



**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

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

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CASES CITED IN THIS REPORT

Short Title	Full Case Title and Citation
<i>Colombia – Frozen Fries</i>	Final Panel Report as issued to the parties in <i>Colombia – Anti-Dumping Duties on Frozen Fries from Belgium, Germany and the Netherlands</i> , attached to Colombia's notice of recourse to arbitration (WT/DS591/7 and Add.1)
<i>Colombia – Frozen Fries (Article 25)</i>	Award of the Arbitrators, <i>Colombia – Anti-Dumping Duties on Frozen Fries from Belgium, Germany and the Netherlands – Arbitration under Article 25 of the DSU</i> , WT/DS591/ARB25 and Add.1, 21 December 2022, DSR 2022:III, p. 1829
<i>Dominican Republic – AD on Steel Bars (Costa Rica)</i>	Panel Report, <i>Dominican Republic – Anti-Dumping Measures on Corrugated Steel Bars</i> , WT/DS605/R and Add.1, circulated to WTO Members 27 July 2023, appealed 18 September 2023
<i>EC – Bed Linen</i>	Appellate Body Report, <i>European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India</i> , WT/DS141/AB/R , adopted 12 March 2001, DSR 2001:V, p. 2049
<i>EC – Hormones</i>	Appellate Body Report, <i>European Communities – Measures Concerning Meat and Meat Products (Hormones)</i> , WT/DS26/AB/R , WT/DS48/AB/R , adopted 13 February 1998, DSR 1998:I, p. 135
<i>EC – Tube or Pipe Fittings</i>	Panel Report, <i>European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil</i> , WT/DS219/R , adopted 18 August 2003, as modified by Appellate Body Report <i>WT/DS219/AB/R</i> , DSR 2003:VII, p. 2701
<i>EU – Biodiesel (Argentina)</i>	Panel Report, <i>European Union – Anti-Dumping Measures on Biodiesel from Argentina</i> , WT/DS473/R and Add.1, adopted 26 October 2016, as modified by Appellate Body Report <i>WT/DS473/AB/R</i> , DSR 2016:VI, p. 3077
<i>EU – Footwear (China)</i>	Panel Report, <i>European Union – Anti-Dumping Measures on Certain Footwear from China</i> , WT/DS405/R , adopted 22 February 2012, DSR 2012:IX, p. 4585
<i>Japan – Alcoholic Beverages II</i>	Appellate Body Report, <i>Japan – Taxes on Alcoholic Beverages</i> , WT/DS8/AB/R , WT/DS10/AB/R , WT/DS11/AB/R , adopted 1 November 1996, DSR 1996:I, p. 97
<i>Morocco – Definitive AD Measures on Exercise Books (Tunisia)</i>	Panel Report, <i>Morocco – Definitive Anti-Dumping Measures on School Exercise Books from Tunisia</i> , WT/DS578/R and Add.1, circulated to WTO Members 27 July 2021, appealed 28 July 2021
<i>US – Softwood Lumber V (Article 21.5 – Canada)</i>	Appellate Body Report, <i>United States – Final Dumping Determination on Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada</i> , WT/DS264/AB/RW , adopted 1 September 2006, DSR 2006:XII, p. 5087
<i>US – Washing Machines</i>	Appellate Body Report, <i>United States – Anti-Dumping and Countervailing Measures on Large Residential Washers from Korea</i> , WT/DS464/AB/R and Add.1, adopted 26 September 2016, DSR 2016:V, p. 2275
<i>US – Wool Shirts and Blouses</i>	Appellate Body Report, <i>United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India</i> , WT/DS33/AB/R , adopted 23 May 1997, and Corr.1, DSR 1997:I, p. 323
<i>US – Zeroing (Japan)</i>	Appellate Body Report, <i>United States – Measures Relating to Zeroing and Sunset Reviews</i> , WT/DS322/AB/R , adopted 23 January 2007, DSR 2007:I, p. 3

EXHIBITS REFERRED TO IN THIS REPORT

Exhibit	Short Title (if any)	Description
EU-1b	Ministerial Resolution No. 286	MINCIT, Resolution No. 286 finalising the administrative review initiated by Resolution No. 065 of 10 April 2023 (21 November 2023)
EU-2b	Final technical report	MINCIT, Technical report, public version, Administrative review to comply with the report issued by the World Trade Organisation – WTO panel and the final arbitration ruling handed down in case DS-591 (2023)
EU-5 (BCI)		Agrarfrost's original questionnaire response
EU-6 (BCI)		Agrarfrost's questionnaire response in the original investigation, Annex 3
EU-8b	MINCIT's request for information (28 August 2023)	Letter dated 28 August 2023 from MINCIT to Agrarfrost requesting information in the context of the administrative procedure initiated by Resolution No. 065 of 10 April 2023
EU-9b (BCI)	Agrarfrost's response to MINCIT's request for information	Agrarfrost's response to the request for information of 28 August 2023 (22 September 2023)
EU-10b	Provisional technical report	MINCIT, Provisional technical report, Administrative review to comply with the report issued by the World Trade Organisation – WTO panel and the final arbitration ruling handed down in case DS-591 (2023)
EU-11b (BCI)	Agrarfrost's comments on provisional technical report	Agrarfrost's comments on provisional technical report (29 October 2023)
EU-12		Agrarfrost's questionnaire response in the original investigation, Annex 4, Product catalogue
EU-15b (BCI)		Agrarfrost verification visit report, Annex 9 (Original Exhibit EU-36.1b (BCI))
COL-4 (BCI)		Exhibit from Agrarfrost's and Aviko's questionnaire response
COL-5 (BCI)		Selection of invoices from Agrarfrost's questionnaire response

ABBREVIATIONS USED IN THIS REPORT

Abbreviation	Description
Agrarfrost	Agrarfrost GmbH
Anti-Dumping Agreement	Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994
Aviko	Aviko B.V.
BCI	business confidential information
DSB	Dispute Settlement Body
DSU	Understanding on rules and procedures governing the settlement of disputes
GATT 1994	General Agreement on Tariffs and Trade 1994
MINCIT	Colombia's Ministry of Trade, Industry and Tourism
POI	period of investigation
WTO	World Trade Organization
W-T	weighted average-to-transactions
W-W	weighted average-to-weighted average

1 INTRODUCTION

1.1 Complaint by the European Union

1.1. This dispute concerns Colombia's compliance with the recommendations and rulings in the Award, including the findings contained in the Final Panel Report as modified by the Award, in DS591: *Colombia – Anti-Dumping Duties on Frozen Fries from Belgium, Germany and the Netherlands* (henceforth DS591 *Colombia – Frozen Fries*). The Award of the Arbitrators was issued and notified to the Dispute Settlement Body (DSB), the Council for Trade in Goods, and the Committee on Anti-Dumping Practices on 21 December 2022.¹ The Arbitrators recommended that Colombia bring into conformity with the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement) those measures in the Award, and in the Final Panel Report as modified by the Award, that were found to be inconsistent with that Agreement.²

1.2. On 20 January 2023, Colombia notified the DSB of its intention to implement the Arbitrators' Award, pursuant to Article 21.3 of the Understanding on rules and procedures governing the settlement of disputes (DSU), and that it required a reasonable period of time to do so.³ On 10 March 2023, the European Union and Colombia informed the DSB of their mutual agreement that the reasonable period of time for Colombia to implement the recommendations and rulings of the Arbitrators' Award would be 10 months and 15 days, counting from the day of the issuance of the Award to the parties on 21 December 2022, thus expiring on 5 November 2023.⁴ On 7 December 2023, Colombia informed the DSB that it had "fully implemented all of the relevant panel and arbitral findings and has complied with its WTO obligations".⁵

1.3. The European Union claims that Colombia has failed to comply with the findings of the Award and the Final Panel Report as modified by the Award because, in the European Union's view, Colombia "artificially created" and/or inflated dumping margins for the exporting producers by using "flawed" methodologies for calculating dumping in its measures taken to comply.⁶ According to the European Union, the measures at issue are inconsistent with Colombia's obligations under Articles 2.4.2, 2.4, 2.1, 1, and 9.3 of the Anti-Dumping Agreement and Article VI of the General Agreement on Tariffs and Trade 1994 (GATT 1994).

1.4. On 31 May 2024, the European Union requested consultations with Colombia pursuant to Articles 1, 4, and 21.5 of the DSU, Article 17 of the Anti-Dumping Agreement, and Article XXIII of the GATT 1994 with respect to the measures and claims set out below.⁷

1.5. The European Union and Colombia held consultations on 25 June 2024 but did not resolve the dispute.

1.2 Panel establishment and composition

1.6. On 14 November 2024, the European Union requested the establishment of a panel pursuant to Article 21.5 of the DSU, with standard terms of reference.⁸ At the DSB's meeting on

¹ Award of the Arbitrators, *Colombia – Frozen Fries (Article 25)*.

² Award of the Arbitrators, *Colombia – Frozen Fries (Article 25)*, para. 4.104.

³ Communication from Colombia, WT/DS591/9.

⁴ Agreement under Article 21.3(b) of the DSU, WT/DS591/10.

⁵ Status report by Colombia under Article 21.6 of the DSU regarding the implementation of the recommendations and rulings of the arbitrators, WT/DS591/12.

⁶ European Union's first written submission, paras. 9, 12, 42, 87-89, 100, and 123.

⁷ Request for consultations by the European Union, WT/DS591/13 (European Union's consultation request). On 13 October 2023, the European Union and Colombia informed the DSB that the two parties had concluded Agreed Procedures under Articles 21 and 22 of the DSU, which provided *inter alia* that "[s]hould the European Union consider that the situation described in Article 21.5 of the DSU exists, the European Union will request that Colombia enter into consultations with the EU". (Understanding between Colombia and the European Union regarding procedures under Articles 21 and 22 of the DSU, WT/DS591/11 (Agreed Procedures under Articles 21 and 22 of the DSU), para. 1).

⁸ Request for the establishment of a panel by the European Union, WT/DS591/14 (European Union's panel request).

25 November 2024, Colombia accepted the establishment of a compliance panel and the DSB referred this dispute to the original panel in accordance with Article 21.5 of the DSU.⁹

1.7. The Panel's terms of reference are the following:

To examine, in the light of the relevant provisions of the covered agreements cited by the parties to the dispute, the matter referred to the DSB by the European Union in document WT/DS591/14 and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.¹⁰

1.8. In accordance with Article 21.5 of the DSU, the Panel was composed on 27 November 2024, comprising the same panel members as the original proceeding, as follows:

Chairperson: Mr Hanspeter TSCHAENI
Members: Ms Leane Cornet NAIDIN
Ms Margarita TRILLO-RAMOS

1.9. Brazil, China, Japan, the Russian Federation, Türkiye, and the United States reserved their rights to participate in the Panel proceedings as third parties.

1.3 Panel proceedings

1.10. After consultation with the parties, the Panel adopted its Working Procedures¹¹, Additional Working Procedures of the Panel concerning Business Confidential Information (BCI)¹² and the timetable on 17 December 2024.¹³ On 13 July 2020, Colombia and the European Union notified to the DSB their mutual agreement, "pursuant to Article 25.2 of the [DSU] to enter into arbitration under Article 25 of the DSU to decide any appeal from any final panel report as issued to the parties" in this dispute.¹⁴ In its Working Procedures for these proceedings, the Panel took "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".¹⁵ On 6 October 2025, after consulting with the parties, the Panel adopted the Additional

⁹ DSB, Minutes of the meeting held on 25 November 2024, WT/DSB/M/495. Under the agreed procedures under Articles 21 and 22 of the DSU, Colombia agreed to accept the establishment of a panel under Article 21.5 of the DSU at the first DSB meeting at which the European Union's panel request appeared on the agenda. (Agreed procedures under Articles 21 and 22 of the DSU, para. 2).

¹⁰ Constitution note of the Panel related to the European Union's recourse to Article 21.5 of the DSU, WT/DS591/15.

¹¹ Working Procedures of the Panel (Annex A-1).

¹² Additional Working Procedures of the Panel concerning Business Confidential Information (Annex A-2).

¹³ In advance of the Panel's organizational meeting with the parties, the Panel circulated a proposed timetable that envisaged that the European Union and Colombia would file their first written submissions by 17 January 2025 and 31 January 2025, respectively, and that the substantive meeting of the Panel with the parties would take place on 2 April 2025. During the organizational meeting, which was held on 12 December 2024, the European Union requested the Panel to modify its proposed timetable by extending the deadline for its first written submission by three weeks, and to hold the Panel's substantive meeting with the parties during the week of 5 May 2025. Colombia did not object to the European Union's requests. Colombia requested the Panel to provide it with a symmetrical amount of time for it to file its first and second written submissions, that is three weeks from the date that the European Union submitted its first and second written submissions. The European Union did not oppose this request. After considering the parties' views, the Panel granted these requests. The timetable was adjusted accordingly. On 25 February 2025, the Panel informed the DSB that it would not be able to issue its Report within the 90-day period stipulated in the DSU. (WT/DS591/16).

¹⁴ Agreed procedures for arbitration under Article 25 of the DSU, WT/DS591/3 (fn omitted). The parties revised these procedures on 20 April 2021, WT/DS591/3/Rev.1.

¹⁵ Working Procedures of the Panel (Annex A-1), para. 32.

