



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

RECOURSE TO ARTICLE 21.5 OF THE DSU BY THE EUROPEAN UNION

REPORT OF THE PANEL

Addendum

BCI deleted, as indicated [[***]]

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

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ANNEX A-1

WORKING PROCEDURES OF THE PANEL

Adopted on 17 December 2024

General

1. (1) In this proceeding, the Panel shall follow the relevant provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). In addition, the following Working Procedures apply.

(2) The Panel reserves the right to modify these Working Procedures and adopt additional procedures as necessary, after consultation with the parties.

Confidentiality

2. (1) The deliberations of the Panel and the documents submitted to it shall be kept confidential. Members shall treat as confidential information submitted to the Panel that the submitting Member has designated as confidential.

(2) In accordance with the DSU, nothing in these Working Procedures shall preclude a party or third party from disclosing statements of its own positions to the public.

(3) If a party submits a confidential version of its written submissions to the Panel, it shall also, upon request of a Member, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public. A party should endeavour to promptly provide a non-confidential summary to any Member requesting it, and if possible within 10 days of receiving the request.

(4) Upon request, the Panel may adopt appropriate additional procedures for the treatment and handling of confidential information after consultation with the parties.

Submissions

3. (1) Before the substantive meeting of the Panel with the parties, each party shall submit to the Panel a first written submission, and subsequently a written rebuttal, in which it presents the facts of the case and its arguments, and counter-arguments, respectively, in accordance with the timetable adopted by the Panel.

(2) Each third party that chooses to make a written submission before the substantive meeting of the Panel with the parties shall do so in accordance with the timetable adopted by the Panel.

(3) The Panel may invite the parties or third parties to make additional submissions during the proceeding, including with respect to requests for preliminary rulings in accordance with paragraph 4 below.

(4) Each party is encouraged to be succinct in its submissions in the interest of efficient dispute settlement.

(5) The working language of the Panel shall be English. The parties shall provide concurrently courtesy translations in English of written submissions that are drafted in another WTO working language.

Preliminary rulings

4. (1) If Colombia considers that the Panel should make a ruling before the issuance of the Report that certain measures or claims in the panel request or the complainant's first written submission are not properly before the Panel, the following procedure applies. Exceptions to this procedure shall be granted upon a showing of good cause.
 - a. Colombia shall submit any such request for a preliminary ruling at the earliest possible opportunity and in any event no later than in its first written submission to the Panel. The European Union shall submit its response to the request before the substantive meeting of the Panel, at a time to be determined by the Panel in light of the request.
 - b. The Panel may issue a preliminary ruling on the issues raised before, during or after the substantive meeting, or the Panel may defer any ruling until it issues its Report.
 - c. If the Panel finds it appropriate to issue a preliminary ruling before the issuance of its Report, the Panel may provide reasons for the ruling at the time that the ruling is made, or subsequently in its Report.
 - d. Any request for such a preliminary ruling by the respondent before the meeting, and any subsequent submissions of the parties in relation thereto before the meeting, shall be served on the third parties. The Panel may provide the third parties with an opportunity to provide comments on any such request, either in their written submission, as provided for in the timetable, or in a separate submission. Any preliminary ruling issued by the Panel before the substantive meeting on whether certain measures or claims are properly before the Panel shall be shared with the third parties.
- (2) This procedure is without prejudice to the parties' right to request other types of preliminary or procedural rulings during the proceeding, and to the procedures that the Panel may follow with respect to such requests.

Evidence

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

"exhibit intentionally left blank" on the cover page that contains the number of the exhibit concerned.

(2) Each party shall provide an updated list of exhibits (in Word or Excel format) together with each of its submissions, oral statements, and responses to questions.

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

(4) Insofar as a party considers that the compliance panel should take into account a document already submitted as an exhibit in the original panel proceeding, it should resubmit that document as an exhibit for the purpose of this proceeding. In its list of exhibits, it should refer to the number of the original exhibit in the original panel proceedings (OP) (example: [XXX]-1 ([XXX]-21-OP)).

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

Editorial Guide

8. In order to facilitate the work of the Panel, each party and third party is invited to make its submissions in accordance with the Editorial Guide (which is available in the Help & Resources section of the Disputes Online Registry Application (DORA)).

Questions

9. The Panel may pose questions to the parties and third parties at any time, including:
- a. Before the meeting, the Panel may send written questions, or a list of topics it intends to pursue in questioning orally during the meeting. The Panel may ask different or additional questions at the meeting.
 - b. The Panel may put questions to the parties and third parties orally during the meeting, and in writing following the meeting, as provided for in paragraphs 16 and 21 below.

Substantive meeting

10. The Panel shall meet in closed session.
11. The parties and third parties shall be present at the meetings only when invited by the Panel to appear before it. As a general matter, the Panel intends to conduct such meetings in person but may provide for remote participation as appropriate.
12. (1) Each party has the right to determine the composition of its own delegation when meeting with the Panel.
- (2) Each party shall have the responsibility for all members of its delegation and shall ensure that each member of its delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceeding and of the submissions of the parties and third parties.
13. Each party shall provide the list of members of its delegation who will attend the meeting no later than 5:00 p.m. (Geneva time) three working days before the first day of each meeting with the Panel.
14. A request by a party for interpretation from one WTO working language to another should be made to the Panel as early as possible, preferably at the organizational stage, to allow sufficient time to ensure availability of interpreters.

15. There shall be one substantive meeting with the parties.
16. The substantive meeting of the Panel with the parties shall be conducted as follows:
 - a. The Panel shall invite the European Union to make an opening statement to present its case first. Subsequently, the Panel shall invite Colombia to present its opening statement. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. If interpretation is needed, each party shall provide additional copies for the interpreters before taking the floor.
 - b. Each party should limit the duration of its opening statement to not more than 75 minutes. If either party considers that it requires more time for its opening statement, it should inform the Panel and the other party at least seven working days before the meeting, together with an estimate of the expected duration of its statement. The Panel will accord equal time to the other party.
 - c. After the conclusion of the opening statements, the Panel shall give each party the opportunity to make comments or ask the other party questions.
 - d. The Panel may subsequently pose questions to the parties.
 - e. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with the European Union presenting its statement first. Before each party takes the floor, it should provide the Panel and other participants at the meeting with a provisional written version of its closing statement, if available.
 - f. Following the meeting:
 - i. Each party shall submit a final written version of its opening statement as delivered no later than 5:00 p.m. (Geneva time) on the first working day following the meeting. At the same time, each party should also submit a final written version of any prepared closing statement that it delivered at the meeting of the Panel with the parties.
 - ii. Each party shall send in writing, within the time-frame confirmed by the Panel before the end of the meeting, any questions to the other party to which it wishes to receive a response in writing.
 - iii. The Panel shall send in writing, within the time-frame confirmed by the Panel before the end of the meeting, any questions to the parties to which it wishes to receive a response in writing.
 - iv. Each party shall respond in writing to the questions from the Panel, and to any questions posed by the other party, within the time-frame established by the Panel.

Third-party session

17. Each third party may present its views orally during a session of the substantive meeting with the parties set aside for that purpose.
18. Each third party shall indicate to the Panel whether it intends to make an oral statement during the third party session three weeks before this session.
19. (1) Each third party has the right to determine the composition of its own delegation when meeting with the Panel.

(2) Each third party shall have the responsibility for all members of its delegation and shall ensure that each member of its delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceeding and of the submissions of the parties and third parties.

(3) Each third party shall provide the list of the members of its delegation who will attend the third-party session no later than 5:00 p.m. (Geneva time) three working days before the third-party session.

20. To ensure the availability of interpreters, the third parties shall also indicate at least three weeks before the third-party session whether they intend to make their statement in a WTO working language other than English and whether they require interpretation from English to any other WTO working language.

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

- a. All parties and third parties may be present during the entirety of this session.
- b. The Panel shall first hear the oral statements of the third parties, who shall speak in alphabetical order. Each third party making an oral statement at the third-party session shall provide the Panel and other participants at the session with a provisional written version of its statement before it takes the floor. If interpretation of a third party's oral statement is needed, that third party shall provide additional copies for the interpreters before taking the floor.
- c. Each third party should limit the duration of its statement to 15 minutes. If a third party considers that it requires more time for its oral statement, it should inform the Panel and the parties at least seven working days before the meeting, together with an estimate of the expected duration of its statement. The Panel will accord equal time to all third parties for their statements.
- d. After the third parties have made their statements, the parties shall be given the opportunity to pose questions to any third party for clarification on any matter raised in that third party's submission or statement.
- e. The Panel may subsequently pose questions to any third party.
- f. Following the third-party session:
 - i. Each third party shall submit the final written version of its oral statement as delivered, no later than 5:00 p.m. (Geneva time) on the first working day following the meeting.
 - ii. Each party may send in writing, within the time-frame to be confirmed by the Panel before the end of the meeting, any questions to one or more third parties to which it wishes to receive a response in writing.
 - iii. The Panel may send in writing, within the time-frame to be confirmed by the Panel before the end of the meeting, any questions to one or more third parties to which it wishes to receive a response in writing.
 - iv. Each third party choosing to do so shall respond in writing to written questions from the Panel or a party, within the time-frame established by the Panel.

Descriptive part and executive summaries

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

23. Each party shall submit one integrated executive summary. This integrated executive summary shall summarize the facts and arguments as presented to the Panel. The timing of the submission of the integrated executive summary shall be indicated in the timetable adopted by the Panel.

24. Each integrated executive summary shall not exceed 15 pages.

25. Each third party shall submit an executive summary of its arguments as presented to the Panel. The executive summary to be provided by each third party shall not exceed six pages. If a third party wishes for one of its submissions which does not exceed six pages to serve as its executive summary, it shall so indicate. The timing of the submission of the executive summary shall be indicated in the timetable adopted by the Panel.

Interim review

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

27. If no meeting is requested, each party may submit written comments on the other party's written request for review in accordance with the timetable adopted by the Panel. Such written comments shall be limited to the other party's written request for review.

28. If a meeting is requested, the Panel shall consult with the parties on the timing of the meeting and any further written comments.

Interim and Final Reports

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

Service of documents

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

- a. Unless otherwise requested by the Panel, the Panel Secretary or the DS Registry, all communications with the Panel shall take place via the Disputes On-Line Registry Application (DORA) <https://dora.wto.org>. All submissions shall be uploaded to the Documents tab by 5:00 p.m. (Geneva time) on the due dates established by the Panel. The electronic version uploaded to DORA shall constitute the official version for the purposes of submission deadlines and the record of the dispute. Upload of a document to DORA shall constitute electronic service on the Panel, the other party, and the third parties. Parties and third parties should upload all submissions in the Documents tab, not as attachments to messages transmitted via the Messages tab.
- b. The DS Registry is available to assist parties and third parties with DORA, including managing their DORA accounts and filing and downloading documents. The DS Registry is located in Room 2047 of the CWR building and is open from 9.30 a.m. to 12.30 p.m. and 2.30 p.m. to 5:00 p.m. The Registry can be reached by telephone or via email at DSRegistry@wto.org. A DORA User Guide for Members is available in the Help & Resources section of DORA.
- c. If a document is in a format that cannot be submitted electronically, then the party or third party shall complete the Notice of Manual Filing (available in the Help & Resources section of DORA) and upload that Notice to DORA by 5:00 p.m. on the due date established by the Panel. The party or third party shall bring the physical document to the DS Registry by 5:00 p.m. (Geneva time) the next working day along with the documents described in subparagraph e.
- d. The parties and third parties should upload submissions in both Microsoft Word and PDF formats. To the extent possible, all documents in PDF format, including exhibits, should be searchable.

- e. Each party and third party shall make an appointment with the DS Registry to file one paper copy of all documents it submits to the Panel, including the exhibits. The DS Registry shall stamp the documents with the date and time of the submission. If an exhibit is in a format that is impractical to submit as a paper copy, then the party or third party may submit such exhibit in electronic format only. In this case, the cover page that contains the number of the exhibit concerned should indicate that the exhibit is only available in electronic format.
- f. The Panel shall provide the parties with the Draft Descriptive Part of the Report, the Interim Report and the Final Report, as well as all other documents or communications issued by the Panel during the proceeding, via DORA.
- g. If any party or third party is unable to meet a deadline set by the Panel because of technical difficulties in uploading any document to DORA that it cannot resolve with the assistance of the DS Registry, it shall submit the document(s) via email without delay and no later than by 6:00 p.m. on the due date. Any such email shall be addressed to the DS Registry, the Panel Secretary, the other party and, if appropriate, the third parties.
- h. In case any party or third party is unable to access a document submitted via DORA because of technical difficulties, it shall promptly, upon becoming aware of the problem, inform the DS Registry, the Panel Secretary, and the party or third party that submitted the document, of the problem. The party or third party that submitted the document(s) shall promptly provide an electronic version of the relevant document(s) to the affected party or third party by email, with a copy to the DS Registry and the Panel Secretary.

Correction of clerical errors in submissions

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

Parties' agreed procedures for arbitration

32. The Panel takes note of the Agreed Procedures for Arbitration under Article 25 of the DSU in this dispute notified by the parties on 20 April 2021 (WT/DS591/3/Rev.1) and of the joint requests of the parties to the Panel formulated therein.

ANNEX A-2

ADDITIONAL WORKING PROCEDURES OF THE PANEL CONCERNING BUSINESS CONFIDENTIAL INFORMATION

Adopted on 17 December 2024

1. For the purpose of this proceeding, business confidential information (BCI) is defined as any information that has been designated as such by a party submitting the information to the Panel. The parties shall only designate as BCI information that is not available in the public domain, the release of which would cause serious harm to the interests of the originator(s) of the information. BCI may include information that was previously treated by the Colombian investigating authority as confidential in the course of the anti-dumping proceeding at issue in this dispute.
2. No person may have access to BCI except a panelist, a member of the Secretariat assisting the Panel, an employee of a party or a third party, or an outside advisor to a party or a third party for the purposes of this dispute. However, an outside advisor is not permitted to access BCI if that advisor is an officer or employee of an enterprise engaged in the production, sale, export, or import of the products that were the subject of the proceeding[s] at issue in this dispute, or an officer or employee of an association of such enterprises.
3. A person having access to BCI shall treat it as confidential, i.e., shall not disclose that information other than to those persons authorized to receive it pursuant to these procedures. Each party and third party shall have responsibility in this regard for its employees as well as any outside advisors used 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. All documents and electronic storage media containing BCI shall be stored in such a manner as to prevent unauthorized access to such information.
4. When a party or third party includes BCI in a submission or exhibit, the cover and/or first page of the document containing BCI, and each page of the document, shall be marked to indicate the presence of such information. The first page or cover of the document shall state "Contains Business Confidential Information on pages xxxxxx", and each page of the document shall contain the notice "Contains Business Confidential Information" at the top of the page. The specific information in question shall be placed between double square brackets, as follows: [[xx.xxx.xx]]. BCI presented in the form of, or as part of, an exhibit shall be marked to indicate, in addition to the above, that it contains BCI by putting "BCI" next to the exhibit number (e.g. Exhibit [MEMBER SYMBOL]-1 (BCI)).
5. When BCI is submitted in electronic format, the file name shall include the terms "Business Confidential Information" or "BCI". In addition, when BCI is submitted: (a) in electronic format using the Disputes Online Registry Application (DORA), the level of confidentiality shall be selected as BCI; and (b) on a storage medium, the label of the storage medium shall be clearly marked with the statement "Business Confidential Information" or "BCI".
6. At any of the meetings of the Panel with the parties, including the third-party session, if a party or third party intends to refer to BCI, it shall inform the Panel before doing so, and the Panel will ensure that only persons authorized to have access to BCI pursuant to these procedures are in the room to hear that statement.
7. When a party or third party submits a document containing BCI to the Panel, the other party and third parties, when referring to that BCI in their documents, including written submissions, and oral statements, shall clearly identify all such information in those documents. All such documents shall be marked as described in paragraph 4.
8. If a party considers that information submitted by the other party or a third party should have been designated as BCI and objects to such submission without BCI designation, it shall promptly bring this objection to the attention of the Panel and the other party or third party, together with

the reasons for the objection. Similarly, if a party considers that the other party or a third party submitted information designated as BCI, information which should not be so designated, it shall promptly bring this objection to the attention of the Panel and the other party or third party, together with the reasons for the objection. The Panel shall decide whether information subject to an objection will be treated as BCI for the purposes of these proceedings on the basis of the criteria set out in paragraph 1.

