



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

ARBITRATION UNDER ARTICLE 25 OF THE DSU

AWARD OF THE ARBITRATORS

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ABBREVIATIONS USED IN THIS AWARD

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

CASES CITED IN THIS AWARD

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

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

Parties:

Colombia
European Union

Third Parties:

Brazil	Japan
China	Russian Federation
Honduras	Türkiye
India	United States

Arbitrators:

José Alfredo Graça Lima, Chairperson
Alejandro Jara
Joost Pauwelyn

1 INTRODUCTION

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

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

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

1.4. On 29 August 2022, the Panel issued the final Panel Report in English to the parties.⁵ Following a communication from Colombia requesting the Panel to suspend its work in order to facilitate arbitration under the Agreed Procedures⁶, the Panel, on 13 September 2022, instructed the Dispute Settlement Registry to "transmit immediately the original English language version of the final Panel Report ... to the pool of [MPIA] arbitrators"⁷, pursuant to the Additional Working Procedures of the Panel to facilitate arbitration under Article 25 of the DSU (the Panel's Additional Working Procedures).⁸ On 16 September 2022, the Panel transmitted the final Panel Report in the

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

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

³ WT/DS591/3.

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

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

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

⁷ WT/DS591/6, p. 2.

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

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

1.5. In its Report, the Panel found that:

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

⁹ WT/DS591/6, p. 2.

¹⁰ Panel Report, para. 8.1.a.

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

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

¹¹ Panel Report, para. 8.1.b.

¹² Panel Report, para. 8.1.c.

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

- e. With respect to the European Union's claims concerning MINCIT's injury and causation determinations:
- i. the European Union had established that Colombia acted inconsistently with its obligations under Articles 3.1, 3.2, 3.4, and 3.5 of the Anti-Dumping Agreement because MINCIT included in its injury and causation determinations imports from the exporters that were determined to have: (a) final *de minimis* margins of dumping (Clarebout (Belgium), Agristo (Belgium), and Other Companies (Belgium)); and (b) final *negative* margins of dumping (Ecofrost (Belgium) and Farm Frites (the Netherlands)); and
 - ii. having found that Colombia acted inconsistently with its obligations under Articles 3.1, 3.2, 3.4, and 3.5, the Panel was not called upon to make further findings with respect to the other grounds presented by the European Union in support of its claims challenging MINCIT's analysis of the "price effects" under Articles 3.2 and 3.1; the impact on domestic industry under Articles 3.4 and 3.1; and the causal link under Articles 3.5 and 3.1.¹⁴

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

1.7. On 6 October 2022, Colombia notified the DSB of its decision to initiate an arbitration under Article 25 of the DSU through a "Notification of an Appeal" pursuant to Article 25 of the DSU, paragraph 5 of the Agreed Procedures, and Rule 20 of the Working Procedures for Appellate Review.¹⁶ On the same day, Colombia filed its written submission. Colombia's Notice of Appeal, together with the Panel Report, was circulated to Members on 10 October 2022.¹⁷

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

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

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

¹³ Panel Report, para. 8.1.d.

¹⁴ Panel Report, para. 8.1.e.

¹⁵ Panel Report, para. 8.2.

¹⁶ Hereafter referred to as "Colombia's Notice of Appeal".

¹⁷ WT/DS591/7 and WT/DS591/7/Add.1.

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

¹⁹ WT/DS591/8.

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

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

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

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

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

1.13. The hearing was held in person on 15 November 2022 at the premises of the WTO. The parties and six third parties (Brazil, China, Japan, the Russian Federation, Türkiye, and the United States) attended the hearing. The parties and five third parties²³ made oral statements and/or responded to questions. Pursuant to the Additional Procedures for BCI Protection and Partial Public Viewing of the Hearing, the opening statements of the European Union, the Russian Federation, and the United States were video recorded and subsequently posted for viewing by registered viewers on the WTO website.²⁴ On 16 November 2022, we held a discussion with the other members of the pool of MPIA arbitrators pursuant to paragraph 5 of the MPIA and paragraph 8 of the Agreed Procedures.²⁵

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

2 ARGUMENTS OF THE PARTIES

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

3 ARGUMENTS OF THE THIRD PARTIES

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

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

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

²⁴ The video recording is available at

https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds591_e.htm.

