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

REPORT OF THE PANEL

*Addendum*

This *addendum* contains Annexes A to C to the Report of the Panel to be found in document WT/DS591/7.

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**LIST OF ANNEXES****ANNEX A**

## PANEL DOCUMENTS

<b>Contents</b>		<b>Page</b>
Annex A-1	Working Procedures of the Panel	4
Annex A-2	Additional Working Procedures of the Panel concerning Business Confidential Information	11
Annex A-3	Additional Working Procedures of the Panel for virtual participation at the first substantive meeting	13
Annex A-4	Additional Working Procedures of the Panel for virtual participation at the second substantive meeting	16
Annex A-5	Additional Working Procedures of the panel to facilitate arbitration under Article 25 of the DSU	19
Annex A-6	Interim Review	20

**ANNEX B**

## ARGUMENTS OF THE PARTIES

<b>Contents</b>		<b>Page</b>
Annex B-1	Integrated executive summary of the arguments of the European Union	24
Annex B-2	Integrated executive summary of the arguments of Colombia	33

**ANNEX C**

## ARGUMENTS OF THE THIRD PARTIES

<b>Contents</b>		<b>Page</b>
Annex C-1	Integrated executive summary of the arguments of Brazil	62
Annex C-2	Integrated executive summary of the arguments of Japan	64
Annex C-3	Integrated executive summary of the arguments of the United States	69

**ANNEX A**

## PANEL DOCUMENTS

<b>Contents</b>		<b>Page</b>
Annex A-1	Working Procedures of the Panel	4
Annex A-2	Additional Working Procedures of the Panel concerning Business Confidential Information	11
Annex A-3	Additional Working Procedures of the Panel for virtual participation at the First Substantive Meeting	13
Annex A-4	Additional Working Procedures of the Panel for virtual participation at the Second Substantive Meeting	16
Annex A-5	Additional Working Procedures of the panel to facilitate arbitration under Article 25 of the DSU	19
Annex A-6	Interim Review	20

## **ANNEX A-1**

### **WORKING PROCEDURES OF THE PANEL**

#### **Adopted on 8 February 2021**

#### **General**

1. (1) In this proceeding, the Panel shall follow the relevant provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU"). In addition, the following Working Procedures apply.  
  
(2) The Panel reserves the right to modify these procedures as necessary, after consultation with the parties.

#### **Confidentiality**

2. (1) The deliberations of the Panel and the documents submitted to it and by it shall be kept confidential. Members shall treat as confidential information that is submitted to the Panel which the submitting Member has designated as confidential.  
  
(2) In accordance with the DSU, nothing in these Working Procedures shall preclude a party or third party from disclosing statements of its own positions to the public.  
  
(3) If a party submits a confidential version of its written submissions to the Panel, it shall also, upon request of a Member, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public. The Panel may, upon request, fix a time-limit within which the party should endeavour to provide such summary.  
  
(4) Parties and third parties shall treat business confidential information in accordance with the procedures set forth in the Additional Working Procedures of the Panel Concerning Business Confidential Information adopted by the Panel.

#### **Submissions**

3. (1) Before the first substantive meeting of the Panel with the parties, each party shall submit a written submission in which it presents the facts of the case and its arguments, in accordance with the timetable adopted by the Panel.  
  
(2) Each party shall also submit to the Panel, before the second substantive meeting of the Panel, a written rebuttal, in accordance with the timetable adopted by the Panel.  
  
(3) Each third party that chooses to make a written submission before the first substantive meeting of the Panel with the parties shall do so in accordance with the timetable adopted by the Panel.  
  
(4) The Panel may invite the parties or third parties to make additional submissions during the proceeding, including with respect to requests for preliminary rulings in accordance with paragraph 4 below.

#### **Preliminary rulings**

4. (1) If Colombia considers that the Panel should make a ruling before the issuance of the Report that certain measures or claims in the panel request or the complainant's first written submission are not properly before the Panel, the following procedure applies. Exceptions to this procedure shall be granted upon a showing of good cause.
  - a. Colombia shall submit any such request for a preliminary ruling at the earliest possible opportunity and in any event no later than in its first written submission to the Panel and

shall identify clearly that it seeks a ruling pursuant to the present procedure. The European Union shall submit its response to the request before the first substantive meeting of the Panel, at a time to be determined by the Panel in light of the request.

- b. The Panel may issue a preliminary ruling on the issues raised in such a preliminary ruling request before, during or after the first substantive meeting, or the Panel may defer a ruling on the issues raised by a preliminary ruling request until it issues its Report to the parties.
- c. If the Panel finds it appropriate to issue a preliminary ruling before the issuance of its Report, the Panel may provide reasons for the ruling at the time that the ruling is made, or subsequently in its Report.
- d. Any request for such a preliminary ruling by Colombia before or in its first written submission, and any subsequent submissions of the parties in relation thereto before the first meeting, shall be served on all third parties. The Panel may provide all third parties with an opportunity to provide comments on any such request, either in their submissions as provided for in the timetable or separately. Any preliminary ruling issued by the Panel before the first substantive meeting on whether certain measures or claims are properly before the Panel shall be shared with all third parties.

(2) This procedure is without prejudice to the parties' right to request other types of preliminary or procedural rulings during the proceeding, and to the procedures that the Panel may follow with respect to such requests.

## **Evidence**

5. (1) The Panel requests each party to submit all evidence supporting its case together with its first written submission. In any event, the parties shall submit all evidence to the Panel no later than during the first substantive meeting, except evidence necessary for purposes of rebuttal, or evidence necessary for answers to questions or comments on answers provided by the other party. Additional exceptions may be granted upon a showing of good cause.  
  
(2) If any new evidence has been admitted upon a showing of good cause, the Panel shall accord the other party an appropriate period of time to comment on the new evidence submitted.
6. (1) If the original language of an exhibit or portion thereof is not a WTO working language, the submitting party or third party shall simultaneously submit a translation of the exhibit or relevant portion into the WTO working language of the submission. The Panel may grant reasonable extensions of time for the translation of exhibits upon a showing of good cause.  
  
(2) Any objection as to the accuracy of a translation should be raised promptly in writing, preferably no later than the next submission or meeting (whichever occurs earlier) following the submission which contains the translation in question. Any objection shall be accompanied by an explanation of the grounds for the objection and an alternative translation.
7. (1) To facilitate the maintenance of the record of the dispute and maximize the clarity of submissions, each party and third party shall sequentially number its exhibits throughout the course of the dispute, indicating the submitting Member and the number of each exhibit on its cover page. Exhibits submitted by the European Union should be numbered EU-1, EU-2, etc. Exhibits submitted by Colombia should be numbered COL-1, COL-2, etc. If the last exhibit in connection with the first submission was numbered COL-5, the first exhibit in connection with the next submission thus would be numbered COL-6. If a party withdraws an exhibit or leaves one or more exhibits intentionally blank, it should indicate this on the cover page that provides the number of the blank exhibit.  
  
(2) Each party shall provide an updated list of exhibits (in Word or Excel format) together with each of its submissions, oral statements, and responses to questions if an exhibit is attached to such submission, oral statement or responses to questions.

(3) If a party submits a document that has already been submitted as an exhibit by the other party, it should explain why it is submitting that document again.

(4) If a party includes a hyperlink to the content of a website in a submission, and intends that the cited content form part of the official record, the cited content of the website shall be provided in the form of an exhibit along with an indication of the date that it was accessed.

### **Editorial Guide**

8. In order to facilitate the work of the Panel, each party and third party is invited to make its submissions in accordance with the WTO Editorial Guide for Panel Submissions (electronic copy provided).

### **Questions**

9. The Panel may pose questions to the parties and third parties at any time, including:
- a. Before any meeting, the Panel may send written questions, or a list of topics it intends to pursue in questioning orally during a meeting. The Panel may ask different or additional questions at the meeting.
  - b. The Panel may put questions to the parties and third parties orally during a meeting, and in writing following the meeting, as provided for in paragraphs 15 and 21 below.

### **Substantive meetings**

10. The Panel shall meet in closed session.
11. The parties shall be present at the meetings only when invited by the Panel to appear before it.
12. (1) Each party has the right to determine the composition of its own delegation when meeting with the Panel.
- (2) Each 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 and these Working Procedures, particularly with regard to the confidentiality of the proceeding and the submissions of the parties and third parties.
13. Each party shall provide to the Panel the list of members of its delegation no later than 5 p.m. (Geneva time) three working days before the first day of each meeting with the Panel.
14. A request for interpretation by any party should be made to the Panel as early as possible, preferably at the organizational stage, to allow sufficient time to ensure availability of interpreters.
15. The first substantive meeting of the Panel with the parties shall be conducted as follows:
- a. The Panel shall invite the European Union to make an opening statement to present its case first. Subsequently, the Panel shall invite Colombia to present its point of view. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. If interpretation is needed, each party shall provide additional copies for the interpreters before taking the floor.
  - b. Each party should avoid lengthy repetition of the arguments in its submissions. Each party is invited to limit the duration of its opening statement according to the Panel's instructions issued prior to the meeting. If either party considers that it requires more time for its opening statement, it should inform the Panel and the other party at least 5 working days before the meeting, together with an estimate of the expected duration of its statement. The Panel will accord equal time to the other party.
  - c. After the conclusion of the opening statements, the Panel shall give each party the opportunity to make comments or ask the other party questions through the Panel.

- d. The Panel may subsequently pose questions to the parties.
- e. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with the European Union presenting its statement first. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its closing statement, if available.
- f. Following the meeting:
  - i. Each party shall submit a final written version of its opening statement no later than
  - ii. 5 p.m. (Geneva time) on the first working day following the meeting. At the same time, each party should also submit a final written version of any prepared closing statement that it delivered at the meeting.
  - iii. Each party shall send in writing, within the time-frame established by the Panel before the end of the meeting, any questions to the other party to which it wishes to receive a response in writing.
  - iv. The Panel shall send in writing, within the time-frame established by the Panel before the end of the meeting, any questions to the parties to which it wishes to receive a response in writing.
  - v. Each party shall respond in writing to the questions from the Panel, and to any questions posed by the other party, within the time-frame established by the Panel before the end of the meeting.

16. The second substantive meeting of the Panel with the parties shall be conducted in the same manner as the first substantive meeting with the Panel, except that Colombia shall be given the opportunity to present its oral statement first. If Colombia chooses not to avail itself of that right, it shall inform the Panel and the other party no later than 5 p.m. (Geneva time) three working days before the meeting. In that case, the European Union shall present its opening statement first, followed by Colombia. The party that presented its opening statement first shall present its closing statement first.

### **Third-party session**

17. Each third party may present its views orally during a session of the first substantive meeting with the parties set aside for that purpose.

18. Each third party shall indicate to the Panel whether it intends to make an oral statement during the third-party session, along with the list of members of its delegation, in advance of this session and no later than 5 p.m. (Geneva time) three working days before the third-party session of the meeting with the Panel.

19. (1) Each third party has the right to determine the composition of its own delegation when meeting with the Panel.

(2) Each 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 and these Working Procedures, particularly with regard to the confidentiality of the proceeding and the submissions of the parties and third parties.

20. A request for interpretation by any third party should be made to the Panel as early as possible, preferably upon receiving the working procedures and timetable for the proceeding, to allow sufficient time to ensure availability of interpreters.

21. The third-party session shall be conducted as follows:

- a. All parties and third parties may be present during the entirety of this session.

- b. The Panel shall first hear the oral statements of the third parties, who shall speak in alphabetical order. Each third party making an oral statement at the third-party session shall provide the Panel and other participants with a provisional written version of its statement before it takes the floor. If interpretation of a third party's oral statement is needed, that third party shall provide additional copies for the interpreters before taking the floor.
- c. Each third party should limit the duration of its statement according to the Panel's instructions issued prior to the session and avoid repetition of the arguments already in its submission. If a third party considers that it requires more time for its opening statement, it should inform the Panel and the parties at least 5 working days before the meeting, together with an estimate of the expected duration of its statement. The Panel will accord equal time to all third parties for their statements.
- d. After the third parties have made their statements, the parties shall be given the opportunity to pose questions to any third party for clarification on any matter raised in that third party's submission or statement.
- e. The Panel may subsequently pose questions to any third party.
- f. Following the third-party session:
  - i. Each third party shall submit the final written version of its oral statement, no later than 5 p.m. (Geneva time) on the first working day following the meeting.
  - ii. Each party may send in writing, within the time-frame to be established by the Panel before the end of the meeting, any questions to one or more third parties to which it wishes to receive a response in writing.
  - iii. The Panel may send in writing, within the time-frame to be established by the Panel before the end of the meeting, any questions to one or more third parties to which it wishes to receive a response in writing.
  - iv. Each third party choosing to do so shall respond in writing to written questions from the Panel or a party, within a time-frame established by the Panel before the end of the meeting.

### **Descriptive part and executive summaries**

22. The description of the arguments of the parties and third parties in the descriptive part of the Panel Report shall consist of executive summaries provided by the parties and third parties, which shall be annexed as addenda to the Report. These executive summaries shall not in any way serve as a substitute for the submissions of the parties and third parties in the Panel's examination of the case.

23. Each party shall submit a single integrated executive summary of the facts and arguments as presented to the Panel in its written submissions and oral statement(s), in accordance with the timetable adopted by the Panel. The integrated executive summary may also include a summary of its written responses to written questions.

24. The integrated executive summary shall not exceed 30 pages.

25. The Panel may request the parties and third parties to provide executive summaries of facts and arguments presented in any other submissions to the Panel for which a deadline is not specified in the timetable.

26. Each third party shall submit an integrated executive summary of its arguments as presented in its written submission and statement in accordance with the timetable adopted by the Panel. This integrated executive summary may also include a summary of written responses to written questions, if relevant. The executive summary to be provided by each third party shall not exceed six pages. If the document(s) comprising a third-party submission and/or oral statement does not



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exceed six pages in total, this will serve as the executive summary of that third party's arguments unless the third party submits a separate integrated executive summary or otherwise indicates that it does not wish those document(s) to serve as its executive summary.

### **Interim review**

27. Following issuance of the Interim Report, each party may submit a written request to review precise aspects of the Interim Report and request a further meeting with the Panel, in accordance with the timetable adopted by the Panel. The right to request such a meeting shall be exercised no later than at the time the written request for review is submitted.

28. Each party may submit written comments on the other party's written request for review. Such written comments shall be limited to the other party's written request for review and shall be submitted in accordance with the timetable adopted by the Panel.

### **Interim and Final Report**

29. The Interim Report, as well as the Final Report before its official circulation, shall be kept strictly confidential and shall not be disclosed.

### **Service of documents**

30. The following procedures regarding service of documents apply to all documents submitted by parties and third parties during the proceeding:

- a. Each party and third party shall send an email to the DS Registry attaching an electronic copy of all documents that it submits to the Panel, in both Microsoft Word and PDF format. To the extent possible, all documents in PDF format, including exhibits, should be searchable and editable (i.e. not "image-only" or scanned). All such emails to the Panel shall be addressed to [DSRegistry@wto.org](mailto:DSRegistry@wto.org) and copied to other WTO Secretariat staff whose email addresses have been provided to the parties during the proceeding. If it is not possible to attach all the exhibits to one email, the submitting party or third party may send separate emails. If the number of emails necessary to transmit the exhibits would exceed 5 or any one exhibit is too large to be transmitted via email, the party shall upload the relevant exhibits to the Disputes On-line Registry Application (DORA). The email version sent to the DS Registry shall constitute the official version for the purposes of submission deadlines and the record of the dispute, and shall, with respect to the due dates established by the Panel, be sent by 5 p.m. (Geneva time).
- b. In addition, each party and third party is invited to submit all documents through DORA within 24 hours following the deadline for the submission by email. If the parties or third parties have any questions or technical difficulties relating to DORA, they are invited to consult the User Guide available in the "Help" section of DORA and if necessary contact the DS Registry ([DSRegistry@wto.org](mailto:DSRegistry@wto.org)).
- c. Following email submission, each party and third party shall submit three paper copies of all documents it submits to the Panel, including the exhibits, with the DS Registry (office No. 2047) by 5 p.m. (Geneva time) the next business day. If, for any reason, the WTO building is extraordinarily closed, the "next business day" will mean the day that the Panel determines for such filings once normal operations have resumed. If the Member does not have a mission or representative in Geneva the submissions may be sent by post or courier and must have a postmark or proof that they were sent the next business day after the submission was due. The DS Registrar shall stamp the documents with the date and time of receipt. If an exhibit is in a format that is impractical to submit as a paper copy, then the party may submit such exhibit in electronic format (e.g. USB key). In this case, the cover page of the exhibit should indicate that the exhibit is only available in electronic format.
- d. The receipt of the email by the DS Registry shall constitute service on the Panel. Each party shall serve any document submitted to the Panel directly on the other party. A party shall submit its documents to the other party by email. Each party shall confirm, in writing, that it has served on the other party, as appropriate, at the same time it provides each

document to the Panel, a copy of such documents. Each party shall, in addition, serve any document submitted in advance of the first substantive meeting with the Panel directly on the third parties. The receipt of the email by the other party and the third parties (where relevant) shall constitute service.

- e. As a general rule, all communications from the Panel to the parties and third parties will be via email. In addition to transmitting them to the parties by email, the Panel shall provide the parties with a paper copy of the Interim Report and the Final Report upon request.

#### **Correction of clerical errors in submissions**

31. The Panel may grant leave to a party or third party to correct clerical errors in any of its submissions (including paragraph numbering and typographical mistakes). Any such request should identify the nature of the errors to be corrected, and should be made promptly following the filing of the submission in question.

#### **Developments in circumstances**

32. The Panel will conduct the proceedings and apply the present procedures in such a way as to mitigate circumstances arising from the COVID-19 pandemic. The Panel may provide further guidance in that regard as any such circumstances develop. If the Panel considers that the present Working Procedures cannot be applied effectively because of the COVID-19 pandemic, the Panel may modify these Procedures after consultation with the parties.

#### **Appeal arbitration**

33. The Panel takes note of the Agreed Procedures for Arbitration under Article 25 of the DSU in this dispute notified by the parties on 13 July 2020 (WT/DS591/3) and of the joint requests of the parties to the Panel formulated therein.

**ANNEX A-2**

**ADDITIONAL WORKING PROCEDURES OF THE PANEL CONCERNING BUSINESS  
CONFIDENTIAL INFORMATION**

**Adopted on 8 February 2021**

The following procedures apply to any business confidential information (BCI) submitted during the Panel proceedings in DS591.

1. For the purposes of these Panel proceedings, BCI includes:
  - a. any information designated as such by the party submitting it that was previously treated as confidential by the investigating authority in the anti-dumping investigation at issue in this dispute unless the Panel decides it should not be treated as BCI for purposes of these Panel proceedings based on an objection by a party pursuant to paragraph 3 below.
  - b. any other information designated as such by the party submitting it, unless the Panel decides it should not be treated as BCI for purposes of these Panel proceedings based on an objection by a party pursuant to paragraph 3 below.
2. Any information that is available in the public domain may not be designated as BCI. In addition, information previously treated as confidential by the investigating authority in the anti-dumping investigation at issue in this dispute may not be designated as BCI if the person or entity who provided the information in the course of that investigation agrees in writing to make the information publicly available.
3. If a party or third party considers that information submitted by the other party or a third party should have been designated as BCI and objects to its submission without such designation, it shall forthwith bring this objection to the attention of the Panel, the other party, and, where relevant, the third parties, together with the reasons for the objection. Similarly, if a party or third party considers that the other party or a third party designated information as BCI which should not be so designated, it shall forthwith bring this objection to the attention of the Panel, the other party, and, where relevant, the third parties, together with the reasons for the objection. The Panel, in deciding whether information subject to an objection should be treated as BCI for purposes of these Panel proceedings, will consider whether disclosure of the information in question could cause serious harm to the interests of the originator(s) of the information.
4. No person may have access to BCI except a member of the Secretariat assisting the Panel or the Panel, an employee of a party or third party, or an outside advisor to a party or third party for the purposes of this dispute.
5. A party or third party having access to BCI in these Panel proceedings shall not disclose that information other than to persons authorized to have access to it pursuant to these procedures. Any information designated as BCI under these procedures shall only be used for the purposes of this dispute. Each party and third party is responsible for ensuring that its employees and/or outside advisors comply with these procedures to protect BCI.
6. An outside advisor of a party or third party is not permitted access to BCI if that advisor is an officer or employee of an enterprise engaged in the production, sale, export, or import of the product(s) that was/were the subject of the investigation at issue in this dispute, or an officer or employee of an association of such enterprises. All third-party access to BCI shall be subject to the terms of these working procedures.
7. The party submitting BCI shall mark the cover and/or first page of the document containing BCI, and each page of the document, to indicate the presence of such information.

The specific information in question shall be placed between double brackets, as follows: [[xx,xxx.xx]]. The first page or cover of the document shall state "Contains Business Confidential Information", and each page of the document shall contain the notice "Contains Business Confidential Information" at the top of the page. In case of exhibits, the party submitting BCI in the form of an Exhibit shall mark it as (BCI) next to the exhibit number (e.g. Exhibit EU-1 (BCI)). Should the party submit specific BCI within a document which is considered to be public, the specific information in question shall be placed between double brackets, as follows: [[xx,xxx.xx]]."

8. Any BCI that is submitted in binary-encoded form shall be clearly marked with the statement "Business Confidential Information" on a label of the storage medium, and clearly marked with the statement "Business Confidential Information" in the binary-encoded files.

9. In the case of an oral statement containing BCI, the party or third party making such a statement shall inform the Panel before making it that the statement will contain BCI, and the Panel will ensure that only persons authorized to have access to BCI pursuant to these procedures are in the room to hear that statement. The written versions of such oral statements submitted to the Panel shall be marked as provided for in paragraph 7.

10. Any person authorized to have access to BCI under the terms of these procedures shall store all documents containing BCI in such a manner as to prevent unauthorized access to such information.

11. The Panel will not disclose BCI, in its report or in any other way, to persons not authorized under these procedures to have access to BCI. The Panel may, however, make statements of conclusion drawn from such information. Before the Panel circulates its final report to the Members, the Panel will give each party an opportunity to review the report to ensure that it does not contain any information that the party has designated as BCI.

12. Submissions containing BCI will be included in the record forwarded to the Appellate Body in the event of an appeal of the Panel's Report. The same applies to the Panel record transmitted to the arbitrators pursuant to paragraph 4(ii) of the Agreed Procedures for Arbitration under Article 25 of the DSU (WT/DS591/3).

### **ANNEX A-3**

#### **ADDITIONAL WORKING PROCEDURES OF THE PANEL FOR VIRTUAL PARTICIPATION AT THE FIRST SUBSTANTIVE MEETING**

**Adopted on 14 July 2021**

#### **General**

1. These additional Working Procedures set out terms for holding a first substantive meeting with the Panel in which all participants participate virtually.

#### **Definitions**

2. For the purposes of these Procedures:

**"Participant"** means any person participating in the virtual meeting with the Panel. This includes the members of the parties' and third parties' delegations, the members of the Panel, the members of the Secretariat team assisting the Panel, and the interpreters.

**"Platform"** means the Cisco Webex Legislate software through which participants will participate in the meeting with the Panel.

**"Host"** means the designated person within the WTO Secretariat responsible for the management of the platform for participants to participate in the meeting with the Panel.

**"DORA"** means Disputes Online Registry Application.

#### **Equipment and technical requirements for participation**

3. Each party and third party shall ensure that all members of its delegation join the meeting using the designated platform, and meet the minimum equipment and technical requirements set out by the platform provider for the effective conduct of the meeting.
4. Technical questions, including the minimum equipment and technical requirements for the usage of the Platform, will be addressed in the advance testing sessions between the host and the participants provided for in paragraph 6 below.

#### **Technical support**

5. (1) In light of the Secretariat's limited ability to offer technical assistance during, and in advance of the meeting, each party and third party is, in principle, responsible for providing its own technical support to the members of its delegation.  
(2) The host will assist participants in accessing and using the platform in advance of and during the meeting with the Panel.  
(3) In order to provide timely assistance, the host will prioritize assisting those members of the delegations designated as main speakers on the delegations' lists.

#### **Registration**

6. Each party and third party shall provide to the Panel the list of the members of its delegation by returning the completed form in Annex I below, no later than 4 p.m. (Geneva time) on Friday, 16 July 2021. Each party and third party shall indicate who among the members of their delegation will be their main speaker(s).

### **Advance testing**

7. The members of the parties' and third parties' delegations will hold two testing sessions with the Secretariat, at dates to be established separately. One of these sessions will be a joint session with all participants in the meeting, including the members of the Panel and the Secretariat. Participants should make themselves available for the testing sessions.

### **Confidentiality and security**

8. The meeting shall be confidential.
9. The requirements concerning the treatment of confidential and business confidential information, set forth in the Working Procedures of the Panel and the Additional Working Procedures of the Panel Concerning Business Confidential Information, adopted on 8 February 2021, apply and must be observed by the parties and third parties.
10. Participants shall connect to the virtual meeting through a secure internet connection and shall avoid the use of an open or public internet connection.
11. The parties and third parties are strictly prohibited from:
  - (1) Recording, via audio, video or screenshot, the virtual meeting or any part thereof; and
  - (2) Permitting any non-participant to record, via audio, video or screenshot, the virtual meeting or any part thereof.

### **Simultaneous interpretation**

12. Simultaneous interpretation between English and Spanish will be available for the participants through the platform.

### **Conduct of the meeting**

#### Access to the virtual meeting room

13. (1) The host will invite participants via email to join the virtual meeting room on the platform. This email will provide each participant with its personal access and login information.
  - (2) For security reasons, access to the virtual meeting will be password-protected and limited to members of the delegations, as listed in the completed Annex I form, who shall not forward or share the virtual meeting link or password.
  - (3) Each party and third party shall ensure that only members of its delegation join the virtual meeting room.

#### Advance log-on

14. (1) The virtual meeting room will be accessible 60 minutes in advance of the scheduled start time of each session of the meeting with the Panel.
  - (2) Participants shall log on to the platform at least 30 minutes in advance of the scheduled start time of each session of the meeting with the Panel.

#### Participation

15. (1) If a participant wishes to take the floor, the participant should use the "raise a hand" function on the platform.

(2) All participants are encouraged to use their cameras during the entirety of the meeting. Participants should turn on their camera when taking the floor. Participants should turn off their microphones when others take the floor.

#### Document sharing

16. (1) Before each party and third party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement through DORA, at the time indicated below.  
  