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

10. Submissions, exhibits, and other documents or recordings containing BCI will be included in the record forwarded to the Appellate Body or any arbitration proceeding that may be established pursuant to Article 25 of the DSU in the event of an appeal of the Panel's Report.

ANNEX A-3

ADDITIONAL WORKING PROCEDURES OF THE PANEL TO FACILITATE ARBITRATION UNDER ARTICLE 25 OF THE DSU¹

Adopted on 6 October 2025

Transmission of the Panel Report

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

Suspension of the panel proceedings

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

Transmission of the Panel record

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

Transmission of the Panel Report and the Panel record through DORA

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

Confidentiality of the Panel Report and the Panel Record

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

¹ See paragraph 1.10 of the Panel Report and the parties' Agreed Procedures for Arbitration under Article 25 of the DSU (WT/DS591/3/Rev.1) ("Agreed Arbitration Procedures"). Through the present Additional Working Procedures of the Panel, the Panel accedes to, and operationalizes the modalities of, the parties' joint request formulated in paragraphs 4 and 19 of the Agreed Arbitration Procedures.

² Unless the parties indicate otherwise, the "pool of arbitrators" shall be understood to comprise all individuals identified in JOB/DSB/1/Add.12/Suppl.14.

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

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

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

ANNEX A-4

INTERIM REVIEW

1 INTRODUCTION

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

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

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

2 COLOMBIA'S REQUESTS FOR REVIEW OF THE INTERIM REPORT

2.1 Paragraph 7.25

2.1. Colombia requests deletion of the first sentence of paragraph 7.25. This sentence states: "Colombia does not contest that MINCIT applied this methodology".² Colombia asserts that this sentence creates the impression that the content or description of the methodology were somehow in dispute whereas the preceding descriptions of the methodology in paragraphs 7.21-7.23 refer to Colombia's own submissions.

2.2. The European Union asks us to reject Colombia's request. The European Union asserts that the sentence simply confirms that the content or description of the methodology is not in dispute between the parties and that the correctness of the sentence is not contested by Colombia.³

2.3. We have deleted the sentence in question.

2.2 Paragraph 7.78

2.4. Colombia requests deletion of paragraph 7.78. Colombia asserts that the paragraph gives the impression that the Panel is taking a position on an unsettled issue that is not separately evaluated in the Report and has not been argued fully before this Panel.⁴ The European Union has not commented on Colombia's request.

2.5. We decline Colombia's request. Paragraph 7.78 constitutes the Panel's separate evaluation of the applicable requirements of Article 2.1, including the Panel's assessments of agreement with certain analyses adopted in prior dispute settlement proceedings. The Panel subsequent analysis proceeds consistently with this evaluation and assessment.

2.3 Paragraphs 7.82, 7.86, 7.89, 7.90, 7.106, 7.114, and 7.120

2.6. Colombia requests that we treat the specific article numbers at issue in our findings as BCI.⁵ The European Union has not commented on Colombia's request.

2.7. We decline Colombia's request. Paragraph 1 of our Additional Working Procedures concerning BCI preclude information in the public domain from being treated as BCI. We note in this regard that

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

² Colombia's request for interim review, para. 2.2.

³ European Union's comments on Colombia's request for interim review, para. 4.

⁴ Colombia's request for interim review, para. 2.5.

⁵ Colombia's request for interim review, para. 2.6.

the "public version" of MINCIT's final technical report⁶ includes the relevant article numbers. Since the relevant article numbers are already in the public domain, such numbers may not be treated as BCI.

2.4 Paragraph 7.101

2.8. Colombia requests that we amend our finding to further find that "Agrar frost consistently used the same article number and name to refer to a specific article".⁷ The European Union has not commented on Colombia's request.

2.9. We will not include the additional finding requested by Colombia, since it extends beyond the scope of our analysis in paragraph 7.101.

2.5 Paragraph 7.102

2.10. Colombia asks us to include an additional statement that the reference to the accounting system in the verification report confirms, as argued by Colombia, that the relevant article names and articles numbers were widely used for all of the company's operations, whether for external or internal purposes.⁸

2.11. The European Union asks us to reject Colombia's request. The European Union asserts that the findings in paragraph 7.102 merely indicate that the verification report relates to a matter other than the use of article numbers for identifying product characteristics. It therefore only concerns the irrelevance – in the opinion of the Panel – of that report for the significance of the article numbers.⁹

2.12. We reject Colombia's request. As indicated by the European Union, the scope of our finding in respect of the verification report is limited, and would not support the broader conclusion suggested by Colombia.

⁶ Final technical report (Exhibit EU-2(b)).

⁷ Colombia's request for interim review, para. 2.7.

⁸ Colombia's request for interim review, paras. 2.9-2.10.

⁹ European Union's comments on Colombia's request for interim review, para. 6.

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ANNEX B-1

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE EUROPEAN UNION

1 INTRODUCTION

1. The Award of the Arbitrators in DS591 *Colombia – Anti-Dumping Duties on Frozen Fries* (WT/DS591/ARB25 and WT/DS591/ARB25/Add.1) was issued and notified to the DSB on 21 December 2022. Since that date, the European Union has been waiting for Colombia to implement the panel and arbitral findings in a manner consistent with the Anti-Dumping Agreement. Unfortunately, Colombia insisted on using flawed methodologies to artificially create and/or inflate the margins of dumping which it determined for EU exporting producers of frozen fries.
2. Colombia puts forward creative arguments to justify MINCIT's flawed calculations of dumping margins in the administrative review. Despite these, the European Union submits that Colombia has not brought its measures into conformity with the covered agreements or with the recommendations and rulings notified to the DSB in the original proceedings.

2 COLOMBIA ACTED INCONSISTENTLY WITH ITS OBLIGATIONS UNDER ARTICLE 2.4.2 OF THE ANTI-DUMPING AGREEMENT BY USING SIMPLE AVERAGES OF DOMESTIC PRICES TO ESTABLISH THE NORMAL VALUE OF CERTAIN PRODUCT TYPES AND COMPARING THE NORMAL VALUE SO ESTABLISHED TO WEIGHTED AVERAGES OF EXPORT PRICES IN ORDER TO DETERMINE A MARGIN OF DUMPING FOR INDIVIDUAL EXPORTERS

3. Colombia confirms in its first written submission that it used a simple average of the sales prices of the items within a product type to calculate the normal value when "there was no exact match between the item sold on the export market and the goods sold in the domestic market". That normal value, calculated on the basis of a simple average, was then compared to the export price of the items concerned, calculated on a weighted-average basis.
4. Colombia's argument that the methodology applied by MINCIT to calculate normal value does not fall within the scope of Article 2.4.2, but rather under Article 2.4, must be rejected. The assessment of any methodology under Article 2.4.2 must also take account of its consistency with the provisions governing fair comparison in Article 2.4.
5. The Panel should reject Colombia's argument that the model matching methodology applied by MINCIT does not fall within the scope of Article 2.4.2 because it would fall, instead, within the scope of Article 2.4. This argument ignores the fact that the "fair comparison" requirement also informs Article 2.4.2 and that the assessment of any methodology under Article 2.4.2 must take account of that methodology's consistency with the provisions governing fair comparison in Article 2.4.
6. The fact that MINCIT used a simple average "because it was trying to determine a proper match for exported articles so as to ensure a 'fair comparison'" does not remove that methodology from the scope of Article 2.4.2 of the Anti-Dumping Agreement.
7. MINCIT exceeded its margin of discretion by using a simple average of domestic prices for the purpose of selecting an appropriate match to the exported product.
8. Even if MINCIT has first calculated the weighted-average prices of all items sold on the domestic market, this does not allow it to take an intermediate step by which the weighted-average prices of each item are combined within a "product grouping" by using a simple average. That intermediate step distorts the calculation of the overall normal value and hence the establishment of a margin of dumping.

9. The violation of Article 2.4.2 does not arise from the use as such of a "model-matching approach", but rather from the type of model-matching that is used by the investigating authority. Colombia has not convincingly explained why it was necessary for MINCIT, for the purposes of matching a model (product type/product grouping) sold on the domestic market of the exporter to the product exported to Colombia, to calculate the normal value of the like product sold on the domestic market by using a simple average of the sales prices. The European Union submits that the correct approach under Article 2.4.2 of the Anti-Dumping Agreement would have been to calculate the normal value of the like product sold in the domestic market by using a weighted average of the sales prices of all products like the exported product, i.e. products whose characteristics closely resemble those of the exported product.
10. When the like product is not identical, in all respects, to the exported product, if there are domestic sales of products that are "like" the exported product, the investigating authority is required to calculate normal value on the basis of the comparable price of those domestic sales, unless any other of the conditions in Article 2.2 is met.
11. The use of a simple average in this case skews upward the normal value, does not rest on a permissible interpretation of Article 2.4.2 and is therefore inconsistent with that provision.
12. The intention of MINCIT to create a "proxy comparator article that would represent the average of the physical characteristics of all the articles contained within each product grouping" is not relevant to exempt Colombia from its obligations under Article 2.4.2 of the Anti-Dumping Agreement.
13. In addition, the European Union submits that it does not flow from any provision of the Anti-Dumping Agreement that investigating authorities must create a proxy comparator product which represents the average of the physical characteristics of all the items contained within a model or product grouping. By contrast, the Anti-Dumping Agreement clearly requires investigating authorities to calculate normal value on the basis of a weighted average of domestic sales prices of all products which are "like" the exported product. The physical characteristics of each product are important to determine which products or items must be included within a particular model, product type or product grouping. However, there is no reason why their physical characteristics must be "averaged" or why it is necessary to create an artificial product combining the physical characteristics of all those products.
14. The European Union submits that MINCIT did not have to decide which of the "articles" within the relevant "referencia" was *most similar to the exported product* and, in fact, MINCIT was not allowed to do so because it do not contest or reject the "referencias" that were proposed by the exporters as being the like product sold on the domestic market. All the "articles" included in those "referencias" had characteristics closely resembling those of the "articles" exported to Colombia, therefore the prices and volumes of all the sales of all the "articles" within the relevant "referencia" had to be included in the calculation of normal value. Colombia confirmed that MINCIT took account of the prices of all the "articles" within the relevant "referencia" and also confirmed that MINCIT failed to take account of the volumes in which they were sold in the domestic market. By not taking account of the volumes of sales of each "article" within the relevant "referencias" sold in the domestic market, information which had been provided by the exporters, MINCIT distorted the calculation of the normal value of the like product and created or inflated margins of dumping.
15. There was no need for MINCIT to average physical characteristics of the "articles" within the relevant "referencia" and there was no need for MINCIT to use an arbitrary proxy. MINCIT had received from the exporters all the information necessary to calculate the normal value of the like product sold on the domestic market even in those cases where none of the products sold on the domestic market were identical to the exported product.
16. In reality, all the "articles" within a "referencia" shared physical characteristics closely resembling those of the exported "article" and an "adjustment" for differences in physical characteristics, contrary to what Colombia claimed during the hearing, was not warranted.

17. MINCIT used a simple average of the prices of the domestic sales transactions of all the "articles" within the "product grouping" to calculate the normal value of the like product of the exported product. While purporting to construct a hypothetical "normal value comparator" based on the "average of the physical characteristics of all the articles within a product grouping", MINCIT simply skewed upwards the normal value of the like product sold on the domestic market of the exporters, since it did not take account of the respective sales volumes. The "normal value comparator" was in reality a higher normal value than it should have been, if a weighted average of the sales prices of each "article" had been used.
 18. The European Union takes no issue with the fact that MINCIT aggregated multiple intermediate comparisons into one single dumping margin. Nonetheless, each calculation of normal value to be compared with "a weighted average of prices of all comparable export transactions" must be made on the basis of a weighted average of the sales prices of the like product in the domestic market of the exporter for which the existence of a dumping margin is established. Using simple averages in the calculation of the normal value of certain products can lead the investigating authority to create and/or inflate margins of dumping. This is precisely what happened when MINCIT calculated normal value in the cases of EU exporting producers Aviko and Agrarfrost.
 19. In other words, a simple average of a series of weighted average normal values is not a weighted average normal value and thus does not comply with Article 2.4.2's "W to W" methodology even if this simple averaging is used to calculate an "intermediate" dumping margin that is subsequently aggregated into an "overall" single dumping margin.
 20. In any event, the use of simple averages to calculate normal value is not a permissible interpretation of Article 2.4.2 of the Anti-Dumping Agreement. As the European Union explained in its first written submission, the first sentence of Article 2.4.2 of the Anti-Dumping sets forth two methodologies that "shall normally" be used by investigating authorities to establish "margins of dumping". The transaction-to-transaction and the weighted average-to-weighted average comparison methodologies are alternative means for establishing "margins of dumping" and an investigating authority may choose between the two depending on which is most suitable for the particular investigation. The third methodology, provided for in the second sentence of Article 2.4.2, does not involve all export transactions but only certain export transactions identified individually and falling within the relevant "pattern" of prices and it is subject to strict conditions. The use of a methodology different from those that are specifically mentioned in this article is therefore not permitted.
 21. To conclude on this claim, the European Union maintains that by using simple averages of domestic sales prices to establish normal value and by comparing the normal value so established to weighted averages of export prices in its measures to comply with the recommendations and rulings notified to the DSB in the original proceedings, Colombia has acted inconsistently with its obligations under Article 2.4.2 of the Anti-Dumping Agreement.
- 3 COLOMBIA ACTED INCONSISTENTLY WITH ARTICLES 2.4 AND 2.1 OF THE ANTI-DUMPING AGREEMENT BY USING, FOR THE COMPARISON BETWEEN THE EXPORT PRICE AND THE NORMAL VALUE, ARBITRARILY SELECTED DOMESTIC TRANSACTIONS WITHIN CERTAIN PRODUCT TYPES OF AN EXPORTING PRODUCER WHILE DISREGARDING COMPLETE AND RELIABLE DATA FOR ALL OTHER RELEVANT DOMESTIC TRANSACTIONS IN THOSE PRODUCT TYPES**
22. The European Union submits that Colombia also breached Articles 2.1 and 2.4 of the Anti-Dumping Agreement by the fact that MINCIT compared the prices of certain export transactions to arbitrarily selected items in the respective product type, and ignoring the pricing data for all other comparable domestic transactions in the product type. In so doing, MINCIT refused to engage with any of the input and information provided by the exporter on those matters. This concerns in particular transactions in product types TS9 and LS9 of the exporter Agrarfrost. The same flaw also occurred in other product types, for instance type "CL", as regards item 514 on the domestic side and item 10514 on the export side, or in product type LSSA as regards items 10581 on the export side and 581 on the domestic side.
 23. The exporter Agrarfrost had, from the beginning and throughout the investigation, provided full and reliable information on all domestic sales of the like product. The information provided

included a proposal to group a large amount of transactions into appropriate product types, trying to remedy the fact that MINCIT had not proposed any product type grouping; grouping which was however necessary for the fair comparison. At no point in the investigation did MINCIT question the product type grouping that Agrarfrost had proposed, the product characteristics used to group the various items into the product types, or the fact that all items within one product type shared the same main characteristics of that product type.