Working Procedures to facilitate arbitration under Article 25 of the DSU.¹⁶ The Panel revised its timetable on 28 May 2025.¹⁷

1.11. The Panel held one substantive meeting with the parties on 6 and 7 May 2025. A session with the third parties took place on 7 May 2025.

1.12. On 4 July 2025, the Panel issued the descriptive part of its Report to the parties. The Panel issued its Interim Report to the parties on 29 August 2025.¹⁸ The Panel issued its Final Report to the parties on 6 October 2025.

2 FACTUAL ASPECTS

2.1. The European Union challenges the measures taken by Colombia to comply with the recommendations and rulings in the Award, including those in the Final Panel Report as modified by the Award. In its panel request, the European Union identifies the measures as follows:

Ministry of Trade, Industry and Tourism Resolution 065 of 10 April 2023, published in Official Journal 52.362 of 11 April 2023;

Ministry of Trade, Industry and Tourism Technical Report, Public Version, of the Administrative Review to Comply with the Report Issued by the World Trade Organization – WTO Panel and the Final Arbitration Ruling Handed Down in Case DS-591, 2023, sent to the European Commission on 18 October 2023 for interested parties to comment on;

Ministerial Resolution 286 finalising the administrative review initiated by Resolution 065 of 10 April 2023 published in the Official Journal 52.588 of 23 November 2023; and

Ministry of Trade, Industry and Tourism Technical Report, Public Version, of the Administrative Review to Comply with the Report Issued by the World Trade Organization – WTO Panel and the Final Arbitration Ruling Handed Down in Case DS-591, 2023, placed on the public file on or after 23 November 2023.¹⁹

2.2. The European Union also challenges any annexes to these measures, notices, preliminary findings, reviews, amendments, supplements, replacements, renewals, extensions, implementing measures or any other related measures that Colombia may take in connection with the measures at issue.

3 PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

3.1. The European Union requests the Panel to find that Colombia has acted inconsistently with its obligations under:

- a. 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;
- b. Articles 2.4 and 2.1 of the Anti-Dumping Agreement by not performing a fair comparison between the export price and the normal value; and consequently

¹⁶ Additional Working Procedures of the Panel to facilitate arbitration under Article 25 of the DSU (Annex A-3)

¹⁷ On 27 May 2025, Colombia requested the Panel to extend by one day the date to submit comments on the other party's responses to the Panel's questions following the meeting with the parties. The European Union did not oppose Colombia's request. After considering the parties' views, the Panel granted this request on 28 May 2025. The timetable was updated accordingly.

¹⁸ The Panel had originally scheduled the issuance of the Interim Report for 1 August 2025, but was forced to extend the deadline due to unforeseen circumstances.

¹⁹ European Union's panel request, p. 2. (fns omitted)

c. Articles 1 and 9.3 of the Anti-Dumping Agreement and Article VI of the GATT 1994.²⁰

3.2. The European Union therefore requests the Panel to find that Colombia has not brought its measures into conformity with the recommendations and rulings notified to the DSB in the original proceedings.²¹

3.3. Colombia requests that the Panel reject the European Union's claims in this dispute, asserting that the claims are based on an incorrect understanding and characterization of the facts as well as on an incorrect legal analysis.²²

4 ARGUMENTS OF THE PARTIES

4.1. The arguments of the parties are reflected in their executive summaries, provided to the Panel in accordance with paragraph 23 of the Working Procedures adopted by the Panel (see Annexes B-1 and B-2).

5 ARGUMENTS OF THE THIRD PARTIES

5.1. The arguments of Brazil, Japan, the Russian Federation and the United States are reflected in their executive summaries, provided in accordance with paragraph 25 of the Working Procedures adopted by the Panel (see Annexes C-1, C-2, C-3, and C-4). China and Türkiye participated in the third-party session on 7 May 2025 but did not submit written or oral arguments to the Panel.

6 INTERIM REVIEW

6.1. On 15 September 2025, Colombia submitted a written request for the review of precise aspects of the Interim Report. The European Union did not submit any specific comments on the Interim Report. Neither party requested an interim review meeting. On 22 September 2025, the European Union submitted comments on Colombia's requests for review. The Panel's discussion and disposition of the parties' submissions related to the interim review are set out in Annex A-4.

7 FINDINGS

7.1 Order of the Panel's analysis

7.1. We organize our analysis as follows: in the next several pages we recall the basic principles that govern our examination of the European Union's claims in this dispute. We then review the background to, and proceed to evaluate the substance of, the European Union's claims in the order they are presented in paragraph 3.1 above.

7.2. As such, we first consider the European Union's claim that Colombia did not fulfil its obligations under Article 2.4.2 of the Anti-Dumping Agreement because the Colombian investigating authority, the Ministry of Trade, Industry and Tourism (MINCIT)²³, used simple averaging to establish normal value and the existence of margins of dumping (see section 7.4 below). We then evaluate the European Union's claims that Colombia did not fulfil its obligations under Articles 2.4 and 2.1 of the Anti-Dumping Agreement because MINCIT, in calculating margins of dumping, did not perform a fair comparison between the export price and the normal value (see section 7.5 below). Lastly, we examine the consequential claims that the European Union raises under Articles 1 and 9.3 of the Anti-Dumping Agreement and Article VI of the GATT 1994 (see section 7.6 below).

²⁰ European Union's first written submission, para. 134; second written submission, para. 65.

²¹ European Union's first written submission, para. 135; second written submission, para. 66.

²² Colombia's first written submission, paras. 1.1 and 7.1; second written submission, para. 6.1.

²³ Original name in Spanish: Subdirección de Prácticas Comerciales del Ministerio de Comercio, Industria y Turismo. Colombia generally refers to its investigating authority as the "Subdirección", whereas the European Union refers to the authority as "MINCIT". As the panel in the original proceedings and the Arbitrators both referred to the Colombian authority as "MINCIT", in the interest of consistency, we also use the term MINCIT.

7.2 General principles regarding treaty interpretation, the applicable standard of review, and burden of proof

7.2.1 Treaty interpretation

7.3. Article 3.2 of the DSU provides that the dispute settlement system serves to clarify the existing provisions of the covered agreements "in accordance with customary rules of interpretation of public international law". It is generally accepted that the principles codified in Articles 31 and 32 of the Vienna Convention on the Law of Treaties are such customary rules.²⁴

7.4. Article 17.6(ii) of the Anti-Dumping Agreement directs a panel to the same customary rules of treaty interpretation, and further provides:

[T]he 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.

7.2.2 Standard of review

7.5. Panels generally are bound by the standard of review set forth in Article 11 of the DSU, which provides, in relevant part:

[A] panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements.

7.6. In addition to Article 11 of the DSU, Article 17.6(i) of the Anti-Dumping Agreement provides that in disputes under the Anti-Dumping Agreement:

[I]n 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[.]

7.7. Thus, Article 17.6(i) is explicit that in carrying out its objective assessment, the Panel is barred from conducting a *de novo* review of the facts. Instead, the Panel is directed to "determine whether the authorities' establishment of the facts was proper", and "whether their evaluation of those facts was unbiased and objective".

7.8. As to the universe of relevant facts whose "establishment" and "evaluation" by the authority the Panel must assess, Article 17.5(ii) of the Anti-Dumping Agreement provides that the Panel is to "examine the matter based upon ... the facts made available in conformity with appropriate domestic procedures to the authorities of the importing Member".

7.2.3 Burden of proof

7.9. The DSU does not contain specific rules concerning the allocation of the burden of proof in WTO dispute settlement proceedings. We agree, however, with the observation that the "generally accepted canon of evidence in ... most jurisdictions, that the burden of proof rests upon the party ... who asserts the affirmative of a particular claim or defence" is also followed in WTO dispute settlement.²⁵ Therefore, the European Union bears the burden of demonstrating that Colombia's measures are inconsistent with the WTO Agreement. A complaining party will satisfy its burden when it establishes a *prima facie* case, namely a case which, in the absence of effective refutation by the defending party, requires a panel, as a matter of law, to rule in favour of the complaining party.²⁶ Finally, it is generally for each party asserting a fact to provide proof thereof.²⁷

²⁴ Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 10, section D.

²⁵ Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14.

²⁶ Appellate Body Report, *EC – Hormones*, para. 104.

²⁷ Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14.

7.3 Procedural background and overview of the European Union's claims

7.10. The European Union brings these proceedings due to a "disagreement", under Article 21.5 of the DSU, "as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings" in the Award²⁸, and in the Final Panel Report as modified by the Award in DS591 *Colombia - Frozen Fries*.²⁹

7.11. In the original dispute settlement proceedings, the Panel found, *inter alia*, that the Colombian investigating authority acted inconsistently with the fair comparison requirements of Article 2.4 because it disregarded the data provided by the exporters and calculated margins of dumping without accounting for certain requested product mix-related adjustments to normal value.³⁰

7.12. To implement the Panel's findings, Colombia initiated a procedure on 10 April 2023 (the "compliance review"), which involved, *inter alia*, recalculating the dumping margins for the exporters concerned using the data provided by them in the questionnaires. MINCIT determined that it did not need to reopen the factual record to perform this exercise and conducted this recalculation on the basis of the interested parties' original questionnaire responses and arguments, as well as additional explanations and comments that it received from the interested parties during the compliance review.³¹

7.13. MINCIT's compliance review findings and determinations are contained in its final technical report³² and in Ministerial Resolution No. 286 which finalizes the results of the compliance review.³³

7.14. The European Union brings two primary claims in these compliance proceedings concerning the manner in which MINCIT recalculated certain margins of dumping during the compliance review.

- a. First, the European Union claims that MINCIT acted inconsistently with Article 2.4.2 of the Anti-Dumping Agreement by establishing the existence of margins of dumping based on a methodology that improperly compared the "simple average normal value with a weighted average of prices of export transactions"³⁴ wherever "there was no exact match between the [article] sold on the export market and the goods sold in the domestic market".³⁵
- b. Second, the European Union claims that MINCIT's decision to apply an "article-to-article" comparison methodology is inconsistent with its obligation to make a fair comparison between export price and normal value under Article 2.4 and the obligation to make a dumping determination in accordance with Article 2.1 of the Anti-Dumping Agreement.

7.15. The European Union also raises consequential claims under Articles 1 and 9.3 of the Anti-Dumping Agreement, and Article VI of the GATT 1994.

7.16. We consider these claims in turn.

7.4 Claim under Article 2.4.2 of the Anti-Dumping Agreement: the use of simple averaging to determine normal value and establish the existence of margins of dumping

7.4.1 Introduction

7.17. The European Union claims that "in its measures taken to comply with the recommendations and rulings notified to the DSB in the original proceedings, 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"³⁶ as the "normal value so established

²⁸ Award of the Arbitrators, *Colombia – Frozen Fries (Article 25)*, para. 4.103(c).

²⁹ Final Panel Report as issued to the parties in *Colombia – Frozen Fries*, paras. 8.1(c) and (d).

³⁰ Final Panel Report as issued to the parties in *Colombia – Frozen Fries*, para. 7.216.

³¹ Colombia's first written submission, paras. 2.3-2.4.

³² Final technical report (Exhibit EU-2b).

³³ Ministerial Resolution No. 286 (Exhibit EU-1b).

³⁴ European Union's first written submission, para. 14.

³⁵ European Union's first written submission, para. 17 (quoting Final technical report (Exhibit EU-2b), p. 38).

³⁶ European Union's second written submission, para. 16.

was compared to weighted averages of export prices in order to determine a margin of dumping for individual exporters".³⁷ Specifically, the European Union contends that MINCIT violated Colombia's obligations under Article 2.4.2 because the authority did not establish the existence of margins of dumping for these products on either "the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions" or by comparing "normal value and export prices on a transaction-to-transaction basis". Instead, MINCIT did so based on a methodology that compared "a simple average normal value with a weighted average of prices of export transactions".³⁸

7.18. Colombia rejects these allegations and asks the Panel to dismiss the European Union's Article 2.4.2 claim for two reasons. First, Colombia asserts that the conduct that the European Union is challenging is not subject to Article 2.4.2 because it concerns discretionary "model-matching" and adjustment-related determinations that MINCIT made in accordance with the "fair comparison" requirement under Article 2.4.³⁹ Second, Colombia asserts that even if one assumes that Article 2.4.2 "was relevant" to the authority's approach, MINCIT "fully complied with Article 2.4.2".⁴⁰

7.19. We begin our evaluation of the European Union's claim by reviewing the methodology that MINCIT applied to determine the existence of margins of dumping in the compliance review and the reasons for doing so. We then (a) recall the requirements of Article 2.4.2 and Article 2.4 of the Anti-Dumping Agreement; (b) address the threshold argument of Colombia whether the European Union's complaint fails to raise a claim under Article 2.4.2; and (c) examine the European Union's claim that the methodology that MINCIT applied to calculate a margin of dumping is inconsistent with Article 2.4.2 while noting, as appropriate, relevant arguments by the parties and third parties.

7.4.2 Overview of the methodology MINCIT applied to determine the existence of margins of dumping

7.20. In the underlying compliance review, MINCIT determined to make comparisons between the normal value and the export price at the "article-to-article" level.⁴¹ In doing so, MINCIT applied different methodologies to determine intermediate margins of dumping for articles depending on whether the authority concluded that the exact same article⁴² either was – or was not – sold both in the domestic market and in Colombia.

