WORLD TRADE ORGANIZATION

WT/DS591/7

10 October 2022

(22-7585)

Page: 1/93

Original: English

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

NOTIFICATION OF AN APPEAL BY COLOMBIA UNDER ARTICLE 25 OF THE UNDERSTANDING ON RULES AND PROCEDURES GOVERNING THE SETTLEMENT OF DISPUTES (DSU), PARAGRAPH 5 OF THE AGREED PROCEDURES FOR ARBITRATION UNDER ARTICLE 25 OF THE DSU (THE "AGREED PROCEDURES") AND RULE 20 OF THE WORKING PROCEDURES FOR APPELLATE REVIEW

The following communication, dated 6 October 2022, from the delegation of Colombia, is being circulated to Members.

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

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

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

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

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

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

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

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

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

3. The Panel erred in the interpretation and application of Article 6.2 of the DSU by finding that the European Union's claim under Article 2.4 of the Anti-Dumping Agreement pertaining to packaging costs was within the Panel's terms of reference.[5] The Panel incorrectly held that the claim developed by the European Union before the Panel was the same as the claim pertaining to an exporter's packaging costs that was contained in the panel request (but not developed before the Panel). By treating these two issues as different arguments regarding the same claim in the panel request, rather than as different claims, the Panel erred under Article 6.2. Colombia requests that the Arbitrators reverse the Panel's finding under Article 6.2 of the DSU and consequently also declare moot and of no legal effect the Panel's substantive finding under Article 2.4[6].

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

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

Pursuant to Rule 20(2)(c) of the Working Procedures for Appellate Review, the service address, telephone and facsimile numbers of Colombia are:

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[4] Panel Report, paras. 7.126, 7.152.a., and 8.1.b.i.
[5] Panel Report, paras. 7.232, 7.233, 7.244, and 8.1.d.ii.
[6] Panel Report, paras. 7.244 and 8.1.d.iii.
[7] Panel Report, paras. 7.241, 7.244, and 8.1.d.iii.
[8] Panel Report, paras. 7.303, 7.307, and 8.1.e.i.

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

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CASES CITED IN THIS REPORT

Short Title	Full Case Title and Citation
Argentina – Footwear (EC)	Appellate Body Report, *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R, adopted 12 January 2000, DSR 2000:I, p. 515
Argentina – Poultry Anti-Dumping Duties	Panel Report, *Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil*, WT/DS241/R, adopted 19 May 2003, DSR 2003:V, p. 1727
Canada – Welded Pipe	Panel Report, *Canada – Anti-Dumping Measures on Imports of Certain Carbon Steel Welded Pipe from the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu*, WT/DS482/R and Add.1, adopted 25 January 2017, DSR 2017:I, p. 7
China – Broiler Products (Article 21.5 – US)	Panel Report, *China – Anti-Dumping and Countervailing Duty Measures on Broiler Products from the United States – Recourse to Article 21.5 of the DSU by the United States*, WT/DS427/RW and Add.1, adopted 28 February 2018, DSR 2018:II, p. 839
China – HP-SSST (Japan) / China – HP-SSST (EU)	Appellate Body Reports, *China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from Japan / China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from the European Union*, WT/DS454/AB/R and Add.1 / WT/DS460/AB/R and Add.1, adopted 28 October 2015, DSR 2015:IX, p. 4573
China – HP-SSST (Japan) / China – HP-SSST (EU)	Panel Reports, *China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from Japan / China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from the European Union*, WT/DS454/R and Add.1 / WT/DS460/R, Add.1 and Corr.1, adopted 28 October 2015, as modified by Appellate Body Reports WT/DS454/AB/R / WT/DS460/AB/R, DSR 2015:IX, p. 4789
EC – Bed Linen	Panel Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/R, adopted 12 March 2001, as modified by Appellate Body Report WT/DS141/AB/R, DSR 2001:VI, p. 2077
EC – Chicken Cuts	Appellate Body Report, *European Communities – Customs Classification of Frozen Boneless Chicken Cuts*, WT/DS269/AB/R, WT/DS286/AB/R, adopted 27 September 2005, and Corr.1, DSR 2005:XIX, p. 9157
EC – Fasteners (China)	Appellate Body Report, *European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China*, WT/DS397/AB/R, adopted 28 July 2011, DSR 2011:VII, p. 3995
EC – Fasteners (China)	Panel Report, *European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China*, WT/DS397/R and Corr.1, adopted 28 July 2011, as modified by Appellate Body Report WT/DS397/AB/R, DSR 2011:VIII, p. 4289
EC – Fasteners (China) (Article 21.5 – China)	Appellate Body Report, *European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China – Recourse to Article 21.5 of the DSU by China*, WT/DS397/AB/RW and Add.1, adopted 12 February 2016, DSR 2016:I, p. 7
EC – Hormones	Appellate Body Report, *European Communities – Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, p. 135
EC – Salmon (Norway)	Panel Report, *European Communities – Anti-Dumping Measure on Farmed Salmon from Norway*, WT/DS337/R, adopted 15 January 2008, and Corr.1, DSR 2008:I, p. 3
EC – Tube or Pipe Fittings	Panel Report, *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WT/DS219/R, adopted 18 August 2003, as modified by Appellate Body Report WT/DS219/AB/R, DSR 2003:VII, p. 2701
EU – Cost Adjustment Methodologies II (Russia)	Panel Report, *European Union – Cost Adjustment Methodologies and Certain Anti-Dumping Measures on Imports from Russia (Second Complaint)*, WT/DS494/R and Add.1, circulated to WTO Members 24 July 2020 [appealed; adoption pending]
EU – Footwear (China)	Panel Report, *European Union – Anti-Dumping Measures on Certain Footwear from China*, WT/DS405/R, adopted 22 February 2012, DSR 2012:IX, p. 4585
Guatemala – Cement II	Panel Report, *Guatemala – Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico*, WT/DS156/R, adopted 17 November 2000, DSR 2000:XI, p. 5295
Japan – Alcoholic Beverages II	Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996:I, p. 97
Korea – Certain Paper	Panel Report, *Korea – Anti-Dumping Duties on Imports of Certain Paper from Indonesia*, WT/DS312/R, adopted 28 November 2005, DSR 2005:XXII, p. 10637
Korea – Dairy	Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, adopted 12 January 2000, DSR 2000:I, p. 3

Short Title	Full Case Title and Citation
Korea – Pneumatic Valves (Japan)	Appellate Body Report, *Korea – Anti-Dumping Duties on Pneumatic Valves from Japan*, WT/DS504/AB/R and Add.1, adopted 30 September 2019, DSR 2019:XI, p. 5637
Korea – Pneumatic Valves (Japan)	Panel Report, *Korea – Anti-Dumping Duties on Pneumatic Valves from Japan*, WT/DS504/R and Add.1, adopted 30 September 2019, as modified by Appellate Body Report WT/DS504/AB/R, DSR 2019:XI, p. 5935
Korea – Stainless Steel Bars	Panel Report, *Korea – Sunset Review of Anti-Dumping Duties on Stainless Steel Bars*, WT/DS553/R and Add.1, circulated to WTO Members 30 November 2020 [appealed; adoption pending]
Mexico – Anti-Dumping Measures on Rice	Appellate Body Report, *Mexico – Definitive Anti-Dumping Measures on Beef and Rice, Complaint with Respect to Rice*, WT/DS295/AB/R, adopted 20 December 2005, DSR 2005:XXII, p. 10853
Mexico – Corn Syrup	Panel Report, *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States*, WT/DS132/R, adopted 24 February 2000, and Corr.1, DSR 2000:III, p. 1345
Mexico – Steel Pipes and Tubes	Panel Report, *Mexico – Anti-Dumping Duties on Steel Pipes and Tubes from Guatemala*, WT/DS331/R, adopted 24 July 2007, DSR 2007:IV, p. 1207
Morocco – Definitive AD Measures on Exercise Books (Tunisia)	Panel Report, *Morocco – Definitive Anti-Dumping Measures on School Exercise Books from Tunisia*, WT/DS578/R and Add.1, circulated to WTO Members 27 July 2021 [appealed; adoption pending]
Pakistan – BOPP Film (UAE)	Panel Report, *Pakistan – Anti-Dumping Measures on Biaxially Oriented Polypropylene Film from the United Arab Emirates*, WT/DS538/R and Add.1, circulated to WTO Members 18 January 2021 [appealed; adoption pending]
Russia – Commercial Vehicles	Panel Report, *Russia – Anti-Dumping Duties on Light Commercial Vehicles from Germany and Italy*, WT/DS479/R and Add.1, adopted 9 April 2018, as modified by Appellate Body Report WT/DS479/AB/R, DSR 2018:III, p. 1329
US – Countervailing Measures (China)	Appellate Body Report, *United States – Countervailing Duty Measures on Certain Products from China*, WT/DS437/AB/R, adopted 16 January 2015, DSR 2015:I, p. 7
US – Differential Pricing Methodology	Panel Report, *United States – Anti-Dumping Measures Applying Differential Pricing Methodology to Softwood Lumber from Canada*, WT/DS534/R and Add.1, circulated to WTO Members 9 April 2019 [appealed; adoption pending]
US – Gasoline	Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, p. 3
US – Large Civil Aircraft (2nd complaint)	Appellate Body Report, *United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, WT/DS353/AB/R, adopted 23 March 2012, DSR 2012:I, p. 7
US – Softwood Lumber V	Panel Report, *United States – Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/R, adopted 31 August 2004, as modified by Appellate Body Report WT/DS264/AB/R, DSR 2004:V, p. 1937
US – Softwood Lumber VI (Article 21.5 – Canada)	Appellate Body Report, *United States – Investigation of the International Trade Commission in Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada*, WT/DS277/AB/RW, adopted 9 May 2006, and Corr.1, DSR 2006:XI, p. 4865
US – Steel Plate	Panel Report, *United States – Anti-Dumping and Countervailing Measures on Steel Plate from India*, WT/DS206/R and Corr.1, adopted 29 July 2002, DSR 2002:VI, p. 2073
US – Tuna II (Mexico) (Article 21.5 – Mexico)	Appellate Body Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products – Recourse to Article 21.5 of the DSU by Mexico*, WT/DS381/AB/RW and Add.1, adopted 3 December 2015, DSR 2015:X, p. 5133
US – Upland Cotton (Article 22.6 – US I)	Decision by the Arbitrator, *United States – Subsidies on Upland Cotton – Recourse to Arbitration by the United States under Article 22.6 of the DSU and Article 4.11 of the SCM Agreement*, WT/DS267/ARB/1, 31 August 2009, DSR 2009:IX, p. 3871
US – Wool Shirts and Blouses	Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, adopted 23 May 1997, and Corr.1, DSR 1997:I, p. 323

EXHIBITS REFERRED TO IN THIS REPORT

Exhibit	Short Title (if any)	Description/Long title
COL-1 (BCI)	Mydibel's comments on the essential facts technical report	Comments by interested parties on the essential facts technical report
COL-8	Decree No. 1750 of 2015 regulating the application of anti-dumping duties	MINCIT, Decree No. 1750 of 2015 regulating the application of anti-dumping duties (1 September 2015)
COL-10 (BCI)	Technical report on the initiation	MINCIT, Technical report on the initiation of the investigation, confidential version (August 2017)
COL-11	Annex 10 of the revised application	Annex 10 of the revised application, non-confidential version
COL-12		Political Constitution of Colombia
COL-13		Law No. 1437 of 2011 establishing the Code of Administrative Procedure and Administrative Disputes
COL-15 (BCI)	Technical report on essential facts (confidential version)	MINCIT, Technical report on essential facts, confidential version (27 August 2018)
COL-16 (BCI)	Final technical report (confidential version)	MINCIT, Final technical report, confidential version (9 November 2018)
COL-35-B	Annexes to FEDEPAPA's application	Annexes to FEDEPAPA's application for the initiation of an investigation
COL-36-A (BCI)	Annex 1 of the revised application	Annexes 1-12 to FEDEPAPA's revised application dated 19 July 2017
COL-41 (BCI)	Agrarfrost's export transactions	Export transactions provided by Agrarfrost and data corresponding to the DIAN database
COL-42 (BCI)	Aviko's export transactions	Export transactions provided by Aviko and data corresponding to the DIAN database
COL-43 (BCI)	Mydibel's export transactions	Export transactions provided by Mydibel and data corresponding to the DIAN database
COL-67	Revised application (confidential version)	Solicitud revisada de FEDEPAPA de 19 de julio de 2017 radicada en el expediente confidencial
EU-1a	Notice of initiation	MINCIT, Resolution No. 121 of 2 August 2017 ordering the initiation of an administrative investigation with a view to determining the existence, degree and effect on the domestic industry of alleged dumping in imports of potatoes, prepared or preserved otherwise than by vinegar or acetic acid, frozen, originating in Belgium, the Netherlands (Holland) and Germany (2 August 2017)
EU-2a	Preliminary determination	MINCIT, Decision No. 191 of 1 November 2017 adopting the preliminary determination in the administrative investigation initiated by means of Resolution No. 121 of 2 August 2017 (1 November 2017)
EU-3a	Final report on essential facts (public version)	MINCIT, Final technical report on essential facts, Investigation of alleged dumping in imports of potatoes prepared or preserved (otherwise than by vinegar or acetic acid, frozen) classified under tariff subheading 2004.10.00.00, originating in Belgium, the Netherlands (Holland) and Germany (27 August 2018)
EU-4a	Final technical report (public version)	MINCIT, Final technical report, public version (9 November 2018)
EU-5a	Final determination (public version)	MINCIT, Resolution No. 257 of 9 November 2018 adopting the final determination in the administrative investigation initiated by means of Decision 121 of 2 August 2017 (9 November 2018)
EU-6a	MINCIT's revocation decision	MINCIT, Resolution No. 093 of 13 May 2019 settling several applications for direct revocation (13 May 2019)
EU-8a	FEDEPAPA's application	Communication dated 22 June 2017 from FEDEPAPA to MINCIT requesting the initiation of an investigation and the imposition of provisional measures
EU-9a	MINCIT's deficiency letter to FEDEPAPA	Communication dated 29 June 2017 from MINCIT to FEDEPAPA requesting additional information
EU-10	Revised application	Letter dated 19 July 2017 from FEDEPAPA to MINCIT responding to the MINCIT's deficiency letter
EU-12a	Preliminary technical report	MINCIT, Preliminary technical report, public version (October 2017)

Exhibit	Short Title (if any)	Description/Long title
EU-14	FEDEPAPA's certificate of existence and legal representation	Certificate of existence and legal representation of the non-profit entity FEDEPAPA, issued by the Chamber of Commerce of Bogota (6 July 2017)
EU-15	FEDEPAPA's responses to questions raised during the hearing	Letter dated 6 December 2017 from FEDEPAPA to MINCIT, responses to questions raised during the hearing
EU-17a	Responses to comments on essential facts	MINCIT's responses to comments on essential facts
EU-18a	European Commission's observations on essential facts	European Commission's observations on the essential facts (10 September 2018)
EU-22 (BCI)		Mydibel's questionnaire response, photos demonstrating packaging materials
EU-23a	Dumping investigation questionnaire for foreign producers and/or exporters	MINCIT's questionnaire for foreign producers and/or exporters
EU-25a (BCI)		Agrarfrost's comments on essential facts
EU-26a (BCI)		Aviko's comments on essential facts
EU-28a (BCI)	Agrarfrost's questionnaire response	Agrarfrost's questionnaire response, confidential version
EU-28.1 (BCI)	Agrarfrost's questionnaire response, Excel workbook "ventas domésticas"	Agrarfrost's questionnaire response, confidential version, Excel workbook "ventas domésticas"
EU-29a (BCI)	Aviko's questionnaire response	Aviko's questionnaire response, confidential version
EU-29.1 (BCI)	Aviko's questionnaire response, Excel workbook "ventas domésticas"	Aviko's questionnaire response, confidential version, Excel workbook "ventas domésticas"
EU-29.2 (BCI)	Aviko's questionnaire response, Excel workbook "ventas en Colombia"	Aviko's questionnaire response, confidential version, Excel workbook "ventas en Colombia"
EU-30a (BCI)	Mydibel's questionnaire response	Mydibel's questionnaire response, confidential version
EU-30.1 (BCI)		Mydibel's questionnaire response, annex 3.2.1.2, 3rd workbook "costes de manufactura"
EU-34a (BCI)		Agrarfrost's submission to MINCIT dated 1 December 2017
EU-35a (BCI)		Agrarfrost's submission to MINCIT dated 22 December 2017
EU-36a	Agrarfrost verification visit report	Agrarfrost verification visit report (17 May 2018)
EU-36.1a (BCI)	Agrarfrost verification visit report, annex 9	Agrarfrost verification visit report, annex 9 "Adjustment for type of oil"
EU-37 (BCI)	MINCIT's response to Agrarfrost dated 30 August 2018	Letter dated 30 August 2018 from MINCIT to Agrarfrost responding to the request for information on essential facts
EU-41 (BCI)		Agrarfrost's submission to MINCIT dated 28 August 2018

ABBREVIATIONS USED TO IN THIS REPORT

Abbreviation	Description
Agrarfrost	Agrarfrost GMBH & CO
Agristo	Agristo N.V.
Anti-Dumping Agreement	Anti-Dumping Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994
Aviko	Aviko B.V.
BCI	business confidential information
Clarebout	Clarebout Potatoes N.V.
Congelagro	Congelados Agrícolas S.A.
Customs Valuation Agreement	Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994
DIAN	National Tax and Customs Directorate
DIAN database	Customs database of the Colombian National Directorate for Taxes and Customs
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
Ecofrost	Ecofrost S.A.
F.o.b.	free on board
Farm Frites	Farm Frites International N.V.
FEDEPAPA	Colombian Federation of Potato Producers
Frozen Express	Productos Alimenticios Frozen Express S.A.S.
GATT 1994	General Agreement on Tariffs and Trade 1994
MINCIT	Ministry of Trade, Industry and Tourism
Mydibel	Mydibel S.A.
PUC	product under consideration
Soraca	Procesadora y Comercializadora de Alimentos Soraca S.A.
Vienna Convention	Vienna Convention on the Law of Treaties, done at Vienna, 23 May 1969, 1155 UNTS 331; 8 International Legal Materials 679
WTO	World Trade Organization

1 INTRODUCTION

1.1 Complaint by the European Union

1.1. On 15 November 2019, the European Union requested consultations with Colombia pursuant to Articles 1 and 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Article 17 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement), Article 19 of the Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994 (Customs Valuation Agreement), and Article XXIII of the General Agreement on Tariffs and Trade 1994 (GATT 1994) with respect to the measures and claims set out below.[9]

1.2. Consultations were held on 15-16 January 2020, but were unsuccessful in resolving the dispute.

1.2 Panel establishment and composition

1.3. On 17 February 2020, the European Union requested the establishment of a panel pursuant to Articles 4.7 and 6 of the DSU, Article 17.4 of the Anti-Dumping Agreement, Article 19 of the Customs Valuation Agreement, and Article XXIII of the GATT 1994, to examine the matter based on the standard terms of reference, as set out in Article 7.1 of the DSU.[10] Pursuant to the European Union's request, the Dispute Settlement Body (DSB) established the Panel at its meeting on 29 June 2020, in accordance with Article 6 of the DSU.[11]

1.4. Under its terms of reference, the Panel is required:

> 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/DS591/2 and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.[12]

1.5. Based on an agreement between the parties, the Panel was composed on 24 August 2020 as follows:

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

1.6. Brazil, China, Honduras, India, Japan, the Russian Federation, Türkiye, and the United States notified their interest in participating in the Panel proceedings as third parties.

1.3 Panel proceedings

1.3.1 General

1.7. Upon the parties' request, the Panel commenced the organizational process in these proceedings on 3 December 2020 and, in light of the challenges posed by the COVID-19 pandemic, decided to conduct the organizational process through written consultations with the parties. Based on these consultations, the Panel adopted its Working Procedures[13] as well as a partial timetable for these proceedings on 8 February 2021.[14]

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[9] Request for consultations by the European Union, WT/DS591/1, G/ADP/D133/1, G/VAL/D/14, G/L/1339 (European Union's consultations request). The measures and claims are set out in sections 2-3 below.

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

[11] DSB, Minutes of the meeting held on 29 June 2020, WT/DSB/M/442.

[12] Constitution note of the Panel, WT/DS591/4.

[13] Working Procedures of the Panel (Annex A-1).

[14] The timetable proposed by the Panel to the parties on 21 December 2020 envisaged that the European Union and Colombia would file their first written submissions by 26 February 2021 and

1.8. In light of subsequent developments and multiple requests by the parties, the Panel further revised and updated the timetable for these proceedings on:

- 21 June 2021[15];
- 28 June 2021[16];
- 1 July 2021[17];
- 4 August 2021[18];
- 26 October 2021[19];
- 7 February 2022[20];
- 30 May 2022[21];

26 March 2021, respectively. On 12 January 2021, Colombia requested the Panel to extend the deadline for filing its first written submission to 21 May 2021. On the same date, the European Union requested the Panel to extend the deadline for filing its first written submission to a date not before 7 March 2021. After considering the parties' requests, the Panel fixed 8 March 2021 as the date for the European Union's first written submission and 7 May 2021 for Colombia's first written submission.

[15] On 27 May 2021, the Panel proposed 27-29 July 2021 for its first substantive meeting with the parties. On 31 May 2021, Colombia requested the Panel to organize the first substantive meeting either during the month of June through 9 July 2021 or, alternatively, during the first week of September 2021. On 2 June 2021, the European Union communicated its availability for the first substantive meeting with the Panel from 7-9 July 2021. On 9 June 2021, having considered the parties' positions, and taking account of certain technological constraints and the then-prevailing pandemic-related restrictions that precluded a meeting from being held in June or early July, the Panel maintained its originally proposed dates of 27-29 July 2021. On 10 June 2021, Colombia requested the Panel to: (a) provide sufficient time (not earlier than 17 September 2021) to respond to the Panel's questions; and (b) circulate at least some of the questions in advance of the first substantive meeting. The Panel partially granted Colombia's request and adopted a revised timetable on 21 June 2021 that set: (i) 16 July 2021 as the date for issuing advance questions to the parties; (ii) 4 August 2021 as the date for issuing post-hearing questions to the parties; and (iii) 3 September 2021 as the date for receiving the parties' written responses to the questions posed by the Panel at the first substantive meeting.

[16] On 23 June 2021, the European Union also requested the Panel to extend the deadline for filing its responses to the Panel's questions from 3 September to 17 September 2021. On 28 June 2021, given the parties' shared position, the Panel granted the European Union's request and revised the timetable accordingly.

[17] On 1 July 2021, the Panel communicated to the parties and the third parties the following dates: (a) 27-29 July 2021 as the date for the first substantive meeting of the Panel with the parties; (b) 28 July 2021 as the date for the Panel's session with the third parties; (c) 4 August 2021 as the date for issuing written questions to the third parties; and (d) 17 September 2021 as the date for receiving third-parties' written responses to the questions posed by the Panel. The timetable was updated accordingly.

[18] On 4 August 2021, the Panel communicated to the parties and third parties 24 September 2021 as the date for submitting the integrated executive summaries of the third parties. On the same date, the Panel also communicated to the parties 29 October 2021 as the date for submitting their second written submissions. The timetable was updated accordingly.

[19] On 14 October 2021, the Panel proposed 19-20 January 2022 for its second substantive meeting with the parties. On 18 October 2021, Colombia requested the Panel to postpone this meeting to the week of 7-11 February 2022. In a communication dated 21 October 2021, the European Union did not oppose Colombia's request and indicated its preference to hold the second substantive meeting on 9-10 February 2022. Having considered the parties' positions and the availability of the Panel, the Panel revised the timetable on 26 October 2021 and set 1-2 February 2022 as the dates for the second substantive meeting with the parties. On 10 December 2021, Colombia further requested the Panel to postpone the dates of the second substantive meeting, on a tentative basis, to mid-April 2022. On 14 December 2021, the European Union opposed Colombia's request. Having considered the parties' positions, the Panel rejected Colombia's request on 15 December 2021 and maintained 1-2 February 2022 as the dates for the second substantive meeting with the parties.

[20] On 2 February 2022, at the end of the second substantive meeting with the parties, both parties requested the Panel for additional time for filing their responses to the questions posed and their written comments on each other's responses. Having considered the parties' positions, the Panel granted this request and revised the timetable on 7 February 2022 changing the two deadlines from 18 February to 21 February 2022 and from 25 February to 1 March 2022, respectively. On the same date, the Panel also communicated to the parties the following dates: (a) 4 March 2022 as the date for submitting the integrated executive summaries of the parties; (b) 14 March 2022 as the date for issuing the descriptive part of its report; and (c) 28 March 2022 as the date for submitting comments on the descriptive part of the Panel's report. The timetable was updated accordingly.

[21] On 19 May 2022, with a view to completing its work in this matter by the end of July, the Panel communicated to the parties the following dates: (a) 10 June 2022 for the issuance of the interim report; (b) 24 June 2022 for parties to request review of part(s) of the report and to request an interim review meeting; and (c) 1 July 2022 for the parties to submit their comments on the requests for review. On 23 May 2022, Colombia requested the Panel to grant a "short extension to comment on the interim report, having in mind that its issuance is going to happen" on 10 June 2022, "just before the [12th] WTO Ministerial"

- 9 June 2022[22]; and
- 22 June 2022.[23]

1.9. On 21 December 2020, with a view to ensuring that these proceedings are conducted in an expeditious manner in the face of the challenges posed by the COVID-19 pandemic, the Panel proposed to pursue a round of written questions and answers with the parties following the receipt of their first written submissions, and to hold the substantive meeting with the parties as well as the third parties' session after the filing of the parties' rebuttal submissions.[24] On 12 January 2021, the European Union stated that, for reasons of due process, it did not consider it appropriate to deviate from the normal practice of two substantive meetings in this present dispute. On the same date, Colombia stated that, in light of the universal practice under the DSU to hold two substantive meetings, and because one substantive meeting would not allow it to present its defence in an adequate manner, the maintenance of two substantive meetings was essential. Given the parties' shared position, the Panel planned and organized these proceedings with two substantive meetings with the parties.

1.10. The European Union and Colombia informed the Panel on 7 December 2020 that they intended to present their written submissions and their oral arguments during the substantive meetings in English and Spanish, respectively.[25] In light of the travel and organizational restrictions presented by the COVID-19 pandemic, and as acknowledged by both parties in their communications dated 12 January 2021, the Panel decided to conduct the first substantive meeting virtually by means of a novel software solution that allowed for both remote participation and secure simultaneous interpretation, while respecting the confidentiality of these proceedings. Consistent with the then-prevailing health guidelines, the Panel allowed a limited number of the parties' delegates to participate in this virtual meeting from the WTO premises. On 14 July 2021, the Panel adopted the Additional Working Procedures for virtual participation at the first substantive meeting.[26] The Panel

Conference. On 24 May 2022, the European Union informed the Panel that it had no comments to offer on Colombia's request. On 30 May 2022, the Panel partially granted Colombia's request and communicated to the parties the following dates: (a) 9 June 2022 for the issuance of the interim report; (b) 28 June 2022 for the parties to request review of part(s) of the report and to request an interim review meeting; and (c) 5 July 2022 for the parties to submit their comments on the requests for review. The timetable was updated accordingly.

[22] On the morning of 9 June 2022, the parties "jointly request[ed] the Panel not to issue its Interim Report to the Parties today and to postpone the issuance of the Interim Report until Thursday 16 June 2022", when the parties "will have finished" with the 12th WTO Ministerial Conference. Granting their joint request on the same date, the Panel informed the parties that the Interim Report would be issued on 16 June 2022 and that the subsequent dates for the interim review process that had already been communicated to the parties would remain unchanged. The timetable was updated accordingly.

[23] On the night of 15 June 2022, the European Union stated that it was "considering whether to request the Panel to modify again its timetable and to delay the issuance of the Interim Report". The European Union stated that such a request could be submitted in the morning of 16 June 2022. On 16 June 2022, Colombia and the European Union jointly requested the Panel, *inter alia*, "not to issue its Interim Report to the parties today," and to "modify its Timetable in order to provide that the Interim Report will not be issued to the parties before Thursday 30 June 2022." In light of this joint request, the Panel informed the parties on 16 June 2022 that it would not issue its Interim Report that day, and that it would issue a revised timetable in due course. On 22 June 2022, the Panel communicated to the parties the following dates: (a) 30 June 2022 for the issuance of the Interim Report; (b) 14 July 2022 for the parties to request review of part(s) of the report and to request an interim review meeting; and (c) 21 July 2022 for the parties to submit their comments on the requests for review. The timetable was updated accordingly.

[24] The draft Working Procedures initially proposed by the Panel indicated that, "[u]pon request by either party, or should the Panel consider it necessary, the Panel may, after consultation with the parties, decide to hold a second substantive meeting with the parties."

[25] We note that the record of the underlying investigation is in Spanish and so are materials from that record that the parties placed as exhibits on the Panel's record. For certain exhibits, the European Union provided, in addition to the original Spanish document (typically labelled as Exhibit EU-[…]a), a courtesy English translation (typically labelled as Exhibit EU-[…]b). Colombia, for its part, did not "endorse[]" or "object[]" to the "accuracy" of the English translations provided by the European Union and requested the Panel to conduct its analysis "on the basis of the official version of the exhibits, that is to say, the Spanish version". (Colombia's first written submission, paras. 4.2-4.3). Where necessary, the Panel has relied on its own understanding of the Spanish texts of the original exhibits and of Colombia's submissions that are a part of the Panel record. The English language version of this Panel Report contains the Panel's English translations of the original, Spanish texts, which can be found in the Spanish language version of this Panel Report.

[26] Additional Working Procedures of the Panel for virtual participation at the first substantive meeting (Annex A-3).

held its first substantive meeting with the parties on 27-29 July 2021. A session with the third parties was convened on 28 July 2021.

1.11. In light of the prevailing epidemiological situation and the stricter pandemic-related restrictions in place at the time, the Panel decided to hold the second substantive meeting virtually, without the possibility for in-person attendance at the WTO premises. Accordingly, the entire meeting was convened using a secure software platform and, on 17 January 2022, the Panel adopted the Additional Working Procedures for virtual participation at the second substantive meeting.[27] The Panel held its second substantive meeting with the parties on 1-2 February 2022.

1.12. On 14 March 2022, the Panel issued the descriptive part of its Report to the parties. The Panel issued its Interim Report to the parties on 30 June 2022. The Panel issued its Final Report to the parties on 29 August 2022.

1.3.2 Working Procedures on Business Confidential Information

1.13. Following written consultations with the parties, the Panel adopted the Additional Working Procedures for the protection of Business Confidential Information (BCI) in these proceedings on 8 February 2021.[28]

1.3.3 Agreed procedures for arbitration under Article 25 of the DSU

1.14. 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.[29] 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 13 July 2020 (WT/DS591/3) and of the joint requests of the parties to the Panel formulated therein".[30] On 29 August 2022, the Panel, having consulted with the parties, adopted the Additional Working Procedures to facilitate arbitration under Article 25 of the DSU.[31]

2 FACTUAL ASPECTS: THE MEASURES AT ISSUE

2.1. The European Union's panel request challenges the WTO-consistency of the anti-dumping duties imposed by Colombia on imports of potatoes, prepared or preserved (otherwise than by vinegar or acetic acid), frozen, classified under tariff subheading 2004.10.00.00 originating in Belgium, Germany, and the Netherlands, as set forth in the following documents[32]:

a. Ministry of Trade, Industry and Tourism Resolution Number 191 of 1 November 2017 adopting the preliminary determination on the administrative investigation initiated by means of Decision 121 of 2 August 2017, published in the Official Journal No. 50.406 of 3 November 2017[33], page 4;

b. Ministry of Trade, Industry and Tourism Resolution Number 257 of 9 November 2018 adopting the final determination on the administrative investigation initiated by Decision 121 of 2 August 2017, published in the Official Journal No. 50.772 of 9 November 2018, page 9;

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[27] Additional Working Procedures of the Panel for virtual participation at the second substantive meeting (Annex A-4).

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

[29] 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.

[30] Working Procedures of the Panel (Annex A-1), para. 33.

[31] Additional Working Procedures of the Panel to facilitate arbitration under Article 25 of the DSU (Annex A-5).

[32] European Union's panel request, pp. 1-2.

[33] The date of publication of the preliminary determination indicated in the European Union's panel request is 9 November 2018. However, as indicated in MINCIT's revocation decision, (Exhibit EU-6a), the preliminary determination was published in the Official Journal No. 50.406 on 3 November 2017.

c. Responses to the comments on the essential facts in the investigation of dumping of imports of potatoes, prepared or preserved, classified under tariff subheading 2004.10.00.00 originating in Belgium, the Netherlands and Germany;

d. Final technical report, public version, investigation of alleged dumping of imports of potatoes, prepared or preserved (otherwise than by vinegar or acetic acid), classified under tariff subheading 2004.10.00.00 originating in Belgium, the Netherlands (Holland) and Germany; and

e. Ministry of Trade, Industry and Tourism Resolution Number 093 of 13 May 2019 addressing some requests for administrative review, published in the Official Journal No. 50.956, page 18.

2.2. The European Union also challenges any annexes thereto, as well as notices, preliminary findings, reviews, amendments, supplements, replacements, renewals, extensions, implementing measures or any other related measures.[34]

3 PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

3.1. The European Union requests the Panel to make the following findings[35]:

a. Colombia acted inconsistently with its obligations under Article 5.3 of the Anti-Dumping Agreement by initiating the anti-dumping investigation on the basis of insufficient evidence of dumping, injury, and causal link between the dumped imports and the alleged injury;

b. Colombia acted inconsistently with its obligations under Article 5.8 of the Anti-Dumping Agreement by failing to reject the application submitted by the Colombian Federation of Potato Producers (FEDEPAPA), which did not include sufficient evidence to justify proceeding with the investigation;

c. Colombia acted inconsistently with its obligations under Article 6.5 of the Anti-Dumping Agreement by providing confidential treatment, on its own initiative, to the information supplied by the applicant, without any showing of good cause;

d. Colombia acted inconsistently with its obligations under Article 6.5.1 of the Anti-Dumping Agreement by failing to require the applicant to furnish non-confidential summaries in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence, or by failing to require a statement of reasons in support of a claim that the information was not susceptible of summary;

e. Colombia acted inconsistently with its obligations under Articles 2.1 and 6.8, and paragraphs 3 and 6 of Annex II, of the Anti-Dumping Agreement, by not using, in the calculation of the dumping margins, the information on export prices provided by the cooperating investigated companies, and instead using information from its customs database (Customs database of the National Customs and Excise Directorate (DIAN database));

f. Colombia acted inconsistently with its obligations under Article 2.4 of the Anti-Dumping Agreement by not making due allowances for differences impacting price comparability (differences in product mix and differences in oil used in the preparation), by making undue adjustments (for packaging costs), and by not informing interested parties about the information required for the fair comparison;

g. Colombia acted inconsistently with its obligations under Articles 3.1, 3.2, 3.4, and 3.5 of the Anti-Dumping Agreement by erroneously including non-dumped imports in its injury and causation analyses;

[34] European Union's panel request, p. 2.
[35] European Union's first written submission, paras. 331-332; second written submission, para. 143.

h. Colombia acted inconsistently with its obligations under Articles 3.1 and 3.2 of the Anti-Dumping Agreement by not conducting an objective examination, based on positive evidence, by failing to properly establish the effect of the dumped imports on prices in the domestic market for the like product, and by failing to adequately justify its findings;

i. Colombia acted inconsistently with its obligations under Articles 3.1 and 3.4 of the Anti-Dumping Agreement by not conducting an objective examination, based on positive evidence, by failing to properly consider all relevant economic factors and indices having a bearing on the state of the industry, and by failing to adequately justify its findings; and

j. Colombia acted inconsistently with its obligations under Articles 3.1 and 3.5 of the Anti-Dumping Agreement by not conducting an objective examination, based on positive evidence, by failing to demonstrate a causal link between the dumped imports and the injury to the domestic industry, and by failing to adequately justify its findings.

3.2. The European Union further requests the Panel to recommend, pursuant to Article 19.1 of the DSU, that Colombia bring its measures into conformity with the GATT 1994 and the Anti-Dumping Agreement.[36]

3.3. Having presented arguments in response to each of the European Union's claims, Colombia requests the Panel to reject the European Union's claims under Articles 2.1, 2.4, 3.1, 3.2, 3.4, 3.5, 5.3, 5.8, 6.5, 6.5.1 and 6.8, as well as paragraphs 3 and 6 of Annex II, of the Anti-Dumping Agreement, asserting, *inter alia*, that the European Union has failed to make a *prima facie* case that Colombia acted inconsistently with its obligations under these provisions. Colombia therefore also considers it inappropriate for the Panel to issue any recommendations under Article 19.1 of the DSU.[37]

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, and the United States are reflected in their executive summaries, provided in accordance with paragraph 26 of the Working Procedures adopted by the Panel (see Annexes C-1, C-2, and C-3). China, Honduras, India, the Russian Federation, and Türkiye did not make written or oral submissions before the Panel.

6 INTERIM REVIEW

6.1. The Panel issued its Interim Report to the parties on 30 June 2022. On 14 July 2022, Colombia submitted a written request seeking a review of precise aspects of the Interim Report, and the European Union informed the Panel that it "ha[d] no comments on the Interim Report".[38] On 21 July 2022, the European Union submitted comments on Colombia's request for review. Neither party requested an interim review meeting.

6.2. The request and comments made at the interim review stage as well as the Panel's discussion and disposition thereof are set out in Annex A-6.

[36] European Union's first written submission, para. 333; second written submission, para. 144.
[37] Colombia's first written submission, paras. 13.231-13.232; second written submission, paras. 14.1-14.2.
[38] European Union's communication (14 July 2022).

7 FINDINGS

7.1 General issues relating to treaty interpretation, the standard of review, and burden of proof

7.1.1 Treaty interpretation

7.1. In Article 3.2 of the DSU, WTO Members "recognize" that the dispute settlement system serves, *inter alia*, to "clarify" the existing provisions of the covered agreements "in accordance with customary rules of interpretation of public international law".[39] Article 17.6(ii) of the Anti-Dumping Agreement similarly requires panels to "interpret the relevant provisions of [that] Agreement in accordance with customary rules of interpretation of public international law". It is generally accepted that the principles enumerated in Articles 31 and 32 of the Vienna Convention on the Law of Treaties (Vienna Convention) are such customary rules.[40]

7.1.2 Standard of review

7.2. Panels examining the WTO-consistency of a challenged measure are generally bound by Article 11 of the DSU, which provides, in relevant part, that:

> [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[.]

7.3. In addition, with respect to "matter[s]" concerning claims under the Anti-Dumping Agreement, Article 17.6 of the Agreement provides that:

> (i) in its assessment of the facts of the matter, the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned;
>
> (ii) the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.[41]

7.4. In light of these provisions, a panel examining an investigating authority's determination should not conduct a *de novo* review of the evidence, nor substitute its own judgment for that of the investigating authority. The exact standard of review to be applied by a panel in examining an investigating authority's determination in a given case is a "function of the substantive provisions of the specific covered agreements that are at issue in the dispute"[42] as well as the "specific claim(s) put forth by a complainant".[43]

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[39] We also note that Article 3.2 of the DSU provides that "[r]ecommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered Agreements".