(2) Any participant wishing to share a document with the other participants during the meeting will do so through DORA, before first referring to such document at the meeting.
17. The European Union shall upload the provisional written version of its opening statement on DORA no later than 15 minutes before the beginning of the session on the first meeting day (27 July 2021). After the European Union has concluded its opening statement, the Panel will break for approx. 15 minutes. Colombia shall upload the provisional written version of its opening statement on DORA no later than at the beginning of that break. To facilitate a fulsome engagement of all members of the Panel with the parties' opening statements, the Panel invites each party to submit a courtesy translation in English or Spanish, as appropriate, together with the provisional written version of its opening statement.
18. Each third party shall upload a provisional written version of its opening statement on DORA no later than 15 minutes before the beginning of the session on the second meeting day (28 July 2021).
19. The Panel will break for approx. 15 minutes each before and between the parties' closing statements. Each party shall upload a provisional written version of its closing statement, if available, on DORA no later than at the beginning of the break preceding its closing statement.

#### Pauses for internal coordination and consultation

20. The Panel may briefly pause a session at any time, at its own initiative or upon request by a party or third party, to enable any necessary internal coordination and consultation within a party's or third party's delegation and/or among the Panelists.

#### Technical issues

21. (1) Each party and third-party shall designate a contact person who can liaise with the host during the meeting to report any technical issues that arise with respect to the platform. The host can be contacted via the platform, by sending an email to [olga.falguerasalamo@wto.org](mailto:olga.falguerasalamo@wto.org), or by calling at +41 22 739 6746.  
  
(2) Should any technical interruptions occur, the host will directly coordinate with the affected participants to resolve the issue. After consulting the parties, the Panel may pause the session until the technical issue is resolved or may decide to continue the proceedings with those participants that remain connected. In preparing for the meeting, the parties and third parties are invited to ensure that an alternate member of its delegation is able to deliver, or to continue to deliver, statements and answers to questions in case that a designated speaker encounters technical difficulties or connectivity issues.

#### **Relation with the Working Procedures**

22. These additional Working Procedures complement the Working Procedures of the Panel adopted on 8 February 2021 and prevail over the latter to the extent of any conflict.

**ANNEX A-4**

**ADDITIONAL WORKING PROCEDURES OF THE PANEL FOR VIRTUAL PARTICIPATION  
AT THE SECOND SUBSTANTIVE MEETING**

**Adopted on 17 January 2022**

**General**

1. These additional Working Procedures set out terms for holding a second substantive meeting with the Panel in which all participants participate virtually.

**Definitions**

2. For the purposes of these Procedures:

**"Participant"** means any person participating in the virtual meeting with the Panel. This includes the members of the parties' delegations, the members of the Panel, the members of the Secretariat team assisting the Panel, and the interpreters.

**"Platform"** means the Cisco Webex Legislate software through which participants will participate in the meeting with the Panel.

**"Host"** means the designated person within the WTO Secretariat responsible for the management of the platform for participants to participate in the meeting with the Panel.

**"DORA"** means Disputes Online Registry Application.

**Equipment and technical requirements for participation**

3. Each party shall ensure that all members of its delegation join the meeting using the designated platform, and meet the minimum equipment and technical requirements set out by the platform provider for the effective conduct of the meeting.
4. Technical questions, including the minimum equipment and technical requirements for the usage of the Platform, will be addressed in the advance testing sessions between the host and the participants provided for in paragraph 7 below.

**Technical support**

5. (1) In light of the Secretariat's limited ability to offer technical assistance during, and in advance of the meeting, each party is, in principle, responsible for providing its own technical support to the members of its delegation.  
(2) The host will assist participants in accessing and using the platform in advance of and during the meeting with the Panel.  
(3) In order to provide timely assistance, the host will prioritize assisting those members of the delegations designated as main speakers on the delegations' lists.

**Registration**

6. Each party shall provide to the Panel the list of the members of its delegation by returning the completed form in Annex I below, no later than 5:00 p.m. (Geneva time) on Wednesday, 19 January 2022. Each party shall indicate who among the members of their delegation will be their main speaker(s).



### **Advance testing**

7. The members of the parties' delegations will hold two test sessions with the Secretariat, at dates to be established separately. One of these sessions will be a joint session with all participants, including the members of the Panel and the Secretariat team. Participants should make themselves available for the test sessions.

### **Confidentiality and security**

8. The meeting shall be confidential.
9. The requirements concerning the treatment of confidential and business confidential information, set forth in the Working Procedures of the Panel and the Additional Working Procedures of the Panel Concerning Business Confidential Information, adopted on 8 February 2021, apply and must be observed by the parties.
10. Participants shall connect to the virtual meeting through a secure internet connection and shall avoid the use of an open or public internet connection.
11. The parties are strictly prohibited from:
  - (1) Recording, via audio, video or screenshot, the virtual meeting or any part thereof; and
  - (2) Permitting any non-participant to record, via audio, video or screenshot, the virtual meeting or any part thereof.

### **Simultaneous interpretation**

12. Simultaneous interpretation between English and Spanish will be available for the participants through the platform.

### **Conduct of the meeting**

#### Access to the virtual meeting room

13. (1) The host will invite participants via email to join the virtual meeting room on the platform. This email will provide each participant with its personal access and login information.
  - (2) For security reasons, access to the virtual meeting will be password-protected and limited to members of the delegations, as listed in the completed Annex I form, who shall not forward or share the virtual meeting link or password.
  - (3) Each party shall ensure that only members of its delegation join the virtual meeting room.

#### Advance log-on

14. (1) The virtual meeting room will be accessible 60 minutes in advance of the scheduled start time of each session of the meeting with the Panel.
  - (2) Participants shall log on to the platform at least 30 minutes in advance of the scheduled start time of each session of the meeting with the Panel.

#### Participation

15. (1) If a participant wishes to take the floor, the participant should use the "raise a hand" function on the platform.

(2) All participants are encouraged to use their cameras during the entirety of the meeting. Participants should turn on their camera when taking the floor. Participants should turn off their microphones when others take the floor.

#### Document sharing

16. Before each party takes the floor to deliver its opening statement, it shall provide the Panel and other participants at the meeting with a provisional written version of the statement through DORA, clearly marking it "check against delivery".
17. Before each party takes the floor to deliver its closing statement, it shall provide the Panel and other participants at the meeting with a provisional written version of the statement, if available, through DORA, clearly marking it "check against delivery".
18. Any participant wishing to share a document with the other participants during the meeting will do so through DORA, before first referring to such document at the meeting. Documents that are already on the Panel's record as exhibits need not be shared through DORA again. If a delegate wishes to display a section of such a document on screen when taking the floor, the delegate is requested to advise the Panel accordingly when making the statement at the meeting. A member of the Secretariat team will then share the relevant section of the exhibit through the platform. To facilitate this process during the meeting, the delegation may inform the Secretariat team in advance of the exhibit number that it intends to refer to at the meeting.

#### Pauses for internal coordination and consultation

19. The Panel may briefly pause a session at any time, at its own initiative or upon request by a party, to enable any necessary internal coordination and consultation within a party's delegation and/or among the Panelists.

#### Technical issues

20. (1) Each party shall designate a contact person who can liaise with the host during the meeting to report any technical issues that arise with respect to the platform. The host can be contacted via the platform, by sending an email to kent.gisiger@wto.org, or by calling at +41 22 739 6586.  
  
(2) Should any technical interruptions occur, the host will directly coordinate with the affected participants to resolve the issue. After consulting the parties, the Panel may pause the session until the technical issue is resolved or may decide to continue the proceedings with those participants that remain connected. In preparing for the meeting, the parties are invited to ensure that an alternate member of its delegation is able to deliver, or to continue to deliver, statements and answers to questions in case that a designated speaker encounters technical difficulties or connectivity issues.

#### **Relation with the Working Procedures**

21. These additional Working Procedures complement the Working Procedures of the Panel adopted on 8 February 2021 and prevail over the latter to the extent of any conflict.

## **ANNEX A-5**

### **ADDITIONAL WORKING PROCEDURES OF THE PANEL TO FACILITATE ARBITRATION UNDER ARTICLE 25 OF THE DSU<sup>1</sup>**

**Adopted on 29 August 2022**

#### **Transmission of the Panel Report**

1. After issuance of the final panel report to the parties and upon a request to suspend the Panel proceedings for purposes of facilitating an arbitration under the Agreed Arbitration Procedures, the Panel shall transmit the final Panel Report in the three working languages of the WTO (the "Translated Report") to the parties, third parties and the pool of arbitrators.<sup>2,3</sup>
2. If the Translated Report is not yet available when the request for suspension is made, the Panel shall transmit immediately the original English language version of the final Panel Report (the "original final Panel Report") to the pool of arbitrators. The Panel shall transmit the Translated Report as per paragraph 1, once the translations become available.

#### **Suspension of the panel proceedings**

3. Once the Translated Report has been transmitted to the parties, third parties and the pool of arbitrators, the Panel shall grant the request to suspend the Panel proceedings and indicate when suspension takes effect.

#### **Transmission of the Panel record**

4. In the event that a notice of recourse to Article 25 under the Agreed Arbitration Procedures ("Notice of Appeal"<sup>4</sup>) is filed, the Panel shall, once suspension of the Panel proceedings has taken effect and as soon as possible after the arbitrators have been appointed, transmit the record of the Panel proceedings to the arbitrators. The Panel shall consult with the third parties concerned with a view to transmitting, as part of the Panel record, the third-party submissions, third-party oral statements and third-party responses to questions.

#### **Transmission of the Panel Report and the Panel record through DORA**

5. Transmission of the final Panel Report, the Translated Report and the Panel record, as appropriate, shall take place through the WTO Disputes On-Line Registry Application (DORA).

#### **Confidentiality of the Panel Report and the Panel Record**

6. Once transmitted to the parties, third parties and the pool of arbitrators, the original final Panel Report and/or the Translated Report remain confidential. In the event of the filing of a Notice of Appeal, confidentiality of the Translated Report is thereby lifted such that the Notice of Appeal, which will be circulated as an unrestricted DS document, may include the Translated Report.<sup>5</sup>

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<sup>1</sup> See paragraph 1.14 of the Panel Report and the parties' Agreed Procedures for Arbitration under Article 25 of the DSU (WT/DS591/3/Rev.1) ("Agreed Arbitration Procedures"). Through the present Additional Working Procedures of the Panel, the Panel accedes to, and operationalizes the modalities of, the parties' joint request formulated in paragraphs 4 and 19 of the Agreed Arbitration Procedures.

<sup>2</sup> Unless the parties indicate otherwise, the "pool of arbitrators" shall be understood to comprise all individuals identified in JOB/DSB/1/Add.12/Suppl.5, as validated in JOB/DSB/1/Add.12/Suppl.8.

<sup>3</sup> It is understood that transmission of the Translated Report shall not constitute circulation of the Panel Report within the meaning of Article 16 of the DSU.

<sup>4</sup> In the Agreed Arbitration Procedures, the parties refer to this notice as a Notice of Appeal and we use this term accordingly in these Additional Working Procedures.

<sup>5</sup> In paragraph 5 of the Agreed Arbitration Procedures, the parties envisage that the Notice of Appeal shall include the Translated Report.

## **ANNEX A-6**

### **INTERIM REVIEW**

#### **1 INTRODUCTION**

1.1. In accordance with Article 15.3 of the DSU, this annex sets out our discussion and disposition of Colombia's requests for interim review and the European Union's comments thereupon.<sup>1</sup>

1.2. As explained below, we have made certain modifications to the Report in light of the parties' arguments made at the interim review stage. The numbering of footnotes in the Final Report has changed from the Interim Report. The numbering of the paragraphs in the Final Report remains the same as in the Interim Report.

1.3. In addition to the modifications specified below, the Panel also made certain other typographical and other non-substantive changes to its Report.

#### **2 COLOMBIA'S REQUESTS FOR REVIEW OF THE INTERIM REPORT**

##### **2.1 Paragraph 3.3**

2.1. Colombia requests the addition of the word "also" in the last sentence of this paragraph in order to "fully" capture the "logical connection" between this sentence and the preceding sentence.<sup>2</sup>

2.2. While the European Union does not consider the addition of the word "also" to be necessary, it does not oppose Colombia's request.<sup>3</sup>

2.3. The addition of the term "also" does not, in our view, alter the content or substance of the paragraph and we have therefore made the modification requested by Colombia.

##### **2.2 Paragraph 7.67**

2.4. Colombia requests that this paragraph be expanded to reflect its arguments in a more complete manner, because, in its current form, it does not mention all the relevant elements of its arguments, and, moreover, the brevity of the summary of its arguments stands in contrast to the much longer summary of the European Union's arguments.<sup>4</sup>

2.5. The European Union observes that certain of Colombia's requests go beyond merely reflecting "a more extensive description" of Colombia's arguments. Therefore, in the event the Panel accedes to Colombia's requests, the European Union requests the Panel to strictly limit this to direct citations of Colombia's submissions, and to not add any new language or modify the existing language summarizing or qualifying those submissions.<sup>5</sup>

2.6. We have included in our summary all elements of Colombia's arguments that we consider to be relevant to our analysis. Moreover, the parties' executive summaries of their arguments are already appended to the Report and also set out, in detail, their respective positions. To address Colombia's comment concerning the alleged brevity of the summary of its arguments in comparison to the summary of the European Union's position, we have made certain modifications to this paragraph by including additional text from Colombia's submissions in these proceedings.

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<sup>1</sup> The European Union did not request that the Panel review precise aspects of the Interim Report.

<sup>2</sup> Colombia's request for interim review, para. 2.1.

<sup>3</sup> European Union's comments on Colombia's request for interim review, para. 3.

<sup>4</sup> Colombia's request for interim review, para. 2.2.

<sup>5</sup> European Union's comments on Colombia's request for interim review, paras. 4-7.

### 2.3 Paragraph 7.71

2.7. Colombia requests that this paragraph be modified to include a reference to its alternative argument that "even if the words 'where appropriate' required an analysis as to why domestic sales prices were not used, the petitioner and [MINCIT] complied with this requirement in the instant investigation". According to Colombia, in its current form, the paragraph – together with the remainder of the Panel's reasoning and the previous description of the parties' arguments – does not make sufficiently clear Colombia's explicit alternative argument.<sup>6</sup>

2.8. In addition to its above response with respect to Colombia's comments concerning paragraph 7.67 of the Interim Report, the European Union submits that Colombia is in fact requesting that the Panel include an additional finding that the petitioner or the investigating authority satisfied the requirement to explain the reasons why information on domestic sales was not provided in the application or examined in the initiation decision. For the European Union, this proposed finding would flatly contradict the Panel's finding in paragraph 7.75 of the Interim Report, and it also appears to ignore the fact that, in the preceding paragraph 7.74, the Panel quoted paragraph 2.1.3 of the initiation decision, and found that it did not contain the required explanation.<sup>7</sup>

2.9. We consider that the argument identified by Colombia is already reflected and addressed elsewhere in the Panel Report.<sup>8</sup> We therefore do not grant Colombia's request.

### 2.4 Paragraphs 7.124 and 7.125

2.10. Colombia requests the Panel to include *verbatim* the three tables contained in paragraphs 4.10, 4.12, and 4.14 of its second written submission. According to Colombia, given that the Interim Report finds that the comparisons in these tables are not enough to show that the information was the same, these tables would allow the reader to compare visually the information submitted in the original application to the redacted information in the revised application.<sup>9</sup>

2.11. The European Union does not see the need to include the three tables identified by Colombia. The European Union argues that the finding made by the Panel in paragraph 7.125 of the Interim Report is that other interested parties in the investigation could not have "easily" inferred that the redacted information in the revised application was the same as the relevant information contained in the original application.<sup>10</sup>

2.12. Colombia has not identified any error or suggested any revisions, but merely contends that "[g]iven that the interim report finds that the comparisons in these tables are not enough to show that the information was the same", the inclusion of these tables "would allow the reader to compare visually the information submitted in the original application" to "the redacted information in the revised application".

2.13. We recall that in paragraph 7.125 of the Report, we have already explained that: "the fact that the relevant tables share the same title, structure, and source of information does not, alone, 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." In light of this paragraph, we do not grant Colombia's request.

### 2.5 Paragraph 7.183

2.14. Colombia disagrees with the Panel's characterization that Colombia's arguments "evolved during the proceedings" and contends that its position remained "exactly the same", specifically "[t]hat the investigating authority's explicit determination to use facts available is a 'key condition', but not the sole condition".<sup>11</sup> Therefore, Colombia requests that the Panel delete paragraph 7.183.<sup>12</sup>

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<sup>6</sup> Colombia's request for interim review, paras. 2.3-2.4.

<sup>7</sup> European Union's comments on Colombia's request for interim review, paras. 4-7.

<sup>8</sup> Panel Report, paras. 7.67 and 7.69-7.75.

<sup>9</sup> Colombia's request for interim review, para. 2.5.

<sup>10</sup> European Union's comments on Colombia's request for interim review, para. 9.

<sup>11</sup> Colombia's request for interim review, paras. 2.7, 2.9, and 2.12.

<sup>12</sup> Colombia's request for interim review, para. 2.6.

2.15. The European Union concurs with the Panel's description that Colombia's arguments "evolved during the proceedings" and thus objects to Colombia's request.<sup>13</sup>

2.16. While we decline Colombia's request to delete this paragraph, we have removed the reference to Colombia's arguments having "evolved during the proceedings" and, for greater clarity, quoted the text of Colombia's underlying statements.

## **2.6 Paragraph 7.190**

2.17. Colombia makes several requests in respect of this paragraph. First, Colombia requests that the Panel delete the words "and rejected" because, in its view, the Panel did not "reject" Colombia's arguments on substance.<sup>14</sup> Second, Colombia asks the Panel to delete the term "*post factum*" because these words evoke the separate and distinct concept of "*ex post* rationalization".<sup>15</sup> Third, Colombia proposes to add a new sentence at the end of the paragraph.<sup>16</sup>

2.18. The European Union opposes Colombia's requests because it considers that the text in the paragraph at hand is accurate, and that Colombia's proposed changes would distort the Panel's findings.<sup>17</sup>

2.19. Removing the words "and rejected" and "*post factum*" does not alter the content or substance of the paragraph and we have therefore made the requested changes. We have also supplemented the text of the paragraph by paraphrasing the findings made in paragraph 7.188.

## **2.7 Paragraph 7.282**

2.20. Colombia requests the Panel to modify this paragraph and to add that MINCIT explained the relevance of non-dumped imports for the domestic industry.<sup>18</sup>

2.21. The European Union does not consider such addition to be necessary for the Panel's findings and adds that it, in any event, lacks relevance in the context of this paragraph of the Interim Report and would wrongly imply that certain matters are "agreed" facts.<sup>19</sup>

2.22. As the European Union points out, Colombia's requested modifications go beyond the scope of the Panel's analysis as reflected in paragraph 7.282, which is limited to noting the parties' agreement on the factual issue of what imports were included in MINCIT's injury and causation analysis. We are therefore unable to grant Colombia's request.

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<sup>13</sup> European Union's comments on Colombia's request for interim review, para. 10.

<sup>14</sup> Colombia's request for interim review, para. 2.20.

<sup>15</sup> Colombia's request for interim review, para. 2.21.

<sup>16</sup> Colombia's request for interim review, para. 2.22.

<sup>17</sup> European Union's comments on Colombia's request for interim review, para. 11.

<sup>18</sup> Colombia's request for interim review, paras. 2.23-2.24.

<sup>19</sup> European Union's comments on Colombia's request for interim review, paras. 12-15.

**ANNEX B**

ARGUMENTS OF THE PARTIES

<b>Contents</b>		<b>Page</b>
Annex B-1	Integrated executive summary of the arguments of the European Union	24
Annex B-2	Integrated executive summary of the arguments of Colombia	33

**ANNEX B-1****INTEGRATED EXECUTIVE SUMMARY OF THE  
ARGUMENTS OF THE EUROPEAN UNION****1. INTRODUCTION**

1. Following a complaint lodged by the Colombian Federation of Potato Producers (FEDEPAPA), the Colombian Ministry of Trade, Industry and Tourism ("Ministerio de Comercio, Industria y Turismo", "MINCIT") opened an administrative investigation for the purpose of determining the existence, degree and effects on the domestic industry of alleged dumping of imports of potatoes, prepared or preserved otherwise than by vinegar or acetic acid, frozen, classified under tariff subheading 2004.10.00.00 originating in Belgium, the Netherlands (Holland) and Germany.
2. Tariff subheading 2004.10.00.00 includes both "traditional chips and fries", which are similar to potato products produced on the Colombian market, and "potato specialties", which differ from traditional potatoes in their physical appearance and final sales price (160% more expensive).
3. The product mix exported to Colombia by the investigated producers consists quasi exclusively of products of the first category, while the product mix sold in the European Union comprises significant volumes of the second category. Other price-relevant differences exist between the respective product mixes relating to coating, size, cuts, shapes etc.
4. On 27 August 2018, MINCIT circulated the Technical Report on Essential Facts. The Final Technical Report and the Final Determination were published on 9 November 2018. MINCIT imposed anti-dumping duties on imports of potatoes, prepared or preserved otherwise than by vinegar or acetic acid, frozen, classified under tariff subheading 2004.10.00.00 originating in Belgium, the Netherlands (Holland) and Germany, in the form of an *ad valorem* duty to be settled on the free on board (FOB) value declared by the importer, in addition to the tariff in force on the National Customs Tariff, as follows:
  - from Belgium: Mydibel S.A.: 8.01%;
  - from the Netherlands (Holland):
    - Aviko B.V.: 3.64%;
    - OTHER EXPORTERS: 44.52% (except Farmfrites B.V.);
  - from Germany: Agrarfrost GmbH & Co. KG.: 3.21%.

**2. CLAIMS RELATING TO INITIATION AND CONFIDENTIALITY OF INFORMATION  
SUBMITTED BY THE APPLICANT****2.1. Violation of Article 5.3 of the Anti-Dumping Agreement**

5. The application submitted by FEDEPAPA did not contain all the information required by Article 5.2 of the Anti-Dumping Agreement. It also did not include sufficient evidence of dumping, injury, and the existence of a causal link between the dumped imports and the alleged injury. Yet, MINCIT decided to initiate an investigation of the alleged dumping of the product imported from Belgium, Germany and the Netherlands under tariff subheading 2004.10.00.00 on the basis of insufficient evidence, thereby acting inconsistently with Colombia's obligations under Article 5.3 of the Anti-Dumping Agreement.



2.1.1. Lack of sufficient evidence with respect to product under consideration

6. MINCIT failed to verify whether FEDEPAPA's application and supporting evidence justified the initiation of an investigation covering all products originating in Belgium, Germany and the Netherlands that fall under tariff subheading 2004.10.00.00. The definition of the product under consideration was over-inclusive because it covered potato preparations that were not imported into Colombia, or only in very small quantities, and for which it was not certain whether they were manufactured by the domestic industry.
7. The absence of sufficient evidence submitted by the applicant on this crucial point in its application, as well as in a subsequent reply to a request for clarification, should have led the investigating authority to conclude that the application did not provide sufficient evidence to justify the opening of an investigation.
8. The European Union submits that since Article 5.3 Anti-Dumping Agreement obliges the investigating authority to examine the accuracy and adequacy of the evidence provided in the application, MINCIT should have determined whether the definition of the product under consideration proposed by the applicant was appropriate and supported by the evidence.

2.1.2. Lack of sufficient evidence regarding the representativeness of the applicant

9. The European Union considers that, at the time of the initiation of the investigation, legitimate doubts existed concerning the extent to which of the applicant represented the domestic industry, i.e. the Colombian potato-processing industry manufacturing the products "like" those allegedly dumped.
10. The terms of the application did not clearly identify the producers of the "like" product and included potato growers among the domestic industry. The doubts thus created were not dispelled by an attentive reading of the Certificate Existence and Legal Representation of the non-profit entity FEDEPAPA.
11. Although the European Union does not contest that the representativeness of the applicant was clarified later during the investigation, and therefore raised no claim under Article 5.4 of the Anti-Dumping Agreement, it argues that the evidence supporting the application was sketchy and insufficient as regards the representativeness of FEDEPAPA.

2.1.3. Lack of sufficient evidence of dumping

12. MINCIT relied on information that FEDEPAPA carefully selected in order to support its allegations of dumping. Whereas information on prices of the like product in the domestic markets of the countries of origin was reasonably available to the applicant, such information was not submitted as it would have shown that there was no dumping within the meaning Article 2 of the Anti-Dumping Agreement. By accepting the information on prices of exports to a third country without questioning whether data on domestic sales was reasonably available to the applicant, MINCIT failed to discharge its duty to examine the accuracy and adequacy of evidence provided in the application.
13. Colombia's argument that Article 5.2(iii) of the Anti-Dumping Agreement should be interpreted as leaving the applicant free to choose to submit information relating to export prices in a third country, rather than relating to sales in the domestic market, is not convincing. The correct interpretation of Article 5.2(iii) is very far from the concept of "haz lo que quieras" (or "do as you wish") suggested by Colombia. The terms "cuando proceda" and "le cas échéant", just like the term "where appropriate", constrain the choice of information that an applicant can submit to the investigating authority for the purpose of calculating the normal value of the product allegedly dumped at the stage of initiation. It is only "appropriate" for the applicant to submit information on export prices to a third country, or on the constructed value of the product, if in the circumstances present in each case if domestic sales of the product do not exist, are not representative or information on prices of domestic sales are not reasonably available to the applicant.

14. Under Article 5.3, the role of the investigating authority is to examine the evidence submitted by the applicant and determine whether it is accurate, adequate and sufficient to justify the initiation of an investigation. In order to determine which evidence is adequate, guidance must be found in the text of Article 5.2(iii) itself and also in that of other provisions of the Anti-Dumping Agreement that provide context for its interpretation. The European Union agrees with Colombia that the last sentence of the "chapeau" of Article 5.2 provides relevant context, because it clarifies that the application must only include information that is "reasonably applicable to the applicant". Article 2 of the Anti-Dumping Agreement also provides relevant context for the interpretation of Article 5.2(iii) and, indirectly, for the interpretation of Article 5.3, as found by the panel in *Guatemala – Cement II*. Contrary to what Colombia alleges, there is no need for a cross reference to Article 2.2 in the text of Article 5.2(iii). The terms used in the latter provision are clearly inspired by those used in Article 2 and, as noted by the panel in *Guatemala – Cement II*, "in order to determine that there is sufficient evidence of dumping, the investigating authority cannot entirely disregard the elements that configure the existence of this practice as outlined in Article 2".
15. FEDEPAPA submitted an application for anti-dumping relief on behalf of the Colombian domestic potato-processing industry, in which Congelagro S.A., a subsidiary of McCain Foods, played a prominent role (it alone represented more than 50% of the domestic industry). It would have been perfectly practicable for MINCIT to require the applicant to submit information on sale prices in the domestic markets of Belgium, Germany and the Netherlands. Even if that information had not been readily available to the applicant (*quod non*), a multinational group with the dimension and financial strength of McCain Foods could have, without difficulty, availed itself of the commercial intelligence services.
16. An impartial and objective investigating authority should have considered that the alternative information on prices of exports to third countries submitted by the applicant was not adequate and sufficient evidence to justify the initiation of an investigation.