7.21. "Exact match": in cases in which MINCIT determined that an article that was sold in the EU market was essentially "identical" to an article that was exported to Colombia, MINCIT determined an "intermediate" margin of dumping for each "identical" article-pair. MINCIT did this by (a) examining all the domestic transactions for the article in question and calculating normal value based on the weighted average sales price of these transactions⁴³; (b) examining all the export transactions for the article in question and calculating the export price based on the weighted average sales price of these transactions⁴⁴; and then (c) comparing the weighted average normal value and the weighted average export price for the article concerned.

³⁷ European Union's second written submission, para. 16.

³⁸ European Union's first written submission, para. 14.

³⁹ Colombia's first written submission, para. 5.4 (asserting that the "legal obligation governing model matching and any related adjustments is Article 2.4 ... not Article 2.4.2").

⁴⁰ Colombia's first written submission, para. 5.5.

⁴¹ Provisional technical report (Exhibit EU-10b), pp. 27-28 and 36 (stating that "the comparison between the normal value and the export price is carried out [article] by [article] and on the basis of detailed information on sales in the domestic market and in the export market to Colombia, as provided by each of the companies when responding to the questionnaire"). We review the rationale by which MINCIT determined to compare export price to normal value at the "articles-level" in more detail at section 7.5 below, in the context of the European Union's claims under Articles 2.4 and 2.1.

⁴² We note that Colombia states that the three investigated companies reported their sales of the investigated product on the basis of product types referred to as "articles". During this proceeding, Colombia uses the term "article", whereas the European Union refers to the same concept as "item". The parties agree that these terms are generally synonymous. For the sake of consistency, we generally use the term "article" in this Report. (Colombia's first written submission, para. 2.8; European Union's response to Panel question No. 4(a), paras. 11-12).

⁴³ Colombia's first written submission, para. 2.40(a).

⁴⁴ Colombia's first written submission, para. 2.40(a); see also Final technical report (Exhibit EU-2b), pp. 38 and 49.

7.22. "No exact match": Colombia states that, when MINCIT could not identify an "exact" domestic match – or article-pair – between an article sold in Colombia and an article sold in the domestic market, MINCIT sought "to identify an appropriate comparator"⁴⁵ or "proxy sales price"⁴⁶ (i.e. normal value) to compare to the export price and thereby determine an intermediate margin of dumping. To identify or derive this domestic comparator/proxy sales price MINCIT calculated the simple average of the weighted average domestic sales prices of all the articles in the same product group as the article concerned.⁴⁷ As such, MINCIT determined an intermediate margin of dumping for articles sold in Colombia but *not* sold in the European Union by following these steps⁴⁸:

- a. First, MINCIT calculated a weighted average export price for the exported article in question.⁴⁹
- b. Second, MINCIT determined a comparator normal value⁵⁰ by:
 - i. identifying the "product group" (as defined by the exporters) that includes the exported article, and using all the domestically sold articles from that "product group" as the basis for determining normal value⁵¹;
 - ii. calculating the weighted average of the domestic sales prices for each article within the "product group" and using them as intermediate weighted average normal values⁵²; and then
 - iii. deriving a single comparator normal value by calculating the simple average of the intermediate weighted average normal values calculated for each domestically sold article in the "product group".⁵³
- c. Third, MINCIT compared the normal value calculated in the second step, above, with the weighted average export price of the exported article to determine an "intermediate" margin of dumping⁵⁴ for each article that was sold in Colombia but not in the European Union.

7.23. MINCIT subsequently aggregated all the intermediate margins of dumping that it determined based on either the "exact match" methodology or the "no exact match" methodology, on a weighted basis, to determine an overall margin of dumping for "frozen fries" as the product under investigation.⁵⁵

7.24. The European Union asserts that MINCIT used the methodology "across the board whenever 'there was no exact match between the [article] sold on the export market and the goods sold in the domestic market'" and that the negative "impact" of this methodology "can be exemplified through the calculations ... used for product types exported by ... [Aviko B.V. (Aviko) and Agrarfrost GmbH (Agrarfrost)]".⁵⁶

7.25. Colombia states that the reason MINCIT elected to derive these "proxy" normal values based on "the sales prices of the other articles" in the same product group as the exported article is because "the exporters had argued that the comparisons should be done on a product [group] basis".⁵⁷ Colombia asserts that these exporter statements established that – "from the

⁴⁵ Colombia's first written submission, para. 2.50.

⁴⁶ Colombia's first written submission, para. 2.50.

⁴⁷ Colombia's first written submission, paras. 2.50-2.51.

⁴⁸ Colombia's first written submission, para. 2.41.

⁴⁹ Colombia's first written submission, para. 2.41(a).

⁵⁰ Colombia describes this comparator as a "hypothetical article", the "hypothetical average article", an "appropriate comparator", or "proxy". (Colombia's first written submission, paras. 2.41(b), 2.50 and 2.56; second written submission, paras. 4.20-4.21 and 4.24).

⁵¹ Colombia's first written submission, para. 2.41(d).

⁵² Colombia's first written submission, para. 2.41(e).

⁵³ Colombia's first written submission, para. 2.41(e). (emphasis original)

⁵⁴ Colombia's first written submission, para. 2.41(g).

⁵⁵ Colombia's first written submission, para. 2.42.

⁵⁶ European Union's first written submission, para. 17 (quoting Final technical report (Exhibit EU-2b), p. 38).

⁵⁷ Colombia's first written submission, para. 2.41(d).

exporters' perspective" – "all of the articles within a product [group] were sufficiently similar to be matched to an exported article within the same product [group]".⁵⁸

7.26. Colombia also asserts that MINCIT lacked sufficient information for it to determine which articles sold in the domestic market had characteristics that most closely matched the articles exported to Colombia.⁵⁹ Given this, Colombia states that MINCIT determined "to treat all of the articles sold in the domestic market within the relevant product [group] as equally similar for the purpose of selecting a match for an exported article for which the identical article was not sold in the domestic market"⁶⁰, and asserts that doing so was reasonable⁶¹ because:

- a. using simple averaging was the most appropriate way "to give the same weight to the physical characteristics of each of the ... articles" in the same product group⁶²; and that,
- b. using a weighted average of the weighted average domestic sales prices of all other articles in the same product type would "give[] greater weight to some articles simply because they happened to be sold in greater volumes during the [period of investigation (POI)]".⁶³

7.27. In view of the above, we note that the parties do not dispute that MINCIT: (a) sought to determine margins of dumping in the underlying compliance review based on the weighted average-to-weighted average (W-W) comparison methodology in Article 2.4.2 of the Anti-Dumping Agreement; and (b) used simple averaging to determine the proxy normal values that MINCIT compared to the weighted average export price of articles sold in Colombia (but that did not have an "identical" equivalent in the domestic market) to calculate "an intermediate 'dumping margin' for the exported article".⁶⁴

7.28. The parties do dispute, however, whether MINCIT's use of simple averaging violates Colombia's obligations under Article 2.4.2 in the circumstance of this proceeding and/or whether this conduct was permissible in view of the "fair comparison" requirement contained in Article 2.4.

7.4.3 Applicable requirements of Article 2.4 and Article 2.4.2

7.29. Article 2.4 of the Anti-Dumping Agreement provides, in relevant part, that:

A fair comparison shall be made between the export price and the normal value. This comparison shall be made at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time. Due allowance shall be made in each case, on its merits, for differences which affect price comparability, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability The authorities shall indicate to the parties in question what information is necessary to ensure a fair comparison and shall not impose an unreasonable burden of proof on those parties.

7.30. We have previously observed that:

Article 2.4 requires investigating authorities to make a "fair comparison" between the export price and the normal value, and imposes certain requirements on authorities to achieve this objective. In particular, Article 2.4 requires investigating authorities to make "[d]ue allowance ... in each case, on its merits, for differences which affect price comparability". The provision provides an illustrative list of the types of differences that may affect price comparability, including "differences in ... physical characteristics" and "any other differences" that may be relevant in this regard; [and]

While Article 2.4 requires authorities to ensure that the comparison is fair, the provision only requires an allowance to be made for differences that are "demonstrated to affect price comparability". Thus, parties seeking the adjustments bear the burden of

⁵⁸ Colombia's first written submission, para. 2.41(d).

⁵⁹ Colombia's first written submission, para. 2.41(d).

⁶⁰ Colombia's first written submission, para. 2.41(d).

⁶¹ Colombia's first written submission, para. 2.41(f).

⁶² Colombia's first written submission, para. 2.53.

⁶³ Colombia's first written submission, para. 2.53.

⁶⁴ Colombia's first written submission, para. 2.41(g).

substantiating – through arguments and evidence – their requests to account for differences affecting price comparability. Investigating authorities are not obliged to make the adjustments if the parties requesting such adjustments do not demonstrate that the differences underlying their request affect price comparability.⁶⁵

7.31. We also observe that a prior dispute settlement report has stated that "[t]he term 'fair' is generally understood to connote impartiality, even-handedness, or lack of bias".⁶⁶ We agree with this understanding.

7.32. Article 2.4.2 of the Anti-Dumping Agreement provides that:

Subject to the provisions governing fair comparison in paragraph 4, the existence of margins of dumping during the investigation phase shall normally be established 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. A normal value established on a weighted average basis may be compared to prices of individual export transactions if the authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods, and if an explanation is 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.

7.33. The first sentence of Article 2.4.2 of the Anti-Dumping Agreement sets forth two methodologies that shall normally be used by investigating authorities to establish the existence of margins of dumping: the W-W comparison methodology and the transaction-to-transaction (T-T) methodology. The text of Article 2.4.2 does not provide any guidance that investigating authorities must consider in determining whether to apply either the W-W methodology or the T-T methodology to determine the existence of margins of dumping. This indicates that an authority has a degree of discretion to choose between these two methodologies based on the circumstances of the proceeding. Article 2.4.2 also provides that an authority may use a third methodology – i.e. one that compares weighted average normal values to transactions (W-T), in the event that the authority determines that certain "patterns" of export prices exist and complies with other procedural requirements – but does not otherwise expressly state that an authority may apply any other methodology to establish the existence of margins of dumping.⁶⁷ For the purposes of analysing the European Union's claim, we focus on the W-W methodology as the obligations that apply to the implementation of this methodology are central to the resolution of this dispute.

7.34. Articles 2.4.2 and 2.4 are both part of Article 2 of the Anti-Dumping Agreement which establishes rules that an investigating authority must follow when making a "determination of dumping". The two articles are also directly linked to one another as Article 2.4.2 expressly notes that the establishment of "the existence of margins of dumping" is "[s]ubject to the provisions governing fair comparison in paragraph 4". Prior dispute settlement reports have taken the view that this linkage requires investigating authorities – as a predicate to applying any of the three methodologies set forth in Article 2.4.2 – to ensure that a "fair comparison" is made between export price and normal value, regardless whether an authority determines margins of dumping pursuant to the W-W, T-T, or W-T methodology.⁶⁸ We agree with this understanding.

⁶⁵ Final Panel Report as issued to the parties in *Colombia – Frozen Fries*, paras. 7.201-7.202.

⁶⁶ Appellate Body Report, *United States – Softwood Lumber V (Article 21.5 – Canada)*, para. 138 and fn 231 (referring to the Shorter Oxford English Dictionary, 5th edn, W.R. Trumble, A. Stevenson (eds) (Oxford University Press, 2002, vol. 1, p. 915) and stating that "[t]he relevant dictionary meaning of 'fair' is 'just, unbiased, equitable, impartial; legitimate, in accordance with the rules or standards', and 'offering an equal chance of success'"). See also Japan's third-party submission, para. 4 (referring to Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 138; Panel Reports, *EC – Tube or Pipe Fittings*, para. 7.178; and *Dominican Republic – AD on Steel Bars (Costa Rica)*, appealed 18 September 2023, para. 7.32).

⁶⁷ Appellate Body Report, *US – Washing Machines*, para. 5.74 (stating that the W-T methodology "is an exception to the comparison methodologies that are set out in the first sentence [that] are normally to be used"). See also Appellate Body Reports, *US – Zeroing (Japan)*, para. 131, and *US – Softwood Lumber V (Article 21.5 – Canada)*, paras. 86 and 97.

⁶⁸ Appellate Body Reports, *United States – Softwood Lumber V (Article 21.5 – Canada)*, para. 132 (stating that "Article 2.4.2 begins with the phrase '[s]ubject to the provisions governing fair comparison in

7.4.4 Evaluation

7.35. The European Union's Article 2.4.2 claim is framed by three methodological choices made by MINCIT and not challenged by the European Union. In particular, MINCIT (a) determined to apply the W-W comparison methodology; (b) calculated a weighted average export price for the comparison; and (c) identified domestic sales transactions as the basis for normal value for the comparison. Within this frame, the issue for the Panel to resolve is whether MINCIT relied on a permissible interpretation of Article 2.4.2 when it compared that weighted average export price with a comparator normal value calculated as a simple average of intermediate weighted average prices of all domestically sold articles within the same product group as the article exported to Colombia but not sold in the domestic EU market.