[40] See e.g. Appellate Body Reports, *US – Gasoline*, DSR 1996:I, pp. 15-16; and *Japan – Alcoholic Beverages II*, DSR 1996:I, p. 104.

[41] Article 17.6 of the Anti-Dumping Agreement is identified in Article 1.2 and Appendix 2 of the DSU as one of the "special or additional rules and procedures" which prevail over the DSU "[t]o the extent that there is a difference" between those provisions and the provisions of the DSU.

[42] Appellate Body Reports, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 95; *US – Countervailing Measures (China)*, para. 4.182.

[43] See e.g. Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.182.

7.1.3 Burden of proof

7.5. The DSU does not contain any specific rules concerning the allocation of the burden of proof in WTO dispute settlement proceedings. We agree 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.[44] As such, the complainant – i.e. the European Union in these proceedings – must "establish a *prima facie* case of inconsistency with [the] provision [invoked] before the burden of showing consistency with that provision is taken on by the defending party".[45] A *prima facie* case is one which, "in the absence of effective refutation by the defending party", requires a panel to find in favour of the complaining party.[46]

7.2 Claims under Article 5.3 of the Anti-Dumping Agreement: the initiation of the investigation

7.2.1 Introduction

7.6. In the underlying proceeding, the Colombian Federation of Potato Producers (FEDEPAPA) – the applicant – filed an application before MINCIT – the Colombian investigating authority – requesting, on behalf of the domestic industry, the initiation of an anti-dumping investigation into alleged dumping of imports of "potatoes, prepared or preserved (otherwise than by vinegar or acetic acid)" and exported to Colombia under "tariff subheading 2004.10.00.00".[47] After reviewing this filing, MINCIT sent a deficiency letter to FEDEPAPA requesting certain supplementary information and clarifications.[48] The applicant responded to MINCIT's request by submitting a revised application.[49] Thereafter, MINCIT issued a "technical report" that analysed the application and explained the basis for its decision to initiate the investigation.[50] A resolution to initiate the investigation concerning the allegedly dumped imports from Belgium, the Netherlands, and Germany, was issued by MINCIT on 2 August 2017.[51]

7.7. The European Union claims that Colombia acted inconsistently with its obligations under Article 5.3 of the Anti-Dumping Agreement because the evidence examined and relied upon by MINCIT was insufficient for an unbiased and objective investigating authority to justify the initiation of the investigation.[52] Specifically, the European Union challenges the manner in which MINCIT's notice of initiation considered: (a) the definition of the product under consideration; (b) the representativeness of the applicant; (c) the evidence used to calculate the normal value; (d) the evidence relied upon for the injury analysis; and (e) the evidence concerning the causal relationship.[53]

7.8. Colombia asserts that the European Union's claims should be rejected in their entirety because they are based on a "misunderstanding" of the facts and of the disciplines of the

[44] Appellate Body Report, *US – Wool Shirts and Blouses*, DSR 1997:I, p. 335.
[45] Appellate Body Report, *EC – Hormones*, para. 104. Colombia argues that, in light of paragraphs 3(1) and 5(1) of the Panel's Working Procedures, a *prima facie* case must be established by the European Union no later than its first written submission. (See e.g. Colombia's second written submission, fn 88; and response to Panel question No. 1.17, paras. 96-97 and fn 52). We note, however, that neither paragraph 3(1) nor paragraph 5(1) contains any such requirement with respect to the demonstration of a "*prima facie*" case by the complainant.
[46] Appellate Body Report, *EC – Hormones*, para. 104.
[47] FEDEPAPA's application, (Exhibit EU-8a), para. 1.
[48] MINCIT's deficiency letter to FEDEPAPA, (Exhibit EU-9a).
[49] Revised application, (Exhibit EU-10).
[50] Technical report on the initiation, (Exhibit COL-10 (BCI)).
[51] MINCIT elected to exclude imports from France from the investigation on the grounds that "there have been no imports since 2015" and that therefore "it [was] not appropriate to link these imports to the investigation". (Notice of initiation, (Exhibit EU-1a), section 1.4).
[52] European Union's first written submission, paras. 50 and 66-67; second written submission, paras. 41-42.
[53] European Union's first written submission, paras. 51-67; second written submission, paras. 4-41.

Anti-Dumping Agreement.[54] Colombia also maintains that the European Union fails to make a *prima facie* case in respect of certain claims.[55]

7.9. We begin our analysis by recalling the applicable requirements of Article 5.3 of the Anti-Dumping Agreement (section 7.2.2). Subsequently, we consider whether, in light of the specific facts and circumstances of this dispute, Colombia acted inconsistently with Article 5.3 in respect of: (a) the definition of the product under consideration (section 7.2.3); (b) the representativeness of the applicant (section 7.2.4); (c) the evidence used to calculate the normal value (section 7.2.5); (d) the evidence relied upon for the injury analysis (section 7.2.6); and (e) the evidence on the causal relationship (section 7.2.7).

7.2.2 Applicable requirements under Article 5.3 of the Anti-Dumping Agreement

7.10. Article 5.3 of the Anti-Dumping Agreement states that:

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

7.11. Article 5.3 requires investigating authorities to determine whether there is "sufficient" evidence to justify the initiation of an investigation and requires that, in making such a determination, the investigating authorities "examine" the "accuracy" and "adequacy" of the "evidence" provided "in the application".[56] The dictionary meanings of the words "accuracy" and "adequacy" include "the state or quality" of being "accurate" and "adequate", respectively.[57] The dictionary meaning of the word "accurate" includes "exact, precise; conforming exactly with the truth or with a given standard; free from error".[58] The dictionary meaning of "adequate" comprises "fully satisfying what is required; quite sufficient, suitable, or acceptable in quality or quantity."[59] The dictionary meaning of the word "sufficient" includes "enough for a particular purpose".[60]

7.12. Article 5.3 requires authorities to examine the evidence "in the application". We observe that Article 5.2 requires an "application" for initiation to include, *inter alia*, evidence of "(a) dumping, (b) injury … and (c) a causal link between the dumped imports and the alleged injury". We also observe that Article 5.6, which concerns initiation by an investigating authority without having received a written application, requires an authority to determine whether there is "sufficient evidence of dumping, injury and a causal link" to justify the initiation of an investigation. These textual and contextual elements in Article 5 of the Anti-Dumping Agreement suggest that the "evidence" in an application that authorities must examine under Article 5.3 is evidence relating to the three elements necessary for the imposition of an anti-dumping measure, namely, evidence of dumping, injury, and a causal link between the two.[61] That said, we recognize that the initiation stage of an investigation is distinct from the "subsequent investigation".[62] In this regard, we consider

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[54] Colombia's first written submission, paras. 5.3 and 6.2.

[55] See e.g. Colombia's second written submission, paras. 3.3 and 2.60-2.62; and response to Panel question No. 1.17, paras. 96-97.

[56] In this regard, we agree that "inherent in the very meaning of evidence [in the context of Article 5.3] is its relationship to the facts that it tends to establish, i.e. its relevance" and that the context provided by Article 5.2 confirms that "the evidence in the application must be 'relevant'". (Panel Report, *Pakistan – BOPP Film (UAE)*, para. 7.19 [appealed; adoption pending]).

[57] Oxford Dictionaries online, definitions of "accuracy" https://www.oed.com/view/Entry/1281?redirectedFrom=accuracy#eid and "adequacy" https://www.oed.com/view/Entry/2298?redirectedFrom=adequacy#eid (accessed 10 May 2022), meaning 1, respectively.

[58] Oxford Dictionaries online, definition of "accurate" https://www.oed.com/view/Entry/1283?redirectedFrom=accurate#eid (accessed 10 May 2022), meaning 3.

[59] Oxford Dictionaries online, definition of "adequate" https://www.oed.com/view/Entry/2299?rskey=MTPVBE&result=1&isAdvanced=false#eid (accessed 10 May 2022), adj., meaning 3a.

[60] Cambridge dictionary online, definition of "sufficient" https://dictionary.cambridge.org/dictionary/english/sufficient (accessed 10 May 2022), adj., meaning 1.

[61] See e.g. Panel Reports, *Guatemala – Cement II*, para. 8.35; *Argentina – Poultry Anti-Dumping Duties*, para. 7.61; *Mexico – Steel Pipes and Tubes*, para. 7.21; and *US – Softwood Lumber V*, para. 7.77.

[62] See e.g. Article 5.7 and the heading of Article 5 of the Anti-Dumping Agreement.

that the "quantity and quality" of the evidence needed to initiate an investigation are generally lesser than what is required to impose anti-dumping measures.[63]

7.13. Article 5.3 thus requires investigating authorities to "examine" whether an application contains "enough", "precise", and "suitable" evidence of dumping, injury, and causation to justify the initiation of an investigation. At the same time, we agree with a prior adopted DSB report that the provision "says nothing regarding the nature of the examination to be carried out. Nor does it say anything requiring an explanation of how that examination was carried out."[64] Any review of an investigating authority's conduct under Article 5.3 must therefore be carried out on a case-by-case basis, in light of the specific facts and circumstances at issue.[65]

7.14. The applicable standard of review for examining the European Union's claims under Article 5.3 therefore requires us to consider whether an unbiased and objective investigating authority could have determined that the application and the revised application that FEDEPAPA submitted to MINCIT contained "sufficient" evidence – based upon an examination of the "accuracy" and "adequacy" of the evidence – to justify the initiation of an anti-dumping investigation into imports of frozen fries from Belgium, Germany, and the Netherlands.[66]

7.2.3 Definition of the product under consideration

7.2.3.1 Introduction

7.15. In its application of initiation, FEDEPAPA defined the product under consideration (PUC) based on a narrative description that, among other things, described the subject imports as: "potatoes, with or without skin, that are cut in any way, processed in some way (normally precooked and pre-fried), frozen and stored at low temperatures". This narrative further stated that these products are "most commonly known in the market as '*precooked, pre-fried and frozen potatoes*' with the emphasis on them being ready for final preparation and subsequent consumption". The narrative also indicated that these products are exported to Colombia "already precooked, pre-fried and frozen, under subheading 2004.10.00.00" and that "[t]he main raw materials used in the production of *precooked, pre-fried and frozen potatoes* are fresh (*unprocessed*) potatoes, followed to a lesser degree by vegetable oil, disodium pyrophosphate stabilizer (INS 450I), and certain other chemical elements."[67]

7.16. MINCIT drew upon this narrative description when initiating the underlying investigation. Specifically, MINCIT's notice of initiation defined the PUC to be "potatoes prepared or preserved (otherwise than by vinegar or acetic acid), frozen, classified under tariff subheading 2004.10.00.00".[68]

7.17. The European Union claims that, by initiating the investigation on the basis of an "over-inclusive definition" of the PUC, MINCIT failed to discharge its "duty to verify whether that definition was appropriate"[69], and to ensure that "there was sufficient evidence to launch an investigation with respect to the broad range of products covered" by that definition.[70] According to the European Union, the fact that the definition of the PUC includes tariff subheading 2004.10.00.00 ("potatoes, prepared or preserved otherwise than by vinegar or acetic acid, frozen") means that the PUC "covers a wide range of potato preparations".[71] According to the European Union, this definition was over-inclusive and unsupported by evidence because it included: (a) products that were not imported (or were only imported in very small quantities) into Colombia; and (b) products for which

[63] See e.g. Panel Reports, *Guatemala – Cement II*, para. 8.35; *Mexico – Steel Pipes and Tubes*, para. 7.22; and *Argentina – Poultry Anti-Dumping Duties*, para. 7.67.
[64] Panel Report, *EC – Bed Linen*, para. 6.198. See also *Mexico – Corn Syrup*, paras. 7.105 and 7.110.
[65] See e.g. Panel Report, *Mexico – Steel Pipes and Tubes*, para. 7.24.
[66] See e.g. Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.60. See also Panel Reports, *Mexico – Steel Pipes and Tubes*, paras. 7.26 and 7.32; *US – Softwood Lumber V*, para. 7.79; and *Guatemala – Cement II*, para. 8.31.
[67] Revised application, (Exhibit EU-10), section 8. (emphasis original)
[68] Notice of initiation, (Exhibit EU-1a), section 1.2.
[69] European Union's response to Panel question No. 1.2, para. 2.
[70] European Union's response to Panel question No. 1.2, para. 7.
[71] European Union's response to Panel question No. 1.2, para. 3. See also European Union's opening statement at the first meeting of the Panel, para. 9.

it was unclear whether they were produced by the domestic industry.[72] The European Union asserts that an "investigating authority should not limit itself to accepting whatever definition is used in the application", but, rather, should "determine independently if there is sufficient evidence to justify the initiation of an investigation in respect of the alleged dumping of a particular product."[73]

7.18. Colombia responds, *inter alia*, that the definition of the PUC cannot be challenged under Article 5.3 as this provision does not set out any relevant obligations. Recalling previous panels, Colombia adds that the Anti-Dumping Agreement also contains no provision defining the PUC but focuses, instead, on the definition of the "like" product, which in turn must reflect the PUC selected by the investigating authority. According to Colombia, it therefore follows that an investigating authority enjoys "material discretion" to define the PUC and that the Anti-Dumping Agreement does not envisage a challenge against this definition.[74]

7.2.3.2 Analysis

7.19. The European Union's Article 5.3 claim concerning the PUC requires us to consider whether an unbiased and objective investigating authority could have determined that the evidence that FEDEPAPA provided in its application and revised application was "sufficient" to initiate an investigation on imports of frozen fries based on the definition of the PUC that identified the subject imports as "potatoes, prepared or preserved otherwise than vinegar or acetic acid, frozen, classified under tariff subheading 2004.10.00.00".

7.20. At the outset, we observe that the European Union makes somewhat contradictory statements as part of its submissions to the Panel on this claim. On the one hand, the European Union asserts that MINCIT's "*definition* of the [PUC] was over-inclusive".[75] On the other hand, the European Union maintains that it "does not challenge the *definition* of the 'product under consideration' under Articles 2.1 and 2.6"[76]; nor does it allege "that Article 5.3 contains any requirement limiting the investigating authority's discretion in *defining* the product under consideration".[77]

7.21. Notwithstanding this, we understand the European Union to, in essence, argue that, for its claim under Article 5.3, "[t]he evidence supporting the description of the alleged dumped product" was "lacking", because, "if it had existed", it "would have shown" that the product imported into Colombia from the countries concerned "consisted quasi exclusively of the so-called 'traditional chips or fries'", such that "the inclusion of other categories of prepared or frozen potatoes in the definition of the [PUC] was therefore unjustified and unwarranted".[78] Specifically, we understand the European Union to assert that MINCIT's definition of the PUC was over-inclusive and unsupported by evidence because it included within its scope: (a) products that were not imported (or were only imported in very small quantities) into Colombia; and (b) products for which it was unclear whether they were produced by the domestic industry.[79]

7.22. Although the European Union attempts to couch its arguments in evidentiary terms to fit within the scope of Article 5.3, its position appears to presuppose and imply that the provisions of the Anti-Dumping Agreement, in fact, limit the definition of the PUC to include only those specific product categories: (a) that are actually imported into another country; and, (b) that are "like" the products actually produced by the domestic industry.[80] In our view, therefore, the European Union's arguments are related to the legal question of the obligations, if any, that the Anti-Dumping Agreement imposes with respect to the scope of the definition of the PUC. The European Union's arguments also raise the issue of the kind of evidence that is required as part of

[72] European Union's opening statement at the first meeting of the Panel, para. 9. See also European Union's response to Panel question No. 1.2, para. 3; and first written submission, para. 51.
[73] European Union's response to Panel question No. 1.2, para. 4.
[74] See e.g. Colombia's first written submission, paras. 5.11-5.16 (referring to Panel Reports, *Mexico – Steel Pipes and Tubes*, para. 7.21; and *EC – Salmon (Norway)*, para. 7.43); opening statement at the first meeting of the Panel, para. 2.4; and second written submission, paras. 2.4, 2.11, and 2.15.
[75] European Union's second written submission, para. 4. (emphasis added)
[76] European Union's response to Panel question No. 1.2, para. 5. (emphasis added)
[77] European Union's second written submission, para. 7. (emphasis added)
[78] European Union's response to Panel question No. 1.2, para. 7.
[79] European Union's opening statement at the first meeting of the Panel, para. 9. See also European Union's response to Panel question No. 1.2, para. 3; and first written submission, para. 51.
[80] European Union's opening statement at the first meeting of the Panel, para. 9. See also European Union's response to Panel question No. 1.2, para. 3; and first written submission, para. 51.

the application in support of the definition of the PUC and, specifically, whether the applicant needs to include evidence demonstrating that *all* the specific categories of products within the scope of the definition of the PUC are, in fact, imported into another country and are also produced by the domestic industry. In this sense, the European Union's arguments that are couched in evidentiary terms for the purpose of Article 5.3 also appear to be related to the interpretative issue of the obligations, if any, concerning the definition of the PUC and the evidence in support thereof at the initiation stage of an investigation.

7.23. With respect to the legal basis of its claim, we note that the European Union asserts "that MINCIT failed to draw the appropriate conclusions from the fact that FEDEPAPA's application and subsequent reply to a request for clarification did not contain all the information required by Article 5.2 subparagraphs (i) and (ii) of the Anti-Dumping Agreement".[81] Article 5.2(ii) states, in relevant part, that:

> An application … shall include evidence of (a) dumping, (b) injury … and (c) a causal link between the dumped imports and the alleged injury. … The application shall contain such information as is reasonably available to the applicant on the following:
>
> …
>
> a complete description of the allegedly dumped product[.]

7.24. Although Article 5.2(ii) requires an application to contain a "complete description" of the "allegedly dumped product", the provision does not otherwise define what may constitute a "complete" description or definition of the "allegedly dumped product" or the PUC .[82] In this respect, we note that the European Union "does not argue that Article 5.3 contains any requirement limiting the investigating authority's discretion in defining the product under consideration".[83] We also agree with prior adopted DSB reports that there is "no specific provision in the AD Agreement concerning the selection, description, or determination, of a product under consideration".[84] As such, we are of the view that the treaty text does not require an applicant to ensure that the definition of the PUC that it submits to an investigating authority excludes all those specific product categories: that are not imported into its country; and that are not produced by the domestic industry. In the absence of such a definitional requirement, we cannot see how Article 5.2(ii) can be read to require an applicant to provide supporting evidence demonstrating that all the specific categories of products within the range of products covered by the definition of the PUC are, in fact, imported into another country and are produced by the domestic industry. Consequently, there is no basis, under Article 5.3 read in light of Article 5.2(ii), to fault an investigating authority for not examining the sufficiency of such evidence which is not required in the first place.

7.25. With respect to Article 5.2(i), the European Union contends that MINCIT initiated the investigation based on insufficient evidence regarding the extent to which the PUC "corresponded" to the "like" product manufactured by the domestic industry.[85] In particular, the European Union argues that while Article 5.2(i) requires the applicant to "correctly describe" the domestic production of the "like" product, FEDEPAPA requested MINCIT to initiate the investigation in respect of a range of products that was wider than the range of "like" products manufactured by domestic Colombian

[81] European Union's second written submission, para. 5.

[82] We note that Article 5.2(ii) uses the term "allegedly dumped product" and not "product under consideration". Other provisions of the Anti-Dumping Agreement, such as, e.g. Article 2.2.1.1, use the term "product under consideration". In the present proceedings, we understand the parties to use these terms interchangeably, using various formulations, including the "product under consideration", the "product concerned", the "product in respect of which dumping was alleged", and "the product under investigation". (See e.g. European Union's first written submission, para. 51; European Union's response to Panel question No. 1.2, paras. 2-3 and 5; Colombia's first written submission, paras. 5.9 and 5.13; Colombia's second written submission, paras. 2.4 and 2.10). See also Panel Report, *US – Softwood Lumber V*, para. 7.152 (noting that "the allegedly dumped product … is generally referred to in the AD Agreement as the 'product under consideration'". (emphasis omitted)).

[83] European Union's second written submission, para. 7.

[84] Panel Report, *EC - Salmon (Norway)*, para. 7.43. See also Panel Report, *US – Softwood Lumber V*, para. 7.153.

[85] European Union's opening statement at the first meeting of the Panel, para. 9.

producers.[86] Thus, according to the European Union, MINCIT failed to verify the "accuracy" and "adequacy" of the evidence provided by the applicant in support of its "description of the domestic production" of the "like" product for purposes of Article 5.3 read in light of Article 5.2(i).[87]

7.26. Noting that the Anti-Dumping Agreement does not require an authority to ensure that the PUC includes only those exact "models" that are produced by the domestic industry, Colombia argues that any such "rule" has no basis in the treaty text.[88] Colombia also notes that, as Article 2.6 expressly contemplates that the PUC and the domestic like product may not be identical, it is "perfectly possible" for the PUC to be defined to contain elements or models that are not produced by the domestic industry.[89]

7.27. As we see it, the crux of the European Union's claim is that the applicant did not provide sufficient evidence demonstrating that the PUC "corresponded" to the "like" product produced by the domestic industry, and that this omission led to MINCIT using an over-inclusive definition of the PUC.[90] According to the European Union, the applicant was required to provide such information because: Article 5.2(i) requires a "correct description" of the domestic production of the "like" product; and, it is "reasonable" to expect that an applicant will provide "detailed and comprehensive" information about the range of products that are manufactured by the domestic industry that are "like" the PUC.[91]

7.28. Article 5.2(i) states, in relevant part, as follows:

> The application shall contain such information as is reasonably available to the applicant on the following:
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> …
>
> the identity of the applicant and a description of the volume and value of the domestic production of the like product by the applicant. Where a written application is made on behalf of the domestic industry, the application shall identify the industry on behalf of which the application is made by a list of all known domestic producers of the like product (or associations of domestic producers of the like product) and, to the extent possible, a description of the volume and value of domestic production of the like product accounted for by such producers[.]

7.29. Article 5.2(i) requires "a description of the volume and value of the domestic production of the like product by the applicant". In the case of an application made on behalf of the domestic industry, the provision requires, "to the extent possible, a description of the volume and value of domestic production of the like product accounted for by [the domestic] producers". We note that Article 5.2(i) does not use the terms "product under consideration" or "allegedly dumped product". We also note that the provision does not concern the issue of defining, describing, or determining the PUC. Rather, it focuses, *inter alia*, on information concerning the "domestic production of the like product". As such, we are of the view that Article 5.2(i) does not require an applicant to provide evidence demonstrating that the scope of the definition of the PUC "correspond[s]" exactly to the scope of the "like product manufactured by the domestic industry".[92]

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[86] Specifically, the European Union asserts that MINCIT's definition of the PUC contained within its scope products for which it was unclear whether they were produced by the domestic industry. (See e.g. European Union's, second written submission, para. 4).

[87] European Union's response to Panel question No. 12.1, para. 7; opening statement at the first meeting of the Panel, para. 9. See also European Union's response to Panel question No. 1.2, paras. 2-3.

[88] Colombia's second written submission, para. 2.7.

[89] Colombia also argues that limiting the PUC only to models also produced by the domestic industry would result in a "circumvention" of the disciplines of the Anti-Dumping Agreement, because this approach would effectively require importing countries to leave "gaps" in anti-dumping measures, thereby allowing for the entry of product models sold at dumped prices that compete with the domestic industry's products despite being slightly different. (Colombia's second written submission, paras. 2.20-2.21).

[90] European Union's opening statement at the first meeting of the Panel, para. 9.

[91] European Union's opening statement at the first meeting of the Panel, para. 10. See also European Union's first written submission, para. 51; and response to Panel question No. 1.2, paras. 2-3.

[92] European Union's opening statement at the first meeting of the Panel, para. 9.

7.30. We further note that Article 2.6 defines the term "like product" as follows:

> Throughout this Agreement the term "like product" ("produit similaire") shall be interpreted to mean a product which is identical, i.e. alike in all respects to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration.

7.31. The provision thus defines the "like product" by comparing it to the "product under consideration", i.e. a product which is either "identical" to the "product under consideration", or in the absence of such a product, another product which has characteristics "closely resembling" those of the "product under consideration". In this regard, we note and agree with the finding of a prior panel that:

> [T]he definition of "like product" implies a comparison with another product … the starting point can only be the "other product", being the allegedly dumped product. Therefore, once the product under consideration is defined, the "like product" to the product under consideration has to be determined on the basis of Article 2.6. However, in our analysis of the AD Agreement, we could not find any guidance on the way in which the "product under consideration" should be determined.[93]

7.32. In relying on Article 5.2(i) to challenge the manner in which MINCIT defined the PUC for the purpose of initiation, the European Union suggests that the specific products that are produced by the domestic industry should serve as the "starting point" for defining the PUC and that the definition of the PUC (or, in this case, the allegedly dumped product) should correspond exactly to the "like" products produced by the domestic industry. This line of inquiry, in our view, effectively reverses the logic underlying the definition of the term "like product" and finds no basis in the text of Articles 5.2(i) and 2.6.[94] We thus disagree with the European Union's argument that the range of products covered by MINCIT's definition of the PUC at the stage of initiation was inconsistent with Article 5.3 because it contained certain products that were not produced by the domestic industry.

7.33. The European Union presents two additional supporting arguments. First, the European Union contends that, because Article 5.3 governs the obligations of the investigating authority at the phase of initiation, it is at this stage that the investigating authority is required to examine "critically" the definition of the PUC and determine whether it is "appropriate".[95] We note that while an investigating authority, at the time of initiation, has to make an initial decision as to the scope of the investigation, and give "public notice" of the "product involved" pursuant to Article 12.1.1(i), the Anti-Dumping Agreement does not preclude an authority from continuing to adjust or to refine the scope of the PUC during the course of an investigation.[96]

7.34. Second, the European Union notes that adopting an "over-inclusive" definition of the PUC has repercussions for the subsequent conduct of an investigation. According to the European Union, the fact that MINCIT adopted an "over-inclusive" definition of the PUC erroneously caused sales prices of higher-value products in the domestic markets of the countries of origin to be included in the calculation of the normal value and the inclusion of these sales artificially inflated the margins of dumping found by MINCIT during the investigation.[97] Colombia responds that the fact that the

[93] Panel Report, *US – Softwood Lumber V*, para. 7.153.

[94] See e.g. Panel Report, *EC – Salmon (Norway)*, para. 7.51 (noting that, "[i]t is clear that the subject of Article 2.6 is not the scope of the product that is the subject of an anti-dumping investigation at all. Rather, the purpose of Article 2.6, apparent from its plain language, is to define the 'like product'").

[95] European Union's response to Panel question No. 1.2, para. 4.

[96] See e.g. Panel Report, *Mexico – Steel Pipes and Tubes*, para. 7.343 (observing that nothing in the Anti-Dumping Agreement "prevent[s] an investigating authority from adjusting the definition of the product under investigation", and that, "in certain circumstances, it might be necessary or highly appropriate for an investigating authority to adjust or refine its product definition in light of information collected and analysed in the course of the investigation that was not available to the IA at the time of initiation").

[97] European Union's response to Panel question No. 12.1, para. 8. See also European Union's response to Panel question No. 1.3, paras. 10-11; and opening statement at the second meeting of the Panel, para. 8.

definition of the PUC has implications for other steps in the investigation does not mean that this definition can be challenged under Article 5.3.[98]

7.35. We agree that the manner in which the PUC is defined at the initiation stage can have implications for an investigating authority's subsequent analysis. The WTO-consistency of any such subsequent analysis is, however, a distinct issue that would have to be examined in light of the specific claims and provisions that may be presented by a complainant. As such, we share the view of a prior panel that the mere possibility that an authority's decision at one stage of an investigation might lead to an error in its subsequent analysis is "not enough to persuade us to read obligations into the AD Agreement for which we can find no basis in the text of the Agreement".[99]

7.2.3.3 Conclusion

7.36. For the reasons set out above, we find that the European Union has not established that Colombia acted inconsistently with Article 5.3 of the Anti-Dumping Agreement because MINCIT failed to conclude "that the application did not provide sufficient evidence to justify opening an investigation on the alleged dumping of the full range of products falling under tariff subheading 2004.10.00.00."[100]

7.2.4 Representativeness of the applicant

7.2.4.1 Introduction

7.37. When initiating the underlying investigation MINCIT determined, *inter alia*, that "the party [represented by FEDEPAPA] accounts for 69% of the total volume of domestic production", and that this fulfilled "the requirement … that it must account for over 50% [of the total *production* of the like product] in order for the investigation to be initiated."[101] In addition, MINCIT noted that FEDEPAPA attached to its revised application "a list of 45 'non applicant companies', in respect of which it stated that steps were being taken to obtain a written document demonstrating the support of the entire domestic industry."[102]

7.38. The European Union claims that, in initiating the investigation, MINCIT acted inconsistently with Article 5.3 because the application did not include sufficient evidence of the applicant's representativeness of the domestic industry that manufactures the "like" product. The European Union presents three grounds in support of its claim. First, the European Union asserts that an apparent discrepancy exists between statements that FEDEPAPA made in section 3 of its revised application (stating that the domestic potato-processing industry represented 69% of the domestic market, not of the total production) and statements that MINCIT made in its decision of initiation (stating that FEDEPAPA's members account for some 69% of the total volume of the domestic industry).[103] Second, the European Union submits that it is "not clear" that the applicant actually represented potato-processing companies, both because FEDEPAPA's certificate of existence and legal representation does not specifically note that the federation's objectives include "the representation, defence, and protection of the interests of the potato-processing industry"; and because this certificate does not indicate whether the potato-processing industry could be members of the Colombian federation of potato growers.[104] Finally, the European Union asserts that it was "not clear", at the time of initiation, whether FEDEPAPA represented at least 25% of the total production of the like product as required by Article 5.4 of the Anti-Dumping Agreement.[105]

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[98] Colombia's second written submission, para. 2.4. See also Colombia's first written submission, para. 5.13.

[99] Panel Report, *EC – Salmon (Norway)*, para. 7.58.

[100] European Union's second written submission, para. 5.

[101] Notice of initiation, (Exhibit EU-1a), section 1.1 (emphasis added); Decree No. 1750 of 2015 regulating the application of anti-dumping duties, (Exhibit COL-8), Article 21.

[102] Notice of initiation, (Exhibit EU-1a), section 1.1.

[103] European Union's first written submission, para. 55.

[104] See e.g. European Union's first written submission, para. 57; and second written submission, paras. 9-12.

[105] European Union's first written submission, para. 56; opening statement at the first meeting of the Panel, paras. 11-12.

7.39. Colombia responds, *inter alia*, that the alleged discrepancy between the use of the term "domestic market" and the term "domestic production" is a small "semantic error by FEDEPAPA".[106] Moreover, according to Colombia, the European Union "seeks to interpret Colombian law by questioning whether FEDEPAPA represented, in a legitimate manner in accordance with Colombian law, the petitioning firms." For Colombia, nothing in the Anti-Dumping Agreement limits the entities which, under the applicable domestic legislation, are entitled to represent petitioning firms, nor the manner in which they wish to be represented, and as such, any determination of "representativeness" by an investigating authority is fully within the discretion of each Member. Colombia also asserts that the record indicates that MINCIT evaluated – in light of the regulations in force and all relevant facts – FEDEPAPA's capacity to represent the petitioning firms and determined that it was empowered to do so under Colombian law[107], and that MINCIT properly determined that the petitioning firms accounted for 69% of domestic production, thus satisfying the minimum thresholds of 25% and 50% required by Article 5.4. In any event, Colombia asserts that the European Union's "representativeness" claim must fail because (a) the European Union's arguments relate to Article 5.4 but it has failed to identify Article 5.4 among its claims; and (b) the issue of industry support "does not form part of the matter of 'evidence' under Article 5.3".[108]

7.2.4.2 Analysis

7.40. The European Union's "representativeness" claim requires us to consider whether an unbiased and objective authority could have determined that the evidence that FEDEPAPA provided in the application (and revised application) regarding its ability to represent the producers of the domestic "like" product was sufficient to initiate the investigation in accordance with Article 5.3 of the Anti-Dumping Agreement.

7.41. We recall that Article 5.3 requires an investigating authority to examine the "accuracy" and "adequacy" of the evidence of dumping, injury, and causal link between them, provided in the application, and to determine, on this basis, whether there is "sufficient" evidence to initiate an investigation.[109]

7.42. As we see it, there are three key points of contention between the parties regarding the representativeness of the applicant: first, an alleged discrepancy in the relevant evidence between "domestic market" and "domestic production"; second, whether the applicant was authorized to represent the domestic industry; and third, whether FEDEPAPA's members accounted for at least 25% of total production of frozen fries in Colombia. We examine each of these points, in turn.

7.43. As to the alleged discrepancy in the relevant evidence, the parties do not dispute that there is an inconsistency between *section 3 of the revised application*, which states that the domestic potato-processing industry represented 69% of the *domestic market*, and *section 1.1 of the decision of initiation*, which states that FEDEPAPA's members account for 69% of the total volume of the domestic *production*.

7.44. Section 3 of FEDEPAPA's revised application reads, in relevant part, as follows:

> **3 REPRESENTATIVENESS**
>
> **Decree 1750 of 2015** sets out the provisions applicable to investigations concerning imports of products originating in WTO member countries that generate or cause dumping while *affecting a significant portion of the domestic industry*.
>
> **Article 21** thereof states that "*for the purposes of initiating an investigation, an application shall be considered to have been made by or on behalf of the domestic industry if it is supported by those domestic producers whose collective output constitutes more than 50% of the total production of the like product produced by that*

[106] Colombia's first written submission, paras. 5.19-5.20.
[107] See e.g. Colombia's first written submission, paras. 5.27-5.29 and 5.34.
[108] See e.g. Colombia's first written submission, paras. 5.25-5.29; closing statement at the first meeting of the Panel, para. 4; and second written submission, paras. 2.26 and 2.28-2.30.
[109] See paragraph 7.12 above.

portion of the domestic industry expressing either support for or opposition to the application".

That said, the following facts should be highlighted in relation to representativeness:

…

b. The national processing industry, in accordance with "Annex 4", accounts for 69% of the *domestic market, exceeding the threshold laid down in the above-mentioned decree*.[110]

7.45. In support of its position, the European Union highlights the last part of the above excerpt, wherein FEDEPAPA states that "[t]he national processing industry" accounts for 69% of "the domestic market" instead of referring to domestic *production* as stated by MINCIT in the notice of initiation.[111] The European Union, however, does not explain how this discrepancy demonstrates an alleged lack of evidence regarding the applicant's representativeness of the total domestic production. Moreover, we consider that the passages cited above could reasonably be read to infer that the applicant wanted to refer to 69% of domestic production. This is because the figure of 69% in this passage refers explicitly to the "threshold laid down [in Article 21 of the Decree No. 1750 of 2015]" which requires compliance with the requirement of "more than 50% of the total *production* of the like product produced by that portion of the domestic industry expressing either support for or opposition to the application".[112] We thus agree with Colombia that this discrepancy appears to be a simple "semantic error by FEDEPAPA".[113] For this reason, we reject the European Union's argument that FEDEPAPA's use of the term "domestic market" (in section 3 of the revised the application) rather than the term "domestic production" demonstrates that the revised application did not include sufficient evidence of the applicant's representativeness of the domestic industry that manufactures the "like" product.

7.46. Turning to the question of whether the applicant was authorized to act on behalf of the domestic industry, we note that the parties' disagreement concerns the basis on which the applicant claimed to represent the potato-processing industry. The parties do not dispute that FEDEPAPA relied on its certificate of existence and legal representation to demonstrate its ability to represent the potato-processing industry.[114] Specifically, in its revised application, FEDEPAPA quoted this certificate, in relevant part, as follows:

1 INFORMATION CONCERNING THE APPLICANT

…

CORPORATE PURPOSE: The Colombian Federation of Potato Producers (Fedepapa) has the following objectives: (a) … (b) to represent, defend and protect the interests of potato growers before the national government and other public and private entities in all areas related directly or indirectly to the potato production system; …

[110] Revised application, (Exhibit EU-10), section 3. (italics and bold type original; underlining added)

[111] Specifically, the European Union refers to the notice of initiation, which in relevant part, reads as follows:

1.1 Representativeness

The legal representative of the applicant FEDEPAPA states that the party it represents accounts for 69% of the total volume of domestic *production* and would therefore fulfil the requirement of Article 21 of Decree No. 1750 of 2015 that it must account for over 50% in order for the investigation to be initiated.

(Notice of initiation, (Exbibit EU-1a), section 1.1 (bold type original; italics added))

[112] Decree No. 1750 of 2015 regulating the application of anti-dumping duties, (Exhibit COL-8), Article 21. (emphasis added)

[113] Colombia's first written submission, paras. 5.19-5.21.

[114] See e.g. Colombia's first written submission, para. 5.31; and European Union's opening statement at the second meeting of the Panel, para. 11.

> (k) to reaffirm the economic, social and political importance of potatoes and the potato industry before government agencies and private entities[.][115]

7.47. The European Union contends that the basis on which the applicant claimed to represent the potato-processing industry was "not clear" because none of the objectives listed in FEDEPAPA's certificate refer specifically to "the representation, defence, and protection of the interests of the potato-processing industry", and the wording of objective (k) is "vague and generic", in contrast to the precise wording of objective (b), which explicitly refers to "the representation, defence, and protection of the interests of the potato growers".[116] Colombia responds that the Anti-Dumping Agreement does not "limit" the types of entities that may represent petitioning firms, nor the manner in which they wish to be represented, and as such, this determination of "representativeness" is fully within the "discretion" of each Member.[117] Colombia also notes that MINCIT evaluated – in light of the regulations in force and all relevant facts – FEDEPAPA's capacity to represent the three petitioning firms (Congelagro, Frozen Express, and Soraca) and determined that it was empowered to do so under Colombian law.[118]

7.48. Article 5.1 of the Anti-Dumping Agreement recognizes that an application may be made "on behalf" of the domestic industry. Article 5.2(i) of the Anti-Dumping Agreement also states that an "application shall contain such information as is reasonably available to the applicant" concerning "the identity of the applicant" and, where the application is made "on behalf" of the domestic industry, the application shall also "identify the industry on behalf of which the application is made by a list of all known domestic producers of the like product (or associations of domestic producers of the like product)".

7.49. We note that nothing in the text of these provisions, or elsewhere in the Anti-Dumping Agreement, provides guidance as to how the representation of domestic producers in an anti-dumping investigation should be established by an applicant.[119] The Agreement is thus silent as to the form or manner in which an applicant, acting "on behalf" of the domestic industry, must demonstrate that it has the capacity to represent domestic producers of the like product (or associations of domestic producers of the like product).

7.50. The European Union does not assert that FEDEPAPA's certificate of existence and legal representation could *per se* not be used to demonstrate that FEDEPAPA has the capacity to represent the potato-processing industry. Rather, the European Union simply argues that it was "not clear" from the objectives listed in this certificate that FEDEPAPA could represent the producers of the potato-processing industry because none of these objectives expressly refer to "the representation, defence, and protection of the interests of the potato-processing industry", in contrast to the precise wording of objective (b) with respect to the representation of potato growers.

7.51. We note, however, that the European Union has not pointed the Panel to any evidence in support of its argument that the fact that FEDEPAPA's certificate does not "explicitly" authorize it to represent the potato-processing industry before MINCIT prevents it from doing so. Specifically, the European Union has not explained, much less demonstrated on the basis of evidence, (i) how the allegedly "vague and generic" wording of objective (k) *precludes* FEDEPAPA from representing the potato-processing industry, or (ii) how the fact that objective (b) explicitly refers to the "representation, defence, and protection of the interests of the potato growers" *precludes* FEDEPAPA from representing potato-processing producers. We also observe that the European Union has

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[115] Revised application, (Exhibit EU-10), section 1 (bold type original). See also FEDEPAPA's certificate of existence and legal representation, (Exhibit EU-14), p. 498.

