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

(DS591)

THIRD PARTY SUBMISSION OF THE UNITED STATES OF AMERICA

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TABLE OF CONTENTS

I. Introduction 1

II. Claims Relating to the Dumping Determination 3

A. Claims Relating to Article 2.1, Article 6.8, and Annex II, paragraphs 3 and 6, of the Anti-Dumping Agreement 3

1. Article 2.1, Article 6.8, and Annex II, paragraphs 3 and 6, Do Not Impose Independent Obligations on the Calculation of Export Price 4

2. Article 6.8 and Annex II, paragraphs 3 and 6, Do Not Require a Member to Use Information Supplied by an Interested Party, but this Information Should be Taken into Account where it is Verifiable, Appropriately Submitted, and Timely 5

B. Claims Relating to Article 2.4 of the Anti-Dumping Agreement 6

III. Claims Relating to the Injury and Causation Determinations 8

A. Claims Relating to the Term "Dumped Imports" in Article 3 of the Anti-Dumping Agreement 8

B. Other Claims Relating to Article 3.4 of the Anti-Dumping Agreement 10

IV. Conclusion 11

TABLE OF REPORTS

Short Title	Full Case Title and Citation
Argentina – Poultry Anti-Dumping Duties	Panel Report, *Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil*, WT/DS241/R, adopted 19 May 2003
China – Broiler Products	Panel Report, *China – Anti-Dumping and Countervailing Duty Measures on Broiler Products from the United States*, WT/DS427/R and Add.1, adopted 25 September 2013
EC – Bed Linen (Article 21.5 – India) (AB)	Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India*, WT/DS141/AB/RW, adopted 24 April 2003
EC – Fasteners (China) (AB	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
EC – Tube or Pipe Fittings (AB)	Appellate Body Report, *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WT/DS219/AB/R, adopted 18 August 2003
EU – Footwear (China)	Panel Report, *European Union – Anti-Dumping Measures on Certain Footwear from China*, WT/DS405/R, adopted 22 February 2012
Egypt – Steel Rebar (Panel)	Panel Report, *Egypt – Definitive Anti-Dumping Measures on Steel Rebar from Turkey*, WT/DS211/R, adopted 1 October 2002
Korea – Certain Paper	Panel Report, *Korea – Anti-Dumping Duties on Imports of Certain Paper from Indonesia*, WT/DS312/R, adopted 28 November 2005
Mexico – Anti-Dumping Measures on Rice (AB)	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
Thailand – H-Beams (Panel)	Appellate Body Report, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, WT/DS122/AB/R, adopted 5 April 2001
US – Coated Paper (Indonesia)	Panel Report, *United States – Anti-Dumping and Countervailing Measures on Certain Coated Paper from Indonesia*, WT/DS491/R, and Add.1, adopted 22 January 2018

US – Cotton Yarn (AB)	Appellate Body Report, *United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan*, WT/DS192/AB/R, adopted 5 November 2001
US – Countervailing Duty Investigation on DRAMS (AB)	Appellate Body Report, *United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea*, WT/DS296/AB/R, adopted 20 July 2005
US – Hot-Rolled Steel (AB)	Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, adopted 23 August 2001
US – Lamb (AB)	Appellate Body Report, *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, WT/DS177/AB/R, WT/DS178/AB/R, adopted 16 May 2001
US – Softwood Lumber VI (Article 21.5 – Canada) (AB)	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
US – Zeroing (Japan) (AB)	Appellate Body Report, *United States – Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/AB/R, adopted 23 January 2007

I. INTRODUCTION

1. The United States welcomes the opportunity to present its views to the Panel.

2. The standard of review to be applied by WTO dispute settlement panels is set forth in Article 11 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU) and, specifically with respect to disputes involving anti-dumping measures, Article 17.6 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (Anti-Dumping Agreement).

3. Article 11 of the DSU provides in relevant part:

> The function of panels is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements. Accordingly, 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, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements.[1]

4. Article 17.6 of the Anti-Dumping Agreement provides:

> In examining the matter referred to in paragraph 5:
>
> > (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.[2]

5. The text of Article 17.6 of the Anti-Dumping Agreement establishes a specific standard of review for a panel undertaking its objective assessment pursuant to DSU Article 11. Article 17.6 imposes "limiting obligations on a panel" in reviewing an investigating authority's establishment and evaluation of facts.[3] The aim of Article 17.6 is "to prevent a panel from

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[1] DSU, Art. 11.