#### 2.1.4. Lack of sufficient evidence of injury

17. The European Union argues that, as is apparent from the initiation decision, MINCIT relied on information concerning, to a large extent, the impact of the allegedly dumped imports on farmers and on the prices for fresh potatoes. This is not in line with the concept of injury in Article 3.1 of the Anti-Dumping Agreement, which rather requires an analysis of the impact of the alleged dumped imports on prices in the domestic market for "like products" of the importing country and the consequent impact of these imports on the domestic producers of such products.
18. MINCIT relied exclusively on the statements made by FEDEPAPA, which stressed the impact of the imports of frozen fries on the economic situation of Colombian potato farmers, and this impact played a prominent role in the initiation decision. However, at the stage of initiation, the examination of the adequacy of the evidence on injury must be consistent with the requirements of Article 5.3, interpreted in the light of Article 5.2(iv) and Article 3.1 of the Anti-Dumping Agreement. MINCIT did not comply with those requirements.

#### 2.1.5. Lack of sufficient evidence of a causal link between the dumped imports and the alleged injury

19. The evidence regarding the causal link, on the basis of which MINCIT took its initiation decision, was limited to an assertion by the applicant that "[o]wing to the low prices of the imported product ... the domestic product loses share compared to the European product".
20. The European Union submits that this assertion, together with the evidence on the evolution of imports originating in Belgium, Germany and the Netherlands, is insufficient to establish a causal link between those imports and the alleged injury suffered by the domestic industry. It should be noted that, as indicated by FEDEPAPA itself, the Colombian market for frozen fries grew by 33% between 2014 and 2016. Moreover, Colombia does not deny that there were other sources of imports of the product, it only confirms that FEDEPAPA singled out the three European countries in its letter of 19 July 2017 supplementing the application.

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2.2. Violation of Article 5.8 of the Anti-Dumping Agreement: MINCIT should have rejected FEDEPAPA's application

21. The European Union maintains its consequential claim under Article 5.8 of the Anti-Dumping Agreement. In its view, if the Panel finds that Colombia acted inconsistently with its obligations under Article 5.3 by initiating the anti-dumping investigation on the basis of insufficient evidence, it should also find that Colombia acted inconsistently with its obligations under Article 5.8 by failing to reject the application submitted by FEDEPAPA.
22. The European Union relies on the Panel's findings in *Guatemala – Cement II* in which it was recalled that Article 5.8 makes specific reference to the rejection of an application as soon as the authorities conclude that there is not sufficient evidence of dumping or injury to justify proceeding with the case. The Panel linked its finding that an investigating authority should have considered the evidence insufficient to launch an investigation, to a subsequent conclusion that the authority should have rejected the application.
23. Since the initiation of the original investigation is inconsistent with Colombia's obligations under Articles 5.3 and 5.8 of the Anti-Dumping Agreement, the whole investigation procedure is vitiated and cannot lead to a lawful imposition of anti-dumping duties on the subject imports.

2.3. Violation of Articles 6.5 and 6.5.1 of the Anti-Dumping Agreement

24. The European Union contends that MINCIT failed to comply with its obligations under Article 6.5, which aim to reconcile two competing duties of investigating authorities: on the one hand, to ensure confidential treatment of sensitive information supplied by certain parties and, on the other hand, to grant adequate opportunity for other parties to defend their interests.
25. It is not sufficient for the investigating authority to ask the person supplying the information to provide a justification for confidential treatment. The investigating authority must also objectively determine whether the justification provided amounts to "good cause".
26. Moreover, in this case, MINCIT treated the financial and commercial information provided by domestic producers as confidential, while disclosing similar information provided by the European exporters cooperating with the investigation. This undermines Colombia's argument that all such information is confidential "by nature" and therefore implicitly deserves confidential treatment. It also reveals that MINCIT has not objectively assessed whether the content of the non-disclosed information could have a prejudicial effect on the transparency and due process interests of other parties involved in the investigation.
27. While the European Union does not exclude that certain nominal or numerical information may not be susceptible of summarization without revealing sensitive trade secrets, this is certainly not the case of all nominal or numerical data submitted by an applicant. It is the task of the investigating authority to ensure that parties provide meaningful summaries of the confidential information they submit (for example through indexation or ranges) and also that, in the exceptional cases where this is not possible, they provide a statement appropriately explaining the reasons why particular pieces of confidential information are not susceptible of summary.

**3. CLAIMS RELATING TO THE DUMPING DETERMINATION**

28. The European Union considers that MINCIT's entire process of determination of the dumping margins was fundamentally flawed. A correct application of the Anti-Dumping Agreement would have led the authority to terminate the investigation without imposing duties.
- 3.1. Violation of Articles 2.1, 6.8 and paragraphs 3 and 6 of Annex II of the Anti-Dumping Agreement: MINCIT unlawfully relied on secondary source information for its dumping calculation
29. MINCIT disregarded the truthful and complete export price data submitted by the exporters, and instead used secondary data from the national customs database "DIAN". Disregarding data submitted by the exporters in and for the purpose of the investigation is only allowed if

the conditions set out in Article 6.8 of the Anti-Dumping Agreement are met. Colombia itself admits that this was not the case. MINCIT did not point at any time at deficiencies of the exporters' primary data which would have justified the use of "facts available" – because there were no such deficiencies.

30. The European Union disagrees on principle with Colombia's position that data from a secondary source can be considered as constituting primary source data if it is "identical in essence" to the data submitted by the exporters in and for the purpose of the investigation, and that therefore Article 6.8 of the Anti-Dumping Agreement does not apply. On the contrary, the European Union considers that secondary source data will always constitute "facts available", even if it were fully identical to the data submitted by the exporters in and for the purpose of the investigation (which it was not, in *casu*). Moreover, in the case at hand, the European Union demonstrated that significant differences existed between the two datasets, both at the level of the individual transactions and at the level of the overall dataset, which Colombia eventually acknowledged.
31. Accordingly, the fact that MINCIT relied on the DIAN data for determining the export price was unlawful in respect of the conditions laid down in Article 6.8 and Annex II of the Anti-Dumping Agreement. Because the export price was not based on the correct information sources and did not as such constitute a proper basis for the dumping calculations, MINCIT's decision is also in breach of Article 2.1 of the Anti-Dumping Agreement.
- 3.2. Violation of Article 2.4 of the Anti-Dumping Agreement: the comparison between domestic sales and export sales was conducted in an unfair manner
32. The investigating authority failed to carry out a fair comparison between the export price and the normal value. In particular, it breached its obligation to make the adjustments needed in order to take due account of differences affecting price comparability.
- 3.2.1. Product mix: MINCIT ignored price-relevant differences in product mixes
33. MINCIT knowingly ignored the differences between the product mixes sold on the domestic market on the one hand, and on the export market on the other hand, and refused to make the required adjustments, even though these differences were significant and price-relevant and even though the investigated exporters had requested that these crucial differences should be taken into consideration, and duly substantiated their request.
34. The product under investigation covers several different subtypes, amongst others traditional fries on the one hand, potato specialties on the other hand. These two sub-types of products have very different physical characteristics. Accordingly, their production processes are different which in turn results in price-relevant product specifications and final sales prices (161% for potato specialties). MINCIT's decision to carry out neither a type-by-type comparison, nor to make any adjustments for these differences therefore led to significantly inflated dumping margins.
35. The attempt made by Colombia to justify this blatant unfairness based on an allegation of insufficient substantiation is unconvincing. In fact, the investigated exporters proposed several methods to take into account the differences in product characteristics, provided export listings, which clearly distinguished between the various product types, and provided evidence and figures detailing the different product mixes and how they concretely affected price comparability. Thus, MINCIT had all the necessary information to conduct a fair comparison. Furthermore, any remaining need for clarifications concerning the information submitted by the exporter should have been dealt with through information requests to the interested parties, pursuant to Article 2.4, 4<sup>th</sup> sentence – which MINCIT never made.
36. Moreover, the European Union considers that the argument raised by MINCIT that it was not required to conduct a type-by-type comparison as Article 2.4 does not impose a specific methodology is wrong. To the contrary, Article 2.4 requires that investigation authorities who decide not to make a type-by-type comparison are required to do the necessary adjustments in a different manner – which MINCIT did not do either.

37. The European Union also rejects Colombia's argument that the exporters allegedly submitted confusing and contradictory calculations in their claims for adjustment. Any divergence in calculations only concerns the quantification of overall price effects, which the exporters were not even obliged to submit in order to substantiate their claim, and which resulted from the fact that MINCIT did not upfront indicate how it would structure the comparison for the different product types (which it was obliged to do).

### 3.2.2. Packaging

38. MINCIT also breached the fair comparison requirement, because for Mydibel it included the packaging costs in the normal value but deducted them from the export price, thereby unlawfully inflating the dumping margin. The European Union rejects Colombia's assertion that what was deducted from the export price was merely the "additional overseas packaging costs" and not regular packaging costs. This argument is contradicted by the detailed explanations provided by Mydibel to MINCIT, and submitted by the European Union in these panel proceedings, which convincingly show that the deduction concerned the full normal cost of packaging.

### 3.2.3. Types of oil

39. MINCIT also ignored Agrarfrost's request for an adjustment concerning the types of oil used for the preparation of the potato product (products for the domestic market are mostly pre-fried in the more expensive sunflower oil at the request of the customers, whereas the export product is pre-fried in cheaper types of oil). This adjustment alone would have lowered Agrarfrost's dumping margin below the *de minimis* threshold.
40. Colombia's position that the request was ignored by MINCIT because of a lack of substantiation is not convincing and should be rejected. The exporter provided extensive explanations on the price-relevance of the type of oil used, and the different usages on the domestic and export market, respectively. All data substantiating the request was submitted as early as with Agrarfrost's questionnaire replies; relevant invoices were submitted in writing during the investigation and the full body of relevant evidence was verified at MINCIT's verification visit to Agrarfrost's premises. This is explicitly stated in MINCIT's own verification report, and explained in more detail in Annex 9 to this report, which the report endorses, contrary to Colombia's implausible assertions.

### 3.2.4. MINCIT failed to specify necessary information and imposed an unreasonable burden of proof

41. By simply ignoring the requests for adjustments raised by the investigated exporters, without raising any specific questions or giving any indication of further explanations or information it would have required, MINCIT also failed to engage in the "constructive dialogue" on requested adjustments which is required under Article 2.4 of the Anti-Dumping Agreement.

## **4 CLAIMS RELATING TO THE INJURY AND CAUSATION DETERMINATION**

### 4.1. Colombia has acted inconsistently with its obligations under Article 3.1, 3.2, 3.4 and 3.5 of the Anti-Dumping Agreement by wrongfully including non-dumped imports

42. In its analysis of injury and causation, MINCIT wrongly included both:
- Imports which were found not to have been dumped in that they were found to have negative dumping margins; and
  - Imports that were found to have dumping margins below the *de minimis* threshold and in respect of which no anti-dumping duty was imposed.
43. The European Union considers that, by including these imports in its injury analysis, MINCIT committed an overarching error of law which permeated and contaminated the entirety of the injury and causation analysis, as one is consequential upon the other.

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44. Specifically, for the purposes of its assessment of injury, MINCIT relied upon data allegedly showing the comparative performance of different economic indices as between a "reference period" and a "critical period". Those periods are not of equal duration. However, since the figures that MINCIT relies upon have been distorted by the overarching error described above, the findings are not based on "positive evidence" within the meaning of Article 3.1 of the Anti-Dumping Agreement and the assessment lacked the requisite objectivity. This breach gives rise in turn to consequential violations of Articles 3.2, 3.4 and 3.5 of the Anti-Dumping Agreement.
  45. With respect to the inclusion of imports, which were found to have a negative dumping margin, Colombia has at the least implicitly acknowledged that this was an error. However, it contends that this is not material. This attempt to downplay the amplitude of this error and the consequences that it bears for the validity of the entire injury analysis should be rejected.
  46. The data forms the foundation for the entire logical progression of the injury analysis. Hence, any error with respect to the scope of the imports that may legitimately form part of an injury analysis undermines the entire inquiry and the ultimate findings of causation and injury.
  47. Colombia tries to justify the inclusion of imports that were found to be below the *de minimis* threshold by inviting the Panel to find that it applied a permissible interpretation of the term "dumped imports".
  48. The European Union disagrees. The interpretation for which Colombia advocates would run against the logical structure of the Anti-Dumping Agreement as a whole, would undermine the function of Article 5.8 of the Anti-Dumping Agreement and in particular defeats the purpose of the procedural guarantees that are to be afforded throughout an investigation. Indeed, the existence of an investigation is the precondition for the conduct of an injury analysis and for any consequential finding. It should not be possible to revive imports which have or which ought to have been excluded from an investigation for the sole purpose of demonstrating injury and causation. Once the condition set down in Article 5.8 of the Anti-Dumping Agreement for the immediate termination of an investigation is met, the relevant imports (in this case those imports for which a *de minimis* margin of dumping was found) can no longer legitimately form any part of an analysis relied upon to establish injury or causation.
  49. The European Union emphasises that this interpretation is supported by multiple reports of the Appellate Body and other Panels.
  50. Moreover, this issue is not one which can be left open to an ambiguous or dual interpretation. Either imports found to be "de minimis" within the meaning of Article 5.8 of the Anti-Dumping Agreement may be treated as "dumped imports" or they may not.
  - 4.2. Colombia acted inconsistently with its obligations under Article 3.1 and 3.2 of the Anti-Dumping Agreement by relying on flawed analysis of the effect of the dumped imports on prices in the domestic market for the like product
  51. First, the European Union contends that the data relied upon by MINCIT to establish "trends" for the purpose of its price effects analysis was over-inclusive, because it included "non-dumped" imports. Thus, all subsequent findings related to alleged price effects based on this data fail to meet the conditions laid down in Article 3.1 of the Anti-Dumping Agreement, as they are not sustained by positive and objective evidence.
  52. Second, the European Union has demonstrated that the methodological approach followed by the investigating authority for its effects analysis is deficient. Aside from the error relating to the data, MINCIT also failed to ensure price comparability or to properly assess the effects on domestic prices.
  53. Whereas domestic prices were assessed in terms of their "real implicit price", there is no equivalent analysis of the price of imports. Colombia has engaged in semantic arguments claiming that it 'juxtaposed' rather than compared trends. This does not suffice to justify the lack of equivalence between the data as regards domestic prices (real implicit price) and the data as regards the price of imports (FOB price). There is a degree of comparison in the

analysis relied upon and that implies that the data had to be objectively comparable. The European Union reiterates that this lack of equivalence undermines the objectivity of the entire price effects analysis.

- 4.3. Colombia has acted inconsistently with its obligations under Article 3.1 and Article 3.4 of the Anti-Dumping Agreement by failing to evaluate all relevant economic factors and indices when concluding there was material injury to the domestic industry
54. The European Union's position is that MINCIT's analysis of the impact of the allegedly dumped imports on the domestic industry falls short of the legal standard as it did not include all relevant economic factors and indices having a bearing on the state of the industry, but instead focused on only seven of the fifteen economic factors and indices.
55. Furthermore, the methodology applied by MINCIT throughout the course of this analysis was significantly flawed. MINCIT's calculation of the averages in respect of each of the economic variables set down in its Final Technical Report was inappropriate, as these averages were calculated based on periods of different durations (for the "reference period" on the one side, and for the "critical period" on the other side). This method has a distortive effect and does not reflect fluctuations in data adequately. This is not resolved by describing six monthly data points in addition to the averages; a bare description of the movement of data without any proper evaluation falls short of the standard imposed by Article 3.4 of the Anti-Dumping Agreement. There was no attempt to analyse the relevance of significant movements in the data which occurred in the reference period. Moreover, it is sufficient to read the Final Determination and Final Technical Report to understand that it was the averages that were considered determinative.
56. In addition, Colombia has failed to explain why MINCIT did not attach any importance in its analysis to factors, which showed trends favorable for the domestic industry. Such factors, given that they supported the position that the domestic industry did not suffer any material injury should have been thoroughly assessed. Conversely, and at the least implicitly, MINCIT placed significant emphasis on factors that did substantiate the existence of a material injury. The absence of any explanation as to the reasons why certain factors were ascribed more weight than others in the overall analysis of the existence of a material injury demonstrates that MINCIT failed to conduct an "objective" examination of the different factors and indices.
57. The European Union emphasises the need for the Panel to focus on the documents on record rather than on the new reasoning that has been developed in Colombia's submissions.
- 4.4. Colombia has acted inconsistently with its obligations under Articles 3.1 and 3.5 of the Anti-Dumping Agreement by failing to demonstrate a causal link between dumped imports and injury to the domestic market
58. The European Union contends that Colombia's causation determination is inconsistent with Article 3.5 and 3.1 of the Anti-Dumping Agreement, since it builds upon the findings of an injury analysis, which suffered itself from significant shortcomings, as stated above.
59. Furthermore, the European Union underlines that MINCIT failed to separate, distinguish and adequately analyse all relevant non-attribution factors, and in particular the impact of "non-dumped" imports. In particular, the impact of those imports in respect of which either a negative dumping margin or which in respect of which the dumping margin was found to be *de minimis* should have been assessed as a non-attribution factor.
60. Again, the European Union urges the Panel to disregard new elements of analysis that have been brought to the table by Colombia during the legal proceedings, as they do not form part of MINCIT's assessment during the investigation, and remain unsubstantiated.
61. Finally, MINCIT also failed to demonstrate the existence of the alleged causal link. It simply relied on the correlation between the alleged injury and the allegedly dumped imports. This is insufficient to meet the legal standard.

**5 CONCLUSIONS**

62. For the reasons set out above, the European Union requests the Panel to find that:
- Colombia has acted inconsistently with its obligations under Article 5.3 of the Anti-Dumping Agreement by initiating the anti-dumping investigation on the basis of insufficient evidence of dumping, injury and a causal link between the dumped imports and the alleged injury;
  - Colombia has acted inconsistently with its obligations under Article 5.8 of the Anti-Dumping Agreement in failing to reject the application submitted by FEDEPAPA, which did not include sufficient evidence to justify proceeding with the investigation;
  - Colombia violated Article 6.5 of the Anti-Dumping Agreement by providing confidential treatment on its own initiative to the information supplied by the applicant, without good cause having been shown;
  - Colombia acted inconsistently with its obligations under Article 6.5.1 of the Anti-Dumping Agreement by failing to require the applicant to furnish non-confidential summaries in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence, or by failing to require a statement of reasons in support of a claim that the information was not susceptible of summary;
  - Colombia violated Articles 2.1, 6.8 and paragraphs 3 and 6 of Annex II of the Anti-Dumping Agreement, by not using, in the calculation of the dumping margins, the information on export prices provided by the cooperating investigated companies, but instead, information from its customs database (DIAN);
  - Colombia violated Article 2.4 of the Anti-Dumping Agreement by not making due allowances for differences impacting price comparability (differences in product mix and differences in oil used in the preparation), by making undue adjustments (for packaging costs), and by not informing interested parties about the information required for the fair comparison;
  - Colombia violated Articles 3.1, 3.2, 3.4 and 3.5 of the Anti-Dumping agreement by wrongfully including non-dumped imports;
  - Colombia violated Article 3.1 and Article 3.2 of the Anti-Dumping Agreement by not conducting an objective examination, based on positive evidence, by failing to properly establish the effect of the dumped imports on prices in the domestic market for the like product and by failing to adequately justify its findings;
  - Colombia violated Article 3.1 and Article 3.4 of the Anti-Dumping Agreement by not conducting an objective examination, based on positive evidence, by failing to properly consider all relevant economic factors and indices having a bearing on the state of the industry and by failing to adequately justify its findings; and
  - Colombia violated Article 3.1 and Article 3.5 of the Anti-Dumping Agreement by not conducting an objective examination, based on positive evidence, by failing to demonstrate a causal link between the dumped imports and the injury to the domestic industry and by failing to adequately justify its findings.
63. The European Union further requests, pursuant to Article 19.1 of the DSU, that the Panel recommends that Colombia bring its measures into conformity with the GATT 1994 and the Anti-Dumping Agreement.



**ANNEX B-2**

## INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF COLOMBIA\*

**1 THE EUROPEAN UNION'S CLAIM UNDER ARTICLE 5.3 OF THE ANTI-DUMPING AGREEMENT ON CERTAIN ASPECTS OF THE INITIATION OF THE INVESTIGATION SHOULD BE REJECTED**

1.1. The European Union makes five arguments under Article 5.3, claiming that the investigation was initiated incorrectly. Each of these five arguments are baseless in law and in fact and should be rejected.

**1.1 The European Union's arguments concerning the definition of the product under investigation have no legal basis**

1.2. The European Union's first argument is that the definition of the product under investigation, that is to say, the product imported from the European Union to Colombia, is "over-inclusive".<sup>1</sup> This argument should be rejected because it has no legal basis in the Anti-Dumping Agreement. Moreover, the European Union's argument completely undermines the logic of an anti-dumping investigation.

1.3. The basis of the European Union's complaint, Article 5.3, requires sufficient evidence to justify the initiation of an investigation. The evidence to be examined by the investigating authority is evidence of *dumping, injury* (or threat thereof) and *a causal link*. The case law under Article 5.3 confirms this, for instance, the panel in *Mexico – Steel Pipes and Tubes*.<sup>2</sup> In contrast, a complainant party *cannot challenge under Article 5.3 the definition of the product under consideration* (the product "concerned"). Article 5.3 contains no such provision. Rather, Article 5.3 presumes an earlier definition of the product under investigation. All the evidence relating to dumping, injury and causation examined under Article 5.3 depends on, derives from and is based on that definition.

1.4. More generally, there is no provision in the Anti-Dumping Agreement that defines the "product under consideration". This principle has already been confirmed by several panels. For instance, the panel in *Korea – Certain Paper* found that it was "aware of no provision in Article 2.6, or any other article in the Agreement, that contains a definition of 'the product under consideration' itself".<sup>3</sup> The panel in *EC – Salmon (Norway)* reached the same finding, just as the European Union itself argued in that dispute.<sup>4</sup>

1.5. Hence an investigating authority enjoys a considerable degree of discretion with regard to how to define the product under consideration, and this definition cannot be directly challenged. Rather, the disciplines of the Anti-Dumping Agreement focus on the definition of the "like" product, under Article 2.6, which must reflect the product under consideration selected by the investigating authority.<sup>5</sup>

1.6. The European Union's argument based on Article 5.3, under the rubric of "evidence" for initiating an investigation, is in fact tantamount to introducing, through the "back door", requirements under the Anti-Dumping Agreement that several panels have already found do not exist. The European Union has argued that the definition of the product under consideration was allegedly "over-inclusive"<sup>6</sup> or encompassed "a range of products that was wider than the range of 'like' products manufactured by domestic producers".<sup>7</sup> But regardless of how it is labelled, the

\* In Spanish original language.

<sup>1</sup> European Union's first written submission, para. 51.

<sup>2</sup> Panel Report, *Mexico – Steel Pipes and Tubes*, para. 7.21. (emphasis added)

<sup>3</sup> Panel Report, *Korea – Certain Paper*, para. 7.221.

<sup>4</sup> See for example Panel Report, *EC – Salmon (Norway)*, para. 4.240.

<sup>5</sup> Panel Report, *EC – Salmon (Norway)*, para. 7.51 et seq.

<sup>6</sup> European Union's first written submission, para. 51. European Union's opening statement at the first meeting of the Panel, para. 9.

<sup>7</sup> European Union's response to Panel question No. 12.1, para. 6.

rationale behind the European Union's complaint remains the same. Accordingly, the Panel should reject the European Union's arguments.

1.7. In any event, there is no logical link between the applicant's obligation to provide information on the product it produces (evidence) and the alleged rule freely invented by the European Union. If the Subdirectorate had initiated the investigation using a product under consideration that contained only exactly the models produced by the domestic industry – as the European Union would like – the European Union would probably be satisfied and would not claim any violation of Article 5.3 and/or 5.2(i). However, this outcome would occur without any change in the evidence submitted by the applicant. That is to say that what would have changed in our hypothetical case would not be the evidence, but the decision of the Subdirectorate on the scope of the product under consideration.

## **1.2 The European Union's arguments regarding the representativeness of Fedepapa should be rejected**

1.8. The European Union advances two distinct arguments as to why Fedepapa could not be considered the legitimate representative of the domestic industry. For both arguments, the European Union explicitly relies on the text of Article 5.4, using almost exactly the same words as are used in Article 5.4. However, the European Union bases its claim on Article 5.3, purporting to rely on the text of Article 5.3, which refers to the "evidence" provided "in the application", the "accuracy and adequacy" of which the investigating authority must examine. Nevertheless, Article 5.3 deals with *substantive* evidence, provided "in the application", and not with who submits an application on whose behalf.<sup>8</sup> Thus, the European Union's claim should be rejected because its legal basis is incorrect.

1.9. On the substance, the European Union first claims that "at the time of initiation, it was not clear whether the companies expressly supporting the application represented at least 25% of the total production of the like product produced by the domestic industry".<sup>9</sup> But the Subdirectorate responded to various arguments of this nature already during the investigation. The petitioning firms account for 69% of domestic production. This, of course, exceeds the minimum threshold of 25% in support of the application. This also meets the requirement that 50% of firms must express support or opposition. This assertion by the European Union is therefore without merit.

1.10. There is also considerable confusion in the European Union's arguments, given that it admits that "ultimately, the application was expressly supported by domestic producers accounting for at least 25% of total production of the like product produced by the domestic industry".<sup>10</sup> Colombia does not understand how the European Union can accept the Subdirectorate's determination as correct, while claiming at the same time that the Subdirectorate did not have sufficient information before it. The legality of the Subdirectorate's decision is based on the information that the authority had before it.

