.5, "treated" as confidential by MINCIT. Because there was no showing of "good

<sup>90</sup> Colombia's responses to questions at the hearing.

<sup>91</sup> Panel Report, para. 7.110 (quoting MINCIT's deficiency letter to FEDEPAPA (Panel Exhibit EU-9a), numeral 5).

<sup>92</sup> Panel Report, para. 7.110 (quoting revised application (Panel Exhibit EU-10), section 11).

<sup>93</sup> Panel Report, para. 7.110 and fn 241 thereto (referring to Colombia's response to Panel question No. 1.1, para. 3; and quoting revised application (Panel Exhibit EU-10), section 10 d(i)).

<sup>94</sup> Panel Report, para. 7.110 (quoting notice of initiation (Panel Exhibit EU-1a), section 1.5).

<sup>95</sup> Panel Report, paras. 7.122 and 7.126. See also Panel Report, fn 261 to para. 7.120 (referring to the redacted and non-redacted versions of the revised application in Panel Exhibits EU-10 and COL-67).

<sup>96</sup> Panel Exhibits EU-10 and COL-67, respectively.

<sup>97</sup> Panel Report, para. 7.110 and fn 241 thereto. The Panel explained that, although the confidential information of the domestic companies was set out in Annexes 10-12 of the revised application, it would refer to these three annexes as "Annex 10" for ease of reference. (*Ibid.*, fn 241 to para. 7.110)

<sup>98</sup> Panel Report, paras. 7.120 and 7.122 and fn 267 thereto (referring to Colombia's response to Panel question No. 13.2, para. 67).

<sup>99</sup> Panel Report, para. 7.122 (stating that "[t]he parties thus do not dispute that the applicant did not attempt to show 'good cause' for the confidential treatment of this information.").

<sup>100</sup> The European Union noted at the hearing that the first time it was able to see the information that had been redacted was when the non-redacted version had been provided to the Panel in these proceedings. (European Union's responses to questions at the hearing; see also Panel Report, fn 261 to para. 7.120 (referring to section d(i) of the redacted and non-redacted versions of the revised application in Panel Exhibits EU-10 and COL-67))

cause" for the information to be treated as confidential, MINCIT has acted in a manner inconsistent with Article 6.5.<sup>101</sup>

4.44. Colombia further contends that the redacted information in section d(i) cannot be found to have been treated as confidential as it was available in a non-redacted form elsewhere on the record. As Colombia puts it, "any interested party seeking the information otherwise redacted in the revised application could have found it in the equivalent table in the original application, which was placed on the public record."<sup>102</sup> In support, Colombia points to the Panel's statement that the "'relevant tables' in both applications 'share the same title, structure, and source of information'".<sup>103</sup>

4.45. The Panel stated that such similarities were "not enough to demonstrate that the information at issue was the *same*".<sup>104</sup> Specifically, the Panel found that the similarities did not by themselves "demonstrate (or make it easy to 'infer') that the specific 'values' or 'trends' redacted in one table are the *same* as the 'values' or 'trends' allegedly available in another table".<sup>105</sup> Accordingly, the Panel rejected Colombia's argument that a reading of both applications "clearly shows", or enabled a reader to "easily infer", that the redacted information in section d(i) of the revised application was the same as the relevant information contained in the original application.<sup>106</sup>

4.46. That the same information redacted in one document is available and disclosed in another document may mean that the applicant no longer considers that the information is truly kept "confidential". However, for the exporter and other interested parties, that is not necessarily the case. Interested parties must not only search and identify the exact place in the other document where the information can be found. In addition, they cannot be certain if the information provided in one document and that withheld in another is really the same. The applicant may know for certain; the exporter cannot be sure. On the contrary, the fact that the information was redacted in a later document could lead an interested party to believe that there must have been a change to that information justifying the difference in treatment from non-redacted to redacted.

4.47. In light of the Panel's factual finding that a joint reading of both applications did not clearly show, or enable a reader to easily infer, that the redacted information in section d(i) was the same as the information contained in the original application, we see no basis to disturb the Panel's understanding that such information was properly regarded as having been granted confidential treatment by MINCIT.<sup>107</sup>

### 4.3.3 Conclusion

4.48. On the basis of the above, we uphold the Panel's finding, in paragraphs 7.126, 7.152.a, and 8.1.b.i of its Report, that the European Union had established that Colombia acted inconsistently with its obligations under Article 6.5 of the Anti-Dumping Agreement with respect to the redacted information in section d(i) of FEDEPAPA's revised application because MINCIT granted confidential treatment to this information without a showing of "good cause" by the applicant.

<sup>101</sup> For this reason, our consideration of this matter is not coloured by Colombia's contention that the European Union should have instead brought a claim under Article 6.4 of the Anti-Dumping Agreement, which relates to the requirement of an authority to provide timely opportunities to interested parties to see non-confidential information relevant to the presentation of their cases. (Colombia's responses to questions at the hearing; see also Colombia's written submission, para. 5.23 and fn 86 thereto) Because we deem that information in section d(i) of the revised application was accorded confidential treatment by MINCIT, Article 6.4 is not applicable to that information.

<sup>102</sup> Colombia's written submission, para. 5.27.

<sup>103</sup> Colombia's written submission, para. 5.26 (quoting Panel Report, para. 7.125).

<sup>104</sup> Panel Report, para. 7.125. (emphasis original)

<sup>105</sup> Panel Report, para. 7.125. (emphasis original)

<sup>106</sup> Panel Report, para. 7.125.

<sup>107</sup> Colombia argues that the information in footnote 3 to section d(i) of the revised application was not treated as confidential because it was ultimately disclosed by MINCIT in its notice of initiation. (Colombia's written submission, paras. 5.24-5.25) However, we do not see that this alters the Panel's and our consideration that the information contained in the main text of section d(i), which remained on the public record in its redacted form, was properly regarded as having been granted confidential treatment by MINCIT.

#### 4.4 Claim under Article 6.2 of the DSU

##### 4.4.1 Introduction and Panel findings

4.49. Colombia appeals the Panel's finding that the European Union's panel request satisfied the requirement of Article 6.2 of the DSU with respect to the European Union's "packaging cost-related claim" under Article 2.4 of the Anti-Dumping Agreement and that, therefore, such claim fell within the Panel's terms of reference.<sup>108</sup> The "packaging cost-related claim" at issue concerned the European Union's allegation before the Panel that "Colombia acted inconsistently with the requirement under Article 2.4 to make a fair comparison because MINCIT did not grant [Belgium exporter] Mydibel's adjustment request and, instead, elected to exclude certain packaging costs from the export price but retained packaging costs on the normal value side."<sup>109</sup> According to Colombia, while the first part of this allegation, on the failure to grant an adjustment request, was contained in the panel request, the second part, regarding the exclusion of certain packaging costs from the export price side alone, was a separate claim raised only during the panel proceedings and hence fell outside the Panel's terms of reference.<sup>110</sup>

4.50. Article 6.2 of the DSU provides, in relevant part:

Article 6  
*Establishment of Panels*

2. The request for the establishment of a panel shall be made in writing. It shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.

4.51. The relevant part of the European Union's panel request, including its paragraph 5, reads as follows:

The measures at issue described above [in the panel request] appear to be inconsistent with Colombia's obligations under the following provisions of the covered agreements:

5. Article 2.4 of the Anti-Dumping Agreement because Colombia did not make a fair comparison between the export price and the normal value. *In particular, Colombia did not make due allowances for differences which affect price comparability, including for differences in physical characteristics and/or any other differences between the products sold on the domestic markets in Belgium, Germany and the Netherlands, and the products under investigation sold on the export market, which were demonstrated to affect price comparability. Inter alia, Colombia disregarded the differences between the types of products, the different proportions of high and low value products exported to Colombia, as compared to domestic sales in Belgium, Germany and the Netherlands, as well as differences in packaging and differences resulting from the use of different types of oils.*<sup>111</sup>

4.52. In addition, Article 2.4 of the Anti-Dumping Agreement provides, in relevant part:

<sup>108</sup> See Colombia's Notice of Appeal, para. 3 (referring to Panel Report, paras. 7.232-7.233, 7.244, and 8.1.d.ii).

<sup>109</sup> Panel Report, para. 7.218. (fn omitted)

<sup>110</sup> Colombia's written submission, para. 6.1. See also Panel Report, paras. 7.219 and 7.223. Colombia requests that we declare "moot and of no legal effect" the Panel's substantive finding under Article 2.4 should we accept Colombia's appeal under Article 6.2 of the DSU. (Colombia's written submission, paras. 6.35 and 6.38)

<sup>111</sup> WT/DS591/2, pp. 2-3. (emphasis added)

## Article 2

*Determination of Dumping*

2.4 A fair comparison shall be made between the export price and the normal value. ... Due allowance shall be made in each case, on its merits, for differences which affect price comparability, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability.

4.53. By way of background, the European Union's "packaging cost-related claim" at issue arose from the following facts that transpired before MINCIT.<sup>112</sup> In its questionnaire response during the investigation, Mydibel stated that, while it used the same packaging materials in all of its sales, the costs of these common components differed between products made for export and those made for domestic sales, due to differences in product types and customer specifications.<sup>113</sup> In particular, customers in its domestic market requested packaging material that incurred higher costs.<sup>114</sup> To account for this difference, Mydibel requested an adjustment<sup>115</sup> by listing the cost of "packaging material" as one of the elements of the cost of manufacture, and identifying the amount incurred for packaging for each product type.<sup>116</sup>

4.54. MINCIT did not make the adjustment requested by Mydibel.<sup>117</sup> Instead, MINCIT deducted certain packaging costs from the export price<sup>118</sup>, without making any corresponding adjustment to the normal value<sup>119</sup>, resulting in a so-called "asymmetrical deduction".<sup>120</sup> In its comments on MINCIT's essential facts disclosure, Mydibel stated explicitly that its exports did *not* incur any *additional* export packaging costs distinct from those incurred in its domestic sales.<sup>121</sup> Notwithstanding Mydibel's comment, MINCIT maintained that it deducted costs for "export packaging material" from the export price alone (thereby increasing any margin of dumping), and that it did not make any normal value adjustment for packaging costs (which would have decreased the margin of dumping) because, in its view, "*packaging costs ... are part of the production ... costs.*"<sup>122</sup>

4.55. During the panel proceedings, the European Union submitted that Colombia acted inconsistently with the requirement under Article 2.4 to make a fair comparison, because MINCIT "erred in declining" Mydibel's adjustment request "for differences in the cost of the common packaging components", and then "compounded the error" by making the "asymmetrical deduction".<sup>123</sup> Colombia challenged the sufficiency of the panel request under Article 6.2 of the DSU,

<sup>112</sup> Our brief description of these facts is based on the Panel's factual findings not subject to appeal.

<sup>113</sup> Panel Report, paras. 7.217 and 7.234 (referring to Mydibel's questionnaire response (Panel Exhibit EU-30a (BCI)), section 5; Mydibel's comments on the essential facts technical report (Panel Exhibit COL-1 (BCI)), pp. 10-11 and 21).

<sup>114</sup> Panel Report, para. 7.234 (referring to Mydibel's comments on the essential facts technical report (Panel Exhibit COL-1 (BCI)), p. 21).

<sup>115</sup> Panel Report, para. 7.217 (referring to European Union's first written submission to the Panel, paras. 182-183; Mydibel's questionnaire response (Panel Exhibit EU-30a (BCI)), section 5).

<sup>116</sup> Panel Report, para. 7.238 (referring to Mydibel's questionnaire response (Panel Exhibit EU-30a (BCI)), section 5; Mydibel's questionnaire response, Annex 3.2.1.2, 3<sup>rd</sup> workbook "costes de manufactura" (Panel Exhibit EU-30.1 (BCI))).

<sup>117</sup> Panel Report, para. 7.217.

<sup>118</sup> See Panel Report, fn 468 to para. 7.242 (referring to European Union's second written submission to the Panel, para. 74 (arguing that "the amount that MINCIT deducted from the export price ... corresponds to what Mydibel indicated as regular full packaging costs" and "is roughly the same amount as what was included as full packaging costs on the normal value side")). The Panel noted that "Colombia neither substantiated its assertions concerning the existence of export ... packaging costs, nor attempted to rebut the European Union's arguments to the contrary." (Ibid., para. 7.242)

<sup>119</sup> Panel Report, para. 7.217 (referring to MINCIT's responses to comments on essential facts (Panel Exhibit EU-17a), section 7).

<sup>120</sup> See e.g. Colombia's written submission, para. 6.4.

<sup>121</sup> Panel Report, para. 7.238 (referring to Mydibel's comments on the essential facts technical report (Panel Exhibit COL-1 (BCI)), pp. 14 and 17).

<sup>122</sup> Panel Report, para. 7.239 (quoting MINCIT's responses to comments on essential facts (Panel Exhibit EU-17a), section 7) (emphasis added by the Panel); European Union's response to questioning at the hearing.

<sup>123</sup> Panel Report, para. 7.235 (referring to European Union's first written submission to the Panel, para. 183). See also Panel Report, para. 7.218.

arguing that, whereas the panel request referred to MINCIT's alleged "disregard" of packaging costs differences, the allegation against the "asymmetrical deduction" developed in the European Union's first written submission was "substantively different" from that which was in the panel request.<sup>124</sup> In the alternative, Colombia also challenged the merits of the European Union's above allegation.<sup>125</sup>

4.56. The Panel, having examined the panel request and how the European Union developed its claim during the panel proceedings, found that "the European Union's panel request did not need to engage in detail with all the factual aspects of the calculation that led to Colombia's alleged failure to perform a fair comparison."<sup>126</sup> "In particular", the Panel stated, "it was not necessary for the panel request to outline which specific adjustment was allegedly not – or incorrectly – made and why."<sup>127</sup> The Panel therefore concluded that Article 6.2 of the DSU does not require the European Union to include its argument regarding the "asymmetrical deduction" in the panel request in order to provide a brief summary of the legal basis of its "fair comparison" complaint.<sup>128</sup> These findings are subject to Colombia's appeal.

4.57. In examining the merits of the European Union's claim under Article 2.4, the Panel observed a "disconnect" between the parties' arguments as they addressed "different types of packaging costs and, hence, distinct and unrelated types of adjustments".<sup>129</sup> Specifically, the European Union's arguments referred to Mydibel's request for an adjustment "to account for alleged cost differences" due to "differences in product types and customer specifications", while Colombia's rebuttal arguments related to an adjustment made by MINCIT "to account for the fact that Mydibel's export sales allegedly incurred additional – and different – packaging costs than its domestic sales".<sup>130</sup> Having examined the relevant facts underlying these arguments<sup>131</sup>, the Panel considered that, because MINCIT's actual consideration of packaging costs "*did not respond to the substance*" of the requested adjustment, MINCIT "failed to provide a proper basis to deny" Mydibel's request.<sup>132</sup> The Panel also considered that "MINCIT had no proper basis ... to deduct certain other packaging costs from the export price" alone.<sup>133</sup> Both considerations served as the basis for the Panel's ultimate conclusion that Colombia had acted inconsistently with Article 2.4 for its failure to make a fair comparison. These findings are not subject to, but provide relevant background for assessing, Colombia's appeal under Article 6.2 of the DSU.

#### **4.4.2 Whether the Panel erred in finding that the European Union's "packaging cost-related claim" under Article 2.4 of the Anti-Dumping Agreement was within the Panel's terms of reference pursuant to Article 6.2 of the DSU**

4.58. Pursuant to Article 6.2 of the DSU, the "specific measures at issue" and "a brief summary of the legal basis of the complaint" identified in a panel request constitute the "matter referred to the DSB" which, pursuant to Article 7.1 of the DSU, forms the basis of a Panel's terms of reference. The term "legal basis of the complaint" in Article 6.2 has been understood to mean the "claim" brought by a complainant in a dispute, such as an allegation that the responding party has acted inconsistently with an identified provision of a particular agreement.<sup>134</sup> To fulfil the requirement to provide a "brief summary" of the claim sufficient to "present the problem clearly", findings in prior disputes suggest that the complaining party must plainly connect the challenged measure(s) with the provision(s) of the covered agreements claimed to have been infringed.<sup>135</sup> Furthermore, while the failure to set out a claim in the panel request excludes such claim from the panel's terms of reference, the same is not true for arguments. In contrast to claims, "arguments" are the reasons put forth by a complaining party to demonstrate that the responding party's measure does indeed

<sup>124</sup> Panel Report, paras. 7.219 and 7.223 (referring to Colombia's first written submission to the Panel, paras. 10.10, 10.12, and 10.14).

<sup>125</sup> Panel Report, para. 7.219 (referring to Colombia's first written submission to the Panel, paras. 10.24 and 10.26-10.27; responses to Panel questions No. 5.5(a), paras. 184-186, and No. 5.6, para. 190).

<sup>126</sup> Panel Report, para. 7.231.

<sup>127</sup> Panel Report, para. 7.231.

<sup>128</sup> See Panel Report, para. 7.232.

<sup>129</sup> Panel Report, para. 7.237.

<sup>130</sup> Panel Report, para. 7.237.

<sup>131</sup> See Panel Report, paras. 7.238-7.242.

<sup>132</sup> Panel Report, para. 7.243. (emphasis added)

<sup>133</sup> Panel Report, para. 7.244.

<sup>134</sup> See e.g. Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.14 (quoting Appellate Body Report, *Korea – Dairy*, para. 139).