[2] Anti-Dumping Agreement, Art. 17.6.

[3] *See Thailand – H-Beams (AB)*, para. 114.

'second-guessing' a determination of a national authority when the establishment of the facts is proper and the evaluation of those facts is unbiased and objective."[4]

6. Article 17.6 further reflects that in making its objective assessment under DSU Article 11, a panel is not undertaking a *de novo* evidentiary review, but instead is acting as "*reviewer* of agency action" and not as "*initial trier of fact*."[5] In making an objective assessment of agency action that has resulted in a record and determinations on pertinent issues of fact and law, it is appropriate to "review whether the authorities have provided a reasoned and adequate explanation as to (i) how the evidence on the record supported its factual findings; and (ii) how those factual findings support the overall determination."[6] This does not mean that a panel "must simply *accept* the conclusions of the competent authorities."[7] Examination of the authority's "conclusions must be 'in-depth' and 'critical and searching'."[8] But a complainant will prevail on its claims only where it has shown that the findings of the investigating authority are not findings that could have been reached by an objective and unbiased investigating authority.[9]

7. The Panel's task in this dispute, therefore, is not to determine whether potatoes, prepared or preserved otherwise than by vinegar or acetic acid, frozen, classified under tariff subheading 2004.10.00.00, from Belgium, Germany, and the Netherlands, were dumped, or whether the associated domestic industry was injured. Rather, the Panel's role is to assess whether Colombia's Subdirección de Prácticas Comerciales del Ministerio de Comercio, Industria y Turismo (MINCIT[10]) properly established the facts and evaluated them in an unbiased and objective way. Put differently, the Panel's task is to determine whether a reasonable, unbiased investigating authority, looking at the same evidentiary record as MINCIT, could have – not would have – reached the same conclusions that MINCIT reached. It would be inconsistent with the Panel's function under DSU Article 11 to go beyond its role as reviewer and instead substitute its own assessment of the evidence and judgment for that of the investigating authority.

8. In this submission, the United States will present its views on the proper legal interpretation of certain provisions of the Anti-Dumping Agreement as relevant to certain issues in this dispute.

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[4] *Thailand – H-Beams (AB)*, para. 117.

[5] *US – Countervailing Duty Investigation on DRAMS (AB)*, paras. 187-188 (italics original).

[6] *China – Broiler Products*, para. 7.4 (*citing US – Countervailing Duty Investigation on DRAMS (AB)*, para. 186, and *US – Lamb (AB)*, para. 103).

[7] *US – Cotton Yarn (AB)*, para. 69, n. 42 (italics in original) (*citing US – Lamb (AB)*, para. 106, n. 41).

[8] *China – Broiler Products (Panel)*, para. 7.5 (*quoting US – Softwood Lumber VI (Article 21.5 – Canada) (AB)*, para. 93).

[9] *US – Coated Paper (Indonesia),* paras. 7.3-7.7, 7.61, 7.83, 7.113, 7.193.

[10] Colombia's abbreviation for this agency is "la Subdirección."

II. Claims Relating to the Dumping Determination

A. Claims Relating to Article 2.1, Article 6.8, and Annex II, paragraphs 3 and 6, of the Anti-Dumping Agreement

9. The European Union contends that an investigating authority breaches Article 2.1 of the Anti-Dumping Agreement when it acts in a manner not consistent with Article 6.8 and Annex II, paragraphs 3 and 6, of the Agreement.[11] The European Union alleges that MINCIT incorrectly used import declarations from the database of Colombia's Dirección de Impuestos y Aduanas Nacionales (DIAN) to calculate "export price" even though the interested parties submitted export data specifically for this purpose.[12] According to the European Union, when an interested party "provides necessary information in and for the purpose of an anti-dumping proceeding, and this information satisfies the criteria or conditions set out in paragraph 3 of Annex II of the Anti-Dumping Agreement, this information must be used and the investigating authority may not resort to other sources of information instead (secondary source information)."[13] The European Union further alleges that an authority may not use secondary source information absent a finding that an interested party refused access to necessary information, failed to provide such information within a reasonable period, or significantly impeded the investigation.[14]

10. Colombia contends that it did not breach Article 6.8 and Annex II, paragraphs 3 and 6, of the Anti-Dumping Agreement, or Article 2.1, because the information it used to calculate export price "constituyen información primaria y no 'mejor información disponible'."[15] According to Colombia, the information that it extracted from DIAN's database "es información individualmente pertinente a la empresa en cuestión, es información que se basa en documentos preparados por la misma empresa y también es información vinculada con las mismas transacciones de exportación."[16] Colombia requests that the Panel reject the European Union's claim under Article 6.8 and Annex II, paragraphs 3 and 6, as well as its consequential claim under Article 2.1, because the obligations set forth in those provisions do not apply in these circumstances.