7.4.4.1 Whether the European Union's claim under Article 2.4.2 should be dismissed on jurisdictional grounds

7.36. As a threshold matter, Colombia requests the Panel to dismiss the European Union's claim under Article 2.4.2. Colombia asserts the "European Union has failed to raise a claim" under Article 2.4.2 because the legal obligation governing the methodological step challenged by the European Union is Article 2.4, and not Article 2.4.2.⁶⁹

7.37. Colombia states that the European Union's claim under Article 2.4.2 seeks to challenge an "intermediate" methodological step that "concerns model matching" that was designed to identify "the proper match for an exported article in circumstances in which there were no domestic sales of the identical article in the domestic market".⁷⁰

7.38. Colombia expresses the view that:

Articles 2.4 and 2.4.2 have different scopes of application [as they] apply to separate steps in the analytical process by which an investigating authority ... determines sales prices for domestic and export sales, adjust[s] them to ensure price comparability, typically bringing these prices to the ex-factory level, where necessary converts the prices from one currency to another, and then applies one of the comparison methodologies set out in Article 2.4.2.⁷¹

7.39. Colombia asserts that: (a) "[t]hese are separate, sequential steps in the dumping analysis", and that any "one of these steps is governed by either Article 2.4, 2.4.1 or Article 2.4.2, but not by all of these provisions at the same time"⁷²; and (b) "Article 2.4.2 does not apply to the analytical step at issue"⁷³ (i.e. the process of using simple averaging to identify a proxy normal value comparator) "because there is nothing in the language in Article 2.4.2 that relates to this analytical

paragraph 4'. Thus, the application of the comparison methodologies set out in Article 2.4.2 of the Anti-Dumping Agreement ... is expressly made subject to the 'fair comparison' requirement set out in Article 2.4"); *EC – Bed Linen*, para. 59 (stating that "Article 2.4 sets forth a general obligation to make a 'fair comparison' between export price and normal value" which "informs all of Article 2, but applies, in particular, to Article 2.4.2 which is specifically made 'subject to the provisions governing fair comparison in [Article 2.4].'").

⁶⁹ Colombia's second written submission, para. 4.48. See also Colombia's first written submission, para. 5.4. Colombia's opening statement at the meeting of the Panel, para. 3.2 (asserting that "[m]odel-matching is not governed by Article 2.4.2"); Colombia's responses to the Panel question No. 13, para. 1.49; question No. 14(a), para. 1.57 (stating that "it is Colombia's position that because the simple averaging" that the European Union challenges "was done as part of the intermediate step of model matching and determining how to make adjustments for physical characteristics in cases where there was no identical match in the domestic market the relevant legal provision is Article 2.4 ... not Article 2.4.2"); and question No. 15, para. 1.85 (asserting that "Article 2.4.2 does not apply to the averaging of the weighted-average normal values of the various articles" as that "step is a model-matching exercise ... covered by Article 2.4").

⁷⁰ Colombia's first written submission, para. 5.4.

⁷¹ Colombia's response to Panel question No. 14(a), para. 1.63. See also Colombia's second written submission, para. 4.42 (stating that "Articles 2.4 and 2.4.2 address different steps in the [fair comparison] process").

⁷² Colombia's response to Panel question No. 14(a), para. 1.63.

⁷³ Colombia's response to Panel question No. 14(a), para. 1.70.

step".⁷⁴ Colombia contends that "the Panel should reject the European Union's allegations for [this] reason alone".⁷⁵

7.40. The European Union asks the Panel to reject Colombia's argument that the methodology that MINCIT applied "does not fall within the scope of Article 2.4.2" because it falls "within the scope of Article 2.4".⁷⁶ The European Union states that this "argument ignores the fact that the 'fair comparison' requirement ... informs Article 2.4.2" so 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".⁷⁷

7.41. We note that Colombia suggests that the Panel should dismiss the European Union's claim under Article 2.4.2 by evaluating whether "the precise terms of Article 2.4.2 apply to the analytical step ... that is being challenged by the European Union".⁷⁸ We also note that Colombia takes the position that the Panel "can and indeed should resolve" this question "without engaging in elaborate theoretical analysis of the relationship between Articles 2.4 and 2.4.2 ... especially ... as the European Union has not invoked Article 2.4 and thus the Panel lacks jurisdiction to examine Colombia's measure under Article 2.4".⁷⁹

7.42. We agree with Colombia that the European Union has not asserted a separate claim alleging that MINCIT's determination of the normal value for W-W comparisons – when no domestic sales of the same article existed – was inconsistent with Article 2.4 of the Anti-Dumping Agreement. For that reason, we do not evaluate the European Union's claim for the purposes of determining whether MINCIT's conduct violates Article 2.4. We also do not treat the European Union's claim under Article 2.4.2 "as if it were" an Article 2.4 claim.

7.43. We disagree, however, with Colombia's suggestion that the fact that the European Union does not challenge MINCIT's methodology under Article 2.4 requires its Article 2.4.2 claim to be dismissed on jurisdictional grounds.

7.44. Colombia acknowledges that Article 2.4.2 and Article 2.4 are connected with one another as it notes that, "[g]iven the all-encompassing nature of the 'fair comparison' requirement, any matter falling under Article 2.4.2 is also subject to the general fair comparison requirement in Article 2.4".⁸⁰ Notwithstanding this, Colombia posits 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".⁸¹ Colombia suggests that this necessarily precludes MINCIT's "model-matching" methodology from being considered under Article 2.4.2 because, as mentioned above, "there is nothing in the language in Article 2.4.2 that relates to this analytical step".⁸²

7.45. We observe that Colombia accepts⁸³ that the European Union's claim under Article 2.4.2 contends that Colombia failed to fulfil its obligations under Article 2.4.2 because MINCIT allegedly failed to establish margins of dumping in a manner that accords with the requirements of the W-W comparison methodology. Specifically, the European Union alleges that MINCIT "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".⁸⁴

7.46. The European Union's allegations objectively set forth an Article 2.4.2 claim that challenges the methodology that MINCIT applied to establish the existence of margins of dumping when it could not identify an exact domestic match with an article sold on the export market. We appreciate that Colombia explains that MINCIT was "trying to determine a proper match for exported articles that were not sold on the domestic market, so as to ensure a 'fair comparison'"⁸⁵ pursuant to Article 2.4. We are of the view, however, that this explanation does not preclude the Panel from considering

⁷⁴ Colombia's second written submission, para. 4.13.

⁷⁵ Colombia's second written submission, para. 4.48.

⁷⁶ European Union's opening statement at the meeting of the Panel, para. 21.

⁷⁷ European Union's opening statement at the meeting of the Panel, para. 21.

⁷⁸ Colombia's response to Panel question No. 14(a), para. 1.69.

⁷⁹ Colombia's response to Panel question No. 14(a), para. 1.69.

⁸⁰ Colombia's response to the Panel question No. 14(a), para. 1.67.

⁸¹ Colombia's response to the Panel question No. 14(a), para. 1.65. (emphasis original)

⁸² Colombia's second written submission, para. 4.13.

⁸³ Colombia's first written submission, paras. 5.2-5.3.

⁸⁴ European Union's first written submission, para. 14.

⁸⁵ Colombia's first written submission, para. 5.12. (emphasis omitted)

whether MINCIT's determination of normal value when applying the W-W comparison methodology complies with Article 2.4.2.

7.47. We find that a methodology that an authority applies to determine margins of dumping is not rendered "unreviewable" under Article 2.4.2 or "not subject to" Article 2.4.2 because the methodology was motivated by concerns that relate to the fair comparison requirement of Article 2.4. We now turn to ascertain whether the European Union's claim under Article 2.4.2 identifies an element of MINCIT's methodology to which the obligations of Article 2.4.2 are applicable.

7.48. We first note that MINCIT determined a company-specific overall margin of dumping for each of three companies. For each company, the overall margin of dumping was determined by aggregating multiple comparison results between normal values and export prices. The European Union does not challenge these aspects of MINCIT's determination.

7.49. We next turn to an examination of what Colombia describes as "model matching". We observe that what Colombia describes as "model matching" encompasses multiple functional elements, some of which are not challenged under the European Union's Article 2.4.2 claim. Our focus is on whether the European Union's Article 2.4.2 claim challenges any functional element and on whether relevant obligations under Article 2.4.2 are applicable to such a challenged element.

7.50. We recall that MINCIT identified certain domestic transactions as the basis for determining the normal value to be compared with the weighted average export price. For the purpose of comparing the export sales price of a particular "article", MINCIT determined the domestic sales price of the same "article". In instances where no domestic sales of the same "article" were available, MINCIT determined the comparator normal value on the basis of the domestic sales prices of all articles that the exporter had classified within the "product group" to which the exported article was also assigned. We understand that certain aspects of these methodological choices are at issue with respect to the European Union's claim under Articles 2.1 and 2.4, but we do not understand the European Union's Article 2.4.2 claim to be specifically challenging MINCIT's identification of domestic transactions of the same "article" in some cases or of the same "product group" in other cases. For that reason our determination of whether the complaint raises a claim under Article 2.4.2 does not focus on those elements of MINCIT's methodology.

7.51. Next, we examine the step of determining a comparator normal value on the basis of the selected domestic transactions. We recall that MINCIT applied two distinct methods for determining normal value depending on whether the domestic sales selected for comparison were from the same "article" or from the same "product group" as the export sales at issue.

7.52. In the first case, where domestic transactions of the "same" "article" were available, MINCIT compared the weighted average price of the domestically sold "article" with the weighted average export price of that "article". The European Union's Article 2.4.2 claim does not challenge the methodology MINCIT adopted in this case. Accordingly, we focus our examination hereafter exclusively on the second case.

7.53. In the second case, where no domestic transactions of the same "article" were available, MINCIT established the comparator normal value through a two-step process. First, it calculated an intermediate weighted average normal value for each "article" within the "product group". Next, it derived a single comparator normal value by taking the simple average of these article-specific intermediate weighted averages. Although Colombia characterizes these calculations as part of its "model matching" step, we view them as functionally distinct from the step involving the identification of matching domestic transactions. Given that Article 2.4.2 expressly requires that the W-W methodology consists of a comparison between a "weighted average normal value" and a weighted average export price, we consider this calculation step to fall within the scope of the obligations set out in that provision. We understand the European Union's claim under Article 2.4.2 to assert that a normal value calculated in this manner cannot serve as a valid comparator under the W-W comparison methodology. Accordingly, we conclude that the European Union's claim under Article 2.4.2 challenges this aspect of MINCIT's methodology, and that the obligations of Article 2.4.2 are applicable to it.

7.54. Next, we examine the step of comparing the comparator normal values as described above with the weighted average export price.

7.55. Turning directly to the second case, MINCIT compared a normal value that was a simple average of intermediate weighted average normal values based on domestic transactions from the same "product group" as the export transactions at issue. The European Union's Article 2.4.2 claim challenges MINCIT's use of such a comparator normal value in these comparisons (hereinafter, the "challenged comparisons"). We are of the view that the obligation expressed in the text of Article 2.4.2 is that the W-W comparison methodology consists of a comparison of a "weighted average normal value" with the weighted average export price. We, therefore, consider that the comparison step is also implicated by the obligations of Article 2.4.2 with respect to the comparisons that rely on normal values calculated in this manner. Consequently, we find that the European Union's Article 2.4.2 claim both challenges this element of MINCIT's methodology and that the relevant obligations of Article 2.4.2 are applicable to this element of MINCIT's methodology.

7.56. For the above reasons, we find that the European Union has properly brought a claim under Article 2.4.2, and therefore we reject Colombia's argument that the European Union's claim should be dismissed on the ground that it "has failed to raise a claim" under Article 2.4.2.⁸⁶

7.4.4.2 Whether the normal values MINCIT used for the challenged comparisons comply with Article 2.4.2

7.57. We now turn to assess whether the methodology that MINCIT applied to establish the existence of margins of dumping in the underlying proceeding complies with the requirements of Article 2.4.2.

7.58. Colombia stated that MINCIT "calculated dumping margins for the three investigated companies using a weighted-average to weighted-average ... comparison methodology" based on multiple comparisons of weighted average normal values and weighted average export prices.⁸⁷ As noted at paragraphs 7.24-7.25 above, the parties do not dispute that the normal value that MINCIT compared with the weighted average export price for the challenged comparisons was calculated as the simple average (i.e. non-weighted average) of intermediate weighted average prices. The parties dispute whether MINCIT acted inconsistently with the obligation under Article 2.4.2 to use a weighted average normal value when utilizing the W-W comparison methodology.

7.59. We recall, as noted at paragraph 7.27 above, that the parties do not dispute that the investigating authority sought to determine the existence of margins of dumping based on the W-W comparison methodology. We recall our examination of MINCIT's methodology in paragraphs 7.48-7.55 in which we observed that the challenged comparisons were those where there were no domestic transactions of the same "article" as the export transactions. For such comparisons, MINCIT identified domestic transactions of articles from the same "product group" as the export transactions at issue, and these domestic transactions would be the basis for determining the normal value to be compared with the weighted average export price of the export transactions. For these comparisons, MINCIT determined the normal value by first calculating an intermediate weighted average normal value for each of the "articles" into which the selected domestic transactions had been grouped. MINCIT then calculated a single simple average of the multiple (article-based) intermediate weighted average normal values. The resulting simple average normal value was then compared with the weighted average export price for the export transactions at issue. The European Union's Article 2.4.2 claim challenges MINCIT's use of simple averages in these comparisons (the "challenged comparisons").

7.60. Colombia argues that not "every analytical step" that an authority takes to establish normal value pursuant to the W-W methodology falls under Article 2.4.2.⁸⁸ In particular, Colombia argues that MINCIT's use of simple averaging was a part of the "model matching" step, which it asserts is not covered by Article 2.4.2.⁸⁹ As noted in paragraphs 7.53 and 7.55 above, we disagree. Averaging the selected domestic sales prices to derive a normal value for comparison with the weighted average

⁸⁶ Colombia's second written submission, para. 4.48.