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

4 ANALYSIS OF THE ARBITRATORS

4.1 Issues on appeal

4.1. We address the following issues on the basis of claims raised on appeal by Colombia²⁶:

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

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

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

4.2.1 Introduction and Panel findings

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

²⁶ Colombia's Notice of Appeal, Annex B-1.

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

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

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

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

Article 5

Initiation and Subsequent Investigation

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

...

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

...

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

(underlining added)

4.5. The Panel found "an explicit connection or link" between Articles 5.2(iii) and 5.3.³⁰ The Panel noted that, under Article 5.2(iii), the possibility of providing third-country sales prices and constructed value was, "*unlike the case of domestic sales prices*, textually limited to 'where' this is 'appropriate' and forms part of a parenthetical text".³¹ For the purposes of an authority's examination under Article 5.3, the Panel found that the use of the phrase "where appropriate" implies, "at a minimum, the exercise of judgment as to the fitness, suitability, or 'appropriateness', of using third-country sales prices, *instead of domestic sales prices*, in light of the specific situation at hand".³² The Panel therefore disagreed with Colombia's interpretation that the phrase "where appropriate" indicates "that an applicant enjoys complete 'free choice' to submit any information that it desires for calculating normal value", noting that it would deny any effect to the meaning or placement of "where appropriate", contrary to the principle of effective treaty interpretation.³³

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

³⁰ Panel Report, para. 7.63.

³¹ Panel Report, para. 7.65. (emphasis original)

³² Panel Report, para. 7.69. (emphasis original)

³³ Panel Report, para. 7.70.

³⁴ Panel Report, para. 7.73.

³⁵ Panel Report, para. 7.73.

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

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

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

4.8. The parties agree that our assessment of whether the Panel's specific findings under Articles 5.2(iii) and 5.3 constitute a legal error must be guided by Article 17.6.³⁸ This is the case even though Colombia did not file a separate claim on appeal under Article 17.6. Article 17.6 is relevant and applies to any interpretation of the Anti-Dumping Agreement, including ours under Articles 5.2(iii) and 5.3.

Article 17

Consultation and Dispute Settlement

17.6 In examining the matter referred to in paragraph 5:

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

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

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

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

³⁷ Panel Report, para. 7.78.

³⁸ Parties' responses to questioning at the hearing.

³⁹ Panel Report, para. 7.4.

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

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

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

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

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

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

⁴¹ Panel Report, para. 7.286.

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

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

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

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

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

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

4.17. The European Union maintains that the core legal issue is not the interpretation of the phrase "where appropriate" in Article 5.2(iii), but rather whether the investigating authority, in accordance with Article 5.3, examined the evidence provided in the application to determine if it was adequate and sufficient to justify the initiation of the investigation.⁴⁹ For the European Union, the Panel correctly applied interpretative rules⁵⁰, and did not disregard or misinterpret the requirements under

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

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

⁴⁵ Colombia's written submission, para. 4.23.

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

⁴⁷ Colombia's written submission, paras. 4.18-4.19 and 4.24.

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

⁴⁹ European Union's written submission, para. 30.

⁵⁰ European Union's written submission, paras. 36 and 40.

Articles 5.2(iii) and 5.3.⁵¹ The European Union also disagreed with Colombia that the Panel's interpretation leads to empty formalism or an unworkable substantive test.⁵²

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

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

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

4.21. Second, the fact that the phrase "where appropriate" attaches to third-country sales prices and constructed normal value indicates to us that, as a general matter, domestic sales prices are to be accorded greater evidentiary value since an assessment as to "appropriateness" with regard to such prices is not required.⁵⁷ Colombia argues that the fact that the language in Article 5.2(iii) "stands in stark contrast" to the detailed language in Article 2.2 "strongly suggests" that the drafters did not intend the "strict hierarchy" in Article 2.2 to apply in the context of Article 5.2.⁵⁸ We agree. However, recognizing the evidentiary value of domestic sales prices does not amount to importing the requirements or a "strict hierarchy" from Article 2.2 into Article 5.2(iii). As noted, in the context of initiation of an investigation under Article 5.3, all that is required is that the evidence in the

⁵¹ European Union's written submission, paras. 43-48.

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

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

⁵⁴ Panel Report, *EC – Bed Linen*, para. 6.198.