1.11. According to its second argument, the European Union seeks to interpret Colombian law by questioning whether the industry association, Fedepapa, represented, in a legitimate manner in accordance with Colombian law, the petitioning firms. According to the European Union, the Certificate of Existence and Legal Representation "did not indicate ... that potato-processing companies could be members of the Colombian federation of potato growers".<sup>11</sup>

1.12. The Panel should reject this extraordinary argument made by the European Union. The Anti-Dumping Agreement in no way limits the entities which, under domestic legislation, are empowered to represent petitioning firms, nor the manner in which those firms wish to be represented. Therefore, it is entirely at the discretion of each Member to determine which entity, under which legal and factual conditions, is authorized to represent the petitioning firms in accordance with domestic legislation. This is the sovereign right of every Member and Colombia firmly rejects any attempt by a complainant party to impose its preferences (or its national practice) on the Colombian authorities.

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<sup>8</sup> See the case law cited by Colombia in its response to Panel question No. 1.9, paras. 29-32.

<sup>9</sup> European Union's first written submission, para. 56.

<sup>10</sup> European Union's responses to the Panel's questions, para. 19.

<sup>11</sup> European Union's first written submission, para. 57.

1.13. Second, under Colombian regulations, the Subdirectorate was fully empowered to accept communications from Fedepapa, in Fedepapa's capacity as the representative of the petitioning firms. Colombia does not know which legal basis – in both Colombian law and the Anti-Dumping Agreement – the European Union is using to argue that Fedepapa was not so empowered.

1.14. The Subdirectorate responded to various arguments of this nature already during the investigation. For instance, in its responses to certain comments made by the European Commission during the investigation, the Subdirectorate referred to sub-paragraph "k" of Fedepapa's Certificate of Existence and Legal Representation.<sup>12</sup> Nor has the European Union provided any evidence that the petitioning firms were not members of Fedepapa. Colombia does not understand why the European Union believes that a national association cannot represent its members before a Member State's authorities.

1.15. If the European Union now wishes to challenge the investigating authority's approach, the European Union must demonstrate that the investigating authority exceeded its margin of discretion which, as the European Union itself accepts<sup>13</sup>, it enjoys under domestic legislation. But obviously, there is nothing manifestly incorrect in finding that a potato industry association can represent, in an administrative process, producers not only of raw potatoes, but also producers of frozen potatoes. On the contrary, this is intuitive and reflects common sense, especially given that these producers were members of Fedepapa. More generally, Colombian producers could have requested representation by any entity that they considered suitable, for example, a law firm, a consulting firm, etc. Of course, it would not be reasonable to require that a panel verify and interpret the certificate of legal representation of each representing entity.

1.16. As a last point in this regard, the three Colombian companies represented by Fedepapa cooperated assiduously with Fedepapa during each phase of the investigation. The companies also communicated with the Subdirectorate and sent their individual data not only through Fedepapa, but also directly, to complete the application that Fedepapa had sent on behalf of these companies.<sup>14</sup> The European Union effectively requests the Panel to tell these companies that their representation by Fedepapa did not take place.

### **1.3 The European Union's arguments regarding evidence of normal value should be rejected**

1.17. The European Union challenges the Subdirectorate's use of export prices from Germany, Belgium and the Netherlands to the United Kingdom as the normal value source. The European Union insists that the applicant and the Subdirectorate did not justify the use of these prices, instead of the selling price on the European market. The European Union contends that the words "where appropriate" in Article 5.2(iii) mean that the hierarchy of methods for determining normal value under Article 2.2 also applies in the context of initiation.

1.18. This cannot be correct, as it would essentially be impossible to conduct the investigation under Article 2.2 in the context of initiating the investigation. It is clear that, at the initiation stage, the test foreseen under Article 2.2 cannot be applied in the same way as during the investigation. To argue otherwise would turn the initiation analysis into a full-fledged investigation.

1.19. Rather, the words "where appropriate" are best understood as leaving to the discretion of the applicant, as well as of the investigating authority when revising an application, to select what it considers to be the most "appropriate", that is to say, "reasonable" or "suitable", source of normal value data. By including the phrase "where appropriate", the authors of the Agreement indicated that using the export price to a third country as the normal value does not depend on the hierarchy in Article 2.2, but rather it depends on the applicant's criterion of what is "appropriate", "relevant", pertinent, available, etc. in the light of the information that is available to the applicant in their particular circumstances.

1.20. The words "*cuando proceda*" in the Spanish version mean exactly the same as the English phrase "where appropriate". Moreover, the use of the subjunctive tense in the Spanish phrase ("*proceda*" instead of "*procede*") further highlights the applicant's subjective discretion. The French

<sup>12</sup> Response to comments on the Essential Facts Report, (Exhibit EU-17), p. 10.

<sup>13</sup> European Union's response to Panel question No. 1.4, para. 13.

<sup>14</sup> Colombia's second written submission, para. 2.24.

locution "*le cas échéant*" means the same as the Spanish and English expressions. This phrase is synonymous with the words "[éventuellement](#)" ("possibly"), "[à l'occasion](#)" ("when"), "[si l'occasion se présente](#)" ("should the opportunity arise").<sup>15</sup> Therefore, the applicant has the right to submit, for instance, information or data on an export price to a third country "should the opportunity arise", that is to say, if the applicant has such information and should the applicant consider it proper and appropriate to submit that information. This confirms that information on the export price to a third country may be freely submitted, in its own right, and not as an "emergency solution" to remedy the lack of domestic market prices.

1.21. There are three normal value sources: (i) domestic market prices, (ii) export prices to third countries and (iii) the cost of production. They are all legitimate normal value sources which could, ultimately, be used as a basis for normal value depending on how the investigation evolves. Nothing in Articles 5.2 and 5.3 precludes using evidence relating to third country prices in an application. The applicant and the authority, therefore, can rely on data from any of the three sources, provided that the data are "adequate" and "accurate", and provided that they are deemed "appropriate" for that purpose (Article 5.3).

1.22. Data are not inadequate or inaccurate, or allegedly not "appropriate", just because they come from one market and not another. Data would only be inadequate or inaccurate if they did not permit a proper comparison, for instance, for the reasons discussed by the panel in *Guatemala – Cement II*. Colombia points out that the European Union has not argued that the data used by the Subdirectorate are flawed in this way.

1.23. If the third country export market data suggest dumping, and there is no information or contradictory data from another market, the authority must still have the right to initiate an investigation on that basis. The authority cannot automatically assume, nor can it be required to assume, that domestic market data are "better" or inherently more reliable than third market sales data. Of course, all of these considerations are taken into account only for the purposes of initiating the investigation. During the investigation, the authority will, of course, first seek to obtain the normal value of sales in the domestic market, on the basis of the requirements enumerated in Article 2.2. In fact, in this investigation, the Subdirectorate used domestic selling prices for the final determination and found dumping.

1.24. The phrase "where appropriate" cannot mean that the authority is required to request an explanation from the applicant as to why it did not submit price data for the domestic market of the exporting country. The applicant could simply respond that it does not have access to those prices, because they are unavailable, they are confidential, etc. If such a request from the authority and such a response from the applicant were in themselves – and without being extensively examined by the authority – sufficient to satisfy the alleged obligation arising from the words "where appropriate", it would be an empty formality.

1.25. Nor can the phrase "where appropriate" mean that an authority and a WTO panel must decide whether the applicant made enough of an effort to obtain domestic market data. This judgement could not be objective or pragmatic. The European Union cites the fact that Congelagro, one of the Colombian petitioning firms, is related to the McCain company, which is active in the German and Dutch markets.<sup>16</sup> The European Union claims that, for this reason, "the information on sale prices in the domestic markets of [Germany and the Netherlands] could have been collected easily and provided with the application".<sup>17</sup> The European Union's example only serves to substantiate Colombia's argument. The mere fact that two companies are related says absolutely nothing about the possibility that one may obtain information from the other. Two companies, even if they are related, can have diametrically *opposed* commercial considerations.

1.26. If it is assumed that the phrase "where appropriate" requires some sort of explanation or explicit query, the obligation on the applicant and the authority would have to be much less onerous. For instance, a requirement could be envisaged whereby the applicant and the investigating authority should consider and explain whether third market data are "appropriate" or "adequate" to be used as evidence of the normal value, in the particular circumstances in question.

<sup>15</sup> <https://dictionnaire.lerobert.com/definition/echeant>.

<sup>16</sup> European Union's response to Panel question No. 12.2, para. 28.

<sup>17</sup> European Union's response to Panel question No. 12.2, para. 28.

1.27. Even within that understanding of the term "where appropriate", the investigation initiation was consistent with Article 5.3. The Subdirectorate stated that the United Kingdom market was the largest single market for fries within the EU single market (at that time) and, as such, was a particularly suitable parallel.<sup>18</sup> Moreover, in its application, with regard to the normal value calculation, the applicant included as an annex the initiation decision of the Brazilian investigating authority in its frozen potatoes anti-dumping investigation, which asserted that the Brazilian applicant was unable to obtain the domestic price internally within the relevant European Union member States, but was able to obtain information on prices in the United Kingdom through the Eurostat service. Thus, the reference to "other requests" in the Subdirectorate's decision should be understood as a reference to the Brazilian authority's explanation in the Brazilian case. This annex forms part of the documents that Colombia has submitted to the Panel.<sup>19</sup> The Subdirectorate relied on this information essentially in the same way as the Brazilian authority. Therefore, under any interpretation of Articles 5.2 and 5.3, the applicant and the Subdirectorate acted consistently with the Anti-Dumping Agreement.

1.28. There are several investigating authorities that, under the same circumstances as the Subdirectorate, proceeded in the same manner. Colombia has identified examples of the practice of the investigating authorities of the Eurasian Economic Union, South Africa, and Turkey. These authorities use either the constructed normal value or the export price to a third country, without examining or explaining why they did not base the normal value on the domestic market price.

1.29. In conclusion, as the complainant in these proceedings, the European Union bears the burden of establishing that it was not "appropriate" for the Subdirectorate to rely on this evidence. The European Union has failed to meet this burden. In addition, the fact that the authority did not rely on United Kingdom prices as the basis for normal value at the end of the investigation does not mean that using these prices as evidence for initiating it was not appropriate.

#### **1.4 The European Union's arguments regarding evidence of injury should be rejected**

1.30. The European Union claims that the Subdirectorate relied on information processed by Fedepapa and that said data covered – inappropriately – both the potato-processing industry (i.e. the producers of the frozen potatoes under investigation), as well as the producers of fresh potatoes.<sup>20</sup>

1.31. There are two problems with the European Union's claim. First, the European Union's claim is based on a misunderstanding of the facts. For its material injury analysis, *the Subdirectorate relied exclusively on the relevant data for producers of the product under investigation*, that is to say, producers of frozen pre-cooked potatoes (sometimes referred to as the "potato-processing companies"). The European Union's assertion that the underlying data included producers of fresh potatoes is factually incorrect.

1.32. The only evidence cited by the European Union in support of its incorrect assertion is the Initiation of Original Investigation<sup>21</sup> and the comments made by the European Commission during the investigation. But the Initiation of Original Investigation, by itself and even more when read in conjunction with the Technical Report on Initiation and Fedepapa's application, demonstrate that the European Union has mischaracterized the facts of the case and the underlying data. The Initiation of Original Investigation mentions potato producers because, ultimately, and in a productive environment as fragile as the Colombian countryside, potato farmers are also victims of the injury caused to the local processing industry by the sale in Colombia of dumped imported frozen potatoes. Therefore, in certain circumstances, the Subdirectorate considers it appropriate, for the purposes of initiating an investigation, to also mention or give a general assessment of the interests of other economic sectors related to the product under investigation. This is similar to the European Union's "Union interest" test.

1.33. The second problem is that the European Union focuses on the Subdirectorate's analysis, instead of focusing on the evidence that existed in the record when the investigation was initiated. Article 5.3 requires that, at the time of initiation, *there is* sufficient evidence of the three key

<sup>18</sup> Initiation of Original Investigation, (Exhibit EU-1b), p. 9.

<sup>19</sup> Exhibit COL-35-B, pp. 6-42 (folios 90-126).

<sup>20</sup> European Union's first written submission, para. 59.

<sup>21</sup> See European Union's first written submission, fns 92 and 93.

elements<sup>22</sup>, namely dumping, injury and a causal link. In contrast, Article 5.3 does not require an analysis by the investigating authority, nor does it impose requirements on the characteristics of such an analysis. The panel in *EC – Bed Linen* found that Article 5.3 says nothing regarding the nature of the examination to be carried out. *Nor does it say anything requiring an explanation of how that examination was carried out.*<sup>23</sup> This interpretation was confirmed by the panels in *Mexico – Steel Pipes and Tubes*<sup>24</sup> and in *Mexico – Corn Syrup*.<sup>25</sup>

1.34. Lastly, Colombia trusts it is clear that the evidence the authority had before it at the time of initiation is that contained in Fedepapa's application of 22 June 2017 and its revised application (and the annexed documents) of 19 July 2017.<sup>26</sup> These documents contain all the relevant evidence for establishing the existence of injury and causation for initiation purposes. This evidence speaks for itself. The European Union has failed to present any arguments that allege this evidence was insufficient to justify the initiation of the investigation.

1.35. In the final phase of this dispute, the European Union has argued that Colombia supposedly submitted certain exhibits too late in the course of the proceedings to be able to rely on this evidence.<sup>27</sup> But Colombia never submitted these documents to rely on them as part of its arguments. Rather, Colombia submitted these documents *because the Panel asked Colombia to provide them.*<sup>28</sup> Colombia did not need to rely on the evidence in the record, precisely because the European Union – thanks to its incorrect legal approach under Article 5.3 – never claimed that there was insufficient evidence in the record, but focused (incorrectly) on the opening statement and the explanation contained therein. In addition, the European Union decided to submit its complaint for the first time on 1 February 2022. But Colombia submitted Exhibits COL-35 and COL-36 in its responses of 17 September 2021, four and a half months earlier. The European Union's second written submission of 29 October 2021 would have been a logical moment for advancing this argument. But the European Union never raised this concern.

### **1.5 The European Union's arguments regarding evidence of a causal link should be rejected**

1.36. The European Union also puts forward an argument, in the context of initiation under Article 5.3, regarding an alleged absence of evidence of a causal link.

1.37. In the first phase of these proceedings, the European Union argued that the Subdirectorate's analysis was not sufficient, as there was no "separate analysis" of the existence of a causal link in the initiation decision. Colombia responded that the presence or absence or the quality of "a separate analysis" is not the criterion under Article 5.3. Article 5.3 requires that, at the time of initiation, *there is* sufficient evidence of the three key elements<sup>29</sup>, namely dumping, injury and a causal link. In contrast, Article 5.3 does not require the investigating authority to perform an analysis, nor does it set out requirements for the characteristics of such an analysis. The panel in *EC – Bed Linen* found that Article 5.3 says nothing regarding the nature of the examination to be carried out. *Nor does it say anything requiring an explanation of how that examination was carried out.*<sup>30</sup> This interpretation was confirmed by the panels in *Mexico – Steel Pipes and Tubes*<sup>31</sup> and in *Mexico – Corn Syrup*.<sup>32</sup> The European Union's legal error is similar to its legal error under the matter of injury.

1.38. In any event, Colombia is of the opinion that the Subdirectorate's analysis in the Technical Report on Initiation and in the Initiation of Original Investigation is sufficiently clear and rigorous to meet any requirement for an explanation.

1.39. After the first meeting with the Panel, the European Union changed its argument, abandoning the argument of the absence of a "separate analysis" and claiming that there was insufficient

<sup>22</sup> Panel Report, *Mexico – Steel Pipes and Tubes*, para. 7.21.

<sup>23</sup> Panel Report, *EC – Bed Linen*, para. 6.198.

<sup>24</sup> Panel Report, *Mexico – Steel Pipes and Tubes*, para. 7.21.

<sup>25</sup> Panel Report, *Mexico – Corn Syrup*, para. 7.102.

<sup>26</sup> Colombia's response to Panel question No. 1.17, paras. 87-97.

<sup>27</sup> European Union's response to Panel question No. 12.9, paras. 30 et seq.

<sup>28</sup> Panel question No. 1.1.

<sup>29</sup> Panel Report, *Mexico – Steel Pipes and Tubes*, para. 7.21.

<sup>30</sup> Panel Report, *EC – Bed Linen*, para. 6.198.

<sup>31</sup> Panel Report, *Mexico – Steel Pipes and Tubes*, para. 7.21.

<sup>32</sup> Panel Report, *Mexico – Corn Syrup*, para. 7.102.

evidence in the record, under Article 5.3. However, this means that the European Union has failed to make a *prima facie* case when required, i.e. in its first written submission or, at the latest, at the first meeting. The European Union should have focused – in its first written submission – on the evidence that was before the Subdirectorate, and should have explained how that evidence was deficient or insufficient to demonstrate the existence of a causal link for the purposes of initiation. Colombia therefore requests that the Panel reject the European Union's claims for having failed to make a *prima facie* case.

1.40. In the event that the Panel should decide to examine the merits of the European Union's arguments, Colombia is of the view there was sufficient information before the Subdirectorate at the time of initiation. The application also contained specific and precise information on imports from the countries under investigation and on the specific mechanism through which the domestic industry would allegedly suffer injury as a result of the imports. Colombia also wishes to point out that the "evidence" with respect to the causal link – especially for the purposes of initiation – often does not consist of separate documents that address the issue of "causation". Rather, the "evidence" is the investigating authority's interpretation of the import data and information on the state of the domestic industry. In other words, the "evidence" of a causal link is really the import data and the relevant data for the determination of injury and of the market as a whole, and the investigating authority's analysis of these and the connection it makes between them. Therefore, it is not very useful to look for "evidence" of a causal link in the sense of looking for documents that are *separate and distinct* from those pertaining to injury, the level of imports, etc. Rather, the same documents and the same data can demonstrate both injury and causation.

## **2 THE EUROPEAN UNION'S CLAIM UNDER ARTICLE 5.8 REGARDING THE INITIATION OF THE INVESTIGATION SHOULD BE REJECTED**

2.1. The European Union also brings a claim under Article 5.8 of the Anti-Dumping Agreement. This claim is purely consequential, as the European Union bases it on the alleged "consequence of the lack of evidence" to justify the initiation decision. Given that the European Union's claim under Article 5.3 is baseless in fact and in law, Colombia also requests the Panel to reject the European Union's consequential claim under Article 5.8.

2.2. The European Union acknowledges the recent panel findings in *Morocco – Definitive AD Measures on Exercise Books (Tunisia)*<sup>33</sup>, according to which a finding of violation under Article 5.3 cannot, automatically, result in a finding of violation of Article 5.8. Instead, a finding of violation under Article 5.8 must be based on different or additional circumstances. The European Union does not explain why the Subdirectorate allegedly violated Article 5.8 and how this violation relates to the alleged violation of Article 5.3.

## **3 THE CLAIMS RELATING TO CONFIDENTIALITY UNDER ARTICLES 6.5 AND 6.5.1 OF THE ANTI-DUMPING AGREEMENT SHOULD BE REJECTED**

3.1. The European Union complains that certain information was "heavily redacted"<sup>34</sup> in section d(i) of the revised application of 19 July 2017, as well as in Annexes 10 et seq. to the same document.<sup>35</sup> Specifically, the European Union criticizes the fact that, with respect to this information, the Subdirectorate: did *not* require the domestic industry to show "good cause" for the information to be treated as confidential; did *not* receive "good cause" from the domestic industry for the information to be treated as confidential; did *not* require the applicant to furnish non-confidential summaries of that information; and did *not* receive from Fedepapa a statement of reasons why summarization of the information was not possible, nor did the Subdirectorate provide such an explanation in its determination on confidentiality.<sup>36</sup>

3.2. With respect to the redacted information in section d(i) of the *revised* application of 19 July 2017, this information is included in full in Fedepapa's *original* non-confidential application dated 22 June 2017, which the European Union itself submitted as Exhibit EU-8. A reasonable reading of the relevant parts of the original and revised applications (the structure and content of

<sup>33</sup> European Union's response to Panel question No. 2.1, para. 51.

<sup>34</sup> European Union's first written submission, para. 82.

<sup>35</sup> European Union's response to Panel question No. 3.1, para. 55.

<sup>36</sup> European Union's first written submission, paras. 73 and 87.

the respective paragraphs, as well as the titles, structure and coordinates of each of the relevant tables) allows any reader to understand that it is actually the same information.

3.3. Thus, Colombia considers that Articles 6.5 and 6.5.1 of the Anti-Dumping Agreement do not apply to the redacted information in section d(i) of the revised application of 19 July 2017. The premise of Article 6.5 revolves around information that has been accorded confidential treatment. Consequently, Article 6.5 is not applicable here because Fedepapa never requested confidential treatment for the redacted information in section d(i) of the revised application nor did the Subdirectorato afford it such treatment. Even more importantly, Fedepapa itself submitted it in another document, which is in the *public* record of the investigation.

3.4. With regard to the information redacted in footnote 3 of the revised application of 19 July 2017, Colombia confirms that it is not in the public version of the record. However, in the absence of a request for this information to be treated as confidential, the Subdirectorato simply disregarded it under Article 6.5.2 of the Anti-Dumping Agreement. Colombia observes, in this regard, that the European Union does *not* claim that this information was used by the Subdirectorato during its investigation.

3.5. Lastly, in relation to the information contained in Annexes 10 et seq. that the Subdirectorato afforded confidential treatment, the European Union has failed to demonstrate that the good cause invoked by Fedepapa in its revised application of 19 July 2017 was "insufficient" under Article 6.5 of the Anti-Dumping Agreement.<sup>37</sup> In particular, Colombia has demonstrated that the Subdirectorato required in its deficiency letter of 29 June 2017 the "[i]dentification and *justification of confidential information*".<sup>38</sup> In addition, the Subdirectorato accepted Fedepapa's assertion that this information was confidential because it was "financial", as it understood that the disclosure of this information, by its very nature, "could cause serious prejudice to the companies involved"<sup>39</sup> and their disclosure "could generate a significant advantage for a competitor".<sup>40</sup> The Subdirectorato also recalled that there are constitutional and administrative provisions to protect privacy and personal data, as well as competition and intellectual property laws that prohibit the disclosure of important commercial and financial information.<sup>41</sup>

3.6. In response, the European Union simply notes that "it is not at all certain that all commercial and financial information deserves confidential treatment and even less that it constitutes a 'business secret'".<sup>42</sup> However, this assertion is too vague and imprecise, and fails to explain why specifically the information in Annexes 10, 11 and 12 cannot be described as a "business secret", as Colombian legislation provides. In the absence of such explanations, the European Union's claim under Article 6.5 relating to "good cause" must be rejected.

3.7. Moreover, in relation to the argument that the Subdirectorato did not require a non-confidential summary, Fedepapa did provide a statement of the reasons why summarization of the financial information in Annexes 10, 11 and 12 was not possible, namely: this information was "numerical".<sup>43</sup> Colombia has pointed out that this claim should be read in the relevant factual context that, in the same revised application, Annexes 10, 11 and 12 were submitted separately by each applicant company.<sup>44</sup> Thus, the European Union's assertion that there was no explanation as to why it was impossible to furnish a non-confidential summary of the information contained in Annexes 10, 11 and 12 is incorrect and should be rejected.

#### **4 THE EUROPEAN UNION'S COMPLAINT REGARDING THE USE OF DATA FROM THE DIAN DATABASE AS "BEST INFORMATION AVAILABLE" SHOULD BE REJECTED**

4.1. The European Union erroneously claims that Colombia acted inconsistently with its obligations under Articles 2.1 and 6.8 of the Anti-Dumping Agreement, and Annexes II(3) and II(6) thereto.

<sup>37</sup> European Union's response to Panel question No. 3.4.d., para. 64.

<sup>38</sup> Deficiency letter dated 29 June 2017, (Exhibit EU-9).

<sup>39</sup> Confidential technical report on the initiation of the investigation, (Exhibit COL-10 (BCI)), folio 537.

<sup>40</sup> Subdirectorato's response to the European Union's comments on the Essential Facts Technical Report, (Exhibit EU-17), p. 11 (folio 6060).

<sup>41</sup> Articles 15 and 73 of the Political Constitution of Colombia and Article 24.1 of Law No. 1437 of 2011 (Code of Administrative Procedure and Administrative Disputes).

<sup>42</sup> European Union's response to Panel question No. 3.4.d, para. 64.

<sup>43</sup> Fedepapa's application dated 19 July 2017, (Exhibit EU-10), folio 297.

<sup>44</sup> Colombia's response to Panel question No. 3.5.a, para. 132.



The European Union's complaint is based on the fact that the Subdirectorate used data extracted from the database of the National Tax and Customs Directorate (DIAN, DIAN database) to calculate the export price.<sup>45</sup>

4.2. Colombia's main argument is that the information in the DIAN database cannot be considered to be "best information available" or secondary information. The information collected from the DIAN database is information that is exclusively relevant to the company concerned, is information based on documents prepared by the same company, and is also information linked to the same export transactions.

4.3. The DIAN database contains information that is, because of its very nature and its original source, identical to the information provided by the investigated companies in their questionnaire responses. The relevant data from the same transactions that are reported in the questionnaire response are fed into the DIAN database, which is always checked against the response for consistency. Data entered into the DIAN database are based on documents prepared by the exporting companies. It is therefore primary information that is directly and exclusively relevant to exporters. This information is identical, in terms of its nature and origin, to the information contained in the questionnaire responses. As a result, the investigating authority was fully within its discretionary powers in using these data as primary information relevant to the investigated companies.

4.4. This methodology – and the use of DIAN data – was no secret during the investigation. The Subdirectorate clarified this fact in several documents, explicitly and transparently, during the investigation.<sup>46</sup> Therefore, all interested parties were duly informed what information was used and how it was used, and some of the interested parties submitted comments in that regard.

4.5. In short, the information in the DIAN database does not constitute "best information available" and therefore does not lead to the application of Article 6.8 of the Anti-Dumping Agreement or of Annex II thereto.

4.6. The concept of "best information available" is not defined in the covered agreements. There is no definition either in Article 6.8 of the Anti-Dumping Agreement and Annex II thereto, or in Article 12.7 of the Agreement on Subsidies and Countervailing Measures (SCM Agreement).<sup>47</sup> An investigated company is the primary source of the information that the authority needs for the determination of dumping. This is because the primary information that must underpin a dumping determination is the information relevant to the specific company and to the transactions that the authority examines. Such information is usually only in the possession of the company itself and can only be provided by the company, because there are normally no other entities that possess that information.

4.7. In the light of the foregoing, the information in question taken from the DIAN database is still information directly relevant to the company. The fact that this is not, strictly speaking, information provided in the context of the dumping investigation does not change the legal assessment. In addition, the DIAN database is an official database certified by the National Administrative Department of Statistics (DANE) of Colombia and, therefore, the information is authoritative and reliable. The Subdirectorate made this fact clear during the investigation.