⁸⁷ Colombia's first written submission, para. 5.6.

⁸⁸ Colombia's first written submission, para. 5.9. See also Colombia's second written submission, para. 4.15 (emphasis omitted) (asserting that "the intermediate step of model-matching ... is not covered by Article 2.4.2, even if certain other steps of the process of calculating normal value and the export price are"), and para. 4.14 (asserting that MINCIT complied with Article 2.4.2's requirement to aggregate any intermediate dumping margins that the authority determined via its "model-matching" methodology on a weight-average basis).

⁸⁹ Colombia's second written submission, para. 4.49 (asserting that "the model matching intermediate step undertaken by [MINCIT] is covered by, and is an expression of", the authority's discretion).

export price is explicitly covered by Article 2.4.2. This holds regardless of whether the identification of domestic sales for this calculation falls under Article 2.4, Article 2.4.2, or both.

7.61. Similarly, we are of the view that Article 2.4.2 imposes obligations on investigating authorities on the nature of the comparisons that may be the basis for the establishment of margins of dumping. We recall that MINCIT determined a company-specific overall margin of dumping for each of three companies. For each company, the overall margin of dumping was determined by aggregating multiple comparison results between normal values and export prices. While the aggregation of comparison results took into account the weights of the export transaction volumes corresponding to each of the multiple comparisons, it does not follow that the comparison results themselves were a proper basis for the establishment of margins of dumping. We therefore turn to the question of whether the comparators used in this case, and the comparison results thereby obtained, were consistent with the obligations of Article 2.4.2.

7.62. Colombia asserts that the methodology that MINCIT applied was "fully within the range of methodological choices" that MINCIT "was entitled to make as part of its discretion as the investigating authority".⁹⁰ In particular, Colombia asserts that MINCIT used simple averaging to determine normal value for a "hypothetical comparator proxy" for the "article" that was not sold on the domestic market because: (a) doing so gave "the same weight to the physical characteristics of each of the other articles" in the same product group⁹¹; and (b) using a weighted average of the weighted average domestic sales prices of all other articles in the same product type would "give[] greater weight to some articles simply because they happened to be sold in greater volumes during the POI".⁹²

7.63. The European Union responds by stating that, even if MINCIT "first calculated the weighted-average prices of all [articles] sold on the domestic market, this does not allow it to take an intermediate step by which the weighted-average prices of each [article] are combined within a 'product grouping' (as Colombia prefers to call a 'product type' or a 'model') by using a simple average".⁹³ This is because, the European Union asserts, this use of a simple average "distorts the calculation of the overall normal value and hence the establishment of a margin of dumping".⁹⁴

7.64. The European Union also challenges Colombia's argument that MINCIT's simple-averaging is permissible because it allegedly gives "equal weight to the physical characteristics of each individual article within the product grouping".⁹⁵ Specifically, the European Union argues that:

The [articles] within a product type, while not identical, are all supposed to have sufficiently similar characteristics, otherwise they should not be included in the product type. Those [articles] may, however, have different prices and different sales volumes. Using a simple average gives a greater weight to the prices of [articles] which were sold in lower volumes. The obligation to use weighted averages set out in the first sentence of Article 2.4.2 is intended to avoid precisely this type of distortion.⁹⁶

7.65. In considering whether the methodology – and specifically the use of a normal value calculated as a simple average of intermediate weighted average normal values – that MINCIT applied with respect to the challenged comparisons complies with Article 2.4.2, we observe that Article 2.4.2 establishes that whenever an authority seeks to establish the existence of margins of dumping via the W-W methodology, it must ensure that both the weighted average normal value and the weighted average export price are, in fact, weighted averages.

7.66. Article 2.4.2 describes the W-W methodology as "a comparison of a weighted average normal value with a weighted average of prices of *all* comparable export transactions".⁹⁷ We are of the view that the meaning of this text is that, when an authority elects to establish margins of dumping via the W-W methodology, Article 2.4.2 requires the authority to do so in a manner that ensures that the weighted average export price is compared with a "weighted average normal value". Where domestic sales transactions have been identified as the basis for determining normal value, a

⁹⁰ Colombia's second written submission, para. 4.26.

⁹¹ Colombia's first written submission, para. 2.53.

⁹² Colombia's first written submission, para. 2.53.

⁹³ European Union's second written submission, para. 33. (fn omitted)

⁹⁴ European Union's second written submission, para. 33.

⁹⁵ European Union's second written submission, para. 34.

⁹⁶ European Union's second written submission, para. 34.

⁹⁷ Emphasis added.

weighted average normal value is one that takes into account the relative volumes of the domestic sales transactions selected. The issue before us is whether, with respect to the challenged comparisons, the normal values MINCIT compared with weighted average export prices are consistent with this understanding of a "weighted average normal value" comparison when it was purporting to make a W-W comparison within the meaning of Article 2.4.2. We find that MINCIT, while purporting to make W-W comparisons, failed to use a "weighted average normal value" when the normal value it compared with the weighted average export price was calculated as a simple average of intermediate weighted average normal values.

7.67. We find that a normal value that has been determined on the basis of a simple average (including a simple average of a series of weighted averages) is not a "weighted average normal value" within the meaning of Article 2.4.2. MINCIT's calculation of an intermediate weighted average normal value for each "article" provides a normal value that takes into account the relative volumes of the various transactions in which the "article" was sold domestically. However, MINCIT's calculation of a simple average of these intermediate weighted averages does not produce a weighted average. This is because a simple average does not account for volume differences, thereby overweighting transactions involving "articles" sold in small volumes domestically and underweighting transactions involving "articles" sold in large volumes domestically as compared to a "weighted average normal value" calculated consistently with the explicit requirement of Article 2.4.2.⁹⁸

7.68. We turn to Colombia's argument that MINCIT's use of a simple average to determine normal value for the challenged comparisons was justified because it sought to give "the same weight to the physical characteristics of each of the articles" in the same product group.⁹⁹ Colombia further contends that using a weighted average of the weighted average domestic sales prices of all other articles in the same product type would "give[] greater weight to some articles simply because they happened to be sold in greater volumes during the POI".¹⁰⁰ We are not persuaded by these arguments.

7.69. We consider that where a group of domestic sales transactions have been identified as the basis for determining normal value to be compared with a weighted average export price using the W-W methodology as provided for in Article 2.4.2, the fact that the domestic sales transactions are not identical to the export transactions is not a basis for abrogating the obligation to compare a weighted average normal value with a weighted average export price. We consider that our interpretation is supported by the fact that Article 2.4, which Article 2.4.2 is "subject to", provides that "due allowance shall be made ... for differences which affect price comparability". We observe that if due allowances were made in accordance with Article 2.4, then Colombia's interests in according "equal weight" to various physical characteristics of the domestic transactions and Colombia's concern about overweighting or underweighting certain articles based on sales volumes could both be addressed appropriately and consistently with the relevant obligations.

7.70. To the extent that the granting of due allowances presented problems, MINCIT had still other alternatives. For example, it may have been possible to identify a more focused group of domestic sales transactions for which granting due allowances would be less problematic. Alternatively, constructed value or third country sales could be used for determining normal value consistent with Article 2.2. Yet another alternative could be to utilize T-T comparisons for export transactions for which there are no matching articles sold in the domestic market by identifying the single closest match for each affected export transaction and making any necessary adjustments to account for any remaining differences that affect price comparability. We are mindful that our task is to determine whether MINCIT's methodology was consistent with Article 2.4.2, and not to prescribe a methodology that MINCIT should have adopted. Nevertheless, the availability of alternative approaches to addressing the issue that MINCIT identified in the underlying proceeding is relevant to addressing Colombia's interpretive argument and to confirming our understanding of Article 2.4.2.

⁹⁸ European Union's second written submission, para. 34 (stating that "[u]sing a simple average gives a greater weight to the prices of [articles] which were sold in lower volumes", and that "the obligation to use weighted averages set out in the first sentence of Article 2.4.2 is intended to avoid precisely this type of distortion"); Japan's third-party submission, para. 17 (noting that using a simple average "tends to excessively reflect the higher price of some [articles] with lower volume in the normal value calculation"); Brazil's third-party submission, para. 11 (noting its agreement with the "necessity to consider the volume of sales in the calculation of the average domestic sales price").

⁹⁹ Colombia's first written submission, para. 2.53.

¹⁰⁰ Colombia's first written submission, para. 2.53.

In sum, we are not convinced that the concerns raised are a sufficient basis to conclude that the circumstances of this case justified MINCIT proceeding with "W-W" comparisons that were not consistent with the obligation to use a weighted average normal value as the comparator.

7.71. We recall again that Colombia confirms that MINCIT sought to establish the existence of margins of dumping via the W-W comparison methodology. In view of this, we find that the investigating authority had an obligation under Article 2.4.2 to ensure that a "weighted average normal value" was compared with a weighted average export price for the challenged comparisons.

7.72. For these reasons, we are of the view that the normal values that MINCIT calculated using simple averaging and then compared with weighted average export prices did not comply with the requirements of the W-W methodology under Article 2.4.2. In our view, Article 2.4.2 embodies an obligation adopted by the Members to take the volume differences into account when determining normal value on the basis of domestic transactions for use under the W-W comparison method. Under the circumstances of this case, we conclude that MINCIT did not have discretion to depart from the methodological choice adopted by the Members as an obligation under Article 2.4.2. We find that with respect to the challenged comparisons MINCIT, having identified certain domestic sales transactions to be the basis for normal value and having determined to apply the W-W comparison methodology, acted inconsistently with the obligations of Article 2.4.2 to compare a weighted average export price with a "weighted average normal value" and to establish margins of dumping on the basis of the results of comparisons between a weighted average export price and a "weighted average normal value".

7.4.5 Conclusion

7.73. We conclude that by comparing a weighted average export price with a simple average of intermediate weighted average normal values for the challenged comparisons, MINCIT acted inconsistently with the obligations that apply when opting to use the W-W comparison methodology under Article 2.4.2.

7.5 Claims under Articles 2.1 and 2.4 of the Anti-Dumping Agreement: the "fair comparison" requirement and the "article-to-article" comparison methodology

7.5.1 Introduction

7.74. We now turn to the European Union's claims under Articles 2.1 and 2.4 of the Anti-Dumping Agreement. These claims concern instances in which MINCIT made "exact matches" between articles sold in the European Union and articles sold in Colombia and then determined intermediate margins of dumping for the relevant article-pairs.¹⁰¹

7.75. The European Union claims that MINCIT failed to make a fair comparison between the export price and normal value in accordance with Article 2.4 of the Anti-Dumping Agreement because, when determining exact matches of articles, MINCIT "arbitrarily selected" domestic articles within a product group while, at the same time, disregarding "clear and reliable data" for all the other comparable domestic sales in the same product group.¹⁰² The European Union also claims that MINCIT failed to make a dumping determination in accordance with the definition of dumping under Article 2.1 of the Anti-Dumping Agreement.¹⁰³ Colombia asks us to reject these claims.

7.76. We begin our analysis of the European Union's claims by first reviewing the requirements of Article 2.1 and Article 2.4. We then describe the parameters of the European Union's claims as refined during the course of this dispute, before proceeding to evaluate the merits of those claims.

7.5.2 Applicable requirements of Article 2.1 and Article 2.4

7.77. Article 2.1 of the Anti-Dumping Agreement provides that:

For the purpose of this Agreement, a product is to be considered as being dumped, i.e. introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the

¹⁰¹ See para. 7.21 above.

¹⁰² European Union's first written submission, paras. 35 and 127.

¹⁰³ European Union's first written submission, para. 127.

comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country.

7.78. Article 2.1 defines the meaning of the word "dumping" for the purposes of the Anti-Dumping Agreement. Article 2.1 is thus a purely definitional provision. While we note that a prior dispute settlement report (with which we agree) has observed that "Members are bound" by this definition, we also note that: (a) Article 2.1 does not itself establish any rights or prescribe any independent obligations on Members¹⁰⁴; and (b) that prior dispute proceedings have taken the view that Article 2.1 cannot provide the basis for an independent claim under the Anti-Dumping Agreement.¹⁰⁵ We also agree with this understanding.

7.79. We have reviewed the text of Article 2.4 of the Anti-Dumping Agreement in section 7.4.3, above. For ease of reference, however, we again note that this Article, in relevant part, provides that:

A fair comparison shall be made between the export price and the normal value. This comparison shall be made at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time. Due allowance shall be made in each case, on its merits, for differences which affect price comparability, including differences in ... physical characteristics, and any other differences which are also demonstrated to affect price comparability. ... The authorities shall indicate to the parties in question what information is necessary to ensure a fair comparison and shall not impose an unreasonable burden of proof on those parties.

7.80. As we have discussed, the first sentence of Article 2.4 requires investigating authorities – when performing the dumping calculation – to make a fair comparison between the export price and the normal value, and sets forth certain requirements that must be complied with to ensure that the comparison is fair.

7.81. In particular, Article 2.4 requires investigating authorities to make "[d]ue allowance ... in each case, on its merits, for differences which affect price comparability". Article 2.4 provides an illustrative list of differences that may affect price comparability, including "differences in ... physical characteristics". We note that Article 2.4 does not expressly prescribe a particular methodology that authorities must follow to ensure that a comparison is "fair". This indicates that the question of whether a particular comparison can be considered to be fair is a fact-specific inquiry that will depend on the particular circumstances on the record of the proceeding.