[116] See e.g. European Union's first written submission, para. 57; response to Panel question No. 1.5, paras. 14-15; and second written submission, paras. 9 and 12.

[117] Colombia's first written submission, paras. 5.27-5.29 and 5.34-5.35; second written submission, para. 2.32.

[118] Colombia's first written submission, para. 5.34.

[119] In this regard, we note Colombia's assertion that "[t]he Anti-dumping Agreement does not contain any provision, rule or requirement as to when and how and under what conditions an entity can represent domestic producers and act on 'behalf of' them", indicating therefore that it is within the "investigating authorities[’] full discretion to determine, under the national legislation in force and, in each particular case, under what conditions an entity or person may validly represent domestic producers". (Colombia's response to Panel question No. 1.3 paras. 4-5 (fn omitted)). Apart from indicating the limitations imposed by Article 5.4 on industry support, the European Union does not appear to have disputed this assertion. (European Union's response to Panel question No. 1.4, para. 13).

neither argued, nor pointed to any evidence that demonstrates that the petitioning firms are not, in fact, members of FEDEPAPA.[120]

7.52. Absent specific guidance in the Anti-Dumping Agreement indicating how an applicant, acting "on behalf" of domestic producers, must establish that it has the capacity to represent these producers, as well as the lack of argument or evidence presented by the European Union for demonstrating that these producers were not members of FEDEPAPA, we fail to see the basis for the European Union's argument that there was no evidence that FEDEPAPA represented the domestic industry that produced the domestic like product.[121]

7.53. The final issue concerns whether the evidence that FEDEPAPA provided in its application was sufficient to establish that the application was expressly supported by at least 25% of the domestic producers of the "like" product. Colombia asserts that, while the European Union's argument is related to Article 5.4, the European Union has failed to identify Article 5.4 among its claims, and therefore the subject of industry support is outside the Panel's terms of reference.[122] In response to questioning by the Panel, the European Union clarified that it does not raise a claim under Article 5.4.[123]

7.54. Even assuming (*quod non*) that the obligations of Article 5.3 apply to the issue of industry support referred to in Article 5.4, we are of the view that the European Union has not established that MINCIT failed to examine the accuracy and adequacy of the information in the application concerning the issue of industry support. In particular, the European Union has not demonstrated, with supporting evidence, that the information provided by FEDEPAPA was insufficient to establish that the application was supported by at least 25% of the domestic producers of the "like" product, and was therefore insufficient to justify initiating the investigation.[124]

7.55. In support of its argument, the European Union refers to section 1.1 of MINCIT's notice of initiation entitled "Representativeness", which reads as follows:

> **1.1 Representativeness**
>
> The legal representative of the applicant FEDEPAPA states that the party it represents accounts for 69% of the total volume of domestic production and would therefore fulfil the requirement of Article 21 of Decree No. 1750 of 2015 that it must account for over 50% in order for the investigation to be initiated.[125]
>
> In addition, the applicant attached a list of 45 "non applicant companies", in respect of which it stated that steps were being taken to obtain a written document demonstrating the support of the entire domestic industry.[126]

[120] We also note Colombia's assertion, which the European Union has not countered, that the three companies represented by FEDEPAPA cooperated actively in the submission of documents and information to MINCIT. (Colombia's second written submission, para. 2.24; opening statement at the second meeting of the Panel, para. 2.17).

[121] For the same reasons, we also decline to accept the European Union's argument that FEDEPAPA's certificate of existence and legal representation does not indicate "in any form" that potato-processing companies could be members of this federation. (See e.g. European Union's first written submission, para. 57). In particular, the European Union has not demonstrated that this certificate precludes FEDEPAPA from representing potato-processing producers.

[122] Colombia adds that the issue of industry support does not form part of the matter of "evidence" under Article 5.3 of the Anti-Dumping Agreement. (Colombia's response to Panel question No. 1.8, paras. 19-20; closing statement at the first meeting of the Panel, para. 4; and second written submission, paras. 2.26-2.30).

[123] European Union's response to Panel question No. 1.7(a), para. 18. See also European Union's second written submission, para. 13.

[124] European Union's response to Panel question No. 1.7(a), para. 19; second written submission, para. 14.

[125] Decree No. 1750 of 2015 regulating the application of anti-dumping duties, (Exhibit COL-8), Article 21. We note that Article 21 of Decree No. 1750 of 2015 refers to both the minimum thresholds of 50% and 25% required by Article 5.4 of the Anti-Dumping Agreement.

[126] Notice of initiation, (Exhibit EU-1a), section 1.1.

7.56. According to the European Union, the industry support of at least 25% was "far from clear" from the text of the passages cited above.[127] In our view, however, a careful reading of these passages shows that the application was supported by "69% of the total volume of domestic production", indicating therefore that the application met the minimum threshold of 25% of the total production of the like product. We also recall that nothing in Article 5.3 sets out obligations with respect to how the examination of the evidence is to be undertaken or needs to be explained by investigating authorities.[128] As a consequence, we do not see the basis for the European Union's argument that it was "unclear" that the application was supported by at least 25% of the total production of the like product. Moreover, a mere allegation of a "lack of clarity" in an investigating authority's determination does not demonstrate a lack of "sufficient" evidence for purposes of initiation within the meaning of Article 5.3. In fact, the European Union recognizes that MINCIT did not fail to make a determination with regard to the degree of support of the application by the domestic industry.[129]

7.57. The European Union also argues that because the application did not "clearly" identify the producers of the like product and included potato growers among the domestic industry, there were legitimate "doubts" about the extent to which FEDEPAPA represented the producers of the like product at the time of initiation.[130] First, we note that section 3 of the revised application, which refers to the "representativeness" of FEDEPAPA, states that "[t]he national processing industry … accounts for 69% of the domestic [production]".[131] Second, annex 1 of the revised application provides a list of the domestic processing industry.[132] Finally, as noted in section 7.2.6 below, the record evidence shows that the data considered by MINCIT in its injury analysis relates explicitly to frozen precooked potatoes and to the potato-processing industry, indicating therefore that potato growers were not included in the definition of the domestic industry. Thus, the European Union's assertions that the application did not "clearly" identify the producers of the "like" product and included potato growers among the domestic industry do not correspond to the facts on the record. As such, we fail to see how these arguments can demonstrate the alleged lack of sufficient evidence establishing that the application was expressly supported by at least 25% of the domestic producers of the "like" product.

7.2.4.3 Conclusion

7.58. For the foregoing reasons, we find that the European Union has not established that Colombia acted inconsistently with its obligations under Article 5.3 because MINCIT did not have sufficient evidence demonstrating that FEDEPAPA represented the domestic producers of the "like" product so as to justify initiating the underlying investigation.

7.2.5 Evidence used to determine the normal value

7.2.5.1 Introduction

7.59. As part of its revised application for the initiation of the underlying investigation, FEDEPAPA stated that "the export price for frozen precooked potatoes exported from Belgium, the Netherlands (Holland), Germany and France to the United Kingdom during the period July 2014-June 2016 was used as the basis for the normal value."[133] In its notice of initiation, MINCIT determined the normal

[127] European Union's response to Panel question No. 1.7(a), para. 18.

[128] We agree with prior adopted DSB reports that Article 5.3 does not speak to "the nature of the examination to be carried out", nor does it require "an explanation of how that examination was carried out". (Panel Report, *EC – Bed Linen*, para. 6.198); nor does Article 5.3 "impose an obligation on the investigating authority to set out its resolution of *all* underlying issues considered in making [its determination of whether there is sufficient evidence to justify initiation]". (Panel Report, *Mexico – Corn Syrup*, para. 7.102 (emphasis original)).

[129] See e.g. European Union's second written submission, para. 13.

[130] European Union's second written submission, para. 14. According to the European Union, this "in itself" indicates that the evidence supporting the application was "sketchy" and "insufficient". (Ibid. para. 15).

[131] As noted in paragraph 7.45 above, we understand that the applicant referred to 69% of "domestic production".

[132] Revised application, (Exhibit EU-10), section 11; Annex 1 of the revised application, (Exhibit COL-36-A (BCI)).

[133] Revised application, (Exhibit EU-10), section 10(a). As noted in fn 51 above, MINCIT elected to exclude imports from France from the investigation at issue on the grounds that "there have been no imports since 2015" and that therefore "it [was] not appropriate to link these imports to the investigation". (Notice of initiation, (Exhibit EU-1a), section 1.4).

value "based on the information provided by the applicant", noting that the "applicant proposed" taking "the export price of frozen precooked potatoes from Belgium, the Netherlands (Holland), Germany and France to the United Kingdom" during "the period from July 2014 [to] June 2016" as the basis for the normal value.[134]

7.60. The European Union claims that, by relying exclusively on the export price of frozen precooked potatoes from Belgium, the Netherlands, and Germany, to the United Kingdom – i.e. a "third country" – for determining the normal value, MINCIT acted inconsistently with Article 5.3 of the Anti-Dumping Agreement because it did not examine the "adequacy" of the evidence provided in the application.[135] Although the European Union accepts that an investigating authority can rely on sales prices to a third country to calculate the normal value for purposes of initiation[136], it submits that under Article 5.2(iii) of the Anti-Dumping Agreement, information on sales prices in the domestic markets of the country or countries of origin is to be "preferred" for this purpose.[137] Highlighting the use of the term "where appropriate" in Article 5.2(iii), the European Union argues that recourse to sales prices in third countries should "only occur where information on the price of sales in the domestic market of the country or countries of origin is not reasonably available to the applicant, or where, in accordance with … Articles 2.2 and 2.2.1 of the Anti-Dumping Agreement, the investigating authority determines that the sales in the domestic market of the exporting country do not permit a proper comparison with the export price", such as in cases "where there are no such domestic sales in the ordinary course of trade, they are not representative or where, for other reasons, a proper comparison is not possible."[138] Emphasizing that there was no indication of the existence of any of these conditions in the underlying investigation[139], the European Union claims that MINCIT acted inconsistently with Article 5.3 because it did not question the "adequacy" of the evidence submitted by FEDEPAPA.[140]

7.61. Colombia responds that, although the European Union focuses on the term "where appropriate" in Article 5.2(iii), it does not explain the relevance of that provision in the context of a claim under Article 5.3.[141] For Colombia, the use of the term "where appropriate" in Article 5.2(iii) highlights that the applicant has the flexibility and the "free choice" to submit the information on normal value that appears to the applicant to be the "most" appropriate and "relevant".[142] Colombia takes issue with the European Union's reliance on Articles 2.2 and 2.2.1, noting that the strict criteria and hierarchies under those provisions do not apply at the stage of the initiation of an investigation.[143] According to Colombia, the European Union's position means effectively that the initiation of an investigation requires a full investigation beforehand and that, therefore, this approach incorrectly mixes the key elements of an "investigation" with the requirements of an "initiation".[144]

7.2.5.2 Analysis

7.62. As discussed above, under Article 5.3, the determination as to whether there is "sufficient evidence to justify the initiation of an investigation" must be based on an examination of the "accuracy" and "adequacy" of the "evidence provided in the application". Article 5.3 thus requires authorities to examine the evidence "in the application". Article 5.2, in turn, specifies what "evidence" and "information" is to be provided in the "application". Specifically, the provision requires an "application" to include evidence of "(a) dumping, (b) injury … and (c) a causal link

[134] Notice of initiation, (Exhibit EU-1a), section 2.1.3.
[135] European Union's response to Panel question No. 12.6, paras. 25-26 (noting that "[t]he European Union does not express an opinion on whether that information was accurate or not. However, the European Union considers that information on the export price of frozen precooked potatoes from Belgium, the Netherlands, and Germany to the United Kingdom was not adequate evidence to serve as a basis for normal value calculations in the context of initiation.")
[136] European Union's second written submission, para. 16; response to Panel question No. 1.9(a), para. 29.
[137] European Union's first written submission, para. 58; response to Panel question No. 12.6, para. 26.
[138] European Union's second written submission, para. 16; response to Panel question No. 1.9(a), para. 29; and response to Panel question No. 12.6, para. 26.
[139] European Union's second written submission, para. 17.
[140] European Union's response to Panel question No. 12.6, paras. 25-26.
[141] Colombia's first written submission, para. 5.43; second written submission, para. 2.41.
[142] Colombia's response to Panel question No. 1.9(b), paras. 37-39.
[143] Colombia's second written submission, para. 2.41; response to Panel question No. 1.9(b), paras. 42-43 and 45-66.
[144] Colombia's second written submission, paras. 2.49-2.53.

between the dumped imports and the alleged injury".[145] With respect to normal value, Article 5.2(iii) further requires that the "application shall contain such information as is reasonably available to the applicant on":

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

7.63. The reference to evidence provided "in the application" in Article 5.3 and the requirements of Article 5.2(iii), specifying in detail what evidence and information is to be included in "the application", establish, in our view, an explicit connection or link between these two provisions. As we see it, an examination of the accuracy and adequacy of the evidence in the application with a view to determining whether it is sufficient for initiation cannot be undertaken in the abstract or in a vacuum. Rather, such an examination under Article 5.3 is informed by Article 5.2, including Article 5.2(iii).[146] For this reason, we disagree with Colombia insofar as it argues that "the terms of Article 5.2 are not in principle relevant to assessing the European Union's claim" under Article 5.3.[147]

7.64. Examining the context provided by Article 5.2(iii) for purposes of our assessment of MINCIT's conduct under Article 5.3 in this dispute, we note that the provision envisages that the application shall contain certain information relating to the prices of the "product in question". Specifically, Article 5.2(iii) requires the application to contain "such information" as is "reasonably available" to the applicant "on prices at which the product in question is sold when destined for consumption in the domestic markets of the country or countries of origin or export (or, where appropriate, information on the prices at which the product is sold from the country or countries of origin or export to a third country or countries, or on the constructed value of the product)".[148]

7.65. Article 5.2(iii) thus envisages the possibility of providing three types of pricing information in the application: (a) information on prices at which the product in question is sold when destined for consumption in the domestic markets of the country or countries of origin or export ("domestic sales prices"); or, "where appropriate", (b) information on the prices at which the product is sold from the country or countries of origin or export to a third country or countries ("third-country sales prices"); or, also "where appropriate", (c) on the constructed value of the product ("constructed value"). The possibility of providing third-country sales prices and constructed value is, *unlike the case of domestic sales prices*, textually limited to "where" this is "appropriate" and forms part of a parenthetical text.

7.66. The parties differ in their interpretation of the term "where appropriate" in Article 5.2(iii). The European Union argues that the phrase "where appropriate" allows an application to provide information on third-country sales prices only: (a) when information on domestic sales prices in the countries of origin is not "reasonably available" to the applicant; or (b) when, "in accordance with the detailed rules in Articles 2.2 and 2.2.1 of the Anti-Dumping Agreement, the investigating authority determines that the sales in the domestic market of the exporting country do not permit a proper comparison with the export price".[149] With respect to the second situation, the

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[145] See paragraph 7.12 above.

[146] See e.g. Panel Report, *Guatemala – Cement II*, para. 8.35; see also Panel Report, *Morocco – Definitive AD Measures on Exercise Books (Tunisia)*, para. 7.355 [appealed; adoption pending] (noting that "Article 5.2 determines the content of the complaint submitted by the domestic industry and does not therefore create directly an obligation for the investigating authority. It is Article 5.3 that … sets the criteria for the review that the authority must undertake to determine whether the evidence contained in the complaint is sufficient to justify the initiation of an investigation. We therefore agree … that Article 5.2 describes the evidence and information that an applicant must include in its complaint, but that the relevant obligations that apply to the investigating authority are set out in Article 5.3.")

[147] Colombia's response to Panel question No. 1.9(d), para. 71; first written submission, para. 5.43; and second written submission, para. 2.41.

[148] This is to be read in light of the qualification in the *chapeau* Article 5.2 that "such information" be "reasonably available to the applicant".

[149] European Union's response to Panel question No. 1.9(a), para. 29; response to Panel question No. 12.3(c), para. 21.

European Union further explains that this is "the case where there are no such domestic sales in the ordinary course of trade, they are not representative or where, for other reasons, a proper comparison is not possible."[150]

7.67. Colombia responds that the term "where appropriate" "indicates and underscores the free choice of the applicant to submit the information on normal value that appears to the applicant to be the most appropriate and relevant."[151] According to Colombia, the term "where appropriate" means that "if the applicant deems it appropriate, it may choose to submit information not on sales in the domestic market, but information on production costs or prices of exports to a third country."[152] Colombia avers that "the drafters included this phrase … most likely to indicate that, in the context of initiation … the Article 2.2 hierarchy of methods for determining normal value does not apply".[153] Colombia submits that, even assuming that the term "where appropriate" requires "some form of explanation or explicit enquiry", this can be limited only to the question of whether "the third market data is 'appropriate' or 'suited' to be used as evidence of normal value".[154]

7.68. We note, first, that Articles 5.2(iii) and 5.3 concern the contents of an application to initiate an investigation and an investigating authority's examination thereof with a view to determining whether they "justify the initiation of an investigation". In other words, the two provisions, by their terms, concern the initiation stage of an investigation, which is distinct from the "subsequent investigation".[155] Furthermore, as discussed above, Article 5.2 requires an "application" to include evidence of "(a) dumping, (b) injury … and (c) a causal link between the dumped imports and the alleged injury".[156] Thus, initiation requires evidence of the same three elements (i.e. dumping, injury, and the causal link between them) as those whose existence must be ultimately determined in order to impose anti-dumping measures.[157] At the same time, we note the absence of a textual link between Article 5.2(iii), on the one hand, and Articles 2.2 and 2.2.1, on the other hand.[158] We also recall that the "quantity and quality" of the evidence needed to initiate an investigation are generally lesser than what is required to impose anti-dumping measures.[159]

7.69. As noted above, the possibility of providing third-country sales prices in an application is, *unlike the case of domestic sales prices*, textually limited in Article 5.2 to "where" this is "appropriate". The dictionary definition of the word "where" includes "[i]n a or the case in which …;

[150] European Union's response to Panel question No. 1.9(a), para. 29; second written submission, para. 16.

[151] Colombia's response to Panel question No. 1.9(b), para. 37.

[152] Colombia's response to Panel question No. 1.9(b), para. 39.

[153] Colombia's response to Panel question No. 1.9(b), para. 40. See also Colombia's response to Panel question No. 1.9(b), paras. 42-64.

[154] Colombia's closing statement at the second meeting of the Panel, paras. 1.9-1.11. Colombia maintains that MINCIT addressed this question. (Ibid. para. 1.11).

[155] See e.g. Article 5.7 of the Anti-Dumping Agreement and the heading of Article 5.

[156] Similarly, Article 5.6 states that if an investigating authority decides to initiate an investigation without having received a written application, i.e. on its own initiative, it "shall proceed only if [it] ha[s] sufficient evidence of dumping, injury and a causal link, as described in paragraph 2 [of Article 5], to justify the initiation of an investigation".

[157] See e.g. Panel Reports, *Guatemala – Cement II*, para. 8.35; *Mexico – Steel Pipes and Tubes*, para. 7.21; and *US – Softwood Lumber V*, para. 7.77.

[158] We note that several third parties in this dispute highlight the limited relevance of Articles 2.1 and 2.2 for purposes of Article 5.2(iii). Brazil considers that the expression "where appropriate" in Article 5.2 should not be interpreted based on Articles 2.1 and 2.2, which concern later stages in the investigation to which a higher threshold of assessment applies. (Brazil's third-party response to Panel question No. 1.3(c), para. 11). For Japan, the term "where appropriate" does not refer to situations provided under Article 2.2 and is not limited to those situations, as there may be other situations that could satisfy the "where appropriate" requirement. (Japan's third-party response to Panel question No. 1.3(c), para. 12). The United States takes the position that, unlike Articles 2.1 and 2.2, Article 5.2 does not indicate that an applicant must establish normal value based on the comparable price for the like product when destined for consumption in the export country, nor does this provision indicate that an application must establish that there are no sales of the like product when destined for consumption in the export country before the applicant may rely on information about third-country sales or constructed value. Moreover, the information provided in an application need not be of the same quantity or quality that would be necessary to make a preliminary or final determination. (United States third-party response to Panel question No. 1.3(c), para. 8).

[159] See paragraph 7.12 above. See also Panel Reports, *Guatemala – Cement II*, para. 8.35; and *Mexico – Steel Pipes and Tubes*, paras. 7.22 and 7.27.

in the circumstances … in which".[160] The word "appropriate" is defined, *inter alia*, as "[s]pecially fitted or suitable".[161] These definitions convey to us the notion of being "suitable" to the particular situation or circumstances at hand.[162] For purposes of an investigating authority's examination under Article 5.3, therefore, the use of the term "where appropriate" implies, at a minimum, the exercise of judgment as to the fitness, suitability, or "appropriateness", of using third-country sales prices, *instead of domestic sales prices*, in light of the specific situation at hand. As relevant context, we also note that the *chapeau* of Article 5.2 states that "[s]imple assertion, unsubstantiated by relevant evidence, cannot be considered sufficient to meet the requirements of this paragraph." Relatedly, we note that Article 5.2(iii) uses the term "where appropriate"[163], and not the term "where *the applicant considers or deems it* appropriate".

7.70. For these reasons, we disagree with Colombia's interpretation that the use of the term "where appropriate" indicates that an applicant enjoys complete "free choice" to submit any information that it desires for calculating normal value. Accepting Colombia's interpretation would deny any effect to the meaning or placement of the term "where appropriate", contrary to the principle of effectiveness in treaty interpretation. Rather, as we see it, an investigating authority's examination, under Article 5.3, of the "adequacy" and sufficiency of the evidence for determining normal value for purposes of initiation requires, at the very least, an exercise of judgment as to the suitability or appropriateness of using third-country sales prices, instead of domestic sales prices, in the specific situation before it. Finally, while Article 5.3 requires investigating authorities to examine the accuracy and adequacy of the evidence provided in the application for purposes of initiation in a given case, we agree with prior adopted DSB reports that the provision says nothing regarding the nature of the examination to be carried out in the abstract. Nor does it say anything requiring an explanation of how that examination was carried out.[164] Any review of an investigating authority's conduct under Article 5.3 must therefore be carried out on a case-by-case basis.[165]

7.71. In light of these requirements and the attendant standard of review, we turn to examine the facts of the underlying investigation.

7.72. In its application, FEDEPAPA stated that "[t]he implicit export prices from Belgium to Colombia compared with other countries nearer to Belgium are relatively low, with the United Kingdom and Denmark standing out as countries particularly close to Belgium."[166] MINCIT subsequently requested the applicant to submit information on, *inter alia*, "[a] definition of the normal value selected for the purpose of determining the dumping margin, as shown in Figure 3, that is to say, the price of the product under consideration set by Belgium, the destination country chosen, as well as the period that should correspond to June 2016 to June 2017."[167]

7.73. Responding to MINCIT's query, FEDEPAPA, in its revised application, did not address why it elected to provide third-country sales prices rather than domestic sales prices as the basis for the normal value calculation. Instead, it simply stated that the "export price for frozen precooked potatoes exported from Belgium, the Netherlands (Holland), Germany and France to the United Kingdom during the period July 2014-June 2016 *was used* as the basis for the normal value."[168] The only further explanation offered by FEDEPAPA relates to its specific choice of the United Kingdom for the third-country sales prices:

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[160] Oxford Dictionaries online, definition of "where" https://www.oed.com/view/Entry/228210?redirectedFrom=where#eid (accessed 6 May 2022), adv., meaning 10b.

[161] Oxford Dictionaries online, definition of "appropriate" https://www.oed.com/view/Entry/9870?rskey=F8CcMO&result=1&isAdvanced=false#eid (accessed 5 May 2022), adj., meaning 5.

[162] See e.g. Decision by the Arbitrator, *US – Upland Cotton (Article 22.6 – US I)*, para. 4.46; and Panel Report, *EC – Tube or Pipe Fittings*, para. 7.240.

[163] We note that the term "where appropriate" appears in the co-authentic Spanish and French texts of the Anti-Dumping Agreement as "cuando proceda" and "le cas échéant", respectively.

[164] Panel Report, *EC – Bed Linen*, para. 6.198. See also *Mexico – Corn Syrup*, paras. 7.105 and 7.110.

[165] See e.g. Panel Report, *Mexico – Steel Pipes and Tubes*, para. 7.24.

[166] FEDEPAPA's application, (Exhibit EU-8a), clause 10.

[167] MINCIT's deficiency letter to FEDEPAPA, (Exhibit EU-9a), numeral 2.

[168] Revised application, (Exhibit EU-10), section 10(a). (emphasis added)

> This country was chosen because other applications have already identified it as a major producer, importer and consumer of frozen precooked potatoes, and it is perhaps the largest market in Europe.
>
> The United Kingdom and the countries covered by this application are members of the European Union and therefore subscribe to the free movement of goods within the common market, which would make the prices of exports from these countries to the British market very close to those in the domestic market of the country that is the subject of this application.[169]

7.74. In its notice of initiation of the investigation, MINCIT determined the normal value "based on the information provided by the applicant", noting that the "applicant" proposed taking "the export price of frozen precooked potatoes from Belgium, the Netherlands (Holland), Germany and France to the United Kingdom during the period from July 2014 to June 2016" as the basis for the normal value.[170] The notice of initiation further stated that:

> The applicant clarifies that the United Kingdom is the chosen country due to the fact that, in other applications, it has already been identified as a major producer, importer and consumer of frozen precooked potatoes and is perhaps the largest market in Europe. Moreover, the United Kingdom and the countries named in the application are members of the European Union and therefore benefit from the free movement of goods through the common market, which would make the export prices of these countries to the British market very close to those found on the domestic market of the countries being studied.[171]

7.75. Thus, the applicant did not offer, and MINCIT accordingly did not examine, any reasons as to why information on domestic sales prices was not provided in the application for initiation. As part of its decision to initiate, MINCIT simply recited – without any further "examination" – the reasons provided by FEDEPAPA for choosing third-country sales prices to the United Kingdom as the basis for determining normal value for purposes of initiation.[172] In our view, the record thus indicates a complete absence of any explanation by FEDEPAPA or examination thereof by MINCIT as to *why* domestic sales prices were not contained in the application and could not be used for purposes of initiation in the specific situation at hand.[173]

7.76. Colombia submits that the reference to "other applications" in FEDEPAPA's application and MINCIT's notice of initiation "refers to Brazil's initiation of an anti-dumping investigation on imports of the same product from Germany, Belgium, France and the Netherlands."[174] The decision to initiate an anti-dumping investigation on frozen potatoes by the Brazilian investigating authority was included as an annex to FEDEPAPA's application.[175] As Colombia acknowledges, the Brazilian authority's initiation decision contains not only a discussion as to the appropriateness of using United Kingdom sales prices as the basis of normal value, but also the reasons as to how and why the applicant in that investigation unsuccessfully attempted to obtain domestic sales prices in the first place.[176]

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[169] Revised application, (Exhibit EU-10), section 10(a).

[170] Notice of initiation, (Exhibit EU-1a), section 2.1.3.

[171] Notice of initiation, (Exhibit EU-1a), section 2.1.3.

[172] Any explanations that may have been provided *after* initiation are, in our view, not relevant to a claim under Article 5.3.

[173] Contrary to Colombia's arguments, this does not mean that MINCIT was necessarily required "to provide explanations as to how the authority attempted to obtain information on the domestic market from the applicant". (Colombia's response to Panel question No. 12.2, para. 30).

[174] Colombia's response to Panel question No. 12.8, para. 58.

[175] FEDEPAPA's application, (Exhibit EU-8a), annex 5. See also Colombia's response to Panel question No. 12.2(a), para. 55; and Annexes to FEDEPAPA's application, (Exhibit COL-35-B).

[176] Colombia points out that, "with regard to the calculation of the normal value, the applicant included as an annex in its application the Brazilian investigating authority's initiation decision in its anti-dumping investigation on frozen potatoes, in which it was explained that the Brazilian applicant was unable to obtain the internal price within the relevant European Union member States, but was able to obtain information on the United Kingdom's prices through the Eurostat service. The Brazilian application also explained that the United Kingdom was one of the largest frozen potato markets and, as part of the European Union's single market, an appropriate basis for the normal value.". (Colombia's response to Panel question No. 12.2, para. 55).

7.77. Based on the reference to "other applications" in the initiation decision above, Colombia submits that MINCIT "relied upon this information in essentially the same way as the Brazilian authority did."[177] We note however that there is nothing on the record before us indicating that FEDEPAPA made any attempt to obtain domestic sales prices (like the applicant in the Brazilian investigation) or that it otherwise faced any difficulties (similar to those that were faced by the Brazilian applicant) in obtaining this information.[178] In the absence of any such indication, and given our understanding of "where appropriate" as requiring the exercise of judgment and a case-by-case assessment by the investigating authority, we disagree with Colombia that the mere reference to and inclusion of the Brazilian initiation decision suffices to establish MINCIT's compliance with Article 5.3 in the investigation at issue.

7.78. We therefore consider that MINCIT did not examine whether the use of third-country sales prices, instead of domestic sales prices, was "appropriate" in the specific facts and circumstances of the investigation at issue. Accordingly, we find that MINCIT acted inconsistently with Article 5.3 of the Anti-Dumping Agreement because it did not examine the "adequacy" of the evidence contained in the application to determine whether there is "sufficient evidence" to justify initiation.

7.2.5.3 Conclusion

7.79. For the reasons set out above, we find that the European Union has established that Colombia acted inconsistently with Article 5.3 of the Anti-Dumping Agreement because, by failing to examine whether the use of third-country sales prices, instead of domestic sales prices, was "appropriate" in the specific facts and circumstances of the investigation at issue, MINCIT did not examine the "adequacy" of the evidence in the application to determine whether there is "sufficient" evidence to justify the initiation of the investigation.

7.2.6 Evidence relied upon for the injury analysis

7.2.6.1 Introduction

7.80. MINCIT determined that "there were grounds" to initiate the underlying investigation "taking into account the existence of evidence of dumping and injury to the domestic industry caused by the low import prices and reflected in the negative performance in terms of market share, installed capacity and domestic profitability."[179]

7.81. The European Union alleges that the evidence of injury examined and relied upon by MINCIT was insufficient to justify initiating the investigation because it is "clear" from both FEDEPAPA's application and the notice of initiation that MINCIT relied, "to a large extent", on the impact of the allegedly dumped imports on "farmers and on the prices for fresh potatoes", instead of the impact of the imports on the price of the domestic "like" product and on the domestic potato-processing industry manufacturing the "like" product. On this basis, the European Union contends that MINCIT did not respect "the limits" of the "domestic industry", as required by Article 3.1 of the Anti-Dumping Agreement.[180]

7.82. Colombia responds, *inter alia*, that the European Union misunderstands the facts because, for the material injury analysis (at the initiation, preliminary, and final stages), MINCIT considered "exclusively" the relevant data of producers of precooked frozen potatoes, and the discussion of the fresh potato sector simply provides the more general economic context for the investigation.[181] Colombia also indicates that the notice of initiation mentions potato producers because they "are

[177] Colombia's response to Panel question No. 12.2, para. 38.

[178] Given our terms of reference, we do not make any findings on the WTO-consistency of the Brazilian authority's initiation decision.

[179] Notice of initiation, (Exhibit EU-1a), section 3. See also ibid. section 2.2 on "Analysis of Material Injury".

[180] European Union's first written submission, paras. 60 and 63; response to Panel question No. 1.13(b), para. 43; second written submission, paras. 29 and 33; and opening statement at the first meeting of the Panel, para. 18. The European Union further indicates that it was not clear whether the applicant had established that the injury is a material injury, a threat of material injury, or a significant delay in the development of the domestic industry.

[181] Colombia's first written submission, para. 5.55.

also victims of the injury caused to the local processing industry".[182] Colombia argues that, in any event, MINCIT's examination respects "the limits" of the PUC and, consequently, the scope of the domestic industry.[183] Finally, Colombia recalls that Article 5.3 requires only that the record at the time of initiation contain sufficient evidence to demonstrate the existence of, *inter alia*, injury, and considers that nothing in this provision requires the authority to publish any analysis of this evidence.[184]

7.2.6.2 Analysis

7.83. In our view, the central question that arises with respect to this claim is whether an unbiased and objective investigating authority could have determined that the evidence of injury that FEDEPAPA had submitted to MINCIT in its application and revised application was sufficient to justify the initiation of the investigation pursuant to Article 5.3 of the Anti-Dumping Agreement.

7.84. We recall that the text and context of Article 5.3 requires the investigating authority to examine the accuracy and adequacy of the evidence of, *inter alia*, injury that is provided in the application.[185] Article 5.2(iv), which specifies the evidence of injury that an application must contain, requires an applicant to provide such information, "as is reasonably available" to it, on the "evolution of the volume of the allegedly dumped imports", the "effect of these imports on prices" of the domestic like product, and the "consequent impact of the imports" on the performance of the domestic industry, in terms of relevant domestic factors, such as those listed in Article 3.2 and Article 3.4 of the Anti-Dumping Agreement.[186]

7.85. The parties do not dispute that the injury analysis that MINCIT conducted as part of its decision to initiate refers to both potato-processors and fresh potato producers. Thus, the parties' arguments raise two questions: first, whether MINCIT did, in fact, focus its injury analysis mainly – or, "to a large extent" – on fresh potato producers and on prices of fresh potatoes rather than on producers of precooked potatoes and on prices of frozen precooked potatoes; and second, if this was indeed the case, whether this focus by MINCIT was inconsistent with Article 5.3.

7.86. We note that MINCIT examined the injury to the domestic industry in section 2.2 of its notice of initiation entitled "Analysis of Material Injury". The text of this section indicates, *inter alia*, that MINCIT examined the "import performance" of the allegedly dumped imports by evaluating the volume, trends, and market share of "potatoes prepared or preserved otherwise than by vinegar or acetic acid, frozen, imported under subheading 2004.10.00.00".[187] This section also indicates that MINCIT examined the impact of these imports on the performance of the potato-processing industry. In particular, we note that MINCIT examined certain economic factors and indices, namely, the

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[182] Colombia's first written submission, paras. 5.57-5.58; second written submission, para. 2.55 and fn 39.

[183] Colombia's first written submission, paras. 5.61-5.62.

[184] Colombia's second written submission, paras. 2.57-2.59. Colombia notes that the evidence that the authority had before it at the time of initiation is that contained in FEDEPAPA's application and its revised application (together with its annexed documents), which comprised the relevant evidence for establishing the existence of injury and causation for initiation purposes.

[185] See paragraph 7.12 above.

[186] Article 5.2(iv) of the Anti-Dumping Agreement, in relevant part, reads as follows:

> The application shall contain such information as is reasonably available to the applicant on the following:
>
> …
>
> information on the evolution of the volume of the allegedly dumped imports, the effect of these imports on prices of the like product in the domestic market and the consequent impact of the imports on the domestic industry, as demonstrated by relevant factors and indices having a bearing on the state of the domestic industry, such as those listed in paragraphs 2 and 4 of Article 3.

[187] For instance, MINCIT noted that the volume of these imports had increased in absolute terms during the period under review and that the F.o.b. prices of these imports registered a decrease during the same period. (Notice of initiation, (Exhibit EU-1a), section 2.2.3). See also Technical report on the initiation, (Exhibit COL-10 (BCI)), sections 2.2.1 and 2.2.2.

market share, capacity utilization, cost of production, profitability, and structure, of the potato-processing industry.[188]

7.87. MINCIT also referred to the injury to potato farmers, by indicating that "if 100,000 tonnes of frozen precooked potatoes were to enter and potentially lead to the restructuring and/or disappearance of the domestic industry", there would be a displacement of "625,000 tonnes of fresh potatoes for industrial use", affecting "10,417 farmers".[189] MINCIT concluded that, based on the information provided by the applicant, "there were grounds" to initiate an investigation into imports of "potatoes, prepared or preserved otherwise than by vinegar or acetic acid, frozen, classified under tariff subheading 2004.10.00.00", originating in Belgium, the Netherlands, and Germany, "taking into account the existence of evidence" of "injury to the domestic industry."[190]

7.88. The European Union does not dispute these facts, but rather contends that it is "clear" from the notice of initiation that, in reaching its conclusion, MINCIT relied, "to a large extent", on the impact of the allegedly dumped imports on potato farmers and on the prices for fresh potatoes (i.e. instead of data associated with the producers of precooked potatoes and on prices of frozen precooked potatoes).

7.89. In support of its position, the European Union refers to sections 2.2 and 2.2.2 of the notice of initiation[191] which, in relevant part, read as follows:

> **2.2 ANALYSIS OF MATERIAL INJURY**
>
> The Colombian Federation of Potato Producers stated that both the potato-processing industry and Colombian farmers have suffered injury, which is reflected in various indicators such as market share, installed capacity and profitability, due to the low prices of the imported product.
>
> …
>
> **2.2.2 Potato farmers**
>
> The application mentions that in order to produce 1 kg of frozen precooked potatoes, 2 kg of fresh potatoes are required with a 32% use of production per hectare. Therefore, *with the Belgian market surpluses, if 100,000 tonnes of frozen precooked potatoes were to enter and potentially lead to the restructuring and/or disappearance of the domestic industry*, 625,000 tonnes of fresh potatoes for industrial use would be displaced, which would be equivalent to 15,625 hectares and 10,417 farmers affected, each with 1.5 hectares on average.[192]

7.90. In our view, and contrary to the European Union's assertion, these excerpts reveal that MINCIT *did not* conduct an injury analysis with respect to the producers of fresh potatoes. In particular, we note that the second passage cited above (entitled "2.2.2 Potato farmers") does not identify or evaluate volume trends of the allegedly dumped imports but considers the *hypothetical* scenario of "100,000 tonnes of frozen precooked potatoes" imported from Belgium. Moreover, this passage does not examine the effect of these *hypothetical* imports on the prices of fresh potatoes, by evaluating, for instance, whether the prices of fresh potatoes were undercut,

[188] Notice of initiation, (Exhibit EU-1a), section 2.2.1. The technical report on the initiation shows that MINCIT also examined the competitiveness of the potato-processing industry, and stresses that the half-yearly statements of results and production cost, as well as the table of injury variables of frozen potatoes, were also evaluated. (Technical report on the initiation, (Exhibit COL-10 (BCI)), sections 2.2.1 and 2.2.3).

[189] Notice of initiation, (Exhibit EU-1a), section 2.2.2. See also Technical report on the initiation, (Exhibit COL-10 (BCI)), section 2.2.3.

[190] Notice of initiation, (Exhibit EU-1a), section 3.

[191] European Union's response to Panel question No. 1.13(a), para. 39. The European Union considers it "apparent" from the notice of initiation, which relied exclusively on the statements made by FEDEPAPA in its application, that the impact of the imports of frozen fries on the economic situation of Colombian potato farmers played a "prominent" role in the injury analysis at the stage of initiation. (European Union's second written submission, para. 33). See also European Union's response to Panel question No. 1.13(a), paras. 40-42.