4.8. The European Union adopts a highly formalistic approach, by suggesting that primary information may only be that provided by an investigated company in the formal context of an investigation.<sup>48</sup> Colombia rejects this interpretative approach. There is no basis in the text of the Anti-Dumping Agreement to support such a definition. Colombia provided an example that shows the type of illogical conclusions to which the European Union's inflexible and categorical definition leads. If an investigated company refuses to submit its consolidated financial statements to the authority during the investigation, and the authority obtains these statements by its own means (for example, if they already have the statements in their possession thanks to a past administrative

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<sup>45</sup> European Union's first written submission, paras. 120-131.

<sup>46</sup> Non-confidential Final Essential Facts Technical Report, (Exhibit EU-3), Section 2.5, p. 71; Response to comments on the Essential Facts Technical Report, (Exhibit EU-17), p. 13; Non-confidential Final Technical Report, (Exhibit EU-4), Section 2.5, pp. 71-72; Final determination, (Exhibit EU-5), p. 3.

<sup>47</sup> Panel Report, *US – Anti-Dumping and Countervailing Duties (Korea)*, para. 7.617.

<sup>48</sup> European Union's response to Panel question No. 4.3, para. 75.

procedure), these statements, according to the European Union, should be treated as secondary information. However, this is tantamount to tying an investigating authority's hands and cannot be either acceptable or correct. The European Union has never countered Colombia's example.

4.9. Colombia's example shows that there is a need to focus *on the substance and content of the information*. This reflects much better the intentions of those who drafted the covered agreements, instead of attaching importance exclusively to formal aspects such as *who* provides the information and *when* exactly they provide it.

4.10. In its responses to the Panel's questions, the European Union stresses that the manner in which information is presented in the DIAN database, on the one hand, and in the questionnaire replies, on the other hand, is not 100% identical.<sup>49</sup> In this connection, the European Union offers detailed descriptions of the alleged differences between the data in the questionnaires and the data in the DIAN database.<sup>50</sup> The European Union's arguments, as the proverb goes, fail to "see the wood for the trees". The remarkable focus on the technical details seen in the European Union's reasoning confirms that the two sets of data are essentially the same.

4.11. The European Union highlights the level of detail of the information allegedly furnished by the DIAN database and compares this level of detail with that of the information provided by the questionnaire responses, particularly with respect to the models or subproducts. The European Union does not describe the DIAN database correctly when it claims that the database is "blind" with regard to the information on models or types of products.<sup>51</sup> Additional factual information that goes beyond the description of the product according to its tariff subheading is provided in box 91 on the import declaration form. Depending on the circumstances, the description given in box 91 of the import declarations may allow additional features of the models or subproducts contained in a particular consignment to be taken into consideration.

4.12. The European Union claims that the use of the DIAN database "prevent[s] a comparison at the required level of granularity".<sup>52</sup> In other words, the European Union seems to argue that, even if it were necessary to carry out a model-by-model comparison, the Subdirectorate could not make such a comparison because, according to the European Union, the level of detail of the information in the DIAN database does not allow for it. However, this is incorrect. The Subdirectorate is always open, in each investigation, to considering whether carrying out a model-by-model comparison is relevant, depending on the particular circumstances of each investigation. In this investigation, it was determined that such a comparison was not appropriate.<sup>53</sup>

4.13. Nor does the DIAN database qualify as "official import statistics" within the meaning of Annex II(7) to the Anti-Dumping Agreement. The term "official import statistics" refers to *aggregate information, not information limited to specific individual companies*. In contrast, the DIAN database contains information and data that relate to *individual companies' specific transactions* and therefore does not fall within the scope of Annex II(7). Data of this type – i.e. data on individual private companies – are not within the scope of Annex II(7).

4.14. In any event, even if the panel were to consider that the information in the DIAN database constituted "best information available", Colombia considers that the Subdirectorate complied with the requirements under Article 6.8 and Annex II. The Subdirectorate informed the investigated companies through the Final Essential Facts Technical Report that the source of the export price was the DIAN database.<sup>54</sup> The companies therefore had ample opportunity to submit their comments on the Subdirectorate's approach and, in fact, some interested parties did just that.<sup>55</sup> The Subdirectorate then justified its decision to continue to rely on the DIAN database in the document containing the responses to those comments.<sup>56</sup>

<sup>49</sup> European Union's response to Panel question No. 4.3, para. 78.

<sup>50</sup> European Union's response to Panel question No. 4.3, paras. 83-91.

<sup>51</sup> European Union's response to Panel question No. 4.3, para. 83.

<sup>52</sup> European Union's response to Panel question No. 4.3, para. 85.

<sup>53</sup> See Colombia's first written submission, paras. 9.11-9.47.

<sup>54</sup> Non-confidential Final Essential Facts Technical Report, (Exhibit EU-3), Section 2.5, p. 71.

<sup>55</sup> For example, Response to the comments on the Essential Facts Technical Report, (Exhibit EU-17), p. 8 (Commission), p. 19 (Agrarfröst), and p. 25 (Agristo and Clarebout).

<sup>56</sup> Responses to the comments on the Essential Facts Technical Report, (Exhibit EU-17), p. 13.

## 5 THE EUROPEAN UNION'S CLAIMS UNDER ARTICLE 2.4 REGARDING THE ADJUSTMENT FOR PHYSICAL CHARACTERISTICS SHOULD BE REJECTED

5.1. The European Union claims that the Subdirectorate acted inconsistently with Article 2.4 of the Anti-Dumping Agreement by failing to take into account physical differences between models of the product under investigation, which allegedly resulted in an unfair comparison between the export price and the normal value.<sup>57</sup>

5.2. The basis of the European Union's claim is that the "product under investigation" covers a number of models or subproducts with differences in physical characteristics. The European Union is of the view that these differences were so great that they affected price comparability. Therefore, according to the European Union, it was necessary to carry out multiple comparisons<sup>58</sup> or make adjustments.<sup>59</sup>

5.3. Colombia, in theory, does not disagree with the European Union's claim that physical characteristics may affect the price comparability of a product. If demonstrated, an investigating authority must take these differences into account in making a fair comparison, for example, by making adjustments or making multiple comparisons.

5.4. In the present case, however, these differences were not properly demonstrated as a matter of fact. The Subdirectorate decided, in exercising its discretion as the trier of facts, that no such differences in physical characteristics had been demonstrated. Therefore, the Subdirectorate did not commit any violation in making a single comparison, without differentiating between the alleged "models" or "subproducts", without making other adjustments and without relying on the companies' unverified assertions.

5.5. It is important to remember that Article 2.4 stipulates that investigating authorities must make a fair comparison and establishes certain requirements that must be met to ensure that the comparison is indeed fair. Article 2.4 is explicit in specifying that the relevant differences are those "which ... affect price comparability". The Appellate Body has explained that this requirement "refers to differences in characteristics of the compared transactions that have an impact, or are likely to have an impact, on the price of the transactions".<sup>60</sup>

5.6. A key point is that the differences are "*demonstrated* to affect price comparability".<sup>61</sup> Although case law has established that there must be a "dialogue" between the investigated companies and the investigating authority in this regard<sup>62</sup>, it is clear that the primary burden rests with the investigated company to provide information to the investigating authority on the alleged differences. Of course, this information must be convincing, comprehensive and consistent.<sup>63</sup> The "dialogue" under Article 2.4 must be a two-way street. Interested parties have an obligation not only to file requests, but also to support them with sufficiently relevant and convincing evidence. For example, as the Appellate Body clarified in its report in *EC – Fasteners (China)*, "exporters bear the burden of substantiating ... their requests for adjustments".<sup>64</sup> Thus, despite the obligation to ensure a dialogue, it may be perfectly legitimate for an investigating authority not to accept such requests, depending on each individual case. The case law has found that "the fair comparison obligation does not mean that the authorities must accept each request for an adjustment".<sup>65</sup>

5.7. Colombia has demonstrated numerous flaws in the submissions of the investigated companies, Aviko, Mydibel and Agrarfröst.<sup>66</sup> The European Union does not deny the existence of these flaws and accepts that they constituted deficiencies in the companies' responses and arguments during the investigation. For instance, the European Union seems to agree that the conversion factor proposed

<sup>57</sup> European Union's first written submission, paras. 149-179.

<sup>58</sup> European Union's first written submission, para. 142.

<sup>59</sup> European Union's first written submission, para. 143.

<sup>60</sup> Appellate Body Report, *EU – Fatty Alcohols (Indonesia)*, para. 5.22 (referring to Appellate Body Report, *US – Zeroing (EC)*, para. 157).

<sup>61</sup> Emphasis added.

<sup>62</sup> Appellate Body Report, *EC – Fasteners (China)*, paras. 488-489; and Panel Report, *Egypt – Steel Rebar*, para. 7.352.

<sup>63</sup> Appellate Body Report, *EC – Fasteners (China)*, para. 488.

<sup>64</sup> Appellate Body Report, *EC – Fasteners (China)*, para. 488.

<sup>65</sup> Appellate Body Report, *EC – Fasteners (China)*, para. 488.

<sup>66</sup> Colombia's first written submission, paras. 9.15-9.47.

by Aviko, and referred to in Colombia's first written submission<sup>67</sup>, was deficient.<sup>68</sup> The European Union also accepts that Aviko put forward certain arguments under the "wrong heading".<sup>69</sup> The European Union even accepts that there were "imprecisions" in Aviko's explanations in this regard.<sup>70</sup> Moreover, the European Union does not rebut other examples provided by Colombia, such as certain sales prices in Mydibel's questionnaire that did not appear to reflect the differences in production costs alleged by Mydibel.<sup>71</sup>

5.8. These admissions, in Colombia's view, indicate that, in reality, the European Union recognizes the challenge posed by the deficient evidence submitted to the Subdirectorate. The European Union simply cannot assert that claims tainted by "imprecisions" and documents submitted under "wrong headings" could give rise to an obligation for the authority to agree to the investigated companies' request.<sup>72</sup>

5.9. It is also incorrect to assert that the Subdirectorate had an obligation, upon the initiation of the investigation, to propose methods for dividing the product under consideration into subgroups.<sup>73</sup> Instead, the burden of requesting adjustments or a model-by-model comparison lay with the companies and they failed to convince the authority.

5.10. The European Union disagrees with the Subdirectorate's decision and is of the view that the companies had outlined their claims in a sufficiently clear manner so as to oblige the investigating authority to compare the like product on a model-by-model basis for the purposes of its calculation of the margin of dumping. In other words, the European Union is not satisfied with the Subdirectorate's conclusion and, on this basis, claims that the investigating authority erred in its assessment of the facts and of the interested parties' arguments.

5.11. Pursuant to the applicable standard of review under Article 17.6(i) of the Anti-Dumping Agreement, an investigating authority enjoys a considerable margin of discretion, and this discretion must be respected by panels and the requesting parties in their arguments before the panel. Colombia considers that the European Union's arguments do not comply with this standard of review. Instead of adapting its arguments to the standard of review, the European Union simply claims that the Subdirectorate did not reach the correct conclusion. This type of argument is not sufficient to make a *prima facie* case because it does not respect the standard of review of Article 17.6(i).

## **6 THE EUROPEAN UNION'S CLAIMS UNDER ARTICLE 2.4 CONCERNING THE ADJUSTMENT FOR PACKAGING COSTS SHOULD BE REJECTED**

6.1. The European Union claims that the Subdirectorate deducted packaging costs from the export price, but not from the normal value.<sup>74</sup> According to the European Union, by proceeding in this way, the Subdirectorate breached the fair comparison requirement.<sup>75</sup> The European Union highlights a number of assertions on this matter by the company during the investigation and also points to the conclusions of the investigating authority.

6.2. First, Colombia asks the Panel to reject the European Union's claim, because it does not comply with Article 6.2 of the DSU and thus falls outside of this Panel's jurisdiction. Under Article 6.2, the complainant party is required to provide a sufficiently precise description of the measure at issue and "a brief summary of the legal basis of the complaint sufficient to present the problem clearly".

6.3. The problem with the European Union's request with regard to packaging costs is that the request identifies *one particular element* of the calculation decision, while the first submission addresses *another element*. More specifically, the European Union's request refers to the *request for adjustments* made by Mydibel. The European Union claims that the Subdirectorate acted

<sup>67</sup> Colombia's first written submission, paras. 9.15-9.23.

<sup>68</sup> European Union's response to Panel question No. 5.2, para. 108.

<sup>69</sup> European Union's response to Panel question No. 5.2, para. 108.

<sup>70</sup> European Union's response to Panel question No. 5.2, para. 108.

<sup>71</sup> Colombia's first written submission, paras. 9.34-9.40.

<sup>72</sup> European Union's response to Panel question No. 5.2, para. 108.

<sup>73</sup> European Union's response to Panel question No. 5.2, paras. 105-106.

<sup>74</sup> European Union's first written submission, para. 181.

<sup>75</sup> European Union's first written submission, para. 181.

inconsistently with "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 ... *Inter alia*, Colombia disregarded ... differences in packaging ... [ ]".<sup>76</sup> This is a reference to the differences in packaging between the products sold on the domestic market and those sold on the export market.

6.4. By contrast, in its first written submission, the European Union does not focus on the matter of "differences in packaging" as requested by Mydibel. Instead, the European Union concentrates on what it characterizes in effect as an improper unilateral deduction of packaging costs from the export price. This matter is, of course, separate and distinct from the first matter. It is obvious that the problem of a deduction of certain costs from one side but not from the other side – as described by the European Union – may exist regardless of whether there are differences in packaging in the transactions. This distinction between adjustments and improper deductions is drawn by the European Union itself in its panel request with regard to another topic, where it refers not to adjustments but to "deducti[ons of] certain sea freight and insurance costs ... from the export price of a company, thereby unduly lowering the export price".<sup>77</sup> The packaging issue should therefore have been included in the same way as the claim relating to the allegation that sea freight and insurance were deducted twice. However, the European Union did not include any such language or reference in its request.

6.5. A panel request cannot be supplemented or corrected at a later date. Accordingly, the Panel should reject the claim relating to packaging costs because it falls outside of the Panel's jurisdiction under Article 6.2 of the DSU.

6.6. Even if the Panel were to consider the merits of the claim, the European Union's arguments should be rejected. Colombia considers it important to point out that the European Union in no way provides a complete or objective description of the factual background and the Subdirectorato's determination in that regard.

6.7. The logic underlying the Subdirectorato's determination is that the packaging costs that were deducted from the "gross" export price reflect the *packaging costs that are unique to export transactions*. It is therefore a matter of packaging *in addition* to the "normal" or "base" packaging. It is obvious to Colombia that the packaging associated with a sea journey taking several weeks, for frozen products, is more complex and costly than the packaging material for sales in the country of production, which do not require shipping or other modes of long-distance transport.

6.8. For the Subdirectorato, this fact forms the basis for its understanding of the factual background, and it is this exact understanding that is reflected in the final determination. The Subdirectorato deducted "*export packaging material*", *not all packaging material*.

6.9. The investigating authority proceeded on the basis of its understanding that there were certain packaging costs for exports that were *in addition* to the "*base*" packaging costs. According to this understanding, "*base*" packaging is the packaging applicable to each sale, regardless of whether it is a domestic sale or an export sale. By contrast, export packaging is any additional material used in the context of additional requirements arising with regard to export transactions. The investigating authority's understanding was that the packaging costs in the questionnaire responses, listed in the section on export sales, reflected the additional packaging cost for exports, and that it was therefore necessary to deduct these costs in order to make a fair comparison.

6.10. Colombia considers that the Subdirectorato was within the bounds of its discretion by adopting the approach in question, on the basis of its understanding of the facts as presented by the company in its questionnaire response. Based on Colombia's current approach, the Subdirectorato's calculation was objective and correct. In its first written submission, the European Union has failed to demonstrate that an objective investigating authority would not have adopted this approach and would not have determined the export price in the same way as the Subdirectorato.

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<sup>76</sup> Request for the establishment of a panel by the European Union, WT/DS591/2, item 5.

<sup>77</sup> WT/DS591/2.

## **7 THE EUROPEAN UNION'S CLAIMS UNDER ARTICLE 2.4 CONCERNING THE ADJUSTMENT FOR OIL SHOULD BE REJECTED**

7.1. The European Union claims that the Subdirectorate improperly rejected Agrarfrost's request for an adjustment for oil costs and did not engage in the appropriate dialogue with the company regarding its request. Agrarfrost requested an adjustment for the use of different types of oil in the production of its potatoes. Agrarfrost claimed that, while the vast majority of its output was produced using palm oil, which is cheaper, a proportion of its sales in Germany was produced using sunflower oil, which is more expensive.

7.2. It is obvious that, in order to support its request, the company should have provided adequate evidence to substantiate these factual assertions. However, the company failed to substantiate these assertions with documentary evidence in its questionnaire response, during the verification visit and during other stages of the investigation. There is no document in the record to support the company's claims, and the European Union has not identified any document in this regard, despite having access to all the company's confidential documents. Consequently, the Subdirectorate rejected the request for an adjustment and explained this in its reports.

7.3. Throughout these proceedings, the European Union has failed to identify a single document supporting Agrarfrost's claims. The European Union has referred to the supposedly more than 300 pages of documents collected during the verification visit, which it claims were about the verification of the data relevant to the oil issue. However, despite this large number of documents, the European Union has not identified a single one that deals with the subject of oil and supports the company's allegations in this regard. The European Union has also submitted an affidavit by Agrarfrost employees from 2022. It is striking that these employees claim to remember details of the visit such as the exact time of the visit yet cannot recall a single example from the 300+ pages collected on the subject of oil.

7.4. In this context, the European Union also attaches great importance to the verification report and to Annex 9 in particular.<sup>78</sup> However, Annex 9 to the visit report is a document prepared by the company. The European Union does not deny this fact. This fact is of great factual and legal relevance. The company submitted this document to the Subdirectorate at the end of the visit. In the interest of transparency, the Subdirectorate attached this document to the report as an annex, despite the fact that it was not a summary prepared by the investigating authority. However, this decision by the Subdirectorate to include the document in the interest of transparency *cannot be interpreted as the Subdirectorate approving or consenting to the factual assertions* made therein. It should also be noted that the numerous factual assertions contained in that document are not supported or substantiated by any document in the record.

7.5. The European Union also claims the alleged "endorsement" by the Subdirectorate *on the basis of certain words in the verification report itself*. These words, in section 2.5 of the report, would allegedly make it possible to impute to the Subdirectorate the intention to confirm the content of the statements made by Agrarfrost.<sup>79</sup> However, it is easy to see that the words in the report relied on by the European Union reflect only the company's arguments and describe the purpose of the visit; they do not reflect any analysis, let alone approval or endorsement, by the investigating authority.

7.6. It should also be noted that these parts of the verification report cannot support any claim that the Subdirectorate confirmed and granted the adjustment. There is a significant difference between a *verification* and the *determinations* of an investigating authority. The European Union's arguments appear to confuse this difference. *Verifying* data or information – during a verification visit or at a later stage – is not the same as *granting an adjustment*. Verification takes place before the authority, in its final determination, decides whether or not to grant a requested adjustment. These are two conceptually distinct steps that take place at different times.

7.7. If certain data or certain information underlying an adjustment request cannot be verified, it will of course not be possible to grant the adjustment. But even if certain data *can* be verified, this does not necessarily mean that the requested adjustment can be granted. For example, if a company under investigation requests an adjustment for differences in levels of trade, it may be the case that

<sup>78</sup> See, for example, European Union's first written submission, paras. 198-199.

<sup>79</sup> European Union's response to Panel question No. 5.9, para. 129.

all the data – e.g. the identity of customers in the two markets, invoices, sales prices, all relevant sales aspects, after-sales services, distribution channels, etc. – are successfully verified, but that the investigating authority still cannot grant the requested adjustment. This would be because the authority, after weighing up all the *verified or verifiable* data and facts, has determined that the transactions at issue, because of their substance, do not represent different levels of trade. This example clearly demonstrates the significant difference between verifying data and deciding on a requested adjustment. Another example would be if any facts or data were verified in respect of *some* sales, but not in respect of *all* the sales for which an adjustment was requested.

7.8. According to the case law on this subject, there is a clear distinction between the results of the verification (under Article 6.7) and the essential facts that form the basis of the final decision (under Article 6.9). When an investigating authority provides its verification report in a document that also contains the essential facts (which is or was the practice of the European Union<sup>80</sup>), in a sense, there may be confusion between the results of the verification, on the one hand, and the essential facts on which the final decision was based, on the other. It is perhaps in this context that the European Union argues that the verification report contains the authority's final word on an issue, such as the request for an adjustment. However, when the authority prepares a verification report in a separate document, long before the report on the essential facts and the final report, the verification report is not the final word. When the verification report is issued long before the report on the essential facts or the final report, it makes no sense to treat its content as a final decision. In these circumstances, it is not correct to argue, as the European Union does, that the verification report contains a decision or commitment by the authority to grant the requested adjustment.

7.9. In any event, the European Union's numerous arguments concerning verification in fact relate to whether the report adequately reflects what happened during the verification visit. However, such a claim should be submitted under Article 6.7 and not under Article 2.4, as the European Union has done.<sup>81</sup>

7.10. Some arguments in this dispute have referred to the administrative proceeding of "direct revocation" in which Agrarfrost provided new evidence that, had it been submitted during the investigation, could have influenced the Subdirectorato's decision. The direct revocation proceeding is an administrative proceeding under Colombian law conducted before the same investigating authority that issued the challenged decision. In the direct revocation proceeding, Agrarfrost submitted a sheet of product specifications required by a purchaser for a specific transaction. The set of documents in this evidence also contains the invoice for the transaction in question.

7.11. As the Subdirectorato already pointed out during the direct revocation<sup>82</sup>, this type of evidence had not been submitted during the investigation. The question arises whether the company considered this documentary evidence to be important enough to be submitted during the direct revocation proceeding and why the company did not submit it previously during the investigation. It is precisely this type of document and evidence that the Subdirectorato noted as not being in the record.

## **8 THE CROSS-CUTTING CLAIM RELATING TO THE INCLUSION OF NON-DUMPED IMPORTS IN THE INJURY EXAMINATION SHOULD BE REJECTED**

8.1. The European Union claims that the Subdirectorato acted inconsistently with Articles 3.1, 3.2, 3.4 and 3.5 by including in its injury examination all imports from the countries subject to the investigation, including non-dumped imports. In response, Colombia proposes dividing the analysis of this cross-cutting claim in two: (i) the inclusion of imports with a *de minimis* dumping margin; and (ii) the inclusion of imports with a negative dumping margin.

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<sup>80</sup> With respect to recent case law on the verification process, see Panel Report, *EU – Fatty Alcohols (Indonesia)*, paras. 7.221-7.236; and Panel Report, *EU – PET (Pakistan)*, paras. 7.165-7.182.

<sup>81</sup> Colombia's response to Panel question No. 15.2, para. 101; opening statement at the second meeting of the Panel, para. 5.5.

<sup>82</sup> Administrative Review Decision, (Exhibit EU-6), section II.6.2.

### 8.1 The Subdirectorate did not err in including imports with a *de minimis* dumping margin in its injury and causation analysis

8.2. The European Union claims that the Subdirectorate incorrectly included imports with *de minimis* dumping margins in its injury and causation analysis, because these imports are not "dumped".<sup>83</sup> The European Union further alleges that imports with *de minimis* dumping margins are imports "which have not been investigated"<sup>84</sup> and/or that "the legal effect of a *de minimis* finding is that there is no 'dumping'".<sup>85</sup> For this reason, the European Union claims that the Subdirectorate failed to conduct an objective analysis of injury and causation, since it included imports with *de minimis* dumping margins, which is inconsistent with Articles 3.1, 3.2, 3.4 and 3.5.<sup>86</sup>

8.3. Colombia, for its part, claims that, in including imports with *de minimis* dumping margins in the injury analysis, the Subdirectorate relied upon an interpretation of the term "dumped imports" that is acceptable under Article 17.6(ii) of the Anti-Dumping Agreement. In this regard, the parties agree that, pursuant to Article 17.6(ii), the interpretation of the term "dumped imports" must be confined to the customary rules of interpretation of public international law codified in Articles 31 and 32 of the Vienna Convention on the Law of Treaties.<sup>87</sup>

8.4. Thus, Colombia notes that the ordinary meaning of the term "dumped imports" is clear and unambiguous, since "dumping" is defined in Article 2.1 of the Anti-Dumping Agreement as any instance in which the export price is less than "its normal value". From this definition, it follows that it does not matter if the difference between the export price and the normal value is small (*de minimis*) or considerable. As soon as there is such a difference, "dumping" will exist. However, neither the European Union nor the third parties make any effort to rebut the ordinary meaning of the term "dumped imports" adopted by the Subdirectorate. Rather, their arguments are contextual and jurisprudential.

8.5. This brings us to the context of the term "dumped imports". Colombia has explained that the most immediate context is provided for in the fourth sentence of Article 3.5 of the Anti-Dumping Agreement (which provides an illustrative list of certain non-attribution factors), specifically "imports not sold at dumping prices". This means that, in the universe of *all* imports, Article 3 distinguishes between "dumped imports" and "imports not sold at dumping prices". It is therefore clear from Article 3 that all imports must fall within one of these two categories. That being the case, imports with *de minimis* dumping margins clearly fall under the category of "dumped imports" because their normal value is higher than their export price.

8.6. The European Union, for its part, refers to Article 5.8 of the Anti-Dumping Agreement in claiming that an investigation must be terminated immediately where it is "determined" that the margin of dumping is *de minimis*, and that this implies that such imports must not be used in the injury examination. However, an interpretation of Article 5.8 in the light of the customary rules of treaty interpretation leads to the conclusion that there is no basis for creating a connection between this provision and Articles 3.1, 3.2, 3.4 and 3.5. Colombia has recalled that the drafters of the Anti-Dumping Agreement explicitly created a link between *de minimis* dumping margins and other provisions when they wanted such a link to exist. This is the case with Articles 3.3 and 9.4 of the Anti-Dumping Agreement.

8.7. By contrast, WTO case law has been clear that, in the absence of an explicit reference to imports with *de minimis* dumping margins in a particular provision, the person interpreting cannot simply presume such a link. For example, in the context of provisional measures under Article 7.1(ii) of the Anti-Dumping Agreement, a panel rejected excluding imports with *de minimis* dumping margins from the term "dumping" because, "[h]ad the drafters intended to define 'dumping' with a *de minimis* component, they could readily have done so".<sup>88</sup> Furthermore, in the context of sunset reviews under Article 11.3 of the Anti-Dumping Agreement, another panel rejected, in the absence of any link between this provision and Article 5.8 (or, alternatively, in the absence of a reference to

<sup>83</sup> European Union's first written submission, para. 248.