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

⁵⁶ Colombia's written submission, paras. 4.20, 4.52, and 4.79.

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

⁵⁸ Colombia's written submission, paras. 4.43-4.44.

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

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

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

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

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

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

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

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

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

⁶⁰ Panel Report, para. 7.70.

⁶¹ Colombia's written submission, paras. 4.45-4.46.

⁶² Panel Report, para. 7.70.

⁶³ Colombia's written submission, paras. 4.18-4.19 and 4.24.

⁶⁴ Colombia's written submission, paras. 4.50-4.65 and 4.84-4.89.

⁶⁵ European Union's written submission, paras. 24-28.

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

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

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

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

4.2.5 Conclusion

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

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

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

⁶⁹ Panel Report, para. 7.75. (emphasis original)

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

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

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

⁷³ Colombia's written submission, para. 4.8.

⁷⁴ Panel Report, fn 176 to para. 7.76.

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

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

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

4.3 Claim under Article 6.5 of the Anti-Dumping Agreement

4.3.1 Introduction and Panel findings

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

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

Article 6

Evidence

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

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

⁷⁵ Panel Report, para. 7.70.

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

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

4.36. The Panel then noted that the information at issue – contained in section d(i) of the revised application – concerned the injury alleged by FEDEPAPA with respect to the Colombian potato-processing industry.⁸⁰ As the Panel further observed, that section contained certain information that was redacted by the applicant⁸¹, but for which no showing of "good cause" had been offered by the applicant or requested by MINCIT.⁸² Nonetheless, the Panel considered it "apparent that MINCIT treated this information as confidential, even in the absence of a showing of 'good cause' by the applicant".⁸³ The Panel rejected Colombia's argument that, given that the applicant never requested that the redacted information be treated as confidential, MINCIT did not grant such confidential treatment, and therefore Article 6.5 does not apply. The Panel instead found that "the fact that the applicant submitted information on a redacted basis without a showing of 'good cause' – coupled with the fact that MINCIT treated this information confidentially – demonstrates a lack of compliance with Article 6.5."⁸⁴

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

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

4.38. The core premise of Colombia's claim on appeal is that a "request" for confidentiality was required to trigger the obligations in Article 6.5.⁸⁶ Colombia argues that, since there was not an explicit request to treat certain redacted information in the revised application as confidential, MINCIT can neither be found to have accorded confidential treatment to the information nor to have failed to require a showing of good cause under Article 6.5.⁸⁷ In addition, Colombia maintains that the redacted information at issue was not treated as confidential as it was available in a non-redacted form elsewhere on the public record (i.e. the original application).⁸⁸

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

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

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

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

⁸⁰ Panel Report, para. 7.120.

⁸¹ Panel Report, para. 7.120.

⁸² Panel Report, para. 7.122.

⁸³ Panel Report, para. 7.122.

⁸⁴ Panel Report, para. 7.126.

⁸⁵ Panel Report, para. 7.125. (emphasis original)

⁸⁶ Colombia's written submission, paras. 5.12-5.13.

⁸⁷ Colombia's written submission, paras. 5.16-5.23.

⁸⁸ Colombia's written submission, paras. 5.26-5.28.

⁸⁹ European Union's written submission, paras. 61-63.

4.40. We do not understand Colombia to challenge the Panel's articulation of the legal standard with respect to Article 6.5 *per se*. As Colombia clarified at the hearing, it does not maintain that an explicit request for confidential treatment is *always* required to trigger the obligations under Article 6.5, but rather that, in the circumstances of this case, where the redacted information at issue, unlike other information provided, was not subject to such an explicit request, MINCIT could not be found to have acted inconsistently with Article 6.5.⁹⁰ We note that Article 6.5 does not itself refer to a "request", but rather provides that, when information "is provided on a confidential basis" by a party to an investigation, it shall be "treated as such" by the investigating authority upon a showing of "good cause".

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

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

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

⁹⁰ Colombia's responses to questions at the hearing.

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

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

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

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

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

⁹⁶ Panel Exhibits EU-10 and COL-67, respectively.

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

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

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

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

cause" for the information to be treated as confidential, MINCIT has acted in a manner inconsistent with Article 6.5.¹⁰¹

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

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

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

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

4.3.3 Conclusion

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

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

¹⁰² Colombia's written submission, para. 5.27.