24. Rather, instead of initiating a constructive dialogue with the exporter on the product type grouping, MINCIT without any prior notice decided towards the end of the investigation to not follow the product type grouping proposed by the exporter (and never questioned by MINCIT), but to instead do the comparison of export and domestic transactions on what it called an "item-to-item method". This method consisted of comparing prices of certain export transactions to the prices of certain domestic transactions, which MINCIT arbitrarily picked among all the comparable domestic transactions in the respective product type, disregarding the prices of all the other comparable domestic transactions
25. Colombia tries to present this arbitrary choice of data subsets as a comparison which followed a valid method, by labelling it "article-to-article comparison" (or "item-to-item comparison"). However, what MINCIT relied on were not articles as such (i.e. the real product), but simply accounting codes, or item numbers – despite the objections from the company concerned. In fact, MINCIT did not even compare sales of products bearing the same accounting code. Instead, MINCIT compared export sales to a selected subset of domestic sales of products with a different accounting code, which just happened to have the same last three digits. It is this comparison method that the European Union asks the Panel to find in breach of Articles 2.1 and 2.4 of the Anti-Dumping Agreement
26. The European Union has shown in its submissions that these last three digits did not correlate in any way to price-comparison relevant factors. The exporter was never informed about the assumptions that MINCIT made about the significance of the last three digits which were not supported by any evidence, instead contradicted by the facts on the file, and reinforced by the absence of any dialogue with the exporter on this specific issue. MINCIT has at no point, not even during these panel proceedings, attempted to show how these last three digits would correlate with price-comparison relevant factors.
27. A fair comparison pursuant to Article 2.4 of the Anti-Dumping Agreement requires, however, that the choice of the transactions to be compared is exclusively made on the basis of criteria related to price-comparison-relevant factors. This is so because the division of the product by models or types depending on qualities, specifications, sizes, etc. is made as "[d]ue allowance" to address an issue regarding "price comparability" between the export price and the normal value, as required pursuant to Article 2.4 of the Anti-Dumping Agreement. If the grouping and matching of transactions to be compared is done on the basis of criteria which have nothing to do with factors affecting price comparability, the comparison does not ensure due allowance of differences affecting price comparability and thereby breaches Article 2.4 of the Anti-Dumping Agreement.
28. In applying its flawed comparison method, MINCIT not only ignored the complete and reliable data that the exporter Agrarfrost had provided on the transactions, the grouping into product types and the comparability of the transactions within a product type. It also ignored Agrarfrost's replies to questions that MINCIT had specifically asked as to the identity of certain items, and the clarifications that Agrarfrost provided when it discovered, towards the end of the investigation, that MINCIT intended to exclude from the comparison a major part of the comparable domestic transactions, without any good reason. It is clear that this way to proceed does in no way meet the investigating authority's obligation pursuant to Article 2.4 of the Anti-Dumping Agreement to ensure that it carries out a fair comparison, duly taking into account the complete and verifiable data provided by the exporter.
29. In this context, the European Union stressed that it is not bringing a separate claim of violation of a procedural obligation to conduct a constructive dialogue pursuant to Article 2.4, last sentence of the Anti-Dumping Agreement. Rather, the absence of constructive dialogue during MINCIT's investigation is an important element of the unfairness of the comparison itself. The unfairness resides primarily in the fact that MINCIT used criteria for the comparison which had no correlation with price comparability-relevant factors (last three digits of accounting codes).

30. This unfairness was exacerbated by the fact that the exporter was never informed about, let alone given a chance to comment on, the assumptions that MINCIT made about the significance of those last three digits. MINCIT's wrongful assumptions, which were not supported by any evidence, but rather contradicted by the facts on the file, were therefore reinforced by the absence of dialogue. In fact, it is only by avoiding to hear the exporter on this topic that MINCIT was able to maintain the fiction that the last three digits of the accounting codes had the significance it had invented them to have.
31. The European Union has shown that MINCIT's unfair comparison artificially created dumping margins for this exporter. This artificially created dumping margin was then relied on instead of the true margin that would have resulted from a proper comparison: a negative margin of -2.3% (no dumping), had MINCIT compared weighted averages of the product types as it should have done. Colombia has not contested any of the figures and calculations that the European Union has put forward in its written submissions to demonstrate that a proper comparison would have resulted in a finding of no dumping for the exporter Agrar frost.
32. In sum, the European Union considers that MINCIT's method of selecting certain sales transactions for the purpose of the price comparison was unfair because the selection was based on criteria that have no correlation with factors relevant for price comparability (the last three digits of accounting codes). The method used by MINCIT therefore runs counter the whole purpose of the grouping of transactions for the purposes of the comparison, which is to address differences in factors that have an impact on price comparability, thereby ensuring "[d]ue allowance" for "differences which affect price comparability" within the meaning of Article 2.4 of the Anti-Dumping Agreement. The explanations on volume and price effects of the flawed methodology that the European Union has provided are not determinative of the breach of Article 2.4 of the Anti-Dumping Agreement but aimed at illustrating the distortive effects of MINCIT's flawed methodology, and the very concrete repercussions on the dumping margins (which would have been negative had MINCIT carried out the comparison in compliance with the disciplines of the Anti-Dumping Agreement).

4 CONSEQUENTIAL CLAIMS

33. The European Union also submits that, in light of the violations of the Anti-Dumping Agreement identified above, the measures at issue are also inconsistent with Articles 1 and 9.3 of the Anti-Dumping Agreement, as well as with Article VI of the GATT 1994. Due to MINCIT's flawed methodology for determining dumping, MINCIT's anti-dumping measures were not applied under the circumstances provided for in the provisions of the Anti-Dumping Agreement, and therefore not pursuant to Article VI of the GATT 1994, as required by Article 1 of the Anti-Dumping Agreement.
34. In this dispute the European Union has demonstrated that the use by MINCIT of flawed methodologies, in violation of Articles 2.1, 2.4 and 2.4.2 of the Anti-Dumping Agreement, has led to the imposition of anti-dumping duties exceeding the margin of dumping as it should have been established under Article 2. The European Union therefore submits that Colombia has also breached its obligations under Article 9.3 of the Anti-Dumping Agreement.
35. Since the flaws in the methodology for establishing dumping lead to dumping margins exceeding those that would have been established in accordance with Article 2 of the Anti-Dumping Agreement, in collecting the duties so established Colombia has breached Article 9.3 of the Anti-Dumping Agreement.

5 CONCLUSION

36. The European Union therefore respectfully requests the Panel to find that the Colombian measures taken to comply with the recommendations and rulings notified to the DSB in the original proceedings, as set out above, are inconsistent with Colombia's obligations under the GATT 1994 and the Anti-Dumping Agreement.
37. Concretely, the European Union requests the Panel to find that:

- Colombia has acted inconsistently with its obligations under Article 2.4.2 of the Anti-Dumping Agreement by using simple averages of domestic sales prices to establish normal value of product types and by comparing the normal value so established to weighted averages of export prices;
 - Colombia has acted inconsistently with its obligations under Articles 2.4 and 2.1 of the Anti-Dumping Agreement, read in particular in light of paragraph 3 of Annex II of the Anti-Dumping Agreement, by not performing a fair comparison between the export price and the normal value for the comparison regarding certain transactions in certain product types;
 - Colombia has consequently also acted inconsistently with Articles 1 and 9.3 of the Anti-Dumping Agreement and Article VI of the GATT 1994.
38. Thus, the European Union requests the Panel to find that Colombia has not brought its measures into conformity with the covered agreements or with the recommendations and rulings notified to the DSB in the original proceedings.

ANNEX B-2

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF COLOMBIA

1 INTRODUCTION

1.1. Colombia thanks the Panel for the opportunity to present its Integrated Executive Summary. Colombia requests that the Panel reject the European Union's claim under Articles 2.4 and 2.1 of the Anti-Dumping Agreement, under Article 2.4.2 of the Anti-Dumping Agreement, as well as the consequential claims under Articles 9.3 and 1 of the Anti-Dumping Agreement, and Article VI of the General Agreement on Tariffs and Trade 1994.

2 THE EUROPEAN UNION'S CLAIM UNDER ARTICLES 2.1 AND 2.4 MUST BE REJECTED

2.1. In its claims under Articles 2.1 and 2.4, the European Union argues that the Subdirección "arbitrarily selected domestic transactions within certain [*referencias*] of an exporting producer while disregarding complete and reliable data for all other relevant domestic transactions in those [*referencias*]"¹ In response to a Panel's question, the European Union has clarified the precise scope of its claim under Articles 2.1 and 2.4. Specifically, it has confirmed that its concern is limited to the Subdirección's choice of articles [[***]] sold domestically as relevant matches for exported articles [[***]].² In particular, the European Union criticizes the Subdirección for choosing these article matches "on the basis of identical last three digits of accounting codes partly consisting of more than three digits".³ The European Union has also confirmed that it is not seeking any findings from the Panel concerning the Subdirección's methodology of conducting the dumping margin calculation at the level of articles.⁴

2.2. The European Union's claim under Articles 2.1 and 2.4 is factually and legally unfounded and must be rejected.

2.1 The European Union's claim under Articles 2.1 and 2.4 is premised on fundamental factual errors and, therefore, it must be dismissed

2.3. The European Union's challenge under Articles 2.1 and 2.4 of the Anti-Dumping Agreement is premised on at least four fundamental factual errors.

2.1.1 First factual error: The European Union incorrectly argues that the choice of the relevant articles sold domestically was based on the last three digits of the article numbers

2.4. The European Union argues that the Subdirección's methodology for choosing the relevant article matches "consisted of comparing items on the basis of identical last three digits of accounting codes"⁵ and that these last three digits were "the decisive criterion used" by the Subdirección.⁶ This is factually incorrect.

2.5. For exported article [[***]], the Subdirección found that it had an identical article name as article [[***]] sold domestically and that the only difference in the number was the prefix "10" in the exported article.⁷ Thus, for this match, the Subdirección found more than just a coincidence of "the last three digits" in the article number. It found that the product name was exactly the same for these articles. Moreover, for exported articles [[***]], the Subdirección found that no article was sold domestically with the identical number and name. However, it found two articles sold domestically with almost identical numbers. The only difference was the prefix. The remaining three

¹ European Union's first written submission, para. 35.

² European Union's response to Panel's question 1, paras. 1-3.

³ European Union's response to Panel's question 1, para. 2.

⁴ European Union's response to Panel's question 1, para. 2.

⁵ European Union's response to Panel's question 1, para. 1.

⁶ European Union's response to Panel's question 5, para. 19.

⁷ Colombia's response to Panel's question 2, para. 1.4.

digits were the same. Faced with these circumstances, the Subdirección sought to ascertain, in its 28 August 2023 letter, whether the articles sold domestically were "the same" as the exported articles [[***]] for purposes of price comparison.⁸

2.6. Accordingly, the issue of the prefix only triggered a doubt as to whether exported articles [[***]] could be compared to articles [[***]] sold domestically. This doubt was well founded given the evidence submitted by the exporter. In particular, Annex 4 to the responses to the initial questionnaire (Exhibit EU-12) showed that, on at least some occasions, the exporter added a prefix to the identical product depending on whether it was sold in "Europe" or "overseas".⁹

2.7. Colombia reiterates that this doubt did not lead directly to the conclusion that these matches were appropriate. Rather, this was only a starting point in the Subdirección's efforts to find an "exact match" for exported articles [[***]]. The Subdirección then asked the exporter, in the 28 August 2023 letter, whether articles [[***]] and articles [[***]] were "the same".¹⁰

2.8. In its responses to these questions, the exporter explained that the matches proposed were "not the same item" but that the differences, in terms of price comparability, were limited to packaging costs for articles [[***]] and to marketing/branding costs for articles [[***]].¹¹ The exporter further provided the precise cost differences of both packaging and marketing/branding for each of these articles.¹²

2.9. Based on this response, in its report containing the essential facts, the Subdirección explained that, "in accordance with the reply to the request for clarification of information submitted by Agrarfrost ... dated 28 August 2023", it determined that these were appropriate matches and made adjustments for, *inter alia*, "marketing costs" and "packaging costs" – i.e. the adjustments that the exporter had requested for articles [[***]].¹³

2.10. Accordingly, the factual premise of the European Union's argument that the last three digits in the article number were the "decisive criterion" for the choice of the relevant matches is incorrect. Rather, the "decisive criterion" was the exporter's responses to the questions in the 28 August 2023 letter. From those responses, the Subdirección properly identified the "differences which are also demonstrated to affect price comparability" and made the "[d]ue allowance[s]" as reported by the exporter itself, thereby acting consistently with Articles 2.1 and 2.4 of the Anti-Dumping Agreement.

2.1.2 Second factual error: The European Union incorrectly argues that the article numbers are "simply accounting codes"

2.11. The European Union criticizes the Subdirección's use of the article numbers to determine the relevant matches for the exported articles at issue on the grounds that they are "simple accounting codes"¹⁴ that change from client to client.¹⁵ The Subdirección's determination was, however, based on substantial affirmative evidence in the record that the exporters used the article numbers to identify, market, and sell their products.

2.12. According to record evidence, Agrarfrost classifies its products based on articles. The listing of the articles was provided as Annex 3 to the exporter's answers to the initial questionnaire.¹⁶ This document shows that each article has its own number and name. Similarly, the catalogue in Annex 4 shows that the exporter markets its products on the basis of the article number and name.¹⁷

⁸ Subdirección's Request for information to Agrarfrost, 28 August 2023 p. 3, Exhibit EU-8b.

⁹ See, Catalogue, Exhibit EU-12.

¹⁰ Subdirección's Request for information to Agrarfrost, 28 August 2023 p. 3, Exhibit EU-8b.

¹¹ Agrarfrost Reply to the request for information of 28 August 2023, submitted on 22 September 2023, pp. 5 and 6 Exhibit EU-9b (BCI).

¹² Agrarfrost Reply to the request for information of 28 August 2023, submitted on 22 September 2023, pp. 5 and 6 Exhibit EU-9b (BCI).

¹³ Ministry of Trade, Industry and Tourism, Provisional Technical Report, October 2023 (Provisional Technical Report), p. 34, Exhibit EU-10b.

¹⁴ European Union's opening statement at the meeting of the Panel with the parties, para. 62. See, also, European Union's second written submission, para. 44.

¹⁵ European Union's second written submission, para. 45.

¹⁶ Agrarfrost Questionnaire Reply in the original investigation – Annex 3, Exhibit EU-6 (BCI).

¹⁷ Agrarfrost Questionnaire Reply in the original investigation – Annex 4, Product catalogue, Exhibit EU-12.

Moreover, the same article numbers and names are also the basis for the identification of the product sold as shown in the exporter's invoices.¹⁸

2.13. The article numbers and names are consistently the same in all of these documents. This confirms that Agrarfrost prices, markets, and sells its products on the basis of permanently defined article numbers and names. Similarly, on the demand side, the only way in which customers make their purchase decisions is on the basis of the article numbers and names.

2.14. The only evidence that the European Union has submitted to substantiate its argument that the article numbers are nothing but accounting codes is the verification report, which noted that [[***]].¹⁹ This report, however, only confirms the point that the exporter uses the article numbers consistently to identify and sell particular articles. As discussed at the Panel meeting, every time a purchase is concluded, this has to be recorded in the internal accounts of the company. Naturally, article numbers used to identify products would be reflected on a company's invoices and recorded in its accounting system. Indeed, it would be odd if the codes used to market and sell the products were *not* recorded on the invoices and in a company's accounting system. This does not mean, however, that the codes used to identify products are mere "accounting codes", as the EU suggests. In fact, in verification visits, investigating authorities ordinarily seek to ensure, among several other things, that the information contained in invoices matches the information contained in the company's accounts. Thus, the quote referred to by the European Union confirms, rather than detracts from, the Subdirección's understanding that the article numbers and names were essential for the marketing and sale of products and that these article numbers and names were permanent means of product identification regardless of the client. They were used consistently for both external and internal purposes. Again, the European Union has not rebutted the evidence referred to by Colombia showing how the article numbers and names were used to price, market, and sell the products.

2.15. Moreover, the European Union incorrectly asserts that an article "will have a different item number when it belongs to a different client".²⁰ Agrarfrost's questionnaire responses submitted as Exhibit EU-5 (BCI) show that the article number was a distinctive element of each article and was not linked to the identity of the client. The fact that the article numbers and names in the invoices match those on the list in Annex 3 to the questionnaire responses shows that these numbers and names are permanently assigned to a specific type of product and, contrary to the European Union's claim, do not change depending on the client.

2.16. Accordingly, the European Union's assertion that the article numbers were assigned simply for accounting purposes for "internal" purposes and changed from client to client is factually erroneous and must be rejected. There is nothing "internal" about them since they are shared with potential and actual customers. In addition, they are not (only) for accounting purposes. They have a clear commercial purpose – i.e. to provide customers with a clear idea for the identification of the exact product they wish to purchase.

2.17. At any rate, Colombia recalls that, for the article numbers identified by the European Union, the Subdirección used these article numbers as a starting point in its analysis that led to the questions in the 28 August 2023 letter, the answers of which enabled the Subdirección to identify the appropriate matches.

2.1.3 Third factual error: The European Union incorrectly argues that the exporter was "never" informed about the "significance of th[e] last three digits" in the article numbers

2.18. The European Union further contends that "the exporter was never informed about, let alone given a chance to comment on, the assumptions that MINCIT made about the significance of those last three digits".²¹

2.19. This argument is without merit. As an initial matter, the European Union has clarified that it is not raising a separate claim under the last sentence of Article 2.4 of the Anti-Dumping Agreement concerning the "procedural" obligation to engage with the exporter to obtain the information

¹⁸ Agrarfrost Verification Visit Report, Annex 9, Exhibit EU-15 (BCI).

