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

ARBITRATION UNDER ARTICLE 25 OF THE DSU

AWARD OF THE ARBITRATORS

Addendum

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

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ANNEX A

WORKING PROCEDURES FOR THE ARBITRATION

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ANNEX A-1

AGREED PROCEDURES FOR ARBITRATION UNDER ARTICLE 25 OF THE DSU[*]

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

Revision

1. In order to give effect to communication JOB/DSB/1/Add.12 in this dispute the European Union and Colombia (hereafter the "parties") mutually agree pursuant to Article 25.2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) to enter into arbitration under Article 25 of the DSU to decide any appeal from any final panel report[1] as issued to the parties in dispute DS591. Any party to the dispute may initiate arbitration in accordance with these agreed procedures.

2. The arbitration may only be initiated if the Appellate Body is not able to hear an appeal in this dispute under Article 16.4 and 17 of the DSU. For the purposes of these agreed procedures, such situation is deemed to arise where, on the date of issuance of the final panel report to the parties, there are fewer than three Appellate Body members.

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

3. In order to facilitate the proper administration of arbitration under these agreed procedures, the parties hereby jointly request the panel to notify the parties of the anticipated date of circulation of the final panel report within the meaning of Article 16 of the DSU, no later than 45 days in advance of that date.

4. Following the issuance of the final panel report to the parties, but no later than 10 days prior to the anticipated date of circulation of the final panel report to the rest of the Membership, any party may request that the panel suspend the panel proceedings with a view to initiating the arbitration under these agreed procedures. Such request by any party is deemed to constitute a joint request by the parties for suspension of the panel proceedings for 12 months pursuant to Article 12.12 of the DSU.

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

i. the immediate transmission of the final panel report, on a provisional basis, to the pool of arbitrators and the lifting of confidentiality for that sole purpose;

ii. the transmission of the panel record to the arbitrators upon the filing of the Notice of Appeal: Rule 25 of the Working Procedures for Appellate Review shall apply *mutatis mutandis*;

iii. the lifting of confidentiality with respect of the final panel report under the Working Procedures of the panel and the transmission of the final panel report, duly adjusted for translation, in the working languages of the WTO to the parties, to the third parties and to the pool of arbitrators.[2]

[*] WT/DS591/3/Rev.1.

[1] For greater certainty, this includes any final panel report issued in compliance proceedings pursuant to Article 21.5 of the DSU.

[2] The parties confirm that it is not their intention that the panel report be circulated within the meaning of Article 16 of the DSU.

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

5. The arbitration shall be initiated by filing of a Notice of Appeal with the WTO Secretariat no later than 20 days after the suspension of the panel proceedings referred to in paragraph 4 has taken effect. The Notice of Appeal shall include the final panel report in the working languages of the WTO. The Notice of Appeal shall be simultaneously notified to the other party or parties and to the third parties in the panel proceedings. Rules 20-23 of the Working Procedures for Appellate Review shall apply *mutatis mutandis*.

6. Subject to paragraph 2, where the arbitration has not been initiated under these agreed procedures, the parties shall be deemed to have agreed not to appeal the panel report pursuant to Articles 16.4 and 17 of the DSU, with a view to its adoption by the DSB. If the panel proceedings have been suspended in accordance with paragraph 4, but no Notice of Appeal has been filed in accordance with paragraph 5, the parties hereby jointly request the panel to resume the panel proceedings.

7. The arbitrators shall be three persons selected from the pool of 10 standing appeal arbitrators composed in accordance with paragraph 4 of communication JOB/DSB/1/Add.12 (hereafter the "pool of arbitrators").[3] The selection from the pool of arbitrators will be done on the basis of the same principles and methods that apply to form a division of the Appellate Body under Article 17.1 of the DSU and Rule 6(2) of the Working Procedures for Appellate Review, including the principle of rotation.[4] The WTO Director General will notify the parties and third parties of the results of the selection. The arbitrators shall elect a Chairperson. Rule 3(2) of the Working Procedure for Appellate Review shall apply, *mutatis mutandis*, to the decision-making by the arbitrators.

8. In order to give effect to paragraph 5 of communication JOB/DSB/1/Add.12 in this dispute, the arbitrators may discuss their decisions relating to the appeal with all of the other members of the pool of arbitrators, without prejudice to the exclusive responsibility and freedom of the arbitrators with respect to such decisions and their quality. All members of the pool of arbitrators shall receive any document relating to the appeal.

9. An appeal shall be limited to issues of law covered by the panel report and legal interpretations developed by the panel. The arbitrators may uphold, modify or reverse the legal findings and conclusions of the panel. Where applicable, the arbitration award shall include recommendations, as envisaged in Article 19 of the DSU. The findings of the panel which have not been appealed shall be deemed to form an integral part of the arbitration award together with the arbitrators' own findings.

10. The arbitrators shall only address those issues that are necessary for the resolution of the dispute. They shall address only those issues that have been raised by the parties, without prejudice to their obligation to rule on jurisdictional issues.

11. Unless otherwise provided for in these agreed procedures, the arbitration shall be governed, *mutatis mutandis*, by the provisions of the DSU and other rules and procedures applicable to Appellate Review. This includes in particular the Working Procedures for Appellate Review and the timetable for appeals provided for therein as well as the Rules of Conduct.[5] The arbitrators may adapt the Working Procedures for Appellate Review and the timetable for appeals provided for therein, where justified under Rule 16 of the Working Procedures for Appellate Review, after consulting the parties.

12. The parties request the arbitrators to issue the award within 90 days following the filing of the Notice of Appeal. To that end, the arbitrators may take appropriate organizational measures to streamline the proceedings, without prejudice to the procedural rights and obligations of the

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

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

[5] For greater certainty, paragraphs 14 – 17 of the Rules of Conduct shall apply to arbitrators.