[192] Notice of initiation, (Exhibit EU-1a), sections 2.2 and 2.2.2 (emphasis added). These sections are the only instances where MINCIT's injury analysis at the time of initiation refers to producers of fresh potatoes.

depressed, or suppressed by these *hypothetical* imports. Likewise, nothing in this passage analyses the consequent impact of these *hypothetical* imports on the producers of fresh potatoes. Indeed, nothing in this passage shows that MINCIT evaluated economic factors and indices such as actual and potential decline in sales, profits, or market share of the producers of fresh potatoes.

7.91. Moreover, in our view, it can reasonably be inferred from the text of the passage in question that the "injury" alleged to the fresh potatoes producers is phrased as a *consequence* of the "restructuring and/or disappearance of the domestic industry" (by displacing "625,000 tonnes of fresh potatoes for industrial use") which could potentially occur "if 100,000 tonnes of frozen precooked potatoes were to enter" into the Colombian domestic market. In other words, in our view, the alleged injury to the fresh potatoes producers is discussed as a *consequence* of the alleged injury to the potato-processing industry, further suggesting that MINCIT's injury analysis concerned only this industry.[193] This is also confirmed by the fact that, as discussed in paragraph 7.86 above, the record indicates that in considering whether the application contained sufficient evidence of injury, MINCIT focused its analysis on the alleged injury to the potato-processing industry.[194]

7.92. The European Union acknowledges that the injury examination that appears in MINCIT's notice of initiation "explicitly" referred to the potato-processing industry, but maintains that "it is not less true" that this analysis also referred to potato farmers and, therefore, that "the limits" of the domestic industry as defined in Article 3.1 of the Anti-Dumping Agreement were not respected.[195] However, for the reasons set forth above, we disagree with the premise of the European Union's contention that MINCIT relied, "to a large extent", on the impact of the allegedly dumped imports on "farmers and on the prices for fresh potatoes". We therefore see no factual basis for the European Union's contention that the definition of the domestic industry was not respected as required by Article 3.1 because, according to the European Union, it included the potato producers within its scope.[196]

7.2.6.3 Conclusion

7.93. Based on the foregoing, we reject the European Union's arguments that it is "clear" from the notice of initiation that MINCIT relied, "to a large extent", on the impact of the allegedly dumped imports on "farmers and on the prices for fresh potatoes", and that, for this reason, MINCIT did not respect "the limits" of the "domestic industry".[197] Accordingly, we find that the European Union has

[193] In this regard, we note Colombia's assertion that potato producers were mentioned in the notice of initiation "only to give a complete picture of the entire potato sector". Colombia also indicates that the mention of these producers is "similar" to the analysis of domestic economic interest in other jurisdictions, for instance, the "Union interest" in the European Union. (Colombia's first written submission, para. 5.58; second written submission, fn 39). The European Union disagrees with Colombia's "public interest" defence for a number of reasons. (European Union's opening statement at the first meeting of the Panel, paras. 19-21). We do not consider it necessary to address the arguments of the parties in this regard because, as already noted, we are of the view that MINCIT did not conduct an injury analysis with respect to the producers of fresh potatoes.

[194] Specifically, as noted in paragraph 7.86 above, MINCIT examined the evolution of imports of the allegedly dumped product and evaluated the consequent impact of those imports (in terms of relevant economic factors and indices) only with respect to the potato-processing industry. See also Notice of initiation, (Exhibit EU-1a), sections 2.2.1 and 2.2.3; and Technical report on the initiation, (Exhibit COL-10 (BCI)), sections 2.2.1-2.2.3.

[195] European Union's response to Panel question No. 1.13(b), para. 43; second written submission, para. 33.

[196] European Union's first written submission, para. 60; second written submission, paras. 29 and 33. In any event, we note that nothing in the record appears to indicate that the domestic industry in the underlying investigation included producers of fresh potatoes, and the European Union has provided no evidence demonstrating otherwise. In particular, we note that although MINCIT did not specifically set out a definition of the "domestic industry" at initiation, its views on the subject are clear from the notice of initiation where MINCIT: (a) defined the PUC as "potatoes prepared or preserved otherwise than by vinegar or acetic acid, frozen, imported under subheading 2004.10.00.00"; (b) considered that "the product under investigation that is allegedly sold at dumping prices in Colombia and the product manufactured by the applicant firm supporting the application corresponds to: potatoes, prepared or preserved otherwise than by vinegar or acetic acid, frozen, classified under tariff subheading 2004.10.00.00, originating in Belgium, the Netherlands (Holland) and Germany", and also "stressed" that "the differences between the domestic and imported product, apart from usable yield and the colour of the pulp, tend to be null"; and (c) determined that the party represented by the applicant accounted "for 69% of the total volume of domestic production". (Notice of initiation, (Exhibit EU-1a), sections 1.1-1.3).

[197] We do not agree with the European Union's assertion that Colombia's submission of annexes 10-12 of FEDEPAPA's revised application after the first meeting of the Panel is not in accordance with

not established that Colombia acted inconsistently with its obligations under Article 5.3 because the evidence of injury examined and relied upon by MINCIT was insufficient to justify the initiation of the investigation.

7.2.7 Evidence concerning causation

7.2.7.1 Introduction

7.94. MINCIT determined that, "based on the information provided by the applicant", "there were grounds" for ordering the initiation of the underlying investigation, "taking into account the existence of evidence of dumping and injury to the domestic industry caused by the low import prices and reflected in the negative performance in terms of market share, installed capacity and domestic profitability."[198]

7.95. The European Union claims that Colombia acted inconsistently with Article 5.3 because MINCIT did not examine whether the evidence provided by the applicant was sufficient to establish a causal link between the European imports and the alleged injury for purposes of initiating the underlying investigation.[199] Alleging that the evidence of causal link in the application was limited to a single assertion by the applicant[200], the European Union contends that such an assertion, together with the evidence on the evolution of imports originating in Belgium, Germany and the Netherlands, was insufficient to establish a causal link between those imports and the alleged injury suffered by the domestic industry.[201]

7.96. Colombia maintains that the European Union has failed to discharge its burden of proof because its "superficial" allegation, "without proof or reference, does not suffice to establish a *prima facie* case".[202] Noting that there is no obligation under Article 5.3 to provide an analysis or explanation of the evidence, Colombia submits that, in any case, MINCIT's analysis is "sufficiently clear and rigorous" to meet any requirement for an explanation.[203] Colombia also asserts that the application contained information that was "fully sufficient" to justify the initiation of the investigation.[204]

7.2.7.2 Analysis

7.97. Before addressing the substance of its claim, we note that, in its first written submission, the European Union alleged that "there was no separate analysis [in MINCIT's notice of initiation] of the existence of a causal link between the alleged injury and the volumes of imports".[205] Subsequently, in response to questioning by the Panel, the European Union clarified that this allegation in its first written submission "merely supports the claim … that the applicant provided no evidence of a causal link between the imports originating in Belgium, Germany and the Netherlands and the alleged injury".[206] Given the European Union's clarification, we limit ourselves to examining its claim as it relates to the evidence concerning the causal link that was provided by the applicant and MINCIT's examination thereof.

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paragraph 5(1) of the Working Procedures of the Panel. (European Union's response to Panel question No. 12.9, para. 33). We note, in this regard, that paragraph 5(1) of the Working Procedures of the Panel allows for the submission, after the first substantive meeting, of factual evidence necessary for purposes of answering questions posed by the Panel.

[198] Notice of initiation, (Exhibit EU-1a), section 3. See also Technical report on the initiation, (Exhibit COL-10 (BCI)), section 2.4.

[199] European Union's opening statement at the first meeting of the Panel, para. 23. See also European Union's second written submission, para. 40.

[200] The European Union asserts that the evidence of causal link, "on the basis on which MINCIT took its initiation decision", was "limited to an assertion by the applicant that '[o]wing to the low prices of the imported product … the domestic product loses share compared to the European product'". (European Union's second written submission, para. 36).

[201] European Union's second written submission, paras. 36-37; opening statement at second meeting of the Panel, paras. 20-21.

[202] Colombia's first written submission, paras. 5.70-5.71.

[203] Colombia's first written submission, paras. 5.67-5.69.

[204] Colombia's response to Panel question No. 1.17(a), para. 87; first written submission, para. 5.72. See also Colombia's response to Panel question No. 1.17(a), paras. 88-91.

[205] European Union's first written submission, para. 65.

[206] European Union's response to Panel question No. 1.16(a), para. 46.

7.98. We recall that Article 5.3 requires the investigating authority to examine the "accuracy" and "adequacy" of the evidence of dumping, injury, and the causal link between them, that is contained in the application in order "to determine whether there is sufficient evidence to justify the initiation of an investigation".[207] We also recall that Article 5.3 does not prescribe any specific requirement with respect to the manner in which an investigating authority is to examine the evidence provided in the application. Nor does Article 5.3 require any specific explanation of how such examination was conducted.[208] Any review of an investigating authority's examination under Article 5.3 must therefore be conducted on a case-by-case basis.

7.99. The central question we must consider with respect to this claim is whether an unbiased and objective investigating authority could have determined that the evidence of causal link that was contained in FEDEPAPA's application and revised application to MINCIT was sufficient to justify the initiation of the investigation pursuant to Article 5.3.

7.100. The European Union's claim that MINCIT failed to examine the sufficiency of evidence of a causal link is grounded on two contentions. First, the European Union highlights that the evidence in the application was "limited" to an assertion by the applicant that "[o]wing to the low prices of the imported product … the domestic product loses share compared to the European product".[209] Second, for the European Union, this assertion, together with the evidence on the evolution of imports originating in Belgium, Germany and the Netherlands, is insufficient to establish a causal link between those imports and the injury alleged by the domestic industry.[210] Colombia responds that the evidence and allegations in the application and revised application were "more than sufficient" to justify the initiation of the investigation.[211]

7.101. We note, first, that, as Colombia points out, the evidence in the application concerning the causal link goes beyond the single "assertion" identified by the European Union.[212] For example, the application contains a graph depicting the "quarterly evolution of market shares" of imports in comparison to the domestic industry for 2014-2015 and observes that "the share of imports in the past three years has grown by 63%, with that of the domestic industry declining by 15%".[213] The application also states, together with supporting data, that the "decline in the share of the domestic industry along with a static market has *resulted in* a loss (idle capacity) of 60% compared with the installed capacity of 90,000 tonnes/year, with actual production only being 36,000 tonnes/month."[214] The revised application further states that the "low prices of the imported product have *caused* significant changes in the market, *leading* the consumer to seek out low-priced products and *causing* the domestic product to lose its share to Europe. In some cases, the low-margin volume has increased, unlike for traditional potato products, which *ends up* affecting profitability, capacity and structure."[215] Nowhere in its submissions does the European Union address these statements and the information that was contained in the application and the revised application or explain their alleged shortcomings. As a factual matter, therefore, we are unable to agree with the European Union's argument that the evidence in the application pertaining to the causal link was limited to a single assertion made by the applicant.

7.102. We now turn to the European Union's argument that a single assertion by the applicant, together with the evidence on the evolution of imports originating in the three countries in question, was "insufficient" to establish a causal link.[216] In support, the European Union points out that, as acknowledged by FEDEPAPA, "the Colombian market for frozen fries grew by 33% between 2014 and 2016"[217] and that "Colombia does not deny that there were other sources of imports of the product, it only confirms that FEDEPAPA singled out the three European countries in its letter of

[207] See paragraph 7.12 above.
[208] See paragraph 7.13 above. See also *Panel Report, EC – Bed Linen*, para. 6.198.
[209] European Union's second written submission, para. 36.
[210] See e.g. European Union's second written submission, para. 37.
[211] See e.g. Colombia's response to Panel question No. 1.17(a), paras. 87-91.
[212] Colombia's first written submission, para. 5.72. See also Colombia's response to Panel question No. 1.17(a), paras. 88-91.
[213] FEDEPAPA's application, (Exhibit EU-8a), clause eight and graph 3.
[214] FEDEPAPA's application, (Exhibit EU-8a), clause nine and table 2. (emphasis added)
[215] Revised application, (Exhibit EU-10), section 10(d)(i) (emphasis added; fn omitted). See also fn 229 below.
[216] European Union's second written submission, para. 37.
[217] European Union's second written submission, para. 37.

19 July 2017 supplementing the application".[218] While we agree that the application notes the growth of the Colombian market[219], we also note that the application indicates that, notwithstanding the fact that "the [Colombian] market grew by 33%", "the imported product [grew] by 66% while the domestic product grew by 13%", "result[ing]" in an "alarming projection for the domestic product" by "losing domestic competitiveness and [market] share".[220] The European Union does not address this information contained in the application.

7.103. As to the European Union's argument concerning the existence of "other sources of imports" of the like product into Colombia[221], we note that while the application and revised application include data of imports originating in countries other than Belgium, the Netherlands, and Germany[222], they also contain specific data regarding the imports originating in the three countries in question.[223] The information considered by MINCIT with respect to the condition of the domestic industry also focuses on the data of the countries concerned.[224] Besides its mere assertion that there were "other sources of imports"[225] the European Union does not offer any further explanation of why it considers this to be problematic in light of the information actually contained in the application and revised application.

7.104. Finally, we note that MINCIT did not determine that the domestic industry was injured solely because of a decline in market share.[226] Rather, we observe that, in initiating the investigation, MINCIT stated that it took "into account the existence of evidence of dumping and injury to the domestic industry *caused* by the low import prices and *reflected in* the negative performance in terms of market share, installed capacity and domestic profitability."[227] We further note that MINCIT's causation determination referred to the allegations presented by the applicant[228], and that the applicant provided information and argument relating to the causal link between the allegedly dumped imports and the alleged injury, including (in addition to the factors above) structure, competitiveness, and growth decline.[229] In the absence of any discussion by the European Union of these aspects of MINCIT's examination, we are unable to find, as asserted by the European Union,

[218] European Union's second written submission, para. 37.

[219] Revised application, (Exhibit EU-10), section 10(d)(i).

[220] Specifically, the applicant indicated that "in 2016, the market grew by 33% compared to 2014, with the imported product growing by 66% while the domestic product grew by 13%, losing competitiveness and share. This has resulted in an alarming projection for the domestic product." (Revised application, (Exhibit EU-10), section 10(d)(i)).

[221] See e.g. European Union's second written submission, para. 37; and opening statement at the second meeting of the Panel, para. 21.

[222] See e.g. FEDEPAPA's application, (Exhibit EU-8a), clause six, graph 1; and clause eight, graph 3; and Revised application, (Exhibit EU-10), section 9(b), tables 2-3 and graph 7.

[223] See e.g. Revised application, (Exhibit EU-10), section 9(b) tables 2-3 and graph 8, section 10(b)(i) table 5, and section 10(b)(iii) table 7. We also note MINCIT's observation in its notice of initiation that "[t]he share of the countries exporting frozen precooked potatoes to Colombia has changed dramatically over the period under review, with the rapid growth of imports from Belgium standing out above all. The share of these imports rose from 23% in the first half of 2014 to 57% in the second half of 2016, which means that the country's share of Colombia's imports has increased by 148% (197% in the first half of 2017)". (Notice of initiation, (Exhibit EU-1a), section 2.2.3.

[224] Notice of initiation, (Exhibit EU-1a), sections 2.2.1 and 2.2.3.

[225] European Union's opening statement at the first meeting of the Panel, para. 22; second written submission, para. 37.

[226] We note in particular MINCIT's statement in its notice of initiation that:

> In line with what has been demonstrated and submitted by FEDEPAPA, the investigating authority notes that there is evidence of dumping and injury and, in addition, the applicant considers that the facts presented above significantly compromise the sector's efforts to, *inter alia*, substitute imports of frozen precooked potatoes, increase the industrialization of domestic production and contribute to stabilizing domestic market prices. This is the result of the imports at dumping prices from Belgium, the Netherlands (Holland) and Germany.

(Notice of initiation, (Exhibit EU-1a), section 2.3)

[227] Notice of initiation, (Exhibit EU-1a), section 3. (emphasis added)

[228] Notice of initiation, (Exhibit EU-1a), section 2.3.

[229] The applicant alleged that "in some cases" the "low-margin has increased" and that this "affect[ed] profitability, capacity and structure". (Revised application, (Exhibit EU-10), section 10(d)(i)). In particular, as observed by MINCIT in its notice of initiation, the applicant explained that "the volume of the food service sector (the sector on which import penetration has been concentrated) has fallen by 4%", and that such decrease "would have had the greatest impact on traditional products, which are three times more profitable than the products created to compete with the importers", affecting therefore the "profitability, capacity and structure" of the potato-processing industry. (Notice of initiation, (Exhibit EU-1a), section 2.2.1).

that this analysis was "limited" to the applicant's assertion that market share decline was caused by the low prices of the imported product.[230]

7.2.7.3 Conclusion

7.105. In light of the allocation of the burden of proof in these proceedings and the limited arguments presented by European Union, we find that the European Union has not established that Colombia acted inconsistently with its obligations under Article 5.3 because the evidence of causal link examined and relied upon by MINCIT was insufficient to justify the initiation of the investigation.

7.2.8 Overall conclusion under Article 5.3

7.106. For the reasons set out above, we find that:

a. the European Union has not established that Colombia acted inconsistently with Article 5.3 of the Anti-Dumping Agreement because MINCIT failed to verify that there was sufficient evidence to initiate the investigation with respect to the full range of products covered by tariff subheading 2004.10.00.00;

b. the European Union has not established that Colombia acted inconsistently with its obligations under Article 5.3 because MINCIT did not have sufficient evidence demonstrating that FEDEPAPA represented the domestic producers of the "like" product so as to justify initiating the underlying investigation;

c. the European Union has established that Colombia acted inconsistently with Article 5.3 of the Anti-Dumping Agreement because, by failing to examine whether the use of third-country sales prices, instead of domestic sales prices, was "appropriate" in the specific facts and circumstances of the investigation at issue, MINCIT did not examine the "adequacy" of the evidence in the application to determine whether there is "sufficient" evidence to justify the initiation of the investigation;

d. the European Union has not established that Colombia acted inconsistently with its obligations under Article 5.3 because the evidence of injury examined and relied upon by MINCIT was insufficient to justify the initiation of the investigation; and

e. the European Union has not established that Colombia acted inconsistently with its obligations under Article 5.3 because the evidence of causal link examined and relied upon by MINCIT was insufficient to justify the initiation of the investigation.

7.3 "Consequential" claim under Article 5.8 of the Anti-Dumping Agreement

7.107. The European Union claims that, "[a]s a consequence of the lack of sufficient evidence to justify initiating the anti-dumping investigation"[231], Colombia also acted inconsistently with the first sentence of Article 5.8 of the Anti-Dumping Agreement.[232] For the European Union, having determined that the application did not contain sufficient evidence of either dumping or injury to justify initiation, MINCIT should have rejected FEDEPAPA's application and terminated the investigation.[233]

7.108. Colombia responds that the European Union's consequential claim under Article 5.8 is without factual or legal basis[234], and adds that the European Union has not clearly explained why,

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[230] For the same reason, we are also unable to find, as asserted by the European Union, that MINCIT's analysis of causal link was "extremely limited" and was based on "the statements submitted by FEDEPAPA". Besides the issue that we have addressed in this paragraph, the European Union does not explain why it considers MINCIT examination to be "extremely limited" for purposes of Article 5.3. (European Union's opening statement at the second meeting of the Panel, para. 20).

[231] European Union's first written submission, para. 68.

[232] European Union's first written submission, para. 68.

[233] See e.g. European Union's first written submission, paras. 70-71. The European Union adds that because the initiation of the investigation is inconsistent with Articles 5.3 and 5.8, the whole investigation procedure is vitiated and cannot lead to a lawful imposition of anti-dumping duties on the subject imports.

[234] Colombia's first written submission, para. 6.2; second written submission, para. 3.1.

in its view, MINCIT violated Article 5.8 and how this violation relates to the alleged violation of Article 5.3. Observing that the European Union has not included this explanation in either its first written submission or its first oral statement, Colombia contends that the European Union has not made a *prima facie* case on a timely basis, and therefore the Panel "must" reject the European Union's claim under Article 5.8.[235]

7.109. The European Union does not present any independent bases for the alleged breach of Article 5.8 of the Anti-Dumping Agreement; instead, its claim under this provision is dependent entirely upon a finding that Colombia acted inconsistently with Article 5.3 of the Anti-Dumping Agreement.[236] In these circumstances – and having already found that Colombia acted inconsistently with Article 5.3 – we do not consider it necessary to make additional findings concerning the European Union's Article 5.8 claim in order to provide a positive resolution to the dispute before us.[237]

7.4 Claims under Articles 6.5 and 6.5.1 of the Anti-Dumping Agreement: MINCIT's confidential treatment of certain information

7.4.1 Introduction

7.110. Following the receipt of the "application for the initiation of an investigation into alleged dumping in imports of potatoes, prepared or preserved (otherwise than vinegar or acetic acid), frozen, classified under tariff subheading 2004.10.00.00 originating in Belgium, the Netherlands (Holland), France and Germany"[238], MINCIT sent a deficiency letter to the applicant, requesting, *inter alia*, "[t]he identification and justification of confidential documents and a summary or non-confidential version of these documents".[239] The applicant, in its revised application, stated that "[t]he specific names of the domestic industry companies, all their financial information, and in general numerical, and any data that is classified as a trade secret, are confidential."[240] The applicant submitted annex 10 of its revised application as confidential information.[241] The applicant also redacted certain information in section d(i) of the revised application, entitled "injury for the potato-processing industry".[242] MINCIT granted confidential treatment to "anything related to financial information or data considered to be part of trade secrets", but stated that the specific names of the companies in the domestic industry cannot be considered confidential.[243]

7.111. The European Union claims that Colombia acted inconsistently with its obligations under Articles 6.5 and 6.5.1 of the Anti-Dumping Agreement when MINCIT elected to grant confidential treatment to the information in section d(i) and annex 10 of FEDEPAPA's revised application[244] because:

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[235] Colombia's second written submission, para. 3.3.

[236] European Union's second written submission, para. 43; response to Panel question No. 2.1, para. 50.

[237] See e.g. Panel Reports, *EU – Footwear (China)*, para. 7.935; *Argentina – Poultry Anti-Dumping Duties*, para. 7.369; and *US – Steel Plate*, para. 7.103. See also Panel Report, *US – Differential Pricing Methodology*, paras. 7.114-7.115.

[238] Notice of initiation, (Exhibit EU-1a), p. 1. As noted in fn 51 of this Report, MINCIT elected to exclude imports from France when it initiated the investigation because "there have been no imports since 2015" and therefore "it [was] not appropriate to link these imports to the investigation". (Notice of initiation, (Exhibit EU-1a), section 1.4).

[239] MINCIT's deficiency letter to FEDEPAPA, (Exhibit EU-9a), numeral 5.

[240] Revised application, (Exhibit EU-10), section 11.

[241] We note Colombia's clarification that annex 10 of the revised application, (Exhibit COL-11), refers to three separate annexes (i.e. annex 10, annex 11, and annex 12), which contain confidential information of the three domestic companies on whose behalf the applicant filed its application, and that were provided directly to MINCIT by these companies in accordance with MINCIT's instructions (i.e. by dividing it into annex 10, annex 11, and annex 12). (Colombia's response to Panel question No. 1.1, para. 3). For ease of reference, we will refer to these three annexes as "annex 10 of the revised application" or "annex 10".

[242] Revised application, (Exhibit EU-10), section 10 d(i).

[243] Notice of initiation, (Exhibit EU-1a), section 1.5.

[244] In response to questioning by the Panel, the European Union confirmed that the information treated as confidential that forms the factual basis of its Articles 6.5 and 6.5.1 claims is the redacted information in section d(i) of FEDEPAPA's revised application and the confidential information contained in annex 10 thereto. (European Union's response to Panel question No. 3.1, para. 55).

a. the applicant did not "actually show" the necessary "good cause" to treat the information at issue as confidential;

b. MINCIT did not objectively determine whether the justification provided by the applicant constituted "good cause";

c. the applicant did not provide non-confidential summaries of the confidential information at issue; and

d. to the extent that the confidential information was not susceptible to summary, a statement of reasons supporting such claim was not provided.[245]

7.112. Requesting the Panel to reject these claims, Colombia asserts, *inter alia*, that MINCIT's "methodology" for the confidential treatment of the information at issue complied with the requirements under Articles 6.5 and 6.5.1 and that none of the European Union's allegations have any factual basis.[246]

7.113. We begin our analysis by recalling the applicable requirements under Articles 6.5 and 6.5.1 of the Anti-Dumping Agreement (section 7.4.2). We then turn to consider whether, in light of the specific facts and circumstances of this dispute, Colombia acted inconsistently with the applicable requirements under Articles 6.5 and 6.5.1 in respect of: (a) the redacted information in section d(i) of FEDEPAPA's revised application (sections 7.4.3 and 7.4.4); and (b) the information contained in annex 10 of the revised application (sections 7.4.5 and 7.4.6).

7.4.2 Applicable requirements under Articles 6.5 and 6.5.1 of the Anti-Dumping Agreement

7.114. Articles 6.5 and 6.5.1 of the Anti-Dumping Agreement read as follows:

> Any information which is by nature confidential (for example, because its disclosure would be of significant competitive advantage to a competitor or because its disclosure would have a significantly adverse effect upon a person supplying the information or upon a person from whom that person acquired the information), or which is provided on a confidential basis by parties to an investigation shall, upon good cause shown, be treated as such by the authorities. Such information shall not be disclosed without specific permission of the party submitting it.[17]
>
> [17] Members are aware that in the territory of certain Members disclosure pursuant to a narrowly-drawn protective order may be required.
>
> The authorities shall require interested parties providing confidential information to furnish non-confidential summaries thereof. These summaries shall be in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence. In exceptional circumstances, such parties may indicate that such information is not susceptible of summary. In such exceptional circumstances, a statement of the reasons why summarization is not possible must be provided.

7.115. Article 6.5 addresses the confidential treatment of certain information submitted by interested parties to an investigation. It envisages the confidential treatment by investigating authorities of two categories of information: (a) information that is "by nature confidential", or (b) information that is submitted "on a confidential basis by parties to an investigation". These two categories of information are not mutually exclusive and, in practice, may often overlap.[247] "[U]pon good cause shown", Article 6.5 requires an investigating authority to: (a) treat such information as confidential; and (b) not disclose such information without the specific permission of the submitter. We agree with prior adopted DSB reports that the showing of "good cause" is a "condition precedent

[245] European Union's first written submission, paras. 73-74 and 87. See also European Union's second written submission, paras. 45-55; closing statement at the first meeting of the Panel, para. 6; and closing statement at the second meeting of the Panel, para. 3.

[246] Colombia's first written submission, paras. 7.3, 7.15-7.16, and 7.43-7.44; second written submission, paras. 4.4-4.5 and 4.28; and opening statement at the first meeting of the Panel, paras. 5.1-5.3.

[247] Appellate Body Report, *EC – Fasteners (China)*, para. 536.

for according confidential treatment to information submitted to an authority"[248] and applies to both information that is by nature confidential as well as information that is submitted on a confidential basis.[249]

7.116. The text of Article 6.5 provides limited illustrative guidance on what constitutes "good cause"[250] as well as the manner in which such good cause is to be "shown".[251] We agree with previous DSB reports that "good cause" refers to "a reason sufficient to justify the withholding of information from both the public and from the other parties interested in the investigation" such that there is a "risk of a potential consequence, the avoidance of which is important enough to warrant the non-disclosure of the information".[252]

7.117. We also agree with related findings in prior DSB reports that, in determining the showing of "good cause", investigating authorities are required to objectively assess the alleged "good cause" offered as the basis of the request for confidential treatment, and to examine the showing of such "good cause" in order to determine whether the request is sufficiently substantiated.[253] Article 6.5 does not prescribe *how* the sufficiency of a showing of "good cause" is to be assessed by an investigating authority.[254] Nonetheless, we recall that in examining the WTO-consistency of an investigating authority's assessment, panels must not engage in a *de novo* review of the record of the investigation to determine for themselves whether the existence of "good cause" has been sufficiently substantiated by the party requesting confidential treatment.[255] This means that the examination by panels of claims relating to the showing of "good cause" and its assessment by an investigating authority ought to be made "on the basis of the investigating authority's published report and its related supporting documents, and in the light of the nature of the information at issue and the reasons given by the submitting party for its request for confidential treatment."[256]

7.118. Moreover, the type of evidence and the extent of substantiation required to demonstrate the existence of "good cause" will necessarily depend upon the nature of the information at issue and the "good cause" alleged to exist.[257] The confidentiality of certain kinds of information may be

[248] Appellate Body Report, *EC – Fasteners (China) (Article 21*.5 – *China)*, para. 5.38. See also, Panel Reports, *EU – Cost Adjustment Methodologies II (Russia)*, para. 7.635; *Russia – Commercial Vehicles*, para. 7.241; and *Korea – Pneumatic Valves (Japan)*, para. 7.423.

[249] See e.g. Appellate Body Report, *EC – Fasteners (China)*, para. 537; and Panel Report, *Guatemala – Cement II*, para. 8.219.

[250] Article 6.5 provides examples of information that is "by nature" confidential, including information that is sensitive "because its disclosure would be of significant competitive advantage to a competitor or because its disclosure would have a significantly adverse effect upon a person supplying the information or upon a person from whom that person acquired the information". We agree with prior DSB findings that these examples "are helpful in interpreting 'good cause' generally, because they illustrate the type of harm that might result from the disclosure of sensitive information, and the protectable interests involved". Specifically, these illustrative examples suggest that "a 'good cause' which could justify the non-disclosure of confidential information might include an advantage being bestowed on a competitor, or the experience of an adverse effect on the submitting party or the party from which it was acquired." We also agree that the "confidentiality of information that is 'by nature' confidential will often be readily apparent" and that one such type of information is "commercially sensitive information not typically disclosed in the normal course of business, and which would likely be regularly treated as confidential in anti-dumping investigations", including for example, "certain profit or cost data or proprietary customer information". (Appellate Body Report, *EC – Fasteners (China)*, paras. 536 and 538, and fn 775). We note that a prior DSB report likewise considered that "sales price data may, in principle, constitute information 'by nature confidential'". (Panel Report*, EU – Footwear (China)*, para. 7.744).

[251] See e.g. Panel Report, *EU – Footwear (China)*, para. 7.684 (observing that Article 6.5 contains no guidance as to how good cause should be established, and that nothing in Article 6.5 requires "any particular form or means of showing good cause, or any particular type or degree of supporting evidence which must be provided"). See also Appellate Body Report, *Korea – Pneumatic Valves (Japan)*, para. 5.399.

[252] Appellate Body Report, *EC – Fasteners (China)*, para. 537. See also Panel Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 7.291; *Russia – Commercial Vehicles*, para. 7.241; *Korea – Pneumatic Valves (Japan)*, para. 7.423; and *EU – Cost Adjustment Methodologies II (Russia)*, para. 7.636.

[253] Appellate Body Report, *EC – Fasteners (China) (Article 21*.5 – *China)*, paras. 5.39-5.40. See also Panel Report, *Korea – Pneumatic Valves (Japan)*, paras. 7.427 and 7.440.

[254] Panel Report, *EU – Footwear (China)*, para. 7.728. See also Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.97.

[255] Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.97.

[256] Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.97.

[257] Appellate Body Report, *EC – Fasteners (China)*, para. 539. See also, Panel Reports, *EC – Fasteners (China)*, para. 7.451; *Korea – Certain Paper*, para. 7.335; and *Mexico – Steel Pipes and Tubes*, para. 7.378.

"readily apparent"[258] and this may be a relevant factor for panels to consider when examining the showing of "good cause" by the applicant and its subsequent assessment by an investigating authority.[259]

7.119. Article 6.5.1 obliges an investigating authority – using the term "shall" – to require the party providing confidential information to furnish a "non-confidential summary" of such information. The provision stipulates that such summaries shall contain "sufficient detail to permit a reasonable understanding of the substance" of the confidential information. "In exceptional circumstances", the submitting parties are allowed to indicate that the confidential information at issue is not susceptible of summary. However, in such exceptional circumstances, a statement of the reasons as to why summarization is not possible must be provided. In this regard, we agree with prior DSB reports that "Article 6.5.1 imposes an obligation on the investigating authorities *to ensure* that sufficiently detailed non-confidential summaries are submitted to permit a reasonable understanding of the substance of the confidential information; and, in exceptional circumstances, *to ensure* that parties provide a statement appropriately explaining the reasons why particular pieces of confidential information are not susceptible of summary."[260]

7.4.3 Whether Colombia acted inconsistently with Article 6.5 with respect to the redacted information in section d(i) of FEDEPAPA's revised application

7.120. Section d(i) of the revised application concerns the injury alleged by the applicant with respect to the Colombian potato-processing industry. As noted, certain information in this section was redacted by the applicant. This redacted information concerns, *inter alia*, the following data: (i) *in the main text of section d(i) of the revised application*: (a) injury indicators of the domestic industry (i.e. idle and installed capacity as well as actual production); (b) market share trends during the period 2014-2015; and (c) domestic industry summary data (i.e. capacity of the domestic industry; average production cost for frozen precooked potatoes in Colombia; domestic industry share in the frozen precooked potato market in Colombia; domestic industry installed capacity utilization; and idle capacity); and, (ii) *in footnote 3 of section d(i) of the revised application*: the volume decrease of the distributors of frozen potatoes (food service).[261]

7.121. The European Union argues that MINCIT granted confidential treatment to this information "on its own initiative", without good cause having been shown by the applicant.[262] Colombia raises three main arguments in defence of its position that, even in the absence of a showing of "good cause by the applicant", there is no violation of Article 6.5.[263] First, *with respect to the redacted information in footnote 3 of section d(i) of the revised application*, Colombia argues that since this information was not presented in any other document, and as confidential treatment was not requested, MINCIT decided not to use this information in the investigation, and it "simply" disregarded it pursuant to Article 6.5.2 of the Anti-Dumping Agreement.[264] Second, *with respect to the redacted information in the main text of section d(i) of the revised application*, Colombia contends that confidential treatment was not granted to this information because such treatment was not requested, and in any event, the information appeared in "full" in the public record. Therefore, Colombia argues that the obligations under Article 6.5 do not apply to this information.[265] Third, Colombia maintains that confidentiality obligations do not apply to information for which no confidential treatment has been granted.[266]

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[258] Appellate Body Report, *EC – Fasteners (China)*, para. 536.
[259] Appellate Body Report, *EC – Fasteners (China)*, para. 537.
[260] Appellate Body Report, *EC – Fasteners (China)*, para. 544 (emphasis added). See also Panel Reports, *EC – Fasteners (China)*, para. 7.515; *Mexico – Steel Pipes and Tubes*, para. 7.379; and *Guatemala – Cement II*, para. 8.213.
[261] Revised application, (Exhibit EU-10), section d(i); Revised application (confidential version), (Exhibit COL-67), section d(i).
[262] See e.g. European Union's first written submission, para. 73.
[263] See e.g. Colombia's second written submission, paras. 4.8-4.23.
[264] Specifically, Colombia alleges that given the lack of a specific request for confidential treatment of the information contained in fn 3 of the revised application, MINCIT decided "not to take it into account" and "simply" disregarded it under Article 6.5.2. Colombia adds that this information "neither had an impact on nor was of any use in subsequent stages of the investigation". (Colombia's response to Panel question No. 13.2, paras. 60 and 64-67).
[265] Colombia's second written submission, paras. 4.16-4.17; response to Panel question No. 13.3, paras. 69-71 and 76; and comments on the European Union's response to Panel question No. 13.1, para. 1.51.
[266] See e.g. Colombia's response to Panel question No. 13.3, para. 69.

7.122. We note that nothing on the record indicates that the applicant showed "good cause" for the confidential treatment of any of the information contained in section d(i), nor is there any indication that MINCIT specifically requested that such "good cause" be shown. Indeed, Colombia concedes that the applicant did not request confidential treatment of this information.[267] The parties thus do not dispute that the applicant did not attempt to show "good cause" for the confidential treatment of this information. We recall that the showing of "good cause" is a condition precedent for according confidential treatment to information submitted to an authority. In the present case, as discussed in paragraph 7.126 below, it is apparent that MINCIT treated this information as confidential, even in the absence of a showing of "good cause" by the applicant. As noted, Colombia raises three general arguments in defence of its position that in spite of the absence of a showing of good cause, it did not act inconsistently with its obligations under Article 6.5.

7.123. Turning to Colombia's first defence with respect to the treatment of the information in footnote 3 of section d(i) of the revised application, Article 6.5.2 envisages that investigating authorities may take the following actions if they "find that a request for confidentiality [of information] is not warranted": (a) to disregard such information; or (b) to take it into account on a confidential basis provided that "it can be demonstrated" that "the information is correct."[268] Colombia asserts that MINCIT disregarded the redacted information contained in footnote 3 of the revised application in accordance with this provision. As noted above, however, Colombia acknowledges that the applicant did not make a request for the confidential treatment of this information.[269] Moreover, there is no evidence before us indicating that MINCIT determined that confidential treatment of this information was "not warranted", and Colombia has not demonstrated otherwise.[270] Finally, contrary to Colombia's assertion that this information was disregarded under Article 6.5.2, the record evidence indicates that MINCIT's injury analysis and determination did, in fact, consider the redacted information that was contained in footnote 3 of the revised application.[271] In these circumstances, we consider that Article 6.5.2 does not apply to the factual circumstances of this case. We therefore reject Colombia's defence that this information was disregarded pursuant to Article 6.5.2.

7.124. Colombia's second argument as part of its defence is concerned with the redacted information in the main text of the revised application. Colombia argues essentially that the availability of this redacted information elsewhere on the record discharges it from complying with its obligations under Article 6.5. Colombia contends that a "reasonable reading" of both the revised application and the original application enables "any reader" to see that it is the same information.[272] According to Colombia, a joint reading of the original and revised application "clearly shows" that the redacted information at issue was recorded "in full" in the original application.[273] For Colombia, certain elements, such as the structure and content of the respective paragraphs, as well as the titles, the source of information, the structure, and the coordinates of each of the relevant tables, enable any reader to see (or to "easily infer") that it is, "in reality", the same information.[274]

[267] Colombia's response to Panel question No. 13.2, para. 67.

[268] Article 6.5.2 of the Anti-Dumping Agreement reads as follows:

> If the authorities find that a request for confidentiality is not warranted and if the supplier of the information is either unwilling to make the information public or to authorize its disclosure in generalized or summary form, the authorities may disregard such information unless it can be demonstrated to their satisfaction from appropriate sources that the information is correct.
> (fn omitted)

[269] Colombia's response to Panel question No. 13.2, para. 67.

[270] In fact, as Colombia acknowledges, the only information for which MINCIT determined that no confidential treatment was warranted, is the information concerning the names of the petitioning firms. (Colombia's response to Panel question No. 13.2, para. 62).

[271] For instance, section 2.2 of the notice of initiation, entitled "Analysis of Material Injury", states that "the volume of the food service sector (the sector on which import penetration has been concentrated) has fallen by 4% in relation to 2015, which would have had the greatest impact on traditional products, which are three times more profitable than the products created to compete with the importers. According to the application, this has an effect on profitability, capacity and structure." (Notice of initiation, (Exhibit EU-1a), section 2.2.1). See also Technical report on the initiation, (Exhibit COL-10 (BCI)), section 2.2.3.

[272] Colombia's response to Panel question No. 13.3, para. 73.

[273] Colombia's second written submission, para. 4.16.

[274] Colombia's second written submission, paras. 4.10-4.15; response to Panel question No. 13.3, para. 73.