¹⁹ Agrarfrost Verification Visit Report, Annex 9, Exhibit EU-15 (BCI).

²⁰ European Union's second written submission, para. 45.

²¹ European Union's answer to Panel's question 7, para. 27.

necessary for a fair comparison. This is consistent with the text of the European Union's request for the establishment of the panel, which does not mention or allude to an alleged violation of the "procedural obligation" set out in the last sentence of Article 2.4.

2.20. Instead, the European Union argues that the exporter was "never" informed about the "significance of th[e] last three digits" in the article numbers in support of its claim that the price comparison was unfair.²² This raises the question, however, of whether a complainant may use arguments relevant to the last sentence of Article 2.4 to establish a violation of other sentences of the same provision. As a matter of treaty interpretation, this approach seems untenable as this would deprive the last sentence of Article 2.4 of any meaning or use. Rather, the substantive obligations in the first five sentences of Article 2.4 refer to the comparison between normal value and export price *per se*, not to the manner in which an authority interacted with the exporter to obtain the necessary information. The interpretation proposed by the European Union would thus conflate the scope of the substantive obligations under the first five sentences and the procedural obligation in the last sentence of Article 2.4 of the Anti-Dumping Agreement. Accordingly, any argument to the effect that the Subdirección failed to engage with the exporter about the "significance of the last three digits" should not fall within the scope of the European Union's claim under Article 2.4. To rule otherwise would allow a complainant to remedy its failure to make a claim under the last sentence of Article 2.4 by obtaining a ruling on a different claim under other provisions of Article 2.4.²³

2.21. In any event, the European Union is factually incorrect when it complains that "the exporter was never informed about, let alone given a chance to comment on, the assumptions that MINCIT made about the significance of those last three digits".²⁴ The Subdirección's questions in the 28 August 2023 letter just did that; they asked whether articles [[***]] were "the same" as articles [[***]], respectively. By asking whether they were the same, the Subdirección asked not only about "the significance of th[e] last three digits", but more directly, whether they were the same and, therefore, comparable – i.e. the standard required in the third sentence of Article 2.4. The exporter responded that there were "factors" that rendered these articles "not the same" and pointed to the adjustments that should be made to render them comparable. This is a further indication of the relevant and meaningful exchanges between the Subdirección and the exporter that ultimately led to the choice of the relevant articles sold domestically as matches.

2.22. In addition, in its report containing the essential facts, the Subdirección explained that, "in accordance with the reply to the request for clarification of information submitted by Agrarfrost ... dated 28 August 2023", it determined that these were appropriate matches and made adjustments for, *inter alia*, "marketing costs" and "packaging costs" – i.e. the adjustments that the exporter had indicated for articles [[***]].²⁵ The exporter had thus another opportunity to react to the matches chosen by the Subdirección in its comments on the essential facts document.

2.23. The Subdirección, therefore, properly and timely engaged with the exporter concerning the suitability of articles [[***]] as "exact matches" for exported articles [[***]], respectively. Thus, the European Union's contention that the exporter was "never" informed of the articles sold domestically used as matches for articles [[***]] is plainly unavailing and should be rejected.

2.1.4 Fourth factual error: The European Union incorrectly argues that article [603] was sold only as an "outlier transaction" to a "non-regular client"

2.24. The European Union further argues that article [[***]] chosen for comparison to exported article [[***]] is "an outlier transaction consisting of a sale to [[***]]".²⁶ This statement is also premised on factually incorrect assertions.

2.25. As an initial matter, Agrarfrost never claimed that the transaction in question was an outlier either during the original investigation or during the review proceedings. Agrarfrost could, of course, have done so at any time during either proceeding. In particular, if Agrarfrost was concerned that

²² European Unions' answer to Panel's question, 7, para. 26.

²³ See, Appellate Body Report, *Korea – Dairy*, para. 124.

²⁴ European Unions' answer to Panel's question, 7, para. 27.

²⁵ Ministry of Trade, Industry and Tourism, Provisional Technical Report, October 2023 (Provisional Technical Report), p. 34, Exhibit EU-10b.

²⁶ European Union's first written submission, para. 41.

this transaction was an outlier, it could have done so in its response to the Subdirección's 28 August 2023 letter or in its comments on the essential facts. To recall, in its letter of 28 August 2023, the Subdirección asked whether articles [[***]] were "the same". The exporter indicated that they were not.²⁷ Although this question was directed at the characteristics of the two articles, the exporter could have explained that article [[***]] sold domestically was irrelevant on the grounds that it consisted of only one "outlier transaction". But it did not argue so.

2.26. In addition, in its comments on the report containing the essential facts, the exporter was fully aware of the relevant matches used by the Subdirección. With respect to article [[***]], it limited itself to arguing that the domestic sales of this article were not representative under Article 2.2 of the Anti-Dumping Agreement as the sales volumes were below five percent of the aggregate sales volumes of the totality of *referencia* TS9. Thus, even though it had the procedural opportunity to raise it, Agrar frost never claimed that article [[***]] was sold domestically only as "an outlier transaction". Colombia recalls that the European Union has not raised any "viability" or "representativeness" arguments before the Panel and did not make a claim under Article 2.2 of the Anti-Dumping Agreement in its request for the establishment of a panel.

2.27. In any event, the European Union's statement in paragraph 41 of first written submission that the Subdirección based its normal value calculation for article [[***]] on an "outlier transaction consisting of a sale to [[***]]" is incorrect. As is clear from a simple reading of Agrar frost's reported sales data in Exhibit EU-5 (BCI), article [[***]] was sold several times in the domestic market during the period of investigation. Moreover, these transactions were made to a number of different clients.

2.28. Moreover, nothing in the Anti-Dumping Agreement requires an investigating authority to doubt the appropriateness of a transaction as long as it has been reported by the exporter as a transaction in the ordinary course of trade. In the circumstances of this case, there is nothing in the investigation record suggesting that the transaction concerning this article was not in the ordinary course of trade. Therefore, the Subdirección legitimately regarded the several sales of article [[***]] as appropriate transactions for purposes of the normal value calculation.

2.29. Accordingly, the European Union incorrectly argues that article [[***]] chosen for comparison to exported article [[***]] is "an outlier transaction consisting of a sale to [[***]]".²⁸ This argument should thus be rejected.

2.1.5 Conclusion on the European Union's claim under Articles 2.1 and 2.4 concerning choice of articles [[*]]**

2.30. For the reasons explained above, the European Union's claim under Articles 2.1 and 2.4 concerning the choice of articles [[***]] is predicated on several fundamental factual errors. The Subdirección properly identified the relevant articles sold domestically based on all of the information on the record. It further ensured that "[d]ue allowance" was made to account for "differences which are also demonstrated to affect price comparability". This is clear from the Subdirección's questions in the 28 August 2023 letter, the responses to those questions, and the Subdirección's explanations in the essential facts document. Accordingly, Colombia requests the Panel to reject the European Union's claim that use of articles [[***]] as relevant matches for exported articles [[***]] is inconsistent with Articles 2.1 and 2.4 of the Anti-Dumping Agreement.

2.2 Although it is not challenged in this dispute, Colombia explains that the article-to-article methodology is consistent with Articles 2.1 and 2.4

2.31. The European Union has clarified that it does not take issue with a "methodology which would consist of comparing items with identical accounting codes", but only with "a comparison on the basis of identical last three digits of accounting codes partly consisting of more than three digits".²⁹ Colombia welcomes this clarification. However, for the sake of completeness, Colombia explains that the Subdirección acted consistently with Articles 2.1 and 2.4 of the Anti-Dumping Agreement by adopting the article-to-article methodology for purposes of price comparison.

²⁷ See, Agrar frost Reply to the request for information of 28 August 2023, submitted on 22 September 2023, pp 5 and 6, Exhibit EU-9b (BCI).

²⁸ European Union's first written submission, para. 41.

²⁹ European Union's answer to Panel's question 1, para. 2.

2.32. The parties agree that, when a product under consideration is composed of several different "models", the most accurate dumping margin calculation is through multiple comparisons on a model-by-model basis. Comparisons at a more detailed level of "model" should, *a priori*, produce a more accurate determination of price discrimination than comparisons at a more aggregate level, which might include items for which prices are set differently and in a manner that affects price comparability.

2.33. Record evidence confirms that the appropriate method for price comparison was at the level of articles and not at the level of *referencias* as the European Union would have it. In particular, the record shows that exporters set prices, and that their customers buy the goods, at the level of articles, not based on the broader level of product groupings of *referencias*. As explained earlier, Agrar frost submitted a listing of the range of articles that it produces organized by article number and name.³⁰ Agrar frost also submitted a catalogue that shows that Agrar frost advertises the subject product by reference to article numbers and names.³¹ In addition, Agrar frost submitted commercial invoices showing that sales orders are placed on the basis of article numbers.³² Therefore, the evidence on the record shows that Agrar frost advertises, sets the prices, and concludes sales on the basis of specific articles identified by number and name.

2.34. Moreover, the Subdirección observed that, even after making adjustments for oil, packaging, and marketing, there were still large price differences among the articles sold domestically that were within a single *referencia*. In the case of *referencia* [[***]], the price differences among the articles sold domestically were as large as [[***]], whereas for *referencia* [[***]], there were price differences of [[***]] between *artículos* within the *referencia*.³³ In other words, if the articles within a single *referencia* were all "comparable" – as the European Union would have it³⁴ – the question is why domestic purchasers would be disposed to pay up to [[***]] or [[***]] more for one article than for another within the same *referencia*. Where more precise comparisons were possible, comparisons on the basis of products with such a large difference in prices for sales in the domestic market would likely not result in an accurate determination of dumping.

2.35. It was thus reasonable, based on the record evidence, for the Subdirección to decide that two products sold domestically with prices that differed by [[***]] or [[***]] should not be lumped within a single basket for purposes of comparing them to the prices of exports. Rather, these price differentials show that domestic customers perceived these articles as different products and, consequently, made specific choices as to which articles within a broader *referencia* grouping they wished to buy. A simple review of Agrar frost's reported sales data submitted as Exhibit EU-5 (BCI) shows that, almost invariably, specific domestic clients bought only one article but not others. In other words, they choose the product they wish to buy on the basis of article's characteristics, as described in the names of the product, and their related article number, in order to identify the product and price that they seek. This supports the Subdirección's finding that an article-to-article comparison was the most appropriate in order for the comparison to be "as accurate and reliable as possible".³⁵

2.36. In its review, the Subdirección was legitimately entitled to make its own evaluation of all of the evidence before it in order to decide what product level would provide a more accurate determination of dumping. In this case, the Subdirección's evaluation of the evidence and decision to use an article-to-article comparison was reasonable and fully supported by evidence. Accordingly, the article-to-article comparison is consistent with Colombia's obligations under Article 2.4 of the Anti-Dumping Agreement.

2.3 Conclusion

2.37. For the reasons set out above, Colombia requests the Panel to reject the European Union's claim under Articles 2.1 and 2.4 concerning the choice of articles [[***]] as relevant matches for exported articles [[***]] for purposes of price comparison.

³⁰ See, Annex 3 to Agrar frost's response to Questionnaire, Exhibit EU-6 (BCI).

³¹ See, Annex 4 to Agrar frost's response to Questionnaire, Exhibit EU-12.

³² See, Colombia's second written submission, para. 3.35, referring to Exhibit COL-5 (Eng) (BCI).

³³ See, Colombia's second written submission, para. 3.44.

³⁴ See, for instance, European Union first written submission, para. 62.

³⁵ Technical Report (draft), Exhibit EU-10b, p. 27.

3 THE EUROPEAN UNION'S ARGUMENT UNDER ARTICLE 2.4.2 IS UNAVAILING AND SHOULD BE REJECTED

3.1 Introduction

3.1. Next, the Panel should reject the European Union's claim under Article 2.4.2 of the Anti-Dumping Agreement. The European Union's arguments under Article 2.4.2 are two-fold. First, the European Union argues that Colombia's model matching approach for articles that were exported, but not sold on the domestic market, is covered by Article 2.4.2. Second, the European Union argues that the Subdirección's model-matching analysis violated Article 2.4.2, on the grounds that the Subdirección determined a model-matching comparator on the domestic market side by means of a *simple* average of the weighted-average prices of similar articles rather than on the basis of *weighted* average of those prices. Both of these arguments are incorrect as a matter of law and should be rejected.

3.2 Article 2.4.2 is not applicable to the challenged methodology applied by the Subdirección

3.2. The Subdirección's averaging methodology is a model-matching methodology combined with an adjustment or due allowance for differences in physical characteristics, under Article 2.4. As such, it is not subject to the disciplines set out in Article 2.4.2 of the Anti-Dumping Agreement.

3.3. The Subdirección's analytical approach was as follows: After the Subdirección calculated the weighted average sales price for each article sold in the export and in the domestic markets (as required by Article 2.4.2), it next sought to compare these prices and obtain model-specific "dumping margins", to be aggregated into a single dumping margin for the product as a whole. In doing so, the Subdirección faced the problem that certain articles that were exported were not also sold on the domestic market. The Subdirección was thus left without an identical match whose normal value it could have compared with the export price for the exported articles at issue. Moreover, the Subdirección lacked sufficient information in the record to determine which was the next most similar article sold in the domestic market. In order to resolve this problem, the Subdirección used the methodology now challenged by the European Union. It decided to treat all articles within the relevant referencia as equally similar and therefore created a single, simple average of the weighted-average prices of all relevant articles, which took differences in physical differences into account. Once this adjusted normal value had been calculated, the Subdirección compared the export price with this adjusted normal value. As the last step, the Subdirección aggregated all of the results of the intermediate comparisons into a single weighted average dumping margin for the product as a whole.

3.4. Therefore, the European Union is challenging an intermediate step, situated between the determination of the weighted average sales price of each article sold in the export and domestic markets and the subsequent aggregation of the resulting article-specific values (intermediate "dumping margins") into a single dumping margin for the product as a whole. This analytical step is an integral part of the "fair comparison" requirement and the requirement that due allowance be made for differences in physical characteristics under Article 2.4. It is thus not covered by Article 2.4.2, even if certain other steps of the process of calculating normal value and the export price are. However, the European Union has not raised any claim under Article 2.4, its challenge of the Subdirección's methodology should be dismissed in its entirety.

3.5. With respect to the Subdirección's intermediate step, it is crucial to realize that there is *not one single model-matching method for situations in which there are no identical matches*. Rather, there are *multiple ways* in which an investigating authority can identify the comparator when the identical article is not sold on the domestic market. In identifying that comparator, the investigating authority has the discretion to choose the method – and make any consequent allowances for differences – that it considers the most appropriate given the case-specific facts and attendant circumstances of a given investigation.

3.6. A frequent model-matching method is to choose the physically most similar model, with or without further adjustments, as appropriate. The European Union appears to agree with Colombia that Article 2.4.2 would not apply to that particular model-matching method. Thus, even on the European Union's view, a complainant that disagrees with the investigating authority's choice of a

particular model as the next most similar model, or with the manner in which the investigating *authority* did or did not adjust for physical characteristics, should bring a complaint under Article 2.4, not under Article 2.4.2. Indeed, in the original panel proceedings, the European Union challenged several decisions of the Subdirección with respect to certain requested adjustments, and always did so under Article 2.4 and not Article 2.4.2

3.7. But choosing a single most similar article is not the only model matching method that an investigating authority may decide to use. For instance, if the evidence on the record – as in this case – does not permit the investigating authority to determine which article sold in the domestic market would be the next most similar match for an article that was sold for export but not in the domestic market, an investigating authority may resort to other methodologies, such as the one applied by the Subdirección.

3.8. As noted, where exported articles were not sold domestically, the Subdirección did not have sufficient information to identify the next most similar articles and, therefore, treated all of the articles sold in the domestic market within the relevant product grouping ("referencia") in the original Spanish) as equally similar for the purpose of selecting a match for those exported articles. Put differently, instead of choosing one particular model as the single most similar model, the Subdirección's methodology sought to "construct" *a hypothetical proxy comparator article that represents the average of the physical characteristics of all the articles within a product grouping and adjusting for differences in physical characteristics*. By giving each difference in the product characteristics between these articles the same weight in the calculation, the Subdirección treated all of the articles as equally similar.