<sup>84</sup> European Union's response to Panel question No. 6.2, para. 168.

<sup>85</sup> European Union's response to Panel question No. 16.1(b), para. 189.

<sup>86</sup> European Union's first written submission, paras. 252 and 253.

<sup>87</sup> See Appellate Body Report, *US – Gasoline*, p. 17.

<sup>88</sup> Panel Report, *Canada – Welded Pipe*, para. 7.59.



"*de minimis*" dumping), the argument that the authority must take into account the *de minimis* threshold in determining the likelihood of continuation or recurrence of dumping.<sup>89</sup>

8.8. Thus, a proper interpretation of Articles 3 and 5.8 of the Anti-Dumping Agreement does not support the European Union's position that the consequence of "immediately terminat[ing] the investigation" under Article 5.8 is that imports with *de minimis* dumping margins must be excluded from the injury examination. Rather, when the final finding of a *de minimis* dumping margin is produced along with the authority's final determination, "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>90</sup> This quote from the Appellate Body is also confirmed by the negotiating history of the current Article 5.8, as Colombia explained in paragraphs 9.55-9.67 of its second written submission. It follows that the intent of Article 5.8 was not to change the definition of "dumping" (and, in particular, of "dumped imports" in Articles 3.1, 3.2, 3.4 and 3.5) but to exclude imports with *de minimis* dumping margins from the application of the anti-dumping measure.

8.9. Moreover, the European Union also relies on WTO case law to support its argument that imports with *de minimis* dumping margins are not part of the "dumped imports" in Articles 3.1, 3.2, 3.4 and 3.5. Mindful of the role of case law in the WTO dispute settlement system, Colombia has been frank and open in recognizing the existence of up to six panels that have determined that imports with *de minimis* dumping margins should be excluded from the injury examination. However, Colombia has also explained how this case law is based on a series of *obiter dicta* with no solid foundation in the customary rules of treaty interpretation. In particular, the first four panels that ruled on this matter made this finding as an *obiter dictum*, as the issue before them was not whether imports with *de minimis* dumping margins could be included in the injury examination.<sup>91</sup> Only in the last two disputes, *EC – Salmon (Norway)* and *Canada – Welded Pipe*, were the panels confronted with the issue of whether imports with *de minimis* dumping margins can be included in the "dumped imports" in Articles 3.1, 3.2, 3.4 and 3.5.<sup>92</sup> However, they merely relied on prior jurisprudence without conducting their own interpretative analysis in accordance with the customary rules of treaty interpretation. In other words, these panels gave preference to what had been said before as *obiter dicta* instead of to objective interpretation analysis under Article 17.6(ii) of the Anti-Dumping Agreement. There is therefore no legal or moral obligation or duty to follow this line of jurisprudence unthinkingly, especially when it is not duly substantiated.

8.10. In any event, Colombia recalls that, according to Article 17.6(ii) of the Anti-Dumping Agreement, the issue before this Panel is whether the measure taken by the Subdirectorate "rests upon one of [the] permissible interpretations" of the provisions in question. Should this be the case, the Panel should "find the measure [at issue] to be in conformity with the [Anti-Dumping] Agreement", regardless of whether another panel, the European Union or even, with all due respect, this Panel are inclined towards a different interpretation. Since the Subdirectorate relied upon a permissible interpretation of Articles 3.1, 3.2, 3.4 and 3.5 by including imports with *de minimis* margins of dumping for the purposes of its injury and causation analysis, the European Union's cross-cutting claim in relation to imports with *de minimis* margins of dumping must be rejected.

## **8.2 The European Union has failed to demonstrate that the inclusion of imports with negative margins of dumping affects the "objectivity" required in Article 3.1**

8.11. In addition, the European Union has failed to explain why the inclusion of imports with negative margins of dumping undermines the objectivity of the injury and causation analysis.

8.12. Colombia states that, pursuant to Articles 3.1 and 17.6(i) of the Anti-Dumping Agreement, in order for the injury analysis to be considered inconsistent with Article 3 of the Anti-Dumping Agreement, it needs to be demonstrated that the injury analysis lacks objectivity or that the evidence relied upon by the authority was not positive. In other words, it is not enough for the complainant to merely point out specific errors in the various stages of the "logical progression"

<sup>89</sup> Panel Report, *US – Corrosion-Resistant Steel Sunset Review*, paras. 7.67 and 7.68.

<sup>90</sup> Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 219.

<sup>91</sup> See Panel Reports, *EC – Bed Linen*, para. 6.138; *EC – Bed Linen (Article 21.5 – India)*, para. 6.131; *Argentina – Poultry Anti-Dumping Duties*, para. 7.303; and *EC – Fasteners (China)*, para. 7.356.

<sup>92</sup> See Panel Reports, *EC – Salmon (Norway)*, paras. 7.621-7.626; and *Canada – Welded Pipe*, paras. 7.79-7.85.

under Article 3. Instead, they must establish a *prima facie* case that these errors undermined the objectivity of the injury analysis.

8.13. WTO case law confirms Colombia's understanding that not every error or flaw gives rise to a violation of the obligation under Article 3.1 of the Anti-Dumping Agreement (and under the standard of review set forth in Article 17.6(i)) to conduct an objective injury and causation examination.<sup>93</sup> Likewise, the third parties in this dispute agree that "not every error or flaw constitutes a violation of the obligation for objectivity in the injury and causation analyses, but rather only those that 'individually' or 'taken together' are of such a magnitude that they undermine this objectivity".<sup>94</sup>

8.14. The question, therefore, is whether, by including imports with negative margins of dumping, the Subdirectorato undermined the objectivity of its injury analysis. Colombia has explained that these imports account for 8.63% of the total imports under investigation<sup>95</sup>, and that the Subdirectorato's findings relating to the price analyses (Article 3.2) and the impact on the domestic industry (Articles 3.4 and 3.5), made on the basis of verifiable calculations, do not vary depending on whether imports with negative margins of dumping are included or excluded. This explanation has been criticized by the European Union as *post hoc* rationalization.<sup>96</sup> However, Colombia has constructively provided this analysis as an indication that the Subdirectorato's examination did not lose objectivity by including imports with negative margins. The analysis provided – *which is based directly on the information contained in the Final Technical Report* – is intended to initiate a discussion with the European Union on the supposed lack of objectivity. However, Colombia's effort to provide these explanations cannot obviate the fact that it is the European Union that bears the burden of demonstrating the lack of objectivity in the overall injury analysis (and that it is not for Colombia to establish a *prima facie* case that this analysis was objective). Nevertheless, it bears repeating that the European Union has neither established a *prima facie* case that the injury and causation examination lacked objectivity (despite bearing this burden as complainant) nor commented upon Colombia's factual explanations.

8.15. The European Union has therefore failed to establish a *prima facie* case that the injury examination lacked objectivity by including imports with negative margins of dumping (8.63% of the total).

## **9 THE CLAIM UNDER ARTICLES 3.1 AND 3.2 RELATING TO THE EFFECTS OF THE IMPORTS ON THE PRICE OF THE DOMESTIC PRODUCT SHOULD BE REJECTED**

9.1. The European Union claims that Colombia has acted inconsistently with Articles 3.1 and 3.2 of the Anti-Dumping Agreement by conducting a flawed analysis of the effects of the dumped imports on the prices of the domestic product in the Colombian market.<sup>97</sup> In its first written submission, the European Union puts forward three specific arguments under Articles 3.1 and 3.2 relating to the analysis of the effect of the imports on the price of the domestic product. Colombia responds to each of these arguments below.

### **9.1 The European Union has failed to demonstrate that the inclusion of non-dumped imports is inappropriate**

9.2. The European Union argues that the Subdirectorato incorrectly included "imported products that were found not to have been dumped during the investigation".<sup>98</sup> The European Union further claims that the Subdirectorato "also included imports from countries, which were not under investigation".<sup>99</sup> Colombia addresses these two assertions below.

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<sup>93</sup> See Panel Reports, *US – Countervailing Duty Investigation on DRAMs*, para. 7.305; and *Morocco – Hot-Rolled Steel*, para. 7.219.

<sup>94</sup> See United States' response to Panel question No. 4.3 for the third parties, paras. 28-30; Japan's response to Panel question No. 4.3 for the third parties, para. 49; and Brazil's response to Panel question No. 4.3 for the third parties, para. 29.

<sup>95</sup> Colombia's first written submission, para. 13.48.

<sup>96</sup> European Union's response to Panel question No. 6.7.b, para. 204.

<sup>97</sup> European Union's first written submission, section 7.4 subheading.

<sup>98</sup> European Union's first written submission, para. 269.

<sup>99</sup> European Union's first written submission, para. 269.

9.3. With respect to the European Union's first assertion (the inclusion of non-dumped imports), Colombia has explained, firstly, that the term "dumped imports" in Articles 3.1 and 3.2 refers to imports for which the investigating authority has calculated a positive margin of dumping, regardless of its magnitude. Therefore, the term "dumped imports" includes those with a *de minimis* margin of dumping.<sup>100</sup> Secondly, Colombia has also explained that the inclusion of imports with negative margins of dumping did not undermine the objectivity of the analysis of the effects of the imports on the price of the domestic product.<sup>101</sup> For these reasons, the European Union's consequential argument that the Subdirectorato violated Articles 3.1 and 3.2 by including both *de minimis* dumped imports and imports with negative margins of dumping is without merit and should be rejected.

9.4. With regard to the second assertion (the inclusion of imports from countries that were not under investigation), Colombia confirms that this is incorrect. The European Union asserts this fact without substantiating it with appropriate explanations or, more importantly, with references to the record or the Subdirectorato's determination. On the contrary, a plain reading of the Final Technical Report confirms that the Subdirectorato separated the effects of the imports from countries that were under investigation from those of imports from other countries. Colombia observes that the European Union has dropped this argument after realizing its error.<sup>102</sup>

## **9.2 The European Union has failed to demonstrate that the data used in the price analysis were inadequate**

9.5. The European Union argues that the data used in the price analysis were "inadequate". Specifically, the European Union refers to section 5.3 of its first written submission in an attempt to demonstrate that the supposed confidentiality-related errors identified in that section also give rise to a violation of Articles 3.1 and 3.2. This argument is incorrect because, even assuming that there are errors in the confidential treatment of the information, the consequence of this would be an inconsistency with Articles 6.5 and 6.5.1. Furthermore, the domestic industry's application (which contains the alleged confidentiality-related errors) and the Subdirectorato's technical reports are two separate documents relating to two distinct procedural steps and are drafted by two different actors. As a result, the European Union cannot accuse Colombia of a violation of Articles 3.1 and 3.2 of the Anti-Dumping Agreement for alleged confidentiality-related errors in the domestic industry's application.

9.6. In any event, Colombia has indicated that the Subdirectorato provided a detailed explanation of the price trends of the domestic product, not only visually, using a graph, but also with an explanation of the fluctuations in percentage terms. The Subdirectorato thus fulfilled its obligation to "satisfy the right of other parties to the investigation to obtain a reasonable understanding of the substance of the confidential information, and to defend their interests".<sup>103</sup> The price analysis provided the necessary information through the examination of trends, and the authority conducted an objective examination as required by Articles 3.1 and 3.2. It is therefore clear that the European Union's assertions relating to confidentiality in the analysis of the effects of the imports on the prices of the domestic product should be rejected.

## **9.3 The European Union has failed to establish a prima facie case that the Subdirectorato has conducted an inadequate analysis of price comparability**

9.7. Lastly, the European Union claims that the Subdirectorato failed to adequately assess price comparability.<sup>104</sup> The European Union's argument is based on the fact that the Subdirectorato compared the real implicit price of the domestic product and the price of the imports, and that it did so in terms that were not comparable. Furthermore, the European Union makes reference only to the analysis of the domestic price trends, but does not refer, in its first written submission, to the part of the final determination in which the Subdirectorato examined the effects of the imports on the domestic price pursuant to the second sentence of Article 3.2 of the Anti-Dumping Agreement.

9.8. In its response, Colombia has drawn the Panel's attention to the relevant part of the final determination containing the analysis of the effects of the imports on the domestic price. On this

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<sup>100</sup> See paras. 13.13-13.28 above.

<sup>101</sup> See paras. 13.53-13.54 above.

<sup>102</sup> See European Union's response to Panel question No. 7.1, paras. 206-212.

<sup>103</sup> Appellate Body Report, *EC – Fasteners (China)*, para. 542.

<sup>104</sup> European Union's first written submission, para. 271.

basis, Colombia has clarified that the Subdirectorato conducted a price depression and suppression analysis, and not a price undercutting analysis. Thus, in accordance with Article 3.2, the Subdirectorato did not directly compare the price of the imports with the price of the domestic product, and was not required to do so. This is because the second sentence of Article 3.2 requires, for the purposes of the price depression and suppression analyses, an examination of the impact of "imports" (not necessarily their prices) on the price of the domestic product. This price depression or suppression analysis can be conducted, for example, through an analysis of import volumes or market share. This is precisely what the Subdirectorato did.

9.9. The Subdirectorato found that the price of the domestic product had declined by 5.38% and that it could not be increased despite the levels of inflation. In addition, despite also finding an upward trend in the price of the imports, the Subdirectorato then immediately found a very significant increase in the *volume* of the imports of 51.85%. According to the Subdirectorato, this increase "had a negative impact on the domestic industry". Moreover, the Subdirectorato analysed the situation in the domestic market and found that, while the domestic industry's share was down by 1 percentage point, that of imports was up 11 percentage points.<sup>105</sup>

9.10. In subsequent submissions, the European Union has roundly criticized the Subdirectorato's analysis of the effect on prices, indicating that the Subdirectorato *did* compare the price of the imports with the price of the domestic product by using the expression "[t]hat contrasts with".<sup>106</sup> This is incorrect. First, the Subdirectorato found that there had been a 5.38% drop in the domestic price; second, it used the expression "[t]hat contrasts with"; and third, it mentioned the 1.66% increase in the price of the imports.<sup>107</sup> It therefore follows that the Subdirectorato did not compare import prices with import prices, but rather, juxtaposed their *trends*. This juxtaposition (or comparison, to use the European Union's word) provides very useful information on the behaviour of both prices, which was what the Subdirectorato was looking for. The trends in the domestic prices and import prices were therefore juxtaposed in comparable terms (percentages).

9.11. Consequently, it is clear that the European Union has failed to establish a *prima facie* case that the analysis of the effects of the imports on the prices of the domestic product is inconsistent with Colombia's obligations under Articles 3.1 and 3.2 of the Anti-Dumping Agreement. The European Union's claim on the basis of these provisions should therefore be rejected.

#### **9.4 The arguments submitted late by the European Union - should be rejected as untimely**

9.12. As stated, in its first written submission, the European Union put forward three arguments relating to its claim under Articles 3.1 and 3.2 of the Anti-Dumping Agreement. None of these arguments refer to the Subdirectorato's analysis of the effects of the imports on domestic prices, which found price depression and suppression. However, over the course of the Panel proceedings, the European Union has been adding new arguments relating to the Subdirectorato's analysis.

9.13. More specifically, the European Union continues to put forward new arguments in the final stage of the proceedings, namely, in its responses to the Panel's questions following the second substantive meeting. These arguments are: (1) criticism of the Subdirectorato's reading of the trend in the real implicit price of the domestic product<sup>108</sup>; (2) criticism of the finding that the volume of imports increased by 51.85% and of the failure to outline the "explanatory force" this increase provides for the prices of the domestic product<sup>109</sup>; (3) criticism of the failure to explain " why this increase in volumes of imports at higher prices than domestic prices depressed those prices or prevented those domestic prices from rising as they otherwise would have done"<sup>110</sup>; and (4) that, in analysing the depression and suppression of domestic prices, the Subdirectorato should have carried out "a counterfactual analysis of what would otherwise have occurred".<sup>111</sup>

<sup>105</sup> Response of the Trade Practices Subdirectorato to BELGAPOM's comments, (Exhibit EU-17), p. 6.; and Response of the Trade Practices Subdirectorato to Mydibel's comments, (Exhibit EU-17), p. 31. See also Final Determination, (Exhibit EU-5), pp. 5-6.

<sup>106</sup> European Union's second written submission, para. 115.

<sup>107</sup> Opening statement at the second substantive meeting of the Panel, para. 7.4.

<sup>108</sup> See European Union's response to Panel question No. 17.5, paras. 102-110.

<sup>109</sup> See European Union's response to Panel question No. 17.5, para. 121.

<sup>110</sup> See European Union's response to Panel question No. 17.5, para. 124.

<sup>111</sup> See European Union's response to Panel question No. 17.5, para. 132.

9.14. Colombia recalls that paragraph 3(1) of the Panel's Working Procedures is clear that the "arguments" of the parties must be presented in a written submission before the first substantive meeting. This rule, used generally in all panel proceedings, has been applied on several occasions in previous disputes, in which the parties' arguments (particularly those of the complainant party) have been dismissed when they have not been presented in the first written submission.<sup>112</sup> In addition, Colombia emphasizes that respect for rule 3(a) of the Panel's Working Procedures is particularly relevant in order for the complainant party to establish a *prima facie* case of alleged inconsistency at the earliest possible stage of the proceedings so that "the respondent [is in a position] to rebut the complainant's *prima facie* case, by presenting evidence and arguments".<sup>113</sup>

9.15. Colombia therefore asks the Panel to refrain from analysing *any* of the untimely arguments relating to the Subdirectorato's analysis of the effects of the imports on domestic prices. However, at the very least, Colombia asks the Panel not to take into account the four aforementioned new arguments, as it is clearly unacceptable for the European Union to present them in the final stage of the proceedings (in its responses to the Panel's questions following the second substantive meeting).

## **10 THE CLAIM UNDER ARTICLES 3.1 AND 3.4 RELATING TO THE ANALYSIS OF THE INJURY FACTORS SHOULD BE REJECTED**

10.1. The European Union further claims that the Subdirectorato's analysis of the injury factors is inconsistent with Articles 3.1 and 3.4 of the Anti-Dumping Agreement. In particular, the European Union raises three arguments relating to the "methodology" used by the Subdirectorato in its analysis, as well as a further three "substantive" arguments. Colombia responds to each of these arguments below.

### **10.1 The European Union has failed to demonstrate that a comparison between the reference period and the critical period is "highly problematic"**

10.2. The European Union states that the Subdirectorato's injury analysis, based on a comparison of the "averages" from the reference period and the critical period, is "problematic" because this methodology "does not account for fluctuations in the data".<sup>114</sup>

10.3. The European Union's assertion about the Subdirectorato's analysis is incorrect. The Subdirectorato conducted a two-pronged analysis of the injury factors, namely: (i) the performance of each variable over consecutive six-month periods; and (ii) the comparison between the average of each factor for the reference period and for the critical period. Through the two-pronged analysis of the injury factors, the Subdirectorato first ascertained the trends in each factor using six-monthly data. In other words, the trends were examined on the basis of seven reference points (seven six-month periods) falling within the investigation period. This analysis of the trends enabled the Subdirectorato to identify the "fluctuations" in each factor assessed. This is evident not only from looking at the graphs that the Subdirectorato included in the Final Technical Report, but also from the explanations of these graphs.

10.4. In the light of these explanations, Colombia is surprised by the European Union's reading of the Subdirectorato's determination. In particular, the European Union criticizes the Subdirectorato for analysing averages that, allegedly, would not account for fluctuations during the investigation period. The European Union's partial reading of the Subdirectorato's methodology is particularly puzzling because, as far as Colombia is aware, no other investigating authority conducts such a thorough analysis of injury factors by examining six-monthly trends (annual trends are usually analysed), followed by a comparison of the averages for the period of dumping and for the period just prior to that. In fact, Colombia understands that even the European authority for anti-dumping investigations tends only to conduct an *annual* assessment of trends, which forms the basis for its conclusion of injury. An annual analysis obviously offers half the reference points of a six-monthly analysis, such as the one conducted by the Subdirectorato.

<sup>112</sup> See Appellate Body Report, *EC – Fasteners (China)*, para. 574. See also Panel Reports, *US – Softwood Lumber VII*, fn 9; *EU – Biodiesel (Indonesia)*, para. 7.141; *Morocco – Hot-Rolled Steel (Turkey)*, para. 7.64; *Korea – Pneumatic Valves*, para. 7.209 and *EC – Fasteners (China)*, para. 7.523.

<sup>113</sup> Appellate Body Report, *Russia – Railway Equipment*, para. 5.189.

<sup>114</sup> European Union's first written submission, para. 291.

10.5. In response to Colombia's explanation, the European Union further claims that the Subdirectorate "focused on the average performance of the economic indices as compared across the two unequal periods".<sup>115</sup> Colombia considers that, for its argument to be successful, the European Union should have identified a factor for which the analysis of the six-monthly trends and the six-monthly averages produced conflicting results and the Subdirectorate still chose to base its conclusion on the six-monthly averages (critical period and reference period). The European Union has not identified any factors for which this occurred. For example, in the case of installed capacity use referred to by the European Union, the Subdirectorate found in its analysis of both the six-monthly trends and the six-monthly averages that there was a decline in installed capacity use, and, on that basis, the Subdirectorate found that the performance of that "variable" was symptomatic of injury. Therefore, even if it were correct that the Subdirectorate "focused" on the comparison between the six-monthly averages (critical and reference periods), this would in no way vitiate the objectivity of the examination of the trends in installed capacity use.

10.6. Accordingly, the European Union's argument criticizing the comparison of the six-monthly averages for the reference period and for the critical period should be rejected.

## **10.2 The European Union has failed to demonstrate that there was anything incorrect in the data used for the analysis of installed capacity**

10.7. The European Union further claims that the analysis of the trend in installed capacity use is incorrect because the data itself was not sufficiently comparable. In particular, the data from 2014 were sourced from one company (Congelagro S.A.), whereas the data for the remaining sub-periods are sourced from two companies (Congelagro S.A. and Productos Alimenticios Frozen Express S.A.S.).<sup>116</sup>

10.8. Colombia does not understand why the emergence of this new producer in 2015 undermines the analysis of installed capacity use, and the European Union has failed to provide an explanation. In particular, the Subdirectorate stated that, in first half of 2015, the company Productos Frozen Express S.A.S. began production and, as a result, its installed capacity was added to that of the company CONGELAGRO for the purposes of the analysis of the domestic industry's overall installed capacity use. Clearly, installed capacity use is expressed as a percentage of the total capacity. Therefore, if a particular company has the capacity to produce 100 units in a given year and produces 60, the installed capacity use of the domestic industry (consisting of just one company) will be 60%. If, the following year, a new company is created with the capacity to produce 100 units, but produces only 60 that year, the overall installed capacity use of the domestic industry (consisting of these two companies) will still be 60%. Therefore, the fact that the company Productos Alimenticios Frozen Express S.A.S. began production in 2015 and that both its installed capacity and its production were added to those of the company CONGELAGRO does not vitiate the Subdirectorate's analysis of installed capacity use for the purpose of determining injury.

10.9. Colombia considers it necessary to point out that the European Union complains about the analysis of "installed capacity use" rather than "installed capacity" *per se*. This clarification becomes important because the domestic industry's "installed capacity" is necessarily affected if a producer begins production any year after the start of the investigation period. In the hypothetical example outlined in the previous paragraph, the "installed capacity" increases from 100 to 200 if the domestic producer's capacity is added to that of the domestic industry during the investigation period. However, as explained, the analysis of "installed capacity use" does not lose objectivity as a result of the domestic industry gaining or losing producers during the investigation period.

10.10. In any event, the European Union is mistaken when it claims that, with regard to installed capacity use, "there is plainly no consideration by [the Subdirectorate] of the relevance of when fluctuations occurred and how this is to be reconciled with a finding of injury."<sup>117</sup> In its analysis, the Subdirectorate noted the drop in installed capacity use of 41.73 percentage points between the second half of 2014 and the first half of 2015. Furthermore, the Subdirectorate identified a subsequent decrease of 10.17 percentage points on average. The graph shows that this other significant drop took place between the second half of 2015 and the first half of 2016. Lastly, the Subdirectorate noted that the decline continued during the critical period, namely, the second half

<sup>115</sup> European Union's response to Panel question No. 8.2, para. 271.

<sup>116</sup> European Union's first written submission, para. 294.

<sup>117</sup> European Union's response to Panel question No. 8.19, para. 339.

of 2016 and the first half of 2017, with slight decreases. The Subdirectorate thus found that the downward trend continued throughout the investigation period, albeit at a varying rate.

10.11. In summary, the analysis of the six-monthly trends revealed the six-monthly movements (trends), which would have shown fluctuations if there were any. Similarly, the European Union is also incorrect when it notes that there was no consideration of how these trends are "to be reconciled with a finding of injury".<sup>118</sup> For the reasons provided in this subsection, Colombia requests the Panel to reject the European Union's argument relating to the data used by the Subdirectorate for the purposes of the examination of installed capacity use.

### **10.3 The European Union has failed to demonstrate that the analysis of the injury factors was deficient**

10.12. The European Union again claims that "this failure to conduct a comparison of equivalent data comes in addition to the overarching flaw described in section 7.3 above in respect to all calculations that relied on data which included non-dumped imports".<sup>119</sup> Moreover, the European Union claims that, to the extent that the Subdirectorate relied upon a flawed price effects analysis, this also necessarily vitiates the findings [of injury] and further demonstrates that Colombia has failed to adhere to its obligations under Articles 3.1 and 3.4 of the Anti-Dumping Agreement, both individually and collectively.<sup>120</sup>

10.13. These arguments are "consequential" to the cross-cutting claims under Articles 3.1 and 3.2 of the Anti-Dumping Agreement. Colombia has explained the reasons why these claims should be rejected. As a result, the European Union's third argument in relation to its claim under Articles 3.1 and 3.4 is consequential and should also be rejected.

### **10.4 The European Union has failed to demonstrate that the Subdirectorate did not take into account the factors with a positive performance**

10.14. The European Union claims that the Subdirectorate simply mentioned the injury factors with positive trends during the investigation period, without explaining or assessing the importance of such factors in the overall conclusion regarding injury.<sup>121</sup> In particular, the European Union refers to domestic sales and production as "key" factors that "registered an increase".<sup>122</sup> However, as Colombia explains below, the European Union ignores the fact that the favourable trend in these two factors was explicitly addressed by the Subdirectorate.