The European Union maintains that it could not know that the information redacted from one document was "identical" to the information made public in another document.[275]

7.125. Absent any clear indication suggesting that the content of the redacted information was made available elsewhere in the record, we cannot see how the "reasonable" or "joint" reading advocated by Colombia could have enabled other interested parties in the investigation to become aware about the availability of the redacted information elsewhere on the record.[276] Moreover, the elements identified by Colombia are, in our view, not enough to demonstrate that the information at issue was the *same*. In particular, the fact that the relevant tables share the same title, structure, and source of information does not, alone, demonstrate (or make it easy to "infer") that the specific "values" or "trends" redacted in one table are the *same* as the "values" or "trends" allegedly available in another table. We therefore disagree with Colombia's argument that a joint reading of both applications "clearly shows", and enables a reader to "easily infer", that the redacted information in the revised application was, "in reality", the *same* as the relevant information contained in the original application.

7.126. Finally, we turn to Colombia's argument that the premise of Article 6.5 is centred on information that has been granted confidential treatment, and given that the applicant never requested that the redacted information in the main text of the revised application be treated as confidential, MINCIT did not grant such treatment to this information, and therefore Article 6.5 does not apply.[277] We are not convinced by Colombia's argument that no confidential treatment was granted to the redacted information in the main text of the revised application. Colombia has not pointed to any evidence indicating that MINCIT found that confidential treatment of this information was not warranted, let alone that it considered whether such treatment was justified.[278] Moreover, the fact that the applicant did not request confidential treatment for the information in question says nothing about whether MINCIT did, in fact, afford confidential treatment to this information. To the contrary, in our view, the fact that the applicant submitted information on a redacted basis without a showing of "good cause" – coupled with the fact that MINCIT treated this information confidentially – demonstrates a lack of compliance with Article 6.5. Colombia's argument would render ineffective the requirement of showing "good cause" by allowing (a) interested parties to submit redacted information without a showing of "good cause" for confidential treatment; and (b) investigating authorities to maintain confidentiality of such information without "good cause" being shown.[279] Accordingly, having received redacted information that was not accompanied by a showing of "good cause", we find that MINCIT granted confidential treatment to such information inconsistently with Article 6.5.[280]

[275] European Union's opening statement at the second meeting of the Panel, para. 27; response to Panel question No. 13.1, para. 34.

[276] Colombia asserts that interested parties had "full" access to the redacted information at issue, to the point that it was the European Union itself that submitted this information to these proceedings in FEDEPAPA's application, (Exhibit EU-8a). (Colombia's second written submission, para. 4.16; response to Panel question No. 13.3, para. 70). We fail to see how the submission of an exhibit in *these proceedings* establishes the "full access" alleged by Colombia as well as compliance by the Colombian investigating authorities in *the underlying investigation* with the requirement under Article 6.5.

[277] Colombia's response to Panel question No. 13.3, paras. 69-71 and 75. Colombia adds that, in any event, this information was available in the public record. We have already addressed and rejected Colombia's arguments in this regard. (See paragraphs 7.124-7.125 above).

[278] As Colombia acknowledges, MINCIT granted confidential treatment to the information contained in annex 10 of the revised application and rejected it for the specific names of the companies in the domestic industry. (Colombia's response to Panel question No. 13.2, para. 62. See also Notice of initiation, (Exhibit EU-1a), section 1.5).

[279] We note that in its revised application, the applicant submitted certain information in a redacted manner without a showing of good cause. Having received redacted information that was not accompanied by a showing of good cause, MINCIT nevertheless extended confidential treatment to this information.

[280] Colombia alleges that since the redacted information in question was not treated as confidential, the issue the Panel should evaluate is whether the record allowed for a correct understanding of the factual aspects relevant to the investigation as per Article 6.2 of the Anti-Dumping Agreement. (Colombia's response to Panel question No. 13.3, paras. 73-75; comments on the European Union's response to Panel question No. 13.1, para. 1.47). Colombia's submission refers to Article 6.2 while quoting the text of Article 6.4 of the Anti-Dumping Agreement. It appears therefore that Colombia intended to refer to Article 6.4. However, we note that Article 6.4 applies to information relevant to the presentation of the interested parties' cases, used by the authorities, and not confidential within the meaning of Article 6.5. Thus, having found that MINCIT treated the relevant redacted information as confidential, we do not consider it necessary to address this argument by Colombia.

7.4.4 Whether Colombia acted inconsistently with Article 6.5.1 with respect to the redacted information in section d(i) of FEDEPAPA's revised application

7.127. We recall that Article 6.5.1 of the Anti-Dumping Agreement requires an investigating authority, when granting confidential treatment to information submitted by interested parties, to ensure that the party submitting such information provides a non-confidential summary thereof, or, in exceptional circumstances, provides a statement of the reasons as to why such summarization was not possible.

7.128. The European Union alleges that the applicant did not provide non-confidential summaries of the confidential information at issue and did not explain why this information could not be summarized in a manner that allowed other interested parties to understand its substance.[281] Colombia rejects the European Union's claims on the ground that this information was not treated as confidential and therefore Article 6.5.1 does not apply.[282]

7.129. Article 6.5.1 applies in respect of information properly treated as confidential under Article 6.5. We have already found that Colombia acted inconsistently with Article 6.5 with respect to MINCIT's confidential treatment of the redacted information in section d(i) of the revised application. In these circumstances, we do not consider it necessary to make further findings on the European Union's Article 6.5.1 claim concerning the provision of non-confidential summaries for that information, or an explanation as to why such summarization was not possible, in order to provide a positive resolution to the dispute before us.[283]

7.4.5 Whether Colombia acted inconsistently with Article 6.5 with respect to the information in annex 10 of FEDEPAPA's revised application

7.130. Annex 10 of the revised application, entitled "Table on Injury Variables", contains certain economic and financial information about the three petitioning companies (Congelagro, Soraca, and Frozen Express) on behalf of whom FEDEPAPA filed its application. Specifically, annex 10 contains the following information, presented in a tabular form: (a) sales revenue; (b) sales costs; (c) gross profit; (d) gross profit margin; (e) gross nominal price; (f) production volume; (g) consumption by producers; (h) sales volume; (i) initial and final inventory; (j) installed capacity and use; (k) direct employment; (l) export volume; and (m) wages.[284] While the table in annex 10 of the revised application lists these categories of information, the exact individual values for each category are redacted for all petitioning companies.[285]

7.131. The parties do not dispute that the applicant requested confidential treatment for this information and that it provided an explanation as to why this information ought to be treated as confidential. The parties also do not dispute that MINCIT granted confidential treatment to the information in annex 10. Rather, the parties' arguments centre around two main issues: (a) whether the applicant demonstrated the necessary "good cause" to protect the annex 10 information[286]; and

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[281] European Union's first written submission, para. 87.

[282] Colombia's opening statement at the second meeting of the Panel, para. 3.2.

[283] We recall that prior DSB reports have found that, where an investigating authority errs in its treatment of confidential information, it is not necessary to address claims concerning the provision of non-confidential summaries or an explanation as to why such summarization was not possible in order to provide a positive resolution to the dispute. (See e.g. Panel Reports, *Russia – Commercial Vehicles*, para. 7.249; and *Korea – Stainless Steel Bars*, para. 7.239).

[284] Annex 10 of the revised application, (Exhibit COL-11).

[285] As noted in fn 241 above, annex 10 of the revised application refers to three separate annexes (i.e. annex 10, annex 11, and annex 12), which contain confidential information of the three domestic companies on whose behalf the applicant filed its application, and that were provided directly to MINCIT by these companies in accordance with MINCIT's instructions (i.e. by dividing it into annex 10, annex 11, and annex 12). (Colombia's response to Panel question No. 1.1, para. 3).

[286] In its first written submission, the European Union argues that "MINCIT did not require the applicant to show good cause for keeping confidential the information supplied". However, in response to Panel question No. 3.2, the European Union acknowledges that "MINCIT requested that the applicant substantiates the reasons that justify the confidential treatment of the information submitted." From the last statement, we thus understand that the European Union is not further pursuing its claim that MINCIT "did not require the applicant to show good cause". (European Union's first written submission, para. 87; response to Panel question No. 3.2, para. 56).

(b) whether MINCIT objectively assessed the "good cause" that the applicant provided to MINCIT when MINCIT elected to grant confidential treatment to the annex 10 information.

7.132. On the first issue, we recall that the applicant requested confidential treatment of the information contained in annex 10 on the grounds that "[t]he specific names of the domestic industry companies, all their financial information, and in general numerical, and any data that is classified as a trade secret, are confidential".[287] The European Union asserts that nothing in the record indicates that the applicant "actually showed" the necessary "good cause" for the confidential treatment sought, and, in particular, argues that the "simple assertion" that all the information relating to the domestic industry constituted "business secrets" does not amount to a showing of "good cause".[288] Colombia maintains that the European Union's position is factually unfounded.[289]

7.133. We recall that our examination of whether "good cause" has been shown should be undertaken in light of the nature of the information at issue. The European Union alleges that "it is not at all certain that *all* commercial and financial information deserves confidential treatment and even less that it constitutes a 'business secret'".[290] We note, however, that the European Union's argument does not concern the showing of good cause for "*all* commercial and financial information" in the abstract. Rather, the European Union's argument relates to the showing of "good cause" for the *specific* information contained in annex 10.

7.134. We observe that, apart from making a general assertion that not "all commercial and financial information" deserves confidential treatment or constitutes a "business secret", the European Union has not explained why the precise reason provided by the applicant (namely, that the information in annex 10 constitutes a "trade secret") cannot amount to a showing of "good cause" for the specific types of information that are actually contained in annex 10.[291] In addition to observing that it does not challenge the showing of good cause by, for example, alleging that the specific information in annex 10 does not constitute a "trade secret", we also note that the European Union agrees that some of the information contained in annex 10 could, in fact, constitute a trade or business secret.[292] In these circumstances, and given the allocation of the burden of proof as noted in paragraph 7.5 of this Report, we find that the European Union has not established that the applicant failed to show "good cause" as to why the information in annex 10 should be accorded confidential treatment.[293]

7.135. We now turn to the second issue as to whether MINCIT objectively assessed the "good cause" invoked by the applicant for the confidential treatment of the information in annex 10. The European Union claims that MINCIT did not objectively examine whether the reasons provided by the applicant constituted "good cause" because: (a) MINCIT "simply accepted" the applicant's assertion that the financial information in annex 10 constituted "business secrets" and determined that information of a commercial and financial nature is confidential "by its very nature"; and (b) MINCIT treated the commercial information provided by the domestic industry as confidential, while disclosing similar information provided by the European exporters.[294] Colombia disagrees with the European Union's understanding of the facts, and maintains that its assertions constitute unsubstantiated allegations.[295]

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[287] Revised application, (Exhibit EU-10), section 11. As noted in paragraph 7.110 of this Report, MINCIT revealed the "specific names of the domestic industry companies".

[288] European Union's first written submission, para. 73; response to Panel question No. 3.2, para. 56; and opening statement at the first meeting of the Panel, para. 26.

[289] See e.g. Colombia's second written submission, paras. 4.4 and 4.19.

[290] European Union's response to Panel question No. 3.4(d), para. 64. (emphasis added)

[291] For example, the European Union does not explain why, and which of, the specific information in annex 10 (i.e. sales, profits, prices, production, consumption, inventories, installed capacity, employment, exports, and wages) cannot constitute a "trade secret" and should therefore not be treated confidentially.

[292] Specifically, the European Union stated that "[it] does not exclude that some of the information contained in [annex 10], which MINCIT treated as confidential, could constitute a trade or business secret". (European Union's opening statement at the second meeting of the Panel, para. 29).

[293] In reaching this conclusion, we express no views as to whether FEDEPAPA's statement did, in fact, constitute "good cause" shown for purposes of Article 6.5.

[294] European Union, response to Panel question No. 3.4(d), paras. 63-64; second written submission, para. 49; and opening statement at the second meeting of the Panel, para. 29.

[295] Colombia's second written submission, paras. 4.4 and 4.20-4.23; response to Panel question No. 3.4(c), para. 132; and opening statement at the second meeting of the Panel, paras. 3.3-3.4. Colombia also argues that given that the European Union's arguments regarding MINCIT's lack of "objective assessment"

7.136. We recall that our task of reviewing whether MINCIT objectively assessed the alleged "good cause" is informed by the investigating authority's published documents, the nature of the information at issue, and the reasons given by the party seeking confidential treatment. In this instance, we note that, in its notice of initiation, MINCIT accepted the applicant's request for confidentiality on the grounds that "anything related to financial information or data considered to be part of trade secrets can be regarded as confidential, since it is considered to be sensitive information that is protected by law, the disclosure of which would seriously damage the companies involved."[296] In light of the above, and in accordance with relevant Colombian domestic law[297], MINCIT concluded that it "shall, as requested, restrict access to the confidential information submitted by the applicant, in order to protect the applicant's economic, financial and industrial trade secrets".[298]

7.137. While some interested parties, including the European Commission, subsequently objected to MINCIT's decision to grant confidential treatment to the annex 10 information[299], we note that MINCIT explained its decision to continue to treat the information at issue as confidential by stating that: "[t]his information was submitted as confidential in compliance with the requirements of the Anti-Dumping Agreement and [the relevant Colombian domestic law]"[300], and because its content, "under constitutional or legal provisions must be subject to restriction, in particular the economic and financial figures which, due to their nature, were submitted in confidence by the Colombian producers, given that their disclosure could give a significant advantage to a competitor."[301] MINCIT also observed that no specific legal reasons that would oblige the investigating authority to consider that such information should be made public were specified by interested parties, nor was there any recourse to the administrative process envisaged by Article 26 of the Code of Administrative Procedure and Administrative Disputes.[302]

7.138. Based on the above, and contrary to the European Union's argument, we do not consider that MINCIT "simply" accepted the reasons presented by the applicant when it determined to provide confidential treatment to the annex 10 information.[303] To the contrary, MINCIT's published statements reveal that it took into account various factors as part of its examination, including: (a) the fact that the information under annex 10 was submitted "in confidence" by the Colombian producers; (b) the "economic and financial" nature of the figures in annex 10; (c) the need to "protect the applicant's economic, financial and industrial trade secrets"; (d) the harm that would be caused to the submitters of the information by the disclosure of this information[304]; and (e) the status of the information under Colombian domestic law. MINCIT's examination was therefore not limited solely to whether "commercial and financial information" is confidential information "by its very nature" or whether such information is protected under domestic law.[305]

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form the basis for the European Union's argument regarding "good cause", these arguments should have been provided in the first written submission in accordance with paragraph 3(1) of the Working Procedures. (Colombia's response to Panel question No. 3.4(b), fn 88). For the reasons explained in fn 45 of this Report, we decline to accept this argument.

[296] Notice of initiation, (Exhibit EU-1a), section 1.5.

[297] Namely, Political Constitution of Colombia, (Exhibit COL-12); Articles 15 and 74; Law No. 1437 of 2011 establishing the Code of Administrative Procedure and Administrative Disputes, (Exhibit COL-13), Article 24.1; and Decree No. 1750 of 2015 regulating the application of anti-dumping duties, (Exhibit COL-8), Article 24.11, para. 1, and Articles 41 and 75. We note that the European Union does not challenge the consistency of any of these provisions with the Anti-Dumping Agreement.

[298] Notice of initiation, (Exhibit EU-1a), section 1.5. The technical report on the initiation, the preliminary technical report, the final technical report, and the final report on essential facts confirm MINCIT's confidential treatment determination and repeat much of the assessment set out in the notice of initiation. (Technical report on the initiation, (Exhibit COL-10 (BCI)), section 1.7; Preliminary technical report, (Exhibit EU-12a), section 1.7; Final technical report (public version), (Exhibit EU-4a), section 1.7; and Final report on essential facts (public version), (Exhibit EU-3a), section 1.7).

[299] See e.g. European Commission's observations on essential facts, (Exhibit EU-18a), pp. 2-3. See also Responses to comments on essential facts, (Exhibit EU-17a), p. 17.

[300] See e.g. Responses to comments on essential facts, (Exhibit EU-17a), p. 21.

[301] See e.g. Final determination (public version), (Exhibit EU-5a), p. 2.

[302] Final determination (public version), (Exhibit EU-5a), p. 2. See also Preliminary technical report, (Exhibit EU-12a), p. 37.

[303] European Union's response to Panel question No. 3.4(d), para. 63.

[304] Specifically, MINCIT noted the "serious[] damage to the companies involved" by potentially conferring "a significant advantage to a competitor". (See paragraph 7.136 above).

[305] According to the European Union, the "fact that the financial *information may be protected under domestic law is not sufficient to establish 'good cause'* within the meaning of Article 6.5 of the Anti-Dumping Agreement, as the type of information protected by domestic law may vary widely among

In our view, MINCIT's published statements demonstrate that it considered these factors, together with others, in arriving at its conclusion.

7.139. Turning to the nature of the information at issue, we recall that the table in annex 10 contains information concerning: (a) sales revenue; (b) sales costs; (c) gross profit; (d) gross profit margin; (e) gross nominal price; (f) production volume; (g) consumption by producers; (h) sales volume; (i) initial and final inventory; (j) installed capacity and use; (k) direct employment; (l) export volume; and (m) wages.[306] Although the European Union seeks to challenge MINCIT's decision to treat this information as confidential by making a general argument that "it is not at all certain that all commercial and financial information deserves confidential treatment and even less that it constitutes a 'business secret'"[307], we note that the European Union concedes that the type of information contained in annex 10 could, in fact, constitute a trade or business secret.[308] Indeed, as we note above, the European Union has not attempted to demonstrate that the specific information in annex 10 does not – or could not – constitute a "trade secret". Furthermore, we note Colombia's argument that the type of information in annex 10 for which confidential treatment was sought is protected as confidential in every anti-dumping investigation worldwide, including by the European Commission.[309] The European Union, for its part, does not counter Colombia's assertion by explaining, for example, why the specific types of operational and financial information in annex 10 concerning domestic producers cannot be confidential.[310] Given the above, we are unable to find that MINCIT's examination of the explanation provided by the applicant was deficient for purposes of Article 6.5 of the Anti-Dumping Agreement.

7.140. The European Union also argues that MINCIT disclosed similar information provided by the European exporters and that such disparate treatment undermines Colombia's assertion that all such information is confidential "by nature".[311] Colombia responds that the European Union fails to specify what "similar information" it refers to, and in any event, it cannot be argued that information ceases to be confidential merely because an investigating authority "inappropriately" disclosed similar information.[312]

7.141. We note that, irrespective of whether the information at issue is confidential "by nature" or is "submitted to authorities on a confidential basis", the granting of confidentiality is generally triggered by a party's request accompanied by a showing of "good cause".[313] In this instance, however, the European Union has neither alleged nor demonstrated that the investigated exporters requested confidential treatment for any information that they provided to MINCIT that was allegedly

different municipal laws", but the "term 'good cause' must be given an autonomous interpretation in its context and in the light of the object and purpose of the Anti-Dumping Agreement." (European Union's response to Panel question No. 3.4(a), para. 59 (emphasis added)). In this regard, however, we note that *the justification provided* by the applicant *was that the information at issue constituted a "trade secret"*. (Revised application, (Exhibit EU-10), section 11). The domestic law upon which MINCIT relied in its assessment shows only one of the reasons why MINCIT accepted such justification. (Notice of initiation, (Exhibit EU-1a), section 1.5).

[306] Annex 10 of the revised application, (Exhibit COL-11).

[307] European Union's response to Panel question No. 3.4(d), para. 64.

[308] European Union's opening statement at the second meeting of the Panel, para. 29.

[309] Colombia's first written submission, para. 7.34; second written submission, para. 4.22; and response to Panel question No. 3.4(b), para. 127.

[310] We note Colombia's argument that "given the importance and sensitivity" of the information contained in annex 10, the European Union should have at least indicated which of the numerous information elements contained in annex 10 it considers could not be deemed a "business secret", in order to demonstrate the merits of its submission. (Colombia's second written submission, para. 4.21).

[311] European Union's response to Panel question No. 3.4(d), para. 64; second written submission, para. 49; and opening statement at the second meeting of the Panel, para. 29. The European Union argues that MINCIT disclosed individualized information on sales prices provided by the investigated exporters, but kept confidential all information on prices provided by the domestic industry, including aggregated prices, averages, and trends. (European Union's first written submission, para. 86).

[312] In particular, Colombia argues that "by complaining about the alleged disclosure of certain <u>*confidential*</u> information of European exporters, the European Union seems to call into question, rather than its confidential nature, the fact that it was disclosed", and adds that "[t]his could give rise, if anything, to an independent violation of the obligation of confidentiality of that information", but "in no case can the European Union argue that certain information loses its confidential character merely because an authority has inappropriately disclosed similar information." (Colombia's opening statement at the second meeting of the Panel, para. 3.4 (emphasis original)).

[313] See e.g. Appellate Body Report, *EC – Fasteners (China)*, para. 537 (finding that "the requirement to show 'good cause' … applies to both [categories of] information [information that is confidential by nature, and information that has been submitted to authorities on a confidential basis]".)

similar to the domestic producers' annex 10 information. Given this important fact, we fail to see how the European Union's "disparate treatment" argument is relevant to – or can support – its assertion that MINCIT did not objectively determine whether the explanation provided by the applicant constitutes a showing of "good cause".[314]

7.142. Based on the foregoing, we find that the European Union has not demonstrated, with respect to the information contained in annex 10 of the revised application: (a) that the applicant failed to show the necessary "good cause" for the confidential treatment requested; and (b) that MINCIT did not objectively assess the showing of "good cause" as the basis of granting confidential treatment. Accordingly, we find that the European Union has not established that Colombia acted inconsistently with Article 6.5 of the Anti-Dumping Agreement in respect of the information contained in annex 10 of the revised application.

7.4.6 Whether Colombia acted inconsistently with Article 6.5.1 with respect to the annex 10 information in FEDEPAPA's revised application

7.143. The parties do not dispute that MINCIT requested the applicant to provide "a summary or non-confidential version" of all information for which confidential treatment was requested.[315] The parties also do not dispute that the applicant did not provide a non-confidential summary of the confidential information contained in annex 10.[316]

7.144. The European Union, however, argues that it is the task of the investigating authority to "ensure" that parties provide meaningful summaries of the confidential information submitted by them (e.g. through indexation or ranges).[317] Colombia responds that it did not act inconsistently with Article 6.5.1 because the Article does not require a summary to be provided in "exceptional circumstances" and the applicant explained why the information contained in annex 10 was not susceptible of summary.[318]

7.145. We recall that, whenever an authority elects to accord confidential treatment to a particular piece of information, Article 6.5.1 mandates that the authority "shall require" the party that provided the information to also "furnish" a non-confidential summary of that information.[319] This non-confidential summary need not be provided in "exceptional circumstances", provided that the party that submitted the information indicates that it "is not susceptible of summary" and provides a "statement of the reasons why summarization is not possible". The question we must therefore consider is whether the applicant provided a statement of the reasons as to why summarization was not possible.

7.146. Colombia's position on this question is grounded in the following statements made by the applicant:

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[314] For the same reasons, we disagree with the European Union's argument that this "disparate" treatment demonstrates that MINCIT did not objectively assess whether the content of the non-disclosed information could have a prejudicial effect on the transparency and due process interests of other parties involved in the investigation. (See e.g. European Union's second written submission, para. 49).

[315] MINCIT's deficiency letter to FEDEPAPA, (Exhibit EU-9a), para. 5.

[316] Colombia's response to Panel question No. 3.5(a), para. 133; European Union's second written submission, para. 50.

[317] European Union's second written submission, para. 54.

[318] Colombia's responses to Panel questions No. 3.5(b), para. 137 and No. 3.5(c), paras. 138-141; second written submission, para. 4.4.

[319] To the extent that Colombia argues that MINCIT acted consistently with Article 6.5.1 because it "requested" a non-confidential summary of the confidential information, we disagree. (Colombia's first written submission, para. 7.38). Using the mandatory "shall", Article 6.5.1 obliges an investigating authority to "require" that a non-confidential summary be "furnished" by the concerned party. The dictionary definition of "require" includes "to … insist on having (something) from or of someone". (Oxford Dictionaries online, definition of "require" https://www.oed.com/view/Entry/163258?rskey=teYJjL&result=2#eid (accessed 21 April 2022), v. meaning 6.b)). In our view, a single request by MINCIT, and the fact that such summaries were ultimately not "furnished" in the underlying investigation, are insufficient to bring Colombia into conformity with the obligation under Article 6.5.1. Our view is supported by the Spanish and French versions of the treaty text, which read, respectively, as follows: "[l]as autoridades *exigirán* a las partes interesadas que faciliten información confidencial que suministren resúmenes no confidenciales de la misma" and "[l]es autorités *exigeront* des parties intéressées qui fournissent des renseignements confidentiels qu'elles en donnent des résumés non confidentiels." (emphasis added)

a. The applicant's request for confidential treatment, which states, in relevant part: "all the [domestic industry companies'] financial information, and in general *numerical*, and any data classified as a trade secret, are confidential".[320]

b. The applicant's response, to a question posed at the public hearing as to why it did not provide the figures of the companies it represents for assessment by all interested parties, that: "[t]he Federation has provided the information necessary for assessment by the interested parties. However, it has always stated that financial information, and in general *numerical*, classified as a trade secret must be kept confidential."[321]

7.147. According to Colombia, these statements demonstrate that summarization was not possible because the financial information submitted in confidence was "numerical". In particular, Colombia argues that this "numerical" claim should be read in the relevant context that annex 10 was individually submitted by each of three petitioning companies and therefore the financial information was directly related to each of the companies. Thus, Colombia contends that this information could not have been summarized without revealing it to at least the other stakeholders in the domestic industry.[322]

7.148. The European Union, however, maintains that: (a) the applicant's indication of what information it considers confidential does not amount to an explanation as to why that information is not susceptible of summary; and (b) the alleged "numerical" reason does not constitute a "sufficient" explanation of why "all" the information contained in annex 10 was not susceptible of summary since most numerical information can be summarized through indexation or indication of ranges.[323]

7.149. In our view, the three sentences that are cited by Colombia[324] reflect the explanation that the applicant provided for requesting *confidential treatment*, but they do not indicate why the specific information contained in annex 10 could not be *summarized*, or why the situation constituted "exceptional circumstances" that would have justified the absence of *summarization*. In addition, we recall that annex 10 concerns different elements of information (i.e. sales, profits, price, production, consumption, inventories, installed capacity, employment, exports, and wages). These statements, however, do not refer to any specific elements of this information for which non-confidential summaries were not provided. Moreover, we note that, while various methods of summarization may be used by parties in anti-dumping investigations[325], nothing in the above statements indicates why "exceptional circumstances" prevented the applicant from employing any particular method of

[320] Revised application, (Exhibit EU-10), section 11. (emphasis added)

[321] FEDEPAPA's responses to questions raised during the hearing, (Exhibit EU-15), p. 3007. (emphasis added)

[322] See e.g. Colombia's first written submission, paras. 7.40-7.41; and response to Panel question No. 3.5(c), paras. 138-141 and fn 105. Colombia adds that such justification was provided in good time and in the correct form, and was sufficient for treating as confidential the information contained in annex 10. (Colombia's second written submission, para. 4.27).

[323] See e.g. European Union's opening statement at the second meeting of the Panel, para. 31; and second written submission, paras. 53-54. In light of the European Union's arguments, we reject Colombia's contention that the "sufficiency" of the justification given by FEDEPAPA is not part of the European Union's position. (Colombia's second written submission, paras. 4.26-4.27 and fn 88; response to Panel question No. 3.5(c), para. 142). For the reasons explained in fn 45 of this Report, we also reject Colombia's contention that this argument should have been submitted by the European Union in its first written submission as required by paragraph 3(1) of the Working Procedures of the Panel. (Colombia's second written submission, fn 88).

[324] See paragraph 7.146 above.

[325] Colombia disagrees with the European Union that the information at issue could be summarized through indexation. (Colombia's closing statement at the second meeting of the Panel, para. 1.21). However, Colombia does not counter the European Union assertion that this information could be summarized through an indication of ranges. Moreover, nothing in the record indicates that any efforts were made to explore the possibilities or potential alternatives for the summarization of the confidential information at issue (or for certain pieces of such confidential information).

summarization.[326] We thus fail to see how these statements support Colombia's assertion that the applicant explained why the information contained in annex 10 was not susceptible of summary.[327]

7.150. Finally, we note Colombia's argument that MINCIT explained the "obvious" reasons why this information could not be summarized, and that based on the explanation by FEDEPAPA[328], and the very "nature" of that information, MINCIT was convinced that it could not be summarized as it could, even in summary form, "cause irreversible harm".[329] While we note that MINCIT discussed the *confidentiality* of the information at issue under Colombian domestic law[330], we do not consider that this reflects the explanation that is now provided by Colombia in these panel proceedings as to why *summarization* of such information was not possible. In any event, as we have found above, a "statement of the reasons why summarization is not possible" – which is a "*must*" under Article 6.5.1 – was not provided in the underlying investigation.

7.151. In light of the foregoing, we find that the European Union has established that Colombia acted inconsistently with its obligations under Article 6.5.1 because: (a) MINCIT did not "require" the applicant to "furnish" non-confidential summaries of the information contained in annex 10 to which confidential treatment was granted; and (b) to the extent that this information was not susceptible of summary, a statement of the reasons as to why summarization was not possible was not provided.

7.4.7 Conclusion

7.152. Based on the foregoing, with respect to the European Union's claims under Articles 6.5 and 6.5.1 of the Anti-Dumping Agreement challenging MINCIT's confidential treatment of the certain information in section d(i) and annex 10 of FEDEPAPA's revised application, we find that:

a. the European Union has established that Colombia acted inconsistently with its obligations under Article 6.5 with respect to the redacted information in section d(i) of FEDEPAPA's revised application because MINCIT granted confidential treatment to this information without a showing of "good cause" by the applicant. Given our finding of

[326] We agree with findings from a prior adopted DSB report that while "various methods of summarization are used by parties and investigating authorities in anti-dumping investigations, such as indexing data, providing trends analysis, and aggregating data from multiple producers", it is incumbent "on the submitting party to explain, *inter alia*, why present circumstances prevent it from employing [a given] method." (Appellate Body Report, *EC – Fasteners (China)*, fn 786).

[327] We note that prior adopted DSB reports have considered that a statement of why summarization is not possible cannot be considered an appropriate statement if: it "speaks to a justification for providing confidential treatment in the first place"; it does not "address the issue of why summarization of the information is not possible, or why the particular information presents exceptional circumstances that would justify a failure to provide a non-confidential summary"; and it is a "single statement" which repeats a "justification for treating a number of different pieces of information as equally unsusceptible to summarization." (Appellate Body Report, *EC – Fasteners (China)*, para. 553. See also Panel Reports, *EC – Fasteners (China)*, para. 7.516; and *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 7.326).

[328] Specifically, Colombia states that "FEDEPAPA indicated on at least two occasions, [that] the information for which confidential treatment was requested is of a 'numerical' nature and cannot therefore be summarized. Moreover, the trends in each producer's different variables cannot be summarized without disclosing their confidential information. For example, if indexed values are used to describe the trend of such variables, other interested parties will not learn the actual values, but will learn of the trend, which is also confidential as its disclosure could be used commercially by other companies. In the words of [MINCIT], its disclosure could 'cause irreversible harm'". (Colombia's first written submission, para. 7.41 (referring to Revised application, (Exhibit EU-10), folio 521; FEDEPAPA's responses to questions raised during the hearing, (Exhibit EU-15), folio 3006; and Responses to comments on essential facts, (Exhibit EU-17a), pp. 11-12)).

[329] Colombia's first written submission, paras. 7.41-7.43 (referring to Responses to comments on essential facts, (Exhibit EU-17a), pp. 11-12).

[330] In support of its position, Colombia refers to MINCIT's statements that "[r]egarding the lack of non-confidential summaries … it should be mentioned that, in accordance with the provisions of the WTO Anti-Dumping Agreement and Decree 1750 of 2015, the right of defence and due process has not been violated, given the company's confidentiality rights under [Colombian domestic law] protecting the confidentiality of company economic and financial data where disclosure thereof *may cause irreparable harm*." Moreover, "[w]ith regard to the provision of information about injury, it is reported that the economic and financial figures, *due their nature*, were provided by the Colombia producers as confidential information, since their disclosure could generate a significant competitive advantage to a competitor. This confidentiality was maintained in accordance with Colombian laws and Article 6.5 of the Anti-Dumping Agreement." (Responses to comments on essential facts, (Exhibit EU-17a), p. 11 (emphasis added)).

inconsistency, we do not consider it necessary to make further findings on the European Union's claim under Article 6.5.1 concerning the information in section d(i) of the revised application in order to provide a positive resolution to the dispute before us;

b. the European Union has not established that Colombia acted inconsistently with its obligations under Article 6.5 in respect of the information contained in annex 10 of the revised application because the European Union has not demonstrated: (a) that the applicant failed to show the necessary "good cause" for the confidential treatment requested; and (b) that MINCIT did not objectively assess the showing of "good cause" as the basis of granting confidential treatment; and

c. the European Union has established that Colombia acted inconsistently with its obligations under Article 6.5.1 with respect to the information contained in annex 10 of FEDEPAPA's revised application because: MINCIT did not "require" the applicant to "furnish" non-confidential summaries of the confidential information contained in annex 10; and, to the extent that this information was not susceptible of summary, a statement of the reasons as to why summarization was not possible was not provided.

7.5 Claims under Article 2.1, Article 6.8, and Annex II of the Anti-Dumping Agreement: MINCIT's alleged use of facts available

7.5.1 Introduction

7.153. In calculating the margins of dumping for the exporters subject to the investigation, including Agrarfrost, Aviko, and Mydibel, MINCIT used export pricing information that it extracted from Colombia's official import statistics (the "DIAN database" or "DIAN data"[331]).[332] MINCIT did not base its dumping determination on the export prices that exporters submitted to the authority in their respective questionnaire responses.[333]

7.154. The European Union claims that, in so doing, MINCIT "in fact" applied facts available without being entitled to do so and thus acted inconsistently with Article 6.8 and paragraph 3 of Annex II of the Anti-Dumping Agreement, and, relatedly, Article 2.1 and paragraph 6 of Annex II of the Anti-Dumping Agreement.[334]

7.155. The European Union supports these claims by asserting that: (a) an authority may only resort to facts available in accordance with the requirements of Article 6.8; (b) none of the requirements under Article 6.8 were fulfilled in the underlying investigation because the exporters fully responded to MINCIT's request for information; and (c) the export price data that the exporters provided to MINCIT satisfied all the criteria set forth in paragraph 3 of Annex II[335] and MINCIT did not find to the contrary.[336] As such, the European Union contends that, in making its dumping determination, MINCIT was required to use the pricing data that the exporters provided to the authority as it had no basis under Article 6.8 or paragraph 3 of Annex II to use the DIAN data.[337]

7.156. The European Union also contends that MINCIT did not inform the exporters of the reasons as to why it elected to disregard the pricing information that they had supplied, contrary to

[331] DIAN is the acronym for Colombia's National Tax and Customs Directorate (Dirección de Impuestos y Aduanas Nacionales).
[332] Final technical report (public version), (Exhibit EU-4a), sections 2.1, 2.5, and 2.5.1-2.5.3.
[333] MINCIT used export price information extracted from the DIAN database to determine dumping margins for the individually investigated exporters (i.e. Agristo, Clarebout, Ecofrost, Mydibel, Farm Frites, Aviko, and Agrarfrost – all of which responded to MINCIT's exporter questionnaire) and any "other" non-responding exporters from Belgium, Germany and the Netherlands. (Final technical report (public version), (Exhibit EU-4a), sections 2.1, 2.5, and 2.5.1-2.5.3). MINCIT applied definitive anti-dumping duties on imports from Agrarfrost, Aviko, and Mydibel as well as on imports from any "other" exporters from the Netherlands.
[334] European Union's first written submission, paras. 99, 120, and 131.
[335] European Union's first written submission, para. 128.
[336] European Union's first written submission, paras. 93 and 102.
[337] European Union's first written submission, paras. 110 and 128.

paragraph 6 of Annex II.[338] Finally, the European Union asserts that, as a consequence of infringing Article 6.8 and Annex II, MINCIT also acted inconsistently with Article 2.1.[339]

7.157. Colombia, for its part, responds that MINCIT did not resort to facts available when it elected to use the DIAN data, and that, therefore, the facts available disciplines do not apply to MINCIT's determination.[340] Specifically, Colombia presents two arguments in this regard. First, Colombia argues that the DIAN data do not constitute facts available, "best information available", or "secondary [source] information".[341] Rather, these data represent what Colombia describes as "primary [source] information".[342] In Colombia's view, this is because the DIAN data pertain directly to the exporters concerned[343] and are "identical, in essence and origin"[344] to – or "essentially the same"[345] as – the data that the exporters provided in their questionnaire responses. Given this, Colombia argues that it was within MINCIT's discretion to select the DIAN data as being "more appropriate" for its calculations.[346]

7.158. Second, Colombia notes that MINCIT never made any express facts available finding pursuant to Article 6.8 and paragraph 3 of Annex II – for instance, by observing that the exporters did not provide the requested "necessary" information.[347] According to Colombia, the absence of an explicit and formal determination by MINCIT in this regard indicates that MINCIT did not use facts available in determining export prices and that, therefore, the rules concerning the use of facts available do not apply in the present context.[348]

7.159. In sum, Colombia contends that, given that MINCIT did not use facts available, the European Union's claims under Article 6.8 and Annex II, as well as its consequential Article 2.1 claim, must fail.

7.160. Notwithstanding the above, Colombia argues that, in the event that the Panel were to find that the DIAN data constituted facts available, MINCIT nonetheless complied with Article 6.8 and Annex II. In this regard, Colombia asserts that MINCIT took into account the information that the exporters had provided and informed them of its decision to use the DIAN data.[349] Colombia also contends that MINCIT afforded the exporters an opportunity to comment on this issue and that the authority explained the reasons for its decision in response to the comments that were made by several exporters.[350]

7.161. We begin our examination by recalling the applicable requirements under Article 6.8 and paragraphs 3 and 6 of Annex II (section 7.5.2). Next, we consider whether MINCIT used "facts available" within the meaning of Article 6.8 and, if so, whether it acted in accordance with the requirements that govern an investigating authority's resort to facts available (section 7.5.3).

7.5.2 Applicable requirements under Article 6.8 and paragraphs 3 and 6 of Annex II

7.162. Article 6.8 of the Anti-Dumping Agreement provides that:

[338] European Union's first written submission, para. 130.
[339] European Union's first written submission, para. 129; response to Panel question No. 4.8, para. 100.
[340] Colombia's first written submission, paras. 8.3, 8.36, and 8.39.
[341] Colombia's first written submission, paras. 8.2, 8.37, 8.52, and 8.56; second written submission, paras. 5.1-5.18.
[342] Colombia's first written submission, paras. 8.2, 8.7, 8.37, 8.40, and 8.46-8.47; second written submission, para. 5.9.
[343] Colombia's first written submission, paras. 8.2, 8.37, and 8.46-8.47.
[344] Colombia's first written submission, paras. 8.2, 8.7, 8.37, 8.47, 8.51, and 8.59.
[345] Colombia's second written submission, paras. 5.3, 5.9, and 5.11.
[346] Colombia's first written submission, paras. 8.2-8.3, 8.7, 8.36, 8.38, 8.52, 8.88-8.89, and 8.96; responses to Panel questions No. 4.2(a), para. 145, No. 4.2(b), para. 148, and No.4.2(c), para. 149; and second written submission, para. 5.3.
[347] Colombia's first written submission, paras. 8.39 and 8.63-8.78.
[348] Colombia's opening statement at the first meeting of the Panel, para. 3.7.
[349] Colombia's opening statement at the first meeting of the Panel, para. 3.9; response to Panel question No. 14.2(a), paras. 81-85.
[350] Colombia's opening statement at the first meeting of the Panel, para. 3.9; response to Panel question No. 14.2(a), para. 85.