11. The United States takes no position on the merits of the European Union's factual claims as related to MINCIT's decision to use export prices from the DIAN database instead of the export price data submitted by the interested parties during the investigation.

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[11] *See* European Union First Written Submission, paras. 110-112.

[12] *See* European Union First Written Submission, paras. 94-102.

[13] European Union First Written Submission, para. 110; *see ibid.*, para. 125.

[14] *See* European Union First Written Submission, paras. 127-129.

[15] Colombia First Written Submission, para. 8.2 ("constitute primary information and not 'best information available'"); *see ibid*., paras. 8.7, 8.36-8.52.

[16] Colombia First Written Submission, para. 8.56 ("is information individually relevant to the company in question, is information that is based on documents prepared by the same company and is also information related to the same export transactions"); *see ibid.*, para. 8.63.

1. Article 2.1, Article 6.8, and Annex II, paragraphs 3 and 6, Do Not Impose Independent Obligations on the Calculation of Export Price

12. Article 2.1 of the Anti-Dumping Agreement provides as follows:

> For the purpose of this Agreement, a product is to be considered as being dumped, i.e. introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country.[17]

13. Article 2.1 is a definitional provision that, "read in isolation, do[es] not impose independent obligations."[18] The definitions set out in Article 2.1 certainly play an important role in the interpretation of other provisions of the Anti-Dumping Agreement, but they do not specify how "export price" is to be determined. The determination of export price is governed by Articles 2.3 and 2.4 of the Anti-Dumping Agreement.[19]

14. Article 6.8 and Annex II of the Anti-Dumping Agreement set out the conditions in which an investigating authority may make a determination on the basis of facts available.[20] Although the conditions set out in Article 6.8 and Annex II play an important role in defining when "preliminary and final determinations, affirmative or negative, may be made on the basis of the facts available," Article 6.8 and Annex II also do not specify how "export price" is to be determined.[21]

15. Therefore, the United States does not agree with the European Union's view that an investigating authority breaches Article 2.1 of the Anti-Dumping Agreement when it acts in a manner not consistent with Article 6.8 and Annex II, paragraphs 3 and 6. Article 2.1 does not impose an independent obligation on Members regarding the determination of "export price," and Article 6.8 and Annex II do not address how "export price" is to be determined.

[17] Anti-Dumping Agreement, Art. 2.1.

[18] *US - Zeroing (Japan) (AB)*, para. 140.

[19] Article 2.3 of the Anti-Dumping Agreement addresses how export price may be established where there is no export price or where export price is unreliable because of an association between the exporter and the importer. Anti-Dumping Agreement, Art. 2.3. The European Union has made no claim that Colombia's constructed export price is based on a methodology not consistent with the obligations of Article 2.3.

[20] *See* Anti-Dumping Agreement, Art. 6.8 and Annex II.

[21] *See* Anti-Dumping Agreement, Art. 6.8 and Annex II.

2. Article 6.8 and Annex II, paragraphs 3 and 6, Do Not Require a Member to Use Information Supplied by an Interested Party, but this Information Should be Taken into Account where it is Verifiable, Appropriately Submitted, and Timely

16. Article 6.8 of the Anti-Dumping Agreement permits an investigating authority to make a determination on the basis of facts available when an interested party refuses access to, or otherwise does not provide, information that is necessary to an investigation within a reasonable period of time, or significantly impedes the investigation.[22] According to the second sentence of Article 6.8, "[t]he provisions of Annex II shall be observed in the application of this paragraph."[23]

17. The first sentence of Annex II, paragraph 3, of the Anti-Dumping Agreement provides as follows:

> All 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, and, where applicable, supplied in a medium or computer language requested by the authorities, should be taken into account when determinations are made.[24]

18. Annex II, paragraph 3, contains a number of conditions which, if met, indicate to an investigating authority that submitted information "should be taken into account when determinations are made" provided that the information is: (1) "verifiable"; (2) "appropriately submitted so that it can be used without undue difficulties"; (3) "supplied in a timely fashion"; and (4) where applicable, "supplied in a medium or computer language requested by the authorities."[25] If the information submitted by the interested party fails to meet one of the conditions set out in paragraph 3, neither Article 6.8 or Annex II indicate that the investigating authority should take into account that information.