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

¹⁰⁴ Panel Report, para. 7.125. (emphasis original)

¹⁰⁵ Panel Report, para. 7.125. (emphasis original)

¹⁰⁶ Panel Report, para. 7.125.

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

4.4 Claim under Article 6.2 of the DSU

4.4.1 Introduction and Panel findings

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

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

Article 6
Establishment of Panels

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

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

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

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

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

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

¹⁰⁹ Panel Report, para. 7.218. (fn omitted)

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

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

Article 2

Determination of Dumping

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

4.53. By way of background, the European Union's "packaging cost-related claim" at issue arose from the following facts that transpired before MINCIT.¹¹² In its questionnaire response during the investigation, Mydibel stated that, while it used the same packaging materials in all of its sales, the costs of these common components differed between products made for export and those made for domestic sales, due to differences in product types and customer specifications.¹¹³ In particular, customers in its domestic market requested packaging material that incurred higher costs.¹¹⁴ To account for this difference, Mydibel requested an adjustment¹¹⁵ by listing the cost of "packaging material" as one of the elements of the cost of manufacture, and identifying the amount incurred for packaging for each product type.¹¹⁶

4.54. MINCIT did not make the adjustment requested by Mydibel.¹¹⁷ Instead, MINCIT deducted certain packaging costs from the export price¹¹⁸, without making any corresponding adjustment to the normal value¹¹⁹, resulting in a so-called "asymmetrical deduction".¹²⁰ In its comments on MINCIT's essential facts disclosure, Mydibel stated explicitly that its exports did *not* incur any *additional* export packaging costs distinct from those incurred in its domestic sales.¹²¹ Notwithstanding Mydibel's comment, MINCIT maintained that it deducted costs for "export packaging material" from the export price alone (thereby increasing any margin of dumping), and that it did not make any normal value adjustment for packaging costs (which would have decreased the margin of dumping) because, in its view, "*packaging costs ... are part of the production ... costs.*"¹²²

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

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

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

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

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

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

¹¹⁷ Panel Report, para. 7.217.

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

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

¹²⁰ See e.g. Colombia's written submission, para. 6.4.

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

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

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

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

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

4.57. In examining the merits of the European Union's claim under Article 2.4, the Panel observed a "disconnect" between the parties' arguments as they addressed "different types of packaging costs and, hence, distinct and unrelated types of adjustments".¹²⁹ Specifically, the European Union's arguments referred to Mydibel's request for an adjustment "to account for alleged cost differences" due to "differences in product types and customer specifications", while Colombia's rebuttal arguments related to an adjustment made by MINCIT "to account for the fact that Mydibel's export sales allegedly incurred additional – and different – packaging costs than its domestic sales".¹³⁰ Having examined the relevant facts underlying these arguments¹³¹, the Panel considered that, because MINCIT's actual consideration of packaging costs "*did not respond to the substance*" of the requested adjustment, MINCIT "failed to provide a proper basis to deny" Mydibel's request.¹³² The Panel also considered that "MINCIT had no proper basis ... to deduct certain other packaging costs from the export price" alone.¹³³ Both considerations served as the basis for the Panel's ultimate conclusion that Colombia had acted inconsistently with Article 2.4 for its failure to make a fair comparison. These findings are not subject to, but provide relevant background for assessing, Colombia's appeal under Article 6.2 of the DSU.

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

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

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

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

¹²⁶ Panel Report, para. 7.231.

¹²⁷ Panel Report, para. 7.231.

¹²⁸ See Panel Report, para. 7.232.

¹²⁹ Panel Report, para. 7.237.

¹³⁰ Panel Report, para. 7.237.

¹³¹ See Panel Report, paras. 7.238-7.242.

¹³² Panel Report, para. 7.243. (emphasis added)

¹³³ Panel Report, para. 7.244.