3.9. The mathematical expression of this approach of model-matching and adjusting for differences in physical characteristics was to calculate the simple average of the (weighted average) prices of the individual articles for which there were sales in the domestic market. The price of each article is deemed to reflect the physical characteristics of the product. By calculating the simple average (as opposed to a weighted average), the authority thus gave equal weight to the physical characteristics of each article. In contrast, an average weighted by the sales volume of each article would have distorted this analysis, by giving greater weight to certain articles simply because they happened to be sold in greater quantities. In Colombia's view, it stands to reason that the sales volume is an irrelevant – and potential distorting – criterion when seeking to adjust for differences in physical characteristics rather than volume-related factors.

3.10. The European Union's argument that this methodology falls under Article 2.4.2 is furthermore inconsistent with the European Union's acknowledgement that the model-matching method of *choosing a single most similar article* is not covered by Article 2.4.2. If one method under a particular analytical step (the method of choosing one individual most similar model) does not fall under Article 2.4.2, the same must be true for another method for the same step (such as the Subdirección's averaging method). Colombia also recalls that the European Union appears to accept that Article 2.4.2 would not apply if an investigating authority chooses to construct normal value for the missing identical article.³⁶ This is further proof that Article 2.4.2 does not apply to model matching or an equivalent step intended to "fill the gap" of a missing identical model on the normal value side and to make relevant adjustments.

3.11. The logic of the European Union's argument is that, because the Subdirección's model matching approach involves *averaging*, Article 2.4.2 should suddenly apply to it, simply because Article 2.4.2 also mentions *averaging*. But equating the Subdirección's average with the reference to the average in Article 2.4.2 makes no sense, because the purpose of averaging under Article 2.4.2 is entirely unrelated to the purpose of averaging as used by the Subdirección for a different purpose and at a different stage in the process. The European Union ignores these fundamentally different objectives and continues to assert that, simply because the Subdirección used averaging and Article 2.4.2 also refers to averaging, Article 2.4.2 must apply. But by that mechanistic logic, not only Article 2.4.2, but also Article 2.2.2(ii) and Articles 9.4 (i) and 9.4(ii) should be applicable to the Subdirección's methodology, because they also include the word "averaging". This obviously makes no sense.

³⁶ See Colombia's first written submission, para. 5.22 (referring to the European Union's first written submission, para. 30 and footnote 22).

3.12. An example from a different aspect of the calculation of dumping margins will illustrate the preceding points. As part of the calculation of normal value and export price, investigating authorities often make an adjustment under Article 2.4 for the imputed credit cost of carrying accounts receivable on the exporter's books. This adjustment is calculated by multiplying the invoice amount by the amount of days payment was outstanding by an appropriate short-term interest rate. This interest rate is normally based on the interest rate paid by the exporter on its short-term borrowings during the relevant period.³⁷ If, however, the exporter does not have any short-term borrowings, the investigating authority might have to use other information to identify an appropriate interest rate. For example, after examining all relevant available evidence, the investigating authority might choose the short-term rate charged by a bank in the exporting country. The choice of the appropriate interest rate is governed by Article 2.4, because it may affect the amount of the adjustment and hence the fair comparison between export price and normal value.

3.13. Moreover, rather than using an interest rate charged by a single bank, the investigating authority might decide to use an average of the short-term interest rates charged by the three largest banks in the exporting country. The WTO-consistency of the calculation of the interest rate would still be governed by whether it would achieve a fair comparison under Article 2.4. It would not become subject to Article 2.4.2, simply because it might involve some sort of averaging. Nor would it become subject to Article 2.2.2(ii) and Articles 9.4 (i) and 9.4(ii), even though those provisions, too, refer to (weighted) averaging. Thus, the specific methodology chosen by the investigating authority – using an interest rate from a single bank or an average of the rates of three banks – does not change the applicable provision. The same principle must hold in the present case.

3.14. Finally, Colombia notes that the Subdirección complied with Article 2.4.2 where it was required to do so. Since the Subdirección conducted a weighted average-to-weighted average comparison, it was subject to Article 2.4.2 and *it complied with this provision with respect to those analytical steps that do fall within the scope of Article 2.4.2*. First, the Subdirección calculated a weighted average price for each article and made a comparison at the level of each individual article. This step yielded an intermediate "dumping margin" for each article. Second, the investigating authority aggregated the intermediate results (intermediate "dumping margins") into an overall dumping margin for the product as a whole, by weighting them by the volume of export transactions within the universe of all export sales. In so doing, the investigating authority complied with the requirements of Article 2.4.2.

3.2.1 The EU has failed to raise a claim under Article 2.4 of the Anti-Dumping Agreement and the Panel cannot rely on the introductory clause to Article 2.4.2 in order to examine the Subdirección's methodology under Article 2.4

3.15. As part of the discussions of which legal provisions are applicable to the Subdirección's methodology, the parties explored the legal effect of the introductory clause to Article 2.4.2, which refers to Article 2.4 and the "fair comparison" requirement. Colombia's view is that under no circumstances can the Panel rely on this language to make a finding that the Subdirección has acted in an unfair manner in a step of the dumping analysis to which Article 2.4.2 does not apply.

3.16. The legal effect of that introductory clause is to clarify that Articles 2.4 and 2.4.2 *operate together and complement each other*, with each part applying to different, sequential stages of the dumping margin investigation. Thus, an investigating authority will adjust sales prices for any factors that affect price comparability (Article 2.4) and subsequently choose one of the comparison methodologies under Article 2.4.2 and conduct its comparison (Article 2.4.2). Moreover, the language of Article 2.4.2 has to be read and interpreted in the light of the "fair comparison" requirement.

3.17. However, at the same time, the "fair comparison" requirement under the first sentence of Article 2.4 is an independent, stand-alone obligation, governed by its own criteria.³⁸ It applies to any and all steps under Article 2.4, including the steps contemplated in Article 2.4.2. However, the source of the obligation to ensure a "fair comparison" is and remains the first sentence of Article 2.4 itself and not Article 2.4.2. Under Article 2.4.2, the panel must examine any given matter pursuant to the specific terms of Article 2.4.2. Thus, for instance, the Appellate Body examined the use of

³⁷ Van Bael & Bellis, EU Anti-Dumping and Other Trade Defence Instruments, 6th ed. (Wolters Kluwer, 2019), page 140 (Exhibit COL-25).

³⁸ Appellate Body Report, *US – Zeroing (EC) (DS294)*, para. 146.

zeroing both under Article 2.4.2 and under the first sentence of Article 2.4. However, the examination under Article 2.4 and the "fair comparison" language was appropriate not because Article 2.4.2 refers to Article 2.4, but rather only because Canada had raised a separate claim under Article 2.4.³⁹

3.18. This distinction has very practical implications for how a panel may rule on a matter before it, including on the present case. Given that the European Union has made a claim under Article 2.4.2, but not Article 2.4, in order to rule in the European Union's favour, the Panel would have to find that the Subdirección has acted inconsistently with Article 2.4.2 *by applying one of the methodologies listed in Article 2.4.2 improperly or in an unfair manner*. The Panel cannot rely on the fact that the fair comparison requirement in the first sentence of Article 2.4 applies to Article 2.4.2 to make a finding that the Subdirección has acted in an unfair manner in a step of the dumping analysis to which Article 2.4.2 does not apply. The language in Article 2.4.2 referring to the fair comparison and to Article 2.4 does not expand the scope of application of Article 2.4.2, nor does it incorporate Article 2.4 into Article 2.4.2 in a manner that would dispense a complaining party from raising Article 2.4 and the "fair comparison" requirement in the first sentence of Article 2.4 in its panel request.

3.3 Whatever the applicable legal provision, the Subdirección's methodology is fully consistent with Colombia's obligations under the Anti-Dumping Agreement

3.19. The European Union argues that the Subdirección's model-matching analysis violated Article 2.4.2, on the grounds that the Subdirección determined a model-matching comparator on the domestic market side by means of a *simple* average of the prices of similar articles rather than on the basis of *weighted* average of those prices. This assertion is incorrect as a matter of law and should be rejected.

3.20. The European Union's key argument under Article 2.4.2 is that the Subdirección's methodology would have been acceptable if the Subdirección had used a weighted average rather than a simple average, when "bundling" the prices of all articles within the relevant product group.

3.21. However, this is incorrect, because the intention of the Subdirección was to create a hypothetical proxy comparator article that would represent the *average of the physical characteristics of all the articles* contained within each product grouping and to adjust for differences in physical characteristics between the various articles contained in each product grouping, without reference to the volume of sales of each model. For this purpose, the Subdirección treated the (weighted) average sales price of each article as reflecting the physical characteristics of that article. The Subdirección decided to give the same weight to each article and its physical characteristics (as reflected in the sales price of that article). The objective was to calculate a proxy comparator that reflected equally the physical characteristics of each of the articles within the product grouping and, simultaneously, the sales price of that comparator. Given this objective, the only appropriate method was to calculate the *simple* average of the prices of all the articles.

3.22. In contrast, the use of a weighted average – advocated by the European Union – would have given greater weight to the physical characteristics of articles that simply happened to be sold in greater volumes. But volume of sales is irrelevant *when the goal is to identify a comparator model based on average physical characteristics*. Weighting by sales volume would give priority to factors unrelated to the purpose of the Subdirección's analysis and would therefore give rise to an improper distortion. Thus, contrary to what the European Union claims, its preferred weight-averaging methodology would have distorted the result. In reality, it was the Subdirección's simple averaging approach that gave rise to a meaningful, undistorted value.

3.23. Throughout these proceedings, the European Union has consistently failed to engage with the logic underlying the Subdirección's methodology. The European Union's entire argument is effectively premised on the text of Article 2.4.2 and on the reference to a weighted (as opposed to a simple) average. But as Colombia has demonstrated, Article 2.4.2 does not apply to the issue at hand.

3.24. The European Union argues the Subdirección's methodology would give rise to a "distortion".⁴⁰ This distortion, according to the European Union, arises because the various articles "have different

³⁹ Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 125.

⁴⁰ European Union's second written submission, para. 34.

prices and different sales volumes"⁴¹ and can only be remedied by the use of weight-averaging, which has been enshrined in Article 2.4.2 "to avoid precisely this type of distortion". Similarly, Japan's third-party submission claims that the Subdirección's approach "tends to excessively reflect the higher price of some items with lower volume in the normal value calculation".⁴²

3.25. On substance, there is no reason why weight-averaging based on sales volumes, as mentioned in Article 2.4.2, should be some kind of universal standard for what can be considered non-distortive under any other provision of the Anti-Dumping Agreement. A calculation method can only be characterized as "distortive" when considered *in relation to a particular objective*. But there is no engagement with the Subdirección's objective by either the European Union or Japan. Thus, by claiming "distortion", the European Union is in reality merely repeating - albeit with different words - that the Subdirección was required to comply with Article 2.4.2 and its prescription of a weighted average normal value in a W-to-W comparison.

3.26. Rather, the key issue is whether the comparison conducted by the Subdirección was "fair". The ordinary meaning of "fair" is "acceptable and appropriate in a particular situation".⁴³ Thus, "fair[ness]" must be assessed in the case-specific context. One cannot extrapolate from Article 2.4.2 some kind of "one-size-fits-all", rigid and unbending standard that is untethered from the case-specific facts and from what an investigating authority is trying to achieve in its analysis.

3.27. At the oral hearing, Colombia illustrated its point with an example involving the exporter with export sales of green apples. In the domestic market, the exporter sold red and yellow apples, and no green apples. There was therefore no identical match to the exported green apples. Moreover, the Subdirección did not have sufficient information to determine which apples, red or yellow, were most like the exported green apples (although there was information that the prices of red and yellow apples were different). Rather than arbitrarily deciding that either the red or yellow apples were more "like" the green apples, the Subdirección decided to create a blended or average (or, as Colombia has also described it, a "hypothetical") apple that would reflect the different physical characteristics of the red and yellow apples *equally*. The fairest or most accurate way to do this was by a simple average of the weighted-average prices of red and of yellow apples. Had the Subdirección done a further weighted average of red and yellow apples together by sales volume, it would, in effect, have been giving much greater weight to the prices of one type of apple, not based on its physical characteristics, but rather simply based on its greater sales volumes.

3.28. In the Subdirección's view, its averaging approach resulted in an adjusted or "hypothetical" article that could be considered a reasonable match for the exported article. Indeed, given the limited evidence on the record, this hypothetical article combining (or averaging) all the physical characteristics of the product grouping had, statistically speaking, the highest probability of being the closest match to the exported article. At a minimum, the probability that the average article was a good match for the exported article was higher than if the investigating authority had randomly selected one individual article (for example, the article with the largest sales volume). Once again, given the limited factual evidence about cost or price effects of the physical characteristics of all articles, the only alternative to the blending of the similar articles into the "average" article would have been to "blindly" select one article as the comparator. This alternative would clearly have been less likely to produce a fair or reasonable match for the exported article.

3.29. Colombia's above-mentioned example involving credit costs provides yet another example to rebut the European Union's baseless assumption that only a weighted average can be considered a non-distorting methodology. As Colombia explained, as part of the calculation of normal value and export price, investigating authorities often make an adjustment under Article 2.4 for the imputed credit cost of carrying accounts receivable on the exporter's books. In certain scenarios, the investigating authority might have to use information other than that provided by the investigated company to identify an appropriate interest rate to calculate that credit cost.

3.30. For example, based on the evidence before it, the investigating authority may decide to use an average of the short-term interest rates charged by the three largest banks in the exporting country. Here, the investigating authority may perfectly reasonably choose to apply a simple average

⁴¹ European Union's second written submission, para. 34.

⁴² Japan's third-party submission, para. 17.

⁴³ Definition of "fair", Oxford learner dictionary,
https://www.oxfordlearnersdictionaries.com/definition/english/fair_1.

of the three interest rates because, even if necessary information for weighting were available, a weighted average might not properly reflect the borrowing options available to the company.

3.31. Similarly, if an investigating authority had daily or monthly interest rates charged by a bank and wanted to calculate a single rate for the period of investigation, it would reasonably calculate a simple average of the daily or monthly rates. If an exporting country were to challenge this in the WTO, the applicable provision would be the fair comparison requirement of Article 2.4. No-one would argue that Article 2.4.2 requires the investigating authority to use a *weighted average* to calculate the interest rate.

3.32. Colombia also recalls the applicable standard of review under Article 17.6(i). The Panel should examine whether the Subdirección exercised its discretion as an objective and reasonable investigating authority or, conversely, whether no objective and reasonable investigating authority could have applied the methodology chosen by the Subdirección. At a minimum, using a simple average as opposed to a weighted average was a perfectly reasonable choice by the Subdirección, grounded in the evidence on the record, fully within the range of methodological choices that the Subdirección was entitled to make as part of its discretion as the investigating authority. In Colombia's view, the Subdirección's choice was more appropriate, and led to a more "fair comparison" than the weighted average methodology that, according to the European Union, the Subdirección should have applied.

3.33. The EU has also repeatedly made the argument that "model matching" "does not require using a simple average to calculate normal value".⁴⁴ But this is a meaningless statement. Colombia does not argue that it was "required" to use a simple average. No investigating authority is "required" to apply a particular methodology unless the Anti-Dumping Agreement expressly requires that methodology to be used. The Anti-Dumping Agreement does not prescribe any particular model-matching methodology. Therefore, an investigating authority is not "required" to use the model matching methodology on which the Subdirección relied, any more or any less than an investigating authority is not "required" to use the method of identifying the single individual most similar model. With this statement, the European Union seeks to shift its own burden of demonstrating that the methodology applied by the Subdirección was improper or unreasonable, assigning to the Subdirección an obligation not contained in the Anti-Dumping Agreement to use a particular methodology.

3.34. In response to a question by the Panel, Colombia has also explained that the reference in Article 2.4 to "quantities" should similarly not be regarded as a basis for requiring the Subdirección to use an average weighted by sales volume. Adjustments for quantities under Article 2.4 are based on a different logic and different facts. This is precisely why they are referred to separately in Article 2.4. Therefore, the reference in Article 2.4 to "quantities" was not relevant for the Subdirección's analysis. The logic behind quantity discount adjustments is that, where investigated companies adduce sufficient evidence, an investigating authority may make price adjustments on the grounds that sales were made in large quantities and that this impacts the terms and conditions of the sale. In contrast, any reliance on the term "quantities" under Article 2.4 would imply that certain articles with higher sales quantities should be given greater weight in the Subdirección's calculation of an average. This would appear to be an entirely different purpose for relying on the term "quantities" in Article 2.4.