7.5.3 Scope of the European Union's Article 2.4/2.1 claims

7.82. We observe that the European Union has refined the scope of its "fair comparison" claims during this proceeding. In response to a question from the Panel, the European Union confirmed that it does not challenge MINCIT's use of article-to-article comparisons as "unreasonable per se".¹⁰⁶ The European Union explained that its Article 2.4 claim focuses on the fact that MINCIT's comparison methodology improperly compared articles sold in the domestic market with articles sold in Colombia notwithstanding that the articles at issue did not have the same article numbers (i.e. "on the basis of identical last three digits of accounting codes partly consisting of more than three digits").¹⁰⁷ The European Union further indicated that it "considers it sufficient for the Panel to focus on the flawed comparison concerning" three specific article-pairs, namely articles 603/10603, 503/10503 and 510/11510.¹⁰⁸ As a result, our evaluation of the European Union's claims focuses on these particular article-to-article comparisons, rather than MINCIT's comparison methodology more generally.

7.83. In response to a further question from the Panel, the European Union clarified that it "is not bringing a separate claim of violation of a procedural obligation to conduct a constructive dialogue

¹⁰⁴ Appellate Body Report, *US – Zeroing (Japan)*, para. 140.

¹⁰⁵ See e.g. Panel Reports, *EU – Footwear (China)*, para. 7.260; *Morocco – Definitive AD Measures on Exercise Books (Tunisia)*, appealed 28 July 2021, paras. 7.56–7.57.

¹⁰⁶ Questions from the Panel to the parties, question No. 1.

¹⁰⁷ European Union's response to Panel question No. 1, para. 2.

¹⁰⁸ European Union's response to Panel question No. 1, para. 3.

pursuant to Article 2.4, last sentence of the Anti-Dumping Agreement".¹⁰⁹ However, the European Union asserted that "the absence of constructive dialogue during MINCIT's investigation is an important element of the unfairness of the comparison itself"¹¹⁰, which "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)".¹¹¹ The European Union asserts that 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".¹¹² Accordingly, we will not consider any separate claim that MINCIT acted contrary to the last sentence of Article 2.4 (although we will consider, in the context of the European Union's claim under the *first* sentence of Article 2.4, whether any unfairness was exacerbated by a lack of dialogue).

7.5.4 Whether MINCIT's comparisons in respect of three article-pairs resulted in an unfair comparison between the export price and normal value

7.5.4.1 Main arguments of the parties

7.5.4.1.1 The European Union

7.84. The European Union claims that the three specific article-to-article comparisons made by MINCIT were unfair and arbitrary because the selection of the relevant article-pairs was based on criteria – i.e. article number "codes" – that have no correlation with factors relevant for price comparability.¹¹³

7.85. The European Union states that MINCIT's article-to-article comparisons were flawed because the numbers and names that the exporters used to refer to their products do not serve as a proper basis to identify comparable export and domestic sales. Specifically, the European Union asserts that these numbers and names were "only used for purposes of internal accounting" or marketing purposes and so "were clearly not meant to have any relevance in an anti-dumping investigation".¹¹⁴ The European Union contends that what MINCIT characterized as "articles" for its article-to-article comparisons were not discrete product articles as such, i.e. the real subtype of product, but simply a bundle of transactions listed under the same numerical accounting code.¹¹⁵

7.86. The European Union states that MINCIT wrongly concluded that article-pairs 603/10603, 503/10503 and 510/11510 could be compared based on the fact that the last three (out of five) digits of their respective article numbers matched.¹¹⁶ According to the European Union, MINCIT improperly assumed, after reviewing Agrarfröst's product catalogue, that the first two digits of the five-digit article number "are only an 'overseas prefix' for the exactly identical" product article.¹¹⁷

7.87. The European Union also claims on the basis of the "fair comparison" requirement in the first sentence of Article 2.4 that where an investigating "authority has a doubt about how to interpret certain pieces of evidence", it must "enter into a constructive dialogue with the exporter" regarding the information it needs to make this comparison.¹¹⁸ The European Union contends that "the absence of a constructive dialogue during MINCIT's investigation is an important element of the unfairness of the comparison itself".¹¹⁹ The European Union asserts that this unfairness "was exacerbated by

¹⁰⁹ European Union's response to Panel question No. 7, para. 26 (emphasis added). See also European Union's closing statement at the meeting of the Panel, para. 11. Colombia argues that 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 that specific provision. (Colombia's comments on the European Union's response to Panel question No. 7, para. 1.38).

¹¹⁰ European Union's response to Panel question No. 7, para. 26.

¹¹¹ European Union's response to Panel question No. 7, para. 26.

¹¹² European Union's response to Panel question No. 7, para. 27.

¹¹³ European Union's first written submission, sections 3.1.2 and 3.1.3. See also European Union's response to Panel question No. 5, paras. 17-21.

¹¹⁴ European Union's opening statement at the meeting of the Panel, para. 35; second written submission, para. 45.

¹¹⁵ European Union's response to Panel question No. 4(a), para. 12.

¹¹⁶ European Union's first written submission, paras. 66-67; opening statement at the meeting of the Panel, para. 30.

¹¹⁷ European Union's first written submission, paras. 69-78.

¹¹⁸ European Union's first written submission, paras. 116-118.

¹¹⁹ European Union's response to Panel question No. 7, para. 26. See also para. 7.83 above.

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".¹²⁰

7.5.4.1.2 Colombia

7.88. Colombia contends that MINCIT had sufficient basis to compare normal value and export price in respect of the relevant article-pairs.¹²¹ Colombia argues that MINCIT's decision to conduct certain comparisons at the "articles" level rather than the "product groups" level was "necessary"¹²² and "eminently reasonable"¹²³ because (a) the "articles" level comparison helped ensure results with the highest degree of precision¹²⁴; (b) exporters used articles names and numbers, rather than product groups, "as the basic means of identifying the product sold and ... the price charged on each sale"¹²⁵; (c) the manner in which exporters grouped articles for marketing purposes differs significantly from the manner in which exporters grouped articles for the purposes of their questionnaire responses¹²⁶; (d) the number of articles sold under each product group varied significantly between the domestic and export markets¹²⁷; and (e) the average sales prices of individual "articles" within "individual product groups" and of articles "within a single broader product [group]" differed significantly.¹²⁸ As such, Colombia asserts that MINCIT "acted both within its discretion and consistently with Article 2.4 by making comparisons [based on] the closest or most precise possible matches".¹²⁹

7.89. Colombia argues that MINCIT did not compare the relevant article-pairs solely because: (a) the last three digits of article numbers 10603, 10503 and 11510 were the same as article numbers 603, 503 and 510; or (b) the content of Agrar frost's product catalogue (i.e. which the European Union describes as a marketing document).¹³⁰ Instead, Colombia asserts that MINCIT reached this conclusion after also examining a number of additional documents.

7.90. Colombia states that these documents included a list of approximately 600 article numbers and names that Agrar frost provided in its original questionnaire response, as well as domestic sales invoices on the record.¹³¹ Colombia states that "[i]n all these documents, the article number and name matched" and that "the exporter ... consistently and uniformly classified its products by article number and name".¹³² Colombia also asserts that, in addition to considering this record information, MINCIT only determined that it could match article-pairs 603/10603, 503/10503 and 510/11510 after the authority requested and received additional information from Agrar frost.¹³³ Specifically, Colombia asserts that MINCIT noted Agrar frost's statement that these paired articles were not identical. However, MINCIT reasoned that the differences found in the exporter's responses related only to "packaging costs and marketing costs", which could be taken into account through adjustments.¹³⁴

7.91. Colombia rejects the European Union's assertion that MINCIT failed to engage in a "constructive dialogue" with the exporters. Colombia contends that MINCIT properly engaged with Agrar frost to obtain the information necessary for article-to-article comparisons.¹³⁵

¹²⁰ European Union's response to Panel question No. 7, para. 27.

¹²¹ Colombia's first written submission, para. 4.60.

¹²² Colombia's first written submission, para. 4.18.

¹²³ Colombia's first written submission, para. 2.31.

¹²⁴ Colombia's first written submission, para. 2.21.

¹²⁵ Colombia's first written submission, para. 2.22.

¹²⁶ Colombia's first written submission, paras. 2.24-2.25.

¹²⁷ Colombia's first written submission, paras. 2.27-2.28.

¹²⁸ Colombia's first written submission, para. 2.29.

¹²⁹ Colombia's first written submission, para. 4.60.

¹³⁰ Colombia's first written submission, paras. 4.73-4.78.

¹³¹ Colombia's first written submission, para. 4.73.

¹³² Colombia's first written submission, para. 4.73.

¹³³ Colombia's first written submission, paras. 4.78-4.79 (quoting MINCIT's request for information (28 August 2023) (Exhibit EU-8b)).

¹³⁴ Colombia's first written submission, para. 4.79 (referring to Final technical report (Exhibit EU-2b), p. 32).

¹³⁵ Colombia's first written submission, para. 4.30. See also Colombia's second written submission, paras. 3.9, 3.10, 3.15 and 3.19-3.21.

7.5.4.2 Evaluation

7.92. We now evaluate the merits of the European Union's claims that MINCIT acted inconsistently with Articles 2.1 and 2.4 by comparing normal value and export price in respect of three article-pairs.

7.93. We first consider MINCIT's assessment of the relevance of article numbers for the purpose of making a fair comparison. We then consider MINCIT's assessment of the relevance of similarities between three- and five-digit article numbers in this context.

7.5.4.2.1 Relevance of article numbers for the purpose of making a fair comparison

7.94. The European Union claims that MINCIT improperly used article numbers to make article-to-article comparisons because it wrongly considered that article numbers relate to product characteristics. According to the European Union, article numbers do not relate to product characteristics, and were only used by Agrarfröst for purposes of internal accounting.¹³⁶ In our view, the European Union's position is not consistent with the evidence before MINCIT.

7.95. In particular, we note that Agrarfröst stated in the compliance review that it "produces" 591 articles, and that:

Each [article] represents a product with specific characteristics depending on the type of potatoes used; the type of cut; the size of the cut (length, height and width); the number of dark spots per kilo; product characteristics in terms of oil used in its preparation; product characteristics as "coated" or not; product characteristics as "prepared/seasoned" or not; or product characteristics as in terms of whether it is fried in oil by the end consumer; air-fried (frier) or oven-baked; and the type of product packaging.

The 591 [articles] were grouped into "product types" depending on the main characteristics, i.e. type of cut, size of cut, type of potato and dark spot tolerance.¹³⁷

7.96. Agrarfröst also provided a table containing a series of three-and five-digit article numbers, which were assembled under different product groups.¹³⁸ In addition, in the original investigation Agrarfröst had submitted a list of over 500 article numbers, with discrete article numbers corresponding to discrete product names and grades (Exhibit EU-6 (BCI)). Each row of the list identified an article number, a corresponding article name, or description, an indication of grade, and the corresponding PCN/product group number.

7.97. In our view, this evidence could properly be understood by an unbiased and objective investigating authority to mean that article numbers relate to product characteristics. The articles are described by Agrarfröst as being "produced", and Agrarfröst states that each article represents a "product with specific characteristics". In addition, the product articles have distinct numerical labels, which are used for product identification. Thus, MINCIT could reasonably have determined that these numerical labels, or article numbers, relate directly to product characteristics.

7.98. In rejecting Agrarfröst's assertion that article numbers do not relate to product characteristics, MINCIT referred specifically to a product catalogue submitted by Agrarfröst in the original investigation.¹³⁹ Agrarfröst described this as a "Catalogue of products for the domestic market and for export".¹⁴⁰ In this catalogue, which MINCIT referred to in its final technical report, Agrarfröst uses article numbers as a means of facilitating product identification¹⁴¹:

¹³⁶ European Union's opening statement at the meeting of the Panel, para. 35.

¹³⁷ Agrarfröst's response to MINCIT's request for information (Exhibit EU-9b (BCI)), p. 3.

¹³⁸ Agrarfröst's response to MINCIT's request for information (Exhibit EU-9b (BCI)), p. 4.

¹³⁹ Agrarfröst's questionnaire response in the original investigation, Annex 4, Product catalogue (Exhibit EU-12).

¹⁴⁰ Agrarfröst's questionnaire response in the original investigation, Annex 4, Product catalogue (Exhibit EU-12).

¹⁴¹ Agrarfröst also used article numbers (and product groups) when reporting its transactions in the original investigation (see Exhibit from Agrarfröst's and Aviko's questionnaire response Exhibit COL-4 (BCI)). We do not consider, simply because MINCIT referred on occasion to the product groups submitted by Agrarfröst, that MINCIT was precluded from making more granular article-to-article comparisons within those groups (see, for example, European Union's first written submission, para. 47). MINCIT relied on both Agrarfröst's product groupings and its more specific itemization of articles within those groups.