<sup>135</sup> See e.g. Appellate Body Reports, *Korea – Pneumatic Valves (Japan)*, para. 5.6; *China – Raw Materials*, para. 220.

infringe upon the identified treaty provision.<sup>136</sup> As such, they are not part of "a brief summary of the legal basis of the complaint" and need not be included in the panel request.<sup>137</sup> We understand that the parties, in principle, agree with the applicable legal standard under Article 6.2 as set out above.<sup>138</sup>

4.59. On appeal, Colombia contends that the Panel's findings under Article 6.2 of the DSU do not correctly reflect the distinction between "claims" and "arguments".<sup>139</sup> According to Colombia, the European Union's panel request only lists a claim regarding packaging cost *adjustments*, and does not cover calculation-related and similar errors such as, in Colombia's view, the European Union's asymmetrical deduction "claim". Colombia considers that the two "claims" are "distinct, involve two different sets of facts and two separate, independent decisions by an investigating authority".<sup>140</sup> The European Union responds that "Colombia attempts to create an impression of two distinct claims where there is, in fact, only one: MINCIT disregarded its obligations under Article 2.4 ... by carrying out an unfair comparison between normal value and export price, because various due allowances/adjustments were not done properly (which includes due allowances/adjustments for packaging costs)".<sup>141</sup>

4.60. The European Union's claim related to packaging costs is set out in paragraph 5 of its panel request and incorporates language from the first and third sentences of Article 2.4 of the Anti-Dumping Agreement. Reading paragraph 5 of the panel request in light of Article 2.4, both quoted above<sup>142</sup>, we agree with the Panel's description of the relevant claim set out in paragraph 5:

[T]he European Union describes the elements of its Article 2.4 complaint as being: (a) the alleged failure to "make a fair comparison between the export price and the normal value"; (b) "[i]n particular", the alleged failure to "make due allowances for differences ... affect[ing] price comparability"; and (c) as an example ("*inter alia*"), Colombia's alleged disregard for "differences in packaging".<sup>143</sup>

4.61. Therefore, the European Union's panel request plainly connects (i) the relevant aspect of the measure, i.e. MINCIT's treatment of differences affecting price comparability, including its alleged disregard of packaging differences, with (ii) the relevant provision of the covered agreements, namely, the requirement to make "due allowance" for differences affecting price comparability and a "fair comparison" under Article 2.4.<sup>144</sup> As the Panel also noted, the alleged disregard for differences in packaging is listed as an "example". As such, it helps to illustrate the claim, but the fact that the European Union chose to elaborate by providing examples should not be taken as narrowing the scope of the claim.<sup>145</sup>

4.62. The requirement to make "[d]ue allowance" in Article 2.4 has been understood to mean that "*additions or deductions* in appropriate amounts to the export price or normal value may be required to account for 'differences' ... affect[ing] price comparability, thereby ensuring the 'fairness' of the comparison".<sup>146</sup> It has also been noted that "Article 2.4 prohibits investigating authorities from making adjustments ... when [differences in characteristics] have no impact on price comparability", and that "making allowances that are not warranted will render the comparison unfair".<sup>147</sup> The text of Article 2.4 and its interpretation thus indicate that not only a lack of due allowance (e.g. MINCIT's refusal of Mydibel's request to make due allowance for higher packaging costs for domestic sales), but also an adjustment that is unwarranted (e.g. MINCIT's asymmetrical deduction of packaging

<sup>136</sup> See e.g. Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.14 (referring to Appellate Body Report, *Korea – Dairy*, para. 139). The United States similarly noted at the hearing that the standard Working Procedures in Appendix 3 of the DSU clarify that "facts" and "arguments" are to be presented in a party's written submission. (United States' third party's opening statement at the hearing)

<sup>137</sup> See e.g. Panel Report, *Costa Rica – Avocados (Mexico)*, para. 3.8 of Annex D; Appellate Body Report, *Korea – Pneumatic Valves (Japan)*, paras. 5.6 and 5.31.

<sup>138</sup> Parties' responses to questioning at the hearing.

<sup>139</sup> Colombia's written submission, para. 6.9.

<sup>140</sup> Colombia's written submission, para. 6.3. See also para. 4.49 above.

<sup>141</sup> European Union's written submission, para. 66.

<sup>142</sup> See paras. 4.51-4.52 above.

<sup>143</sup> Panel Report, para. 7.227.

<sup>144</sup> See also European Union's written submission, paras. 70-73.

<sup>145</sup> See Appellate Body Report, *EC – Selected Customs Matter*, para. 153.

<sup>146</sup> Panel Report, *EU – Biodiesel (Argentina)*, para. 7.294. (emphasis added)

<sup>147</sup> Appellate Body Report, *EU – Fatty Alcohols (Indonesia)*, para. 5.22. (fn omitted)

costs only on the export price side), could lead to a violation of the principle of "fair comparison".<sup>148</sup> Both types of conduct on the part of an authority concern differences affecting price comparability that could have a bearing on the ability to ensure a fair comparison.

4.63. In light of the applicable legal standard under Article 2.4, therefore, we fail to see a basis in Article 2.4 to support Colombia's restricted reading of "allowance" as pertaining only to "[a]djustments ... *requested* by investigated parties" and involving "the treatment of particular expenses incurred by the exporter".<sup>149</sup> Neither do we see a distinction between "due allowances" and "issues such as calculation-related or similar errors", the latter of which are not, according to Colombia, listed in paragraph 5 of the panel request.<sup>150</sup> Rather, in our view, paragraph 5 of the panel request potentially covers errors made by the authority that allegedly rendered an "allowance" it made "undue" or "unfair".

4.64. Similarly, we do not find that paragraph 6 of the panel request lends support to Colombia's position.<sup>151</sup> Paragraph 6 states as follows:

[The measures at issue described above appear to be inconsistent with Colombia's obligations under] Article 2.4 of the Anti-Dumping Agreement because Colombia did not make a fair comparison between the export price and the normal value by *deducting* certain sea freight and insurance costs *twice* from the export price of a company, thereby unduly lowering the export price.<sup>152</sup>

4.65. Both paragraphs 5 and 6 concern a failure to make a "fair comparison" under Article 2.4, although each has its own focus. The fact that paragraph 6 appears to be directed at certain duplicative deductions does not preclude the possibility that the claim raised under paragraph 5 covers other errors in MINCIT's determination on "due allowance". We therefore do not read paragraph 6 as diminishing or altering the scope of the claim set out in paragraph 5 regarding a failure to make "due allowance".

4.66. Turning to the European Union's allegations during the panel proceedings<sup>153</sup>, we recall that both MINCIT's disregard of the requested adjustment and its asymmetrical deduction occurred within the same context and investigative step, i.e. as part of MINCIT's treatment of packaging costs for the purpose of conducting the price comparison with respect to Mydibel.<sup>154</sup> To elaborate on its claim under Article 2.4 during the panel proceedings, the European Union relied on both MINCIT's alleged error in declining the requested adjustment, as well as the asymmetrical deduction which, in its view, "compounded" that error.<sup>155</sup> We therefore share the Panel's view that both allegations concern "detail[s]" in the "factual aspects of the calculation that led to Colombia's alleged failure to perform a fair comparison".<sup>156</sup> As the Panel rightly found, the panel request need not engage in these details or outline "which specific adjustment was allegedly not – or incorrectly – made and why".<sup>157</sup>

4.67. Colombia nonetheless submits that the European Union's allegations regarding these two aspects of MINCIT's conduct "involve two factually and legally 'distinct and unrelated' issues" and are "two different claims".<sup>158</sup> As a linchpin of this argument, Colombia submits that "[t]he Panel itself described these two issues as 'of a different type and of a different nature' and as 'different types of packaging costs and, hence, distinct and unrelated types of adjustments'".<sup>159</sup>

<sup>148</sup> See also European Union's written submission, para. 69.

<sup>149</sup> Colombia's written submission, para. 6.22. (emphasis added) Colombia refers to paragraph 5 as listing "a range of adjustments". In light of the language used in paragraph 5, we understand Colombia uses the word "adjustments" to refer to "allowance". (Ibid.)

<sup>150</sup> Colombia's written submission, para. 6.22.

<sup>151</sup> Colombia's written submission, para. 6.23.

<sup>152</sup> WT/DS591/2, p. 3. (emphasis added)

<sup>153</sup> Panel Report, para. 7.228.

<sup>154</sup> See factual background contained in paras. 4.53-4.54 above.

<sup>155</sup> Panel Report, para. 7.235. See also *ibid.*, para. 7.228.

<sup>156</sup> Panel Report, para. 7.231.

<sup>157</sup> Panel Report, para. 7.231.

<sup>158</sup> Colombia's written submission, paras. 6.3 and 6.28. (emphasis omitted)

<sup>159</sup> Colombia's written submission, para. 6.29 (quoting Panel Report, paras. 7.237 and 7.243). (emphasis omitted)

4.68. The statements quoted by Colombia were made by the Panel when describing a certain "disconnect" between the parties' arguments and the facts underlying these arguments.<sup>160</sup> Read in context, these statements reflect the Panel's appreciation of the fact that, in addressing the issue of packaging costs, what MINCIT was *requested to do* and what it *actually did* were different. As noted above, having examined how this mismatch transpired in MINCIT's treatment of packaging cost adjustments<sup>161</sup>, the Panel came to the view that MINCIT "failed to provide a proper basis to deny" Mydibel's request because what MINCIT actually did (i.e. the asymmetrical deduction) "*did not respond to the substance of [the requested] adjustment*".<sup>162</sup> The mismatch between the two factual aspects at issue was thus one of the reasons supporting the Panel's conclusion that MINCIT's treatment of packaging costs was inconsistent with Article 2.4.<sup>163</sup> This does not turn these two factual aspects, as Colombia argues, into two separate "claims" that are "legally independent of each other", let alone claims that are somehow not covered by the European Union's panel request.<sup>164</sup>

4.69. Furthermore, Colombia highlights the due process objective of a panel request, including to enable the respondent to know what case it has to answer and begin preparing its defence.<sup>165</sup> However, apart from a general reference to the number of claims contained in the European Union's panel request, of which the European Union pursued only a "subset"<sup>166</sup>, Colombia's arguments do not indicate how its due process rights were breached due to the alleged lack of clarity of the European Union's panel request. On the contrary, given that the two factual elements underlying the European Union's allegations related to the same investigative step regarding Mydibel's packaging costs<sup>167</sup>, we see no grounds to consider that Colombia received insufficient notice as to the scope of the European Union's claim listed in paragraph 5 of the panel request.

4.70. Finally, Colombia argues that Article 6.2 of the DSU and Article 17.5(ii) of the Anti-Dumping Agreement, read together, "require[] the complainant ... to identify [in the panel request] the discrete set of 'facts made available' to the investigating authority during the investigation".<sup>168</sup> This means that, for purposes of a claim under Article 2.4 of the Anti-Dumping Agreement, a complainant must identify "the particular element of the determination", such as adjustments, the construction of the export price, or the mechanics of the comparison, so that the respondent can "know what case it has to answer".<sup>169</sup> We note that Article 17.5(ii) governs the scope of evidence a panel is allowed to review in disputes involving anti-dumping measures.<sup>170</sup> The "facts" referred to in Article 17.5(ii) are what a panel may examine during the panel proceedings, not what a complainant must spell out in the panel request. We therefore fail to see how Article 17.5(ii) of the Anti-Dumping Agreement is relevant for assessing the sufficiency of a panel request.<sup>171</sup> Instead, we consider that

<sup>160</sup> See relevant summary of panel findings in para. 4.57 above. See also Panel Report, paras. 7.237 and 7.243. Given the Panel's description of the parties' arguments before it, we are not convinced by Colombia's assertion that "[t]he EU never raised Mydibel's adjustment request before the Panel" and that "[t]he entirety of the EU's case, from the first written submission all the way to its responses to the Panel's questions, revolves around the alleged asymmetrical deduction." (Colombia's written submission, para. 6.29) (emphasis omitted) See also Panel Report, para. 7.228 (quoting the European Union's first written submission to the Panel, para. 183 (in turn, referring to both MINCIT's denial of adjustment request and its asymmetrical deduction)).

<sup>161</sup> See Panel Report, paras. 7.238-7.242.

<sup>162</sup> Panel Report, para. 7.243. (emphasis added)

<sup>163</sup> Panel Report, para. 7.244. See also Panel Report, paras. 7.242-7.243.

<sup>164</sup> Colombia's written submission, para. 6.29. (emphasis omitted) Given the facts of the case, we do not find it pertinent to address the *hypothetical* scenarios raised by Colombia that "[t]he asymmetrical deduction problem could have arisen even if Mydibel had made no adjustment request for packaging costs." (Ibid., para. 6.29) Neither do we find it relevant to consider, for purposes of resolving Colombia's appeal, how a respondent could bring itself into compliance in "a hypothetical instance where both allegations are accepted by a panel". (Ibid.)

<sup>165</sup> Colombia's written submission, paras. 6.13-6.16.

<sup>166</sup> Colombia's written submission, para. 6.16.

<sup>167</sup> MINCIT discussed its asymmetrical deduction, and its reason for not making any packaging cost adjustments to the normal value, in the same section of its response to comments on the essential facts disclosure. (See MINCIT's responses to comments on essential facts (Panel Exhibit EU-17a), section 7 (referred to in Panel Report, fns 464 and 465), pp. 28-30)

<sup>168</sup> Colombia's written submission, para. 6.18.

<sup>169</sup> Colombia's written submission, para. 6.19 (quoting Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 162).

<sup>170</sup> See e.g. Panel Reports, *EC – Salmon (Norway)*, paras. 7.835-7.843; *US – Shrimp II (Viet Nam)*, paras. 7.7-7.8; *US – Softwood Lumber V*, paras. 7.31-7.43; and *EC – Tube or Pipe Fittings*, paras. 7.42-7.47.

<sup>171</sup> As the European Union submits, Article 17.5(ii) "has nothing to do with the panel request". (European Union's written submission, para. 67) As the United States similarly notes, Article 17.5(ii) delineates

a granular description of the facts, as Colombia suggests, is not required in a panel request under Article 6.2 of the DSU.

#### 4.4.3 Conclusion

4.71. On the basis of the above, we uphold the Panel's finding, in paragraphs 7.232, 7.233, 7.244, and 8.1.d.ii of its Report, that the European Union's claim under Article 2.4 of the Anti-Dumping Agreement concerning Mydibel's packaging cost-related adjustment request fell within the Panel's terms of reference. For these reasons, we also decline Colombia's request to "declare moot and of no legal effect" the Panel's substantive findings under Article 2.4.

### 4.5 Claim under Articles 3.1, 3.2, 3.4, and 3.5 of the Anti-Dumping Agreement

#### 4.5.1 Introduction and Panel findings

4.72. Colombia appeals the Panel's finding that MINCIT acted inconsistently with Articles 3.1, 3.2, 3.4, and 3.5 by including in its final injury and causation determinations imports from exporters that were determined to have final *de minimis* dumping margins.<sup>172</sup> According to Colombia, interpreting the term "dumped imports" in Articles 3.1, 3.2, 3.4, and 3.5 to include imports with final *de minimis* dumping margins, as MINCIT did, "is correct or, at the very least, a 'permissible' interpretation within the meaning of Article 17.6(ii) of the Anti-Dumping Agreement".<sup>173</sup>

4.73. Article 3 of the Anti-Dumping Agreement, entitled "Determination of Injury", elaborates on the requirement of injury. Article 3.1 provides:

#### Article 3

##### *Determination of Injury*

3.1 A determination of injury for purposes of Article VI of GATT 1994 shall be based on positive evidence and involve an objective examination of both (a) the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products, and (b) the consequent impact of these imports on domestic producers of such products. (underlining added)

4.74. Articles 3.2, 3.4, and 3.5 similarly refer to "dumped imports" without explicitly addressing whether this includes or excludes imports with *de minimis* dumping margins.

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the scope of a panel's evidentiary review of the investigating authority's evaluation of the facts before it, and does not address, nor concern itself with, the identification of the specific measures at issue and of the legal basis of the complaint under Article 6.2 of the DSU. (United States' third party's opening statement at the hearing)

<sup>172</sup> See Colombia's Notice of Appeal, para. 4 (referring to Panel Report, paras. 7.303, 7.307, and 8.1.e.i). See also Colombia's written submission, para. 7.1. Colombia does not appeal the Panel's finding, in paragraph 7.305, that MINCIT acted inconsistently with the same provisions by including in its injury and causation analysis imports from exporters found to have negative dumping margins. (Ibid., fn 116 to para. 7.1)

<sup>173</sup> Colombia's written submission, para. 7.10.

4.75. In addition to the above provisions at issue under Article 3, the parties and the Panel also referred to, *inter alia*, Article 2.1 and Article 5.8 as pertinent context. Article 2 contains rules on the determination of dumping, and its first paragraph provides:

Article 2

*Determination of Dumping*

2.1 For the purpose of this Agreement, a product is to be considered as being dumped, i.e. introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country.

4.76. Article 5, in turn, entitled "Initiation and Subsequent Investigation", sets out rules and more precise steps for specific anti-dumping applications and investigations. Article 5.8 provides:

Article 5

*Initiation and Subsequent Investigation*

5.8 An application under paragraph 1 shall be rejected and an investigation shall be terminated promptly as soon as the authorities concerned are satisfied that there is not sufficient evidence of either dumping or of injury to justify proceeding with the case. There shall be immediate termination in cases where the authorities determine that the margin of dumping is *de minimis*, or that the volume of dumped imports, actual or potential, or the injury, is negligible. The margin of dumping shall be considered to be *de minimis* if this margin is less than 2 per cent, expressed as a percentage of the export price. (underlining added)

4.77. The Panel observed that, while the term "dumped imports" carries the same meaning across Articles 3.1, 3.2, 3.4, and 3.5, it is not defined in Article 3.<sup>174</sup> The Panel noted that the parties identified different textual and contextual elements in support of their positions.<sup>175</sup> To the Panel, the principle of effectiveness, which flows from Article 31 of the Vienna Convention, meant that it may not adopt an interpretation that would result in reducing the provisions of the Anti-Dumping Agreement to redundancy or inutility.<sup>176</sup>

4.78. The Panel considered that, "[i]n this case", Article 5.8 of the Anti-Dumping Agreement "provides important context for the interpretation of the term 'dumped imports'" because, in addition to Article 2.1, provisions of Article 5 are applicable to and regulate the entire anti-dumping investigation to determine the existence, degree, and effect of any alleged dumping.<sup>177</sup> Article 5.8 requires an authority to end its investigation as soon as it determines that the margin of dumping is *de minimis*. Furthermore, an injury determination under Article 3 follows and takes into account the determination of the margin of dumping. Read together, these provisions indicate that, once a producer or exporter has been assigned a *de minimis* margin of dumping, the continued treatment of any imports from that producer or exporter as "dumped imports", in any subsequent injury and causation analyses under Article 3, would render ineffective the requirement to "immediate[ly] terminate" the investigation.<sup>178</sup>

4.79. Colombia argued before the Panel that Articles 3.3 and 9.4 (which do explicitly exclude *de minimis* margins of dumping) demonstrate the absence of a link between Article 5.8 and Articles 3.1, 3.2, 3.4, and 3.5 because, when drafters decided to qualify the dumping margins as those above the *de minimis* threshold, they did so expressly.<sup>179</sup> In the Panel's view, however, given the "considerably different" scope of these provisions, the fact that Articles 3.3 and 9.4 explicitly make Article 5.8 operational in the *specific* situations contemplated under those provisions

<sup>174</sup> Panel Report, paras. 7.287-7.289.

<sup>175</sup> Panel Report, paras. 7.289-7.291.

<sup>176</sup> Panel Report, para. 7.291.

<sup>177</sup> Panel Report, para. 7.292.

<sup>178</sup> Panel Report, para. 7.294. (fn omitted)

<sup>179</sup> Panel Report, para. 7.295 (referring to Colombia's response to Panel question No. 6.3, para. 204; second written submission to the Panel, para. 9.23).

highlighted the contextual relevance of Article 5.8 for the *general* injury and causation determinations under Article 3.<sup>180</sup> In addition, the Panel rejected Colombia's reliance on the panel's finding in *Canada – Welded Pipe*, where the panel found that the notion of "dumping" does not have a *de minimis* component, because that finding concerns the interpretation of "dumping" in Article 7.1(ii), which is limited to the application of *provisional* anti-dumping measures not at issue in this dispute.<sup>181</sup> The Panel highlighted, instead, the same panel's statement that imports from an exporter with a *final de minimis* margin of dumping "should not be treated as 'dumped' for the purpose of the analysis and final determinations of injury and causation", because "Article 5.8 effectively means that there is no legally cognizable dumping" by that exporter.<sup>182</sup>

4.80. Finally, the Panel disagreed with Colombia that, under its legal system, in which final determinations of dumping, injury, and causation occur at the same time, "the only way to terminate immediately an investigation, in respect of producers or exporters for which a *de minimis* margin of dumping is determined, is to exclude them from the scope of the order."<sup>183</sup> The Panel found that authorities' freedom to structure their investigations cannot be used as a justification for non-compliance with the unambiguous requirement under Article 5.8 to terminate immediately an investigation in cases where the authorities determine that the margin of dumping is *de minimis*.<sup>184</sup> In conclusion, the Panel found that Colombia's interpretation of the term "dumped imports" as including *de minimis* margin imports is not "permissible" within the meaning of the second sentence of Article 17.6(ii) of the Anti-Dumping Agreement.<sup>185</sup>

4.81. In paragraphs 4.8 to 4.15 above, we set out our approach to addressing the interpretative issues before us under Articles 5.2(iii) and 5.3 (especially, the phrase "where appropriate") in light of Article 17.6(ii). We follow the same approach below in examining Colombia's appeal under Articles 3.1, 3.2, 3.4, and 3.5 regarding the term "dumped imports". In doing so, our task is not to search for a single interpretation that we consider to be "final" or "correct". Rather, we will test Colombia's interpretation of the term "dumped imports" and ask whether a treaty interpreter, using the Vienna Convention method for treaty interpretation, could have reached Colombia's interpretation. In other words, we will examine whether Colombia's interpretation has the required degree of solidness or analytical support for it to be given deference as "permissible" within the bounds of the Vienna Convention method for treaty interpretation.