19. Annex II, paragraph 6, uses similar language: If the information submitted by an interested party is not accepted by the investigating authority, then "the supplying party should be informed forthwith of the reasons therefor, and should have any opportunity to provide further explanations within a reasonable period …."[26] If the interested party provides further explanations and the authority does not consider those explanations satisfactory, "the reasons for the rejection of such evidence or information should be given in any published determinations."[27] Therefore, while the text of Annex II, paragraphs 3 and 6, urge the investigating authority to take

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[22] *See* Anti-Dumping Agreement, Art. 6.8.

[23] Anti-Dumping Agreement, Art. 6.8.

[24] Anti-Dumping Agreement, Annex II, para. 3.

[25] Anti-Dumping Agreement, Annex II, para. 3; *see US – Hot-Rolled Steel (AB),* para. 81. The fourth condition listed in Annex II, paragraph 3, is not at issue in this dispute.

[26] Anti-Dumping Agreement, Annex II, para. 6.

[27] Anti-Dumping Agreement, Annex II, para. 6.

into account, or not disregard, information on the record that meets the criteria of those provisions, the ordinary meaning of these provisions does not require Members to utilize that information.[28]

20. Annex II has generally been interpreted to mean that "all the information provided by the parties, even if not ideal in all respects, should to the extent possible be used by the authorities and in case secondary source information is to be used, the authorities should do so with special circumspection."[29] Moreover, Article 6.8 applies exclusively to interested parties from whom information is required by competent authorities, and both Article 6.8 and Annex II establish the expectation that competent authorities will use that information to the extent that it can be used.[30] In this way, Annex II reflects that an investigating authority's ability to rely on facts potentially less favorable to the interests of a non-cooperating interested party is inherent in the authority's role in conducting an investigation in accordance with the Anti-Dumping Agreement, provided certain conditions are met

21. In sum, the Anti-Dumping Agreement provides that when an interested party refuses access to, or otherwise does not supply necessary information, or significantly impedes the investigation, the investigating authority may resort to the facts available to make its determination. However, where information is provided that is verifiable, appropriately submitted so that it can be used without undue difficulty, supplied in a timely fashion, and, where applicable, supplied in the requested medium, this information should be taken into account.

B. Claims Relating to Article 2.4 of the Anti-Dumping Agreement

22. The European Union contends that Colombia did not act consistently with Article 2.4 of the Anti-Dumping Agreement because Colombia failed to make allowances for differences affecting price comparability, including differences in product mixes, packaging, and types of oil used in production.[31] The European Union also argues that Colombia did not act consistently with Article 2.4 because it never informed the interested parties what information was necessary to ensure a fair comparison and imposed on the parties an unreasonable burden of proof.[32]

23. Colombia agrees that physical characteristics can affect price comparability.[33] Nonetheless, Colombia argues that the interested parties failed to provide sufficient factual

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[28] To the extent the European Union is alleging that Colombia did not sufficiently explain the basis for its application of facts available, the sufficiency of an investigating authority's explanations is dealt with under the procedural obligations of Article 12 of the Anti-Dumping Agreement, not Article 6.8.

[29] *Mexico – Anti-Dumping Measures on Rice (Panel),* para. 7.238. The Appellate Body reinforced this point, indicating that so long as "a respondent acted to the best of its ability, an agency must generally use, in the first instance, the information the respondent did provide, if any." *Mexico – Anti-Dumping Measures on Rice (AB)*, para 288.

[30] *US – Zeroing (EC) (AB),* para. 459.

[31] *See* European Union First Written Submission, paras. 133, 168-179, 190-192, 202-205.

[32] *See* European Union First Written Submission, paras. 206-208.

[33] *See* Colombia First Written Submission, para. 9.4.

information to support their allegations regarding differences in product mixes,[34] differences in packaging,[35] and differences in the types of oil used in production[36] to warrant allowances for differences that influence the comparability of prices.[37]

24. The United States takes no position on the merits of the European Union's factual claims as related to MINCIT's decision not to make allowances for differences in product mixes, packaging, and types of oil used in production.