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

13. If necessary in order to issue the award within the 90 day time-period, the arbitrators may also propose substantive measures to the parties, such as an exclusion of claims based on the alleged lack of an objective assessment of the facts pursuant to Article 11 of the DSU.[6]

14. On a proposal from the arbitrators, the parties may agree to extend the 90 day time-period for the issuance of the award.

15. The parties agree to abide by the arbitration award, which shall be final. Pursuant to Article 25.3 of the DSU, the award shall be notified to, but not adopted by, the DSB and to the Council or Committee of any relevant agreement.

16. Only parties to the dispute, not third parties, may initiate the arbitration. Third parties which have notified the DSB of a substantial interest in the matter before the panel pursuant to Article 10.2 of the DSU may make written submissions to, and shall be given an opportunity to be heard by, the arbitrators. Rule 24 of the Working Procedures for Appellate Review shall apply *mutatis mutandis*.

17. Pursuant to Article 25.4 of the DSU, Articles 21 and 22 of the DSU shall apply *mutatis mutandis* to the arbitration award issued in this dispute.

18. At any time during the arbitration, the appellant, or other appellant, may withdraw its appeal, or other appeal, by notifying the arbitrators. This notification shall also be notified to the panel and third parties, at the same time as the notification to the arbitrators. If no other appeal or appeal remains, the notification shall be deemed to constitute a joint request by the parties to resume panel proceedings under Article 12.12 of the DSU.[7] If another appeal or appeal remains at the time an appeal or other appeal is withdrawn, the arbitration shall continue.

19. The parties shall jointly notify these agreed procedures to the panel in DS 591 and ask the panel to grant, where applicable, the joint requests formulated in paragraphs 3, 4, 6, and 18.[8]

20. These agreed procedures, signed in Geneva on April 20, 2021, supersede the agreed procedures which were signed between the parties on July 13, 2020 and circulated to the WTO Members on July 15, 2020 and which are hereby declared null and void.

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

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

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

ANNEX A-2

ADDITIONAL PROCEDURES FOR ARBITRATION UNDER ARTICLE 25 OF THE DSU

Adopted by the Arbitrators on 19 October 2022

1 GENERAL

1. The arbitrators are called upon to decide claims in these arbitration proceedings pursuant to the Agreed Procedures for Arbitration under Article 25 of the DSU[1] (Agreed Procedures) between the parties to this dispute. Colombia initiated these proceedings on 6 October 2022.

2. Pursuant to paragraph 11 of the Agreed Procedures, these arbitration proceedings shall be governed, *mutatis mutandis*, by the provisions of the DSU and other rules and procedures applicable to appellate review, including the Working Procedures for Appellate Review, the timetable for appeals contained therein, and the Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes (Rules of Conduct). Paragraph 11 further provides that the arbitrators may adapt the Working Procedures for Appellate Review and the timetable, where justified under Rule 16 of the Working Procedures for Appellate Review, after consulting the parties.

3. These Additional Procedures for Arbitration, adopted after consultations with the parties, set out additional rules and guidelines on certain practical aspects to facilitate these proceedings. They should be read in conjunction with the Agreed Procedures, together with the DSU and the other rules and procedures applicable to appellate review as specified in paragraph 11 of the Agreed Procedures.

4. The arbitrators may modify these Additional Procedures for Arbitration as necessary, after consultation with the parties.

2 ARBITRATORS

5. Decisions relating to the current proceedings shall be taken by the following three arbitrators selected for this arbitration: Mr. José Alfredo Graça Lima, Mr. Alejandro Jara, and Mr. Joost Pauwelyn.

6. Mr. José Alfredo Graça Lima has been elected as the Chairperson. The responsibilities of the Chairperson include: (a) chairing any hearings and meetings related to the proceedings; (b) receiving all requests for staff support from the arbitrators on the appeal and coordinating the provision of such support; (c) coordinating the drafting of the award; and (d) generally coordinating the overall conduct of the appeal arbitration including the discussions pursuant to paragraph 8 of the Agreed Procedures.

3 LANGUAGE OF THE ARBITRATION

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

4 CONFIDENTIALITY

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

[1] WT/DS591/3/Rev.1.
[2] The arbitrators are bound by Article VII of the Rules of Conduct.

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

5 EX PARTE COMMUNICATIONS

10. Arbitrators shall not meet with or contact one party in the absence of the other party to the dispute. Likewise, they shall not meet with or contact one or more third parties in the absence of the parties to the dispute and other third parties.

11. No arbitrator may discuss any aspect of the subject matter of this arbitration with any party or third party in the absence of the other arbitrators.

6 TIME-LIMIT FOR THIS ARBITRATION

12. Pursuant to paragraph 12 of the Agreed Procedures and Article 17.5 of the DSU, the arbitrators shall issue the award within 90 days following the commencement of this arbitration.

13. Pursuant to paragraphs 12 and 13 of the Agreed Procedures, in order to issue the award within 90 days following the commencement of this arbitration, the arbitrators may "take appropriate organizational measures to streamline the proceedings, without prejudice to the procedural rights and obligations of the parties and due process", and may "propose substantive measures to the parties, such as an exclusion of claims based on the alleged lack of an objective assessment of the facts pursuant to Article 11 of the DSU."[3]

14. In order to issue the award within the 90-day time-period, and in view of paragraphs 12 and 13 of the Agreed Procedures, rules and guidelines regarding the following aspects of the proceedings are set out in sections 7 to 12 below: length and style of written rebuttal and third parties' submissions, Working Schedule[4], meetings with parties and third parties before the hearing, conduct of the hearing, and filing and service of documents.[5]

15. On a proposal from the arbitrators, the parties may agree to extend the 90-day time-period for the issuance of the award.