#### **4.5.2 Whether it is permissible to interpret the term "dumped imports" in Articles 3.1, 3.2, 3.4, and 3.5 of the Anti-Dumping Agreement to include imports of exporters determined to have final *de minimis* margins of dumping**

4.82. On appeal, Colombia contends that the Panel ignored the ordinary meaning of the term "dumped imports" in light of the definition of "dumping" in Article 2.1 of the Anti-Dumping Agreement<sup>186</sup>, and instead focused on one contextual provision, i.e. Article 5.8, at the expense of the context provided by other provisions such as Articles 3.3, 3.5, and 9.4.<sup>187</sup> Colombia further argues that the Panel's reliance on Article 5.8 is premised on the erroneous understanding that an authority must definitely determine the existence of dumping *before* assessing the existence of injury and causation, even though such a sequential decision-making process is not required by the Anti-Dumping Agreement.<sup>188</sup> Colombia also seeks to support its view with supplementary means of treaty interpretation, including preparatory work for the Kennedy Round Anti-Dumping Code.<sup>189</sup>

4.83. The European Union maintains that the "ordinary meaning" of the term "dumped imports" in Article 3 refers to those imports attributable to producers or exporters for which, at the end of an investigation, a margin of dumping greater than *de minimis* has been calculated.<sup>190</sup> To the European Union, such a reading comports with the "terms and objectives" of the Anti-Dumping

<sup>180</sup> Panel Report, para. 7.298. See also Panel Report, paras. 7.296-7.297.

<sup>181</sup> Panel Report, para. 7.299 (referring to Panel Report, *Canada – Welded Pipe*, paras. 7.59 and 7.64).

<sup>182</sup> Panel Report, para. 7.299 (quoting Panel Report, *Canada – Welded Pipe*, para. 7.83).

<sup>183</sup> Panel Report, para. 7.300 (quoting Colombia's response to Panel question No. 6.3, para. 210 (in turn, quoting Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 219)).

<sup>184</sup> Panel Report, paras. 7.301-7.302.

<sup>185</sup> Panel Report, para. 7.303.

<sup>186</sup> Colombia's written submission, paras. 7.16-7.26.

<sup>187</sup> Colombia's written submission, paras. 7.27-7.36.

<sup>188</sup> Colombia's written submission, paras. 7.37-7.57.

<sup>189</sup> Colombia's written submission, paras. 7.21-7.24 and 7.58-7.60.

<sup>190</sup> European Union's written submission, para. 105.

Agreement as a whole<sup>191</sup>, ensures the effectiveness of all relevant provisions including Articles 5 and 6 of the Agreement<sup>192</sup>, and is supported by findings in previous disputes.<sup>193</sup> In reaching its finding, therefore, the Panel gave due consideration to the ordinary meaning of the term "dumped imports" in its context<sup>194</sup>, and did not err in its reliance on Article 5.8 or in its rejection of Colombia's arguments on the basis of context and preparatory work.<sup>195</sup>

4.84. At the outset, we note that MINCIT based its final injury and causation determinations in this case on all investigated imports, i.e. those from exporters for whom it determined final margins of dumping that were (i) above the *de minimis* threshold (2% or greater); (ii) below the *de minimis* threshold (less than 2%); and (iii) negative.<sup>196</sup> The question raised by Colombia's appeal is whether, by including imports from exporters for whom final *de minimis* margins of dumping were determined, MINCIT's injury and causation determinations rest upon a "permissible" interpretation of the term "dumped imports" in Articles 3.1, 3.2, 3.4, and 3.5. The Spanish and French versions of the same term are, respectively, "importaciones objeto de dumping" and "importations faisant l'objet d'un dumping". The text of these provisions does not define the term "dumped imports" and, on its face, is silent as to whether the term is limited to imports with margins of dumping above a particular threshold.

#### 4.5.2.1 Context provided by Article 2.1 and relevant provisions of Article 5

4.85. Colombia's interpretation relies principally on the fact that, under the definition of "dumping" in Article 2.1, dumping exists when the dumping margin is above 0%. To Colombia, absent an express indication to the contrary, every time there is a reference to "dumping" anywhere in the Anti-Dumping Agreement, the definition in Article 2.1 must apply. Thus, the term "dumped imports" refers to "any imports for which an authority calculates a positive dumping margin *regardless of the magnitude of the margin*".<sup>197</sup>

4.86. Article 2.1, entitled "Determination of Dumping", outlines provisions relevant to determining whether a "product" can be "considered as being dumped" and does so "[f]or the purpose of" the Anti-Dumping Agreement. Article 3, however, refers specifically to "dumped *imports*"<sup>198</sup> in the context of injury determinations, rather than the generic concept of "dumping" in isolation, as Article 2.1 does. While the definition in Article 2.1 is relevant for interpreting the term "dumped imports", it is not the only relevant context for assessing the ordinary meaning of this term under Article 3. This is because, unlike the considerations in Article 2.1 relating to a determination of "dumping" (or "dumped"), the term "dumped *imports*" in Article 3 refers to a specific group of imports subject to an authority's injury determination in the context of a specific anti-dumping investigation which, in turn, may lead to the application of duties. This is supported by Article 1 of the Anti-Dumping Agreement, which states that an anti-dumping measure may be "applied only under the circumstances provided for in Article VI of GATT 1994 and pursuant to investigations *initiated and conducted in accordance with the provisions of this Agreement*".<sup>199</sup> Thus, in addition to Article 2.1, other provisions of the Anti-Dumping Agreement regarding the initiation and conduct of investigations are also instructive as to the meaning and scope of the term "dumped imports".

4.87. The "provisions" referred to in Article 1 begin with the "Determination of Dumping" in Article 2, proceed to the "Determination of Injury" in Article 3, and continue with the "Definition of Domestic Industry" in Article 4. Each provision, separately, addresses one of the substantive components of an anti-dumping investigation, including by defining the relevant concepts. Article 5, in turn, links these components together by regulating an investigating authority's "Initiation and Subsequent Investigation" to determine the "*existence, degree and effect of any alleged dumping*".<sup>200</sup> Read in its totality, the disciplines imposed by Article 5 are intended to cover all stages

<sup>191</sup> European Union's written submission, paras. 106.a and 108-110.

<sup>192</sup> European Union's written submission, paras. 106.b and 111-124.

<sup>193</sup> European Union's written submission, paras. 125-132.

<sup>194</sup> European Union's written submission, paras. 146-155.

<sup>195</sup> European Union's written submission, paras. 156-224.

<sup>196</sup> See Panel Report, para. 7.282.

<sup>197</sup> Colombia's written submission, para. 7.16. (emphasis added)

<sup>198</sup> Emphasis added.

<sup>199</sup> Emphasis added; fn omitted.

<sup>200</sup> Anti-Dumping Agreement, Article 5.1. (emphasis added)

of an investigating authority's investigation, including the analysis leading to the injury determination.<sup>201</sup>

4.88. We recall Colombia's argument that the reference to dumping "anywhere" in the Agreement<sup>202</sup>, including in Articles 5.1 and 5.7, must mean "the difference between a higher normal value and a lower export price *regardless of the magnitude*".<sup>203</sup> This reading, however, is contradicted by Article 5.1, which refers to "an investigation to determine the existence, *degree* and effect of any alleged dumping" and indicates that not only the existence of dumping, but also its *degree*, are pertinent for the conduct of an anti-dumping investigation. Under the Anti-Dumping Agreement, the degree of dumping is expressed in terms of the margin of dumping. Where an authority determines the margin of dumping to be *de minimis*, Article 5.8 requires that there must be "immediate termination" of the investigation. Thus, notwithstanding the *existence* of dumping in the meaning of Article 2.1, if the *degree* of the dumping is determined to be *de minimis* for an exporter, it ends the investigation with regard to that exporter. This also means that, in the scenarios triggering "immediate termination" under Article 5.8 (i.e. *de minimis* dumping margins, *negligible* volumes of dumped imports, or *negligible* injury), dumping is *not* "to be condemned" within the meaning of Article VI:1 of the GATT 1994<sup>204</sup>, and hence cannot be the subject of an anti-dumping measure. Immediate termination, as noted by panels in prior disputes, indicates that there is no longer "legally cognizable dumping".<sup>205</sup>

4.89. The term "dumped imports" in Article 3 and the reference to "the magnitude of the margin of dumping" in Article 3.4 indicate that a determination regarding the injurious *effect of dumping* under Article 3 cannot be disconnected from the *existence and degree of such dumping*. In view of this connection, where an authority determines final *de minimis* margins for an exporter<sup>206</sup>, the fact that dumping is no longer "legally cognizable" means that imports by that exporter may no longer form part of "dumped imports" for purposes of the final injury determination required for the imposition of duties on imports with dumping margins above *de minimis*.<sup>207</sup> In this sense, we agree with the Panel that "the determination of injury follows – and takes into account – the determination of the existence and degree of any alleged dumping (i.e. the determination of the margin of dumping)."<sup>208</sup> Rather than imposing a "sequential" decision-making process on an investigating authority<sup>209</sup>, the Panel's statement rightly reflects the interconnected nature of an authority's final dumping and injury determinations as two prerequisites for imposing a definitive anti-dumping measure.<sup>210</sup> Reading all of these provisions holistically, we find, as the Panel found, that inclusion in the injury determination of imports by exporters with final *de minimis* margins would "render ineffective the requirement ... to 'immediate[ly] terminate' the investigation" under Article 5.8.<sup>211</sup>

<sup>201</sup> See European Union's written submission, para. 117.

<sup>202</sup> Colombia's written submission, para. 7.16.

<sup>203</sup> Colombia's written submission, para. 7.41. (emphasis added) See also *ibid.*, para. 7.42.

<sup>204</sup> Article VI:1 of the GATT 1994 provides in relevant part that "dumping ... is to be condemned if it causes or threatens *material* injury to an established industry ... or *materially* retards the establishment of a domestic industry". (emphasis added) The requirement regarding "material" injury also aligns with the notion of "negligibility" underlying the scenarios triggering "immediate termination" in Article 5.8.

<sup>205</sup> See e.g. Panel Reports, *EC – Salmon (Norway)*, para. 7.625; *Canada – Welded Pipe*, para. 7.83.

<sup>206</sup> Thus, we are not addressing a scenario in which "an investigating authority calculates a positive dumping margin below 2% (*de minimis*) at a particular point in time during the investigation", i.e. before its final dumping determination. (Colombia's written submission, para. 7.45 (emphasis added)) We therefore do not find it pertinent to address Colombia's reliance on the panel's finding in *Canada – Welded Pipe* as those findings relate to provisional measures. (See *ibid.*, paras. 7.17-7.18 (referring to Panel Report, *Canada – Welded Pipe*, para. 7.59); Panel Report, para. 7.299) Furthermore, the significance Colombia attaches to that panel's finding is premised on Colombia's assumption that the ordinary meaning of the term "dumped imports" flows directly from the definition of "dumping" in Article 2.1. (See e.g. *ibid.*, paras. 7.16 and 7.26) Our analysis above addresses and disagrees with such an assumption.

<sup>207</sup> As Japan similarly notes, in light of the first sentence of Article VI:1 of GATT 1994, "dumped imports should *not be condemned* (i.e., should not be offset by anti-dumping duties) *for material injury that is not attributable to those dumped imports*." (Japan's third party's written submission, para. 48 (emphasis added))

<sup>208</sup> Panel Report, para. 7.293.

<sup>209</sup> Colombia's written submission, para. 7.49.

<sup>210</sup> Similarly, we do not view the Panel's statement as contradictory to the requirement in Article 5.7 that "[t]he evidence of both dumping and injury ... be considered simultaneously". (See Colombia's written submission, para. 7.41) The word "simultaneously", instead of imposing a strict temporal structure, highlights that an investigating authority should not consider the evidence regarding dumping and injury "in silos". (European Union's written submission, para. 187. See also *ibid.*, paras. 189-190.)

<sup>211</sup> Panel Report, para. 7.302.

4.90. Colombia disagrees with the view that interpreting "dumped imports" as including those with a *de minimis* dumping margin would render Article 5.8 ineffective.<sup>212</sup> To Colombia, the final "determination" in Article 5.8, upon which the "immediate termination" is required, refers to "a definitive determination that admits of no further modification" at the end of the investigation.<sup>213</sup> Given that, under Colombia's legal system, authorities make the final determinations of dumping and injury *at the same time*, Colombia maintains that the only legal consequence of the "immediate termination" of the investigation is to exclude the exporters with final *de minimis* margins from the scope of the anti-dumping duties.<sup>214</sup>

4.91. We recall that, according to Colombia, the term "dumped imports" refers to "any imports for which an authority calculates a *positive* dumping margin regardless of the magnitude of the margin".<sup>215</sup> Yet, as Colombia acknowledges, under its interpretation, imports of those exporters assigned a *negative* margin of dumping may not form part of the "dumped imports" for purposes of injury and causation analyses.<sup>216</sup> Thus, regardless of how the various steps of an investigation are structured, Colombia's authority, acting consistently with its own interpretation, must ensure that imports of exporters determined to have *final negative* dumping margins are excluded from "dumped imports" in its final injury determination.<sup>217</sup> In other words, the authority must first make a final determination on dumping (albeit not necessarily in a separate, formal decision), next delete certain imports for the purpose of analysing injury and, finally, conduct an injury and causation analysis to determine appropriate duties (to be applied only to imports with dumping margins above *de minimis*). Following this logic, we fail to see why Colombia's investigating authority is prevented from giving effect to the "immediate termination" requirement by excluding imports not only with final negative dumping margins but also with final *de minimis* margins from "dumped imports" for the final injury determination.<sup>218</sup> Colombia's reference to its anti-dumping practice therefore does not support its view that the only legal consequence of the "immediate termination" of the investigation under Article 5.8 is to exclude exporters with *de minimis* margins from the application of duties.<sup>219</sup>

4.92. Similarly, we do not consider that the Appellate Body's findings under Article 5.8 in *Mexico – Anti-Dumping Measures on Rice* lend support to Colombia's view.<sup>220</sup> The findings in that dispute, including the statement that "the only way to terminate *immediately* [with respect to those exporters with 0% dumping margins] is to exclude them from the scope of the order", flow from the Appellate Body's application of Article 5.8 to the particular factual scenario of that dispute, namely, where Mexico did apply duties to imports with 0% dumping margins.<sup>221</sup> Those findings do not exhaustively define the way in which an investigation is to be "terminated" under Article 5.8 in case of a *final* determination of a *de minimis* margin of dumping.<sup>222</sup>

<sup>212</sup> Colombia's written submission, para. 7.55.

<sup>213</sup> Colombia's written submission, para. 7.49.

<sup>214</sup> Colombia's written submission, paras. 7.49, 7.56, 7.57, and 7.59; response to questioning at the hearing.

<sup>215</sup> Colombia's written submission, para. 7.16. (emphasis added)

<sup>216</sup> Colombia's response to questioning at the hearing.

<sup>217</sup> Brazil's response to questioning at the hearing.

<sup>218</sup> See European Union's written submission, para. 198 (noting that "the practical difficulties Colombia invoked ... are illusory"). See also Japan's third party's written submission, para. 56 (noting that "it is undisputable that at least imports from exporters with zero dumping margins should not be included in the dumped imports under Article 3" and that, "regardless of the precise timing of each determination, it is obvious that the determination, finding or analysis of injury and causation follows and takes into account those of dumping margin, as a 'logical' sequence").

<sup>219</sup> See also Panel Report, para. 7.300.

<sup>220</sup> Colombia's written submission, paras. 7.56, 7.57, and 7.59.

<sup>221</sup> Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 219. (emphasis original) The Appellate Body made this statement after noting that, "[i]n the present case, the *order* establishing anti-dumping duties came *after the final determination* of a margin of dumping of zero per cent was made for [the exporters at issue], but the order nevertheless covered these exporters." (Ibid., para. 219 (emphasis added)) As Japan also notes, "the focus in *Mexico – Anti-Dumping Measures on Rice* was the final treatment of exporters with *de minimis* dumping margins themselves, and not their role in the injury determination." (Japan's third party's written submission, para. 57)

<sup>222</sup> We emphasize that our analysis is framed by the question put before us, namely, whether it is permissible to interpret the term "dumped imports" to include imports of exporters who are "determined" to have *final de minimis* dumping margins. For greater clarity, we are not asked to, and we do not, address the implication of a preliminary determination of a *de minimis* margin in an authority's investigation prior to the final dumping determination.

#### 4.5.2.2 Context provided by Articles 3.3, 3.5, and 9.4

4.93. In addition to the definition of "dumping" in Article 2.1, Colombia relies on several other contextual elements to highlight the "absence of a link" between Article 5.8 and Articles 3.1, 3.2, 3.4, and 3.5. To Colombia, "nothing in the Anti-Dumping Agreement explicitly states that the legal consequence (or purpose) of immediately terminating an investigation in Article 5.8 is to exclude the imports with *de minimis* dumping margins from the injury and causation analysis in Article 3"<sup>223</sup>, and this is confirmed by Articles 3.3, 9.4, and 3.5.

4.94. Beginning with Article 3.5, this provision prohibits an authority from attributing to the "dumped imports" those injuries caused by "any known factors *other than the dumped imports*", including, "*inter alia*, the volume and prices of imports *not sold at dumping prices*."<sup>224</sup> "Evidently", Colombia argues, "imports with *de minimis* dumping margins fall *outside* of the category of imports not sold at dump[ing] prices" and, "*therefore*", such *de minimis* margin imports "form part of the 'dumped imports'".<sup>225</sup> This argument assumes that all imports that *are* "sold at dumping prices" *must necessarily* belong to the group of "dumped imports". However, whether this assumption is correct depends on the answer to the very question of what is meant by "dumped imports". Relying on this non-attribution factor to interpret "dumped imports" is thus "self-referential"<sup>226</sup> and unavailing.

