

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.