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

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

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

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

4.60. The European Union's claim related to packaging costs is set out in paragraph 5 of its panel request and incorporates language from the first and third sentences of Article 2.4 of the Anti-Dumping Agreement. Reading paragraph 5 of the panel request in light of Article 2.4, both quoted above¹⁴², we agree with the Panel's description of the relevant claim set out in paragraph 5:

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

4.61. Therefore, the European Union's panel request plainly connects (i) the relevant aspect of the measure, i.e. MINCIT's treatment of differences affecting price comparability, including its alleged disregard of packaging differences, with (ii) the relevant provision of the covered agreements, namely, the requirement to make "due allowance" for differences affecting price comparability and a "fair comparison" under Article 2.4.¹⁴⁴ As the Panel also noted, the alleged disregard for differences in packaging is listed as an "example". As such, it helps to illustrate the claim, but the fact that the European Union chose to elaborate by providing examples should not be taken as narrowing the scope of the claim.¹⁴⁵

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

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

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

¹³⁸ Parties' responses to questioning at the hearing.

¹³⁹ Colombia's written submission, para. 6.9.

¹⁴⁰ Colombia's written submission, para. 6.3. See also para. 4.49 above.

¹⁴¹ European Union's written submission, para. 66.

¹⁴² See paras. 4.51-4.52 above.

¹⁴³ Panel Report, para. 7.227.

¹⁴⁴ See also European Union's written submission, paras. 70-73.

¹⁴⁵ See Appellate Body Report, *EC – Selected Customs Matter*, para. 153.

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

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

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

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

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

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

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

4.66. Turning to the European Union's allegations during the panel proceedings¹⁵³, we recall that both MINCIT's disregard of the requested adjustment and its asymmetrical deduction occurred within the same context and investigative step, i.e. as part of MINCIT's treatment of packaging costs for the purpose of conducting the price comparison with respect to Mydibel.¹⁵⁴ To elaborate on its claim under Article 2.4 during the panel proceedings, the European Union relied on both MINCIT's alleged error in declining the requested adjustment, as well as the asymmetrical deduction which, in its view, "compounded" that error.¹⁵⁵ We therefore share the Panel's view that both allegations concern "detail[s]" in the "factual aspects of the calculation that led to Colombia's alleged failure to perform a fair comparison".¹⁵⁶ As the Panel rightly found, the panel request need not engage in these details or outline "which specific adjustment was allegedly not – or incorrectly – made and why".¹⁵⁷

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

¹⁴⁸ See also European Union's written submission, para. 69.

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

¹⁵⁰ Colombia's written submission, para. 6.22.

¹⁵¹ Colombia's written submission, para. 6.23.

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

¹⁵³ Panel Report, para. 7.228.

¹⁵⁴ See factual background contained in paras. 4.53-4.54 above.

¹⁵⁵ Panel Report, para. 7.235. See also *ibid.*, para. 7.228.

¹⁵⁶ Panel Report, para. 7.231.

¹⁵⁷ Panel Report, para. 7.231.

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

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

4.68. The statements quoted by Colombia were made by the Panel when describing a certain "disconnect" between the parties' arguments and the facts underlying these arguments.¹⁶⁰ Read in context, these statements reflect the Panel's appreciation of the fact that, in addressing the issue of packaging costs, what MINCIT was *requested to do* and what it *actually did* were different. As noted above, having examined how this mismatch transpired in MINCIT's treatment of packaging cost adjustments¹⁶¹, the Panel came to the view that MINCIT "failed to provide a proper basis to deny" Mydibel's request because what MINCIT actually did (i.e. the asymmetrical deduction) "*did not respond to the substance of [the requested] adjustment*".¹⁶² The mismatch between the two factual aspects at issue was thus one of the reasons supporting the Panel's conclusion that MINCIT's treatment of packaging costs was inconsistent with Article 2.4.¹⁶³ This does not turn these two factual aspects, as Colombia argues, into two separate "claims" that are "legally independent of each other", let alone claims that are somehow not covered by the European Union's panel request.¹⁶⁴

4.69. Furthermore, Colombia highlights the due process objective of a panel request, including to enable the respondent to know what case it has to answer and begin preparing its defence.¹⁶⁵ However, apart from a general reference to the number of claims contained in the European Union's panel request, of which the European Union pursued only a "subset"¹⁶⁶, Colombia's arguments do not indicate how its due process rights were breached due to the alleged lack of clarity of the European Union's panel request. On the contrary, given that the two factual elements underlying the European Union's allegations related to the same investigative step regarding Mydibel's packaging costs¹⁶⁷, we see no grounds to consider that Colombia received insufficient notice as to the scope of the European Union's claim listed in paragraph 5 of the panel request.