4.95. Colombia nonetheless considers that the contextual relevance of Article 3.5 becomes even more apparent when that provision is juxtaposed with Articles 3.3 and 9.4. Colombia notes that the fourth sentence of Article 3.5 (i.e. the illustrative list of non-attribution factors) was added during the Uruguay Round at the same time as Articles 3.3 and 9.4. To Colombia, the absence of any reference to *de minimis* dumping margins in Article 3.5, and the express references to such margins in Articles 3.3 and 9.4, supports its view that, had the drafters wished to limit the "dumped imports" in Articles 3.1, 3.2, 3.4, and 3.5 to dumped imports above *de minimis* margins, they could have done so explicitly.<sup>227</sup>

4.96. Under Article 3.3, investigating authorities may cumulatively assess the effects of imports from more than one country only if they determine, *inter alia*, that "the margin of dumping established *in relation to the imports from each country* is more than *de minimis* as defined in paragraph 8 of Article 5."<sup>228</sup> The reference to "the margin of dumping established in relation to the imports from each country" departs from the general rule<sup>229</sup> that "[t]he authorities shall ... determine an individual margin of dumping *for each known exporter or producer* concerned."<sup>230</sup> Similarly, Article 9.4 "also has a different scope than Articles 3.1, 3.2, 3.4, and 3.5"<sup>231</sup>, as it "focuses on the determination of the so-called 'all others' rate, i.e. the anti-dumping duty that is applied to imports from exporters or producers that are *not examined* by an investigating authority", requiring an authority to "disregard ... any zero and *de minimis* margins" in calculating the "all others" rate.<sup>232</sup> In contrast, Articles 3.1, 3.2, 3.4, and 3.5, at issue in this dispute, "concern an investigating authority's determination of injury caused by 'dumped imports' from producers and exporters that are *examined* by an investigating authority".<sup>233</sup>

4.97. In Articles 3.3 and 9.4, therefore, the cross-reference to the *de minimis* threshold as defined in Article 5.8, which generally relates to the dumping margin determined for an exporter or producer individually<sup>234</sup>, makes this threshold "operational"<sup>235</sup> for the specific situations under these provisions. Thus, the fact that the *de minimis* threshold is made operational in specific situations

<sup>223</sup> Colombia's written submission, para. 7.55.

<sup>224</sup> Emphasis added.

<sup>225</sup> Colombia's written submission, para. 7.30. (emphasis added)

<sup>226</sup> European Union's written submission, para. 166.

<sup>227</sup> Colombia's written submission, para. 7.32.

<sup>228</sup> Emphasis added.

<sup>229</sup> See Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 220. See also Panel Report, fns 551 and 552 to paras. 7.296 and 7.298, respectively.

<sup>230</sup> Anti-Dumping Agreement, Article 6.10. (emphasis added)

<sup>231</sup> Panel Report, para. 7.297.

<sup>232</sup> Panel Report, para. 7.297. (emphasis original)

<sup>233</sup> Panel Report, para. 7.297. (emphasis original)

<sup>234</sup> See e.g. Panel Reports, *Canada – Welded Pipe*, paras. 7.21 and 7.26; *Mexico – Anti-Dumping Measures on Rice*, para. 7.140; Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 216.

<sup>235</sup> Panel Report, para. 7.298.

under Articles 3.3 and 9.4 reinforces, rather than refutes<sup>236</sup>, the link between Article 5.8 and Article 3 generally. Given this link, there was no need for the drafters, each time they mentioned "dumped imports", to cross-reference Article 5.8 in the context of Articles 3.1, 3.2, 3.4, and 3.5. In those provisions, the relevance of the *de minimis* threshold is implied from a holistic reading of these provisions. We share, in this respect, the European Union's view that, as a matter of treaty drafting, a generally applicable rule need not be repeated in every instance where it is relevant.<sup>237</sup> Rather, as the Panel stated, "the fact that Articles 9.4 and 3.3 refer to Article 5.8 and '*de minimis* margins', and make Article 5.8 operational in the *specific* situations contemplated under these provisions highlights ... the contextual relevance of Article 5.8 for purposes of the *general* injury and causation determinations under Article 3."<sup>238</sup>

#### 4.5.2.3 Supplementary means of interpretation relied upon by Colombia

4.98. Colombia submitted to the Panel certain documents regarding the negotiating history related to Article 5.8 of the Anti-Dumping Agreement. This included records of discussion on a provision of the Kennedy Round Anti-Dumping Code that is "almost identical to ... Article 5.8 of the Anti-Dumping Agreement".<sup>239</sup> The Panel did not address Colombia's arguments concerning negotiating history, finding, instead, that doing so was unnecessary given its "unambiguous conclusion resulting from the interpretative exercise under Article 31 of the Vienna Convention".<sup>240</sup>

4.99. On appeal, Colombia similarly contends that the negotiating history demonstrates that the GATT Contracting Parties explicitly rejected a proposal to limit the definition of "dumping" to margins above a *de minimis* level.<sup>241</sup> Certain documents cited by Colombia may indeed suggest that the negotiators of the Kennedy Round Anti-Dumping Code chose not to limit the *definition of dumping* to instances in which the price difference between normal value and export price was above a certain minimal percentage.<sup>242</sup> The significance ascribed by Colombia to such materials, however, is premised on its view that the definition of "dumping", alone, is sufficient for deriving the "ordinary meaning" of the term "dumped imports". In the preceding analysis, we have found that such a reading runs counter to the overall context of the provisions under the Anti-Dumping Agreement regarding the initiation and conduct of investigations. Thus, what the negotiating history may have revealed about the discussions underlying the definition of "dumping" does not elevate Colombia's interpretation as one that is "permissible".

4.100. Furthermore, even if documents cited by Colombia<sup>243</sup> could be read to indicate that the *de minimis* rule "concern[s] the imposition or the right to take anti-dumping measures"<sup>244</sup>, this alone does not preclude that the *de minimis* rule may *also* be relevant for demarcating the scope of "dumped imports" for the purposes of the injury determination. As the European Union notes, the fact that the *de minimis* rule is of relevance to the imposition of an anti-dumping measure does not mean that this is the only way in which such rule is relevant.<sup>245</sup> Finally, Colombia contends that "the

<sup>236</sup> See Colombia's written submission, para. 7.35.

<sup>237</sup> European Union's response to questioning at the hearing.

<sup>238</sup> Panel Report, para. 7.298. (emphasis original)

<sup>239</sup> Colombia's written submission, para. 7.24.

<sup>240</sup> Panel Report, fn 565 to para. 7.303.

<sup>241</sup> Colombia's written submission, para. 7.24.

<sup>242</sup> Colombia's written submission, paras. 7.21-7.24 (quoting *Anti-Dumping Checklist, Addendum, Comments by the United States on Items I-V*, 30 June 1966, TN.64/NTB/W/12/Add.5 (Panel Exhibit COL-19), p. 4; Possible Elements to be Considered for Inclusion in an Anti-Dumping Code: Note by the Secretariat, TN.64/NTB/W/13, 23 August 1966 (Panel Exhibit COL-20), p. 9; and referring to Possible Elements to be Considered for Inclusion in an Anti-Dumping Code: Note by the Secretariat (Revised List), TN.64/NTB/W/14, 9 December 1966 (Panel Exhibit COL-21)).

<sup>243</sup> Colombia's written submission, para. 7.58 (quoting *Anti-Dumping Checklist, Addendum, Comments by the United States on Items I-V*, TN.64/NTB/W/12/Add.5, 30 June 1966 (Panel Exhibit COL-19), p. 5; *Anti-Dumping Checklist, Comments by Norway on Items I-V and IX-XIII*, TN.64/NTB/W/12/Add.1, 23 June 1966 (Panel Exhibit COL-51), at 3; *Anti-Dumping Checklist, Comments by the European Economic Community on Items I-V and IX- XIII*, TN.64/NTB/W/12/Add.2, 24 June 1966 (Panel Exhibit COL-52), p. 3; *Anti-Dumping Checklist, Comments by Denmark on Items I-V and IX-XIII*, TN.64/NTB/W/12/Add.7, 30 June 1966 (Panel Exhibit COL-54), pp. 1-2; *Anti-Dumping Checklist, Addendum, Comments by Sweden on Items I-V and IX-XIII*, TN.64/NTB/W/12/Add.8, 7 July 1966 (Panel Exhibit COL-55), p. 3; and referring to *Anti-Dumping Checklist, Addendum, Comments by the Government of Canada on Items I-V and IX-XI, and XIII* TN.64/NTB/W/12/Add.3, 30 June 1966 (Panel Exhibit COL-53), p. 3)).

<sup>244</sup> Colombia's written submission, para. 7.59.

<sup>245</sup> European Union's written submission, paras. 218-219.

negotiators conceived of the 'percentage limit' rule as applying even if ... imports, *including those with de minimis dumping margins*, have been assessed and found to cause injury within the meaning of Article VI."<sup>246</sup> However, a review of the materials cited does not show that the relevance of *de minimis* margins vis-à-vis the injury determination was discussed by the negotiators.<sup>247</sup> The reference to "imports, including those with *de minimis* dumping margins", which is not discernible from the materials, is dependent on Colombia's view that the term "dumped imports" includes *de minimis* margin imports.<sup>248</sup> In sum, the supplementary means of interpretation relied on by Colombia do not lend credence to its interpretation of "dumped imports" as a "permissible" one.

#### 4.5.3 Conclusion

4.101. Our analysis of the textual and contextual arguments advanced by Colombia indicates that its interpretation of the term "dumped imports" as including imports of exporters determined to have final *de minimis* dumping margins does not comport with a holistic reading of relevant provisions of the Anti-Dumping Agreement, and renders the requirement of "immediate termination" under Article 5.8 ineffective. Having tested Colombia's interpretation in light of Articles 31 and 32 of the Vienna Convention, we do not consider that a treaty interpreter, using the Vienna Convention method for treaty interpretation, could have reached Colombia's interpretation. This interpretation does not have the required degree of solidness or analytical support for it to be given deference as "permissible" within the bounds of the Vienna Convention method for treaty interpretation.

4.102. On the basis of the above, we uphold the Panel's finding, in paragraphs 7.303, 7.307, and 8.1.e.i of its Report, that the European Union had established that Colombia acted inconsistently with its obligations under Articles 3.1, 3.2, 3.4, and 3.5 of the Anti-Dumping Agreement because MINCIT included in its final injury and causation determinations imports from the exporters that were determined to have final *de minimis* margins of dumping.

#### 4.6 Award findings

4.103. In this Award, we have reached the following findings:

- a. we reverse the Panel's finding in paragraphs 7.75, 7.78, 7.79, and 8.1.a.iii of its Report, and find that relevant factual findings by the Panel demonstrate that MINCIT satisfied its duty under Articles 5.2(iii) and 5.3 of the Anti-Dumping Agreement, for the purpose of initiating an investigation, by examining the "appropriateness" of third-country sales prices consisting of export prices to the United Kingdom, including, in particular, their sufficiency vis-à-vis domestic sales prices; accordingly, we find that the European Union has not established that Colombia acted inconsistently with Article 5.3 of the Anti-Dumping Agreement;
- b. we uphold the Panel's finding, in paragraphs 7.126, 7.152.a, and 8.1.b.i of its Report, that the European Union had established that Colombia acted inconsistently with its obligations under Article 6.5 of the Anti-Dumping Agreement with respect to the redacted information in section d(i) of FEDEPAPA's revised application because MINCIT granted confidential treatment to this information without a showing of "good cause" by the applicant;
- c. we uphold the Panel's finding, in paragraphs 7.232, 7.233, 7.244, and 8.1.d.ii of its Report, that the European Union's claim under Article 2.4 of the Anti-Dumping Agreement concerning Mydibel's packaging cost-related adjustment request fell within the

<sup>246</sup> Colombia's written submission, para. 7.60. (emphasis added)

<sup>247</sup> See Colombia's written submission, para. 7.58. See also Japan's third party's written submission, para. 58 (noting that "the negotiators' comments cited by Colombia was made in a different context where the issue was whether anti-dumping duties should be imposed to imports with *de minimis* dumping margins, not in the context of whether imports with *de minimis* dumping margins should be included in the injury and causation analysis").

<sup>248</sup> See Colombia's written submission, para. 7.60 (noting that "the negotiators conceived of the 'percentage limit' rule as applying even if the conditions of Article VI of the GATT 1947 were met"; that "[o]ne of these conditions ... is the determination of injury and causation"; and that "[i]n other words, the 'percentage limit' rule would apply even if, and therefore when, imports, including those with *de minimis* dumping margins, have been assessed and found to cause injury within the meaning of Article VI" (underlining original; emphasis added)).

Panel's terms of reference; we also decline Colombia's request to "declare moot and of no legal effect" the Panel's substantive findings under Article 2.4; and

- d. we uphold the Panel's finding, in paragraphs 7.303, 7.307, and 8.1.e.i of its Report, that the European Union had established that Colombia acted inconsistently with its obligations under Articles 3.1, 3.2, 3.4, and 3.5 of the Anti-Dumping Agreement because MINCIT included in its final injury and causation determinations imports from the exporters that were determined to have final *de minimis* margins of dumping.

4.104. Paragraph 9 of the Agreed Procedures provides that the findings of the Panel that have not been appealed in this Arbitration shall be deemed to form an integral part of this Award together with our own findings, and that the Award shall include recommendations where applicable. Accordingly, we recommend that Colombia bring into conformity with the Anti-Dumping Agreement those measures found in this Award, and in the Panel Report as modified by this Award, to be inconsistent with that Agreement.

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Alejandro JARA  
Arbitrator

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José Alfredo GRAÇA LIMA  
Chairperson

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Joost PAUWELYN  
Arbitrator



**COLOMBIA – ANTI-DUMPING DUTIES ON FROZEN FRIES FROM  
BELGIUM, GERMANY AND THE NETHERLANDS**

ARBITRATION UNDER ARTICLE 25 OF THE DSU

AWARD OF THE ARBITRATORS

*Addendum*

This Addendum contains Annexes A to D to the Award of the Arbitrators to be found as document WT/DS591/ARB25.

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**ANNEX A-1**

**AGREED PROCEDURES FOR ARBITRATION UNDER ARTICLE 25 OF THE DSU\***

**Notified by the parties to the Dispute Settlement Body on 20 April 2021**

*Revision*

1. In order to give effect to communication JOB/DSB/1/Add.12 in this dispute the European Union and Colombia (hereafter the "parties") mutually agree pursuant to Article 25.2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) to enter into arbitration under Article 25 of the DSU to decide any appeal from any final panel report<sup>1</sup> as issued to the parties in dispute DS591. Any party to the dispute may initiate arbitration in accordance with these agreed procedures.
2. The arbitration may only be initiated if the Appellate Body is not able to hear an appeal in this dispute under Article 16.4 and 17 of the DSU. For the purposes of these agreed procedures, such situation is deemed to arise where, on the date of issuance of the final panel report to the parties, there are fewer than three Appellate Body members.

For greater certainty, if the Appellate Body is able to hear appeals at the date on which the final panel report is issued to the parties, a party may not initiate an arbitration, and the parties shall be free to consider an appeal under Articles 16.4 and 17 of the DSU.

3. In order to facilitate the proper administration of arbitration under these agreed procedures, the parties hereby jointly request the panel to notify the parties of the anticipated date of circulation of the final panel report within the meaning of Article 16 of the DSU, no later than 45 days in advance of that date.
4. Following the issuance of the final panel report to the parties, but no later than 10 days prior to the anticipated date of circulation of the final panel report to the rest of the Membership, any party may request that the panel suspend the panel proceedings with a view to initiating the arbitration under these agreed procedures. Such request by any party is deemed to constitute a joint request by the parties for suspension of the panel proceedings for 12 months pursuant to Article 12.12 of the DSU.

The parties hereby jointly request the panel to provide for the following, before the suspension takes effect:

- i. the immediate transmission of the final panel report, on a provisional basis, to the pool of arbitrators and the lifting of confidentiality for that sole purpose;
- ii. the transmission of the panel record to the arbitrators upon the filing of the Notice of Appeal: Rule 25 of the Working Procedures for Appellate Review shall apply *mutatis mutandis*;
- iii. the lifting of confidentiality with respect of the final panel report under the Working Procedures of the panel and the transmission of the final panel report, duly adjusted for translation, in the working languages of the WTO to the parties, to the third parties and to the pool of arbitrators.<sup>2</sup>

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\* WT/DS591/3/Rev.1.

<sup>1</sup> For greater certainty, this includes any final panel report issued in compliance proceedings pursuant to Article 21.5 of the DSU.

<sup>2</sup> The parties confirm that it is not their intention that the panel report be circulated within the meaning of Article 16 of the DSU.

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Except as provided in paragraphs 6 and 18, the parties shall not request the panel to resume the panel proceedings.

5. The arbitration shall be initiated by filing of a Notice of Appeal with the WTO Secretariat no later than 20 days after the suspension of the panel proceedings referred to in paragraph 4 has taken effect. The Notice of Appeal shall include the final panel report in the working languages of the WTO. The Notice of Appeal shall be simultaneously notified to the other party or parties and to the third parties in the panel proceedings. Rules 20-23 of the Working Procedures for Appellate Review shall apply *mutatis mutandis*.
6. Subject to paragraph 2, where the arbitration has not been initiated under these agreed procedures, the parties shall be deemed to have agreed not to appeal the panel report pursuant to Articles 16.4 and 17 of the DSU, with a view to its adoption by the DSB. If the panel proceedings have been suspended in accordance with paragraph 4, but no Notice of Appeal has been filed in accordance with paragraph 5, the parties hereby jointly request the panel to resume the panel proceedings.
7. The arbitrators shall be three persons selected from the pool of 10 standing appeal arbitrators composed in accordance with paragraph 4 of communication JOB/DSB/1/Add.12 (hereafter the "pool of arbitrators").<sup>3</sup> The selection from the pool of arbitrators will be done on the basis of the same principles and methods that apply to form a division of the Appellate Body under Article 17.1 of the DSU and Rule 6(2) of the Working Procedures for Appellate Review, including the principle of rotation.<sup>4</sup> The WTO Director General will notify the parties and third parties of the results of the selection. The arbitrators shall elect a Chairperson. Rule 3(2) of the Working Procedure for Appellate Review shall apply, *mutatis mutandis*, to the decision-making by the arbitrators.
8. In order to give effect to paragraph 5 of communication JOB/DSB/1/Add.12 in this dispute, the arbitrators may discuss their decisions relating to the appeal with all of the other members of the pool of arbitrators, without prejudice to the exclusive responsibility and freedom of the arbitrators with respect to such decisions and their quality. All members of the pool of arbitrators shall receive any document relating to the appeal.
9. An appeal shall be limited to issues of law covered by the panel report and legal interpretations developed by the panel. The arbitrators may uphold, modify or reverse the legal findings and conclusions of the panel. Where applicable, the arbitration award shall include recommendations, as envisaged in Article 19 of the DSU. The findings of the panel which have not been appealed shall be deemed to form an integral part of the arbitration award together with the arbitrators' own findings.
10. The arbitrators shall only address those issues that are necessary for the resolution of the dispute. They shall address only those issues that have been raised by the parties, without prejudice to their obligation to rule on jurisdictional issues.
11. Unless otherwise provided for in these agreed procedures, the arbitration shall be governed, *mutatis mutandis*, by the provisions of the DSU and other rules and procedures applicable to Appellate Review. This includes in particular the Working Procedures for Appellate Review and the timetable for appeals provided for therein as well as the Rules of Conduct.<sup>5</sup> The arbitrators may adapt the Working Procedures for Appellate Review and the timetable for appeals provided for therein, where justified under Rule 16 of the Working Procedures for Appellate Review, after consulting the parties.
12. The parties request the arbitrators to issue the award within 90 days following the filing of the Notice of Appeal. To that end, the arbitrators may take appropriate organizational measures to streamline the proceedings, without prejudice to the procedural rights and obligations of the

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<sup>3</sup> If the pool of arbitrators has not been composed, footnote 1 to paragraph 4 of communication JOB/DSB/1/Add.12 shall apply.