7 LENGTH OF WRITTEN SUBMISSIONS AND EXECUTIVE SUMMARIES

16. In light of paragraph 12 of the Agreed Procedures, and in order to enhance procedural efficiency and facilitate meeting the 90-day time period:

    (i) Parties and third parties are requested to keep their written submissions as concise as possible and to focus on the main claims and outstanding differences, bearing in mind that the arbitrators will have read the panel report and will have access to the panel record. Therefore, there is no need to repeat facts, arguments or findings set out in either the panel report or panel record (cross-references can be made and will suffice);

    (ii) As an indicative guideline:

        a. The rebuttal submission should normally be limited to a maximum of 27,000 words or 40% of the word count of the appealed panel report, whichever is the highest; and

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

[4] The Working Schedule, as provided for in section 9 below, is set out in Annex 1.

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

b. Third parties who wish to make a written submission should normally limit them to a maximum of 9,000 words.

(iii) Each party or third party who files a written submission is requested to submit contemporaneously an executive summary of such submission of a maximum length of 10% of the total word count of the submission itself. These executive summaries will be annexed as addenda to the award and the content of such executive summaries will not be revised or edited by the arbitrators.

8 STYLE OF WRITTEN SUBMISSIONS

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

9 WORKING SCHEDULE

18. Each party and third party shall file written submissions in accordance with the time-periods stipulated in the Working Schedule contained in Annex 1 of these Additional Procedures for Arbitration.

19. The time-periods in the Working Schedule will be firm and no deviations will be permitted except for highly compelling reasons (such as sudden illness of counsel) and taking into account the impact on the 90-day time-period.

10 MEETINGS WITH PARTIES AND THIRD PARTIES

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

11 HEARING

21. The arbitrators shall hold a hearing of no more than two days with the parties and third parties as set out in the Working Schedule.

22. The arbitrators will endeavour to provide a list of questions to the parties in advance of the hearing to facilitate the parties' preparation for the hearing.

23. Opening statements by parties shall be no longer than 30 to 35 minutes each; opening statements by third parties shall be limited to seven minutes each; and closing statements by parties shall be limited to five minutes each.

24. Each party and third party shall provide to the WTO Secretariat the list of members of its delegation no later than 17:00 (Geneva time) three working days before the first day of the hearing. Each party and third party shall have the responsibility for all members of its delegation and shall ensure that each member of its delegation acts in accordance with the DSU, the Agreed Procedures, the Rules of Conduct, and these Additional Procedures for Arbitration, particularly with regard to the confidentiality of proceedings and the written and oral submissions of the parties and third parties.

12 FILING AND SERVICE OF DOCUMENTS[6]

25. No document shall be considered filed with the arbitrators unless the document is received by the WTO Secretariat within the time-period set out for filing in accordance with these Additional Procedures for Arbitration and the Working Schedule.

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

27. If any party or third party has any questions or technical difficulties relating to DORA, they are encouraged to contact the DS Registry (DSRegistry@wto.org).

28. If any party or third party is unable to meet the 17:00 (Geneva time) deadline because of technical difficulties in uploading these documents into DORA, the party or third party concerned shall inform the DS Registry (DSRegistry@wto.org) without delay and provide an electronic version of all documents to be submitted to the arbitrators through the electronic mail address arbitration25@wto.org copied to DSRegistry@wto.org, and to parties and third parties.

29. Upon authorization by the arbitrators, a party or third party may correct clerical errors in any of its documents (including typographical mistakes, errors of grammar, or words or numbers placed in the wrong order). The request to correct clerical errors shall identify the specific errors to be corrected and shall be filed with the WTO Secretariat promptly following the filing of the written submission in question. A copy of the request shall be served upon parties and third parties, each of whom shall be given an opportunity to comment in writing on the request. The arbitrators shall notify the parties and third parties of their decision.

30. As a general rule, all communications from the arbitrators to the parties and third parties will be via electronic mail (arbitration25@wto.org) and uploaded into DORA. In addition to transmitting the award to the parties in electronic format, the arbitrators shall provide them with a paper copy.

13 TRANSLATION OF THE AWARD

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

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

Annex 1: Working Schedule

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

Annex 2: Pre-Arbitration Letter

19 September 2022

Amb. Santiago Wills Valderrama
Permanent Representative of Colombia to the World Trade Organization
Permanent Mission of Colombia to the World Trade Organization

Amb. Joao Aguiar Machado
Permanent Representative of the European Union to the World Trade Organization Permanent Mission of the European Union to the World Trade Organization

Dear Ambassadors:

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

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

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

1. Length of Written Submission

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

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

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

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

(ii) Parties and Third Parties are requested to keep their submissions as concise as possible and to focus on the main claims and outstanding differences, bearing in mind that the arbitrators will have read the panel report and will have access to the panel record. Therefore, there is no need to repeat facts, arguments or findings set out in either the panel report or panel record (cross-references can be made and will suffice);

(iii) As an indicative guideline[ii]

a. Notices of Appeal/Other Appeal should normally be limited to a maximum of 2,000 words[iii], Appellant/Other Appellant/Appellee submissions should normally be limited to a maximum of 27,000 words[iv] or 40% of the word count of the appealed Panel report[v], whichever is the highest;[vi]

b. Third Parties who wish to make a submission should normally limit them to a maximum of 9,000 words;[vii] and

c. where MPIA appeal proceedings are conducted in French or Spanish, the above indicative limits are increased by 15%.[viii]

(iv) Each Party who files an Appellant's, Other Appellant's, or Appellee's submission, and each Third Party who files a written submission, is requested to submit contemporaneously an executive summary of such written submission of a maximum length of 10% of the total word count of the submission itself.[ix] These executive summaries will be annexed as addenda to MPIA awards and the content of such executive summaries will not be revised or edited by the MPIA arbitrators.