25. Article 2.4 of the Anti-Dumping Agreement provides in relevant part as follows:

> A fair comparison shall be made between the export price and the normal value. This comparison shall be made at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time. Due allowance shall be made in each case, on its merits, for differences which affect price comparability, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability…. The authorities shall indicate to the parties in question what information is necessary to ensure a fair comparison and shall not impose an unreasonable burden of proof on those parties.[38]

26. Article 2.4 obligates an investigating authority to make a "fair comparison" between the export price and the normal value when determining the existence of dumping and calculating a dumping margin. The text of Article 2.4 presupposes that the appropriate normal value has been identified. Once normal value and export price have been established, the investigating authority is required to select the proper sales for comparison (sales at the same level of trade and as nearly as possible the same time) and make appropriate adjustments to those sales (due allowances for differences which affect price comparability).[39]

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[34] *See* Colombia First Written Submission, paras. 9.11-9.49.

[35] *See* Colombia First Written Submission, paras. 10.23-10.28.

[36] *See* Colombia First Written Submission, paras. 11.3-11.14.

[37] Colombia also contends that the European Union's claim under Article 2.4 regarding differences in packaging falls outside the terms of reference in this dispute because the claims the European Union presents in its first written submission were not identified in its panel request. *See* Colombia First Written Submission, paras. 10.2-10.22. The United States takes no position as to this argument.

[38] Anti-Dumping Agreement, Art. 2.4.

[39] For instance, Article 2.4 articulates that to ensure a fair comparison between export price and normal value, due allowance shall be made with respect to models with differing physical characteristics, at distinct levels of trade, pursuant to different terms and conditions, or in varying quantities, all of which may affect price. *See* Anti-Dumping Agreement, Art. 2.4; *EC –Tube or Pipe Fittings* (Panel), para. 7.157. As the panel in *Egypt – Steel Rebar* explained, "[A]rticle 2.4 in its entirety, including its burden of proof requirement, has to do with ensuring a fair comparison, through various adjustments as appropriate, of export price and normal value." *Egypt – Steel Rebar,* para. 7.335.

27. If the exporters have not provided evidence demonstrating to the authorities that there is a difference affecting price comparability, or argument demonstrating that existing information on the record reflects a difference affecting price comparability, however, there would be no basis for the investigating authority to make an adjustment and no requirement to do so.[40] An investigating authority thus is not obligated to accept a request for an adjustment that is unsubstantiated.[41]

28. A determination of whether the obligation in Article 2.4 has been met will depend on the specific facts and circumstances at issue. Therefore, consistent with Article 11 of the DSU and Article 17.6(i) of the Anti-Dumping Agreement, the question of whether Colombia failed to make reasonable adjustments will depend on whether the Panel determines that the European Union has shown that MINCIT's findings could not have been made by an unbiased and objective investigating authority.

III. CLAIMS RELATING TO THE INJURY AND CAUSATION DETERMINATIONS

A. Claims Relating to the Term "Dumped Imports" in Article 3 of the Anti-Dumping Agreement

29. The European Union contends that Colombia breached Article 3.1 of the Anti-Dumping Agreement, and consequentially Articles 3.2, 3.4, and 3.5, because MINCIT included non-dumped imports from the countries under investigation in its injury and causation analysis.[42]

30. Colombia contends that the term "dumped imports" as it appears in Articles 3.1, 3.2, 3.4, and 3.5 of the Anti-Dumping Agreement includes all imports for which the investigating authority has calculated a positive margin of dumping, including those imports in which the margin of dumping is *de minimis*.[43] Colombia also argues that the inclusion of imports for which the authority has calculated a negative margin of dumping does not *per se* undermine the objectivity of the authority's injury determination.[44]

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[40] *EC – Fasteners (China) (AB)*, para. 488 (*quoting EC – Tube or Pipe Fittings*, para. 7.158, and *citing Korea – Certain Paper (Panel)*, para. 7.147).

[41] *See EC – Fasteners (China) (AB)*, para. 488 (finding that if an interested party does not demonstrate the existence of a difference affecting price comparability, an investigating authority is not obligated to make an adjustment).