10.15. *With regard to the favourable trend in sales*, the Subdirectorate analysed the following in its causation examination: first, the Subdirectorate found that sales of the imports rose by 51.85%, while sales increased by 19.77%<sup>123</sup>; second, the Subdirectorate found that the imports' market share increased by 11 percentage points, while the domestic product's market share fell by 1 percentage point<sup>124</sup>; third, the Subdirectorate stated that "material injury was found" in, *inter alia*, "the share of the applicant's sales with respect to apparent domestic consumption"<sup>125</sup>; and fourth, in the "Conclusion" section of the Final Technical Report (last page), the Subdirectorate found that the "increase in the market share of dumped imports displaced the domestic producers and the share of the investigated imports with respect to the volume of production increased by 25.7 percentage points".<sup>126</sup>

10.16. Thus, although the Subdirectorate had previously acknowledged, in the causation analysis, the increase in the domestic industry's sales of 19.77% in absolute terms, it eventually concluded that there had been a negative performance in "the share of the applicant's sales **with respect to apparent domestic consumption**" contributing to "material injury". In other words, the Subdirectorate *did* take into consideration the 19.77% increase in absolute terms in the domestic

<sup>118</sup> European Union's response to Panel question No. 8.19, para. 339.

<sup>119</sup> European Union's first written submission, para. 296.

<sup>120</sup> European Union's first written submission, para. 296.

<sup>121</sup> European Union's first written submission, paras. 300-305.

<sup>122</sup> European Union's first written submission, para. 301.

<sup>123</sup> Confidential Final Technical Report, (Exhibit COL-16 (BCI)), p. 109.

<sup>124</sup> Confidential Final Technical Report, (Exhibit COL-16 (BCI)), p. 109.

<sup>125</sup> Confidential Final Technical Report, (Exhibit COL-16 (BCI)), p. 114.

<sup>126</sup> Confidential Final Technical Report, (Exhibit COL-16 (BCI)), p. 116.

industry's sales but downplayed its importance ("relativized" its importance) in the light of the prevailing market conditions, particularly the fact that demand increased and that most of this increase was captured by imports.

10.17. *Regarding the positive trend in production*, Colombia has stated that the Subdirectorate dedicated an entire page of its Final Technical Report to assessing "investigated imports with respect to the volume of production". The Subdirectorate pointed out that the ratio of investigated imports to production volume increased by around 20 percentage points on average, with the exception of the last six-month period analysed.<sup>127</sup> In other words, whatever the increase in production in absolute terms, it was relativized by an even sharper rise in imports. It is thus clear that the Subdirectorate *did* evaluate the upward trend in production, not in isolation but in relation to the increase in imports, and found that imports increased at a faster rate than production.

10.18. These explanations show that the Subdirectorate *did* take into account the increase in sales and production in absolute terms, but that increase was insufficient to benefit from growing demand. Therefore these increases in absolute terms are relativized by other factors that display a negative performance, especially (but not exclusively) market share. The Subdirectorate's explanations and findings contradict the European Union's argument that the Subdirectorate did not examine the impact of the positive trend in sales and production in its overall injury examination. Accordingly, Colombia requests the Panel to dismiss this argument.

### **10.5 The European Union has failed to establish that the Subdirectorate's assessment of six injury factors was deficient**

10.19. The European Union claims that the Final Technical Report does not contain a proper assessment of six injury factors, as it "deliberately" excluded them on the basis that they "provide general background information".<sup>128</sup> The six factors contested by the European Union are: return on investments, factors affecting domestic prices, the magnitude of the margin of dumping, effects on cash flow, growth, and the ability to raise capital or investments. This argument is unfounded, as is explained below.

10.20. *First*, of the six challenged factors, four were analysed with respect to the total production of the domestic industry, and two in relation to the product under consideration. The last two are the *factors that could affect internal prices* and the *magnitude of the margin of dumping*. The European Union does not present any criticism of the factors that could affect domestic prices. However, with respect to the magnitude of the margin of dumping, the European Union incorrectly claims that the Subdirectorate's explanations are insufficient. Colombia recalls that the Subdirectorate found that the margin of dumping for two companies was below the national inflation rate, while the margin of dumping for another company (Mydibel), which recorded the highest volume of exports to Colombia, was greater than the inflation rate in Colombia and that, as a result, the margin of dumping was considered "relevant".<sup>129</sup>

10.21. The European Union does not claim that it is incorrect to analyse the magnitude of the margin of dumping in the light of the levels of inflation, or that this cannot lead to the conclusion that the margin of dumping is "relevant". Rather, it claims that these explanations are insufficient. However, Colombia considers that the European Union is too vague and imprecise in its argument and, therefore, it cannot be considered that it has met its burden of establishing a *prima facie* case with respect to the lack of objectivity in the assessment of the magnitude of the margin of dumping for the purposes of the claim under Articles 3.1 and 3.4.

10.22. *Second*, with regard to the four remaining factors (return on investments, effects on cash flow, growth, and the ability to raise capital), the European Union claims that they were not the subject of a "proper assessment" because the Subdirectorate had aggregate information on all the products produced by the domestic industry. In accordance with Article 3.6 of the Anti-Dumping Agreement, the Subdirectorate found that, regarding these four financial factors pertaining to the domestic industry, it was impossible to separate the information on the like product under investigation from that on other products. The Subdirectorate then proceeded to analyse them

<sup>127</sup> Confidential Final Technical Report, (Exhibit COL-16 (BCI)), p. 95.

<sup>128</sup> European Union's first written submission, para. 301.

<sup>129</sup> Responses to the comments on the Essential Facts Technical Report, (Exhibit EU-17), p. 15.



in an overall manner for the entire production of the domestic industry and not just in relation to the product under consideration.

10.23. In its analysis of these four factors, the Subdirectorate found them to be performing negatively (which supports the view that there is injury). However, the Subdirectorate was cautious in emphasizing that "we cannot establish with any certainty how each indicator specifically affects the domestic industry of frozen potatoes", i.e. specifically the product under consideration.<sup>130</sup> Colombia does not understand how this *responsible* and *cautious* position adopted by the Subdirectorate is now challenged by the European Union, especially when Article 3.6 of the Anti-Dumping Agreement allows for the analysis of certain injury factors on the basis of a broader universe of products than the product under investigation.

10.24. For the reasons given above, Colombia requests the Panel to reject the European Union's argument that the Subdirectorate failed to make a "proper assessment" of the following six injury factors: the size (magnitude) of the margin of dumping, factors likely to affect prices, return on investments, effects on cash flow, growth, and the ability to raise capital.

### **10.6 The European Union has failed to demonstrate that the analysis of injury factors did not examine the impact of the imports on the domestic industry**

10.25. Lastly, the European Union claims that even for those factors in respect of which injury was found, "the analysis presented by [the Subdirectorate] also falls significantly short of the requirement to examine the impact on the [domestic] industry".<sup>131</sup> In particular, the European Union notes that "[the Subdirectorate] has plainly not complied with the requirement to identify whether the dumped imports had explanatory force for the state of the domestic industry".<sup>132</sup> Once again, this argument appears to derive from an incomplete reading of the Final Technical Report. In particular, in the section entitled "Causal Link", the Subdirectorate conducted a detailed seven-page examination of the "explanatory force"<sup>133</sup> of the imports on the deterioration of the state of the domestic industry.<sup>134</sup>

10.26. Three conclusions emerge from section "5. Causation" of the Final Technical Report. *First*, the Subdirectorate's causation analysis was *progressive*: first, the evolution of domestic demand was observed; second, it was observed that sales of both the imports and the domestic industry increased at different rates; third, it was observed that the market share of the imports rose while that of the domestic industry fell; fourth, the imports were found to have displaced the domestic industry in its own market. This analysis has been described above.

10.27. *Second*, contrary to what the European Union seems to argue, the components of this progressive analysis are not scattered in such a way that Colombia has to search for them individually and then piece them together. Rather, all the components of the progressive analysis are logically sequenced one after the other on pages 108-114 of the Final Technical Report (Exhibit EU-4).

10.28. *Third*, the conclusion that the "dumped imports displaced domestic producers" is not an unsubstantiated theory of the Subdirectorate. Rather, it is a conclusion that appears just after the progressive causation analysis described above (demand - sales - market share). Therefore, the finding of "displacement" is properly supported by a comprehensive analysis of the interaction between imports and the domestic industry in the Colombian market.

10.29. Moreover, the European Union alleges that "an 'evaluation' of each of the factors in Article 3.4 requires a process of analysis and assessment of the role, relevance and relative weight of **each factor** in the particular investigation". However, it is incorrect to claim that the authority is required to analyse the impact of imports on each particular factor. Article 3.4 indicates that the examination of the "impact of the dumped imports" relates to the "domestic industry". However, the examination of the "impact" includes an "evaluation" of all the factors "having a bearing on the state of the industry". Thus, the "evaluation" of each of the factors is objective (if the performance is

<sup>130</sup> Responses to the comments on the Essential Facts Technical Report, (Exhibit EU-17), p. 14.

<sup>131</sup> European Union's first written submission, para. 308.

<sup>132</sup> European Union's first written submission, para. 314.

<sup>133</sup> Appellate Body Report, *China - GOES*, para. 136.

<sup>134</sup> Non-confidential Final Technical Report, (Exhibit EU-4), pp. 108-114.

positive and negative) and it is through an overall reading of the behaviour of all the factors that the authority must conduct the "examination" of the impact of the dumped imports on the domestic industry.

10.30. In conclusion, the European Union's sixth argument concerning the alleged failure to examine the impact of imports on the domestic industry is unfounded and should be rejected.

## **11 THE CLAIM UNDER ARTICLES 3.1 AND 3.5 RELATING TO CAUSATION SHOULD BE REJECTED**

11.1. The European Union puts forward three arguments to attempt to demonstrate that the causation analysis is inconsistent with Articles 3.1 and 3.5 of the Anti-Dumping Agreement.

### **11.1 The European Union has failed to demonstrate that causation has been "vitiating" by alleged shortcomings in the injury analysis**

11.2. The European Union asserts that the Subdirector's causation analysis is "vitiating" by shortcomings in the analyses of the volume of the imports, the effects of the imports on the price of the domestic product and the impact on the state of the domestic industry. On this basis, the European Union claims that the causation analysis is inconsistent with Articles 3.1 and 3.5 of the Anti-Dumping Agreement.<sup>135</sup>

11.3. This being an argument that is consequential to its previous claims under Articles 3.1, 3.2 and 3.4, Colombia has explained that there is no violation of these provisions and that there is therefore no basis for finding a consequential violation of Article 3.5. This first argument by the European Union should therefore be rejected.

### **11.2 The European Union has failed to demonstrate that the conclusion regarding causation was based simply on a "correlation"**

11.4. The European Union claims that the Subdirector failed to adequately explain the existence of a causal link by confusing the concept of "correlation" with "causation".<sup>136</sup> According to the European Union, the Subdirector "appears to conclude that because it found that there was an injury to the domestic market ... this must have been caused by the dumped imports".<sup>137</sup>

11.5. Once again, the European Union makes no reference to the Subdirector's determination to substantiate its claim. However, Colombia recalls, once again, that the Subdirector carried out its causation analysis on the basis of a *progressive analysis* in which it evaluated the upward trend in demand, the levels of sales of the imports and the domestic product, and the trend in the market share of the imports and the domestic product. On this basis, the Subdirector found that there had been a negative performance in "the share of the applicant's sales **with respect to apparent domestic consumption**" contributing to "material injury".<sup>138</sup> Ultimately, all these elements led it to conclude that imports "displaced" the domestic industry in its own market.<sup>139</sup>

11.6. Colombia believes that this analysis has sufficient logical rigour for it to be observed that the domestic product's loss of market share (because it was unable to increase its sales at the same rate as the rise in demand) was caused by imports. Therefore, the European Union's argument that the Subdirector confused the concept of "correlation" with "causation" should be rejected.

### **11.3 The European Union has failed to demonstrate that the analysis of the non-attribution factors was reduced to a descriptive narrative**

11.7. Lastly, the European Union claims that the analysis of the non-attribution factors "is woefully deficient and essentially consists of a descriptive narrative".<sup>140</sup> The European Union argues that, when an authority cites a non-attribution factor in its determination, that triggers the obligation to

<sup>135</sup> European Union's first written submission, para. 320.

<sup>136</sup> European Union's first written submission, para. 321.

<sup>137</sup> European Union's first written submission, para. 322.

<sup>138</sup> Non-confidential Final Technical Report, (Exhibit EU-4), pp. 108-114.

<sup>139</sup> Non-confidential Final Technical Report, (Exhibit EU-4), p. 116.

<sup>140</sup> European Union's first written submission, para. 325.

analyse it. In particular, the European Union criticizes the evaluation of the following three non-attribution factors: the volumes and prices of non-investigated imports; the trade restrictive practices of Brazil and South Africa; and the market satisfaction capacity.<sup>141</sup>

11.8. The European Union ignores the legal standard for non-attribution under Article 3.5 (adopted by various panels), according to which, for an authority to be required to analyse a non-attribution factor, it must have "evidence before [it] to indicate that a factor is injuring the domestic industry".<sup>142</sup> Colombia has also observed that this legal standard is consistent with that of the European Court of Justice itself in relation to non-attribution, which requires there to be sufficient evidence in the record before the European authority is required to examine the injurious effects of a particular non-attribution factor.<sup>143</sup>

11.9. In the present case, however, the European Union fails to indicate whether the Subdirectorate had before it evidence relating to the injury to the domestic industry caused by the three contested factors. Specifically, the European Union should refer the Panel (and Colombia) to the relevant part of the record where one of the interested parties has demonstrated the injurious effects of the three non-attribution factors contested in this dispute. The European Union has not done this.

11.10. On the contrary, the European Union alleges that there is an obligation to analyse the challenged non-attribution factors even in the absence of evidence in the record demonstrating their injurious effects on the domestic industry. However, the European Union has not explained why it believes that the established case law outlined above is incorrect or inapplicable in this case.

11.11. In any event, and for the sake of completeness, Colombia has explained that the Subdirectorate *did* provide an analysis of two of the three non-attribution factors. Regarding the inclusion of imports with negative margins of dumping, the Subdirectorate stated that the dumped imports "represent[ed] a very significant volume of trade" and that, among them, Mydibel imports alone accounted for 66.97% of the total volume of dumped imports.<sup>144</sup> Similarly, regarding the capacity to meet the needs of the market, the Subdirectorate stated that the domestic industry had the capacity to meet between 58.6% and 70.8% of the domestic market needs<sup>145</sup>, and also observed that the domestic industry's market share stood at only 40.5% at the end of the investigation period.<sup>146</sup>

11.12. Lastly, regarding the trade restrictive practices of Brazil and South Africa, Colombia has explained that the anti-dumping measures of other countries for the same product and origin can be considered a direct cause of the increase in dumped imports in countries that are not yet protected. From this perspective, such anti-dumping measures in other countries are the opposite of a non-attribution cause under Article 3.5. The Subdirectorate mentioned these anti-dumping measures in the section on non-attribution simply in order to record their existence, but in the absence of evidence demonstrating their injurious effects on the domestic industry, the Subdirectorate correctly limited itself to pointing them out without further analysis.

11.13. Therefore, the claim regarding the non-attribution factors under Articles 3.1 and 3.5 of the Anti-Dumping Agreement should be rejected in the light of the European Union's failure to establish that the Subdirectorate had before it evidence demonstrating that the three contested non-attribution factors were causing injury to the domestic industry.

## 12 REQUEST FOR FINDINGS

12.1. For the reasons explained in this submission, Colombia respectfully requests the Panel to reject all the European Union's claims under Articles 2.1, 2.4, 3.1, 3.2, 3.4, 3.5, 5.3, 5.8, 6.5, 6.5.1

<sup>141</sup> European Union's first written submission, paras. 326-329.

<sup>142</sup> Panel Report, *Morocco – Definitive AD Measures on Exercise Books (Tunisia)*, paras. 7.328-7.330. See also Panel Reports, *China – X-Ray Equipment*, para. 7.267; and *EU – Fatty Alcohols (Indonesia)*, para. 7.196.

<sup>143</sup> See Case C-143/14, *TMK Europe GmbH and Hauptzollamt Frankfurt (Oder)*, 16 April 2015, para. 42. See also Case C-10/12, *Transnational Company 'Kazchrome' AO*, 19 December 2013, para. 28; Case C-398/05, *AGST Draht- und Biegetechnik GmbH*, 28 February 2008, para. 51; Case C-31/15, *Photo USA Electronic Graphic Inc.*, 2 June 2016, para. 79; and Case T-157/14, *JingAo Solar Co. Ltd.*, 28 February 2017, para. 196.

<sup>144</sup> Comments by interested parties on the Essential Facts Technical Report, (Exhibit EU-17), p. 31.

<sup>145</sup> Final Technical Report, (Exhibit EU-4), p. 115.

<sup>146</sup> Final Technical Report, (Exhibit EU-4), pp. 99 and 112.

and 6.8, of the Anti-Dumping Agreement and Annex II, paragraphs 3 and 6, thereto. Consequently, Colombia considers it inappropriate to issue any recommendation under Article 19.1 of the DSU.

12.2. Colombia once again thanks the Panel and the Secretariat for all their work during these proceedings.

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**ANNEX C**

ARGUMENTS OF THE THIRD PARTIES

<b>Contents</b>		<b>Page</b>
Annex C-1	Integrated executive summary of the arguments of Brazil	62
Annex C-2	Integrated executive summary of the arguments of Japan	64
Annex C-3	Integrated executive summary of the arguments of the United States	69

**ANNEX C-1**

## INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF BRAZIL

**INTRODUCTION**

1. Brazil provides the following executive summary of its participation during the panel proceedings in this dispute.

**I. ARGUMENTS****A. Articles 5.2, 5.3, and 5.4 regarding the initiation of an anti-dumping investigation**

2. Brazil observes that it is well established under WTO practice that the quantum and quality of the information necessary for the purpose of initiating an investigation will be less demanding than that required for a final determination. It is only natural that an investigation will gradually become more precise and more complex as it advances. In this sense, later findings by the responsible authority cannot serve as a *posteriori* evidence that the initial investigation had been vitiated.

3. Brazil understands that Article 5.2 demands that the petitioner presents not the *best* information reasonably available, but, instead, presents *sufficient* information reasonably available. Brazil also recalls that according to the panel in *Argentina – Poultry Anti-Dumping Duties*

<sup>1</sup>, Article 5.3 does not impose an obligation on the investigating authority, at that stage, to review the adequacy and accuracy of those facts *per se*, but rather to review the sufficiency of the evidence to justify the initiation of an investigation.

4. Regarding the definition of "product under consideration", Brazil observes that neither Article 5.3 nor the ADA in general contains a specific methodology that investigating authorities must follow. However, as stated by the panel in *Guatemala – Cement II*<sup>2</sup>, Article 5.3 should be read in close relationship with Article 5.2, which, by its turn, includes the "complete description of the allegedly dumped products" among the necessary requirements to initiate an investigation. Panels may assess claims under Article 5.3 in order to assure that an investigating authority has conducted an objective and unbiased analysis of the facts presented by the petitioners.

5. Regarding Article 5.2 and the expression "where appropriate", Brazil understands that it should not be interpreted on the basis of Articles 2.1 and 2.2, which concern later stages in the investigation to which a higher threshold of assessment applies.

6. Finally, in respect to Article 5.4, Brazil considers that investigating authorities may have discretion to determine whether a trade or industry association is representative of domestic producers, provided that the criteria in Article 5.4 are observed.

**B. Articles 6.5 and 6.5.1 of the Anti-Dumping Agreement regarding confidentiality and "good cause shown"**

7. Brazil understands that "good cause" must be shown by the petitioner before the authority deems the information confidential. The Spanish version of the ADA reinforces this perspective, as it reads that "*toda información que sea confidencial (...) o que las partes (...) faciliten con carácter confidencial será, previa justificación suficiente al respecto, tratada como tal por las autoridades*".

8. Nevertheless, Article 6.5 does not prescribe any particular methodology that investigating authorities should take in order to assess whether "good cause" has been shown. Consequently, the type of information needed to certify "good cause" may vary from case to case. Brazil considers that justifications under the examples provided in Article 6.5 ("because its disclosure would be of

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<sup>1</sup> Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para 7.60.

<sup>2</sup> Panel Report, *Guatemala – Cement II*, para. 8.35.

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 that refer to a similar or equivalent situation, are indicative of adequate justification of "good cause shown".

9. Finally, although there is no methodology prescribed regarding "good cause shown" in the ADA, panels may examine claims under Article 6.5, as decided by the Appellate Body in *Korea – Pneumatic Valves (Japan)*<sup>3</sup>, in order to assess if investigating authorities properly determined that "good cause" was appropriately argued and substantiated.

**C. Articles 2.1, 6.8 and paragraphs 3 and 6 of Annex II of the Anti-Dumping Agreement regarding the use of the information provided by the cooperating investigated companies.**

10. In Brazil's view, investigating authorities are not entitled to reject information submitted by interested parties if the conditions of paragraph 3 of Annex II are satisfied, namely that the information provided is (i) verifiable; (ii) appropriately submitted so that it can be used without undue difficulties; (iii) supplied in a timely fashion; and, where applicable, (iv) supplied in a medium computer language requested by the investigating authority.

11. Brazil underscores that the ADA sets a high standard for determining whether an investigating authority can disregard information provided by cooperating parties, because its rules on the treatment of information are concerned not only with the level of precision of the information on which an investigation is based, but also with the guarantee of the due process rights of the parties.

12. Finally, Brazil sustains that what defines the use of "facts available" in an investigation is not the explicit and formal determination to do so, but rather the *de facto* procedure that an investigating authority adopts. Therefore, if an investigating authority does not explicitly mention recourse to "facts available", but still decides to use information other than that provided in the questionnaires, that authority shall do so in a manner consistent with Article 6.8 and Annex II of the ADA.

**D. Article 5.8 of the Anti-Dumping Agreement and "immediate termination" of investigations and Article 3.**

13. Brazil understands that Article 5.8 requires the immediate termination of the investigation in respect of an exporter for which an individual margin of dumping of zero or *de minimis* is found. Consequently, those exports must also be excluded from the injury and causation analyses under Article 3.

**E. Article 3.4 of the Anti-Dumping Agreement and injury analysis**

14. In Brazil's view, Article 3.4 sets forth a non-exhaustive and non-hierarchical list of factors relevant to the assessment of injury. Nothing in the language therein supports the conclusion that some factors are inherently and *a priori* more important than others. In fact, the relevance of each factor may vary on a case-by-case basis.

15. Additionally, Brazil sustains that investigating authorities must present an unbiased and objective examination of relevant factors, regardless of their favorable or unfavorable trend, in order to reach a balanced and unbiased evaluation of injury factors.

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<sup>3</sup> Appellate Body Report, *Korea – Pneumatic Valves (Japan)*, para. 5.399.

**ANNEX C-2****INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF JAPAN****I. ARGUMENTS RELATING TO THE DUMPING DETERMINATION****A. Use of Facts Available under Article 6.8 and Annex II of the Anti-Dumping Agreement**

1. Japan agrees with the EU that investigating authorities should as much as possible use the primary information submitted by interested parties, and should not resort to other secondary sources of information.
2. First, Japan agrees there is an important distinction between primary source information and secondary source information when applying facts available. To the extent that an investigating authority has requested the information about export prices from exporters, the exporters become the primary source of such information. As Article 6.8 stipulates, if the exporters refuse access to, or otherwise do not provide, necessary information within a reasonable period or significantly impede the investigation, then Annex II must be applied to reject and replace that information. Thus, if an investigating authority does not rely on such information submitted by the exporters, the authority must comply with the requirements stated in Article 6.8 and Annex II of the Anti-Dumping Agreement.
3. The information from the exporters themselves responding to the questionnaire is the most probative information about the specific export transactions (including export price) for each such exporter. Information sourced from databases (including custom data) may be collected for different purposes and with different coverage. The key is the source's proximity to the original source of the relevant information.
4. As to the criteria for when an investigating authority shall take into account the information actually submitted by an interested party or not, the Anti-Dumping Agreement is clear. Paragraph 3 of Annex II requires that the information must be: (a) "verifiable", (b) "appropriately submitted so that it can be used ... without undue difficulties", (c) "supplied in a timely fashion", and (d) "where applicable, ... supplied in a medium or computer language requested by the authorities". In *US – Hot-Rolled Steel*, the Appellate Body explained that if the conditions are satisfied, "investigating authorities are not entitled to reject information submitted" by interested parties, and cannot use facts available.<sup>1</sup>
5. Second, Japan considers that the investigating authority must communicate to the interested party specifically and clearly what is the "necessary information" requested, and what problems (if any) may exist with that information. "Necessary information" relates to specific information held by an interested party that is requested by an authority for the purpose of making determinations.<sup>2</sup>
6. Japan considers that this finding applies when an investigating authority establishes certain parameters, methodology or specific requirements for "necessary information" during the investigation, or changes them during the investigation. The investigating authority cannot collect information from different sources and then pick what it likes best.
7. Third, Japan notes that Article 6.8 and Annex II apply regardless of whether or not the investigating authority chooses to categorize its approach as "recourse to the 'facts available' mechanism". An investigating authority does not have discretion to ignore these requirements simply by avoiding the use of the words "facts available" in explaining its conduct instead of declaring that it relied on facts available. When an investigating authority does not rely on the

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<sup>1</sup> Appellate Body Report, *US – Hot-Rolled Steel*, para. 81.

<sup>2</sup> Panel Reports, *Korea – Stainless Steel Bars*, para. 7.185; *EC – Salmon (Norway)*, para. 7.343.



requested primary source information, Article 6.8 specifically provides that "[t]he provision of Annex II *shall* be observed in the application of this paragraph". (emphasis added)

8. While Colombia cites *Ukraine – Ammonium Nitrate* in this regard, this finding does not provide guidance for this dispute. In that earlier dispute, the panel found that Russia failed to show that the Ukrainian investigating authority had actually resorted to facts available under Article 6.8, since the authority specifically referred to Article 2.2.1.1 of the Anti-Dumping Agreement as the basis for its determination. This provision provided an independent legal basis for choosing factual information separate from Article 6.8 and Annex II. Therefore, that decision does not apply here, where the investigating authority did not refer explicitly to any specific provision about the selection of information as being the basis for their rejection.