<sup>4</sup> However, at the request of a party to a dispute, any member of the pool of arbitrators who is not a national of a participating Member shall be excluded from the selection process. Two nationals of the same Member shall not serve on the same case.

<sup>5</sup> For greater certainty, paragraphs 14 – 17 of the Rules of Conduct shall apply to arbitrators.

parties and due process. Such measures may include decisions on page limits, time limits and deadlines as well as on the length and number of hearings required.

13. If necessary in order to issue the award within the 90 day time-period, the arbitrators may also propose substantive measures to the parties, such as an exclusion of claims based on the alleged lack of an objective assessment of the facts pursuant to Article 11 of the DSU.<sup>6</sup>
14. On a proposal from the arbitrators, the parties may agree to extend the 90 day time-period for the issuance of the award.
15. The parties agree to abide by the arbitration award, which shall be final. Pursuant to Article 25.3 of the DSU, the award shall be notified to, but not adopted by, the DSB and to the Council or Committee of any relevant agreement.
16. Only parties to the dispute, not third parties, may initiate the arbitration. Third parties which have notified the DSB of a substantial interest in the matter before the panel pursuant to Article 10.2 of the DSU may make written submissions to, and shall be given an opportunity to be heard by, the arbitrators. Rule 24 of the Working Procedures for Appellate Review shall apply *mutatis mutandis*.
17. Pursuant to Article 25.4 of the DSU, Articles 21 and 22 of the DSU shall apply *mutatis mutandis* to the arbitration award issued in this dispute.
18. At any time during the arbitration, the appellant, or other appellant, may withdraw its appeal, or other appeal, by notifying the arbitrators. This notification shall also be notified to the panel and third parties, at the same time as the notification to the arbitrators. If no other appeal or appeal remains, the notification shall be deemed to constitute a joint request by the parties to resume panel proceedings under Article 12.12 of the DSU.<sup>7</sup> If another appeal or appeal remains at the time an appeal or other appeal is withdrawn, the arbitration shall continue.
19. The parties shall jointly notify these agreed procedures to the panel in DS 591 and ask the panel to grant, where applicable, the joint requests formulated in paragraphs 3, 4, 6, and 18.<sup>8</sup>
20. These agreed procedures, signed in Geneva on April 20, 2021, supersede the agreed procedures which were signed between the parties on July 13, 2020 and circulated to the WTO Members on July 15, 2020 and which are hereby declared null and void.

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<sup>6</sup> For greater certainty, the proposal of the arbitrators is not legally binding and it will be up to the party concerned to agree with the proposed substantive measures. The fact that the party concerned does not agree with the proposed substantive measures shall not prejudice the consideration of the case or the rights of the parties.

<sup>7</sup> If the authority of the panel has lapsed pursuant to Article 12.12 of the DSU, the arbitrators shall issue an award that incorporates the findings and conclusions of the panel in their entirety.

<sup>8</sup> For greater certainty, should any of these requests not be granted by the panel, the parties will agree on alternative procedural modalities to preserve the effects of the relevant provisions of these agreed procedures.

## **ANNEX A-2**

### **ADDITIONAL PROCEDURES FOR ARBITRATION UNDER ARTICLE 25 OF THE DSU**

#### **Adopted by the Arbitrators on 19 October 2022**

#### **1 GENERAL**

1. The arbitrators are called upon to decide claims in these arbitration proceedings pursuant to the Agreed Procedures for Arbitration under Article 25 of the DSU<sup>1</sup> (Agreed Procedures) between the parties to this dispute. Colombia initiated these proceedings on 6 October 2022.
2. Pursuant to paragraph 11 of the Agreed Procedures, these arbitration proceedings shall be governed, *mutatis mutandis*, by the provisions of the DSU and other rules and procedures applicable to appellate review, including the Working Procedures for Appellate Review, the timetable for appeals contained therein, and the Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes (Rules of Conduct). Paragraph 11 further provides that the arbitrators may adapt the Working Procedures for Appellate Review and the timetable, where justified under Rule 16 of the Working Procedures for Appellate Review, after consulting the parties.
3. These Additional Procedures for Arbitration, adopted after consultations with the parties, set out additional rules and guidelines on certain practical aspects to facilitate these proceedings. They should be read in conjunction with the Agreed Procedures, together with the DSU and the other rules and procedures applicable to appellate review as specified in paragraph 11 of the Agreed Procedures.
4. The arbitrators may modify these Additional Procedures for Arbitration as necessary, after consultation with the parties.

#### **2 ARBITRATORS**

5. Decisions relating to the current proceedings shall be taken by the following three arbitrators selected for this arbitration: Mr. José Alfredo Graça Lima, Mr. Alejandro Jara, and Mr. Joost Pauwelyn.
6. Mr. José Alfredo Graça Lima has been elected as the Chairperson. The responsibilities of the Chairperson include: (a) chairing any hearings and meetings related to the proceedings; (b) receiving all requests for staff support from the arbitrators on the appeal and coordinating the provision of such support; (c) coordinating the drafting of the award; and (d) generally coordinating the overall conduct of the appeal arbitration including the discussions pursuant to paragraph 8 of the Agreed Procedures.

#### **3 LANGUAGE OF THE ARBITRATION**

7. The working language of the arbitration shall be English.

#### **4 CONFIDENTIALITY**

8. The deliberations of the arbitrators and the documents submitted to them shall be kept confidential.<sup>2</sup> Parties and third parties shall treat as confidential any information submitted to the arbitrators which the submitting party or third party has designated as confidential.

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<sup>1</sup> WT/DS591/3/Rev.1.

<sup>2</sup> The arbitrators are bound by Article VII of the Rules of Conduct.

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9. Upon request, the arbitrators may adopt appropriate additional procedures for the treatment and handling of any confidential information after consultation with the parties.

## **5 EX PARTE COMMUNICATIONS**

10. Arbitrators shall not meet with or contact one party in the absence of the other party to the dispute. Likewise, they shall not meet with or contact one or more third parties in the absence of the parties to the dispute and other third parties.
11. No arbitrator may discuss any aspect of the subject matter of this arbitration with any party or third party in the absence of the other arbitrators.

## **6 TIME-LIMIT FOR THIS ARBITRATION**

12. Pursuant to paragraph 12 of the Agreed Procedures and Article 17.5 of the DSU, the arbitrators shall issue the award within 90 days following the commencement of this arbitration.
13. Pursuant to paragraphs 12 and 13 of the Agreed Procedures, in order to issue the award within 90 days following the commencement of this arbitration, the arbitrators may "take appropriate organizational measures to streamline the proceedings, without prejudice to the procedural rights and obligations of the parties and due process", and may "propose substantive measures to the parties, such as an exclusion of claims based on the alleged lack of an objective assessment of the facts pursuant to Article 11 of the DSU."<sup>3</sup>
14. In order to issue the award within the 90-day time-period, and in view of paragraphs 12 and 13 of the Agreed Procedures, rules and guidelines regarding the following aspects of the proceedings are set out in sections 7 to 12 below: length and style of written rebuttal and third parties' submissions, Working Schedule<sup>4</sup>, meetings with parties and third parties before the hearing, conduct of the hearing, and filing and service of documents.<sup>5</sup>
15. On a proposal from the arbitrators, the parties may agree to extend the 90-day time-period for the issuance of the award.

## **7 LENGTH OF WRITTEN SUBMISSIONS AND EXECUTIVE SUMMARIES**

16. In light of paragraph 12 of the Agreed Procedures, and in order to enhance procedural efficiency and facilitate meeting the 90-day time period:
- (i) Parties and third parties are requested to keep their written submissions as concise as possible and to focus on the main claims and outstanding differences, bearing in mind that the arbitrators will have read the panel report and will have access to the panel record. Therefore, there is no need to repeat facts, arguments or findings set out in either the panel report or panel record (cross-references can be made and will suffice);
  - (ii) As an indicative guideline:
    - a. The rebuttal submission should normally be limited to a maximum of 27,000 words or 40% of the word count of the appealed panel report, whichever is the highest; and

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<sup>3</sup> As stated in fn 6 to paragraph 13 of the Agreed Procedures, a proposal by the arbitrators shall not be legally binding and it will be up to the party concerned to agree with the proposed substantive measures. The fact that the party concerned does not agree with the proposed substantive measures shall not prejudice the consideration of the case or the rights of the parties.

<sup>4</sup> The Working Schedule, as provided for in section 9 below, is set out in Annex 1.

<sup>5</sup> In addition, guidelines relating to matters that have already transpired at the time of the adoption of these Additional Procedures for Arbitration are set out in a letter sent to the parties on 19 September 2022 by the pool of arbitrators of the Multi-Party Interim Appeal Arbitration Arrangement pursuant to Article 25 of the DSU (the "pre-arbitration letter"). That letter is attached as Annex 2.

- b. Third parties who wish to make a written submission should normally limit them to a maximum of 9,000 words.
- (iii) Each party or third party who files a written submission is requested to submit contemporaneously an executive summary of such submission of a maximum length of 10% of the total word count of the submission itself. These executive summaries will be annexed as addenda to the award and the content of such executive summaries will not be revised or edited by the arbitrators.

## **8 STYLE OF WRITTEN SUBMISSIONS**

- 17. Parties and third parties are encouraged to follow the WTO Editorial Guide for Panel Submissions in preparing their written submissions, to the extent that it is practical to do so.

## **9 WORKING SCHEDULE**

- 18. Each party and third party shall file written submissions in accordance with the time-periods stipulated in the Working Schedule contained in Annex 1 of these Additional Procedures for Arbitration.
- 19. The time-periods in the Working Schedule will be firm and no deviations will be permitted except for highly compelling reasons (such as sudden illness of counsel) and taking into account the impact on the 90-day time-period.

## **10 MEETINGS WITH PARTIES AND THIRD PARTIES**

- 20. Pursuant to paragraph 12 of the Agreed Procedures, and in order to enhance procedural efficiency and facilitate meeting the 90-day time-period, a virtual pre-hearing conference may be convened by the arbitrators with the parties and third parties to help identify "those issues that are necessary for the resolution of the dispute", as provided in paragraph 10 of the Agreed Procedures, or to highlight the key issues raised by the parties in the appeal that need further discussion at the hearing.

## **11 HEARING**

- 21. The arbitrators shall hold a hearing of no more than two days with the parties and third parties as set out in the Working Schedule.
- 22. The arbitrators will endeavour to provide a list of questions to the parties in advance of the hearing to facilitate the parties' preparation for the hearing.
- 23. Opening statements by parties shall be no longer than 30 to 35 minutes each; opening statements by third parties shall be limited to seven minutes each; and closing statements by parties shall be limited to five minutes each.
- 24. Each party and third party shall provide to the WTO Secretariat the list of members of its delegation no later than 17:00 (Geneva time) three working days before the first day of the hearing. Each party and third party shall have the responsibility for all members of its delegation and shall ensure that each member of its delegation acts in accordance with the DSU, the Agreed Procedures, the Rules of Conduct, and these Additional Procedures for Arbitration, particularly with regard to the confidentiality of proceedings and the written and oral submissions of the parties and third parties.

## 12 FILING AND SERVICE OF DOCUMENTS<sup>6</sup>

25. No document shall be considered filed with the arbitrators unless the document is received by the WTO Secretariat within the time-period set out for filing in accordance with these Additional Procedures for Arbitration and the Working Schedule.
26. Each party or third party shall file documents to the arbitrators by submitting them via the Disputes On-Line Registry Application (DORA) <https://dora.wto.org> by 17:00 (Geneva time) on the day that the document is due. Electronic copies of documents shall be preferably provided in both Microsoft Word and PDF format. The electronic version uploaded into DORA shall constitute the official version for the purposes of written submission deadlines and the record of the dispute. Upload of a document into DORA shall constitute electronic service on the arbitrators and parties and third parties.
27. If any party or third party has any questions or technical difficulties relating to DORA, they are encouraged to contact the DS Registry ([DSRegistry@wto.org](mailto:DSRegistry@wto.org)).
28. If any party or third party is unable to meet the 17:00 (Geneva time) deadline because of technical difficulties in uploading these documents into DORA, the party or third party concerned shall inform the DS Registry ([DSRegistry@wto.org](mailto:DSRegistry@wto.org)) without delay and provide an electronic version of all documents to be submitted to the arbitrators through the electronic mail address [arbitration25@wto.org](mailto:arbitration25@wto.org) copied to [DSRegistry@wto.org](mailto:DSRegistry@wto.org), and to parties and third parties.
29. Upon authorization by the arbitrators, a party or third party may correct clerical errors in any of its documents (including typographical mistakes, errors of grammar, or words or numbers placed in the wrong order). The request to correct clerical errors shall identify the specific errors to be corrected and shall be filed with the WTO Secretariat promptly following the filing of the written submission in question. A copy of the request shall be served upon parties and third parties, each of whom shall be given an opportunity to comment in writing on the request. The arbitrators shall notify the parties and third parties of their decision.
30. As a general rule, all communications from the arbitrators to the parties and third parties will be via electronic mail ([arbitration25@wto.org](mailto:arbitration25@wto.org)) and uploaded into DORA. In addition to transmitting the award to the parties in electronic format, the arbitrators shall provide them with a paper copy.

## 13 TRANSLATION OF THE AWARD

31. The time period for translation of the award will be considered following consultation with the parties and in the light of the 90-day time-period requirement.

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<sup>6</sup> For greater clarity, Section 12 applies in lieu of Rule 18 of the Working Procedures for Appellate Review for purposes of these arbitration proceedings.

**Annex 1: Working Schedule**

<b>Process</b>	<b>Days</b>	<b>Date</b>
Colombia's Notice of Appeal and submission	0	6 October 2022
European Union's rebuttal submission	18	24 October 2022
Third parties' submissions	21	27 October 2022
Hearing	40 and/or 41	15 and/or 16 November 2022
Issuance of the Award	60-90	5 December 2022 - 4 January 2023

**Annex 2: Pre-Arbitration Letter**

19 September 2022

**Amb. Santiago Wills Valderrama**

Permanent Representative of Colombia to the World Trade Organization  
Permanent Mission of Colombia to the World Trade Organization

**Amb. Joao Aguiar Machado**

Permanent Representative of the European Union to the World Trade Organization  
Permanent Mission of the European Union to the World Trade Organization

Dear Ambassadors:

On 14 September, 2022, the Panel Report in **Colombia – Anti-dumping duties on frozen fries from Belgium, Germany and the Netherlands** (WT/DS591/R) was communicated to the MPIA pool of arbitrators, following a request by Colombia to suspend the Panel proceedings pursuant to paragraph 4 of the Agreed Procedures for Arbitration under Article 25 of the DSU in Dispute DS591 (hereafter "the Agreed Procedures"). French and Spanish versions of the same Panel Report were communicated to the MPIA pool of arbitrators on 16 September, 2022.

In accordance with paragraph 5 of the Agreed Procedures, appeal arbitration is initiated by filing a Notice of Appeal with the WTO Secretariat no later than 20 days after the suspension of the Panel proceedings. Where Panel proceedings have been suspended but no Notice of Appeal is filed, paragraph 6 of the Agreed Procedures provides that the Panel will resume its proceedings.

The information below is set out in order to assist the parties to this dispute in the event of an appeal of the Panel Report and is without prejudice to each party's right to decide whether or not to initiate such an appeal.

**1. Length of Written Submission**

Paragraph 12 of the Agreed Procedures permits MPIA arbitrators to "take appropriate organizational measures to streamline the proceedings, without prejudice to the procedural rights and obligations of the parties and due process." One such measure explicitly suggested is "decisions on page limits".

Since the Appellant's submission must be filed on the same day as the Notice of Appeal is filed<sup>1</sup>, any "decision on page limits" would need to be issued *before* the Notice of Appeal is filed.

In this context, and in order to enhance procedural efficiency and facilitate meeting the 90-day time period:

- (i) Parties are encouraged to be selective in the number of claims filed on appeal/other appeal and to prioritize such claims in the event more than one claim is filed;

- (ii) Parties and Third Parties are requested to keep their submissions as concise as possible and to focus on the main claims and outstanding differences, bearing in mind that the arbitrators will have read the panel report and will have access to the panel record. Therefore, there is no need to repeat facts, arguments or findings set out in either the panel report or panel record (cross-references can be made and will suffice);
- (iii) As an indicative guideline<sup>ii</sup>
  - a. Notices of Appeal/Other Appeal should normally be limited to a maximum of 2,000 words<sup>iii</sup>, Appellant/Other Appellant/Appellee submissions should normally be limited to a maximum of 27,000 words<sup>iv</sup> or 40% of the word count of the appealed Panel report<sup>v</sup>, whichever is the highest;<sup>vi</sup>
  - b. Third Parties who wish to make a submission should normally limit them to a maximum of 9,000 words;<sup>vii</sup> and
  - c. where MPIA appeal proceedings are conducted in French or Spanish, the above indicative limits are increased by 15%.<sup>viii</sup>
- (iv) Each Party who files an Appellant's, Other Appellant's, or Appellee's submission, and each Third Party who files a written submission, is requested to submit contemporaneously an executive summary of such written submission of a maximum length of 10% of the total word count of the submission itself.<sup>ix</sup> These executive summaries will be annexed as addenda to MPIA awards and the content of such executive summaries will not be revised or edited by the MPIA arbitrators.

## **2. Style of Written Submission**

Parties and Third Parties are invited to follow the WTO Editorial Guide for Panel Submissions in preparing their written submissions, to the extent that it is practical to do so.

## **3. Claims Based on the Alleged Lack of an Objective Assessment of the Facts Pursuant to Article 11 of the DSU**

Paragraph 13 of the Agreed Procedures provides that "[i]f necessary in order to issue the award within the 90 day time-period, the arbitrators may ... propose substantive measures to the parties". One such measure explicitly suggested is "an exclusion of claims based on the alleged lack of an objective assessment of the facts pursuant to Article 11 of the DSU." Footnote 6 clarifies that such proposal of the arbitrators "is not legally binding and it will be up to the party concerned to agree with the proposed substantive measures. The fact that the party concerned does not agree with the proposed substantive measures shall not prejudice the consideration of the case or the rights of the parties".

Taking into account paragraph 13 of the Agreed Procedures and in order to enhance procedural efficiency and facilitate meeting the 90 day time-period, the parties in this dispute are invited to consider refraining from making claims based on the alleged lack of an objective assessment of the facts pursuant to Article 11 of the DSU.