3.35. Moreover, relying on the term "quantities" in Article 2.4 would appear to assume that larger aggregate sales volumes of a particular article (within a given product grouping) require an adjustment for quantities, whereas a smaller aggregate quantity of sales of a particular article (within a product grouping) do not require such an adjustment. Given that quantity discounts are assessed at the level of individual transactions, this would in turn assume that articles with higher aggregate sales volumes were sold in larger individual sales transactions – and thus deserve a greater "adjustment" by giving these articles greater weight – than articles with smaller aggregate sales volumes. But, of course, this need not be so. It is entirely possible that smaller aggregate volume articles were composed of individual sales that were the of the same volume as - or of greater volume than – sales of an article with a greater aggregate sales volume. Colombia has

⁴⁴ Heading of section 4.1 and paragraph 23 of the European Union's second written submission. (emphasis added)

demonstrated that this was indeed the case with respect to one of the companies in this investigation.⁴⁵

3.36. Adjustments for sales volumes must furthermore be requested by the investigated companies and must be well-documented, because investigating authorities require convincing evidence that a lower price reflects a quantity discount and not simply a pricing decision that should be part and parcel of a dumping calculation. However, in the underlying original investigation and in the review proceeding at issue, to Colombia's best knowledge, the investigating companies did not request a quantity adjustment. According to well-established caselaw, it is for investigated companies to request a quantity adjustment.⁴⁶ Hence, it would be contrary to investigating authority practice and WTO jurisprudence to require the Subdirección to take into account sales quantities in any way if that was not requested by the investigated companies. In practice, it is difficult for investigated companies to obtain a quantity discount adjustment⁴⁷, as investigating authorities have a good reason to require sound evidence for quantity adjustments because, if adjustments are not well-grounded in record evidence, "adjusting" for a lower price may mean adjusting away the very dumping margin whose existence the authority is seeking to identify in the first place. This applies both to practice of the EU Commission⁴⁸ and the USDOC.⁴⁹ For all of these reasons, the reference to allowances for differences in quantities in Article 2.4 does not apply to the issue at hand and should not be read to imply that the Subdirección was required to use a weighted average based on sales quantities, rather than a simple average, when adjusting for a factor (differences in physical characteristics) other than differences in quantities.

3.37. Colombia also notes that the European Union's arguments are at times confusing, because on occasions the European Union appears to suggest that, under Article 2.4.2, Colombia was not entitled to conduct the comparison at the level of articles and instead was required to have conducted the comparison at the level of the product groupings. For instance, the European Union argues that "the sales prices of all [articles within a product grouping] must be included in the calculation of normal value using a weighted average, not a simple average". If the term "sales prices" are the *individual* sales transactions, the argument that "the sales prices of all [articles within a product grouping] must be included in the calculation of normal value" can only mean that the Subdirección's should have calculated one normal value per product grouping (*referencia*). This would be a repetition of the European Union's argument under Article 2.4 and, in any event, could not be inconsistent with Article 2.4.2.

4 THE EUROPEAN UNION'S CONSEQUENTIAL CLAIMS UNDER ARTICLES 1 AND 9.3 OF THE ANTI-DUMPING AGREEMENT AND ARTICLE VI OF THE GATT 1994 MUST BE REJECTED

4.1. The European Union's claims of violation under Articles 1 and 9.3 of the Anti-Dumping Agreement, as well as under Article VI of the GATT 1994, are entirely dependent on and consequential to the European Union's claims under Articles 2.1, 2.4 and 2.4.2. As Colombia has demonstrated in the preceding sections, the European Union's claims under all of these provisions must be rejected. As a result, there is also no legal basis for findings of violations under Articles 1 and 9.3 of the Anti-Dumping Agreement, as well as under Article VI of the GATT 1994.

4.2. However, even in the event that the Panel were to agree with the European Union on one or both of its claims under Articles 2.4 and 2.4.2, the Panel should still reject the European Union's claim under Article 9.3. As the European Union itself admits⁵⁰, not every violation of Article 2 will give rise to a violation of Article 9.3. Rather, a violation of Article 2 can give rise to a violation of Article 9.3 only if – to use the European Union's own words – that violation "has led to the imposition of anti-dumping duties [that] exceed[] the margin of dumping as it should have been established under Article 2."⁵¹

⁴⁵ See Colombia's response to Panel Question 18, paras. 1.98 – 1.101.

⁴⁶ Panel Report, *Colombia – Frozen Fries*, paras 7.201 – 7.202.

⁴⁷ WTO Anti-Dumping Handbook, p. 186. (Exhibit COL-27)

⁴⁸ See Van Bael & Bellis, *EU Anti-Dumping and Other Trade Defence Instruments*, 6th ed. (Wolters Kluwer, 2019), page 135. Exhibit COL-26.

⁴⁹ USDOC, *Antidumping Manual*, Chapter 8 (Normal Value), p. 60. (Exhibit COL-6)

⁵⁰ European Union's response to Panel Question 21.

⁵¹ European Union's response to Panel Question 21, para. 48.

4.3. This means that the European Union, by its own admission, should have demonstrated that, by conducting a comparison at the level of articles (rather than at the level of product groupings) and/or by applying its simple-averaging model-matching methodology, the Subdirección calculated a higher dumping margin than it would have calculated under a comparison at the product grouping level and by applying a different model-matching methodology. This would have required a comprehensive calculation of the dumping margin, using the data of the investigated companies. The evidence that the European Union has presented to that effect⁵² is not sufficient to demonstrate a violation of Article 9.3, as it is not based on the data used by the investigating authority.

5 REQUEST FOR FINDINGS

5.1. For all of the above reasons, Colombia requests the Panel in these Article 21.5 compliance proceedings to reject the European Union's claims under Articles 2.1, 2.4, 2.4.2, and 9.3 of the Anti-Dumping Agreement, as well as under Article VI of the GATT 1994, given that:

- a. The European Union has not demonstrated that the Subdirección acted outside of the scope of its discretion under Article 2.4;
- b. The European Union has failed to demonstrate that the Subdirección acted inconsistently with Article 2.1 of the Anti-Dumping Agreement;
- c. The European Union has failed to demonstrate that the Subdirección applied an improper model matching methodology and, as a result, acted inconsistently with Article 2.4 or 2.4.2; and
- d. The European Union has not demonstrated that the Subdirección acted inconsistently with Articles 1 and 9.3 of the Anti-Dumping Agreement, as well as with Article VI of the GATT 1994.

5.2. In the light of the above, there is no basis for the panel to find that Colombia has failed to bring itself into conformity with the covered agreements or with the arbitral findings notified to the DSB in the original proceedings.

5.3. Colombia thanks the Panel for the opportunity to respond to the European Union's claims.

⁵² See the European Union's "alternative" calculation for Agrarfröst, contained in EU-13(BCI).

ANNEX C

ARGUMENTS OF THE THIRD PARTIES

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ANNEX C-1

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF BRAZIL

I. INTRODUCTION

1. Brazil welcomes the opportunity to present its views on the issues raised in these panel proceedings. In this submission, Brazil will present its views on certain aspects of the methodological approaches adopted by the Colombian investigating authority in calculating normal value, particularly those related to (i) article 2.4 of the Anti-Dumping Agreement, regarding the fair comparison obligation and the methodology used to make comparisons between export price and normal value for certain product types; and (ii) articles 2.4 and 2.4.2 of the Anti-Dumping Agreement, regarding the use of a simple average for the calculation of normal value for certain product types.

II. ARGUMENTS

2. Colombia's investigating authority, for the purposes of calculating dumping margins, considered the commercial codes of items (or "articles", as it prefers to call them) of the investigated companies for model matching. In doing so, it disregarded the modeling, or grouping, of articles suggested by the exporters. Nonetheless, in Brazil's understanding, the use of an article-to-article comparison, as a general principle, is not questioned by the European Union, and it will thus not be subject of further comments in this opportunity.
3. As it is common in anti-dumping investigations, for some of the investigated articles, no sales of identical items in the domestic market of the exporters were identified, which seems to be a case of low volume of sales in the domestic market of the exporting country. Thus, such sales do not permit a proper comparison.
4. In order to find a comparable domestic price for the calculation of normal value, the Colombian investigating authority took different approaches to different exporters. Brazil will provide comments on two of such approaches, which are related to (i) article 2.4 of the Anti-Dumping Agreement regarding the fair comparison obligation and the methodology used to make comparisons between export price and normal value for certain product types; and (ii) articles 2.4 and 2.4.2 of the Anti-Dumping Agreement regarding the use of a simple average for the calculation of normal value for certain product types.

A. Article 2.4 of the Anti-Dumping Agreement regarding the fair comparison obligation and the methodology used to make comparisons between export price and normal value for certain product types

5. In its First Written Submission, the European Union argues that Colombia breached the fair comparison obligation in Article 2.4 of the Anti-Dumping Agreement by comparing the prices of certain export transactions to what it refers to "arbitrarily selected items in the respective product type, and ignoring the pricing data for all other comparable domestic transactions in the product type, not engaging with any of the input and information provided by the exporter on those matters."¹
6. In Brazil's view, Colombia made a determination based on all the information presented by the exporter of domestic sales of those articles that, although having a different commercial code, were identical to the ones sold to Colombia. The investigating authority matched those articles, for the purpose of making a fair comparison between the weighted-average prices in each market, making adjustments when necessary for packaging and marketing costs. It should be noted

¹ EU's First Written Submission, para. 35.

that, although destined for different markets, those articles with different commercial codes were grouped by the European exporter itself within the same model or category of Price Code Numbers, and they should therefore be comparable between themselves.

7. Even though Brazil would take a different approach in calculating a comparable domestic price in such cases, we do not agree with the European Union's arguments that the Colombian authority's approach is arbitrary. As the panel in *EC – Fasteners (China)* stated, "there is no methodological guidance in Article 2.4 as to how due allowance for differences affecting price comparability is to be made"². That same panel indicated that "the fair comparison obligation does not mean that the authorities must accept each request for an adjustment"³. In our view, the methodology used by Colombia seems to be within a reasonable interpretation of the facts under its consideration and in accordance with the Agreement on Antidumping regarding the necessity of making due allowance for a fair comparison under article 2.4.

B. Articles 2.4 and 2.4.2 of the Anti-Dumping Agreement regarding the use of a simple average for the calculation of normal value for certain product types

8. A second approach adopted by Colombia to find a comparable domestic price for the calculation of normal value was to find a simple average of the weighted-averaged normal values of several articles that were sold in the domestic market within a given group of articles. This simple average of normal values of those articles sold on the domestic market would result in a normal value for an article of that same group that was sold to Colombia but was not sold in the domestic market.
9. In this case, the investigating authority made a simple average of the weighted average domestic price of each article used in the comparison, without considering the volume of sales of each article.
10. In its First Written Submission, the European Union holds that Colombia did not establish the margins of dumping by comparing a weighted average normal value with a weighted average of prices of all comparable export transactions, nor by a comparison of normal value and export prices on a transaction-to-transaction basis, as determined by Article 2.4.2 of the Anti-Dumping Agreement, but instead "Colombia has established the existence of margins of dumping on the basis of a comparison of a simple average normal value with a weighted average of prices of export transactions".⁴ The European Union thus claims that "by using simple averages of domestic sales prices to establish normal value and by comparing the normal value so established to weighted averages of export prices in its measures to comply with the recommendations and rulings notified to the DSB in the original proceedings, Colombia has acted inconsistently with its obligations under Article 2.4.2 of the Anti-Dumping Agreement".⁵
11. Brazil agrees with the European Union's arguments, in particular regarding the necessity to consider the volume of sales in the calculation of the average of domestic sales prices.
12. Article 2.4 of the Antidumping Agreement determines that due allowance shall be made for differences which affect price comparability. In our view, different sales involving different articles and different quantities of articles usually also result in different prices, as sellers normally give discounts or rebates to larger sales or clients. Brazil thus believes that the volumes of the domestic sales of the articles used in the comparability with the export price should be taken into account in the "merging" of normal values, in order to ensure fair comparison, by means of a second exercise of weighting-average.

² Panel Report, *EC – Fasteners (China)*, para. 7.297.

³ Panel Report, *EC – Fasteners (China)*, para. 7.298.

⁴ EU's First Written Submission, para. 14.

⁵ EU's First Written Submission, para. 34.

13. In that sense, Brazil considers that a simple average of weighted averages of domestic prices of certain articles, as applied by Colombia, does not make due allowance for differences in volumes sold of the articles considered in the simple averaging. Therefore, the simple averaging is not in accordance with the fair comparison obligation of an investigating authority contained both in Article 2.4 and Article 2.4.2 of the Anti-Dumping Agreement, the latter which, in its literacy, encompasses the obligations of the former in its first sentence.

III. CONCLUSION

14. Brazil appreciates the opportunity to comment on these issues in these proceedings and hopes that the viewpoints presented in this submission will prove helpful to the Panel in assessing the subject matter brought before it.

ANNEX C-2

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF JAPAN

I. CONSISTENCY OF THE "ITEM-BY-ITEM COMPARISON" WITH ARTICLE 2.4 OF THE ANTI-DUMPING AGREEMENT

A. Requirements of Article 2.4 of the Anti-Dumping Agreement

1. Article 2.4 of the Anti-Dumping Agreement, in its first sentence, requires "[a] fair comparison" between the export price and the normal value. As the term "fair" is "generally understood to connote impartiality, even-handedness, or lack of bias"¹, "[a]n investigating authority must act in an unbiased, even-handed manner and must not exercise its discretion in an arbitrary manner".² In addition, to ensure a comparison "in an unbiased, even-handed manner", the third sentence of Article 2.4 requires an investigating authority to make "[d]ue allowance" for "differences which affect price comparability".
2. Although the obligation to ensure a fair comparison under Article 2.4 lies on the investigating authorities³, "exporters bear the burden of substantiating, 'as constructively as possible', their requests for adjustments reflecting the 'due allowance' within the meaning of Article 2.4"⁴. An investigating authorities' denial of the exporters' requests with "no proper basis for [their] finding[s] that [the exporters] had not sufficiently substantiated [their] [...] request[s]" may be inconsistent with the obligation to ensure a "fair comparison".⁵ "[T]he authorities must take steps to achieve clarity as to the adjustment claimed and then determine whether and to what extent that adjustment is merited".⁶ And "[l]ogically, as a step 'to achieve clarity as to the adjustment claimed', authorities must first evaluate the differences identified to assess whether they affect price comparability".⁷
3. While Colombia suggests that investigating authorities have a certain degree of discretion in margin calculation and that some deference is given to the authorities' determination under Article 17.6 of the Anti-Dumping Agreement, such discretion and deference are not unbounded.

B. Due allowance for differences which affect price comparability

4. It should be carefully reviewed and determined whether the "item-by-item comparison" adopted by the Sub-directorate is consistent with Article 2.4 of the Anti-Dumping Agreement.
5. When the subject product is heterogeneous in terms of qualities, specifications, sizes, etc., it is permitted under Article 2.4.2 for investigating authorities to use "multiple averaging"⁸, in which the authorities divide the product into models or types in order to compare the export price to the normal value at the level of models or types. In general, multiple averaging is made to address an issue regarding "price comparability" and thus is considered to be "[d]ue allowance" and made "in an unbiased, even-handed manner".
6. In this regard, Colombia argues that an "item-by-item comparison" is better "to achieve the highest degree of precision"⁹ and that "item numbers appear to provide the most appropriate

¹ Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 138.

² Panel Report, *EC – Tube or Pipe Fittings*, para. 7.178.

³ Appellate Body Report; *EC – Fasteners (China) (Article 21.5 China)*, para. 5.163 (quoting Appellate Body Report, *EC – Fasteners (China)*, para. 487).

⁴ Appellate Body Report; *EC – Fasteners (China) (Article 21.5 China)*, para. 5.163 (quoting Appellate Body Report, *EC – Fasteners (China)*, para. 488).

⁵ Panel Report, *Colombia – Frozen Fries*, para. 7.216.

⁶ Appellate Body Report; *EC – Fasteners (China) (Article 21.5 China)*, para. 5.163 (quoting Appellate Body Report, *EC – Fasteners (China)*, paras. 488 and 519).

⁷ Appellate Body Report, *EC – Fasteners (China)*, para. 517.

⁸ Appellate Body Report, *US – Softwood Lumber V*, para. 81.