2. Style of Written Submission

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

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

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

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

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

(i) appraise how any such Article 11 claim would affect the 90 day time-period for the issuance of the award as referred to in paragraphs 12 and 13 of the Agreed Procedures; and

(ii) evaluate, in the light of paragraph 10 of the Agreed Procedures which requires arbitrators to address only "those issues that are necessary for the resolution of the dispute" and Article 3.7 of the DSU which calls on each WTO Member to "exercise its judgement as to whether action under these procedures would be fruitful", whether such Article 11 claim has the potential to impact the substantive outcome of the dispute and whether and how it is "necessary for the resolution of the dispute."

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

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

(i) whether and how the alleged panel error was raised before the Panel, in particular during the interim review stage, thereby providing the Panel an opportunity to address the alleged error, taking into account that paragraph 9 of the Agreed Procedures limits appeals to "issues of law covered in the panel report and legal interpretations developed by the panel" (underlining added);

(ii) in what way the Article 11 claim is an issue "necessary for the resolution of the dispute" in the sense of paragraph 10 of the Agreed Procedures and a matter that cannot be brought under one of the substantive treaty provisions at issue in the dispute; and

(iii) in what way the alleged panel error is not simply an appreciation of a factual issue (within the exclusive domain of panels) and amounts to an "issue of law" covered in the Panel Report or "legal interpretation" developed by the Panel, and thereby falls within the mandate of appellate review under paragraph 9 of the Agreed Procedures.

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

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

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

(i) an organizational meeting may be convened by the arbitrators with the Parties and Third Parties to discuss practical matters;

(ii) following consultation with the Parties and Third Parties, a virtual pre-hearing conference may be convened by the arbitrators with the Parties and Third Parties to help identify "those issues that are necessary for the resolution of the dispute" (paragraph 10 of the Agreed Procedures), to highlight the key issues raised by the Parties in the appeal that need further discussion at the hearing, and/or to discuss any Article 11 claims filed by the Parties;

(iii) unless exceptional circumstances arise:

a. oral hearings will be limited to one hearing of no more than two days;

b. opening statements by Parties will be limited to 25 minutes; opening statements by Third Parties who have notified their intention to make an oral statement will be limited to seven minutes; and

c. the standard deadlines set forth in the Working Procedures for Appellate Review, as set forth below, will apply. These time limits and deadlines will be firm and no deviations will be permitted except for highly compelling reasons (such as sudden illness of counsel) and taking into account the impact on the 90 day time-period.

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

5. Language of Proceedings

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

6. Filing and Service of Documents

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

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

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

7. Translation of the MPIA Award

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

ENDNOTES

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

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

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

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

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

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

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

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

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

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

ANNEX A-3

ADDITIONAL PROCEDURES FOR BCI PROTECTION AND
PARTIAL PUBLIC VIEWING OF THE HEARING

Adopted by the Arbitrators on 1 November 2022

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

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

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

Additional Procedures for BCI Protection

1. For the purposes of these arbitration proceedings, BCI shall include: (i) information marked as BCI and enclosed within double square brackets in any document to the Arbitrators; and (ii) information designated by the Panel as BCI on the Panel record.

2. The additional BCI protection in these arbitration proceedings is provided according to the following terms:

    a. No person may have access to information that qualifies as BCI, except the Arbitrators, the staff of the WTO Secretariat assisting them, an employee of a party or third party, or an outside advisor for the purposes of this dispute to a party or third party. However, an outside advisor is not permitted access to BCI if that advisor is an officer or employee of an enterprise engaged in the production, export, or import of the products that were the subject of the anti-dumping investigation at issue in this dispute.

    b. A party or third party having access to BCI shall treat it as confidential and shall not disclose that information other than to those persons authorized to receive it pursuant to

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

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

c. A party or third party that submits any document containing BCI to the Arbitrators shall clearly identify such information in the document filed. The party or third party shall mark the cover and/or first page of the document containing BCI, and each subsequent page of the document, to indicate the presence of such information. The specific information in question shall be placed within double square brackets, as follows: [[…]]. The first page or cover of the document shall state "Contains Business Confidential Information", and the top of each page of the document shall contain the notice "Contains Business Confidential Information".

d. In view of paragraph 3 below, a party or third party that intends to have its opening statement at the hearing be made public shall not refer to BCI in the opening statement.

e. For the purpose of ensuring that only persons authorized to have access to BCI pursuant to these procedures are in the room to hear an oral statement containing BCI:

   i. Colombia, and third parties referred to in paragraph 4 below, shall inform the Arbitrators in advance if they intend to refer to BCI in their opening statements.

   ii. A party or third party that intends to refer to BCI in response to questions during the hearing or in the closing statement shall inform the Arbitrators in advance.

f. The Arbitrators will make every effort to draft an award that does not disclose BCI by limiting themselves to making statements or drawing conclusions that are based on BCI. A copy of the Award intended for circulation to WTO Members will be provided in advance to the parties, at a date and in a manner to be specified by the Arbitrators. The parties will be provided with an opportunity to request the removal of any BCI that is inadvertently included in the Award, in accordance with a time period to be specified by the Arbitrators. No other comments or submissions shall be accepted.

g. Pursuant to paragraph 8 of the Agreed Procedures, members of the pool of standing appeal arbitrators composed in accordance with paragraph 4 of communication JOB/DSB/1/Add.12[2] shall receive any document relating to the appeal, including any document containing BCI. Members of the pool of arbitrators shall not disclose BCI to persons not authorized under these procedures to have access to BCI.

Additional Procedures for Partial Public Viewing of the Hearing

3. Subject to the terms set out below, the first session of the hearing, which will consist of opening statements, shall be video recorded with the camera in "full-room view", i.e., without zooming in on individual speakers.