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

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

¹⁶¹ See Panel Report, paras. 7.238-7.242.

¹⁶² Panel Report, para. 7.243. (emphasis added)

¹⁶³ Panel Report, para. 7.244. See also Panel Report, paras. 7.242-7.243.

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

¹⁶⁵ Colombia's written submission, paras. 6.13-6.16.

¹⁶⁶ Colombia's written submission, para. 6.16.

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

¹⁶⁸ Colombia's written submission, para. 6.18.

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

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

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

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

4.4.3 Conclusion

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

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

4.5.1 Introduction and Panel findings

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

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

Article 3

Determination of Injury

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

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

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

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

¹⁷³ Colombia's written submission, para. 7.10.

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

Article 2

Determination of Dumping

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

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

Article 5

Initiation and Subsequent Investigation

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

4.77. The Panel observed that, while the term "dumped imports" carries the same meaning across Articles 3.1, 3.2, 3.4, and 3.5, it is not defined in Article 3.¹⁷⁴ The Panel noted that the parties identified different textual and contextual elements in support of their positions.¹⁷⁵ To the Panel, the principle of effectiveness, which flows from Article 31 of the Vienna Convention, meant that it may not adopt an interpretation that would result in reducing the provisions of the Anti-Dumping Agreement to redundancy or inutility.¹⁷⁶

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

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

¹⁷⁴ Panel Report, paras. 7.287-7.289.

¹⁷⁵ Panel Report, paras. 7.289-7.291.

¹⁷⁶ Panel Report, para. 7.291.

¹⁷⁷ Panel Report, para. 7.292.

¹⁷⁸ Panel Report, para. 7.294. (fn omitted)

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

highlighted the contextual relevance of Article 5.8 for the *general* injury and causation determinations under Article 3.¹⁸⁰ In addition, the Panel rejected Colombia's reliance on the panel's finding in *Canada – Welded Pipe*, where the panel found that the notion of "dumping" does not have a *de minimis* component, because that finding concerns the interpretation of "dumping" in Article 7.1(ii), which is limited to the application of *provisional* anti-dumping measures not at issue in this dispute.¹⁸¹ The Panel highlighted, instead, the same panel's statement that imports from an exporter with a *final de minimis* margin of dumping "should not be treated as 'dumped' for the purpose of the analysis and final determinations of injury and causation", because "Article 5.8 effectively means that there is no legally cognizable dumping" by that exporter.¹⁸²

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

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

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

4.82. On appeal, Colombia contends that the Panel ignored the ordinary meaning of the term "dumped imports" in light of the definition of "dumping" in Article 2.1 of the Anti-Dumping Agreement¹⁸⁶, and instead focused on one contextual provision, i.e. Article 5.8, at the expense of the context provided by other provisions such as Articles 3.3, 3.5, and 9.4.¹⁸⁷ Colombia further argues that the Panel's reliance on Article 5.8 is premised on the erroneous understanding that an authority must definitely determine the existence of dumping *before* assessing the existence of injury and causation, even though such a sequential decision-making process is not required by the Anti-Dumping Agreement.¹⁸⁸ Colombia also seeks to support its view with supplementary means of treaty interpretation, including preparatory work for the Kennedy Round Anti-Dumping Code.¹⁸⁹

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

¹⁸⁰ Panel Report, para. 7.298. See also Panel Report, paras. 7.296-7.297.

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

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

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

¹⁸⁴ Panel Report, paras. 7.301-7.302.

¹⁸⁵ Panel Report, para. 7.303.

¹⁸⁶ Colombia's written submission, paras. 7.16-7.26.

¹⁸⁷ Colombia's written submission, paras. 7.27-7.36.

¹⁸⁸ Colombia's written submission, paras. 7.37-7.57.

¹⁸⁹ Colombia's written submission, paras. 7.21-7.24 and 7.58-7.60.

¹⁹⁰ European Union's written submission, para. 105.

Agreement as a whole¹⁹¹, ensures the effectiveness of all relevant provisions including Articles 5 and 6 of the Agreement¹⁹², and is supported by findings in previous disputes.¹⁹³ In reaching its finding, therefore, the Panel gave due consideration to the ordinary meaning of the term "dumped imports" in its context¹⁹⁴, and did not err in its reliance on Article 5.8 or in its rejection of Colombia's arguments on the basis of context and preparatory work.¹⁹⁵

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

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

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

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

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

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

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

¹⁹³ European Union's written submission, paras. 125-132.