In this light, any Party considering making such claims is encouraged to:

- (i) appraise how any such Article 11 claim would affect the 90 day time-period for the issuance of the award as referred to in paragraphs 12 and 13 of the Agreed Procedures; and
- (ii) evaluate, in the light of paragraph 10 of the Agreed Procedures which requires arbitrators to address only "those issues that are necessary for the resolution of the dispute" and Article 3.7 of the DSU which calls on each WTO Member to "exercise its judgement as to whether action under these procedures would be fruitful", whether such Article 11 claim has the potential to impact the substantive outcome of the dispute and whether and how it is "necessary for the resolution of the dispute."

Any such Party is also urged to consider whether the substance of any possible Article 11 claim could be brought under one of the substantive treaty provisions at issue in the dispute, for example as an allegation of panel error in the application of that provision to the facts of the case (rather than an allegation of error in the assessment of facts under Article 11 of the DSU).

In the event a Party nonetheless decides to bring an Article 11 claim related to the Panel's assessment of the facts, and without prejudice to the question of whether (and, if so, under what conditions) such claims fall within the appeal mandate set out in Article 17.6 of the DSU and/or paragraph 9 of the Agreed Procedures, the Party is requested to set forth succinctly in its Notice of Appeal or Appellant/Other Appellant Submission:

- (i) whether and how the alleged panel error was raised before the Panel, in particular during the interim review stage, thereby providing the Panel an opportunity to address the alleged error, taking into account that paragraph 9 of the Agreed Procedures limits appeals to "issues of law covered in the panel report and legal interpretations developed by the panel" (underlining added);
- (ii) in what way the Article 11 claim is an issue "necessary for the resolution of the dispute" in the sense of paragraph 10 of the Agreed Procedures and a matter that cannot be brought under one of the substantive treaty provisions at issue in the dispute; and
- (iii) in what way the alleged panel error is not simply an appreciation of a factual issue (within the exclusive domain of panels) and amounts to an "issue of law" covered in the Panel Report or "legal interpretation" developed by the Panel, and thereby falls within the mandate of appellate review under paragraph 9 of the Agreed Procedures.

#### **4. Time Limits, Deadlines and Length and Number of Hearings Required**

In addition to "page limits", paragraph 12 of the Agreed Procedures refers to "time limits and deadlines as well as ... length and number of hearings required."

In this context, and in order to enhance procedural efficiency and facilitate meeting the 90 day time-period:

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- (i) an organizational meeting may be convened by the arbitrators with the Parties and Third Parties to discuss practical matters;
  - (ii) following consultation with the Parties and Third Parties, a virtual pre-hearing conference may be convened by the arbitrators with the Parties and Third Parties to help identify "those issues that are necessary for the resolution of the dispute" (paragraph 10 of the Agreed Procedures), to highlight the key issues raised by the Parties in the appeal that need further discussion at the hearing, and/or to discuss any Article 11 claims filed by the Parties;
  - (iii) unless exceptional circumstances arise:
    - a. oral hearings will be limited to one hearing of no more than two days;
    - b. opening statements by Parties will be limited to 25 minutes; opening statements by Third Parties who have notified their intention to make an oral statement will be limited to seven minutes; and
    - c. the standard deadlines set forth in the Working Procedures for Appellate Review, as set forth below, will apply. These time limits and deadlines will be firm and no deviations will be permitted except for highly compelling reasons (such as sudden illness of counsel) and taking into account the impact on the 90 day time-period.

	<u>General Appeals</u>	<u>Prohibited Subsidies Appeals</u>
	<b>Day</b>	<b>Day</b>
Notice of Appeal	0	0
Appellant's Submission	0	0
Notice of Other Appeal	5	2
Other Appellant's Submission	5	2
Appellee's Submission	18	9
Third Party Submission	21	10
Third Party Notification	21	10
Oral Hearing	30 – 45	15 – 23
Circulation of MPIA Award	60 – 90	30 – 60

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## **5. Language of Proceedings**

Parties and Third Parties are requested to inform the WTO Secretariat as soon as possible prior to the filing of the Notice of Appeal in which language they intend to conduct the appeal proceedings.

## 6. Filing and Service of Documents

No document shall be considered filed with the arbitrators unless the document is received by the Secretariat within the time-period set out for filing in accordance with the final working schedule to be established.

Each Party or Third Party shall file documents to the arbitrators by submitting them via the Disputes On-Line Registry Application (DORA) <https://dora.wto.org> by 17:00 (Geneva time) on the day that the document is due. Electronic copies of documents shall be preferably provided in both Microsoft Word and PDF format. The electronic version uploaded into DORA shall constitute the official version for the purposes of submission deadlines and the record of the dispute. Upload of a document into DORA pursuant to the final working schedule shall constitute electronic filing on the arbitrators, and service the other Party, and the third Parties.

As a general rule, all communications from the arbitrators to the Parties and Third Parties will be via electronic mail and uploaded in DORA. In addition to transmitting the award to the Parties in electronic format, the arbitrators shall provide them with a paper copy.

## 7. Translation of the MPIA Award

The time period for translation of the award will be considered following consultation with the Parties and in the light of the 90 day time-period requirement.

### ENDNOTES

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<sup>i</sup> Pursuant to Rule 21 of the Working Procedures for Appellate Review (AB/WP/6), which apply *mutatis mutandis* to MPIA appeals following paragraph 5 of the Agreed Procedures.

<sup>ii</sup> The word limits referred to in this letter include all words in the document except for words in tables of content, lists of annexes, exhibits, abbreviations or cases cited, and annexes, exhibits or appendices attached to the document.

<sup>iii</sup> In the 23 proceedings currently pending before the Appellate Body (amounting to a total of 24 Notices of Appeal/Other Appeal), only two Notices of Appeal/Other Appeal exceeded four pages.

<sup>iv</sup> The 27,000 word limit was arrived at, *inter alia*, with reference to the calculations found in the Appellate Body's Annual Report for 2015 (WT/AB/26, dated March 2016). More recent data on length of submissions before the Appellate Body are not publicly available. In the 2015 Report (on p. 119, footnote 4) it is noted that "over the period from January 2009 to October 2015, the average length (excluding the top two outliers) of appellants' and other appellants' submissions was 30,425 words and the average length of appellees' submissions was 28,875 words." In addition, within this same time period (appellate proceedings between January 2009 and October 2015), "[t]he average number of words per submission in the first five cases in the period considered was 26,965, and the average number of words per submission in the last five cases of this period was 34,982. This represents an increase of almost 30% in the length of the appellants' and appellees' submissions." (*ibidem*, at p. 119) Given the express wish of MPIA participants to streamline proceedings, seek procedural efficiency and meet the 90-day time period, the lower average of 26,965 words was taken and rounded to 27,000 words. Even though the data cited above indicate that on average appellees' submissions tend to be somewhat shorter than appellants' and other appellants' submissions, in order to ensure due process and equality of arms between the Parties, the same limit is suggested for both Appellant/Other Appellant and Appellee submissions.

<sup>v</sup> The alternative word limit with reference to the length of the appealed Panel report has been added in order to allow for longer submissions in exceptionally long and complex cases. The 40% ratio was arrived at, *inter alia*, based on the Appellate Body's Annual Report for 2015 (WT/AB/26, dated March 2016) which "shows the trend line for the ratio of the total number of words contained in the participants' submissions in each appeal as compared to the total number of words in the corresponding panel report" (at p. 120). This trend line, for the period between January 2009 and October 2015 (excluding the top two outliers) "shows an increase in the ratio

from 0.7 to about 1.6" (*ibidem*). Given the express wish of MPIA participants to streamline proceedings, seek procedural efficiency and meet the 90-day time period, the lower range was taken and rounded to a ratio of 0.8, which is then divided by two (as the 2015 Report refers to the sum of both participants' submissions) to arrive at 0.4 or 40%.

<sup>vi</sup> It is noted that in proceedings involving multiple complainants, multiple appeals/other appeals may be filed by various complainants. In this situation, it is understood that the responding Party may file an Appellee submission in response to each such appeal. In the event that the responding Party decides to file only one joint Appellee submission in response to such multiple appeals, the indicative maximum guideline for such Appellee submission would be multiplied by the number of appeals to which it is responding.

<sup>vii</sup> No data on length of Third Participants' submissions before the Appellate Body are publicly available. Given the obvious difference between main and Third Parties, but recognizing the importance of Third Parties' submissions in disputes concerning multilateral treaties such as WTO covered agreements, the indicative limit for Third Parties' submissions has been set at one third of the limit for main Parties' submissions.

<sup>viii</sup> The 15% extra for documents in French or Spanish was arrived at by comparing the page length of the ten most recent Appellate Body reports. On average, page numbers in the French versions of those Appellate Body reports were 14.55% higher as compared to the English version; page numbers in the Spanish versions were 16.23% higher as compared to the English version. The same top-up of 15% is suggested for both French and Spanish.

<sup>ix</sup> This follows the practice of the Appellate Body. See Communication from the Appellate Body, Executive Summaries of Written Submissions in Appellate Proceedings, WT/AB/23, 11 March 2015.

**ANNEX A-3****ADDITIONAL PROCEDURES FOR BCI PROTECTION AND  
PARTIAL PUBLIC VIEWING OF THE HEARING****Adopted by the Arbitrators on 1 November 2022**

At the organizational meeting between the Arbitrators and the parties to this dispute held on 18 October 2022, Colombia requested that the Arbitrators adopt additional procedures for the treatment and handling of business confidential information (BCI). Colombia recalled that the Panel had adopted certain working procedures on BCI in its proceedings, and suggested that similar procedures may be adopted by the Arbitrators. The European Union did not object to the adoption of additional procedures to protect BCI, but suggested that such procedures may be based on those adopted in prior appellate proceedings. In addition, the European Union requested that the hearing be made public. Colombia stated that, although it could not, in principle, agree to a hearing that is public in its entirety, it would not object to a partial open hearing in which the European Union's opening oral statement, as well as those of the third parties that so wish, is made public.

By letter of 24 October 2022, the Arbitrators sent to the parties and third parties a draft of additional procedures in light of the above requests, and invited comments. Upon receiving comments from the parties and certain third parties, the Arbitrators revised the modalities for the protection of BCI and partial public viewing of the hearing. Regarding BCI protection, the Arbitrators agreed to a request from the European Union to add the language in paragraph 2.f, although, given that the Arbitrators do not intend to include BCI in the Award, this provision is limited to procedures to guard against inadvertent disclosure of BCI. Regarding public viewing of the hearing through a video recording, in response to a request from the United States for further clarification regarding modalities, and a view expressed by Colombia in favour of limiting how long the recording would remain available on the WTO website, the Arbitrators agreed to ensuring that the recording would be in "full-room view" (paragraph 3), and that it be made available only to those who have a registered account on the WTO website (paragraph 6). The Arbitrators did not consider that limiting the time period for public viewing of the video recording was necessary.

Against the above background, and taking into consideration the 90-day time-limit to issue the Award in this arbitration, the Arbitrators thus adopt the following procedures pursuant to paragraph 11 of the Agreed Procedures for Arbitration under Article 25 of the DSU between the parties (Agreed Procedures).<sup>1</sup>

**Additional Procedures for BCI Protection**

1. For the purposes of these arbitration proceedings, BCI shall include: (i) information marked as BCI and enclosed within double square brackets in any document to the Arbitrators; and (ii) information designated by the Panel as BCI on the Panel record.
2. The additional BCI protection in these arbitration proceedings is provided according to the following terms:
  - a. No person may have access to information that qualifies as BCI, except the Arbitrators, the staff of the WTO Secretariat assisting them, an employee of a party or third party, or an outside advisor for the purposes of this dispute to a party or third party. However, an outside advisor is not permitted access to BCI if that advisor is an officer or employee of an enterprise engaged in the production, export, or import of the products that were the subject of the anti-dumping investigation at issue in this dispute.
  - b. A party or third party having access to BCI shall treat it as confidential and shall not disclose that information other than to those persons authorized to receive it pursuant to

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<sup>1</sup> WT/DS591/3/Rev.1. With regard to the request by Colombia pertaining to BCI, we also take note of paragraph 9 of the Additional Procedures for Arbitration under Article 25 of the DSU adopted for this arbitration on 19 October 2022.

these procedures. Each party and third party shall have responsibility in this regard for its employees as well as for any outside advisors employed for the purposes of this dispute. BCI obtained under these procedures may be used only for the purpose of providing information and argumentation in this dispute and for no other purpose.

- c. A party or third party that submits any document containing BCI to the Arbitrators shall clearly identify such information in the document filed. The party or third party shall mark the cover and/or first page of the document containing BCI, and each subsequent page of the document, to indicate the presence of such information. The specific information in question shall be placed within double square brackets, as follows: [[...]]. The first page or cover of the document shall state "Contains Business Confidential Information", and the top of each page of the document shall contain the notice "Contains Business Confidential Information".
- d. In view of paragraph 3 below, a party or third party that intends to have its opening statement at the hearing be made public shall not refer to BCI in the opening statement.
- e. For the purpose of ensuring that only persons authorized to have access to BCI pursuant to these procedures are in the room to hear an oral statement containing BCI:
  - i. Colombia, and third parties referred to in paragraph 4 below, shall inform the Arbitrators in advance if they intend to refer to BCI in their opening statements.
  - ii. A party or third party that intends to refer to BCI in response to questions during the hearing or in the closing statement shall inform the Arbitrators in advance.
- f. The Arbitrators will make every effort to draft an award that does not disclose BCI by limiting themselves to making statements or drawing conclusions that are based on BCI. A copy of the Award intended for circulation to WTO Members will be provided in advance to the parties, at a date and in a manner to be specified by the Arbitrators. The parties will be provided with an opportunity to request the removal of any BCI that is inadvertently included in the Award, in accordance with a time period to be specified by the Arbitrators. No other comments or submissions shall be accepted.
- g. Pursuant to paragraph 8 of the Agreed Procedures, members of the pool of standing appeal arbitrators composed in accordance with paragraph 4 of communication JOB/DSB/1/Add.12<sup>2</sup> shall receive any document relating to the appeal, including any document containing BCI. Members of the pool of arbitrators shall not disclose BCI to persons not authorized under these procedures to have access to BCI.

#### **Additional Procedures for Partial Public Viewing of the Hearing**

3. Subject to the terms set out below, the first session of the hearing, which will consist of opening statements, shall be video recorded with the camera in "full-room view", i.e., without zooming in on individual speakers.
4. The opening statements of Colombia and third parties wishing to maintain the confidentiality of their statements will not be video recorded. Any third party that wishes to participate in the hearing may request that its opening statement remain confidential. Such requests should be made as soon as possible, and no later than 5 p.m. Geneva time on Friday, 11 November 2022.
5. Before the conclusion of the hearing, the parties shall provide confirmation that no BCI is contained in the opening statements of the European Union and any third party other than those referred to in paragraph 4 above.
6. Subject to the parties' confirmation referred to in paragraph 5, the video recording will be posted on the WTO website subsequent to the hearing to allow for viewing by anyone who has a

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<sup>2</sup> Except any member of the pool of arbitrators who has a conflict of interest pursuant to the Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes.

registered account on the WTO website. The date of posting and the registration instructions will be communicated in due course.

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**ANNEX B**

NOTIFICATION OF AN APPEAL BY COLOMBIA

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**ANNEX B-1****NOTIFICATION OF AN APPEAL BY COLOMBIA UNDER ARTICLE 25 OF THE DSU,  
PARAGRAPH 5 OF THE AGREED PROCEDURES, AND RULE 20 OF THE  
WORKING PROCEDURES FOR APPELLATE REVIEW\***

Notification of an Appeal by Colombia under Article 25 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU"), paragraph 5 of the Agreed Procedures for Arbitration under Article 25 of the DSU (the "Agreed Procedures") and Rule 20 of the Working Procedures for Appellate Review

Pursuant to paragraph 5 of the Agreed Procedures<sup>1</sup>, Colombia hereby notifies the Dispute Settlement Body of its decision to initiate an arbitration under Article 25 of the DSU with regard to certain issues of law and legal interpretation covered in the Panel Report in the dispute *Colombia – Anti-Dumping Duties on Frozen Fries from Belgium, Germany and the Netherlands*.

Pursuant to paragraph 5 of the Agreed Procedures and Rule 20(1) of the Working Procedures for Appellate Review, Colombia simultaneously files this Notice of Appeal and its Appellant Submission with the European Union and the third parties in the panel proceedings and with the WTO Secretariat. The Notice of Appeal includes the final report of the Panel in the working languages of the WTO.

For the reasons elaborated in its Appellant Submission to the Arbitrators, Colombia appeals and requests the Arbitrators to reverse the findings, conclusions and recommendations of the Panel, with respect to the following errors of law and legal interpretation contained in the Panel Report<sup>2</sup>:

1. The Panel erred in the interpretation and application of Article 5.3 as well as Article 5.2(ii), as requiring an applicant that presents third-country sales price as a basis for determining normal value to explain why it is "appropriate" that the application does not rely on domestic sales prices.<sup>3</sup> The Panel similarly erred in finding that an investigating authority must, under Articles 5.2(iii) and 5.3, examine whether the use of third-country sales prices, instead of domestic sales prices, was "appropriate" in the specific facts and circumstances of the investigation, in order to satisfy the "accuracy" and "adequacy" requirement in Article 5.3. Accordingly, Colombia requests the Arbitrators to reverse the Panel's findings in paragraphs 7.75, 7.78, 7.79, and 8.1.a.iii.
2. The Panel erred in the interpretation and application of Article 6.5 of the Anti-Dumping Agreement by finding that the investigating authority treated certain information in the revised application for the investigation as "confidential" without receiving a showing of "good cause".<sup>4</sup> As that information was never treated as confidential, the Panel erred in finding that the authority was under an obligation to require and assess a showing of "good cause" within the meaning of Article 6.5. Accordingly, Colombia requests that the Arbitrators reverse the Panel's finding in paragraphs 7.126, 7.152.a., and 8.1.b.i. of its Report that the investigating authority acted inconsistently with Article 6.5 of the Anti-Dumping Agreement.
3. The Panel erred in the interpretation and application of Article 6.2 of the DSU by finding that the European Union's claim under Article 2.4 of the Anti-Dumping Agreement pertaining to packaging costs was within the Panel's terms of reference.<sup>5</sup> The Panel incorrectly held that the claim developed by the European Union before the Panel was the same as the claim pertaining to an exporter's packaging costs that was contained in the panel request (but not developed before the Panel). By treating these two issues as different arguments regarding

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\* This document, dated 6 October 2022, was circulated to Members as WT/DS591/7 and WT/DS591/7/Add.1 in accordance with paragraph 5 of the Agreed Procedures for Arbitration under Article 25 of the DSU. The final Panel Report, which was attached to this document, is not included in this Addendum.

<sup>1</sup> WT/DS591/3/Rev.1, 22 April 2021.

<sup>2</sup> Pursuant to Rule 20(2)(d)(iii) of the *Working Procedures for Appellate Review*, which apply *mutatis mutandis* pursuant to paragraph 11 of the Agreed Procedures, this Notice of Appeal includes an indicative list of the paragraphs of the Panel Report containing the alleged errors, without prejudice to Colombia's ability to refer to other paragraphs of the Panel Report during the arbitration proceedings.

<sup>3</sup> Panel Report, paras. 7.75, 7.78, 7.79, and 8.1.a.iii.

<sup>4</sup> Panel Report, paras. 7.126, 7.152.a., and 8.1.b.i.