Image 1: Excerpt from Exhibit EU.12

Annex 4: Catalogue of products for the domestic market and for export

POMMES FRITES

Extra-Qualität für die Fritteuse

POMMES FRITES

leckere Pommes Frites
im Normalschnitt
für die Fritteuse,
Extra-Qualität

POMMES FRITES

leckere Pommes Frites
im Wellenschnitt
für die Fritteuse,
Extra-Qualität

POMMES JULIENNES

leckere Pommes Frites
im Feinschnitt
für die Fritteuse,
Extra-Qualität

Art.-Nr.	GTIN-Code	Packungsinhalt	Verkaufseinheit	VE je Palette/Lage	Zubereitung
510	4003880005109	2,5 kg	4 Btl.	63 / 9	
520	4003880005208	1000 g	10 Btl.	63 / 9	

Art.-Nr.	GTIN-Code	Packungsinhalt	Verkaufseinheit	VE je Palette/Lage	Zubereitung
509	4003880005093	2,5 kg	4 Btl.	54 / 9	

Art.-Nr.	GTIN-Code	Packungsinhalt	Verkaufseinheit	VE je Palette/Lage	Zubereitung
504	4003880005048	2,5 kg	4 Btl.	54 / 9	
573	4003880005734	750 g	12 Btl.	54 / 9	

7.99. We note that the European Union objects to MINCIT's reliance on the product catalogue¹⁴² by arguing that it is a pure marketing tool, which only provides an illustration of the products available to the clients in a very simplified manner. We are not persuaded by this argument. In our view, MINCIT could reasonably have referred to this document, which was prepared and submitted by Agrar frost, as evidence that Agrar frost itself relied on article numbers for the identification of product characteristics, and not merely for internal accounting purposes.

7.100. We further observe that article numbers were used by Agrar frost to identify products on invoices sent to customers:

[[***]]¹⁴³

7.101. The inclusion of article numbers in client invoices, and in the abovementioned product catalogue, undermines the European Union's assertion that these article numbers are only used as internal accounting codes. Rather, Agrar frost could reasonably be understood to have used article numbers as a means of helping customers identify which products to order, and which products they were invoiced for.

7.102. We note the European Union's reliance on a statement in MINCIT's verification report that Agrar frost's [[***]].¹⁴⁴ First, we note that the main purpose of this part of the verification report was to verify certain adjustments being requested by Agrar frost, rather than to provide a detailed summary of Agrar frost's use of article numbers. Second, the record evidence described above speaks to article numbers relating to product characteristics. We do not consider that MINCIT was required to ignore that evidence simply because of language in the verification report relating to a matter other than the use of article numbers for identifying product characteristics.

7.103. We also note the European Union's assertion that [[***]]¹⁴⁵ However, Colombia¹⁴⁶ has identified transactions where Agrar frost reported [[***]]. This would suggest that article numbers do not change in the manner suggested by the European Union.

7.104. For the above reasons, we are not persuaded by the European Union's arguments against MINCIT's assessment that article numbers relate to the specific characteristics and comparability of Agrar frost's products. We consider that MINCIT's establishment of the relevant facts was proper, and that its evaluation of those facts was unbiased and objective.

7.5.4.2.2 Relevance of similarities between three- and five-digit numbers for the purpose of making a fair comparison

7.105. The European Union contends that, even if article numbers do relate to product characteristics, MINCIT did not even compare sales of products bearing the same article number, as one number had three digits and the other number had five digits. The European Union asserts that it was wrong for MINCIT to rely on the similarity between the last three digits of these numbers. According to the European Union, these last three digits had no meaning whatsoever for the comparability of the relevant articles. The European Union asserts that MINCIT improperly assumed that the first two numbers could be treated as a country-prefix, so that the similarity of last three digits would indicate comparable product characteristics.¹⁴⁷

7.106. We recall that the article-to-article comparisons at issue concern article numbers 603/10603, 503/10503, and 510/10510. In each case, a three-digit article number is paired with a five-digit article number, and the last three digits of the five-digit (exported) article number match the digits of the three-digit (domestic) article number.

7.107. MINCIT stated in its final technical report that Agrar frost:

¹⁴² See, for example, European Union's first written submission, para. 71.

¹⁴³ Selection of invoices from Agrar frost's questionnaire response (Exhibit COL-5 (BCI)), p. 3.

¹⁴⁴ European Union's opening statement at the meeting of the Panel, para. 61 (referring to Agrar frost verification visit report, Annex 9 (Original Exhibit EU-36.1b (BCI)) (Exhibit EU-15b (BCI))).

¹⁴⁵ European Union's second written submission, para. 45.

¹⁴⁶ Colombia's second written submission, para. 3.34, using data from Agrar frost's original questionnaire response (Exhibit EU-5 (BCI)).

¹⁴⁷ European Union's opening statement at the meeting of the Panel, paras. 30-31, 63 and 67; first written submission, para. 66.

[A]ppears to follow the practice of assigning a particular number to a particular [article], except for a prefix which varies according to the market where the [articles] are sold. For example, the product catalogue mentions [article] 514 (sold in Europe) and [articles] 10514 (sold "overseas"), which have the identical name "Crinkle Cut French Fries" (page 5839). As another example, [article] 13503 (sold in Europe) and 10503 (Overseas) have the same name "Classic French Frites Straight cut, 9x9 mm/3/8".¹⁴⁸

7.108. Returning to Agrarfrost's product catalogue, we note that there are six instances where two article numbers are reported for the same product. In these cases, one number is indicated as referring to sales in Europe, and the other number is indicated as referring to sales made Overseas. In each of the four cases where the European number has three digits and the Overseas number has five digits, the last three digits of the Overseas number match the three digits of the European number. Regarding the two cases where both numbers have five digits, the last three digits of the paired numbers match in one case, and the last two digits of the paired numbers match in the other case.¹⁴⁹ This is shown in the following extract from the product catalogue.

¹⁴⁸ Final technical report (Exhibit EU-2b), p. 32.

¹⁴⁹ Agrarfrost's questionnaire response in the original investigation, Annex 4, Product catalogue (Exhibit EU-12).

Image 3: Excerpt from Exhibit EU.12

FRENCH FRIES

Article Number	Product name	Carton volume	Cartons per layer	Layers per pallet	Cartons per pallet	Preparation method & Preparation time in minutes
	FRENCH FRIES					
13503 (Europe)	Classic French Fries – straight cut, 9 x 9 mm /3/8"	4 x 2.5 kg	9	7	63	 3-4
10503 (Overseas)		4 x 2.5 kg	9	7	63	 3-4
13481 (Europe)	Classic French Fries – julienne cut, 6 x 6 mm /1/4"	4 x 2.5 kg	9	6	54	 3
10581 (Overseas)		4 x 2.5 kg	9	6	54	 3
13347	Premium Longs – straight cut, 9 x 9 mm/ 3/8"	5 x 2.5 kg	9	5	45	 3-4
11649	Premium Longs - julienne cut, 6 x 6 mm/ 1/4"	5 x 2.5 kg	9	5	45	 3
786 (Europe)	Premium Crisps – straight cut, 9 x 9 mm/ 3/8"	4 x 2.5 kg	9	6	54	 3-4
10786 (Overseas)		4 x 2.5 kg	9	6	54	 3-4
785 (Europe)	Premium Crisps – julienne cut, 6 x 6 mm/ 1/4"	4 x 2.5 kg	9	6	54	 3
10785 (Overseas)		4 x 2.5 kg	9	6	54	 3
529 (Europe)	Steakhouse French Fries – steak cut, 10 X 20 mm	4 x 2.5 kg	9	7	63	 4
10529 (Overseas)		4 x 2.5 kg	9	7	63	 4

Article Number	Product name	Carton volume	Cartons per layer	Layers per pallet	Cartons per pallet	Preparation method & Preparation time in minutes
	FRENCH FRIES					
548	Thick Cut French Fries – straight cut, 14 x 14 mm / 9/16"	4 x 2.5 kg	9	7	63	 4
11706	Skin-On French Fries – straight cut, 14 x 14 mm / 9/16"	4 x 2.5 kg	9	7	63	 4  20-25
13936	Krixx – X-Cut French Fries	4 x 2.5 kg	9	7	63	 3-4  18
517	11 mm French Fries – straight cut, 11 x 11 mm/ 7/16"	4 x 2.5 kg	9	7	63	 3-4
514 (Europe)	Crinkle Cut French Fries	4 x 2.5 kg	9	6	54	 3-4
10514 (Overseas)		4 x 2.5 kg	9	6	54	 3-4
11514	90 Sec. Crinkle Cut French Fries	4 x 2.5 kg	9	6	54	 1-2
11503	90 Sec. French Fries – straight cut, 9 x 9 mm / 3/8"	4 x 2.5 kg	9	7	63	 1-2
11572	90 Sec. French Fries – julienne cut, 6 x 6 mm / 1/4"	4 x 2.5 kg	9	6	54	 1-2

7.109. Thus, for example, article numbers "10529 (Overseas)" and "529 (Europe)" are reported for the same product, "Steakhouse French Fries – steak cut, 10 x 20mm". For both article numbers, this same product is indicated as being sold with the same carton volume, the same number of cartons per layer, the same number of layers per pallet, the same number of cartons per pallet, and the same preparation method and preparation time in minutes. Furthermore, the last three digits of the Overseas article number (10529) match the digits of the European article number (529).

7.110. In our view, an unbiased and objective investigating authority might properly have relied on this product catalogue – preliminarily, at least – to consider that similarities between the three- and five-digit article numbers might be relevant for identifying comparable export prices and normal values.¹⁵⁰

7.111. It is important to note that MINCIT did not simply rely on Agrarfrost's product catalogue to identify the article matches used for comparing normal value and export price. As indicated in its final technical report¹⁵¹, MINCIT wrote to Agrarfrost on 28 August 2023 to seek additional clarification regarding the comparability of particular pairs of article numbers where the last three digits of the five-digit number match the three-digit number, including the three article-pairs at issue. For convenience, we set MINCIT's question 2 out in full:

We request clarification of the following information set out in the Excel files submitted in the response to the questionnaire, related to domestic sales and sales to Colombia:

[Article] No 603 is sold on the domestic market, whereas [article] No 10603 is sold on the Colombia market – please clarify whether these numbers refer to the same [article];

...

[Article] No 503 is sold on the domestic market, whereas [article] No 10503 is sold on the Colombian market – please clarify whether these numbers refer to the same [article].

...

[Article] No 581 is sold on the domestic market, whereas [article] No 10581 is sold on the Colombian market – please clarify whether these numbers refer to the same [article].

...

[Article] No 510 is sold on the domestic market, whereas [article] No 11510 is sold on the Colombian market – please clarify whether these numbers refer to the same [article].¹⁵²

7.112. Agrarfrost replied in a communication dated 22 September 2023. For each of the three specific product matches at issue, Agrarfrost indicated that the products "are not the same", but that they do have certain physical characteristics in common. Agrarfrost then indicated specific differences between the relevant products, and reported adjustments to address those differences. In full, Agrarfrost stated:

¹⁵⁰ We note the European Union's arguments that some product articles with three-digit numbers are sold by Agrarfrost internationally, and that some article numbers are sold both domestically and internationally (European Union's first written submission, paras. 74-76). This does not mean that MINCIT was precluded from preliminarily considering that similarities between three- and five-digit article numbers might be relevant for making article-to-article comparisons. Further, these arguments in any event do not apply to the three specific article-to-article comparisons at issue.

¹⁵¹ Final technical report (Exhibit EU-2b), p. 32.

¹⁵² MINCIT's request for information (28 August 2023) (Exhibit EU-8b), p. 2.

[[***]].¹⁵³

7.113. We do not consider that MINCIT was required to treat Agrar frost's assertion that the relevant products "are not the same" as excluding outright the comparability of the article-pairs at issue. This is because Agrar frost had indicated that the products had certain physical characteristics in common, and the European Union¹⁵⁴ has indicated that these product characteristics "are relevant for price comparability". Instead, we consider that an unbiased and objective investigating authority might properly have found that, although the relevant products were not identical, the common physical characteristics meant that those products were comparable - provided the adjustments identified by Agrar frost were made. This was the approach taken by MINCIT, as described in its final technical report:

As regards the [articles] specifically mentioned by the company in its comments, although the company claims that the pairs of [articles] in question are not identical, in its reply of 28 August 2023 to the authority's explicit questions regarding certain of these [articles], the company only mentioned differences in packaging costs and marketing costs. However, those differences do not prevent the authority from treating these pairs of [articles] as identical, as adjustments were made to take account of the differences in costs. The investigating authority would point out that those adjustments were made as requested by the company itself, and in the exact amounts indicated by it.¹⁵⁵

7.114. We recall that the European Union challenges MINCIT's comparisons for three matching article-pairs: 603/10603, 503/10503, and 510/1150. We also recall that the European Union has indicated that "the main product characteristics which are relevant for price comparability in the case of fries are (i) shape / cut; (ii) size and length; (iii) quality criteria such as grade (purity / tolerance to dark spots)".¹⁵⁶ We note that the European Union has not identified any differences in such characteristics within the specific pairs of articles matched by MINCIT. Nor has the European Union identified any additional adjustments that MINCIT should have made to ensure comparability within those pairs.

7.115. For these reasons, we are not persuaded by the European Union's arguments against MINCIT's assessment of the relevance of similarities between three- and five-digit numbers for the purpose of making the specific article-to-article comparisons at issue. We consider that MINCIT's establishment of the relevant facts was proper, and that its evaluation of those facts was unbiased and objective.