4. The opening statements of Colombia and third parties wishing to maintain the confidentiality of their statements will not be video recorded. Any third party that wishes to participate in the hearing may request that its opening statement remain confidential. Such requests should be made as soon as possible, and no later than 5 p.m. Geneva time on Friday, 11 November 2022.

5. Before the conclusion of the hearing, the parties shall provide confirmation that no BCI is contained in the opening statements of the European Union and any third party other than those referred to in paragraph 4 above.

6. Subject to the parties' confirmation referred to in paragraph 5, the video recording will be posted on the WTO website subsequent to the hearing to allow for viewing by anyone who has a

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

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

ANNEX B

NOTIFICATION OF AN APPEAL BY COLOMBIA

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ANNEX B-1

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

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

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

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

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

1. The Panel erred in the interpretation and application of Article 5.3 as well as Article 5.2(ii), as requiring an applicant that presents third-country sales price as a basis for determining normal value to explain why it is "appropriate" that the application does not rely on domestic sales prices.[3] The Panel similarly erred in finding that an investigating authority must, under Articles 5.2(iii) and 5.3, examine whether the use of third-country sales prices, instead of domestic sales prices, was "appropriate" in the specific facts and circumstances of the investigation, in order to satisfy the "accuracy" and "adequacy" requirement in Article 5.3. Accordingly, Colombia requests the Arbitrators to reverse the Panel's findings in paragraphs 7.75, 7.78, 7.79, and 8.1.a.iii.

2. The Panel erred in the interpretation and application of Article 6.5 of the Anti-Dumping Agreement by finding that the investigating authority treated certain information in the revised application for the investigation as "confidential" without receiving a showing of "good cause".[4] As that information was never treated as confidential, the Panel erred in finding that the authority was under an obligation to require and assess a showing of "good cause" within the meaning of Article 6.5. Accordingly, Colombia requests that the Arbitrators reverse the Panel's finding in paragraphs 7.126, 7.152.a., and 8.1.b.i. of its Report that the investigating authority acted inconsistently with Article 6.5 of the Anti-Dumping Agreement.

3. The Panel erred in the interpretation and application of Article 6.2 of the DSU by finding that the European Union's claim under Article 2.4 of the Anti-Dumping Agreement pertaining to packaging costs was within the Panel's terms of reference.[5] The Panel incorrectly held that the claim developed by the European Union before the Panel was the same as the claim pertaining to an exporter's packaging costs that was contained in the panel request (but not developed before the Panel). By treating these two issues as different arguments regarding

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

[1] WT/DS591/3/Rev.1, 22 April 2021.

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

[3] Panel Report, paras. 7.75, 7.78, 7.79, and 8.1.a.iii.

[4] Panel Report, paras. 7.126, 7.152.a., and 8.1.b.i.

[5] Panel Report, paras. 7.232, 7.233, 7.244, and 8.1.d.ii.

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

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

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

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[6] Panel Report, paras. 7.244 and 8.1.d.iii.
[7] Panel Report, paras. 7.241, 7.244, and 8.1.d.iii.
[8] Panel Report, paras. 7.303, 7.307, and 8.1.e.i.

ANNEX C

ARGUMENTS OF THE PARTIES

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ANNEX C-1

EXECUTIVE SUMMARY OF COLOMBIA'S WRITTEN SUBMISSION

1 INTRODUCTION

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

2 APPLICABLE STANDARD OF REVIEW

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

3 THE PANEL ERRED IN FINDING AN INCONSISTENCY UNDER ARTICLE 5.3

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[1] Panel Report, para. 7.237 and 7.243.

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

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

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

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

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

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

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

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

7 CONCLUSION

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

[2] Panel Report, *Canada – Welded Pipe*, para. 7.64.
[3] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 219.

ANNEX C-2

EXECUTIVE SUMMARY OF THE EUROPEAN UNION'S WRITTEN SUBMISSION

1. THE PANEL DID NOT ERR IN FINDING THAT COLOMBIA ACTED INCONSISTENTLY WITH ARTICLE 5.3 OF THE ANTI-DUMPING AGREEMENT BECAUSE, BY FAILING TO EXAMINE WHETHER THE USE OF THIRD COUNTRY SALES PRICES, INSTEAD OF DOMESTIC SALES PRICES, WAS "APPROPRIATE" IN THE SPECIFIC FACTS AND CIRCUMSTANCES OF THE INVESTIGATION AT ISSUE, MINCIT DID NOT EXAMINE THE "ADEQUACY" OF THE EVIDENCE IN THE APPLICATION TO DETERMINE WHETHER THERE IS "SUFFICIENT" EVIDENCE TO JUSTIFY THE INITIATION OF THE INVESTIGATION

1. Contrary to Colombia's allegations, the Panel did not state that under Article 5.3 "an explanation" by the applicant is required. The Panel did however recall that Article 5.3 requires investigating authorities to examine the accuracy and adequacy of the evidence provided in the application for purposes of initiation and noted, in line with prior panel reports, that any review of an investigating authority's conduct under Article 5.3 must be carried out on a case-by-case basis.

2. The core interpretative legal issue pertains to the obligation of the investigating authority, under Article 5.3 of the Anti-Dumping Agreement, to examine if the evidence provided in the application is adequate and sufficient to justify the initiation of the investigation requested by the applicant.

3. The Panel correctly applied the customary rules of interpretation of public international law, as required by the first sentence of Article 17.6(ii). The Panel inquired into the ordinary meaning of "where appropriate". It did not limit its analysis to the interpretation of that phrase in Article 5.2(iii) because its focus was on the assessment of MINCIT's conduct under Article 5.3. The Panel had recourse to context and object and purpose to elucidate the meaning of the term "where appropriate", proceeding in a logical and holistic fashion. That process yielded an interpretation that is harmonious and coherent and fits comfortably with Articles 5.3 and 5.2 of the Anti-Dumping Agreement.