¹⁹⁴ European Union's written submission, paras. 146-155.

¹⁹⁵ European Union's written submission, paras. 156-224.

¹⁹⁶ See Panel Report, para. 7.282.

¹⁹⁷ Colombia's written submission, para. 7.16. (emphasis added)

¹⁹⁸ Emphasis added.

¹⁹⁹ Emphasis added; fn omitted.

²⁰⁰ Anti-Dumping Agreement, Article 5.1. (emphasis added)

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

4.88. We recall Colombia's argument that the reference to dumping "anywhere" in the Agreement²⁰², including in Articles 5.1 and 5.7, must mean "the difference between a higher normal value and a lower export price *regardless of the magnitude*".²⁰³ This reading, however, is contradicted by Article 5.1, which refers to "an investigation to determine the existence, *degree* and effect of any alleged dumping" and indicates that not only the existence of dumping, but also its *degree*, are pertinent for the conduct of an anti-dumping investigation. Under the Anti-Dumping Agreement, the degree of dumping is expressed in terms of the margin of dumping. Where an authority determines the margin of dumping to be *de minimis*, Article 5.8 requires that there must be "immediate termination" of the investigation. Thus, notwithstanding the *existence* of dumping in the meaning of Article 2.1, if the *degree* of the dumping is determined to be *de minimis* for an exporter, it ends the investigation with regard to that exporter. This also means that, in the scenarios triggering "immediate termination" under Article 5.8 (i.e. *de minimis* dumping margins, *negligible* volumes of dumped imports, or *negligible* injury), dumping is *not* "to be condemned" within the meaning of Article VI:1 of the GATT 1994²⁰⁴, and hence cannot be the subject of an anti-dumping measure. Immediate termination, as noted by panels in prior disputes, indicates that there is no longer "legally cognizable dumping".²⁰⁵

4.89. The term "dumped imports" in Article 3 and the reference to "the magnitude of the margin of dumping" in Article 3.4 indicate that a determination regarding the injurious *effect of dumping* under Article 3 cannot be disconnected from the *existence and degree of such dumping*. In view of this connection, where an authority determines final *de minimis* margins for an exporter²⁰⁶, the fact that dumping is no longer "legally cognizable" means that imports by that exporter may no longer form part of "dumped imports" for purposes of the final injury determination required for the imposition of duties on imports with dumping margins above *de minimis*.²⁰⁷ In this sense, we agree with the Panel that "the determination of injury follows – and takes into account – the determination of the existence and degree of any alleged dumping (i.e. the determination of the margin of dumping)."²⁰⁸ Rather than imposing a "sequential" decision-making process on an investigating authority²⁰⁹, the Panel's statement rightly reflects the interconnected nature of an authority's final dumping and injury determinations as two prerequisites for imposing a definitive anti-dumping measure.²¹⁰ Reading all of these provisions holistically, we find, as the Panel found, that inclusion in the injury determination of imports by exporters with final *de minimis* margins would "render ineffective the requirement ... to 'immediate[ly] terminate' the investigation" under Article 5.8.²¹¹

²⁰¹ See European Union's written submission, para. 117.

²⁰² Colombia's written submission, para. 7.16.

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

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

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

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

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

²⁰⁸ Panel Report, para. 7.293.

²⁰⁹ Colombia's written submission, para. 7.49.

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

²¹¹ Panel Report, para. 7.302.

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

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

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

²¹² Colombia's written submission, para. 7.55.

²¹³ Colombia's written submission, para. 7.49.

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

²¹⁵ Colombia's written submission, para. 7.16. (emphasis added)

²¹⁶ Colombia's response to questioning at the hearing.

²¹⁷ Brazil's response to questioning at the hearing.

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

²¹⁹ See also Panel Report, para. 7.300.

²²⁰ Colombia's written submission, paras. 7.56, 7.57, and 7.59.