⁹ Colombia's first written submission, para. 2.21.

basis for identifying items".¹⁰ However, the Sub-directorate does not appear to elaborate on or describe in detail what factors are different among the items and how those factors have an impact on price.

7. Colombia also points out considerable price differences between items within a product-type¹¹ and alleges the existence of some "factors" that affect customers' preferences.¹² However, to support the grouping by item number, there must be at least an analysis and evidence as to what specific factors cause such price differences and whether such factors are tied to the item number. Without such analysis or evidence, mere price differences between items of the same product-type do not constitute a factor that might affect price comparability.
8. Therefore, the Sub-directorate's "item-by-item" grouping does not appear to work as "[d]ue allowance" for "differences which affect price comparability", leading to the conclusion that the Sub-directorate may have not made a comparison between the export price and the normal value "in an unbiased, even-handed manner".

C. Steps to achieve clarity as to the "type-by-type" comparison

9. It should also be carefully reviewed and determined whether the Sub-directorate has taken steps to achieve clarity as to the "type-by-type" comparison claimed by the exporter, in particular the evaluation of "the differences identified to assess whether they affect price comparability".¹³
10. In the investigation process of this case, according to the European Union, the exporter requested that the "main product characteristics" which are relevant for price comparability in the case of fries such as cut, size and quality should be used to constitute the product-types¹⁴, and that the "secondary characteristics" such as oil, packaging and marketing cost should not be used to determine the grouping of the product, but rather be addressed through adjustment because they could be easily quantified¹⁵. The exporter consequently claimed that the export and domestic products should be compared on the "type-by-type" basis.
11. Colombia indicates that the "type-by-type" comparison is inappropriate because the exporter admitted that there were also differences between products even within a single product-type.¹⁶ However, what the exporter admitted is the differences in the production cost depending on the oil, marketing expenditure, and the type of packaging¹⁷, which, according to the European Union, are "secondary characteristics" and therefore should be addressed through adjustment as mentioned above. Therefore, the fact that the exporter admitted the differences in the "production cost" does not seem by itself to constitute a "proper basis" to deny the exporter's request of "type-by-type" grouping.
12. In addition, although Colombia offers various reasons¹⁸ not to adopt the "type-by-type" comparison and to support the "item-by-item comparison", none of them refer specifically to the evaluation of whether differences in the "main product characteristics" or "secondary characteristics" affect "price comparability", or whether the type groupings or adjustments is "[d]ue allowance" for those differences.

¹⁰ Final Technical Report, Exhibit EU-2b, pp. 27-28. The item number itself is merely an identifier and does not affect price comparability by itself.

¹¹ See, for instance, Colombia's first written submission, paras. 2.27-2.30; Colombia's second written submission, para. 3.41.

¹² See, for instance, Colombia's second written submission, para. 3.44.

¹³ Appellate Body Report, *EC – Fasteners (China)*, para. 517.

¹⁴ European Union's first written submission, para. 51; Agrar frost Reply to the request for information of 28 August 2023, submitted on 22 September 2023, Exhibit EU-9b (BCI), p. 3.

¹⁵ European Union's first written submission, para. 52; Agrar frost Reply to the request for information of 28 August 2023, submitted on 22 September 2023, Exhibit EU-9b (BCI), p. 3.

¹⁶ See, for instance, Colombia's second written submission, paras. 3.27-28.

¹⁷ See, Agrar frost's Reply to the request for information of 28 August 2023, submitted on 22 September 2023, (Exhibit EU 9b (BCI)), p. 3.

¹⁸ See, for instance, Colombia's first written submission, paras. 2.21-2.30.

13. Colombia also points out that the exporter did not provide any further details about how the type of potato or other factors have an impact on price.¹⁹ In this regard, it should be carefully reviewed whether the Sub-directorate took "steps to achieve clarity", especially in relation to the obligation to "indicate to the parties ... what information is necessary" and not to "impose an unreasonable burden of proof on those parties" under the last sentence of Article 2.4.

II. CONSISTENCY OF USE OF A SIMPLE AVERAGE WITH ARTICLE 2.4 AND 2.4.2 OF THE ANTI-DUMPING AGREEMENT

A. Requirements of Articles 2.4 and 2.4.2 of the Anti-Dumping Agreement

14. Article 2.4.2 begins with the phrase "[s]ubject to the provisions governing fair comparison in [Article 2.4]", and it is not *lex specialis* to Article 2.4²⁰. Any calculation method to be used "during the investigation phase" must always ensure "fair comparison" pursuant to Article 2.4.
15. As an additional context for interpreting the meaning of "fair comparison", the methods explicitly stipulated in Article 2.4.2 are designed to reflect the transaction volumes in the calculation of dumping margins. For instance, the weighted-averaging takes into account the transaction volumes (e.g., per ton) of various imported products with different pricing and therefore serves to calculate a dumping margin that represents the actual impact of the subject dumped import, thereby ensuring a comparison "in an unbiased, even handed manner".
16. In addition, given the structure, context and the requirements of Article 2.4.2, it is hard to imagine that it is permissible for an investigating authority to use comparison methodologies other than the W-W, T-T or W-T methodologies to determine the margin of dumping.

B. The Sub-directorate's use of a simple average

17. The Sub-directorate's use of a simple average to establish normal value does not appear to be consistent with Articles 2.4 and 2.4.2 of the Anti-Dumping Agreement.
18. The Sub-directorate in this case used a simple average method, in which it aggregated all the domestic sales prices of all the items included in the specific product-type, and simply divided the results by the number of items included, regardless of the actual sale volume of each item.
19. This approach tends to excessively reflect the higher price of some items with lower volume in the normal value calculation, disregarding the actual impact of the subject dumped imports. Thus, by choosing a simple average, an investigating authority may calculate a higher normal value for the purposes of the price comparison, and it may be regarded as the use of discretion in "an arbitrary manner".
20. Although the Sub-directorate refers to some problems as reasons to use a simple average, such as "random fluctuations in sales" or "the seasonality of a particular period"²¹, it does not specifically identify what problems existed, nor does it explain why using a simple average solved those problems. Similarly, while Colombia argues that a simple average enabled the Sub-directorate to treat all the items equally with respect to their "physical characteristics"²², it does not explain what characteristics are different among the items, how the characteristics have an impact on price and why differences in the characteristics are appropriately adjusted by a simple average. It seems difficult to assume that mere application of a simple average could appropriately adjust or resolve the above problems. Therefore, the Sub-directorate's use of a simple average does not appear to be "[d]ue allowance" for "differences which affect price comparability" nor an action "in an unbiased, even-handed manner".

¹⁹ See Colombia's second written submission, para. 3.48.

²⁰ Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 136.

²¹ See, Final Technical Report, Exhibit EU-2b, reply to Mydibel, p. 26, para. 3; reply to Agrar frost, p. 31, para. 3; reply to Aviko, p. 33, para. 3; and reply to the Delegation of the European Union to Colombia, p. 35, paras. 2-3.

²² See, Colombia's first submission, paras. 2.41(e) and 2.53.

21. Colombia also argues that the Sub-directorate used a simple average "to 'construct' a *hypothetical* [item] *that represents the average of the physical characteristics of all the* [items] *within a* [product-type]"²³ and thus Article 2.4.2 does not apply to this methodology. However, Japan cannot find any basis in the Anti-Dumping Agreement that would enable the "construction" of a "hypothetical" item price using a simple average without even specifying what characteristics are different among the items and how the characteristics have an impact on price. When there are no transactions of domestic products corresponding to the export products in a group in the process of multiple averaging, the investigating authorities may have the option, for example, to construct "the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits" (Article 2.2 of the Anti-Dumping Agreement) specifically for that group as its normal value. Both the panel and the Appellate Body in *US – Softwood Lumber V (Article 21.5 – Canada)* acknowledged the possibility of using constructed normal value only for a particular group.²⁴

²³ Colombia's second written submission, para. 4.20. (emphasis original)

²⁴ Panel Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 5.62 and Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 104.

ANNEX C-3

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE RUSSIAN FEDERATION

1. INTRODUCTION

1. The Russian Federation intervenes in this dispute because of its systemic interest in developing an effective and coherent approach to the interpretation of WTO obligations enshrined in the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (hereinafter – Anti-Dumping Agreement, ADA). Russia, first, presents its position on the standard of review and understanding of Article 17.6(ii) of the Anti-Dumping Agreement, and, second, comments on approach elaborated by Arbitrators in *Colombia – Frozen fries (Article 25)* in this regard, referred by one of the parties and some third parties.¹

2. STANDARD OF REVIEW

2. With respect to standard of review, it should be noted that for disputes arising under the Anti-Dumping Agreement, a specific standard of review in Article 17.6 of the Anti-Dumping Agreement shall be applied in conjunction with Article 11 of the DSU.²

3. In *US – Hot-Rolled Steel*, the Appellate Body explained that "Article 11 of the DSU imposes upon panels a comprehensive obligation to make an 'objective assessment of the matter', an obligation which embraces all aspects of a panel's examination of the 'matter', both factual and legal".³ Thus, panels make an "objective assessment of the facts", of the "applicability" of the covered agreements, and of the "conformity" of the measure at issue with those covered agreements.

4. In addition to Article 11 of the DSU, Article 17.6 of the Anti-Dumping Agreement sets forth a specific standard of review applicable to anti-dumping disputes:

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

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

5. Thus, the standard of review in Article 17.6 of the Anti-Dumping Agreement contains two separate sub-paragraphs, the requirements of which are cumulative: (1) under Article 17.6(i) "the task of panels is to determine whether the authority's establishment of the facts was proper and whether its evaluation of those facts was unbiased and objective";⁴ and under Article 17.6(ii), panels must "determine whether a measure rests upon an interpretation of the relevant provisions

¹ Colombia's First written submission, paras. 3.6-3.7; US Third party submission, paras. 7-8.

² Appellate Body Reports, *US – Hot-Rolled Steel*, para. 55; *US – Countervailing Duty Investigation on DRAMS*, fn. 345.

³ Appellate Body Report, *US – Hot-Rolled Steel*, para. 54.

⁴ Panel Report, *Morocco – Definitive AD Measures on Exercise Books (Tunisia)*, para. 7.42.

of the *Anti-Dumping Agreement* which is *permissible under the rules of treaty interpretation* in Articles 31 and 32 of the *Vienna Convention*."⁵

6. Regarding the legal interpretation of the Anti-Dumping Agreement, the Appellate Body clarified in *US – Hot-Rolled Steel* that panels shall interpret provisions of this Agreement "in accordance with customary rules of interpretation of public international law" which are embodied in Articles 31 and 32 of the Vienna Convention on the Law of Treaties.⁶ These rules of treaty interpretation impose certain common disciplines upon treaty interpreters, irrespective of the content of the treaty provision being examined. With respect to standard in Article 17.6(ii) of the Anti-Dumping Agreement, the Appellate Body stated:

It follows that, under Article 17.6(ii) of the *Anti-Dumping Agreement*, panels are obliged to determine whether a measure rests upon an interpretation of the relevant provisions of the *Anti-Dumping Agreement* which is *permissible under the rules of treaty interpretation* in Articles 31 and 32 of the *Vienna Convention*. In other words, a permissible interpretation is one which is found to be appropriate *after* application of the pertinent rules of the *Vienna Convention*.⁷

7. Thus, Article 17.6(ii) contemplates a sequential analysis.⁸ The first step requires a panel to apply the customary rules of interpretation to the treaty, and only *after* this exercise will a panel be able to determine whether the second sentence of Article 17.6(ii) applies.⁹ The Appellate Body explicitly stated that "[t]he structure and logic of Article 17.6(ii) therefore do not permit a panel to determine first whether an interpretation is permissible under the second sentence and then to seek validation of that permissibility by recourse to the first sentence."¹⁰

8. The Appellate Body also noted that Article 17.6(ii) of the Anti-Dumping Agreement supplements Article 11 of the DSU which "requires panels to make an 'objective assessment of the matter' as a whole".¹¹ In particular, the Appellate Body stressed that "[n]othing in Article 17.6(ii) of the *Anti-Dumping Agreement* suggests that panels examining claims under that Agreement should not conduct an 'objective assessment' of the legal provisions of the Agreement, their applicability to the dispute, and the conformity of the measures at issue with the Agreement".¹²

9. Accordingly, while considering measures covered by the Anti-Dumping Agreement Russia views that their examination should be based on the standards provided for in Article 11 of the DSU and Article 17.6 of the Anti-Dumping Agreement. The interpretive approach described above is also fully applicable for the proceedings under Article 21.5 of the DSU.

3. THE INTERPRETATIVE APPROACH SUGGESTED BY ARBITRATORS IN COLOMBIA – FROZEN FRIES (ARTICLE 25) IS LEGALLY FLAWED

10. In contrast to the understanding presented above, which is based on the text of Article 17.6(ii), Colombia suggests to apply a different one in these proceedings. Colombia refers to paragraph 4.13 of the Arbitration award in the proceedings under Article 25 of the DSU which says:

[to] begin by asking ourselves whether Colombia's proposed interpretation of the phrase "where appropriate" in Article 5.2(iii) – reflected in MINCIT's decision to initiate its investigation, in part, on the basis of third-country sales prices – is a "permissible" one. As a yardstick for "permissibility", the first sentence of Article 17.6(ii) refers us to the customary rules of treaty interpretation. However, we will not engage in our own, *de novo* interpretation of the terms "where appropriate" so as

⁵ Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, paras. 129 and 130 (referring to Appellate Body Report, *United States – Hot-Rolled Steel*, paras. 55 and 60).

⁶ Appellate Body Report, *US – Hot-Rolled Steel*, para. 57.

⁷ Ibid. para. 60. (emphasis original)

⁸ Appellate Body Report, *US – Continued Zeroing*, para. 271.

⁹ Ibid.

¹⁰ Ibid. This sequence of the steps to be followed by panels is illustrated in the left column of Table 1.

¹¹ Appellate Body Report, *US – Hot-Rolled Steel*, para. 62.

¹² Ibid.

to arrive at what we consider to be the "final" or "correct" application of Articles 31 and 32 of the Vienna Convention. Instead, we will ask whether a treaty interpreter, using the method for treaty interpretation set out in the Vienna Convention – that is, an interpretation "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose" and, where appropriate, "supplementary means of interpretation" – could have reached Colombia's interpretation. And this even though we, as de novo treaty interpreters, might have reached a different conclusion.¹³

11. Further, Colombia requests in this proceeding "to adopt the understanding of the standard of review proposed by the Arbitrators in *Colombia – Frozen Fries (Article 25)*" and suggests the following:

With respect to legal issues, the Panel must ask, not whether Colombia's interpretation would be that reached or preferred by the Panel itself, but only whether Colombia's interpretation is "permissible" in light of the customary rule of interpretation of international law. In other words, the "permissibility" of an interpretation does not depend on whether it resembles the interpretation that the Panel would give to a provision. Rather, the Panel's role is to determine whether the interpretation underlying the Branch's determination is in accordance with the entirety of the customary rule of interpretation of international law.¹⁴

12. Accordingly, Colombia, referring to Arbitrators, insists that panels shall interpret any provisions of the Anti-Dumping Agreement in the following consecutive steps. The initial step comprises the formulation of the "suggested interpretation" by the investigating authority. Only after the formulation of the "suggested interpretation" is completed, the agreement reader, according to Arbitrators, shall test whether this "suggested interpretation" fits into the provision at issue by applying the Vienna Convention rules. Consequently, in Arbitrators view, the object of analysis of the treaty interpreter is the "suggested interpretation", but not the applied provision itself.

13. The sequence of steps suggested by Arbitrators to be followed by panels is illustrated in the right column of Table 1.

Table 1.

Article 17.6(ii), text and context	Arbitrators' mistake in <i>DS591</i>
<u>relevant ADA provision</u> customary rules of interpretation (VCLT, Art. 31-32) existence of a permissible interpretation whether the measure rests on a permissible interpretation	<u>alleged permissible interpretation</u> (position of the investigating authority) customary rules of interpretation in the context of ADA provision (VCLT, Art. 31-32) whether the interpretation is permissible (= measure rests on a permissible intepretation)

¹³ Colombia's First written submission, para. 3.6; Award of the Arbitrators, *Colombia – Frozen Fries (Article 25)*, para. 4.13. (emphasis added)

¹⁴ Colombia's First written submission, para. 3.7.