4. The Panel was right to disagree with Colombia that the use of the term "where appropriate" indicates that an applicant enjoys complete "free choice" to submit any information that it desires for calculating normal value. Accepting Colombia's interpretation would deny any effect to the meaning or placement of the term "where appropriate", contrary to the principle of effectiveness in treaty interpretation. An investigating authority's examination, under Article 5.3, of the "adequacy" and sufficiency of the evidence for determining normal value for purposes of initiation requires, at the very least, an exercise of judgment as to the suitability or appropriateness of using third country sales prices, instead of domestic sales prices, in the specific situation before it.

5. Colombia's alternative interpretation would allow the investigating authority to initiate the investigation even though the applicant has in its possession a number of domestic sales prices that do not, in themselves, suggest dumping. This interpretation is in direct contradiction with the obligation of the investigating authority to examine the adequacy of the evidence provided in the application in order to determine whether there is sufficient evidence to justify the initiation of an investigation.

6. Colombia is therefore wrong in arguing that the sole question to be examined by the investigating authority is whether the evidence on third-country sales prices is reliable or, as Colombia puts it, "accurate" and "adequate" as a matter of substance.

7. There is nothing illogical about the use of third-country sales prices being considered "appropriate" and sufficient to initiate an investigation in one case but not in another case, for reasons unrelated to the substance, nature or quality of that evidence. Any review of an investigating authority's conduct under Article 5.3 must be carried out on a case-by-case basis

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

8. As Colombia acknowledges, the term "where appropriate" is one of those generic, open-ended terms "whose interpretation heavily depends on the context in which they are found". Since the Panel clarified the context and purpose of its interpretation of the term "where appropriate" in Article 5.2(iii), it is difficult to see what can be gained from examining all other instances where the covered agreements use the term "as appropriate" and inquiring how such a generic term stands to be interpreted in different contexts and for different purposes.

9. The word "adequacy" is rightly used in the Panel's finding, since Article 5.3 specifically requires the investigating authority to examine the adequacy of the evidence provided in the application. If the evidence of dumping provided in the application consists of third-country sales prices, instead of domestic sales prices, the investigating authority is required to examine whether that evidence is appropriate and therefore adequate to achieve the purpose of allowing it to determine whether there is sufficient evidence to justify the initiation of an investigation.

10. The European Union does not consider it unworkable for an investigating authority to verify if an applicant is unable to obtain domestic sales prices. It seems reasonable to assume that larger applicants, those who are part of multinational groups or with deeper pockets, will have less difficulty in obtaining information on domestic sales prices.

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

11. FEDEPAPA's revised application of 19 July 2017 was submitted to MINCIT as a document from which information on the alleged injury to the domestic industry had been redacted by the applicant. This was the only version to which the European Union and the other interested parties had access, both before and after the initiation of the anti-dumping investigation.

12. It is therefore indisputable that MINCIT treated as confidential the redacted information in section d(1) of FEDEPAPA's revised application. The Panel rightly reached the same conclusion in paragraph 7.126 of the Panel Report.

13. No clear indication in the record suggested that the information redacted from the revised application was made available elsewhere. A joint reading of the revised and the original application did not enable a reader to "easily infer" that the redacted information in FEDEPAPA's revised application was, "in reality", the same as the relevant information contained in the original application.

14. As correctly found by the Panel, despite the absence of an explicit request by the applicant, MINCIT did grant confidential treatment to the information in section d(1) of the revised application. Other interested parties were prevented from viewing the information redacted from the revised application.

15. The Panel rightly rejected Colombia's argument that the application of Article 6.5 and the obligation to show good cause was not triggered in the circumstances of the dispute. Colombia's argument "would render ineffective the requirement of showing 'good cause' by allowing (a) interested parties to submit redacted information without a showing of 'good cause' for confidential treatment; and (b) investigating authorities to maintain confidentiality of such information without 'good cause' being shown".

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

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

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

17. Colombia's appeal contains several interpretative flaws, and, most importantly, overlooks the fact that the question *why* a due allowance/adjustment was wrong, is not an element of the claim pursuant to Article 2.4 of the Anti-Dumping Agreement. On the contrary, it is part of the explanation demonstrating the actual infringement – and therefore an argument to establish the well-founded nature of the claim. Only claims, but not arguments, must be presented in a panel request.

18. The European Union therefore requests that the Arbitrators uphold the Panel's finding that, having regard to the legal standard that is actually set out in the terms of the treaty used in Article 6.2 of the DSU, which do not refer either to arguments or statements of fact or evidence, the claim relating to the erroneous allowance/adjustment for Mydibel's packaging costs was properly within the Panel's terms of reference. Consequently, the European Union requests that the Arbitrators also reject Colombia's request to declare moot the Panel's findings on the substance of this claim.

4. THE PANEL DID NOT ERR IN FINDING AN INCONSISTENCY WITH ARTICLES 3.1, 3.2, 3.4, AND 3.5 BY INCLUDING IMPORTS WITH DE MINIMIS DUMPING MARGINS IN THE SCOPE OF "DUMPED IMPORTS" UNDER ARTICLE 3 OF THE ANTI-DUMPING AGREEMENT

19. The Panel correctly found that imports from exporters found to have *de minimis* dumping margins may not be included as "dumped imports" under Article 3 of the Anti-Dumping Agreement.

20. The Panel neither "omitted" nor "skipped" a relevant stage in its inquiry. The Panel correctly applied the rules of interpretation under public international law. To determine the "ordinary meaning" of the term "dumped imports", the Panel was required to consider the Anti-Dumping Agreement as a whole, and to interpret that Agreement in a manner which does not result in any provision being rendered redundant.