<sup>5</sup> Panel Report, paras. 7.232, 7.233, 7.244, and 8.1.d.ii.

the same claim in the panel request, rather than as different claims, the Panel erred under Article 6.2. Colombia requests that the Arbitrators reverse the Panel's finding under Article 6.2 of the DSU and consequently also declare moot and of no legal effect the Panel's substantive finding under Article 2.4<sup>6</sup>.

Should the Arbitrators agree with Colombia under Article 6.2 of the DSU, but consider that part of the Panel's substantive finding still stands because it is based also on the European Union's claim pertaining to the adjustment request, Colombia requests the Arbitrators to reverse the Panel's finding under Article 2.4 of the Anti-Dumping Agreement based on the packaging adjustment issue<sup>7</sup>, on the ground that the Panel improperly made the case for the European Union and relieved it of its burden of proof. The European Union made no *prima facie* case under Article 2.4 on the packaging adjustment issue.

4. The Panel erred in the interpretation and application of Articles 3.1, 3.2, 3.4, and 3.5 of the Anti-Dumping Agreement by finding that the term "dumped imports" (*importaciones objeto de dumping*, in Spanish) does not include the imports from exporters that have a positive, *de minimis* dumping margin.<sup>8</sup> The Panel ignored the ordinary meaning of the term "dumped imports" based on the definition of "dumping" in Article 2.1 of the Anti-Dumping Agreement. The Panel also ignored the immediate context provided in Article 3.5 and, instead, placed undue reliance on Article 5.8 to conclude that the term "dumped imports" does not include imports with *de minimis* dumping margins. Accordingly, Colombia requests the Arbitrator to reverse the Panel's finding in paragraphs 7.303, 7.307, and 8.1.e.i. of its Report that the investigating authority acted inconsistently with Articles 3.1, 3.2, 3.4, and 3.5 of the Anti-Dumping Agreement by including in its injury and causation determination imports from those exporters subject to positive, *de minimis* dumping margins.

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<sup>6</sup> Panel Report, paras. 7.244 and 8.1.d.iii.

<sup>7</sup> Panel Report, paras. 7.241, 7.244, and 8.1.d.iii.

<sup>8</sup> Panel Report, paras. 7.303, 7.307, and 8.1.e.i.

**ANNEX C**

ARGUMENTS OF THE PARTIES

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**ANNEX C-1****EXECUTIVE SUMMARY OF COLOMBIA'S WRITTEN SUBMISSION****1 INTRODUCTION**

1.1. Colombia appreciates the opportunity to present for the Arbitrators' review certain legal issues arising from the Panel Report in this dispute.

**2 APPLICABLE STANDARD OF REVIEW**

2.1. Article 11 of the DSU obliges a panel to make an "objective assessment of the matter." Moreover, Article 17.6(ii) of the Anti-Dumping Agreement requires panels to defer to a "permissible interpretation" by investigating authorities. The Panel failed properly to account for such "permissible interpretations" and also failed to apply properly the customary rules of treaty interpretation.

**3 THE PANEL ERRED IN FINDING AN INCONSISTENCY UNDER ARTICLE 5.3**

3.1. Colombia requests the Arbitrators to reverse the Panel's finding under Article 5.3 of the Anti-Dumping Agreement pertaining to the evidence for normal value. Neither Article 5.3 nor Article 5.2(iii) require that an applicant explain, or the investigating authority examine, why it is "appropriate" to use third-country sales in lieu of domestic sales price as the basis for normal value. Instead, the proper meaning of the phrase "where appropriate" is to underscore that applicant – and by extension the investigating authority – have discretion to rely on either type of evidence, based on what they consider to be "appropriate".

3.2. The Panel erred in ascribing to domestic sales prices in Article 5.2(iii) a strict legal primacy. The fact that Article 5.2(iii) mentions third-country sales prices and constructed value in parentheses, and after "where appropriate", simply means that the drafters considered domestic sales prices to be the usual basis for normal value. Parentheses are also frequently used to organize a longer sentence, as in this case. In any event, none of this signifies that the use of third-country export prices or constructed normal value is legally permissible only if explained and justified, on the basis of unspecified criteria. The Panel failed to consider that the phrase "where appropriate" stands in stark contrast to the detailed criteria in Article 2.2 that govern the choice of evidence for determining normal value and the circumstances under which domestic sales prices can be regarded as reliable.

3.3. The Panel failed to examine the proper context of the phrase "where appropriate", including its meaning in numerous other provisions of the covered agreements, in which it has exactly the meaning suggested by Colombia, that is, discretion for the decision maker without a requirement to explain its choice. Examples include Article XX:1(d) of the GATS; footnote 56, Annex II(I)(2), and Annex V(2) of the SCM Agreement; Articles 4.1 and 4.2 of the Agreement on Rules of Origin; Article 15.4 of the TBT Agreement; Article 12.7 of the SPS Agreement; and Article 50.2 of the TRIPS Agreement.

3.4. The Panel's decision to read an explanation requirement into the phrase "where appropriate" is very questionable from an interpretative standpoint. The Anti-Dumping Agreement contains provisions with explicit explanation requirements, as well as with explicit and detailed criteria for setting aside one option and resorting to another option. This demonstrates that, when the drafters wished to establish such requirements, they did so explicitly. They did not do so in Article 5.2(iii). Moreover, rejecting probative evidence provided by the applicant on the ground that it should have provided other evidence goes against the well-established interpretation of the phrase "reasonably available" in the chapeau of Article 5.2.

3.5. The Panel's suggested obligations that the investigating authority must examine why domestic sales prices were not provided in the application, and that the applicant must supply such an explanation, are also undermined by the fact that other provisions state this type of requirements explicitly. This again suggests that the drafters expressed these kinds of obligations explicitly.

Moreover, the Panel's requirement to examine why domestic sales prices have not been used is also difficult to reconcile with the ordinary meaning of the term "adequacy" in Article 5.3.

3.6. Furthermore, the Panel's examination requirement would be either a merely formalistic step or, alternatively, would require the investigating authority to examine explanations by the applicant. However, Article 5.2 and 5.3 do not contain criteria on how to examine an applicant's explanations, on how much effort an applicant should make to obtain domestic sales prices or on how to approach this for different applicants across different jurisdictions. The EU's arguments about the alleged special requirements applying to applicants with related companies in the export market demonstrate the potentially arbitrary nature of these criteria.

3.7. Finally, the Panel failed to appreciate that the primacy of domestic sales prices as the basis for determining normal value is inextricably linked to the detailed criteria in Article 2.2 regarding whether domestic sales prices are reliable. However, in the initiation context, these tests cannot be performed due to insufficient information. Hence, domestic sales prices cannot be accorded the same primacy as under Article 2.2. More generally, at the initiation stage, only limited information exists about the reliability of any evidence. Therefore, if for instance domestic sales prices are low and indicate the absence of dumping, but available third-country sales price are high and indicate presence of dumping, the investigating authority must be entitled to initiate on this basis to gain greater certainty about the underlying facts. Third country sales prices indicating dumping cannot be offset by the existence of low-priced domestic sales and cannot make an initiation WTO-inconsistent. For that reason, it would also not be logical to invalidate an application that does not contain domestic sales data, but does contain probative third-country export sales data. This does not, of course, prejudice the outcome of the investigation.

3.8. In any event, should the Arbitrators read the phrase "where appropriate" as indicating an objective, substantive standard, this would relate to the quality, accuracy, and adequacy of third-country sales prices or constructed normal value.

#### **4 THE PANEL ERRED IN FINDING AN INCONSISTENCY WITH ARTICLE 6.5 (REDACTED INFORMATION IN SECTION D(I) OF THE REVISED APPLICATION)**

4.1. Colombia appeals the Panel's finding that the Subdirección acted inconsistently with Article 6.5 by treating the redacted information in section d(i) of the revised application of 19 July 2017 as "confidential" without any demonstration of "good cause".

4.2. The Panel incorrectly applied Article 6.5. As it found, the applicant requested confidential treatment for certain information in the revised application, but not for the redacted information in section d(i). Consequently, the Subdirección determined confidentiality for the information for which confidential treatment was requested (but not for the information in section d(i)). Thus, the Subdirección was not required to request the applicant to show good cause with respect to information for which confidentiality was not requested. Therefore, the Subdirección cannot be found to have acted inconsistently with Article 6.5 for allegedly treating certain information as confidential when no request for confidentiality was submitted.

4.3. As the redacted information in section d(i) was not confidential (because there was no request for confidentiality), the Subdirección plainly disclosed it in other documents placed on the public record of the investigation. This was explicitly found by the Panel. Thus, the Panel incorrectly stated that the Subdirección had treated this information as "confidential". For this reason, the obligation under Article 6.5 to show "good cause" was not triggered.

4.4. Colombia therefore requests the Arbitrators to reverse the Panel's finding that the *Subdirección* violated Article 6.5 with respect to the information in section d(i) of the revised application.

#### **5 THE PANEL ERRED IN FINDING THAT THE EU'S CLAIM REGARDING PACKAGING COSTS WAS WITHIN THE PANEL'S JURISDICTION**

5.1. The Panel erred in finding that the EU's claim regarding packaging was within its terms of reference. The EU presented one claim in its panel request regarding packaging costs, but subsequently pursued a different claim during the Panel proceedings. The claim in the EU's panel request related to an adjustment request by an exporter. The claim the EU actually pursued related

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to an alleged asymmetrical deduction (a calculation error), whereby the *Subdirección* allegedly deducted packaging costs from the export price, but not from normal value.

5.2. These are two separate claims and not, as the Panel found, merely separate arguments. Each is based on a distinct set of facts. Indeed, the Panel itself stated that these two issues were "of a different type and of a different nature" and concerned "different types of packaging costs and, hence, distinct and unrelated types of adjustments".<sup>1</sup> These two claims are moreover independent of each other, including for purposes of legal findings and implementation.

5.3. The EU's panel request confirms the distinct nature of these two issues. The EU dedicated three separate items to Article 2.4. Item 5 mentions only adjustment requests, while Item 6 mentions an alleged double deduction of sea freight and insurance costs. Thus, a calculation error such as the alleged asymmetrical deduction should have been mentioned in Item 6, but was not.

5.4. Colombia requests the Arbitrators to reverse the Panel's finding under Article 6.2 of the DSU and declare moot and of no legal effect the Panel's substantive finding under Article 2.4 of the Anti-Dumping Agreement. Should the Arbitrators consider that the Panel's finding stands even after declaring the asymmetrical deduction finding to be moot, Colombia appeals the remainder of the Panel's finding on the grounds that the Panel made the case for the EU, improperly relieving it from its burden of proof.

## **6 THE PANEL ERRED IN FINDING AN INCONSISTENCY WITH ARTICLES 3.1, 3.2, 3.4, AND 3.5 (INCLUSION OF IMPORTS WITH *DE MINIMIS* DUMPING MARGINS IN THE INJURY/CAUSATION ANALYSIS)**

6.1. Colombia appeals the Panel's finding that the *Subdirección* acted inconsistently with Articles 3.1, 3.2, 3.4, and 3.5. Specifically, Colombia contends that the Panel erred in finding that the *Subdirección's* interpretation of the terms "dumped imports" in those provisions as including imports with de minimis margins is not "permissible" under Article 17.6(ii). In rejecting this interpretation, the Panel failed properly to apply the customary rules of treaty interpretation.

6.2. First, the Panel skipped the consideration of the ordinary meaning of "dumped imports" as well as the immediate context provided in the fourth sentence of Article 3.5.

6.3. Article 2.1 defines "dumping" as any difference between a higher normal value and a lower export price. Thus, dumping exists when the dumping margin is above 0%. In addition, Article 2.1 clarifies that this definition is "[f]or the purpose of this Agreement" and therefore applies throughout the Anti-Dumping Agreement.

6.4. The findings of a previous panel and the *travaux préparatoires* further confirm that the definition of "dumping" is not subject to the de minimis threshold. Accordingly, "dumping" under Article 2.1 refers to any positive dumping margin regardless of its magnitude. Thus, the term "dumped imports" ("*importaciones objeto de dumping*") in Articles 3.1, 3.2, 3.4, and 3.5 refers to any imports for which an authority calculates a positive dumping margin regardless of its magnitude.

6.5. Moreover, the Panel improperly skipped the immediate context confirming the ordinary meaning of "dumped imports" as including any imports for which there is any positive dumping margin. Specifically, Colombia pointed to the fourth sentence of Article 3.5, which includes, as part of the non-attribution factors, the "volumes and prices of imports not sold at dumped prices". Under this factor, an authority must ensure that the effects of imports not sold at dumped prices are separated from those of the "dumped imports". Imports with de minimis dumping margins are not "imports not sold at dumped prices". Instead they are "dumped imports" ("*importaciones objeto de dumping*") under the first sentence of Article 3.5.

6.6. In addition, unlike in Articles 3.1, 3.2, 3.4, and 3.5, the drafters considered it necessary to limit the "dumping" margins in Articles 3.3 and 9.4 to those above the "de minimis" threshold. This further suggests that, had the drafters wished to limit the "dumped imports" in Articles 3.1, 3.2, 3.4 and 3.5 to dumped imports above de minimis margins, they would have done so, similarly to

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<sup>1</sup> Panel Report, para. 7.237 and 7.243.

Articles 3.3 and 9.4. This supports the interpretation of the terms "dumped imports" in Articles 3.1, 3.2, 3.4, and 3.5 consistent with the definition of "dumping" in Article 2.1.

6.7. Second, the Panel incorrectly relied on Article 5.8 as "important context" for the interpretation of terms "dumped imports" in Articles 3.1, 3.2, 3.4, and 3.5 of the Anti-Dumping Agreement (paragraphs 7.292-7.294 of the Panel Report).

6.8. In paragraph 7.292, the Panel reasoned that the "existence, degree, and effect" of dumping in Article 5.1 forms the basis of the injury/causation analysis. However, the Panel ignored that Article 5.1 refers to "dumping", which means any difference between a higher normal value and a lower export price. Thus, if anything, Article 5.1 confirms that the "dumped imports" in an investigation include those imports with de minimis dumping margins. For this reason, the Panel's reliance on Article 5.1 constitutes legal error.

6.9. In paragraph 7.293, the Panel found that the reference to "effects of the dumped imports" in Article 3 suggests that an authority must first determine the existence of dumping and, only subsequently, make its injury determination. However, the Panel ignored that the "determination" in Article 5.8 refers to "a final determination of a de minimis margin of dumping".<sup>2</sup> In Colombia's anti-dumping system (like in many others), the final determination of both dumping and injury are made simultaneously – i.e. at the last stage of the investigation. Thus, when the obligation in Article 5.8 arose, the Subdirección had already made its final determination of injury.

6.10. Moreover, the Panel's sequential approach is at odds with Article 5.7 that "[t]he evidence of both dumping and injury shall be considered simultaneously". If an authority is required to make a final determination of dumping before a determination of injury, it will no longer be able to assess evidence of dumping when conducting its "subsequent" injury analysis. Thus, the Panel's sequential approach constitutes a legal error.

6.11. In paragraph 7.302, the Panel considered that including imports with a de minimis dumping margin in the injury/causation analysis would "render ineffective" the requirement in Article 5.8 to terminate immediately the investigation. This is incorrect. It is beyond dispute that there is no explicit link between Articles 5.8 and 3. Rather, the purpose of the immediate termination of an investigation is to exclude exporters with de minimis dumping margins from the scope of the anti-dumping measure. The Appellate Body, when faced with this question, agreed.<sup>3</sup> This is further confirmed by the *travaux préparatoires*. Thus, including imports with de minimis dumping margins does not render Article 5.8 ineffective.

6.12. Also, the *travaux préparatoires* reveal that the de minimis rule applies even if, and therefore when, imports, including those with *de minimis* dumping margins, have been assessed and found to cause injury within the meaning of Article VI. This supports Colombia's view that the terms "dumped imports" in Articles 3.1, 3.2, 3.4, and 3.5 include imports with *de minimis* dumping margins.

6.13. Accordingly, Colombia requests the Arbitrators to reverse the Panel's ultimate finding that the *Subdirección* acted inconsistently with Articles 3.1, 3.2, 3.4, and 3.5 by including imports with *de minimis* dumping margins in the injury/causation analysis.

## 7 CONCLUSION

7.1. Colombia thanks the Arbitrators and the Secretariat staff for their work on this appeal.

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<sup>2</sup> Panel Report, *Canada – Welded Pipe*, para. 7.64.

<sup>3</sup> Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 219.

**ANNEX C-2**

## EXECUTIVE SUMMARY OF THE EUROPEAN UNION'S WRITTEN SUBMISSION

- 1. THE PANEL DID NOT ERR IN FINDING THAT COLOMBIA ACTED INCONSISTENTLY WITH ARTICLE 5.3 OF THE ANTI-DUMPING AGREEMENT BECAUSE, BY FAILING TO EXAMINE WHETHER THE USE OF THIRD COUNTRY SALES PRICES, INSTEAD OF DOMESTIC SALES PRICES, WAS "APPROPRIATE" IN THE SPECIFIC FACTS AND CIRCUMSTANCES OF THE INVESTIGATION AT ISSUE, MINCIT DID NOT EXAMINE THE "ADEQUACY" OF THE EVIDENCE IN THE APPLICATION TO DETERMINE WHETHER THERE IS "SUFFICIENT" EVIDENCE TO JUSTIFY THE INITIATION OF THE INVESTIGATION**
1. Contrary to Colombia's allegations, the Panel did not state that under Article 5.3 "an explanation" by the applicant is required. The Panel did however recall that Article 5.3 requires investigating authorities to examine the accuracy and adequacy of the evidence provided in the application for purposes of initiation and noted, in line with prior panel reports, that any review of an investigating authority's conduct under Article 5.3 must be carried out on a case-by-case basis.
2. The core interpretative legal issue pertains to the obligation of the investigating authority, under Article 5.3 of the Anti-Dumping Agreement, to examine if the evidence provided in the application is adequate and sufficient to justify the initiation of the investigation requested by the applicant.
3. The Panel correctly applied the customary rules of interpretation of public international law, as required by the first sentence of Article 17.6(ii). The Panel inquired into the ordinary meaning of "where appropriate". It did not limit its analysis to the interpretation of that phrase in Article 5.2(iii) because its focus was on the assessment of MINCIT's conduct under Article 5.3. The Panel had recourse to context and object and purpose to elucidate the meaning of the term "where appropriate", proceeding in a logical and holistic fashion. That process yielded an interpretation that is harmonious and coherent and fits comfortably with Articles 5.3 and 5.2 of the Anti-Dumping Agreement.
4. The Panel was right to disagree with Colombia that the use of the term "where appropriate" indicates that an applicant enjoys complete "free choice" to submit any information that it desires for calculating normal value. Accepting Colombia's interpretation would deny any effect to the meaning or placement of the term "where appropriate", contrary to the principle of effectiveness in treaty interpretation. An investigating authority's examination, under Article 5.3, of the "adequacy" and sufficiency of the evidence for determining normal value for purposes of initiation requires, at the very least, an exercise of judgment as to the suitability or appropriateness of using third country sales prices, instead of domestic sales prices, in the specific situation before it.
5. Colombia's alternative interpretation would allow the investigating authority to initiate the investigation even though the applicant has in its possession a number of domestic sales prices that do not, in themselves, suggest dumping. This interpretation is in direct contradiction with the obligation of the investigating authority to examine the adequacy of the evidence provided in the application in order to determine whether there is sufficient evidence to justify the initiation of an investigation.
6. Colombia is therefore wrong in arguing that the sole question to be examined by the investigating authority is whether the evidence on third-country sales prices is reliable or, as Colombia puts it, "accurate" and "adequate" as a matter of substance.
7. There is nothing illogical about the use of third-country sales prices being considered "appropriate" and sufficient to initiate an investigation in one case but not in another case, for reasons unrelated to the substance, nature or quality of that evidence. Any review of an investigating authority's conduct under Article 5.3 must be carried out on a case-by-case basis

and it is indisputable that there may be circumstances where the use of evidence other than domestic sales prices is appropriate, as envisaged in the text of Article 5.2(iii).