14. Russia has serious doubts regarding the Arbitrators' approach with respect to Article 17.6(ii) as it is neither consistent with the text of the Anti-Dumping Agreement, nor serves the aim of "security and predictability to the multilateral trading system".¹⁵

15. Russia draws the Panel's attention to the text of Article 17.6(ii):

- **To start with**, the first sentence of this subparagraph imposes an obligation on panels stating that when examining the matter they "shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law".
- **Next**, in contrast to what Arbitrators suggested, the second sentence of Article 17.6(ii) itself says that it starts to apply: "[w]hen the panel finds that a **relevant provision** of the Agreement admits of more than one permissible interpretation".¹⁶ Here in the second sentence one could see that the focus of interpreter shall be on the relevant provision as an object of interpretation, not on the possible permissible interpretations, as such.
- **Moreover**, while concentrating exclusively on the second sentence of Article 17.6(ii) and the possibility of existence of several "permissible interpretations" of the Anti-Dumping Agreement, Russia views that the Arbitrators' approach disregards the structure of the Article itself. The first sentence of Article 17.6(ii) of the Anti-Dumping Agreement requires the panel to interpret the relevant provisions and while doing so to apply the customary rules of interpretation. It is only the *second* sentence that is suggesting the possibility of several permissible interpretations. Such structure of Article 17.6(ii) requires the customary rules of interpretation to be applied to the provision before the permissible interpretation is dealt with and not *vice versa*.

16. Accordingly, when interpreting the relevant provisions of the Anti-Dumping Agreement, a panel shall, in fact, engage in its own analysis regarding such interpretation, guided by customary international law. This panel while looking into relevant treaty provision and determining its meaning shall be objective in all respects. Suggestion to have the "permissible interpretation" as the initial step of analysis would inevitably incorporate a subjective element into the interpretation exercise, which shall not be there.

17. Further, according to Arbitrators in paragraph 4.13 of their award, the adjudicators basically shall agree with the interpretation suggested by the investigating authority, if it was made under certain conditions, "even though [they], as *de novo* treaty interpreters, might have reached a different conclusion."¹⁷ Russia considers that Arbitrators here confused the intolerance of the *de novo* review of facts that were before the investigating authority with the task of an adjudicator under Article 3.2 of the DSU to clarify the existing provisions of the applicable agreement in accordance with customary rules of interpretation of public international law, which the panels shall do on their own. There is no room for any *de novo* interpretation concept and its parameters, neither in text of Article 17.6(ii), nor anywhere else in the Anti-Dumping Agreement. Unlike subparagraph (i) of Article 17.6 of the Anti-Dumping Agreement, which requires the panels to determine "whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective", rather than to establish the facts themselves, the first sentence of subparagraph (ii) of the same Article, in contrast, unambiguously instructs the panel to interpret the relevant provision of the Agreement itself. There is no discretion for panels to deviate from this obligation.

18. The Russian Federation also does not agree with the Arbitrators in labeling the VCLT rules as "facilitative not disciplinary" and concluding that such rules "do not 'instruct the treaty interpreter to find a single meaning of the treaty'".¹⁸ Russia views this approach as too ambitious and in fact dangerous. It appears that the Arbitrators intentionally refrained from calling Articles 31 and 32 of

¹⁵ Article 3.2 of the DSU.

¹⁶ Emphasis added.

¹⁷ Award of the Arbitrators, *Colombia – Frozen Fries (Article 25)*, para. 4.13.

¹⁸ US Third party submission, para 8 (referring to Arbitration award, *Colombia – Frozen Fries (Article 25)*, para. 4.14, fn. 43.

the VCLT as rules of interpretation in their award. Instead, Arbitrators used such words as "method", "tools", "interpretative process", "bounds of interpretative method" to describe them in an attempt to decrease the value of these provisions in the treaty interpretation exercise. This approach is legally void and must be rejected in its entirety. Russia recalls that Articles 31 and 32 of the VCLT reflect customary rules of interpretation to which Article 3.2 of the DSU makes a direct reference. They are not just a "method", or "tools" or an "interpretative process", but legally binding rules. There is no support for use of any "deference to the investigating authorities", "solidness" or "analytical support" as the substitution of VCLT rules.

19. Finally, Russia considers such a new look on Article 17.6(ii) to be dangerous for the whole system. The Arbitrators' approach is also contrary to the object and purpose of the Anti-Dumping Agreement which is "to recognize the right of Members to take anti-dumping measures to counteract injurious dumping while, at the same time, imposing substantive conditions and detailed procedural rules on anti-dumping investigations and on the imposition of anti-dumping measures".¹⁹ The potential consequence for the Arbitrators' line of reasoning will lead to dilution of such substantive conditions and detailed procedural rules. This also would result in adding or diminishing rights of WTO members, which is contrary to Article 3.2 of the DSU.

¹⁹ Appellate Body Report, *EU – Biodiesel*, para. 6.25. See also Appellate Body Report, *US – Washing Machines*, para. 5.52. (emphasis added)

ANNEX C-4

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE UNITED STATES

EXECUTIVE SUMMARY OF U.S. THIRD PARTY SUBMISSION

I. STANDARD OF REVIEW TO BE APPLIED BY WTO DISPUTE SETTLEMENT PANELS

1. The text of Article 17.6 of the Anti-Dumping Agreement establishes a specific standard of review for a panel undertaking its objective assessment pursuant to DSU Article 11. Article 17.6 imposes "limiting obligations on a panel" in reviewing an investigating authority's establishment and evaluation of facts. The aim of Article 17.6 is "to prevent a panel from 'second-guessing' a determination of a national authority when the establishment of the facts is proper and the evaluation of those facts is unbiased and objective."

2. Article 17.6 further reflects that in making its objective assessment under DSU Article 11, a panel is not undertaking a *de novo* evidentiary review, but instead is acting as "reviewer of agency action" and not as "*initial trier of fact*." In making an objective assessment of agency action that has resulted in a record and determinations on pertinent issues of fact and law, a panel need not "simply *accept* the conclusions of the competent authorities," but a complainant will prevail on its claims only where it has shown that the findings of the investigating authority are not findings that could have been reached by an objective and unbiased investigating authority.

3. As such, the question under Article 17.6(ii) is whether an investigating authority's interpretation of the Anti-Dumping Agreement is a permissible interpretation. As the United States has explained for years, "permissible" means just that: a meaning that *could be* reached under the *Vienna Convention on the Law of Treaties*. Article 17.6(ii) itself confirms that provisions of the Anti-Dumping Agreement may "admit[] of more than one permissible interpretation." Where that is the case, and where an investigating authority has relied on one such interpretation, a panel must find the measure to be in conformity with the Anti-Dumping Agreement. As one panel report stated, "[I]n accordance with Article 17.6(ii) of the AD Agreement, if an interpretation is 'permissible', then we are compelled to accept it."

4. The recent award by the arbitrators in this dispute provides an exemplar. The arbitrators appropriately recognized that the subparagraphs of Article 17.6 "must be understood in a manner granting special deference to investigating authorities under the Anti-Dumping Agreement." That analysis addressed directly the nature of treaty interpretation under the Vienna Convention and explained that a logical:

approach assumes, as the second sentence [of Article 17.6(ii)] does, that different treaty interpreters applying the same tools of the Vienna Convention may, in good faith and with solid arguments in support, reach different conclusions on the "correct" interpretation of a treaty provision. This may be particularly true for the Anti-Dumping Agreement, which was drafted with the understanding that investigating authorities employ different methodologies and approaches.

The arbitrators noted favorably the observation that the Vienna Convention rules "are facilitative not disciplinary and do not 'instruct the treaty interpreter to find a single meaning of the treaty' as a former Appellate Body member has written."

II. CLAIMS RELATING TO ARTICLE 2.4.2 OF THE ANTI-DUMPING AGREEMENT

5. The text of Article 2.4.2 provides that margins of dumping "shall normally be established" according to one of two methodologies: a comparison of a weighted average of normal value to a weighted average of the prices for export transactions (W-W); or a comparison of normal value transactions to export price transactions (T-T). Article 2.4.2 also permits, under certain

circumstances, a comparison of individual export transactions to a normal value established on a weighted average basis (W-T). Article 2.4.2 does not otherwise indicate that margins of dumping may be established based on a comparison of a simple average normal value to a weighted average of prices of comparable export transactions. Indeed, the detail in which Article 2.4.2 requires an explanation before an investigating authority may establish margins of dumping based on a W-T methodology underscores that the methodologies for establishing the existence of margins of dumping when comparing normal value to export price are restricted to those set forth in this article.

6. The text of Article 2.4.2 further requires that the transactions included in the W-W methodology be comparable.¹ The reason for this limitation is clear: including transactions in the weighted averages to be compared that are not comparable could result in a dumping margin based on factors unrelated to dumping. That said, the statement in the first sentence of Article 2.4.2—"a comparison of a weighted average normal value with a weighted-average of prices of all comparable export transaction"—presumes that comparability has already been determined prior to the construction of the weighted average. Therefore, to the extent that an investigating authority has identified a group of comparable transactions, the use of the singular in Article 2.4.2 requires that authority to calculate only one weighted average for the comparable transactions.

7. In sum, if the Panel should determine that MINCIT did establish margins of dumping based on a comparison of a simple average normal value to a weighted average of prices of comparable export transactions, such a calculation would appear to be inconsistent with the obligations set forth under Article 2.4.2.

III. CLAIMS RELATING TO ARTICLES 2.4 AND 2.1 OF THE ANTI-DUMPING AGREEMENT

8. The text of Article 2.1 sets forth the definitional character of dumping—a product that is introduced into the commerce of another country at an export price that is less than its normal value. Article 2.1 thus is a definitional provision that plays an important role in the interpretation of other provisions of the Anti-Dumping Agreement. That said, Article 2.1 does "not impose independent obligations." Article 2.1 thus cannot be the legal basis for an independent claim. It follows, therefore, that the text of Article 2.1 does not prescribe the conduct or obligations of an investigating authority, nor specify how an investigating authority has to determine "normal value."

9. Article 2.4 obligates an investigating authority to make a "fair comparison" between the export price and the normal value when determining the possible existence of margins of dumping. The text of Article 2.4 presupposes that an appropriate normal value has already been identified. As such, to ensure a fair comparison between the export price and the normal value, Article 2.4 requires that due allowance be made for any factor that might affect the fair comparison. The essential requirement for any such adjustment is that the factor must affect price comparability. Thus, under Article 2.4, making a "fair comparison" requires a consideration of how "differences in conditions and terms of sale, taxation, levels of trade, quantities, [and] physical characteristics" impact price comparability between the export price and the normal value.

10. A 'difference in price' is not listed as a factor that might affect price comparability under Article 2.4 of the Anti-Dumping Agreement, which makes sense given that dumping is fundamentally defined as a difference in price (*i.e.*, "a product is to be considered as being dumped ... if the export price ... is less than the comparable price ... for the like product ..."). It is also a logical fallacy (*petitio principii*) to maintain that there is a difference that affects the price comparability because of a difference in price.

11. In sum, "price difference[s] between articles of the same reference," in and of themselves, do not constitute a factor that might affect price comparability under Article 2.4 of the Anti-Dumping Agreement.

¹ The concept of comparability is expressed in the Anti-Dumping Agreement not only by the use of the word "comparable" in Article 2.4.2 ("weighted average of prices of all comparable export transactions"), but also by the fact that the application of Article 2.4.2 is explicitly "[s]ubject to" the provisions of Article 2.4.

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

I. U.S. RESPONSE TO PANEL QUESTION 1

12. On its face, Article 2.4.2 of the Anti-Dumping Agreement sets forth three comparison methodologies by which an investigating authority may determine the "existence of margins of dumping." Per the first sentence, an authority "shall normally ... [do so] on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions or by a comparison of normal value and export prices on a transaction-to-transaction basis." The two primary comparison methodologies thus available to an investigating authority are the W-W comparison methodology and the T-T comparison methodology.

13. The second sentence of Article 2.4.2 describes a third comparison methodology, the W-T comparison methodology, which may be used only when two conditions are met. First, an investigating authority must "find a pattern of export prices which differ significantly among different purchasers, regions or time periods" and, second, an explanation must be provided "as to why such differences cannot be taken into account appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction comparison." The W-T methodology is thus provided in addition to the two comparison methodologies that an authority "normally" uses.

14. In sum, Article 2.4.2 provides three permissible methodologies for comparing normal value to export price.

II. U.S. RESPONSE TO PANEL QUESTION 2

15. Colombia's first written submission states that "[t]he classification of a product into models and subsequent comparisons are governed by the rules in Article 2.4 of the Anti-Dumping Agreement. Thus, as a general matter, any action taken by an authority for purposes of comparing export price to normal value must lead to a 'fair comparison' within the meaning of the first sentence of Article 2.4."

16. Article 2.4 of the Anti-Dumping Agreement explains how an investigating authority is to achieve this fair comparison: "Due allowance shall be made in each case, on its merits, for differences in comparisons which affect price comparability." This includes allowances for "differences in ... physical characteristics" between the export price of the product under consideration and the normal value of the like product.²

17. From this it logically follows that, to be consistent with the obligations established under Article 2.4.2 of the Anti-Dumping Agreement, an investigating authority's approach in calculating dumping margins under the W-W methodology must likewise comply with the "fair comparison" requirements established under Article 2.4. The phrase that introduces Article 2.4.2 reinforces this point as it confirms that the obligations of subparagraph 2 are "[s]ubject to the provisions governing fair comparison in paragraph 4." By making Article 2.4.2 subject to Article 2.4, the Anti-Dumping Agreement ensures that any transactions being compared, either individually or as a weighted average, will have been identified and, as appropriate, adjusted in accordance with the provisions of Article 2.4.

18. Finally, Article 2.6 of the Anti-Dumping Agreement establishes a rule of interpretation for the term "like product." Article 2.6 states that "[t]hroughout ... [the Anti-Dumping] Agreement the term 'like product' ... shall be interpreted to mean a product which is identical, i.e. alike in all respects to the product under consideration, or in the absence of [an identical] ... product, another product which, although not alike in all respects, has characteristics closely resembling those of the product

² The text of Article 2.4 does not require an automatic adjustment based on the mere existence of physical differences. Such an interpretation would render the Article 2.4 terms "in each case, on its merits" and "demonstrate" meaningless. These terms plainly require a case-by-case analysis to determine whether the facts support any allowance for differences in physical characteristics due to an effect on price comparability.

under consideration." Article 2.6 thus makes clear that whether a product is a like product is to be determined on the basis of a comparison to the product under consideration.³

19. As noted in the Panel's question, and as confirmed in Colombia's second written submission, MINCIT's decision to construct "intermediate margins" is based on purported price differences among the articles incorporated into the non-identical like product groupings used to calculate the weighted average normal value for purposes of the W-W comparison methodology. As Colombia notes in its second written submission,

the relevance of the price differences referred to by Colombia was not about a comparison between the exported product and the product sold domestically ... but about a comparison among the articles within a single *referencia sold domestically*. That revealed that there were differences in prices between articles within a *referencia* when sold in the domestic market that could affect price comparability.

20. As explained above, the provisions governing "fair comparison" under Article 2.4 of the Anti-Dumping Agreement (and by extension Article 2.4.2) are provided with respect to "differences in comparisons which affect price comparability" between the export price and the normal value. Differences in prices among articles that comprise a non-identical like product grouping (*i.e.*, "among the articles within a single *referencia sold domestically*") is a distinct question from differences in comparisons that affect price comparability under Article 2.4 (and by extension Article 2.4.2).

III. U.S. RESPONSE TO PANEL QUESTION 3

21. Articles 2.1 and 2.2 of the Anti-Dumping Agreement establish that normal value is found by examining sales of the like product in the domestic market of the exporting country. Article 2.2 permits an investigating authority to use another data source under the following circumstances:

- "[w]hen there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country"; or
- "when, because of the particular market situation or the low volume of the sales in the domestic market of the exporting country, such sales do not permit a proper comparison."

22. Whenever the investigating authority has determined, based on the evidence of record, that one of these circumstances exist, Article 2.2 provides two alternative data sources that may be used to calculate normal value: third-country market sales prices or constructed normal value. Article 2.2 permits the authority to calculate normal value using either alternative without any preference to use one over the other.

³ The Anti-Dumping Agreement does not further define the term "product under consideration." Its existence is taken as a given, and it is clearly the basis – the starting point – for any determination about which products are defined as identical or non-identical "like products."