21. The term "dumped imports" is not defined in Article 3 of the Anti-Dumping Agreement. Article 2.1 of the Anti-Dumping Agreement contains a definition which enables one to ascertain when a product will be considered to have been "dumped". Whilst that definition must be interpreted coherently across the Anti-Dumping Agreement, Article 2.1 of the Anti-Dumping Agreement does not provide an "unequivocal" "ordinary meaning" of the term "dumped imports". Arguments parasitic on this incorrect proposition must fall.

22. An injury determination can only follow from an investigation. Article 5 of the Anti-Dumping Agreement provides for the initiation, conduct and termination of investigations. Consideration of the evidence sustaining the injury determination must take place in the course of an investigation (Article 5.7). Article 5.8 sets down an "immediate termination" requirement where there is a determination of a *de minimis* dumping margin. There is a relationship between Article 5 of the Anti-Dumping Agreement and Article 3 of the Anti-Dumping Agreement. Therefore, Article 5.8 of the Anti-Dumping Agreement provides important relevant context for the interpretation of Article 3 of the Anti-Dumping Agreement.

23. The Panel correctly found that the "immediate termination" requirement in Article 5.8 of the Anti-Dumping Agreement would be deprived of effectiveness if Colombia's interpretative proposition were "correct".

24. The factual scenario before the Panel involved three categories of exporters: a) those in respect of whom MINCIT determined there was a *de minimis* final margin of dumping; b) those in respect of whom MINCIT determined there was a negative final margin of dumping; and c) those in respect of whom MINCIT determined there was a positive final margin of dumping that was

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

25. However, as this Appeal is brought under Article 17.6. (ii) of the Anti-Dumping Agreement, the interpretation by the Arbitrators of the term "dumped imports" in Article 3 of the Anti-Dumping Agreement must hold good in all fact patterns. That includes the case in which there is an original anti-dumping investigation relating to a product from one country, with one exporter, with a dumping margin of up to, but less than 2% (for example, 1.9%).

26. On the European Union's interpretation, in such a case the investigation must be immediately terminated, in accordance with Article 5.8 of the Anti-Dumping Agreement, in order for that provision to have any meaningful effect. On Colombia's interpretation, the investigating authority may continue with an injury analysis, based on the "dumped imports" (with a margin of 1.9%), and could, in theory, make findings of material injury and causation. But what happens, then, when the investigating authority considers the imposition of a dumping duty, pursuant to Article 9.2 of the Anti-Dumping Agreement?

27. There are two options. First, an anti-dumping duty is imposed at 1.9%. But this would only serve to emphasise that Article 5.8 of the Anti-Dumping Agreement would have been deprived of all effectiveness. Second, alternatively, no anti-dumping duty is imposed because that would not be appropriate. In the second scenario, there is no possibility other than the investigation is terminated. The injury analysis would have been, right from the outset, entirely without object. Consideration of this scenario decisively demonstrates why Colombia's interpretation cannot be right, or permissible, because it would lead to a conclusion that is manifestly absurd and unreasonable.

28. If Article 5.8 of the Anti-Dumping Agreement mandates "immediate termination" and precludes the injury analysis in the scenario of one exporter with a dumping margin of 1.9% in one country, it must also do so in the factual scenario underlying this Appeal. The imports from the exporters with a *de minimis* dumping margin must be excluded from the injury analysis.

29. Colombia's remaining arguments are unavailing.

30. The Panel was not required to prioritise the "immediate context" of Article 3.5 of the Anti-Dumping Agreement over a reading of the Agreement as a whole. The absence of a reference to Article 5.8 in Article 3.5 of the Anti-Dumping Agreement does not prove that the drafters never intended the *de minimis* rule to apply to "dumped imports". A coincidence in timing of the negotiation of Article 3.5 with other provisions that cross-refer to Article 5.8 of the Anti-Dumping Agreement does not prove the contrary. Whilst a legal consequence of the immediate termination obligation in Article 5.8 of the Anti-Dumping Agreement is that no anti-dumping measure may be imposed on an exporter found to have a *de minimis* dumping margin, this does not prove this is the only legal consequence that the "immediate termination" requirement entails.

31. The interpretative proposition the European Union advances is coherent with the findings of multiple previous panels and the Appellate Body. It was supported by other members before the Panel. The European Union invites the Arbitrators to uphold the Panel's findings.

5. CONCLUSION

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

ANNEX D

ARGUMENTS OF THE THIRD PARTIES

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ANNEX D-1

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

1. In this submission, Brazil will focus on two relevant aspects of the present dispute: (i) Article 5.2(iii) and Article 5.3 concerning the information necessary to initiate an anti-dumping investigation; and (ii) Article 3 regarding the determination of injury, in particular the imports considered to be *de minimis*.

2. For Brazil, the information presented by the applicant in its initial submission is subject to less demanding requirements compared to those applied to the information that substantiates a final determination. Brazil notes that it is only natural and recurrent that an investigation will gradually become more precise and more complex as it advances.

3. Brazil sees with caution a reading implying that the requirements of Articles 2 would apply also to Articles 5.2 and 5.3 of the ADA, as those provisions refer to different stages of the investigation, and impose different thresholds regarding the adequacy and quality of the information used by the authorities.

4. Brazil is of the view that, in cases where the investigating authority finds that a producer or exporter has incurred in a *de minimis* margin of dumping, treating such imports as "dumped imports" would infringe the requirement of Article 5.8 to immediately terminate the investigation.

5. Brazil understands that the proper interpretation of the term "dumped imports" under Articles 3.1, 3.2, 3.4 and 3.5 of the ADA, for purposes of injury and causation analyses, must not consider imports from the producers/exporters that were determined to have final *de minimis* and final negative margins of dumping.