> In cases in which any interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation, preliminary and final determinations, affirmative or negative, may be made on the basis of the facts available. The provisions of Annex II shall be observed in the application of this paragraph.

7.163. The first sentence of Article 6.8 lists three types of circumstances in which an investigating authority may elect to use "facts" that are otherwise "available" in order to make its "determinations". Recourse to facts available is thus limited to situations in which an interested party refuses access to, or otherwise does not provide necessary information, or where it significantly impedes the investigation.

7.164. The second sentence of Article 6.8 sets out the relationship between Article 6.8 and Annex II, entitled "Best information available in terms of paragraph 8 of Article 6", and stipulates that the "provisions of Annex II shall be observed in the application of" Article 6.8. Paragraph 3 of Annex II provides, in relevant part, that "[a]ll information which is verifiable, which is appropriately submitted so that it can be used in the investigation without undue difficulties, [and] which is supplied in a timely fashion … should be taken into account when determinations are made". Paragraph 6 of Annex II requires, *inter alia*, that "[i]f evidence or information is not accepted, the supplying party should be informed forthwith of the reasons therefore, and should have an opportunity to provide further explanations within a reasonable period".

7.5.3 Analysis

7.165. The parties disagree as to whether MINCIT resorted to the use of facts available and, if so, whether it acted inconsistently with the requirements of Article 6.8 and Annex II by electing not to use the export prices provided by the exporters in their questionnaire responses and, instead, using the DIAN data. As we see it, a key question in this regard is whether the DIAN data constitute "facts available" within the meaning of Article 6.8 and Annex II.

7.166. In considering this question, we recall that Article 6.8 permits an investigating authority to use "facts available" as the "basis" of its determinations when an "interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation". We also note that Annex II similarly contains several requirements that regulate the circumstances in which an investigating authority may resort to, and use, facts available – e.g. by regulating, *inter alia*, the manner in which an authority may request necessary information – and the conditions under which an authority should take information into account.

7.167. As part of our analysis below (paragraphs 7.168-7.185), we discuss six considerations that we deem relevant to our evaluation of the European Union's claim: (a) MINCIT's request for export price information; (b) the exporters' questionnaire responses containing the requested export prices; (c) the DIAN data as the basis for MINCIT's determination; (d) the origin of the DIAN data; (e) the dissimilarity between the DIAN data and the exporters' export prices; and (f) the absence of a facts available determination pursuant to the Article 6.8 criteria. Having reviewed these considerations, we undertake an overall evaluation of the matter, including the question of whether the DIAN data constitute facts available and, if so, whether MINCIT acted inconsistently with the requirements of Article 6.8 (paragraphs 7.186-7.192).

First consideration – MINCIT's request for export price information

7.168. We note that, at the outset of the investigation, MINCIT issued a questionnaire to the investigated exporters in which the authority asked for, *inter alia*, company-specific information, including sales prices per export transaction to Colombia during the period of investigation.[351]

Second consideration – The exporters' questionnaire responses with the requested export prices

7.169. The three exporters at issue – Agrarfrost, Aviko, and Mydibel – were among the companies that provided questionnaire responses and supplied the requested export price information to

[351] Dumping investigation questionnaire for foreign producers and/or exporters, (Exhibit EU-23a), section 5.

MINCIT.[352] MINCIT's final technical report notes that these exporters "participated" and "collaborated" in the investigation, including by providing "timely" questionnaire responses.[353]

Third consideration – The DIAN data as the basis for MINCIT's determination

7.170. Article 6.8 permits investigating authorities to make determinations "on the basis of the facts available" in the three situations envisaged thereunder. In the circumstances of the present dispute, we note that MINCIT made its dumping determination "on the basis of" export price information that was necessary for the calculation of the margins of dumping. However, in making this determination, MINCIT did not use the pricing information that the exporters provided in their questionnaire responses and used the DIAN data instead.[354] The latter data thus constituted the actual export price information that MINCIT used as the "basis" of its dumping determination.

7.171. We note that, while not disputing that MINCIT relied on the DIAN data to make its dumping determination, Colombia argues that it would be incorrect to state that MINCIT *rejected*, or did not *use*, the export price information that exporters provided in the questionnaire responses.[355] Rather, Colombia asserts that MINCIT proceeded in two steps. First, Colombia asserts that MINCIT used the DIAN data as a "starting point" in its calculations to determine "initial" F.o.b. (free on board) export prices.[356] Second, Colombia asserts that MINCIT then used the cost information contained in the exporters' questionnaire responses to adjust F.o.b. export prices to ex-factory levels. Therefore, in Colombia's view, MINCIT *used*, and *took into account*, information that the exporters had provided when the authority calculated ex-factory export prices.[357] We note, however, that MINCIT's reliance on the exporters' cost information for calculating deductions or adjustments does not alter the fact that MINCIT used – and based its determination on – the export prices extracted from the DIAN database, rather than the export prices that the exporters had provided in their questionnaire responses.

Fourth consideration – The origin of the DIAN data

7.172. With respect to the operation of its domestic import regime, Colombia explains that importers provide the National Tax and Customs Directorate (DIAN) with information on import transactions when they complete and submit their import declarations.[358] DIAN collects this information in its DIAN database. Colombia adds that, in the circumstances of this dispute, the importers of the product under investigation supplied, *inter alia*, exporter-specific export price information to DIAN in their import declarations.[359] In our view, therefore, the data that MINCIT extracted from the DIAN database in the underlying investigation did not originate from export price information that the *exporters* provided *during the investigation*, for instance, as part of their responses to MINCIT's specific questionnaire request for export prices.[360] Rather, the *importers* provided the DIAN data in an administrative procedure – and to an administrative authority – that was unrelated to the anti-dumping investigation conducted by MINCIT.

7.173. Notwithstanding the fact that the DIAN data did not originate directly from the exporters, we note that Colombia refers to two elements that, in its view, establish a "link" between the importers and the exporters.[361] First, Colombia argues that the importers relied on data and documents from the exporters when they provided export price information to the DIAN database in their import declarations.[362] Second, Colombia contends that according to domestic Colombian law the information in the import declarations had to match the information in the underlying

[352] Final technical report (public version), (Exhibit EU-4a), sections 2.1, 2.5, and 2.5.1-2.5.3.
[353] Final technical report (public version), (Exhibit EU-4a), sections 2.1, 2.5, and 2.5.1-2.5.3.
[354] Final technical report (public version), (Exhibit EU-4a), sections 2.1, 2.5, and 2.5.1-2.5.3.
[355] Colombia's response to Panel question No. 14.2(a), paras. 81-82.
[356] Colombia's first written submission, paras. 8.5, 8.21-8.22, and 8.30-8.31; responses to Panel questions No. 4.2(a), para. 146, No. 4.2(b), para. 147, and No. 4.2(c), para. 149.
[357] Colombia's response to Panel question No. 14.2(a), paras. 81-82.
[358] Colombia's first written submission, paras. 8.13-8.14.
[359] Colombia's first written submission, paras. 8.14-8.15 and 8.47; response to Panel question No. 4.3(b), para. 151.
[360] Colombia's first written submission, paras. 8.14-8.15 and 8.47; response to Panel question No. 4.3(b), para. 151.
[361] Colombia's response to Panel question No. 4.4, para. 162.
[362] Colombia's first written submission, para. 8.15; response to Panel question No. 4.4, para. 162.

supporting documents, such as the invoices.[363] In response to questioning by the Panel seeking further clarification on the relationship between the importers and the exporters, and the documentation provided to the DIAN database, Colombia, however, acknowledges that the importers did not submit to the DIAN database any documents with export price information that the exporters had issued and, in particular, they did not provide any invoices.[364] We also note Colombia's statement that the importers were not agents of the exporters, and therefore did not act in their name and at their direction, when submitting the import declarations.[365] Moreover, and significantly, not only did the two data sets stem from different entities (importers and exporters, respectively) and different administrative procedures (customs procedures and anti-dumping investigation, respectively), but they were, in any event, not the same.[366] We address this latter point in the following paragraphs.

Fifth consideration – The dissimilarity between the DIAN data and the exporters' export prices

7.174. Colombia argues that MINCIT did not use facts available in the circumstances of this case because the export prices extracted from the DIAN database and the export prices that the exporters provided in the questionnaire responses were (essentially) the same. In this regard, Colombia variously refers to the data sets as being "identical, in essence and origin"[367], "equivalent"[368], and "essentially the same"[369], other than for "small differences" in "technical details".[370] This being the case, Colombia argues, MINCIT had discretion to elect to use the DIAN data without resorting to facts available.[371]

7.175. The European Union disagrees with Colombia and argues that the data sets differed significantly, both in terms of the prices for specific export transactions and the overall composition of the sets of export transactions.[372] In particular, the European Union describes in detail the differences as they relate to the content, form, structure, and the source of the data.[373]

7.176. Irrespective of the various ways in which Colombia characterizes the similarities between the data, we consider that, based on both parties' factual descriptions provided to the Panel, the data sets did, in fact, differ in several respects.[374] In particular:

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[363] Colombia's first written submission, para. 8.15; responses to Panel questions No. 4.4, para. 162; and Nos. 4.5(a) and 4.5(b), para. 167.

[364] Colombia's responses to Panel questions Nos. 4.5(a) and 4.5(b), para. 168 and fn 118. According to Colombia, importers were under a legal obligation to keep relevant documentation for five years in case of an audit.

[365] Colombia's response to Panel question No. 4.4, para. 161.

[366] The European Union argues that, irrespective of the fact whether the data sets were the same or not, MINCIT was only permitted to use the export price data that the *exporters* provided *in and for the purpose of the investigation*. (European Union's opening statement at the first meeting of the Panel, para. 36; second written submission, paras. 57 and 60; responses to Panel questions No. 4.3(a), paras. 73-75 and 77, and No. 14.2(b), paras. 39-40; comments on Colombia's response to Panel question No. 14.2(a), para. 15). In the European Union's view, MINCIT could not properly use data that was collected from a different source outside the investigation, and for a different purpose, absent a finding that the conditions in Article 6.8 and Annex II for recourse to the facts available mechanism were met. (European Union's second written submission, paras. 57 and 60). In paragraphs 7.172-7.173, we discuss these aspects of the DIAN data. Our discussion of this issue is among the elements that we consider in our overall assessment in paragraphs 7.168-7.192 in order to resolve the European Union's claim.

[367] Colombia's first written submission, paras. 8.2, 8.7, 8.37, 8.47, 8.51, and 8.59.

[368] Colombia's responses to Panel questions No. 4.2(a), para. 145, No. 4.2(b), para. 148, and No. 4.2(c), para. 149.

[369] Colombia's second written submission, paras. 5.3, 5.9, and 5.11. We note that when asked by the Panel, Colombia acknowledged that the data sets were "not 'identical' in the strict sense of the word". (Colombia's responses to Panel questions No. 4.3(a) and No. 4.3(b), para. 151).

[370] Colombia's second written submission, paras. 5.9 and 5.11.

[371] Colombia's first written submission, paras. 8.2-8.3, 8.7, 8.36, 8.38, 8.52, 8.88-8.89, and 8.96; responses to Panel questions No. 4.2(a), para. 145, No. 4.2(b), para. 148, and No. 4.2(c), para. 149; second written submission, para. 5.3.

[372] European Union's response to Panel question No. 4.3(a), paras. 78-79; second written submission, para. 61; and opening statement at the second meeting of the Panel, paras. 36-37.

[373] European Union's response to Panel question No. 4.3(c), paras. 81-95; second written submission, paras. 62-66.

[374] Colombia's responses to Panel questions No. 4.3(b), para. 151, No. 4.3(d)(i), paras. 152-157 (referring to Agrarfrost's export transactions, (Exhibit COL-41 (BCI)); Aviko's export transactions,

a. the numerical export price values in the two data sets differed both in terms of currency denomination and level of trade (INCOTERMS).[375] Moreover, the exporters provided export prices per product type, whereas the data set extracted from the DIAN database contained prices of merchandise imported under subheading 2004.10.00.00, without differentiating between product types;

b. further, as per MINCIT's questionnaire request, the exporters provided export prices for individual sales transactions.[376] By contrast, each export price in the DIAN database was calculated as an average price of several invoices and several sales transactions.[377] Individual transaction-specific prices and average prices are, in our view, not the same; and

c. as regards Agrarfrost, Aviko, and Mydibel, the two data sets were also partially composed of different export transactions.[378] The data set that MINCIT extracted from the DIAN database included certain transactions, and corresponding export prices, that were not contained in the exporters' data in their questionnaire responses, and *vice versa*.[379] This was mainly because the exporters and MINCIT selected relevant export transactions differently. The exporters reported export transactions for which the sale (by invoice date) occurred during the period of investigation. By contrast, MINCIT selected transactions for which the DIAN database indicated that the customs declaration was made during the period of investigation.[380]

7.177. Therefore, when questioned by the Panel about its assertion that the two sets of data were (essentially) the same, Colombia did not sufficiently substantiate its position.[381] To the contrary, as explained above, the parties' statements, including those by Colombia, indicate that the data sets differed significantly in their scope and content.

(Exhibit COL-42 (BCI)); and Mydibel's export transactions, (Exhibit COL-43 (BCI))), and No. 4.3(d)(ii), paras. 158-159; European Union's response to Panel question No. 4.3(c), paras. 81-95; second written submission, paras. 62-66.

[375] Exporters reported their export prices in EUR and on a CIF basis, while the export prices in the DIAN database were expressed in USD and at F.o.b. level. MINCIT thus made the necessary conversions when using the DIAN data. (Colombia's first written submission, paras. 8.16 and 8.51, and fn 121; Colombia's responses to Panel questions No. 4.3(b), para. 151, and Nos. 4.5(a) and 4.5(b), paras. 165-166; European Union's first written submission, para. 106 and fn 140; and European Union's response to Panel question No. 4.3(c), paras. 86-90).

[376] Dumping investigation questionnaire for foreign producers and/or exporters, (Exhibit EU-23a), section 5.

[377] According to Colombia, the DIAN database is fed with information from import declarations. Each import declaration typically aggregates the prices from several invoices. Each invoice, in turn, may relate to one or several sales transactions. Each export price extracted from the DIAN database thus represents an average price of the invoices covered by a given import declaration where each of the invoices concerned may relate to several sales transactions. (Colombia's response to Panel question No. 4.3(b), para. 151).

[378] Colombia notes that the data sets for the exporter Clarebout, whose exports were not subject to definitive anti-dumping duties, were composed of the same transactions. (Colombia's response to Panel question No. 4.3(d)(i), para. 156).

[379] Colombia's response to Panel question No. 4.3(d)(i), paras. 152-157 (referring to Agrarfrost's export transactions, (Exhibit COL-41 (BCI)); Aviko's export transactions, (Exhibit COL-42 (BCI)); and Mydibel's export transactions, (Exhibit COL-43 (BCI))).

[380] Colombia's first written submission, paras. 8.19 and 8.26; response to Panel question No. 4.3(d)(ii), para. 158; European Union's response to Panel question No. 4.3(e)(ii), para. 95. Colombia also notes that MINCIT selected export transactions from the DIAN database according to the date on which the merchandise was cleared from the customs procedures and released on the domestic market. (Colombia's response to Panel question No. 4.3(d)(ii), para. 158).

[381] Colombia responded only by outlining the differences in the data but not by showing that the data were indeed (essentially) the same. (Colombia's responses to Panel questions No. 4.3(b), para. 151, and No.4.3(d)(i), paras. 152-157).

Sixth consideration – The absence of a facts available determination pursuant to the Article 6.8 criteria

7.178. Turning to the reasons provided by MINCIT for using the DIAN data (as reflected in the investigation record), we note that the authority provided the following reply in response to queries by certain interested parties concerning, in their view, the unjustified use of facts available[382]:

> With regard to the unjustified rejection of information duly submitted by the companies, in our investigations Colombia's official source for import data is the National Tax and Customs Directorate (DIAN). The DIAN obtains its data from information reported by the importer, which is supported by documents issued by the exporter and is used to calculate the FOB export price to Colombia.
>
> Under the Colombian *Customs* Code, import declarations must match the information contained in the documents on which they were based, failing which the declarant shall be held liable as specified in Article 40 of Decree 390 of 2016 (Customs Code), which states, *inter alia*: "***The declarant shall be responsible for submitting the documents required to support the customs declaration, in compliance with the legal requirements, as well as for the authenticity of the documents***. The declarant shall also be responsible for the payment of duties and taxes, interest, the value of the recovery fee and any penalties that may be incurred." (Underlining and bold type added).
>
> Accordingly, the sales listed by each of the companies must be strictly related to what is stated in the customs declaration, which means that the information in the DIAN database can be considered useful, reliable and effective evidence for calculating the export price.[383]

7.179. Based on the excerpt above, we understand MINCIT's reasoning justifying its use of the DIAN data to proceed as follows: the DIAN database was of an official nature; importers provided information to the DIAN database based on documents from the exporters; the information in the import declarations had to match the information in the underlying supporting documents; the export prices in the exporters' questionnaire responses therefore had to accord with the information in the customs declarations; and the DIAN data was thus "useful, reliable and effective evidence".

7.180. We note that MINCIT provided no further reasoning on this matter in its determination. Hence, our review of the record of the investigation indicates that the authority did not state explicitly that it resorted to facts available in order to determine the export price information that it used to calculate the margins of dumping. Specifically, it made no express findings concerning the circumstances that would permit an authority to resort to the use of facts available pursuant to Article 6.8, such as the exporters refusing access to, or otherwise not providing the requested export price information, or significantly impeding the investigation. MINCIT also did not find explicitly that the exporters' reported export price information was not verifiable, was not appropriately submitted such that it could not be used in the investigation without undue difficulties, or was not supplied in a timely fashion, as envisaged under paragraph 3 of Annex II for proper recourse to facts available.

7.181. Elaborating on these facts, Colombia argues that MINCIT cannot be considered to have resorted to facts available because it did not explicitly and formally decide to use facts available, pursuant to the criteria in Article 6.8 and paragraph 3 of Annex II.[384] Colombia contends that such a decision would, however, be necessary for the facts available disciplines in Article 6.8 and Annex II to apply.[385] Colombia also states that "it obviously does not propose" that an investigating authority has unfettered discretion to decide whether the facts available disciplines apply by simply characterizing its conduct as recourse to facts available or not.[386] According to Colombia, "[h]owever,

[382] Agrarfrost's comments on essential facts (Exhibit EU-25a (BCI)), section III.4; European Commission's observations on essential facts, (Exhibit EU-18a), section 2.1(a).

[383] Responses to comments on essential facts (Exhibit EU-17a), p. 13. (emphasis original)

[384] Colombia's first written submission, paras. 8.39 and 8.63-8.78. See also Colombia's opening statement at the first meeting of the Panel, para. 3.7.

[385] Colombia's first written submission, paras. 8.39 and 8.63-8.78. See also Colombia's opening statement at the first meeting of the Panel, para. 3.7.

[386] Colombia's opening statement at the first meeting of the Panel, para. 3.7.

the exact opposite position can also not be correct. It cannot be *irrelevant* if an investigating authority explicitly invokes or not the relevant secondary information provisions during the investigation".[387]

7.182. The European Union agrees that MINCIT made no explicit facts available determination. According to the European Union, however, an objective assessment of MINCIT's determination indicates that the authority nonetheless used facts available and that Article 6.8 and Annex II apply in the circumstances of this case.[388] The third parties that expressed a view on this matter agree with the European Union that, depending on the circumstances, an investigating authority may be considered to use facts available even if it does not state so explicitly.[389]

7.183. We note Colombia's arguments that "[t]he rules on the 'best information available' are also not applicable because … an explicit finding by an investigating authority is a condition for applying the[se] provisions"[390] and that "it cannot be irrelevant" whether or not an authority made such a determination.[391]

7.184. We accept that the absence of an explicit determination pursuant to the criteria in Article 6.8 and paragraph 3 of Annex II may be relevant in assessing whether an investigating authority had recourse to facts available. However, we do not consider that this fact alone is necessarily conclusive for our analysis. In fact, it would be inappropriate to define the nature of an investigating authority's conduct solely by reference to the fact that the authority did or did not expressly engage in the kind of evaluation that is required by Article 6.8 and paragraph 3 of Annex II. To do so would risk conflating the question of whether an authority resorted to facts available with the separate issue of the authority's alleged (non-) compliance with the substantive requirements for a proper use of facts available.

7.185. In our view, therefore, a case-by-case analysis that takes into account all relevant circumstances is required to determine whether an investigating authority, in fact, used facts available. Depending on the circumstances, such analysis may indicate that an investigating authority had *de facto* recourse to the use of facts available, despite its omission to state so explicitly.

Overall evaluation based on the six considerations discussed above

7.186. In paragraphs 7.168-7.185 above, we have discussed six considerations that are relevant to our analysis of the case at hand. To recall, our review of the specific circumstances of the case indicates that (a) MINCIT requested the exporters at issue to provide company-specific information concerning their export prices; (b) the exporters provided the solicited information fully and on a timely basis in direct response to MINCIT's request; (c) MINCIT used export price information as the basis of its dumping margin calculations but in doing so did not use the export prices that MINCIT had requested and that exporters had provided in their questionnaire responses and, instead, used the DIAN data; (d) the DIAN data were not provided by the exporters as part of the investigation but were sourced from information provided by importers as part of their customs procedures;

[387] Colombia's opening statement at the first meeting of the Panel, para. 3.7. (emphasis added)

[388] European Union's opening statement at the first meeting of the Panel, paras. 32-34; response to Panel question No. 4.7, para. 99.

[389] Brazil's response to Panel question No. 3.2, paras. 25-26; Japan's third-party submission, para. 18; Japan's response to Panel question No. 3.2, para. 31; and United States' response to Panel question No. 3.2, para. 21.

[390] Colombia's first written submission, para. 8.39. See also ibid. paras. 8.64 ("an explicit determination, by an investigating authority, is one of the key conditions for applying the WTO rules on the use of the best information available. In fact, the rules on the best information available rely on the authority making such a determination."), 8.66 ("if the investigating authority does not determine that an investigated company has failed to provide the necessary information (incomplete, unverifiable, etc.) or that the company refuses to cooperate with the investigation, the rules on the best information available do not apply."), and 8.68 ("an investigating authority's explicit determination of whether use was made of the best information available is the key criterion for determining whether, legally, such use has been made.").

[391] Responding to Japan's submission that "Article 6.8 and Annex II apply regardless of whether the investigating authority chooses to categorize its approach as 'recourse to the 'facts available' mechanism'" (Japan's third-party submission, para. 18), Colombia denies "that an investigating authority may decide, *on its own and with total discretion*, whether certain information constitutes secondary information or not" but asserts that "the exact opposite position can also not be correct. It cannot be irrelevant if an investigating authority explicitly invokes or not the relevant secondary information provisions during the investigation." (Colombia's opening statement at the first meeting of the Panel, para. 3.7 (emphasis original)).

(e) the DIAN data and the export prices that the exporters had provided were not the same but differed significantly; and (f) MINCIT did not determine affirmatively that one or more of the conditions in Article 6.8 and paragraph 3 of Annex II for recourse to facts available were satisfied.

7.187. Consistent with our task to take into account all the relevant circumstances of a proceeding when determining whether an authority resorted to facts available[392], we consider that in the particular facts of this dispute, the DIAN data constitute "facts available" for the purposes of Article 6.8.[393] We recall that Article 6.8 permits the use of "facts available" in cases where an "interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation". The parties agree that MINCIT made no such finding concerning the exporters in the underlying investigation. To the contrary, MINCIT indicated in its determination – and the parties do not dispute – that the exporters at issue had fully participated and cooperated in the investigation, including by providing a complete and timely response to MINCIT's request for export price information. Therefore, absent a determination that the exporters refused access to, or otherwise did not provide, necessary information concerning export prices within a reasonable period of time, or significantly impeded the investigation, we are of the view that MINCIT did not comply with the requirements of Article 6.8 in basing its determination on the DIAN data rather than the export prices that the exporters had provided in their questionnaire responses.

7.188. Colombia argues that, even if the Panel were to find that the DIAN data constituted facts available, MINCIT complied with Article 6.8 and Annex II because: the authority informed the exporters of its decision to use the DIAN data in the essential facts disclosure; the exporters subsequently had ample opportunity to comment on this matter and several exporters provided comments; and, MINCIT explained the reasons for its decision in response to those comments.[394] Colombia's factual assertions about the exchange of information and comments between MINCIT and the exporters do not, however, change our assessment that MINCIT used facts available without the requisite determination that the exporters refused access to, or otherwise did not provide, necessary information concerning export prices within a reasonable period of time, or significantly impeded the investigation.

7.189. In its closing statement at the second meeting of the Panel and in its response to the Panel's written questions following that meeting, Colombia makes two additional points. First, it asserts that it made "initial arguments" in its opening statement at the first meeting of the Panel to the effect that MINCIT complied with the substantive requirements of Article 6.8 and Annex II, should the Panel consider that these provisions apply.[395] Second, Colombia argues that principles of due process oblige the Panel to afford Colombia a specific opportunity to present *additional* arguments on this matter in the event that the Panel were to consider that the DIAN data constituted "facts available".[396]

7.190. With respect to Colombia's first point, we note that in paragraph 7.188 above we have already considered what Colombia characterizes as "initial arguments" concerning MINCIT's alleged compliance with Article 6.8 and Annex II and have found that they do not change our assessment that MINCIT used facts available without determining that the requisite Article 6.8 conditions existed to do so.

7.191. As to Colombia's second point, we also reject Colombia's demand for a separate and additional opportunity to elaborate further on its alternative arguments in the event that we were to disagree with Colombia on the legal characterization of the DIAN data. We make three remarks in this regard. First, we note that due process does not mandate a panel to "test" its intended reasoning

[392] See paragraph 7.185 above.

[393] We need not, and do not, take any position on the question of whether MINCIT would not have used facts available if the data sets had, in fact, been the same.

[394] Colombia's opening statement at the first meeting of the Panel, para. 3.9. See also Colombia's response to Panel question No. 14.2(a), para. 85.

[395] Colombia's closing statement at the second meeting of the Panel, para. 1.19 (referring to its opening statement at the first meeting of the Panel, para. 3.9). See also Colombia's response to Panel question No. 14.2(a), para. 85.

[396] Colombia's closing statement at the second meeting of the Panel, para. 1.19; response to Panel question No. 14.2(a), para. 84.

with the parties in advance.[397] Second, we recall that, at least since the receipt of the European Union's first written submission, Colombia was on notice of the European Union's claim that MINCIT acted inconsistently with Article 6.8 and several provisions of Annex II.[398] Subsequently, Colombia had ample opportunity to present its defence in two written submissions, during two substantive meetings, and in two sets of responses to the Panel's questions. In fact, we note that Colombia presented several (what it now describes as "initial") arguments on this matter in its opening statement at the first meeting of the Panel.[399] Colombia quotes these arguments in full in its response to the Panel's written questions after the second substantive meeting.[400] Moreover, we observe that, in its opening statement at the second substantive meeting, Colombia stated that, in respect of the facts available claim, "[t]he different approaches – both factual and legal – of Colombia and the European Union have been sufficiently explored in the parties' previous communications".[401] Third, our determination that MINCIT did not comply with the requirements of Article 6.8 rests on Colombia's statements that MINCIT did not find that the exporters concerned refused access to, or otherwise did not provide, necessary information or significantly impeded the investigation.[402] As noted in paragraph 7.187 above, the use of facts available in a WTO-consistent manner would, however, require the authority to find that one or more of these Article 6.8 criteria are satisfied. Colombia's own arguments thus present the elements that are necessary and sufficient to find that MINCIT did not respect the conditions under Article 6.8. Given this, we do not see the need to provide Colombia with another opportunity to further clarify and elaborate its position on this issue.

7.192. Based on the discussion in paragraphs 7.186-7.191 above, we find that MINCIT did not comply with the requirements of Article 6.8 because: (a) the DIAN data constituted facts available for the purposes of Article 6.8; and (b) MINCIT used that data without determining that the criteria under Article 6.8 for proper recourse to facts available were satisfied.

7.193. The European Union also advances claims of inconsistency under paragraphs 3 and 6 of Annex II.[403] These claims are premised on the view that MINCIT improperly resorted to facts available and thus concern essentially the same factual issues already addressed in the context of its Article 6.8 claim. In addition, the European Union pursues a consequential claim under Article 2.1 that depends on a finding of inconsistency of Article 6.8.[404] Having already found in favour of the European Union with respect to its claim under Article 6.8, we do not consider it necessary to make further findings concerning these additional claims in order to provide a positive resolution to the dispute before us.

7.5.4 Conclusion

7.194. Based on the above, we find that the European Union has established that Colombia acted inconsistently with its obligations under Article 6.8 because MINCIT disregarded the export prices that the exporters had provided in their questionnaire responses and, instead, elected to use export prices extracted from the DIAN database to make its dumping determination. In light of this finding, we do not consider it necessary to make additional findings as to whether Colombia also acted inconsistently with its obligations under paragraphs 3 and 6 of Annex II and Article 2.1 in order to provide a positive resolution to the dispute before us.

[397] In this respect we agree with the approach taken in Appellate Body Reports, *US – Large Civil Aircraft (2nd complaint)*, para. 1137; *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.177; and Panel Report, *China – Broiler Products (Article 21.5 – US), Addendum*, Annex A-3, para. 1.1.

[398] European Union's first written submission, paras. 127-130.

[399] Colombia's opening statement at the first meeting of the Panel, para. 3.9.

[400] Colombia's response to Panel question No. 14.2(a), para. 85.

[401] Colombia's opening statement at the second meeting of the Panel, para. 4.1.

[402] Colombia's first written submission, paras. 8.39, 8.63, 8.72, and 8.77; responses to Panel questions No. 4.2(a), para. 145, No. 4.2(b), para. 148, and No. 4.2(c), para. 149.

[403] European Union's first written submission, paras. 128-130 and 332.

[404] European Union's response to Panel question No. 4.8, para. 100.

7.6 Claims under Article 2.4 of the Anti-Dumping Agreement: MINCIT's assessment of the exporters' requests for adjustments

7.6.1 Introduction

7.195. The European Union claims that Colombia acted inconsistently with its obligations under the first and third sentences of Article 2.4 of the Anti-Dumping Agreement to make a fair comparison between export price and normal value, and to make due allowances for differences affecting price comparability.[405] According to the European Union, MINCIT did not make several necessary adjustments to account for differences between the products that the European producers sold domestically and the products that they exported to Colombia. Specifically, the European Union asserts that MINCIT's price comparison was not fair because MINCIT improperly: (a) declined all requests to make adjustments to account for the fact that the exporters sold different product mixes in the domestic and Colombian markets[406]; (b) denied Mydibel's request to make an adjustment to account for differences in packaging costs, and, instead, deducted certain (other) packaging costs from the export price, but not the normal value[407]; and (c) declined Agrarfrost's request to make certain cost adjustments to account for the fact that Agrarfrost primarily used more expensive oil to prepare potato products sold in the domestic market than it used to prepare potato products that were exported to Colombia.[408]

7.196. The European Union also claims that Colombia acted inconsistently with its obligations under the last sentence of Article 2.4 of the Anti-Dumping Agreement because MINCIT "failed to indicate to the [exporters] what information it considered necessary to make a fair comparison and imposed an unreasonable burden of proof on them".[409]

7.197. In response, Colombia asserts, *inter alia*, that MINCIT was entitled to deny the adjustments because the exporters did not sufficiently substantiate their requests.[410]

7.198. Colombia also asserts that certain elements of the European Union's Article 2.4 claims fall outside the Panel's jurisdiction because the European Union's request for the establishment of a panel (panel request) did not provide a "brief summary of the legal basis of the complaint sufficient to present the problem clearly", contrary to the requirements of Article 6.2 of the DSU.[411]

7.199. We begin by recalling the applicable requirements of Article 2.4 (section 7.6.2). Next, we examine each of the European Union's claims regarding the manner in which MINCIT assessed the exporters' adjustment requests (sections 7.6.3-7.6.6).

7.6.2 Applicable requirements under Article 2.4 of the Anti-Dumping Agreement

7.200. Article 2.4 of the Anti-Dumping Agreement provides, in part:

> 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

[405] European Union's first written submission, paras. 132-134, 179, 192, 205, and 332; second written submission, paras. 69-82.
[406] European Union's first written submission, paras. 133 and 149-179; second written submission, paras. 70-72.
[407] European Union's first written submission, paras. 133 and 180-192; second written submission, paras. 73-75.
[408] European Union's first written submission, paras. 133 and 193-205, second written submission, paras. 76-82.
[409] European Union's first written submission, paras. 133 and 206-208.
[410] Colombia's first written submission, paras. 9.1-12.4; second written submission, paras. 6.1-8.27.
[411] Colombia's first written submission, paras. 10.3-10.22.

> 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.[412]

7.201. 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.

7.202. 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 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.[413]

7.6.3 MINCIT's assessment of the exporters' requests for product mix-related adjustments

7.6.3.1 Introduction

7.203. The European Union claims that MINCIT did not make the "fair comparison" required by Article 2.4 because the authority did not account for alleged differences in the mix of products sold in the home market compared to the Colombian market.[414] Specifically, the European Union notes that Agrarfrost, Aviko, and Mydibel[415] claimed that their export sales consisted mostly of "traditional" potato products that have lower production costs and thus sell at lower prices, while their home market sales comprised a significant volume of "speciality" potato products with higher production costs and sales prices.

7.204. The European Union asserts that the exporters substantiated their adjustment requests with arguments and evidence establishing the existence of physical differences between the product types, the cost and price impact of these differences, and disparate sales volumes of each product type in the domestic and export markets.[416] The European Union thus argues[417] that MINCIT rejected the adjustment requests as unsubstantiated without any proper basis.[418]

7.205. Colombia responds that MINCIT was entitled to reject the exporters' product mix adjustments because the companies did not sufficiently substantiate their requests.[419] Specifically,

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[412] Fn omitted.

[413] A similar conclusion was reached in, for example, Appellate Body Reports, *EC – Fasteners (China)*, para. 488; *EC – Fasteners (China) (Article 21*.5 *– China)*, paras. 5.163 and 5.204; and Panel Reports, *EC – Fasteners (China)*, para. 7.298; *Korea – Certain Paper*, para. 7.147.

[414] European Union's first written submission, paras. 133 and 149-179; second written submission, paras. 70-72.

[415] In setting out the contents of its product mix-related claim in its first written submission, the European Union refers to three companies whose exports were subject to definitive anti-dumping duties (Agrarfrost, Aviko, and Mydibel) and three companies whose exports were not (Agristo, Clarebout, and Ecofrost). (European Union's first written submission, paras. 156-161 and 172). In response to a question from the Panel, the European Union clarified that it does not request the Panel to make separate findings concerning MINCIT's treatment of the latter group of exporters and that its arguments in this regard are intended as supporting its principal assertions concerning Agrarfrost, Aviko, and Mydibel. (European Union's response to Panel question No. 5.1, para. 101).

[416] European Union's first written submission, paras. 133, 149, 151-161, 167-169, and 171; responses to Panel questions No. 5.2, paras. 108-112 and No. 5.3, paras. 113-119.

[417] European Union's first written submission, paras. 163, 165, 172, and 174-178.

[418] We note that MINCIT performed a single comparison of weighted average export price and weighted average normal value for the product under investigation, rather than a type-by-type comparison with multiple averaging.

[419] Colombia's first written submission, paras. 9.5, 9.13, 9.41, 9.47, and 9.50; opening statement at the first meeting of the Panel, para. 4.1; second written submission, para. 6.2; and opening statement at the second meeting of the Panel, para. 5.1.

Colombia asserts that the materials provided by the exporters in support of their requests contained contradictory, implausible, inconsistent and unsupported information.[420]

7.6.3.2 Analysis

7.206. The European Union asserts that Agrarfrost, Aviko, and Mydibel requested product mix-related adjustments in a timely manner and provided all necessary data, explanations and evidence to substantiate their requests.[421] Colombia does not dispute that the exporters sought product mix adjustments but contends that MINCIT appropriately denied the adjustments because the exporters did not sufficiently substantiate their requests.[422] As we see it, the parties' arguments raise the following two key issues:

a. first, whether MINCIT did, in fact, deny the exporters' product mix adjustments on the basis that the requests were, as Colombia asserts, not sufficiently substantiated[423]; and

b. second, insofar as MINCIT declined the requests because they were not sufficiently substantiated, whether MINCIT's record findings indicate that the authority had an adequate basis for its decision.

7.207. As to the first issue, based solely on MINCIT's response to *Aviko's* comments on the essential facts disclosure[424], Colombia asserts that the authority denied Agrarfrost's, Aviko's and Mydibel's product-mix adjustments because it determined that none of these exporters had sufficiently substantiated their requests.[425] Specifically, Colombia notes[426] that MINCIT's reply to Aviko's comments on the essential facts disclosure states, in relevant part, as follows:

> [T]he panel in [*EC – Fasteners (China)*] … made the following observations, among others: … "If it is not demonstrated to the authorities that there is a difference affecting price comparability, there is no obligation to make an adjustment."[427]
>
> …
>
> In accordance with the foregoing, the Investigating Authority does not consider it necessary to calculate the dumping margin by type of product as Aviko requests, and considers that the way in which the calculation was performed by Colombia is suitable and represents the value of the product being investigated.[428]

7.208. Although MINCIT did not develop its reasoning in detail, we are of the view that these statements indicate that MINCIT's rationale for denying Aviko's adjustment request was related to the matter of insufficient substantiation ("'If it is not demonstrated to the authorities that there is a difference affecting price comparability' … In accordance with the foregoing, …"). We therefore find sufficient evidence on the record of the investigation indicating that MINCIT denied Aviko's request because it considered that the company did not properly substantiate its product-mix adjustment request.

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[420] Colombia's first written submission, paras. 9.11-9.50; second written submission, para. 6.2.

[421] European Union's first written submission, paras. 149, 154-160, and 171-172; second written submission, para. 71.

[422] Colombia's first written submission, paras. 9.5, 9.13, 9.41, 9.47, and 9.50; opening statement at the first meeting of the Panel, para. 4.1; second written submission, para. 6.2; and opening statement at the second meeting of the Panel, para. 5.1.

[423] We note the European Union's position that the allegation of insufficient substantiation was "*ex-post* rationalisation" and a "post-facto claim". (European Union's first written submission, para. 207; opening statement at the first meeting of the Panel, para. 59).

[424] Colombia's first written submission, para. 9.13.

[425] Colombia's first written submission, para. 9.13 (referring to Responses to comments on essential facts, (Exhibit EU-17a), section 4).

[426] Colombia's first written submission, para. 9.13.