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

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

4.5.2.2 Context provided by Articles 3.3, 3.5, and 9.4

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

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

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

4.96. Under Article 3.3, investigating authorities may cumulatively assess the effects of imports from more than one country only if they determine, *inter alia*, that "the margin of dumping established *in relation to the imports from each country* is more than *de minimis* as defined in paragraph 8 of Article 5."²²⁸ The reference to "the margin of dumping established in relation to the imports from each country" departs from the general rule²²⁹ that "[t]he authorities shall ... determine an individual margin of dumping *for each known exporter or producer* concerned."²³⁰ Similarly, Article 9.4 "also has a different scope than Articles 3.1, 3.2, 3.4, and 3.5"²³¹, as it "focuses on the determination of the so-called 'all others' rate, i.e. the anti-dumping duty that is applied to imports from exporters or producers that are *not examined* by an investigating authority", requiring an authority to "disregard ... any zero and *de minimis* margins" in calculating the "all others" rate.²³² In contrast, Articles 3.1, 3.2, 3.4, and 3.5, at issue in this dispute, "concern an investigating authority's determination of injury caused by 'dumped imports' from producers and exporters that are *examined* by an investigating authority".²³³

4.97. In Articles 3.3 and 9.4, therefore, the cross-reference to the *de minimis* threshold as defined in Article 5.8, which generally relates to the dumping margin determined for an exporter or producer individually²³⁴, makes this threshold "operational"²³⁵ for the specific situations under these provisions. Thus, the fact that the *de minimis* threshold is made operational in specific situations

²²³ Colombia's written submission, para. 7.55.

²²⁴ Emphasis added.

²²⁵ Colombia's written submission, para. 7.30. (emphasis added)

²²⁶ European Union's written submission, para. 166.

²²⁷ Colombia's written submission, para. 7.32.

²²⁸ Emphasis added.

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

²³⁰ Anti-Dumping Agreement, Article 6.10. (emphasis added)

²³¹ Panel Report, para. 7.297.

²³² Panel Report, para. 7.297. (emphasis original)

²³³ Panel Report, para. 7.297. (emphasis original)

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

²³⁵ Panel Report, para. 7.298.

under Articles 3.3 and 9.4 reinforces, rather than refutes²³⁶, the link between Article 5.8 and Article 3 generally. Given this link, there was no need for the drafters, each time they mentioned "dumped imports", to cross-reference Article 5.8 in the context of Articles 3.1, 3.2, 3.4, and 3.5. In those provisions, the relevance of the *de minimis* threshold is implied from a holistic reading of these provisions. We share, in this respect, the European Union's view that, as a matter of treaty drafting, a generally applicable rule need not be repeated in every instance where it is relevant.²³⁷ Rather, as the Panel stated, "the fact that Articles 9.4 and 3.3 refer to Article 5.8 and '*de minimis* margins', and make Article 5.8 operational in the *specific* situations contemplated under these provisions highlights ... the contextual relevance of Article 5.8 for purposes of the *general* injury and causation determinations under Article 3."²³⁸

4.5.2.3 Supplementary means of interpretation relied upon by Colombia

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

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

4.100. Furthermore, even if documents cited by Colombia²⁴³ could be read to indicate that the *de minimis* rule "concern[s] the imposition or the right to take anti-dumping measures"²⁴⁴, this alone does not preclude that the *de minimis* rule may *also* be relevant for demarcating the scope of "dumped imports" for the purposes of the injury determination. As the European Union notes, the fact that the *de minimis* rule is of relevance to the imposition of an anti-dumping measure does not mean that this is the only way in which such rule is relevant.²⁴⁵ Finally, Colombia contends that "the

²³⁶ See Colombia's written submission, para. 7.35.

²³⁷ European Union's response to questioning at the hearing.

²³⁸ Panel Report, para. 7.298. (emphasis original)

²³⁹ Colombia's written submission, para. 7.24.

²⁴⁰ Panel Report, fn 565 to para. 7.303.

²⁴¹ Colombia's written submission, para. 7.24.

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

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

²⁴⁴ Colombia's written submission, para. 7.59.

²⁴⁵ European Union's written submission, paras. 218-219.

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

4.5.3 Conclusion

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

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

4.6 Award findings

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

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

²⁴⁶ Colombia's written submission, para. 7.60. (emphasis added)

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

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

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

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

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

Alejandro JARA
Arbitrator

José Alfredo GRAÇA LIMA
Chairperson

Joost PAUWELYN
Arbitrator