#### **B. Price Information under Article 2 of the Anti-Dumping Agreement**

9. Japan believes that MINCIT's refusal to take into account product differences among different product types cannot be justified just because the second source information used for export price did not provide distinctions based on product type.
10. In this regard, the parties seem to agree that there is no methodological guidance in Article 2.4 specifically as to how due allowance for differences affecting price comparability is to be made. Japan considers that comparison methodologies used in specific cases may have certain restrictions depending on the nature of particular price information to be compared. But the investigating authority cannot itself create an information gap, and then use that self-created gap to justify a refusal to make due allowance. The underlying primary source information from the exporters would have permitted a comparison based on different product types, but that information was unavailable only because of the flawed application of "facts available" as discussed in the prior section.
11. To the extent that the export price sourced from custom declarations does not comply with Article 6.8 and Annex II, irrespective of any violation of Article 2.4, Japan agrees with the EU that the export price which is based on an incorrect and legally flawed information source could not constitute a proper basis for dumping calculation under Article 2.1 of the Anti-Dumping Agreement, and thus the use of such incorrect information is inconsistent with Article 2.1 as well.

#### **II. ARGUMENTS RELATING TO THE INJURY DETERMINATION**

12. Japan agrees with the EU that any exporter under investigation not dumping or found to be below *de minimis* threshold must be excluded from the injury and causation analysis under Article 3 of the Anti-Dumping Agreement. If that exporter's sales as a whole are found not to be dumped, as a legal matter that exporter has not been dumping at all.
13. The relevant text clearly supports this understanding. The first sentence of Article VI:1 of the General Agreement on Tariffs and Trade 1994 ("GATT 1994") provides that "dumping ... is to be condemned if it causes ... material injury" (emphasis added). The second sentence of Article VI:1 goes on to clarify that this "dumping" occurs only when the "a product" is being introduced at less than its normal value. Article 2.1 of the Anti-Dumping Agreement repeats this definition of when "a product" can be deemed as "dumped". The dumping must therefore be linked to the specific product that is being dumped.
14. Articles 3.1, 3.2, 3.4 and 3.5 of the Anti-Dumping Agreement consistently provide that the relevant analyses shall be conducted for "the dumped imports". The analysis must be on the volume of the "dumped imports" under Article 3.1 and Article 3.2, first sentence. The analysis must be on the price effects of the "dumped imports" under Article 3.1 and Article 3.2, second sentence. The impact on the domestic industry must be of "the dumped imports" under Article 3.1 and Article 3.4, first sentence. Finally, Article 3.5, first sentence, then stresses that "the dumped imports" – particularly the "effects of dumping" – are causing the injury. The repeated emphasis on "dumped imports" – and not all imports – sets forth a clear and unambiguous limiting principle on the basis for an injury finding under Article 3.

15. Accordingly, dumped imports should not be condemned for material injury that is not attributable to those dumped imports. If the subject goods being assessed for possible injury include non-dumped imports, the goods being analyzed are over-inclusive. And the injury and causation analysis of more than just the "dumped imports" departs from the text of Article 3 and creates the risk of false attribution of the injury to the domestic industry to goods that are in fact not "dumped" rather than just to the "dumped imports" that are properly subject to the anti-dumping duties.
16. Previous findings by the Appellate Body and panels underline this understanding. In *EC – Bed Linen (Article 21.5 – India)*, the Appellate Body confirmed that "[n]one of these provisions of the Anti-Dumping Agreement can be construed to suggest that Members may include in the volume of dumped imports the imports from producers that are not found to be dumping".<sup>3</sup> The panel in *EC – Fasteners (China)* found that "[t]he text of the AD Agreement is perfectly clear in this regard ... the consideration of 'dumped imports' for purposes of making an injury determination consistent with Articles 3.1, 3.2, 3.4 and 3.5 of the AD Agreement entails the consideration of only those imports for which a margin of dumping greater than *de minimis* is established in the course of the investigation".<sup>4</sup>
17. These prior decisions reflect the basic idea of anti-dumping disciplines that all exporters found not to be exporting "dumped" goods are required to be excluded from the scope of investigation. There is no basis for including exporters found not to be dumping just because their export volume is smaller than other exporters. The analysis must exclude those exporters found not to be dumping, regardless of their relative share of the market. The authority cannot ignore the provision of Article 5.8 that certain levels of below normal value pricing are considered legally *de minimis* and should not be considered to be "dumped". The references in Articles 3.1, 3.2, 3.4 and 3.5 are all to "dumped imports", and it makes no sense to read these provisions to include imports from those exporters affirmatively found not to be dumping. That some exporters in a country are found to be dumping does not establish that all exports from that country should be deemed as dumped.
18. Japan considers that Article 5.8 provides important context that supports this interpretation. The text of Article 5.8 as interpreted by the Appellate Body demonstrates that an individual exporter for which a margin of dumping of zero or *de minimis* is determined should be excluded from the *investigation* as a whole. The rationale for such complete exclusion from the remaining stages of the investigation is that imports from such exporter with a margin of dumping of zero or *de minimis* cannot be considered as "dumped" in that investigation.
19. Moreover, Japan does not consider that the term "dumped imports" in Article 3 admits more than one permissible interpretation within the meaning of Article 17.6(ii). That Colombia can craft a possible interpretation does not make a flawed interpretation permissible. An interpretation that uses context to obscure the plain meaning of the text, that using other agreements to obscure the meaning of the Anti-Dumping Agreement, and relies on negotiating history does not create a permissible interpretation of the text.
20. Beyond these comments on the proper scope of the injury investigation, Japan would also like to make a general observation about the structure of injury determinations under Article 3. Article 3 of the Anti-Dumping Agreement (titled "Determination of Injury") contains several paragraphs setting out an investigating authority's obligations with regard to various aspects of an injury determination in anti-dumping investigations.
21. As the Appellate Body said in *China – GOES*, various paragraphs of Article 3 "contemplate a logical progression of inquiry leading to an investigating authority's ultimate injury and causation determination".<sup>5</sup> The inquiry set forth in Article 3.2 and the examination required under Article 3.4 "are necessary in order to answer the ultimate question" in Article 3.5 "as to whether subject imports are causing injury to the domestic industry".<sup>6</sup>

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<sup>3</sup> Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 112.

<sup>4</sup> Panel Reports, *EC – Fasteners (China)*, para. 7.354; *EC – Salmon (Norway)*, para. 7.625; *Argentina – Poultry Anti-Dumping Duties*, para. 7.300.

<sup>5</sup> Appellate Body Report, *China – GOES*, para. 128.

<sup>6</sup> *Ibid.* paras. 128, 143 and 149.

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22. Based on this overall structure of Article 3, Japan agrees with EU's general arguments that, for the injury determination to be reasoned and adequate, and based on positive evidence and an objective assessment as required under Article 3.1, each step under Articles 3.2, 3.4 and 3.5 must consist a logical progression leading to an ultimate injury and causation determination. Each analytic step needs to be logically consistent, and reasonably supports the final conclusion of injury and causation. The reasoning must be internally consistent, must consider all of the relevant evidence, and must establish the required "causal relationship" between the dumped imports and the injury.
  23. With regard to Article 3.2 specifically, the analysis of price effects must reflect the dynamics of how prices change over time and must show how the adverse price domestic trends are "the effect of" the import prices. As the Appellate Body has stressed, it is critical to assess "how these prices interact over time".<sup>7</sup> The broader the time periods considered, the less likely the analysis will reveal what is truly important for the analysis under Article 3.2.
  24. Turning next to Article 3.4, a finding of material injury must rest on an actual "evaluation" of all of the enumerated factors, and not just a list of them. This evaluation needs to serve as the "meaningful basis" for the eventual finding of causation under Article 3.5.<sup>8</sup> A mere listing of positive factors without any discussion will rarely be sufficient.
  25. Finally, with regard to Article 3.5, the text requires careful analysis and not simplistic conclusions. The investigating authority must provide written analysis that shows how it "demonstrated" the causal link based on a careful "examination" of the record. It is not enough to note a mere correlation, or to assert a connection that has not actually been demonstrated through careful examination of "all relevant evidence", including contrary evidence. That is precisely why Article 3.5 specifically requires that other factors be examined, and they "must not be attributed" to the dumped imports. For the non-attribution analysis, it is not enough to describe other factors, and then to dismiss them without a complete and adequate explanation why.
  26. These specific obligations are important both individually, and in how they fit together. The overall finding that dumped imports caused injury under Article 3 must tie these different elements into an internally consistent, persuasive, fact-based written explanation by the investigating authority. Japan understands that this is the logical progression contemplated in Article 3, as found by the Appellate Body.

### **III. ARGUMENTS RELATING TO THE CONFIDENTIAL INFORMATION**

27. First, with regard to the required level of identification of information for claims under Articles 6.5 and 6.5.1, Japan considers that the burden to identify the relevant information is on a claimant so that a respondent can duly provide its rebuttal and panels can then resolve any disputes. Having said that, Japan does not consider that a claimant must always prepare separate lists of items of relevant information for the purpose of identification, as Colombia suggests. How a claimant identifies the relevant information for claims under Articles 6.5 and 6.5.1 depends on the particular circumstances of each case, and needs case-by-case analysis.
28. Second, Japan would like to comment on the legal standard and elements under these provisions regarding the "good cause" to be shown and the non-confidential summaries to be provided. Japan considers that, while the confidentiality of information submitted by the interested parties should be fully respected, when an investigating authority is allowed to treat as confidential the information submitted by applicant(s) without confirming and assessing the good cause shown or requiring non-confidential summaries, other interested parties cannot have a clear understanding about the information against which they need to defend their interests. Such defects will deprive the interested parties of due process.
29. More specifically, with regard to Article 6.5, the Appellate Body has further clarified that the alleged "good cause" must constitute "a reason sufficient to justify the withholding of

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<sup>7</sup> Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.160.

<sup>8</sup> Appellate Body Report, *China – GOES*, paras. 145 and 154 (quoted in Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.211).

information from both the public and from the other parties interested in the investigation", who would otherwise have a right to view this information under Article 6.<sup>9</sup>

30. Considering the balance between protecting the confidentiality of the information and the due process rights of the interested parties, even when commercial and financial information of a domestic producer is supported with a "good cause" shown and can be treated as confidential information, such information should not be simply redacted. Instead, investigating authorities should provide certain narratives or alternative summary presentations of numerical information (such as certain indexes) that represent the original information so that the interested parties can understand from such narrative or summary whether the original information is correct or whether the original information can actually support the particular arguments or findings based on such summarized information, in light of the particular context of the information. In other words, the interested parties need sufficiently detailed summaries of the original information to be able to gain a reasonable understanding of the content and to defend their interests. In this regard, Japan does not think that the "numerical" or "individualized" nature of information necessarily prevents it from being summarized/supplemented by certain narratives or indexes in every case.
31. Even in cases where it was not possible for a relevant interested party to furnish a non-confidential summary for such information, the investigating authority must ensure that the interested party who submitted the relevant information identify the exceptional circumstances excusing this failure, provide a statement explaining the reasons why summarization was not possible, and scrutinize such statements to determine whether they established exceptional circumstances and whether the reasons given appropriately explained why, under the circumstances, no summary that permitted a reasonable understanding of the information's substance was possible.
32. These obligations imply that, if "good cause" has not already been shown, the investigating authority must make a request to the submitting party to do so. Japan considers that the aforementioned obligation of an investigating authority to scrutinize the party's showing of the good cause would require "the party's showing" of the good cause as a prerequisite, and thus would necessarily entail an obligation to request that the submitting party show the good cause if it had not otherwise done so when originally submitting the information. The text requires the good cause to be "shown", and not just found. Accordingly, someone must "show" the good cause, and contextually the person making the request is logically in the best position to make that showing. The investigating authority should be neutral between the differing perspectives of the parties, and cannot make the case for the submitting party when the submitting party did not seek to establish good cause.

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<sup>9</sup> Appellate Body Report, *EC – Fasteners (China)*, para. 537.

**ANNEX C-3****INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE UNITED STATES****I. CLAIMS RELATING TO THE DUMPING DETERMINATION**

1. Article 2.1 is a definitional provision that, "read in isolation, do[es] not impose independent obligations." The definitions set out in Article 2.1 certainly play an important role in the interpretation of other provisions of the Anti-Dumping Agreement, but they do not specify how "export price" is to be determined. The determination of export price is governed by Articles 2.3 and 2.4 of the Anti-Dumping Agreement.

2. Article 6.8 and Annex II set out the conditions in which an investigating authority may make a determination on the basis of facts available. Although the conditions set out in Article 6.8 and Annex II play an important role in defining when "preliminary and final determinations, affirmative or negative, may be made on the basis of the facts available", Article 6.8 and Annex II also do not specify how "export price" is to be determined. Therefore, Article 2.1 does not impose an independent obligation on Members regarding the determination of "export price", and Article 6.8 and Annex II do not address how "export price" is to be determined.

3. Next, Article 6.8 permits an investigating authority to make a determination on the basis of facts available when an interested party refuses access to, or otherwise does not provide, information that is necessary to an investigation within a reasonable period of time, or significantly impedes the investigation.

4. Annex II, paragraph 3, contains a number of conditions which, if met, indicate to an investigating authority that submitted information "should be taken into account when determinations are made" provided that the information is: (1) "verifiable"; (2) "appropriately submitted so that it can be used without undue difficulties"; (3) "supplied in a timely fashion"; and (4) where applicable, "supplied in a medium or computer language requested by the authorities." If the information submitted by the interested party fails to meet one of the conditions set out in paragraph 3, neither Article 6.8 or Annex II indicate that the investigating authority should take into account that information.

5. Annex II, paragraph 6, uses similar language: If the information submitted by an interested party is not accepted by the investigating authority, then "the supplying party should be informed forthwith of the reasons therefor, and should have any opportunity to provide further explanations within a reasonable period ... ". If the interested party provides further explanations and the authority does not consider those explanations satisfactory, "the reasons for the rejection of such evidence or information should be given in any published determinations." Therefore, while the text of Annex II, paragraphs 3 and 6, urge the investigating authority to take into account, or not disregard, information on the record that meets the criteria of those provisions, the ordinary meaning of these provisions does not require Members to utilize that information.

6. In sum, the Anti-Dumping Agreement provides that when an interested party refuses access to, or otherwise does not supply necessary information, or significantly impedes the investigation, the investigating authority may resort to the facts available to make its determination. However, where information is provided that is verifiable, appropriately submitted so that it can be used without undue difficulty, supplied in a timely fashion, and, where applicable, supplied in the requested medium, this information should be taken into account.

7. Finally, Article 2.4 obligates an investigating authority to make a "fair comparison" between the export price and the normal value when determining the existence of dumping and calculating a dumping margin. The text of Article 2.4 presupposes that the appropriate normal value has been identified. Once normal value and export price have been established, the investigating authority is required to select the proper sales for comparison (sales at the same level of trade and as nearly as possible the same time) and make appropriate adjustments to those sales (due allowances for differences which affect price comparability).

8. However, if the exporters have not provided evidence demonstrating to the authorities that there is a difference affecting price comparability, or argument demonstrating that existing information on the record reflects a difference affecting price comparability, there would be no basis for the investigating authority to make an adjustment and no requirement to do so. An authority thus is not obligated to accept a request for an adjustment that is unsubstantiated.

9. A determination of whether the obligation in Article 2.4 has been met will depend on the specific facts and circumstances at issue. Therefore, consistent with Article 11 of the DSU and Article 17.6(i) of the Anti-Dumping Agreement, the question of whether Colombia failed to make reasonable adjustments will depend on whether the Panel determines that the European Union has shown that MINCIT's findings could not have been made by an unbiased and objective investigating authority.

## II. CLAIMS RELATING TO THE INJURY AND CAUSATION DETERMINATIONS

10. Article 3 focuses on the investigating authority's injury analysis of the effect or impact of "the dumped imports". Article 2.1 defines dumped products, "[f]or the purposes of [the Anti-Dumping] Agreement", on a countrywide basis. The references to "the dumped imports" throughout Article 3 therefore concern all imports of the product from the countries subject to the investigation.

11. Article 5.8, however, requires an authority to terminate an anti-dumping investigation with respect to any exporter or producer for which an individual margin of dumping is determined to be zero or *de minimis*. Therefore, 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".

12. The United States recalls that prior disputes have addressed this issue. In *Argentina – Poultry Anti-Dumping Duties*, the panel considered that "the ordinary meaning of ... the term 'dumped imports' [in Article 3] refers to all imports attributable to producers or exporters for which a margin of dumping greater than *de minimis* has been calculated. The term 'dumped imports' excludes imports from producers/exporters found in the course of the investigation not to have dumped". According to the panel, the investigating authority's failure to exclude the imports of two companies found not to have been dumped breached Articles 3.1, 3.2, 3.4, and 3.5 of the Anti-Dumping Agreement. In addition, the Appellate Body in *EC – Bed Linen (Article 21.5 – India)* recognized that "whatever methodology investigating authorities choose for determining the volume of dumped imports, if that methodology fails to ensure that a determination of injury is made on the basis of 'positive evidence' and involves an 'objective examination' of *dumped* imports – rather than imports that are found *not* to be dumped – it is not consistent with paragraphs 1 and 2 of Article 3".

13. For the above reasons, the United States agrees that the references to "the dumped imports" throughout Article 3 exclude the imports of any exporter or producer for which an individual margin of dumping is determined to be zero or *de minimis*.

14. Next, Article 3.4 mandates that "[t]he examination of the impact of dumped imports on the domestic industry concerned shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry" and lists specific economic factors to be evaluated. Article 3.4 indicates that its list of factors and indices "is not exhaustive, nor can one or several of these factors necessarily give decisive guidance".

15. Article 3.4 does not dictate the methodology that should be employed in conducting the examination of the impact of dumped imports on the domestic industry, or the manner in which the results of this examination are to be set out in the record of the investigation. A determination, through its demonstration of why the authority relied on the specific factors it found to be material in the case, may disclose why other factors on which it did not make specific findings were accorded little weight or deemed not relevant.

16. Finally, nothing in Article 3.4 requires an authority to reach a negative determination of injury merely because a domestic industry has reported a number of positive or improving economic indicators during the period of investigation. Nor does it follow as matter of logic from a conclusion

that an industry is being injured that every indicator must be negative. As the panel in *EU – Footwear (China)* reasoned, "it [is] clear that it is not necessary that all relevant factors, or even most or a majority of them, show negative developments in order for an investigating authority to make a determination of injury". An authority thus is not required to find that a certain number of injury factors declined during the period of investigation in order to make an affirmative determination of injury.

### **EXECUTIVE SUMMARY OF U.S. THIRD PARTY ORAL STATEMENT**

17. Article 3.1 sets forth two overarching obligations. The first obligation is that the injury determination must be based on "positive evidence". The second obligation is that the injury determination must involve an "objective examination" of the volume of the dumped imports, their price effects, and their impact on the domestic industry.

18. Although Article 3.1 indicates that these obligations extend to every aspect of an investigating authority's injury analysis, Article 3.1 does not articulate the analysis that an authority must undertake to determine whether the "volume of the dumped imports", "the effect of the dumped imports on prices in the domestic market for like products", or "the consequent impact of these imports on domestic producers of such products", cause injury. It is the succeeding paragraphs – Articles 3.2, 3.4, and 3.5 – that do so.

19. For example, Article 3.2 addresses the investigating authority's consideration "[w]ith regard to the volume of the dumped imports" and "[w]ith regard to the effect of the dumped imports on price". Article 3.4 discusses the factors that an authority should evaluate in examining the impact of dumped imports on the domestic industry. And Article 3.5 specifically addresses the causation and non-attribution analyses.

20. The references to "the dumped imports" throughout Article 3 exclude the imports of any exporter or producer for which an individual margin of dumping is determined to be zero or *de minimis*. However, while it is true that an investigating authority breaching one or more of the obligations of Articles 3.2, 3.4, and 3.5 consequentially breaches Article 3.1, it is not necessarily true that an authority breaching one or more of the obligations of Article 3.1 consequentially breaches Articles 3.2, 3.4, and 3.5.

### **EXECUTIVE SUMMARY OF U.S. THIRD PARTY RESPONSES TO QUESTIONS**

#### **I. CLAIMS UNDER ARTICLE 5.3**

21. Article 5.4 provides that an investigation shall not be initiated unless the authority has determined that the application for relief has been made by or on behalf of the domestic industry. Therefore, whenever an application is submitted by an entity on behalf of the domestic industry, an authority may initiate an investigation only after it has determined that the application is supported by the domestic industry according to the requirements set out in Article 5.4.

22. Under Article 5.2, when an entity files an application "on behalf of the domestic industry, the application shall identify the industry on behalf of which the application is made by a list of all known domestic producers of the like product (or associations of domestic producers of the like product)". Article 5.2 makes clear that "[s]imple assertion [in the application], unsubstantiated by relevant evidence, cannot be considered sufficient to meet the requirements of this paragraph". Further, under Article 5.3, an investigating authority must "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". Therefore, the operative standard by which an authority shall determine under Article 5.4 whether an entity's application has been made on behalf of the domestic industry is "sufficient evidence".

23. The ordinary meaning of the term "sufficient" is defined, in part, as "[a]dequate (esp. in quantity or extent) for a certain purpose; enough (*for* a person or thing, *to do* something)". Article 5.3 requires an authority to "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". Article 6.6 indicates that "[e]xcept in circumstances provided for in [Article 6.8 regarding the use of facts available], the authorities shall during the course of an investigation satisfy

themselves as to the accuracy of the information supplied by interested parties upon which their findings are based". Therefore, to the extent an authority relies upon representations by a trade or business association regarding the support for an application, that authority must satisfy itself as to the accuracy and adequacy of those representations. Where it does so, an authority has acted consistent with the obligations set out in Article 5.4.

24. Finally, 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". The information provided in an application need not be of the same quantity or quality that would be necessary to make a preliminary or final determination. The term "where appropriate" in Article 5.2(iii) thus anticipates that there may be circumstances in which it is "appropriate" for the applicant to submit third-country sales or constructed value data in its application as evidence of normal value.

## **II. CLAIMS UNDER ARTICLES 6.5 AND 6.5.1**

25. The language of Article 6.5 does not obligate an authority to "request" that a party providing information show good cause that the information should be accorded confidential treatment. As the panel in *EU – Footwear (China)* recognized, "there is nothing in Article 6.5 which would require any particular form or means for showing good cause, or any particular type or degree of supporting evidence which must be provided" and "the nature of the showing that will be sufficient to satisfy the 'good cause' requirement will vary, depending on the nature of the information for which confidential treatment is sought". The panel in *Korea – Stainless Steel Bars* further observed that "Article 6.5 does not specify the manner in which 'good cause' is to be established. This lack of specificity necessarily means that the exact manner in which 'good cause' should be established is not prescribed". Instead, "the nature and the degree of the requirement to show good cause depends on the information concerned".

## **III. CLAIMS UNDER ARTICLE 2.1, ARTICLE 6.8, AND ANNEX II**

26. Article 6.8 and Annex II establish the expectation that an investigating authority will use the information that it requires from an interested party to the extent that such information can be used. Article 6.8 indicates that an authority may make a determination based on information not provided by an interested party, but only where the "interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation". Paragraph 1 of Annex II indicates that an authority should "specify in detail the information required from any interested party" and "ensure that the party is aware that if information is not supplied within a reasonable time, the authorities will be free to make determinations on the basis of the facts available". Therefore, given Article 6.8 and paragraph 1 of Annex II, where an interested party provides access to necessary information within a reasonable period of time and does not otherwise significantly impede an investigation, the information so provided should be used by the authority.

27. Paragraphs 5 and 6 of Annex II further indicate that an authority should not arbitrarily disregard the information provided by an interested party. According to paragraph 5, even when such information "may not be ideal in all respects, this should not justify the authorities from disregarding it, provided the interested party has acted to the best of its ability". Meanwhile, paragraph 6 notes that where "the evidence or information is not accepted, the supplying party should be informed of the reasons therefor, and should have the opportunity to provide further explanations within a reasonable period".

28. In sum, an investigating authority should begin its calculation with an examination of the sales transaction data submitted by the interested parties in response to the authority's request for this information absent a finding that this information could not be used for the reasons set forth in Article 6.8 and Annex II. The Anti-Dumping Agreement establishes the expectation that an authority will use the information that it requires from an interested party, even if that information is not ideal in all respects. The fact that an authority makes no explicit and formal determination about the use of facts available does not release it from this requirement.



**IV. CLAIMS UNDER ARTICLE 3 AND ARTICLE 3.4**

29. Article 5.8 requires an authority to terminate an anti-dumping investigation where it determines the margin of dumping is *de minimis*. Since the Article 3 injury determination can only be rendered as part of an "investigation", once an investigation has been terminated under Article 5.8, the vehicle for making any injury determination likewise terminates. Therefore, where an authority terminates an investigation of a country, producer, or exporter under Article 5.8 based on a determination that the margin of dumping is *de minimis*, this termination results in the exclusion of the imports of that country, producer, or exporter from the injury analysis under Article 3 of the effect or impact of "the dumped imports".

30. Article 3.4 mandates that "[t]he examination of the impact of dumped imports on the domestic industry concerned shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry" and lists specific economic factors to be evaluated. Compliance with Article 3.4 requires the collection of a broad range of information concerning domestic industry performance, including sales, profits, output, market share, productivity, return on investments, utilization of capacity, cash flow, inventories, employment, wages, growth, and ability to raise capital or investments.

31. Article 3.4 indicates that its list of factors and indices "is not exhaustive, nor can one or several of these factors necessarily give decisive guidance". Nothing in Article 3.4, or any other provision of the Agreement, provide further guidance on which factors may "give decisive guidance" as to the impact of dumped imports on the domestic industry. Article 3.4 also does not dictate the methodology that should be employed by the authority, or the manner in which the results of this evaluation are to be set out. Accordingly, none of the factors listed in Article 3.4 is "key" relative to any of the other factors listed in this provision. Indeed, the importance of certain factors may vary significantly from case to case, and the relative weight that an authority may give to certain factors in an investigation has no bearing on their importance vis-à-vis other factors addressed in Article 3.4.

32. Finally, Article 3.4 does not require an authority to explicitly analyze the impact of each of the factors with a "trend favourable" for the domestic industry as part of its injury analysis. For example, in *EC – Tube or Pipe Fittings*, the Appellate Body report explained that an investigating authority need not make specific findings for every factor set forth in Article 3.4. The report went on to observe that, while it is mandatory to evaluate all fifteen factors set forth in Article 3.4, "because Articles 3.1 and 3.4 do not regulate the *manner* in which the results of the analysis of each injury factor are to be set out in the published documents, ... it is not required that in every anti-dumping investigation a separate record be made of the evaluation of each of the injury factors listed in Article 3.4".

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