7.5.4.2.3 Interaction between MINCIT and Agrar frost

7.116. We now turn to the European Union's argument that the unfairness of MINCIT's article-to-article comparisons was exacerbated by the fact that Agrar frost was never informed about, or given a chance to comment on, the assumptions that MINCIT made about the significance of the abovementioned similarities between three- and five-digit numbers.¹⁵⁷

7.117. In rejecting the European Union's arguments regarding MINCIT's reliance on article numbers for determining comparability in respect of the three article-to-article comparisons at issue, we have referred to correspondence between MINCIT and Agrar frost. Specifically, we have cited MINCIT's letter to Agrar frost dated 28 August 2023, and Agrar frost's response to that letter. As explained above, question 2 in MINCIT's letter first identified certain products sold on the domestic market with three-digit article numbers, and then identified products sold in Colombia with five-digit article numbers. MINCIT then asked whether such specific article numbers refer to the same article. In our view, the wording of question 2 should reasonably have been understood by Agrar frost as relating to the comparability of these products. The fact that Agrar frost then identified and quantified the adjustments that would be needed to ensure comparability indicates that this is precisely how Agrar frost did understand this question. We acknowledge that question 2 did not explicitly seek data on adjustments that might be needed to ensure comparability. However, since

¹⁵³ Colombia's first written submission, paras. 4.78-4.79; Agrar frost's response to MINCIT's request for information (Exhibit EU-9b (BCI)), pp. 5-6.

¹⁵⁴ European Union's first written submission, para. 51.

¹⁵⁵ Final technical report (Exhibit EU-2b), p. 32.

¹⁵⁶ European Union's first written submission, para. 51.

¹⁵⁷ European Union's response to Panel question No. 7, para. 26.

Agrarfrost volunteered that data in its reply, and since MINCIT used that data in adjusting for comparability, we see no reason why MINCIT should have engaged in further correspondence with Agrarfrost regarding adjustments.

7.118. In the context of this exchange, we consider that the provisional technical report would have made it sufficiently clear to Agrarfrost that MINCIT would engage in article-to-article comparisons, including the three specific comparisons at issue.¹⁵⁸ Indeed, the European Union acknowledges that Agrarfrost had understood at this stage that this is how MINCIT identified to proceed.¹⁵⁹ This is shown by the fact that, in commenting on MINCIT's provisional technical report, Agrarfrost specifically contested the three article-to-article comparisons at issue:

[[***]]¹⁶⁰

7.119. In these circumstances, we see no basis to conclude that MINCIT exacerbated any unfairness by failing to inform Agrarfrost about assumptions made by MINCIT regarding the significance of similarities between three- and five-digit numbers, or by failing to provide Agrarfrost with an opportunity to comment.¹⁶¹

7.5.4.2.4 Issues concerning the weighted average prices and quantity of the selected articles

7.120. The European Union asserts that the methodology used by MINCIT to determine that domestic article numbers 603, 503, and 510 could be compared with exported article numbers 10603, 10503, and 11510 was unfair because it led the authority to unfairly select domestic articles that were highly priced or, for certain articles, to fail to account for volumetric information on the record of the proceeding. The European Union contends that the "absurdity" of MINCIT's comparisons becomes particularly apparent when looking at the article with the highest quantities among all export articles of that producer, namely article 10603 in product type TS9. The European Union contends that this is an outlier transaction. According to the European Union, article 603 accounts for a very small percentage of the sales of product type TS9 and is the highest priced article of the 13 articles in that product type.¹⁶²

7.121. The Panel sought clarification from the European Union regarding the relevance of these arguments. In response to a question from the Panel, the European Union asserts:

The explanations on volume and price effects explained at paragraphs 84 to 89 of the European Union's first written submission are not determinative of the breach of Article 2.4 of the Anti-Dumping Agreement. They are 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).¹⁶³

7.122. Since the European Union considers that its explanations on volume and price effects are not determinative of any breach of Article 2.4 but merely illustrate the allegedly distortive effects of

¹⁵⁸ In its provisional technical report, MINCIT stated *inter alia*:

The authority asked questions to clarify the similarity between the articles To ensure that the comparison was as accurate and reliable as possible, article by article comparisons were carried out. ... Therefore, the comparison between the normal value and the export price is carried out [article] by [article] and on the basis of detailed information on sales in the domestic market and in the export market to Colombia, as provided by each of the companies when responding to the questionnaire.

(Provisional technical report (Exhibit EU-10b), pp. 27-28).

¹⁵⁹ European Union's first written submission, para. 67.

¹⁶⁰ Agrarfrost's comments on provisional technical report (Exhibit EU-11b (BCI)), pp. 3-4. (emphasis omitted)

¹⁶¹ Given this finding, we see no need to consider Colombia's assertion that arguments concerning the last sentence of Article 2.4 should not be relevant when addressing a claim under other sentences of that provision. (Colombia's comments on European Union's response to question No. 7, para. 1.39).

¹⁶² European Union's first written submission, paras. 41 and 81-89.

¹⁶³ European Union's response to Panel question No. 6, para. 25.

MINCIT's "flawed" methodology, and since we have already found that MINCIT's assessment of comparability in respect of three specific product matchings was not "flawed", or unfair, we see no need to consider secondary arguments regarding the allegedly distortive effects of such matchings. By indicating that its explanations are "not determinative", the European Union effectively acknowledges that the arguments would not suffice, on their own, to establish that MINCIT acted inconsistently with Article 2.4.

7.5.5 Conclusion

7.123. For the reasons set out above, we reject the European Union's claims that MINCIT acted inconsistently with Articles 2.1 and 2.4 by comparing normal value and export price in respect of the three specific article-pairs at issue.

7.6 Claims under Articles 1 and 9.3 of the Anti-Dumping Agreement and Article VI of the GATT 1994

7.6.1 Introduction

7.124. The European Union raises consequential claims under Articles 1 and 9.3 of the Anti-Dumping Agreement, as well as with Article VI of the GATT 1994.

7.6.2 Main arguments of the parties

7.125. The European Union claims that in light of the alleged violations of various provisions of Article 2 of Anti-Dumping Agreement, 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 1994.¹⁶⁴ With respect to Article 1, the European Union argues that "any breach of a provision of the [Anti-Dumping] Agreement, by definition entails a consequential violation of its Article 1".¹⁶⁵ With respect to Article 9.3, the European Union asserts that, because it has allegedly demonstrated "that the margins of dumping calculated for ... certain EU exporting producers are not in accordance with the identified provisions of Article 2 ... Colombia has breached Article 9.3 of the Anti-Dumping Agreement".¹⁶⁶ With respect to Article VI of the GATT 1994, the European Union similarly asserts that a finding that Colombia has acted inconsistently with "any of its obligations under the Anti-Dumping Agreement ... will support and require a finding that Colombia has also acted inconsistently with ... Article VI of the GATT 1994".¹⁶⁷

7.126. Colombia rejects these claims and notes that they are entirely dependent on and consequential to the European Union's claims under Articles 2.1, 2.4 and 2.4.2 of the Anti-Dumping Agreement. Colombia contends that, since the European Union's substantive claims must be rejected, no legal basis exists for the Panel to conclude that MINCIT's conduct violated either Articles 1 and 9.3 of the Anti-Dumping Agreement, or Article VI of the GATT 1994.¹⁶⁸

7.6.3 Evaluation

7.127. We evaluate separately below the European Union's claims under: (a) Article 1 of the Anti-Dumping Agreement; and (b) Article VI of the GATT 1994, and Article 9.3 of the Anti-Dumping Agreement.

7.128. We observe that the European Union's claims under Article 1 and Article VI of the GATT 1994 are consequential in nature as they depend upon a finding that MINCIT acted inconsistently with various provisions of Article 2 of the Anti-Dumping Agreement. We also note that the European Union does not appear to have offered any separate argument or evidence to support an independent breach of these provisions.

7.129. We have found above that the European Union has established that MINCIT acted inconsistently with Article 2.4.2 of the Anti-Dumping Agreement. However, we do not consider that

¹⁶⁴ European Union's first written submission, paras. 129 and 131; second written submission, para. 64.

¹⁶⁵ European Union's first written submission, para. 130.

¹⁶⁶ European Union's first written submission, para. 131.

¹⁶⁷ European Union's first written submission, para. 132.

¹⁶⁸ Colombia's first written submission, para. 6.5; second written submission, paras. 5.2-5.3.

making additional findings with respect to these provisions is necessary to provide a positive resolution to this dispute.

7.130. The European Union's claim under Article 9.3 also depends upon a finding that MINCIT acted inconsistently with various provisions of Article 2 of the Anti-Dumping Agreement but this claim merits additional discussion. Article 9.3 of the Anti-Dumping Agreement provides that:

The amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2.

7.131. Article 9.3 sets the maximum level at which anti-dumping duties may be levied. A prior dispute settlement proceeding has observed that the term "margin of dumping" in Article 9.3 "relates to a margin [of dumping] that is established in a manner subject to the disciplines of Article 2 and which is therefore consistent with those disciplines"¹⁶⁹ so that an error or inconsistency under Article 2 of the Anti-Dumping Agreement "does not necessarily or automatically mean that the anti-dumping duty actually applied will exceed the correct margin of dumping".¹⁷⁰ We agree. In this instance, we note that the European Union claims that "the use by MINCIT of flawed methodologies ... led to the imposition of anti-dumping duties" that exceeded the margin of dumping that "should have been established", had MINCIT applied Article 2 properly.¹⁷¹ Accordingly, the European Union may establish that MINCIT's conduct violated Article 9.3 by demonstrating that: (a) the margin of dumping that MINCIT calculated was determined in a manner that violates Article 2 of the Anti-Dumping Agreement; and (b) the anti-dumping duties that MINCIT applied are higher than the margins of dumping that would have been established had MINCIT acted consistently with Article 2.4.2.

7.132. We have determined that the European Union has established that MINCIT acted inconsistently with Article 2.4.2 when it calculated margins of dumping. Given this we proceed to consider whether the European Union has demonstrated that the anti-dumping duties were imposed at a rate that is higher than the margin of dumping that would have been established had MINCIT acted consistently with Article 2.4.2.

7.133. We observe that the European Union has presented certain arguments and evidence to support its position that, had MINCIT calculated weighted average normal values on the basis of all domestic sales within the same "product group" for the challenged comparisons rather than a simple average of intermediate weighted average normal values, the dumping margin would have been lower.¹⁷²

7.134. Colombia has not responded to the arguments and evidence offered by the European Union to support the contention that the inconsistencies in MINCIT's dumping margin calculations resulted in applied anti-dumping duties that are higher than the margins of dumping that would have been established had MINCIT acted consistently with Article 2.4.2. We understand that Colombia has relied, instead, on its arguments that MINCIT's calculations were consistent with its obligations. We consider that the European Union has put forward arguments and evidence sufficient to establish a *prima facie* case that the anti-dumping duties were imposed at a rate that is higher than the dumping margin that would have been established had the authorities acted consistently with Article 2.4.2. Absent an effective refutation of the evidence and arguments presented, we find that the European Union has demonstrated that MINCIT acted inconsistently with Article 9.3 as a consequence of its actions found to be inconsistent with Article 2.4.2 of the Anti-Dumping Agreement.

8 CONCLUSIONS AND RECOMMENDATION

8.1. For the reasons set forth in this Report, with respect to the European Union's claims that Colombia has failed to bring its measures into conformity with the recommendations and rulings in the Award of the Arbitrators and the Final Panel Report as modified by the Award of the Arbitrators, we conclude as follows:

¹⁶⁹ Panel Report, *EU – Biodiesel (Argentina)*, para. 7.359.

¹⁷⁰ Panel Report, *EU – Biodiesel (Argentina)*, para. 7.363.

¹⁷¹ European Union's response to the Panel question No. 21, para. 48.

¹⁷² European Union's first written submission, paras. 17-22.

- a. The European Union has established that MINCIT acted inconsistently with the obligations that apply when opting to use the W-W comparison methodology under Article 2.4.2 by comparing a weighted average export price with a simple average of intermediate weighted average normal values for the challenged comparisons.
- b. The European Union has not established that MINCIT acted inconsistently with Articles 2.1 and 2.4 by comparing normal value and export price in respect of the three specific article-pairs challenged.
- c. Having found that MINCIT acted inconsistently with Article 2.4.2, we decline to make findings on the European Union's consequential claims under Article 1 of the Anti-Dumping Agreement and Article VI of the GATT 1994.
- d. The European Union has established that MINCIT acted inconsistently with Article 9.3 by imposing anti-dumping duties at a rate that is higher than the dumping margin as a result of its actions found to be inconsistent with Article 2.4.2 of the Anti-Dumping Agreement.

8.2. Pursuant to Article 3.8 of the DSU, in cases where there is an infringement of the obligations assumed under a covered Agreement, the action is considered *prima facie* to constitute a case of nullification or impairment of benefits under that Agreement. Accordingly, we conclude that, to the extent MINCIT has acted inconsistently with the Anti-Dumping Agreement Colombia has nullified or impaired benefits accruing to the European Union under that Agreement.

8.3. We also conclude that to the extent that Colombia has failed to implement the recommendations and rulings in the Award of the Arbitrators and in the Final Panel Report as modified by the Award of the Arbitrators to bring its measures into conformity with its obligations under the Anti-Dumping Agreement, those recommendations and rulings remain operative.

8.4. Pursuant to Article 19.1 of the DSU, we recommend that Colombia bring its measures into conformity with its obligations under the Anti-Dumping Agreement.