8. As Colombia acknowledges, the term "where appropriate" is one of those generic, open-ended terms "whose interpretation heavily depends on the context in which they are found". Since the Panel clarified the context and purpose of its interpretation of the term "where appropriate" in Article 5.2(iii), it is difficult to see what can be gained from examining all other instances where the covered agreements use the term "as appropriate" and inquiring how such a generic term stands to be interpreted in different contexts and for different purposes.
9. The word "adequacy" is rightly used in the Panel's finding, since Article 5.3 specifically requires the investigating authority to examine the adequacy of the evidence provided in the application. If the evidence of dumping provided in the application consists of third-country sales prices, instead of domestic sales prices, the investigating authority is required to examine whether that evidence is appropriate and therefore adequate to achieve the purpose of allowing it to determine whether there is sufficient evidence to justify the initiation of an investigation.
10. The European Union does not consider it unworkable for an investigating authority to verify if an applicant is unable to obtain domestic sales prices. It seems reasonable to assume that larger applicants, those who are part of multinational groups or with deeper pockets, will have less difficulty in obtaining information on domestic sales prices.

**2. THE PANEL DID NOT ERR IN FINDING THAT COLOMBIA ACTED INCONSISTENTLY WITH ITS OBLIGATIONS UNDER ARTICLE 6.5 OF THE ANTI-DUMPING AGREEMENT WITH RESPECT TO THE REDACTED INFORMATION IN SECTION D(I) OF FEDEPAPA'S REVISED APPLICATION BECAUSE MINCIT GRANTED CONFIDENTIAL TREATMENT TO THIS INFORMATION WITHOUT A SHOWING OF "GOOD CAUSE" BY THE APPLICANT**

11. FEDEPAPA's revised application of 19 July 2017 was submitted to MINCIT as a document from which information on the alleged injury to the domestic industry had been redacted by the applicant. This was the only version to which the European Union and the other interested parties had access, both before and after the initiation of the anti-dumping investigation.
12. It is therefore indisputable that MINCIT treated as confidential the redacted information in section d(1) of FEDEPAPA's revised application. The Panel rightly reached the same conclusion in paragraph 7.126 of the Panel Report.
13. No clear indication in the record suggested that the information redacted from the revised application was made available elsewhere. A joint reading of the revised and the original application did not enable a reader to "easily infer" that the redacted information in FEDEPAPA's revised application was, "in reality", the same as the relevant information contained in the original application.
14. As correctly found by the Panel, despite the absence of an explicit request by the applicant, MINCIT did grant confidential treatment to the information in section d(1) of the revised application. Other interested parties were prevented from viewing the information redacted from the revised application.
15. The Panel rightly rejected Colombia's argument that the application of Article 6.5 and the obligation to show good cause was not triggered in the circumstances of the dispute. Colombia's argument "would render ineffective the requirement of showing 'good cause' by allowing (a) interested parties to submit redacted information without a showing of 'good cause' for confidential treatment; and (b) investigating authorities to maintain confidentiality of such information without 'good cause' being shown".

**3. THE PANEL DID NOT ERR IN FINDING THAT THE EUROPEAN UNION'S CLAIM CONCERNING PACKAGING COSTS UNDER ARTICLE 2.4 OF THE ANTI-DUMPING AGREEMENT WAS WITHIN ITS TERMS OF REFERENCE**

16. The Panel rightly found that the European Union's claim regarding the due allowance/adjustment relating to Mydibel's packaging costs was properly before it pursuant to

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Article 6.2 of the DSU. The European Union's claim is that MINCIT breached Article 2.4 of the Anti-Dumping Agreement by carrying out an unfair comparison between normal value and export price, because due allowances/adjustments were not done properly, including for packaging costs. It is this claim, that the European Union set out in its panel request, in accordance with the requirements in Article 6.2 of the DSU, and it is this claim that it pursued in its submissions, and that the Panel adjudicated.

17. Colombia's appeal contains several interpretative flaws, and, most importantly, overlooks the fact that the question *why* a due allowance/adjustment was wrong, is not an element of the claim pursuant to Article 2.4 of the Anti-Dumping Agreement. On the contrary, it is part of the explanation demonstrating the actual infringement – and therefore an argument to establish the well-founded nature of the claim. Only claims, but not arguments, must be presented in a panel request.
18. The European Union therefore requests that the Arbitrators uphold the Panel's finding that, having regard to the legal standard that is actually set out in the terms of the treaty used in Article 6.2 of the DSU, which do not refer either to arguments or statements of fact or evidence, the claim relating to the erroneous allowance/adjustment for Mydibel's packaging costs was properly within the Panel's terms of reference. Consequently, the European Union requests that the Arbitrators also reject Colombia's request to declare moot the Panel's findings on the substance of this claim.
- 4. THE PANEL DID NOT ERR IN FINDING AN INCONSISTENCY WITH ARTICLES 3.1, 3.2, 3.4, AND 3.5 BY INCLUDING IMPORTS WITH DE MINIMIS DUMPING MARGINS IN THE SCOPE OF "DUMPED IMPORTS" UNDER ARTICLE 3 OF THE ANTI-DUMPING AGREEMENT**
19. The Panel correctly found that imports from exporters found to have *de minimis* dumping margins may not be included as "dumped imports" under Article 3 of the Anti-Dumping Agreement.
20. The Panel neither "omitted" nor "skipped" a relevant stage in its inquiry. The Panel correctly applied the rules of interpretation under public international law. To determine the "ordinary meaning" of the term "dumped imports", the Panel was required to consider the Anti-Dumping Agreement as a whole, and to interpret that Agreement in a manner which does not result in any provision being rendered redundant.
21. The term "dumped imports" is not defined in Article 3 of the Anti-Dumping Agreement. Article 2.1 of the Anti-Dumping Agreement contains a definition which enables one to ascertain when a product will be considered to have been "dumped". Whilst that definition must be interpreted coherently across the Anti-Dumping Agreement, Article 2.1 of the Anti-Dumping Agreement does not provide an "unequivocal" "ordinary meaning" of the term "dumped imports". Arguments parasitic on this incorrect proposition must fall.
22. An injury determination can only follow from an investigation. Article 5 of the Anti-Dumping Agreement provides for the initiation, conduct and termination of investigations. Consideration of the evidence sustaining the injury determination must take place in the course of an investigation (Article 5.7). Article 5.8 sets down an "immediate termination" requirement where there is a determination of a *de minimis* dumping margin. There is a relationship between Article 5 of the Anti-Dumping Agreement and Article 3 of the Anti-Dumping Agreement. Therefore, Article 5.8 of the Anti-Dumping Agreement provides important relevant context for the interpretation of Article 3 of the Anti-Dumping Agreement.
23. The Panel correctly found that the "immediate termination" requirement in Article 5.8 of the Anti-Dumping Agreement would be deprived of effectiveness if Colombia's interpretative proposition were "correct".
24. The factual scenario before the Panel involved three categories of exporters: a) those in respect of whom MINCIT determined there was a *de minimis* final margin of dumping; b) those in respect of whom MINCIT determined there was a negative final margin of dumping; and c) those in respect of whom MINCIT determined there was a positive final margin of dumping that was

greater than 2%. MINCIT included all investigated imports from all three categories of exporters in its analysis under Article 3 of the Anti-Dumping Agreement.

25. However, as this Appeal is brought under Article 17.6. (ii) of the Anti-Dumping Agreement, the interpretation by the Arbitrators of the term "dumped imports" in Article 3 of the Anti-Dumping Agreement must hold good in all fact patterns. That includes the case in which there is an original anti-dumping investigation relating to a product from one country, with one exporter, with a dumping margin of up to, but less than 2% (for example, 1.9%).
26. On the European Union's interpretation, in such a case the investigation must be immediately terminated, in accordance with Article 5.8 of the Anti-Dumping Agreement, in order for that provision to have any meaningful effect. On Colombia's interpretation, the investigating authority may continue with an injury analysis, based on the "dumped imports" (with a margin of 1.9%), and could, in theory, make findings of material injury and causation. But what happens, then, when the investigating authority considers the imposition of a dumping duty, pursuant to Article 9.2 of the Anti-Dumping Agreement?
27. There are two options. First, an anti-dumping duty is imposed at 1.9%. But this would only serve to emphasise that Article 5.8 of the Anti-Dumping Agreement would have been deprived of all effectiveness. Second, alternatively, no anti-dumping duty is imposed because that would not be appropriate. In the second scenario, there is no possibility other than the investigation is terminated. The injury analysis would have been, right from the outset, entirely without object. Consideration of this scenario decisively demonstrates why Colombia's interpretation cannot be right, or permissible, because it would lead to a conclusion that is manifestly absurd and unreasonable.
28. If Article 5.8 of the Anti-Dumping Agreement mandates "immediate termination" and precludes the injury analysis in the scenario of one exporter with a dumping margin of 1.9% in one country, it must also do so in the factual scenario underlying this Appeal. The imports from the exporters with a *de minimis* dumping margin must be excluded from the injury analysis.
29. Colombia's remaining arguments are unavailing.
30. The Panel was not required to prioritise the "immediate context" of Article 3.5 of the Anti-Dumping Agreement over a reading of the Agreement as a whole. The absence of a reference to Article 5.8 in Article 3.5 of the Anti-Dumping Agreement does not prove that the drafters never intended the *de minimis* rule to apply to "dumped imports". A coincidence in timing of the negotiation of Article 3.5 with other provisions that cross-refer to Article 5.8 of the Anti-Dumping Agreement does not prove the contrary. Whilst a legal consequence of the immediate termination obligation in Article 5.8 of the Anti-Dumping Agreement is that no anti-dumping measure may be imposed on an exporter found to have a *de minimis* dumping margin, this does not prove this is the only legal consequence that the "immediate termination" requirement entails.
31. The interpretative proposition the European Union advances is coherent with the findings of multiple previous panels and the Appellate Body. It was supported by other members before the Panel. The European Union invites the Arbitrators to uphold the Panel's findings.

## 5. CONCLUSION

32. The European Union requests the Arbitrators to dismiss all the grounds of appeal submitted by Colombia and to uphold the findings and conclusions of the Panel.
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**ANNEX D**

ARGUMENTS OF THE THIRD PARTIES

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**ANNEX D-1**

**EXECUTIVE SUMMARY OF BRAZIL'S THIRD PARTY'S WRITTEN SUBMISSION**

1. In this submission, Brazil will focus on two relevant aspects of the present dispute: (i) Article 5.2(iii) and Article 5.3 concerning the information necessary to initiate an anti-dumping investigation; and (ii) Article 3 regarding the determination of injury, in particular the imports considered to be *de minimis*.
2. For Brazil, the information presented by the applicant in its initial submission is subject to less demanding requirements compared to those applied to the information that substantiates a final determination. Brazil notes that it is only natural and recurrent that an investigation will gradually become more precise and more complex as it advances.
3. Brazil sees with caution a reading implying that the requirements of Articles 2 would apply also to Articles 5.2 and 5.3 of the ADA, as those provisions refer to different stages of the investigation, and impose different thresholds regarding the adequacy and quality of the information used by the authorities.
4. Brazil is of the view that, in cases where the investigating authority finds that a producer or exporter has incurred in a *de minimis* margin of dumping, treating such imports as "dumped imports" would infringe the requirement of Article 5.8 to immediately terminate the investigation.
5. Brazil understands that the proper interpretation of the term "dumped imports" under Articles 3.1, 3.2, 3.4 and 3.5 of the ADA, for purposes of injury and causation analyses, must not consider imports from the producers/exporters that were determined to have final *de minimis* and final negative margins of dumping.

**ANNEX D-2****EXECUTIVE SUMMARY OF JAPAN'S THIRD PARTY'S WRITTEN SUBMISSION****I. THE ASSESSMENT OF THIRD-COUNTRY SALES PRICES AS NORMAL VALUE UNDER ARTICLE 5.3**

1. As context for the phrase "where appropriate" under Article 5.2(iii) of the Anti-Dumping Agreement, both (1) the manner of distinguishing domestic sales prices as the priority in the main text of Article 5.2(iii), and (2) the qualification of third-country sales prices and constructed value with the phrase "or, where appropriate" and enclosed with the parentheses strongly indicate that domestic sales prices are preferred.
2. Article VI:1 of GATT 1994 and Articles 2.1 and 2.2 of the Anti-Dumping Agreement also specifically stipulate the preferred order among the three provided types of price information for normal value, prioritizing the use of domestic sales prices.
3. Such context supports an understanding that, even at the initiation stage of the investigation under Articles 5.3 and 5.2(iii), the prioritized method to determine normal value is domestic sales prices over the alternatives.
4. Japan also notes that the phrase "where appropriate" requirement under Article 5.2(iii) does not refer only to situations provided under Article 2.2 and is not limited to those situations.

**II. THE EXISTENCE OF CONFIDENTIAL TREATMENT UNDER ARTICLE 6.5**

5. In light of the balance between the submitting party's interest in protecting its confidential information and the due process interests of other interested parties, whether the relevant information is properly disclosed to the other interested parties that have defensive interests is one of the key elements to be taken into account in assessing whether the redacted information is confidentially treated under Article 6.5.
6. With regard to the redacted information at issue, Japan agrees with the Panel's finding that, absent any clear indication of knowledge, other interested parties could not have become aware about the availability of the redacted information elsewhere on the record,<sup>1</sup> especially since the other interested parties do not have full investigation record at hand.

**III. TERMS OF REFERENCE FOR ARTICLE 2.4 CLAIM**

7. Demonstration that the measure *does indeed infringe* upon the identified provision would be regarded as "arguments", which are not required to be provided in the panel request.<sup>2</sup> Such demonstration may include, *inter alia*, the description of the manner and/or ways in which the provision's obligation is infringed by the measure.<sup>3</sup>

**IV. THE TREATMENT OF IMPORTS FROM EXPORTERS WITH A DE MINIMIS MARGIN UNDER ARTICLES 3.1, 3.2, 3.4 AND 3.5**

8. According to the first sentence of Article VI:1 of GATT 1994, dumped imports should not be condemned (i.e., should not be offset by anti-dumping duties) for material injury that is not attributable to those dumped imports. If the subject products being assessed for possible injury include non-dumped imports, the products being analysed for causation are over-inclusive. And the injury and causation analysis of more than just the dumped imports departs

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<sup>1</sup> Panel Report, para. 7.125.

<sup>2</sup> Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.14 (quoting Appellate Body Report, *Korea – Dairy*, para. 139).

<sup>3</sup> See Appellate Body Report, *Korea – Pneumatic Valves (Japan)*, paras. 5.111 and 5.133.

from the text of the various provisions of Article 3 and creates the risk of false attribution of the injury to the domestic industry from products that are in fact not "dumped".

9. Also, since Article 5.8 applies and regulates the subsequent procedures to determine the effect of any alleged dumping, the imports with *de minimis* dumping margins should be excluded from the scope of the order imposing anti-dumping duties. This means that imports with *de minimis* dumping margins are not to be condemned in the sense provided in Article VI:1 of GATT 1994. Only the products from exporters that are found to have non-*de minimis* dumping margins are to be condemned, and only to the extent such imports cause material injury to the domestic industry.
10. Taking into account those two provisions as the context, the "dumped imports" under Articles 3.1, 3.2, 3.4 and 3.5 should also not include imports with *de minimis* dumping margins, since there will be a risk of false attribution of the injury caused by imports with *de minimis* dumping margins to imports with non-*de minimis* dumping margins.

**ANNEX D-3****EXECUTIVE SUMMARY OF THE UNITED STATES' THIRD PARTY'S WRITTEN SUBMISSION****I. APPELLANT'S CLAIMS UNDER ARTICLE 5.3**

1. Article 5.2(iii) of the Anti-Dumping Agreement indicates that the application requesting the initiation of an investigation shall contain "information on prices at which the product in question is sold when destined for consumption in the domestic markets of the country or countries of origin or export (or, where appropriate, information on the prices at which the product is sold from the country or countries of origin or export to a third country or countries, or on the constructed value of the product)." The term "where appropriate" should be interpreted in the context of the introductory clause of Article 5.2, which states that "[t]he application shall contain such information as is reasonably available to the applicant," including information about "normal value" under subparagraph (iii). The term "where appropriate" in Article 5.2(iii) thus anticipates that there may be circumstances in which it is "appropriate" for an applicant to submit third-country sales or constructed value data in its application.
2. An investigating authority enjoys a degree of discretion with respect to the type of evidence it may rely on in determining whether to initiate an investigation if it is satisfied that an application contains "sufficient evidence" as required under Article 5.3. Therefore, if an authority determines, after examining the accuracy and adequacy of the evidence provided in an application, that domestic sales pricing information was not reasonably available to an applicant, that is a circumstance in which it would be appropriate for the applicant to submit information on third country sales, or the constructed value, of the product. An authority is not otherwise required to demonstrate that the information in the application was the only information reasonably available to an applicant.

**II. APPELLANT'S CLAIMS UNDER ARTICLES 3.1, 3.2, 3.4, AND 3.5**

3. Article 3 of the Anti-Dumping Agreement focuses on the investigating authority's injury analysis of the effect or impact of "the dumped imports." Article 2.1 of the Anti-Dumping Agreement defines dumped products, "[f]or the purposes of this [Anti-Dumping] Agreement," on a countrywide basis. The references to "the dumped imports" throughout Article 3 therefore concern all the dumped imports of the product from the countries subject to the investigation. In this respect, the Agreement requires an authority to examine, for example in Articles 3.1 and 3.2, the volume and price effects of "the dumped imports."
  4. Imports of an exporter or producer for which an individual margin of dumping is determined to be zero or *de minimis* do not constitute part of "the dumped imports" of the product from the countries subject to the investigation. Article 5.8 requires an authority to terminate an anti-dumping investigation in respect of any exporter or producer for which an individual margin of dumping is determined to be zero or *de minimis*. Once a zero or *de minimis* margin has been finally determined for a particular exporter or producer, the investigation must be terminated in all aspects, including the exclusion of the imports of that exporter or producer from the authority's injury analysis of the effect or impact of "the dumped imports."
  5. The United States considers that the Panel's interpretation is correct as it accords with the ordinary meaning of "dumped imports": The term "dumped imports" in Articles 3.1, 3.2, 3.4, and 3.5 of the Anti-Dumping Agreement excludes the imports of any exporter or producer for which an individual margin of dumping is determined to be zero or *de minimis*.
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