ANNEX D-2

EXECUTIVE SUMMARY OF JAPAN'S THIRD PARTY'S WRITTEN SUBMISSION

I. THE ASSESSMENT OF THIRD-COUNTRY SALES PRICES AS NORMAL VALUE UNDER ARTICLE 5.3

1. As context for the phrase "where appropriate" under Article 5.2(iii) of the Anti-Dumping Agreement, both (1) the manner of distinguishing domestic sales prices as the priority in the main text of Article 5.2(iii), and (2) the qualification of third-country sales prices and constructed value with the phrase "or, where appropriate" and enclosed with the parentheses strongly indicate that domestic sales prices are preferred.

2. Article VI:1 of GATT 1994 and Articles 2.1 and 2.2 of the Anti-Dumping Agreement also specifically stipulate the preferred order among the three provided types of price information for normal value, prioritizing the use of domestic sales prices.

3. Such context supports an understanding that, even at the initiation stage of the investigation under Articles 5.3 and 5.2(iii), the prioritized method to determine normal value is domestic sales prices over the alternatives.

4. Japan also notes that the phrase "where appropriate" requirement under Article 5.2(iii) does not refer only to situations provided under Article 2.2 and is not limited to those situations.

II. THE EXISTENCE OF CONFIDENTIAL TREATMENT UNDER ARTICLE 6.5

5. In light of the balance between the submitting party's interest in protecting its confidential information and the due process interests of other interested parties, whether the relevant information is properly disclosed to the other interested parties that have defensive interests is one of the key elements to be taken into account in assessing whether the redacted information is confidentially treated under Article 6.5.

6. With regard to the redacted information at issue, Japan agrees with the Panel's finding that, absent any clear indication of knowledge, other interested parties could not have become aware about the availability of the redacted information elsewhere on the record,[1] especially since the other interested parties do not have full investigation record at hand.

III. TERMS OF REFERENCE FOR ARTICLE 2.4 CLAIM

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

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

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

[1] Panel Report, para. 7.125.

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

[3] See Appellate Body Report, *Korea – Pneumatic Valves (Japan)*, paras. 5.111 and 5.133.

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

9. Also, since Article 5.8 applies and regulates the subsequent procedures to determine the effect of any alleged dumping, the imports with *de minimis* dumping margins should be excluded from the scope of the order imposing anti-dumping duties. This means that imports with *de minimis* dumping margins are not to be condemned in the sense provided in Article VI:1 of GATT 1994. Only the products from exporters that are found to have non-*de minimis* dumping margins are to be condemned, and only to the extent such imports cause material injury to the domestic industry.

10. Taking into account those two provisions as the context, the "dumped imports" under Articles 3.1, 3.2, 3.4 and 3.5 should also not include imports with *de minimis* dumping margins, since there will be a risk of false attribution of the injury caused by imports with *de minimis* dumping margins to imports with non-*de minimis* dumping margins.

ANNEX D-3

EXECUTIVE SUMMARY OF THE UNITED STATES' THIRD PARTY'S WRITTEN SUBMISSION

I. APPELLANT'S CLAIMS UNDER ARTICLE 5.3

1. Article 5.2(iii) of the Anti-Dumping Agreement indicates that the application requesting the initiation of an investigation shall contain "information on prices at which the product in question is sold when destined for consumption in the domestic markets of the country or countries of origin or export (or, where appropriate, information on the prices at which the product is sold from the country or countries of origin or export to a third country or countries, or on the constructed value of the product)." The term "where appropriate" should be interpreted in the context of the introductory clause of Article 5.2, which states that "[t]he application shall contain such information as is reasonably available to the applicant," including information about "normal value" under subparagraph (iii). The term "where appropriate" in Article 5.2(iii) thus anticipates that there may be circumstances in which it is "appropriate" for an applicant to submit third-country sales or constructed value data in its application.

2. An investigating authority enjoys a degree of discretion with respect to the type of evidence it may rely on in determining whether to initiate an investigation if it is satisfied that an application contains "sufficient evidence" as required under Article 5.3. Therefore, if an authority determines, after examining the accuracy and adequacy of the evidence provided in an application, that domestic sales pricing information was not reasonably available to an applicant, that is a circumstance in which it would be appropriate for the applicant to submit information on third country sales, or the constructed value, of the product. An authority is not otherwise required to demonstrate that the information in the application was the only information reasonably available to an applicant.

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

3. Article 3 of the Anti-Dumping Agreement focuses on the investigating authority's injury analysis of the effect or impact of "the dumped imports." Article 2.1 of the Anti-Dumping Agreement defines dumped products, "[f]or the purposes of this [Anti-Dumping] Agreement," on a countrywide basis. The references to "the dumped imports" throughout Article 3 therefore concern all the dumped imports of the product from the countries subject to the investigation. In this respect, the Agreement requires an authority to examine, for example in Articles 3.1 and 3.2, the volume and price effects of "the dumped imports."

4. Imports of an exporter or producer for which an individual margin of dumping is determined to be zero or *de minimis* do not constitute part of "the dumped imports" of the product from the countries subject to the investigation. Article 5.8 requires an authority to terminate an anti-dumping investigation in respect of any exporter or producer for which an individual margin of dumping is determined to be zero or *de minimis*. Once a zero or *de minimis* margin has been finally determined for a particular exporter or producer, the investigation must be terminated in all aspects, including the exclusion of the imports of that exporter or producer from the authority's injury analysis of the effect or impact of "the dumped imports."

5. The United States considers that the Panel's interpretation is correct as it accords with the ordinary meaning of "dumped imports": The term "dumped imports" in Articles 3.1, 3.2, 3.4, and 3.5 of the Anti-Dumping Agreement excludes the imports of any exporter or producer for which an individual margin of dumping is determined to be zero or *de minimis*.