[427] Responses to comments on essential facts, (Exhibit EU-17a), section 4 (quoting Panel Report, *EC – Fasteners (China)*, para. 7.298, in turn quoting Panel Report, *Korea – Certain Paper*, para. 7.147). (emphasis added by MINCIT omitted)

[428] Responses to comments on essential facts, (Exhibit EU-17a), section 4.

7.209. We note, however, that MINCIT's statements are made in the context of, and are limited to, MINCIT's assessment of Aviko's request and do not appear to respond to either Agrarfrost's or Mydibel's request. We also observe that Colombia has not pointed to any other material on the record of the underlying investigation that would indicate that MINCIT denied Agrarfrost's and Mydibel's product mix adjustments because it found that these companies did not sufficiently substantiate their requests.

7.210. Our assessment of the first issue thus indicates that MINCIT's reason to deny Aviko's adjustment was related to the issue of insufficient substantiation, but that MINCIT did not deny Agrarfrost's and Mydibel's adjustments for the same reason.

7.211. As Colombia has not established that MINCIT did, in fact, determine that Agrarfrost and Mydibel had not sufficiently substantiated their requests for product-mix adjustments, we reject Colombia's arguments in this regard as *ex post* explanations. We also note that Colombia does not argue – and the record of the investigation does not indicate – that MINCIT denied Agrarfrost's and Mydibel's adjustments for any other reason. Given this, we consider that the authority did not have any proper basis to deny Agrarfrost's and Mydibel's requests. Consequently, we focus the remainder of our analysis on MINCIT's assessment of Aviko's request.

7.212. Turning to the second issue, we next examine whether MINCIT had an adequate basis for its decision to deny Aviko's adjustment because the exporter did not sufficiently substantiate its request. We assess this question in light of MINCIT's findings on the record of the investigation and the parties' arguments in these proceedings.

7.213. With respect to MINCIT's findings on the record of the investigation, we recall that MINCIT's assessment of Aviko's request is limited to a few elements: a quote from the WTO panel report in *EC – Fasteners (China)*; a statement that Aviko's requested adjustment was not "necessary"; and a finding that MINCIT's own calculation was "suitable" and "represent[ative of] the value of the product being investigated".[429] To us, however, nothing in these statements indicates why MINCIT determined that Aviko did not sufficiently substantiate its adjustment request.

7.214. The European Union asserts that MINCIT had no basis for its denial decision because Aviko sufficiently substantiated its request with arguments and information, including information concerning the differences in physical characteristics between the product types, the corresponding impact on costs and prices, and the sales volumes by product types for domestic and export sales.[430] In response, Colombia takes issue with certain allegedly flawed elements in Aviko's arguments and information.[431] Specifically, Colombia asserts that MINCIT had reason to determine that Aviko did not substantiate its request because the exporter's statements and information were: (a) "illogical" and "confusing"[432]; (b) made in response to a question in the exporter's questionnaire that was unrelated to the issue of adjustments[433]; (c) unsupported by factual evidence[434]; and (d) inconsistent with Aviko's comments on essential facts[435] and with statements on the record made by other exporters.[436] We note, however, that Colombia does not point to anything on the investigation record that would indicate that any of the alleged "deficiencies"[437] that Colombia now claims before us as vitiating Aviko's request were part of MINCIT's own assessment. In fact, based on the record of the investigation before us (including MINCIT's determinations and other

[429] See paragraph 7.207 above.
[430] European Union's first written submission, para. 157 and fn 198 (referring to Aviko's questionnaire response, (Exhibit EU-29a (BCI)), sections 3.1 and 3.4, annexes 1-12; Questionnaire response, Excel workbook "ventas domésticas", (Exhibit EU-29.1 (BCI)); Questionnaire response, Excel workbook "ventas en Colombia", (Exhibit EU-29.2 (BCI)); and Aviko's comments on essential facts, (Exhibit EU-26a (BCI)), section III).
[431] Colombia's first written submission, paras. 9.15-9.33.
[432] Colombia's first written submission, paras. 9.17, 9.21, 9.23, and 9.26.
[433] Colombia's first written submission, paras. 9.22 and 9.24.
[434] Colombia's first written submission, paras. 9.25 and 9.28.
[435] Colombia's first written submission, para. 9.31.
[436] Colombia's first written submission, paras. 9.29 and 9.32.
[437] Colombia's second written submission, paras. 6.5 and 6.9.

documents[438]), MINCIT does not appear to identify or explain any reasons for its conclusion that Aviko did not sufficiently substantiate its adjustment request.

7.215. We therefore consider that MINCIT denied Aviko's request without, on the record of the investigation, engaging with, and evaluating the substance of, the arguments and information that Aviko provided in support of its adjustment request, let alone providing the reasons underlying its conclusion that the exporter did not sufficiently substantiate its request. Absent such elements in MINCIT's determination, we consider that MINCIT lacked an adequate basis to determine that Aviko did not sufficiently substantiate its adjustment request.

7.6.3.3 Conclusion

7.216. Based on the above, we consider that the record of the investigation does not indicate that MINCIT had any proper basis for its decision to deny Agrarfrost's and Mydibel's product mix-related adjustment requests. Separately, we conclude that MINCIT had no proper basis for its finding that Aviko had not sufficiently substantiated its product mix-related adjustment request. In sum, we therefore find that the European Union has established that Colombia acted inconsistently with its obligation under Article 2.4 to make a "fair comparison" because MINCIT denied the product mix-related adjustments that Agrarfrost, Aviko, and Mydibel had requested.

7.6.4 MINCIT's assessment of Mydibel's request for a packaging cost-related adjustment

7.6.4.1 Introduction

7.217. In its questionnaire response, the Belgian exporter Mydibel requested an adjustment to account for what it claimed to be differences in packaging costs that varied depending on product types and customer specifications.[439] MINCIT did not make the requested adjustment, but instead deducted certain export packaging costs from the export price, without making any corresponding adjustment to the normal value.[440]

7.218. The European Union claims that Colombia acted inconsistently with the requirement under Article 2.4 to make a fair comparison because MINCIT did not grant Mydibel's adjustment request and, instead, elected to exclude certain packaging costs from the export price but retained packaging costs on the normal value side.[441]

7.219. Colombia responds that this claim falls outside the Panel's terms of reference because the European Union's panel request does not comply with the requirements of Article 6.2 of the DSU.[442] Colombia also argues that the claim must, in any event, fail on its merits because MINCIT made the necessary adjustment consistently with Article 2.4.[443]

7.6.4.2 Analysis

7.220. The parties' arguments raise the following two key issues:

a. whether the Panel has jurisdiction over the European Union's packaging cost-related claim; and, if so,

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[438] Final report on the essential facts (public version), (Exhibit EU-3a), section 2.4.2; Responses to comments on essential facts, (Exhibit EU-17a), section 4; Final technical report (public version), (Exhibit EU-4a), section 2.4.2; and Final technical report (confidential version), (Exhibit COL-16 (BCI)), section 2.4.2.

[439] European Union's first written submission, paras. 182-183; Mydibel's questionnaire response, (Exhibit EU-30a (BCI)), section 5.

[440] Responses to comments on essential facts, (Exhibit EU-17a), section 7.

[441] European Union's first written submission, paras. 133, 181, 183-184, 186, 189, and 191.

[442] Colombia's first written submission, paras. 10.3-10.22.

[443] Specifically, Colombia argues that (a) MINCIT deducted the cost for export packaging from the export price but retained the cost for "normal", or "base", packaging material on the export price and normal value sides given that the latter cost item was common to export and domestic sales; and (b) the cost for "base" packaging was part of the manufacturing costs, and, as such, should not be deducted from the ex-factory price. (Colombia's first written submission, paras. 10.24 and 10.26-10.27; responses to Panel questions No. 5.5(a), paras. 184-186, and No. 5.6, para. 190).

b. whether the European Union has established that MINCIT lacked a proper basis to decline the requested adjustment and to deduct, instead, certain packaging costs from the export price but not from the normal value.

7.6.4.2.1 The Panel's terms of reference

7.221. Article 6.2 of the DSU reads, in relevant part, as follows:

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

7.222. The requirement to "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly" is central to establishing a panel's jurisdiction. The legal basis of the complaint – i.e. the claim – is one of the elements constituting the "matter referred to the DSB"[444], which, in turn, forms the basis of a panel's terms of reference.

7.223. Colombia argues that the European Union's panel request does not provide the requisite brief summary of the legal basis of the complaint because the European Union's description of this claim in its first written submission is substantively different from what is in its panel request.[445] Specifically, Colombia points out that paragraph 5 of the panel request refers to MINCIT's alleged disregard of "differences in packaging", whereas in its first written submission the European Union challenges MINCIT's decision to deduct packaging costs from the export price but not from the normal value.[446]

7.224. The European Union counters that paragraph 5 of the panel request provides the requisite brief summary of the legal basis of its complaint because that paragraph refers to "differences in packaging".[447]

7.225. In order to assess whether, in light of Colombia's specific contentions, the European Union's panel request presents a brief summary of the legal basis of the complaint, we review both the panel request and the statement of claim contained in the European Union's first written submission.

7.226. Paragraph 5 of the European Union's panel request states that the challenged measures appear to be inconsistent with Colombia's obligations under Article 2.4 of the Anti-Dumping Agreement because:

> *Colombia did not make a fair comparison between the export price and the normal value. In particular, Colombia did not make due allowances for differences which affect price comparability*, including for differences in physical characteristics and/or any other differences between the products sold on the domestic markets in Belgium, Germany and the Netherlands, and the products under investigation sold on the export market, which were demonstrated to affect price comparability. *Inter alia, Colombia disregarded* the differences between the types of products, the different proportions of high and low value products exported to Colombia, as compared to domestic sales in Belgium, Germany and the Netherlands, as well as *differences in packaging* and differences resulting from the use of different types of oils.[448]

7.227. In paragraph 5 of the panel request, the European Union describes the elements of its Article 2.4 complaint as being: (a) the alleged failure to "make a fair comparison between the export price and the normal value"; (b) "[i]n particular", the alleged failure to "make due allowances for differences … affect[ing] price comparability"; and (c) as an example ("*inter alia*"), Colombia's alleged disregard for "differences in packaging".

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[444] Article 7.1 of the DSU.
[445] Colombia's first written submission, paras. 10.3-10.22.
[446] Colombia's first written submission, paras. 10.10, 10.12, and 10.14.
[447] European Union's opening statement at the first meeting of the Panel, paras. 54-55.
[448] Emphasis added.

7.228. The European Union develops its claim in the first written submission by stating, *inter alia*, that:

> While Mydibel had claimed some adjustments relating to slight differences in packaging costs depending on the product type and client, MINCIT not only ignored this claim, but even worse, included the full packaging costs on the normal value side and none on the export price side.[449]

7.229. The European Union's statement of its claim in its first written submission thus focuses on MINCIT's decision to deny Mydibel's request to account for asserted variations in packaging costs and to deduct, instead, packaging costs from the export price without making any deduction on the normal value side.

7.230. Colombia argues that there is a substantive difference between the European Union's statement in its panel request, which relates to MINCIT's disregard of "differences in packaging", and the claim that it makes in its first written submission that MINCIT deducted packaging costs from the export price only.[450]

7.231. We recall that Article 6.2 of the DSU states that the panel request need only provide a "brief summary" of the "legal basis of the complaint" – i.e., the claim. Therefore, a complainant need not include the *arguments* in support of a *claim* in its panel request but it must do so in its submissions during the panel proceedings.[451] Moreover, we consider that a complainant's *arguments* relate to, *inter alia*, the precise reasons as to how and why a respondent is alleged to have acted WTO-inconsistently. Accordingly, the European Union's panel request did not need to engage in detail with all the factual aspects of the calculation that led to Colombia's alleged failure to perform a fair comparison. In particular, it was not necessary for the panel request to outline which specific adjustment was allegedly not – or incorrectly – made and why.

7.232. Consequently, the European Union's assertions that MINCIT disregarded "differences in packaging" and only deducted packaging costs from the export price constitute arguments, not claims. We therefore consider that Article 6.2 of the DSU does not require the European Union to include its "unilateral deduction" argument in the panel request in order to provide a brief summary of the legal basis of the complaint.

7.233. Based on the above, we find that Colombia has not established that the European Union's panel request does not satisfy the requirements of Article 6.2 of the DSU and that, therefore, its packaging cost-related claim falls outside the Panel's terms of reference.

7.6.4.2.2 MINCIT's basis for declining Mydibel's adjustment request

7.234. Turning to the second issue, we note that Mydibel requested an adjustment to account for certain differences in packaging costs. Mydibel stated that it used the same packaging materials (i.e. bags, cardboard boxes, pallets, and shrink-wrap foil) in all of its sales, but the costs of these common components differed between products made for export and domestic sales (due to differences in product types and customer specifications).[452] In particular, Mydibel submitted that, unlike in the Colombian market, customers in its domestic market requested packaging material that incurred higher costs.[453]

7.235. The European Union claims that MINCIT erred in declining the requested adjustment for differences in the cost of the common packaging components. In the European Union's view, MINCIT's decision to deduct packaging costs from the export price but not from the normal value compounded the error.[454] Colombia asserts that Mydibel's export and domestic sales both incurred the same costs for an equally applicable "normal", or "base", packaging component, while the

[449] European Union's first written submission, para. 183.
[450] Colombia's first written submission, paras. 10.10-10.14.
[451] The same view was taken in Appellate Body Report, *Korea – Pneumatic valves (Japan)*, paras. 5.6 and 5.31.
[452] Mydibel's questionnaire response, (Exhibit EU-30a (BCI)), section 5; Mydibel's comments on the essential facts technical report, (Exhibit COL-1 (BCI)), pp. 10-11 and 21.
[453] Mydibel's comments on the essential facts technical report, (Exhibit COL-1 (BCI)), p. 21.
[454] European Union's first written submission, para. 183.

company's export sales incurred extra costs for "export" packaging.[455] For Colombia, therefore, MINCIT appropriately deducted export packaging costs from the export price but retained "base" packaging costs as part of the export price and the normal value.[456]

7.236. The European Union disagrees with Colombia's distinction between "export" and "base" packaging, and the corresponding packaging costs.[457] According to the European Union, Mydibel's products did not require any unique or different type of *export* packaging material for its sales to Colombia, and thus did not incur what Colombia claims to be additional "export" packaging costs.[458] Accordingly, the European Union suggests that when MINCIT deducted the purported "export" packaging costs, MINCIT, in fact, deducted the full amount of normal packaging costs from the export price but none from the normal value.[459]

7.237. The parties' arguments, as we understand them, address different types of packaging costs and, hence, distinct and unrelated types of adjustments. On the one hand, the European Union's arguments focus on the fact that Mydibel asked MINCIT to make an adjustment to account for alleged cost differences that (as a result of differences in product types and customer specifications) arise when using the same types of packaging materials for products that are either sold domestically or exported to Colombia. On the other hand, Colombia's rebuttal arguments relate to an adjustment that MINCIT made to account for the fact that Mydibel's export sales allegedly incurred additional – and different – packaging costs than its domestic sales. In our view, this disconnect between the parties' arguments is reflected in the statements that Mydibel and MINCIT made on the record of the investigation.

7.238. In paragraph 7.234 above, we described the nature of Mydibel's packaging cost adjustment request, including the fact that the company asserted that it utilized the same packaging material for its domestic and export sales[460] and that the cost of these common packaging components varied depending on product types and customer specifications.[461] To account for this difference, in annex 3.2.1.2 of its questionnaire response, Mydibel listed the cost of "packaging material" as one of the elements of the cost of manufacture and, for each product type, identified the amount incurred for packaging.[462] In Mydibel's submissions to MINCIT placed on the Panel's record, the company did not identify expressly any separate categories of, on the one hand, what Colombia describes as "base" packaging costs applicable to all export and domestic sales and, on the other hand, "export" packaging costs that export sales incurred additionally. Mydibel also did not request any adjustment to account for differences related to such types of packaging costs. To the contrary, Mydibel noted explicitly that its exports did *not* incur any additional packaging costs distinct from those incurred in its domestic sales and that the packaging costs as well as the cost of manufacture more generally, as listed in annex 3.2.1.2 of the questionnaire response, did not differ as such between export and domestic sales.[463]

[455] Colombia's first written submission, para. 10.24; response to Panel question No. 5.5(a), paras. 184-186.

[456] Colombia's first written submission, paras. 10.25-10.26; response to Panel question No. 5.6, para. 190.

[457] European Union's opening statement at the first meeting of the Panel, para. 56; second written submission, para. 74.

[458] European Union's first written submission, para. 182; opening statement at the first meeting of the Panel, para. 56; second written submission, para. 74; and opening statement at the second meeting of the Panel, para. 44. According to the European Union, "the packaging for a product shipped overseas or sold domestically uses exactly the same elements: bags, cardboard boxes, pallets, shrinkwrap foil. Packaging costs are only those costs needed to package the product until it is a collection of boxes on a pallet, with plastic foil around. The only thing needed in addition for overseas sales is a container in which the pallets are loaded. The costs for such containers are not packaging costs; they are freight costs." (European Union's opening statement at the first meeting of the Panel, para. 56).

[459] European Union's second written submission, para. 74; opening statement at the second meeting, para. 44.

[460] Mydibel's questionnaire response, photos demonstrating packaging materials, (Exhibit EU-22 (BCI)); Mydibel's comments on the essential facts technical report, (Exhibit COL-1 (BCI)), pp. 12 and 14-16.

[461] Mydibel's questionnaire response, (Exhibit EU-30a (BCI)), section 5; Mydibel's comments on the essential facts technical report, (Exhibit COL-1 (BCI)), pp. 10-11 and 21.

[462] Mydibel's questionnaire response, (Exhibit EU-30a (BCI)), section 5; Mydibel's questionnaire response, annex 3.2.1.2, 3rd workbook "costes de manufactura", (Exhibit EU-30.1 (BCI)).

[463] Mydibel's comments on the essential facts technical report, (Exhibit COL-1 (BCI)), pp. 14 and 17.

7.239. In its response to Mydibel's comments on the essential facts disclosure, MINCIT stated that it deducted "*export* packaging material" from the export price.[464] In this context, MINCIT also determined that it did not make any normal value adjustment for packaging costs because it considered that "*packaging costs* … are part of the production … costs of the product, and are therefore already included in the ex-factory price".[465]

7.240. While MINCIT did not expressly use the terms "normal" or "base" packaging in its response, Colombia claims that MINCIT's distinction between "export" and "base" packaging is reflected in MINCIT's reference to "export packaging material".[466] Colombia also asserts that, by separately referring to "packaging costs", MINCIT intended to refer to "*base*" packaging costs that were an "integral part" of the production costs and, as such, should not be deducted from the ex-factory price.[467]

7.241. Based on the above, for Colombia, therefore, MINCIT explained that it adjusted for "export" packaging costs but declined to make a normal value adjustment for "base" packaging costs. We need not determine conclusively whether MINCIT's record supports Colombia's assertions on this issue, specifically, as they relate to the alleged findings on "base" packaging. Even in the event that Colombia's assertions were supported by MINCIT's record, it would follow from Colombia's arguments and the record of the investigation that MINCIT's adjustment for export packaging costs and its alleged findings concerning "base" packaging costs were unconnected to – and did not address – Mydibel's specific request for an adjustment for variations in packaging costs related to differences in product types and customer specifications.

7.242. We also observe that the rationale offered by MINCIT concerning "export" and, as Colombia asserts, "base" packaging costs does not appear to be linked to information on the investigation record that might support making such a distinction. To the contrary, as discussed in paragraph 7.238 above, Mydibel's arguments and evidence on the investigation record appear to contradict this distinction and remain uncontested. In these Panel proceedings, the European Union also disagrees with the alleged distinction, pointing to relevant evidence that Mydibel had adduced in the underlying investigation.[468] In response to questioning by the Panel, Colombia neither substantiated its assertions concerning the existence of export and base packaging costs, nor attempted to rebut the European Union's arguments to the contrary.[469]

7.243. Based on the above, we consider that MINCIT addressed a packaging cost adjustment that was of a different type and of a different nature than the one that Mydibel had requested and that, in any event, does not appear to be supported by the facts on the record of the underlying investigation. MINCIT's consideration of packaging costs thus did not respond to the substance of Mydibel's specific packaging cost-related adjustment and failed to provide a proper basis to deny that request.

7.6.4.3 Conclusion

7.244. In light of the foregoing, we disagree with Colombia that the European Union's claim under Article 2.4 concerning packaging cost adjustment falls outside the Panel's terms of reference. We also conclude that the European Union has established that MINCIT had no proper basis to deny Mydibel's adjustment request and to deduct certain other packaging costs from the export price instead. Consequently, we find that the European Union has established that Colombia acted inconsistently with Article 2.4 because, by denying Mydibel's packaging cost adjustment request, MINCIT failed to make a "fair comparison".

[464] Responses to comments on essential facts, (Exhibit EU-17a), section 7. (emphasis added)
[465] Responses to comments on essential facts, (Exhibit EU-17a), section 7. (emphasis added)
[466] Colombia's response to Panel question No. 5.6, para. 190.
[467] Colombia's first written submission, para. 10.27; response to Panel question No. 5.6, para. 190.
[468] European Union's opening statement at the first meeting of the Panel, para. 56; second written submission, para. 74.
[469] Colombia's response to Panel question No. 5.5(b), paras. 187-189; second written submission, para. 7.3; and opening statement at the second meeting of the Panel, para. 5.1.

7.6.5 MINCIT's assessment of Agrarfrost's request for an oil cost-related adjustment

7.6.5.1 Introduction

7.245. In its questionnaire response, the German exporter Agrarfrost requested an adjustment to account for the fact that it primarily used more expensive sunflower oil to prepare potato products sold domestically, while using only cheaper palm oil to prepare potato products exported to Colombia.[470]

7.246. The European Union claims that Colombia acted inconsistently with the requirement under Article 2.4 to make a "fair comparison" because MINCIT improperly denied Agrarfrost's adjustment request. Specifically, the European Union argues that MINCIT erred in concluding that Agrarfrost did not provide the underlying invoices necessary to substantiate the adjustment.[471] In the European Union's view, Agrarfrost substantiated its request with arguments and evidence, including the underlying invoices, establishing the existence of the oil-related differences and the effect that these differences had on Agrarfrost's costs and prices.[472] The European Union asserts that Agrarfrost provided the necessary invoices to MINCIT during verification, and that the verification report establishes that the authority accepted and verified these documents together with all other supporting information.[473] Separately, the European Union notes that MINCIT, in its decision on Agrarfrost's subsequent request for direct revocation (revocation decision), referred to the exporter's alleged failure to substantiate its adjustment claim.[474] The European Union also observes that MINCIT issued its revocation decision in an administrative review proceeding after the investigation had been completed. The European Union thus considers that the "lack of substantiation" argument constituted an *ex post* rationalization and a *post facto* justification.[475]

7.247. Colombia responds that MINCIT was permitted to reject Agrarfrost's oil cost adjustment because, as MINCIT stated in the preliminary determination and in its post-investigation revocation decision[476], the exporter did not provide documentary evidence to support its assertions and thus did not substantiate its request.[477] Specifically, Colombia contends that, throughout the investigation, including during the verification visit, Agrarfrost failed to provide invoices related to the purchase of the different types of oil and that, despite the European Union's assertions to the contrary, the record of the investigation contains no such materials.[478]

7.6.5.2 Analysis

7.248. The parties' arguments raise the following two key issues for our consideration:

a. first, whether Agrarfrost's alleged failure to substantiate its request with invoices was, in fact, the reason provided by MINCIT for denying the adjustment request *when the authority made its final determination on this matter during the underlying investigation*; and

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[470] Agrarfrost's questionnaire response, (Exhibit EU-28a (BCI)), section 6.

[471] European Union's first written submission, paras. 196, 200-201, and 204; opening statement at the first meeting of the Panel, paras. 57-59; and response to Panel question No. 5.10, paras. 145-146.

[472] European Union's first written submission, paras. 133, 193-195, 197, and 203; response to Panel question No. 5.10, paras. 136-141; and second written submission, para. 76.

[473] European Union's first written submission, paras. 198-199; opening statement at the first meeting of the Panel, para. 58; second written submission, para. 79; responses to Panel questions No. 5.9, paras. 128-134; No. 5.10, paras. 142-144; and No. 15.3(a), para. 47; and comments on Colombia's response to Panel question No. 15.2, paras. 17-18.

[474] European Union's first written submission, paras. 201 and 204.

[475] European Union's first written submission, para. 207; opening statement at the first meeting of the Panel, para. 59.

[476] Colombia's first written submission, para. 11.9; responses to Panel questions No. 5.7, paras. 192-196 and No. 5.8, paras. 198-199.

[477] Colombia's first written submission, para. 11.6; second written submission, paras. 8.23-8.25; response to Panel question No. 15.4, para. 106; and comments on the European Union's response to Panel question No. 15.3, para. 1.61.

[478] Colombia's first written submission, para. 11.6; second written submission, paras. 8.23-8.25; response to Panel question No. 15.4, para. 106; and comments on the European Union's response to Panel question No. 15.3, para. 1.61.

b. second, insofar as MINCIT declined the adjustment request on grounds of insufficient substantiation, whether the record of the investigation indicates that the authority had an adequate basis for its decision.

7.249. We begin by considering the first question and review, in turn, the relevant facts and findings from (a) the preliminary stage of the investigation; (b) the final stage of the investigation; and (c) the post-investigation administrative review procedure.

7.250. As to the preliminary stage of the investigation, we note that in its questionnaire response dated 28 September 2017, Agrarfrost asked for three cost-related adjustments, including one for oil cost-related differences.[479] In its exporter questionnaire, MINCIT requested respondents to provide relevant evidence justifying any claimed adjustments[480] and Agrarfrost provided certain explanations, data, and quantifications for its requested oil adjustment.[481] However, the exporter did not, in its questionnaire response, provide MINCIT with any actual invoices that corroborated the alleged oil-related cost differences.[482]

7.251. In its preliminary determination of 1 November 2017, MINCIT disregarded all investigated exporters' home market sales data, including all requests for adjustments, because they were not sufficiently substantiated, including by supporting evidence such as commercial invoices.[483] At the preliminary stage of the investigation, Agrarfrost's oil adjustment was therefore among the entire set of home market sales information that MINCIT considered to be insufficiently substantiated.

7.252. In submissions to MINCIT dated 1 and 22 December 2017, Agrarfrost noted that the relevant underlying invoices comprised a very large volume of documents; asserted that it was therefore unable to translate and submit these materials; and requested MINCIT to conduct an on-site verification visit to verify and confirm the existence and accuracy of the invoices supporting the three adjustments.[484]

7.253. MINCIT conducted a verification visit at Agrarfrost's facilities on 15-17 May 2018. The parties agree that the oil adjustment was among the topics covered during the verification. Section 2.5 of MINCIT's verification report and annex 9 appended to the report address the oil cost-related adjustment.[485] The European Union asserts that the oil cost-related statements in the verification report and in annex 9 demonstrate that during the verification visit Agrarfrost provided, and MINCIT verified, all requested underlying invoices.[486] Colombia disagrees and contends that the statements in both documents reflect Agrarfrost's own unsubstantiated and unsupported arguments and assertions.[487] Specifically, Colombia asserts that MINCIT included these statements in the record of the verification visit for transparency purposes and did not endorse or otherwise subscribe to their content.[488]

7.254. While we note the parties' disagreement, our line of inquiry discussed in paragraphs 7.248-7.249 above does not require us to determine whether the verification report and

[479] Agrarfrost's questionnaire response, (Exhibit EU-28a (BCI)), section 6.

[480] Dumping investigation questionnaire for foreign producers and/or exporters, (Exhibit EU-23a), section 6.

[481] Agrarfrost's questionnaire response, (Exhibit EU-28a (BCI)), section 6; Agrarfrost's questionnaire response, Excel workbook "ventas domésticas", (Exhibit EU-28.1 (BCI)).

[482] European Union's response to Panel question No. 15.3(a), para. 43.

[483] Preliminary determination, (Exhibit EU-2a), section 2.1.1.

[484] Agrarfrost's submission to MINCIT dated 1 December 2017, (Exhibit EU-34a (BCI)); Agrarfrost's submission to MINCIT dated 22 December 2017, (Exhibit EU-35a (BCI)), pp. 2 and 8-10.

[485] Agrarfrost verification visit report, (Exhibit EU-36a); Agrarfrost verification visit report, annex 9, (Exhibit EU-36.1a (BCI)).

[486] European Union's first written submission, paras. 198-199; opening statement at the first meeting of the Panel, para. 58; second written submission, paras. 77 and 79-82; opening statement at the second meeting of the Panel, paras. 45-55; and responses to Panel questions No. 5.9, paras. 128-133; No. 5.10, paras. 142-143; and No. 15.3(b), para. 48; and comments on Colombia's responses to Panel questions No. 15.2, paras. 16-18 and No. 15.4, paras. 19-20.

[487] Colombia's first written submission, para. 11.8; second written submission, paras. 8.3-8.22; responses to Panel questions No. 5.9(a), paras. 200-201; and No. 15.2, paras. 87-101; and comments on the European Union's responses to Panel questions No. 15.1, paras. 1.53-1.54; and No. 15.3(a), paras. 1.55-1.62.

[488] Colombia's first written submission, para. 11.8; second written submission, paras. 8.3-8.22; responses to Panel questions No. 5.9(a), paras. 200-201; and No. 15.2, paras. 87-101; and comments on the European Union's responses to Panel questions No. 15.1, paras. 1.53-1.54; and No. 15.3(a), paras. 1.55-1.62.

annex 9 demonstrate that Agrarfrost provided the requested invoices to MINCIT during the verification visit. Rather, at this stage of the analysis, we turn to MINCIT's statements from the final stage of the investigation in order to assess whether MINCIT did, in fact, deny the adjustment because it found that the request was insufficiently substantiated.

7.255. On 27 August 2018, MINCIT issued the essential facts disclosure. The disclosure document indicates that MINCIT explicitly accepted two of Agrarfrost's three adjustment requests, namely, the adjustments for marketing and sales costs, and packaging costs.[489] While the document acknowledges that Agrarfrost also requested an oil adjustment[490], it neither made explicit the decision to deny the adjustment, nor explained the reasons for such a denial. Following a separate inquiry from Agrarfrost[491], MINCIT subsequently confirmed that it had not granted the oil adjustment but still did not explain the reasons underlying its decision.[492]

7.256. In its comments on the essential facts disclosure dated 10 September 2018, Agrarfrost contested MINCIT's denial of the requested adjustment.[493] The exporter referred to the information provided in its questionnaire response and the elements that MINCIT had verified during the on-site verification visit.

7.257. MINCIT subsequently issued a separate document responding to the interested parties' comments on the essential facts disclosure, addressing Agrarfrost's remarks on the oil adjustment as follows:

> With regard to the adjustments to the normal value requested by Agrarfrost concerning a product type named WP since it is not exported to Colombia, as well as by type of oil used, we clarify that the dumping margin was not determined by type of products in the investigation, since types of products were not identified in the export database from DIAN. In any event, these requests will be submitted for consideration by the Committee.[494]

7.258. We understand MINCIT's response to mean that the authority declined the oil adjustment because the price data contained in the DIAN database that MINCIT used to calculate the dumping margins did not distinguish between product types but instead comprised aggregate data.

7.259. In response to questioning by the Panel on the content of MINCIT's response to Agrarfrost's essential facts comments, Colombia asserts that:

> There appears to be a drafting error in this paragraph, since the reference to the adjustment requested on the basis of oil type does not seem relevant in this context. Therefore, the explanation provided in the above-mentioned paragraph, referring to the types of products and the DIAN database, is not relevant to the issue of the oil cost-related adjustment.
>
> Rather, [MINCIT] rejected this request for the reason that Colombia has been giving since the beginning of this dispute: The company could not back up its factual allegations and claims with relevant documents, whether verifiable or verified during the verification visit.[495]

7.260. In our view, Colombia's arguments concerning the content and meaning of MINCIT's response to Agrarfrost's comments are not persuasive for three reasons. First, while we accept that "drafting errors" can and do occur, we are of the view that Colombia's assumptions (i.e. "[t]here *appears* to be a drafting error in this paragraph, since the reference to the adjustment

[489] Final report on essential facts (public version), (Exhibit EU-3a), section 2.4.3; Technical report on essential facts (confidential version), (Exhibit COL-15 (BCI)), section 2.4.3.
[490] Final report on essential facts (public version), (Exhibit EU-3a), section 1.10.6; Technical report on essential facts (confidential version), (Exhibit COL-15 (BCI)), section 1.10.6.
[491] Agrarfrost's submission to MINCIT dated 28 August 2018, (Exhibit EU-41 (BCI)), item 1(d).
[492] MINCIT's response to Agrarfrost dated 30 August 2018, (Exhibit EU-37 (BCI)), item 1(d).
[493] Agrarfrost's comments on essential facts, (Exhibit EU-25a (BCI)), section III.2.
[494] Responses to comments on essential facts, (Exhibit EU-17a), section 4.
[495] Colombia's response to Panel question No. 15.5, paras. 108-109. (fn omitted)

requested on the basis of oil type does not *seem* to be relevant"[496]), in and of themselves, do not provide a sufficient basis to disregard the clear text of MINCIT's findings. Second, we note that MINCIT's stated reason for denying the oil adjustment is consistent with the authority's general line of reasoning during the investigation that the format of the DIAN data did not allow a type-based analysis.[497] Third, had there been an error in the drafting of MINCIT's response to Agrarfrost's comments, MINCIT had opportunities to rectify that error in its final determination and in the accompanying final technical report. MINCIT, however, did not correct or revise any aspect of its prior reasoning on this issue when it issued these final documents on 9 November 2018.

7.261. To the contrary, MINCIT's assessment of the oil adjustment in the final technical report is identical to the assessment in the essential facts disclosure, discussed in paragraph 7.255 above. Thus, MINCIT acknowledged the existence of Agrarfrost's request but did not make the adjustment; it neither made explicit the decision to deny the adjustment, nor explained the reasons for that (implicit) decision.[498]

7.262. In our view, therefore, during the final stage of the investigation, MINCIT appears to have: either provided a conclusory statement that the adjustment was not made[499]; or acknowledged – but implicitly refused – the request without explaining the reasons for its decision.[500] However, when it replied directly to Agrarfrost's comments, MINCIT justified its decision to reject the request based on the fact that its decision to use the DIAN database did not permit the authority to conduct a product-level cost comparison.[501]

7.263. Having reviewed the relevant facts and findings from the investigation, we now consider Colombia's arguments relating to the contents of MINCIT's post-investigation revocation decision. In this regard, we note that on 1 and 11 March 2019 – i.e. several months after MINCIT had issued the final determination in the underlying investigation – the European Commission and Agrarfrost lodged requests for direct revocation of MINCIT's final determination. These requests sought at a review by MINCIT, *inter alia*, of its decision to deny Agrarfrost's oil cost adjustment request.[502] On 13 May 2019, MINCIT issued its decision rejecting the requests for administrative review and upholding, *inter alia*, its earlier decision to deny the oil cost adjustment request.

7.264. Colombia explains that, under its domestic law, the direct revocation procedure is an administrative review procedure conducted by the same authority that issued the contested decision.[503] It serves the limited purpose of: determining, upon request, whether the act of the authority is manifestly contrary to law or to public or social interest, or causes undue harm; and revoking the challenged decision if one of these conditions is met.[504]

7.265. In dismissing the request for revocation of the decision to deny the oil adjustment, MINCIT stated in the revocation decision that it could not establish the adjustment because Agrarfrost's questionnaire response had failed to supply supporting evidence, including invoices, necessary to substantiate its adjustment claim.[505] MINCIT's revocation decision also stated that while Agrarfrost indicated on the record of the verification visit that it had provided oil-related invoices, such materials were, in fact, absent from the record of the investigation.[506]

[496] Emphasis added.
[497] See e.g. Final technical report (public version), (Exhibit EU-4a), sections 1.10.8.2 and 1.10.13.2; Final technical report (confidential version), (Exhibit COL-16 (BCI)), sections 1.10.8.2 and 1.10.13.2; and Responses to comments on essential facts, (Exhibit EU-17a), section 7.
[498] Final technical report (public version), (Exhibit EU-4a), sections 1.10.6 and 2.4.3; Final technical report (confidential version), (Exhibit COL-16 (BCI)), sections 1.10.6 and 2.4.3.
[499] MINCIT's response to Agrarfrost dated 30 August 2018, (Exhibit EU-37 (BCI)), item 1(d).
[500] Final report on essential facts (public version), (Exhibit EU-3a), section 2.4.3; Technical report on essential facts (confidential version), (Exhibit COL-15 (BCI)), section 2.4.3; Final technical report (public version), (Exhibit EU-4a), sections 1.10.6 and 2.4.3; and Final technical report (confidential version), (Exhibit COL-16 (BCI)), sections 1.10.6 and 2.4.3.
[501] Responses to comments on essential facts, (Exhibit EU-17a), section 4.
[502] European Union's first written submission, para. 15.
[503] Colombia's first written submission, para. 11.11.
[504] Colombia's first written submission, fn 211; response to Panel question No. 5.7, para. 193.
[505] MINCIT's revocation decision, (Exhibit EU-6a), section II.6.2. See also ibid. section II.5.3.
[506] MINCIT's revocation decision, (Exhibit EU-6a), section II.6.2. See also ibid. section II.5.3.

7.266. Colombia argues that the "lack of substantiation" argument in the revocation decision demonstrates that MINCIT denied the adjustment for the same reason in the investigation.[507] According to Colombia, the content of MINCIT's revocation decision clarifies, elaborates upon, and "complement[s]" the record of the investigation, such that the Panel must read the record of the underlying investigation "in conjunction with" the revocation decision when evaluating MINCIT's rationale for declining Agrarfrost's oil adjustment.[508]

7.267. The European Union responds, *inter alia*, that any "lack of substantiation" explanation that MINCIT may have provided must be regarded as an "*ex post* rationalisation" because it was raised only in MINCIT's revocation decision after the underlying investigation was completed.[509]

7.268. The parties' arguments raise the question of whether the Panel should consider the events and explanations following the completion of the investigation (in this instance, the contents of MINCIT's *post-investigation revocation decision*) to evaluate whether, in the *investigation's final determination*, MINCIT implicitly denied the oil cost adjustment because of insufficient substantiation. We note, in this regard, Colombia's clarification that, under its domestic law, MINCIT's revocation proceeding and the underlying investigation are formally separate from one another and serve different purposes.[510] Colombia has also indicated that, in the circumstances of this case, the findings that appear in the revocation decision are not a part of the record of the underlying investigation, are not incorporated into the final determination, and do not supplement, alter, or otherwise supersede any reasoning contained in the final determination.[511]

7.269. In light of Colombia's statements that the underlying investigation and the revocation proceeding, as well as their respective records, are separate and distinct from one another, we do not consider it appropriate to rely on the content of the revocation decision to conclude that the record of the investigation demonstrates that MINCIT rejected Agrarfrost's adjustment because of insufficient substantiation. This is particularly true given that the reason that MINCIT offered for rejecting Agrarfrost's adjustment in the revocation decision differs entirely from the reason MINCIT provided in response to Agrarfrost's comments on the essential facts disclosure (namely, that the DIAN database did not permit the authority to conduct a product-level cost comparison). We are therefore of the view that, contrary to Colombia's assertion, MINCIT's revocation decision does not "complement", and thus cannot "be read in conjunction with", the statements made by MINCIT on this issue during the final stage of the investigation.

7.270. The above review of the relevant facts and findings indicates that MINCIT's reasons for denying the requested adjustment evolved during the underlying investigation. In the preliminary determination, MINCIT denied the request on grounds that it was insufficiently substantiated. Subsequently, in its responses to the comments on essential facts, MINCIT no longer asserted that it had denied the adjustment because of insufficient substantiation but stated, instead, that the adjustment was incompatible with the format of MINCIT's preferred pricing data.[512] MINCIT's explanations in the responses to the comments on essential facts marked the last instance during the investigation when the authority expressly considered the matter at issue; the final determination does not contain any new or different reasoning on this issue, nor does it indicate that MINCIT reversed or modified the reasoning set forth in its responses to the comments on essential facts.

7.271. In light of the above, we consider that, contrary to Colombia's assertions, MINCIT's stated reason for ultimately declining the adjustment in the investigation appears to have been different from – and unrelated to – the alleged failure to substantiate and provide supporting invoices. Therefore, we consider that Colombia's assertions in this regard constitute *ex post* rationalization that we cannot rely upon for our present assessment. Moreover, we recall that Colombia's "lack of

[507] Colombia's first written submission, para. 11.9; response to Panel question No. 5.8, para. 199.

[508] Colombia's response to Panel question No. 5.7, paras. 194-195; oral response to Panel question No. 5.7 at the first meeting of the Panel.

[509] European Union's first written submission, paras. 204 and 207; opening statement at the first meeting of the Panel, para. 59.

[510] Colombia's response to Panel question No. 5.7, para. 193.

[511] Colombia's oral response to Panel question No. 5.7 at the first meeting of the Panel.

[512] This is consistent with the fact that, where appropriate, MINCIT made a specific and express "lack of substantiation" determination in response to the adjustment-related comments on the disclosure of essential facts. Specifically, as discussed in paragraphs 7.207-7.210 above, MINCIT did so with respect to certain (Aviko) but not all (Agrarfrost and Mydibel) of the exporters' product mix adjustments.

substantiation" argument is the only ground on which it seeks to rebut the European Union's claim. Given that we reject this argument, and absent any other rebuttal arguments, we are unable to conclude that MINCIT had a proper basis to deny Agrarfrost's oil cost-related adjustment request.

7.6.5.3 Conclusion

7.272. Based on the above, we find that the European Union has established that Colombia acted inconsistently with Article 2.4 because, by denying Agrarfrost's oil cost-related adjustment request, MINCIT failed to make a "fair comparison".

7.6.6 Alleged failure to specify necessary information and imposition of an unreasonable burden of proof

7.273. The European Union argues that Colombia acted inconsistently with its obligations under the last sentence of Article 2.4 of the Anti-Dumping Agreement because MINCIT failed both to indicate to the exporters what information was necessary to support their adjustment requests, and imposed an unreasonable burden of proof on the exporters to substantiate these requests.[513] In particular, the European Union contends that despite the exporters' submissions containing explanations and corroborating data, MINCIT rejected the requested adjustments without seeking clarifications or information from the exporters.[514]

7.274. Colombia responds that this claim is purely consequential and must fail because it has rebutted the European Union's principal claim that MINCIT acted inconsistently with the "fair comparison" requirement of Article 2.4.[515]

7.275. In our view, the facts underlying the European Union's claim at hand are not materially different from those that serve as the basis for its claim that MINCIT did not make a "fair comparison" as required by the first sentence of Article 2.4. Having already found that MINCIT acted inconsistently with the "fair comparison" requirement of Article 2.4, we do not consider it necessary to make further findings on the European Union's claim under the last sentence of Article 2.4 in order to provide a positive resolution to the dispute before us.

7.6.7 Conclusion

7.276. Based on the foregoing, we find that our terms of reference encompass the European Union's packaging cost-related adjustment claim under Article 2.4. Further, we conclude that the European Union has established that Colombia acted inconsistently with its Article 2.4 obligation to make a "fair comparison" by denying:

a. the product mix-related adjustments requested by Agrarfrost, Aviko and Mydibel;

1. Mydibel's packaging cost-related adjustment request; and

b. Agrarfrost's oil cost-related adjustment request.

7.277. We do not consider it necessary to make additional findings as to whether Colombia also acted inconsistently with its obligations under the last sentence of Article 2.4 in order to provide a positive resolution to the dispute before us.

7.7 Claims under Articles 3.1, 3.2, 3.4, and 3.5 of the Anti-Dumping Agreement: MINCIT's injury and causation determinations

7.7.1 Introduction

7.278. The European Union claims that MINCIT's determinations concerning the existence of material injury as well as the causal link are inconsistent with Articles 3.1, 3.2, 3.4, and 3.5 of the Anti-Dumping Agreement on several grounds. The European Union argues that MINCIT's entire

[513] European Union's first written submission, paras. 133 and 206-208.
[514] European Union's first written submission, para. 207.
[515] Colombia's first written submission, paras. 12.3-12.4.

injury and causation analysis is invalidated by an "overarching" error or flaw because it included imports from the countries under investigation that were not found to have been "dumped" in its evaluation ("non-dumped imports").[516] According to the European Union, this error in the "global approach"[517] adopted by MINCIT is "of such magnitude and is so intrinsic to the remainder of the injury and causation analysis" that it leads to an "independent violation" of Article 3.1 as well as "consequential violations" of Articles 3.2, 3.4, and 3.5[518] of the Anti-Dumping Agreement.

7.279. Separately – and in addition to its "overarching error" claim – the European Union also presents other discrete grounds in support of its claims challenging MINCIT's analysis of: "price effects" under Articles 3.2 and 3.1[519]; impact on the domestic industry under Articles 3.4 and 3.1[520]; and the causal link under Articles 3.5 and 3.1.[521]

7.280. Colombia, for its part, responds to each of the European Union's claims and maintains, ultimately, that the European Union has failed to make a *prima facie* case that MINCIT acted inconsistently with Articles 3.1, 3.2, 3.4, and 3.5 of the Anti-Dumping Agreement in the underlying investigation.[522]

7.281. We begin our analysis by examining the European Union's claim of an "overarching" error under Articles 3.1, 3.2, 3.4, and 3.5 and subsequently address the other grounds presented by the European Union in support of its claims under Articles 3.1, 3.2, 3.4, and 3.5.

7.7.2 The European Union's "overarching" error claim under Articles 3.1, 3.2, 3.4, and 3.5 of the Anti-Dumping Agreement

7.282. As a factual matter, the parties agree[523] and the record confirms[524] that MINCIT based its injury and causation determinations on all investigated imports, including those from exporters for whom it determined: (a) *de minimis* final margins of dumping (Clarebout (Belgium), Agristo (Belgium), and Other Companies (Belgium)) ("*de minimis* margin imports"); and (b) *negative* final margins of dumping (Ecofrost (Belgium) and Farm Frites (the Netherlands)) ("negative margin imports").

7.283. The European Union claims that MINCIT acted inconsistently with Articles 3.1, 3.2, 3.4, and 3.5 by erroneously treating *de minimis* and negative margin imports as "dumped imports" for purposes of its injury and causation analyses.[525] Colombia presents a two-pronged response, maintaining, first, that the term "dumped imports" in Articles 3.1, 3.2, 3.4, and 3.5 includes within its scope *de minimis* margin imports.[526] Second, as to negative-margin imports, Colombia appears to accept that they do not constitute "dumped imports" for purposes of Article 3, but it nevertheless

[516] European Union's first written submission, para. 248.
[517] European Union's opening statement at the second meeting of the Panel, paras. 56-57.
[518] European Union's first written submission, para. 212.
[519] The European Union argues that MINCIT's "price effects" analysis is inconsistent with Articles 3.2 and 3.1, *inter alia*, because it did not include adequate data relating to domestic prices and did not adequately examine whether there had been significant price undercutting, price depression, or price suppression by the dumped imports. See e.g. European Union's first written submission, para. 213; and second written submission, paras. 106-128.
[520] The European Union considers MINCIT's "impact" analysis to be inconsistent with Articles 3.4 and 3.1, *inter alia*, because it only examined 7 of the 15 economic factors and indices having a bearing on the state of the industry and failed to conduct an objective examination of all the relevant factors. (See e.g. European Union's first written submission, para. 214; and second written submission, paras. 129-138).
[521] For the European Union, MINCIT failed to adequately examine the causal link between the alleged material injury and the alleged dumping thus acting inconsistently with Articles 3.5 and 3.1. (See e.g. European Union's first written submission, para. 215; and second written submission, paras. 139-142).
[522] Colombia's first written submission, para. 13.231; second written submission, para. 14.1.
[523] Colombia's response to Panel question No. 6.1; European Union's response to Panel question No. 6.1; European Union's first written submission, paras. 245-246; and Colombia's first written submission, para. 13.11.
[524] Final technical report (public version), (Exhibit EU-4a), pp. 81-84 and 89-90.
[525] European Union's response to Panel question No. 6.2, para. 165.
[526] Colombia's first written submission, para. 13.14.

maintains that the treatment of a "small volume" of negative margin imports as "dumped imports" by MINCIT does not undermine its injury and causation determinations.[527]

7.284. As we see it, the first point of disagreement between the parties relates to whether imports from exporters that have been assigned a *de minimis* dumping margin can be considered to be "dumped imports" within the meaning of Article 3, such that an authority may include such "*de minimis* margin imports" in its analysis of injury and causation.[528]

7.285. Colombia argues that MINCIT's interpretation of the term "dumped imports" as including *de minimis* margin imports is a "permissible" interpretation within the meaning of the second sentence of Article 17.6(ii) of the Anti-Dumping Agreement.[529] The second sentence of Article 17.6(ii) concerns situations "[w]here the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation". The first sentence of Article 17.6(ii) requires that panels "shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law".

7.286. The question of whether a relevant provision admits of more than one "permissible" interpretation – the situation contemplated under the second sentence – thus depends on whether more than one such interpretation emerges when the Panel examines the provision in accordance with the "customary rules of interpretation of public international law" – that is, when the Panel applies the first sentence of Article 17.6(ii). As the starting point of our interpretative analysis, we must therefore interpret the term "dumped imports" in Articles 3.1, 3.2, 3.4, and 3.5 in accordance with the customary rules of interpretation of public international law, as reflected in Articles 31 and 32 of the Vienna Convention.[530]

7.287. Article 3.1 requires that a "determination of injury … shall be based on positive evidence and involve an objective examination of both (a) the volume of the *dumped imports* and the effect of the *dumped imports* on prices in the domestic market for like products, and (b) the consequent impact of *these imports* on domestic producers of such products".[531] Article 3.2 focuses on the volume and price effects of "dumped imports". With respect to "the volume of the *dumped imports*"[532], the provision requires that "the investigating authorities shall consider whether there has been a significant increase in *dumped imports*, either in absolute terms or relative to production or consumption in the importing Member". With regard to the "effect of the *dumped imports* on prices"[533], Article 3.2 requires that "the investigating authorities shall consider whether there has been a significant price undercutting by the *dumped imports* as compared with the price of a like product of the importing Member, or whether the effect of *such imports* is otherwise to depress prices to a significant degree or prevent price increases, which otherwise would have occurred, to a significant degree".[534] Article 3.4 stipulates certain requirements for an investigating authority's "examination of the impact of the *dumped imports* on the domestic industry concerned". Finally, Article 3.5 requires the "demonstration of a causal relationship between the *dumped imports* and the injury to the domestic industry".[535]

7.288. The text of Articles 3.1, 3.2, and 3.4 indicates that an investigating authority's ultimate determination of injury is focused on the volume of the "dumped imports" and their effect on prices in the domestic market, as well as the impact of "dumped imports" on the domestic industry.

[527] Colombia's first written submission, para. 13.41. According to Colombia, a "contextual analysis" of Article 3 of the Anti-Dumping Agreement, in light of Articles 2 and 17.6(i) of the Anti-Dumping Agreement and Article 11 of the DSU, "confirms that the objective of the injury disciplines is to ensure the *objectivity* of the authority's analysis" and reveals "that not every error or inaccuracy gives rise to a violation of Article 3.1 of the Anti-Dumping Agreement, but rather only those errors or inaccuracies that are of such magnitude that they undermine the objectivity of the overall injury and causation examination." (Colombia's response to Panel question No. 6.6, para. 223 (emphasis original); first written submission, paras. 13.32-13.37).

[528] In the event that we conclude, as a matter of treaty interpretation, that imports from exporters with a *de minimis* margin of dumping do not fall within the scope of the term "dumped imports" in Article 3, we agree with the findings of the panel in *EC – Salmon (Norway)* that the factual issue of "the volume of such imports is irrelevant". (Panel Report, *EC – Salmon (Norway)*, fn 763).

[529] Colombia's response to Panel question No. 6.4, para. 218.

[530] See paragraph 7.1 above.

[531] Emphasis added.

[532] Emphasis added.

[533] Emphasis added.

[534] Emphasis added.

[535] Emphasis added.

Article 3.5 requires investigating authorities to further examine whether the "dumped imports" are "causing" injury to the domestic industry. Given that all of these provisions are aimed at an investigating authority's determination of injury caused by "dumped imports", we consider that the term "dumped imports" carries the same meaning across these provisions.

7.289. Article 3 does not define the term "dumped imports". For Colombia, the ordinary meaning of the term "dumped imports" is set out in Article 2.1[536], which provides, in relevant part, that "a product is to be considered as being dumped, i.e. introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country." According to Colombia "had the drafters of the Anti-Dumping Agreement wanted to limit the scope of the term 'dumped imports' in Articles 3.1, 3.2, 3.4, and/or 3.5, they could have readily done so in an explicit manner", e.g. by inserting a "qualifier" or a "footnote". In contrast to these provisions, Colombia notes that, in Articles 3.3 and 9.4 of the Anti-Dumping Agreement, the drafters "explicitly" limited dumping margins as those above the *de minimis* threshold.[537]

7.290. The European Union, for its part, responds that Colombia's "approach ignores the role and function of the investigation in the overall framework established by the Anti-Dumping Agreement which contains guarantees to protect both [the] domestic industry and companies subject to investigations".[538] Questioning the relevance of the contextual elements identified by Colombia, the European Union submits, instead, that it "follows from the logic of Article 1 read together with Article 5 of the Anti-Dumping Agreement that any determination of injury under Article 3 of the Anti-Dumping Agreement leading to the imposition of an anti-dumping measure can only be made in respect of imports which have been the subject of an investigation".[539] For the European Union, this "necessarily precludes consideration of those imports in respect of which an investigation was or ought to have been immediately terminated in accordance with the terms of Article 5.8 of the Anti-Dumping Agreement", and "[h]ence it excludes imports in respect of which the dumping margin was *de minimis*".[540]

7.291. We note that the parties identify different textual and contextual elements in support of their positions. Our task, under the applicable rules of interpretation as reflected, *inter alia*, in Article 31(1) of the Vienna Convention, is to interpret the Anti-Dumping Agreement "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose". Furthermore, the interpretative principle of effectiveness which flows from Article 31 of the Vienna Convention, requires us to seek to interpret the treaty as a whole and to read all applicable provisions in a way that gives meaning to all of them, harmoniously.[541] We are thus not free to adopt a reading that would result in reducing treaty provisions to redundancy or inutility.[542]

7.292. In this case, we consider that Article 5.8 provides important context for the interpretation of the term "dumped imports" in Article 3. Article 5 is entitled "Initiation and Subsequent Investigation". Article 5.1 refers to "an investigation to determine the existence, degree and effect of any alleged dumping". Article 5 thus regulates an investigating authority's initiation and *subsequent investigation* to determine the "*existence*, *degree* and *effect* of any alleged dumping".[543] Therefore, in addition to other provisions such as Article 2.1, the relevant sub-paragraphs of Article 5

[536] Colombia's second written submission, paras. 9.9-9.11.
[537] Colombia's second written submission, para. 9.31; response to Panel question No. 6.3, para. 206.
[538] European Union's response to Panel question No. 6.2, para. 168.
[539] European Union's response to Panel question No. 6.2, para. 165.
[540] European Union's response to Panel question No. 6.2, para. 165.
[541] See e.g. Appellate Body Reports, *Argentina – Footwear (EC)*, para. 81; and *Korea – Dairy*, para. 81. We are not persuaded by Colombia that the question before us is "whether the 'contextual' reading of other provisions of the Anti-Dumping Agreement could contradict the ordinary meaning of a term" that is reflected, in this instance, in Article 2.1 of the Anti-Dumping Agreement. (Colombia's second written submission, para. 9.15). In our view, the ordinary meaning of treaty terms is linked inextricably with context and we agree with prior adopted DSB reports that "[i]nterpretation pursuant to the customary rules codified in Article 31 of the Vienna Convention is ultimately a holistic exercise that should not be mechanically subdivided into rigid components". (Appellate Body Report, *EC – Chicken Cuts*, para. 176).
[542] See e.g. Appellate Body Report, *US – Gasoline*, p. 23.
[543] Emphasis added.

are applicable to and regulate the entire investigation to determine the *existence*, *degree*, and *effect* of any alleged dumping.[544] The second and third sentences of Article 5.8 provide that:

> There shall be immediate termination in cases where the authorities determine that the margin of dumping is *de minimis*, or that the volume of dumped imports, actual or potential, or the injury, is negligible. The margin of dumping shall be considered to be *de minimis* if this margin is less than 2 per cent, expressed as a percentage of the export price.

7.293. The definition of the word "immediate" includes "occurring, accomplished, or taking effect without delay or lapse of time; done at once; instant"[545], and the definition of the word "termination" includes the "action of putting an end to something or of bringing something to a close".[546] An "investigation", as discussed above, is aimed at determining the "existence, degree and effect of any alleged dumping". The requirement to "*immediate[ly]* terminat[e]"[547] an investigation pursuant to Article 5.8 thus requires an authority to end its investigation without delay – or immediately – as soon as it determines that the margin of dumping is *de minimis*, i.e. less than 2% of the export price. Furthermore, the use of the term "dumped imports" in Article 3 indicates that the determination of injury under that provision concerns the *effects* of any dumping that has been found to *exist*. In this sense, the determination of injury follows – and takes into account – the determination of the existence and degree of any alleged dumping (i.e. the determination of the margin of dumping).[548]

7.294. Once a producer or exporter has been assigned a *de minimis* margin of dumping, the continued treatment of any imports from that producer or exporter as "dumped imports", in any subsequent injury and causation analyses under Article 3, would render ineffective the requirement, under Article 5.8, to "immediate[ly] terminate" the investigation.[549] Article 5.8 thus provides useful context for the interpretation of the term "dumped imports" in Articles 3.1, 3.2, 3.4, and 3.5 as excluding all imports from producers or exporters that have been assigned a *de minimis* margin of dumping.

7.295. In support of its position that there is "no link" between Article 5.8 and Article 3, Colombia refers to Articles 9.4 and 3.3 to stress that when drafters did decide to qualify the dumping margins as those above the *de minimis* threshold, they did so expressly.[550]

7.296. Article 3.3 states, in relevant part, as follows:

> Where imports of a product from more than one country are simultaneously subject to anti-dumping investigations, the investigating authorities may cumulatively assess the effects of such imports only if they determine that (a) the margin of dumping established in relation to the imports from each country is more than *de minimis* as defined in paragraph 8 of Article 5 and the volume of imports from each country is not negligible.

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[544] We note that Article 1 of the Anti-Dumping Agreement states that an "anti-dumping measure shall be applied only under the circumstances provided for in Article VI of GATT 1994 and pursuant to investigations initiated and conducted in accordance with the provisions of this Agreement". (fn omitted)

[545] Oxford Dictionaries online, definition of "immediate" https://www.oed.com/view/Entry/91838?redirectedFrom=immediate#eid (accessed 4 May 2022), adj., meaning 4.b.

[546] Oxford Dictionaries online, definition of "termination" https://www.oed.com/view/Entry/199427?redirectedFrom=termination#eid (accessed 4 May 2022), meaning 2.a.

[547] Emphasis added.

[548] This is supported by Article 3.4, which states that the "examination of the impact of the dumped imports on the domestic industry concerned shall include an evaluation of all relevant economic factors and indices … including … *the magnitude of the margin of dumping*". (emphasis added)

[549] See e.g. Panel Report, *EC – Salmon (Norway)*, para. 7.627 (noting that there is "no rational basis on which the imports which are not legally cognizable as 'dumped' because a *de minimis* margin has been calculated for the producer/exporter in question could be included in the volume of dumped imports taken into account in assessing the question of injury. In our view, the consequences from a determination that there is no legally cognizable dumping must be taken into account in the injury analysis").

[550] Colombia's response to Panel question No. 6.3, para. 204; second written submission, para. 9.23.

The provision addresses the specific circumstances under which investigating authorities may cumulatively assess the effects of imports of a product from more than one country that are simultaneously subject to anti-dumping investigations. While both parties rely on Article 3.3 as context for purposes of interpreting Articles 3.1, 3.2, 3.4, and 3.5, neither contends that the provision is directly applicable to the case at hand. Moreover, we note that Article 3.3 is limited to enumerating the specific conditions for cumulation of the effects of the imports from more than one country and, in this sense, has a narrower scope than Articles 3.1, 3.2, 3.4, and 3.5.[551]

7.297. Article 9.4, together with Article 6.10, imposes certain requirements on investigating authorities when they limit their examination to a reasonable number of interested parties or products by using samples in cases where the number of exporters, producers, importers or types of products involved is so large as to make the determination of individual margins of dumping "impracticable". In such cases, Article 9.4 prescribes certain limits on the anti-dumping duties applied to imports from exporters or producers that are not included in the examination (the so-called "all-other's" rate). For determining these limits, the provision clarifies that "the authorities shall disregard for the purpose of this paragraph any zero and *de minimis* margins and margins established under the circumstances referred to in paragraph 8 of Article 6". Similar to Article 3.3, Article 9.4 therefore also has a different scope than Articles 3.1, 3.2, 3.4, and 3.5. The latter provisions concern an investigating authority's determination of injury caused by "dumped imports" from producers and exporters that are *examined* by an investigating authority. By contrast, Article 9.4 focuses on the determination of the so-called "all others" rate, i.e. the anti-dumping duty that is applied to imports from exporters or producers that are *not examined* by an investigating authority.

7.298. Given that the specific situations contemplated under Articles 9.4 and 3.3 have a considerably different – and narrower – scope than an investigating authority's overall determination of injury and causation pursuant to Articles 3.1, 3.2, 3.4, and 3.5, we disagree with Colombia that the context provided by Articles 9.4 and 3.3 establishes that there is "no link" between Article 5.8 and Article 3. Rather, the fact that Articles 9.4 and 3.3 refer to Article 5.8 and "*de minimis* margins", and make Article 5.8 operational in the *specific* situations contemplated under these provisions highlights to us the contextual relevance of Article 5.8 for purposes of the *general* injury and causation determinations under Article 3.[552]

7.299. Colombia also relies upon the panel report in *Canada – Welded Pipe* in support of its position that the notion of "dumping" does not have a *de minimis* component.[553] However, the part of the panel's findings that Colombia relies upon concerns the interpretation of the term "dumping" for the purposes of Article 7.1(ii), which is limited to the application of provisional measures by investigating authorities.[554] We note that the same panel also evaluated Chinese Taipei's claim that Canada acted inconsistently with Articles 3.1, 3.2, 3.4, 3.5, and 3.7 by treating imports from exporters determined to have *de minimis* margins of dumping as "dumped imports" within the meaning of these provisions.[555] In finding against Canada on this issue, the panel stated that "Article 5.8 effectively means that there is no legally cognizable dumping by an exporter with a final *de minimis* margin of dumping" and that, therefore, "imports from that exporter should not be treated as 'dumped' for the purpose of the analysis and final determinations of injury and causation".[556] The findings in *Canada – Welded Pipe* therefore do not support Colombia's position.

7.300. Noting that "only a final determination of a *de minimis* margin of dumping … triggers immediate termination under Article 5.8"[557], Colombia explains that, under its legal system, a "final determination" of dumping margins does not occur until the end of the investigation, i.e. in the final report or determination. Colombia thus questions how the requirement under Article 5.8 to

[551] See also Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 220.
[552] See also Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 220.
[553] Colombia's response to Panel question No. 6.3, para. 205 (referring to Panel Report, *Canada – Welded Pipe*, para. 7.59).
[554] Colombia acknowledges that the Panel's findings at issue were made in a "slightly different context". (Colombia's response to Panel question No. 6.3, para. 205). See also Panel Report, *Canada – Welded Pipe*, para. 7.64 (noting that "it is only a final determination of a *de minimis* margin of dumping that triggers immediate termination under Article 5.8").
[555] Panel Report, *Canada – Welded Pipe*, para. 7.79.
[556] Panel Report, *Canada – Welded Pipe*, para. 7.83.
[557] Colombia's response to Panel question No. 6.3, para. 209 (quoting Panel Report, *Canada – Welded Pipe*, para. 7.64).

immediately terminate an investigation would apply when an authority legitimately determines a *de minimis* margin for a producer or exporter, at the same time as the authority makes its determination of injury and causation.[558] Referring to the findings in *Mexico – Anti-Dumping Measures on Rice*, Colombia asserts that "the only way to terminate immediately an investigation, in respect of producers or exporters for which a *de minimis* margin of dumping is determined, is to exclude them from the scope of the order".[559]

7.301. We note, first, that, contrary to Colombia's assertion, the findings in *Mexico – Anti-Dumping Measures on Rice* did not concern the situation "when an authority legitimately determines the *de minimis* margins of dumping at the end of the investigation, at the same time as the determination of injury and causation".[560] Instead, the interpretive issue in that dispute, *inter alia*, was whether the term "margin of dumping" in Article 5.8 "refers to the individual margin of dumping of an exporter or producer rather than to a country-wide margin of dumping".[561] As to the specific factual situation in that dispute, the finding that "the only way to terminate *immediately* an investigation, in respect of producers or exporters for which a *de minimis* margin of dumping is determined, is to exclude them from the scope of the order"[562] was made in light of the observation that, "for the purposes of Article 5.8, there is one investigation and not as many investigations as there are exporters or foreign producers".[563] This is different from the scenario now presented by Colombia where an authority determines the *de minimis* margins of dumping at the end of the investigation, at the same time as its determination of injury and causation.

7.302. Moreover, we observe that although Article 5.8 requires immediate termination of an investigation in certain situations, the provision does not prescribe the specific manner in which this termination is to be carried out. In other words, the provision prescribes the end but leaves the choice of means to achieve that end to investigating authorities. While investigating authorities thus enjoy certain freedom to structure and conduct their investigations as they consider appropriate, this cannot be used as a justification for non-compliance with the unambiguous requirement under Article 5.8 to terminate immediately an investigation in cases where the authorities determine that the margin of dumping is *de minimis*.[564] As we have found above, once a producer or exporter has been assigned a *de minimis* margin of dumping, the continued treatment of any imports from that producer or exporter as "dumped imports", in any subsequent injury and causation analyses under Article 3, would render ineffective the requirement, under Article 5.8, to "immediate[ly] terminate" the investigation.

7.303. We therefore disagree with Colombia that an interpretation of the term "dumped imports" as including *de minimis* margin imports is "permissible" within the meaning of the second sentence of Article 17.6(ii) of the Anti-Dumping Agreement.[565] Instead, our interpretation of the Anti-Dumping Agreement leads us to agree with prior adopted DSB reports that the context provided by "Article 5.8 means that there is no legally cognizable dumping by an exporter with a final

[558] Colombia's response to Panel question No. 6.3, para. 210.

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

[560] Colombia's response to Panel question No. 6.3, para. 210.

[561] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 216.

[562] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 219. (emphasis original)

[563] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 218. We also note the Appellate Body's observation that, in that case, "the order establishing anti-dumping duties came *after* the final determination of a margin of dumping of zero per cent was made for Farmers Rice and Riceland [(the exporters at issue)], but the order nevertheless covered these exporters." (Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 219 (emphasis original)).

[564] Panel Report, *EC – Salmon (Norway)*, para. 7.628 (noting that "Article 5.8 requires termination of the investigation upon a determination of *de minimis* margins for imports from a particular foreign producer or exporter, and thus leads to the conclusion that there is no legally cognizable dumping. A consistent interpretation of the term 'dumped' requires that such imports be excluded from the 'dumped imports' considered in the analysis of injury (and causation, of course))."

[565] Colombia's response to Panel question No. 6.4, para. 218. Given our unambiguous conclusion resulting from the interpretative exercise under Article 31 of the Vienna Convention, we do not consider it necessary to have recourse to the supplementary means of interpretation within the meaning of Article 32 of the Vienna Convention, including the preparatory work of the Anti-Dumping Agreement, and the other interpretative elements that are presented by the parties.

de minimis margin of dumping", and, "[a]ccordingly, imports from that exporter may not be treated as 'dumped imports' for the purpose of the Article 3 injury analysis".[566]

7.304. Turning to the inclusion of negative margin imports – i.e. imports from exporters with overall negative dumping margins – in MINCIT's injury and causation analyses, we note that Colombia does not contest that such imports do not constitute "dumped imports" for purposes of Articles 3.1, 3.2, 3.4, and 3.5. Colombia instead argues that the treatment of a "small volume" of negative margin imports as "dumped imports" by MINCIT does not undermine the objectivity of its injury and causation analyses.[567] The issue of whether it is permissible to treat imports from exporters with overall negative margins as "dumped" for purposes of the injury and causation analyses is not, in our opinion, a question of fact that is to be addressed in light of the circumstances in different investigations. Instead, we consider that the issue relates to the legal interpretation of the term "dumped imports".[568] On the latter point, even Colombia does not argue that such negative margin imports constitute "dumped imports" for purposes of Article 3 and, in any event, we cannot see how an unbiased and objective investigating authority could have included imports from exporters with negative overall margins in its assessment of the injury caused by "dumped imports".

7.305. For the above reasons, we find that the European Union has established that Colombia acted inconsistently with its obligations under Articles 3.1, 3.2, 3.4, and 3.5, because MINCIT included in its injury and causation determinations imports from the exporters that were determined to have: (a) final *de minimis* margins of dumping (Clarebout (Belgium), Agristo (Belgium), and Other Companies (Belgium)); and (b) final *negative* margins of dumping (Ecofrost (Belgium) and Farm Frites (the Netherlands)).

7.7.3 European Union's other claims under Articles 3.1, 3.2, 3.4, and 3.5

7.306. In addition to its "overarching" error claim examined above, the European Union also presents other discrete grounds in support of its claims challenging MINCIT's analysis of: "price effects" under Articles 3.2 and 3.1[569]; impact on domestic industry under Articles 3.4 and 3.1[570]; and causal link under Articles 3.5 and 3.1.[571] In response to questioning by the Panel, the European Union stated that, "should the Panel uphold the overarching claim, *the European Union would not consider it essential* for the Panel to make finding[s] on the other grounds in support of its claims of a violation of Article 3.2, 3.4 and 3.5 of the Anti-Dumping Agreement".[572] In light of this clarification by the European Union, and having found in favour of the European Union with respect of its claim relating to the "overarching" flaw in MINCIT's injury and causation determinations, the Panel is not called upon to make further findings with respect to the other grounds presented by the European Union in support of its claims challenging MINCIT's analysis of the "price effects" under Articles 3.2 and 3.1; the impact on domestic industry under Articles 3.4 and 3.1; and the causal link under Articles 3.5 and 3.1.

7.7.4 Conclusion

7.307. Based on the foregoing, we find that the European Union has established that Colombia acted inconsistently with its obligations under Articles 3.1, 3.2, 3.4, and 3.5, because MINCIT included in its injury and causation determinations imports from the exporters that were determined to have: (a) final *de minimis* margins of dumping (Clarebout Potatoes (Belgium), Agristo (Belgium),

[566] Panel Reports, *Canada – Welded Pipe*, para. 7.88; *EC – Salmon (Norway)*, para. 7.628.

[567] Colombia's first written submission, para. 13.41. According to Colombia, a "contextual analysis" of Article 3 of the Anti-Dumping Agreement, in light of Articles 2 and 17.6(i) of the Anti-Dumping Agreement and Article 11 of the DSU, "confirms that the objective of the injury disciplines is to ensure the *objectivity* of the authority's analysis" and reveals "that not every error or inaccuracy gives rise to a violation of Article 3.1 of the Anti-Dumping Agreement, but rather only those errors or inaccuracies that are of such magnitude that they undermine the objectivity of the overall injury and causation examination". (Colombia's response to Panel question No. 6.6, para. 223 (emphasis original); first written submission, paras. 13.32-13.37).

[568] See e.g. Panel Report, *EC – Salmon (Norway)*, para. 7.628.

[569] See e.g. European Union's first written submission, para. 213; and second written submission, paras. 106-128.

[570] See e.g. European Union's first written submission, para. 214; and second written submission, paras. 129-138.

[571] See e.g. European Union's first written submission, para. 215; and second written submission, paras. 139-142

[572] European Union's response to Panel question No. 10.1, para. 378. (emphasis added)

and Other Companies (Belgium)); and (b) final *negative* margins of dumping (Ecofrost (Belgium) and Farm Frites (the Netherlands)).

7.308. In light of this finding, we are not called upon to make further findings with respect to the other grounds presented by the European Union in support of its claims challenging MINCIT's analysis of the "price effects" under Articles 3.2 and 3.1; the impact on domestic industry under Articles 3.4 and 3.1; and the causal link under Articles 3.5 and 3.1.

8 CONCLUSIONS AND RECOMMENDATION

8.1. For the reasons set out in this Report, we conclude as follows:

a. with respect to the European Union's claims concerning MINCIT's decision to initiate the underlying investigation:

   i. the European Union has not established that Colombia acted inconsistently with Article 5.3 of the Anti-Dumping Agreement because MINCIT failed to verify that there was "sufficient" evidence to initiate the investigation with respect to the full range of products covered by tariff subheading 2004.10.00.00;

   ii. the European Union has not established that Colombia acted inconsistently with its obligations under Article 5.3 because MINCIT did not have "sufficient" evidence demonstrating that FEDEPAPA represented the domestic producers of the "like" product so as to justify initiating the underlying investigation;

   iii. the European Union has established that Colombia acted inconsistently with Article 5.3 of the Anti-Dumping Agreement because, by failing to examine whether the use of third-country sales prices, instead of domestic sales prices, was "appropriate" in the specific facts and circumstances of the investigation at issue, MINCIT did not examine the "adequacy" of the evidence in the application to determine whether there is "sufficient" evidence to justify the initiation of the underlying investigation;

   iv. the European Union has not established that Colombia acted inconsistently with its obligations under Article 5.3 because the evidence of injury examined and relied upon by MINCIT was insufficient to justify the initiation of the underlying investigation;

   v. the European Union has not established that Colombia acted inconsistently with its obligations under Article 5.3 because the evidence of causal link examined and relied upon by MINCIT was insufficient to justify the initiation of the underlying investigation; and

   vi. having found that Colombia acted inconsistently with its obligations under Article 5.3, the Panel does not consider it necessary to make additional findings concerning the European Union's claim under Article 5.8 of the Anti-Dumping Agreement in order to provide a positive resolution to the present dispute.

b. With respect to the European Union's claims concerning the confidential treatment of certain information by MINCIT:

   i. the European Union has established that Colombia acted inconsistently with its obligations under Article 6.5 of the Anti-Dumping Agreement with respect to the redacted information in section d(i) of FEDEPAPA's revised application because MINCIT granted confidential treatment to this information without a showing of "good cause" by the applicant. Given this finding of inconsistency, the Panel does not consider it necessary to make further findings on the European Union's claim under Article 6.5.1 concerning the information in section d(i) of the revised application in order to provide a positive resolution to the present dispute;

ii. the European Union has not established that Colombia acted inconsistently with its obligations under Article 6.5 in respect of the information contained in annex 10 of the revised application because the European Union has not demonstrated: (a) that the applicant failed to show the necessary "good cause" for the confidential treatment requested; and (b) that MINCIT did not objectively assess the showing of "good cause" as the basis of granting confidential treatment; and

iii. the European Union has established that Colombia acted inconsistently with its obligations under Article 6.5.1 of the Anti-Dumping Agreement with respect to the information contained in annex 10 of FEDEPAPA's revised application because: MINCIT did not "require" the applicant to "furnish" non-confidential summaries of the confidential information contained in annex 10; and, to the extent that this information was not susceptible of summary, a statement of the reasons as to why summarization was not possible was not provided.

c. With respect to the European Union's claims concerning the alleged use of "facts available" by MINCIT:

i. the European Union has established that Colombia acted inconsistently with its obligations under Article 6.8 of the Anti-Dumping Agreement because MINCIT disregarded the export prices that the exporters had provided in their questionnaire responses and, instead, elected to use export prices extracted from the DIAN database to make its dumping determination; and

ii. having found that Colombia acted inconsistently with its obligations under Article 6.8, the Panel does not consider it necessary to make additional findings as to whether Colombia also acted inconsistently with its obligations under paragraphs 3 and 6 of Annex II and Article 2.1 in order to provide a positive resolution to the present dispute.

d. With respect to the European Union's claims concerning MINCIT's assessment of the exporters' requests for adjustments:

i. the European Union has established that Colombia acted inconsistently with its obligation to make a "fair comparison" under Article 2.4 of the Anti-Dumping Agreement because MINCIT denied the product mix-related adjustments requested by Agrarfrost, Aviko, and Mydibel;

ii. the European Union's claim under Article 2.4 of the Anti-Dumping Agreement concerning Mydibel's packaging cost-related adjustment request falls within the Panel's terms of reference;

iii. the European Union has established that Colombia acted inconsistently with its obligation to make a "fair comparison" under Article 2.4 of the Anti-Dumping Agreement because MINCIT denied Mydibel's packaging cost-related adjustment request;

iv. the European Union has established that Colombia acted inconsistently with its obligation to make a "fair comparison" under Article 2.4 of the Anti-Dumping Agreement because MINCIT denied Agrarfrost's oil cost-related adjustment request; and

v. having found that Colombia acted inconsistently with its obligation to make a "fair comparison" under Article 2.4, the Panel does not consider it necessary to make additional findings as to whether Colombia also acted inconsistently with its obligations under the last sentence of Article 2.4 in order to provide a positive resolution to the present dispute.

e. With respect to the European Union's claims concerning MINCIT's injury and causation determinations:

i. the European Union has established that Colombia acted inconsistently with its obligations under Articles 3.1, 3.2, 3.4, and 3.5 of the Anti-Dumping Agreement because MINCIT included in its injury and causation determinations imports from the exporters that were determined to have: (a) final *de minimis* margins of dumping (Clarebout (Belgium), Agristo (Belgium), and Other Companies (Belgium)); and (b) final *negative* margins of dumping (Ecofrost (Belgium) and Farm Frites (the Netherlands)); and

ii. having found that Colombia acted inconsistently with its obligations under Articles 3.1, 3.2, 3.4, and 3.5, the Panel is not called upon to make further findings with respect to the other grounds presented by the European Union in support of its claims challenging MINCIT's analysis of the "price effects" under Articles 3.2 and 3.1; the impact on domestic industry under Articles 3.4 and 3.1; and the causal link under Articles 3.5 and 3.1.

8.2. Pursuant to Article 19.1 of the DSU, we recommend that Colombia bring its measures into conformity with its obligations under the GATT 1994 and the Anti-Dumping Agreement.