[42] *See* European Union First Written Submission, paras. 241, 259. According to the European Union, Colombia breached the requirements of Article 3.1 read in conjunction with Article 3.2 because its price effects analysis included non-dumped imports and did not adequately examine the effect of dumped imports on domestic prices for the like product. *See ibid.*, paras. 260-263, 269-280. The European Union also argues that Colombia breached the requirements of Article 3.1 read in conjunction with Article 3.4 because "the methodology applied by MINCIT falls short of the requirement to conduct an objective examination based on positive evidence." *Ibid.*, para. 283; *see ibid.*, paras. 289-296. Finally, the European Union argues that Colombia breached the requirements of Article 3.1 read in conjunction with Article 3.5 because Colombia's causation determination is "analytically flawed and factually unsupported" and it "failed to separate and distinguish all relevant non-attribution factors." *Ibid.*, para. 318; *see ibid*, paras. 316, 320-330.

[43] *See* Colombia First Written Submission, paras. 13.16-13.28.

[44] *See* Colombia First Written Submission, paras. 13.29-13.41, 13.132-13.135. Colombia also countered the arguments put forward by the European Union about the requirements of Article 3.1 read in conjunction with Article

31. The United States takes no position on the merits of the European Union's factual claims as related to MINCIT's decision to include non-dumped imports from the countries under investigation in its injury and causation analysis.

32. Article 3 focuses on the investigating authority's injury analysis of the effect or impact of "the dumped imports." Article 2.1 of the Anti-Dumping Agreement defines dumped products, "[f]or the purposes of [the Anti-Dumping] Agreement," on a countrywide basis.[45] The references to "the dumped imports" throughout Article 3 therefore concern all imports of the product from the countries subject to the investigation.

33. Article 5.8 of the Anti-Dumping Agreement, however, requires an investigating authority to terminate an anti-dumping investigation with respect to any exporter or producer for which an individual margin of dumping is determined to be zero or *de minimis*.[46] Therefore, once a zero or *de minimis* margin has been finally determined for a particular exporter or producer, the investigation must be terminated in all aspects, including the exclusion of the imports of that exporter or producer from the authority's injury analysis of the effect or impact of "the dumped imports."

34. The United States recalls that prior disputes have addressed this issue. In *Argentina – Poultry Anti-Dumping Duties*, the panel considered that "the ordinary meaning of … the term 'dumped imports' [in Article 3] refers to all imports attributable to producers or exporters for which a margin of dumping greater than *de minimis* has been calculated. The term 'dumped imports' excludes imports from producers / exporters found in the course of the investigation not to have dumped."[47] According to the panel, the investigating authority's failure to exclude the imports of two companies found not to have been dumped breached Articles 3.1, 3.2, 3.4, and 3.5 of the Anti-Dumping Agreement.[48] In addition, the Appellate Body in *EC – Bed Linen (Article 21.5 – India)* recognized that "whatever methodology investigating authorities choose for determining the volume of dumped imports, if that methodology fails to ensure that a determination of injury is made on the basis of 'positive evidence' and involves an 'objective examination' of *dumped* imports—rather than imports that are found *not* to be dumped—it is not consistent with paragraphs 1 and 2 of Article 3."[49]

35. For the above reasons, the United States agrees with the European Union that the references to "the dumped imports" throughout Article 3 exclude the imports of any exporter or producer for which an individual margin of dumping is determined to be zero or *de minimis*.

3.2 (*see ibid*., para. 13.76); the requirements of Article 3.1 read in conjunction with Article 3.4 (*see ibid*., paras. 13.114-13.130); and the requirements of Article 3.1 read in conjunction with Article 3.5 (*see ibid*., paras. 13.198-13.229).

[45] Anti-Dumping Agreement, Art. 2.1.

[46] *See* Anti-Dumping Agreement, Art. 5.8.

[47] *Argentina – Poultry Anti-Dumping Duties*, para. 7.303.

[48] *Argentina – Poultry Anti-Dumping Duties*, paras. 7.306-7.307.

[49] *EC – Bed Linen (Article 21.5 – India) (AB)*, para. 113 (italics original).

B. Other Claims Relating to Article 3.4 of the Anti-Dumping Agreement

36. The European Union contends that MINCIT's analysis of the impact of subject imports on the domestic industry was not consistent with Articles 3.1 and 3.4 of the Anti-Dumping Agreement because it "only elaborated on seven of the fifteen economic factors and indices having a bearing on the state of the industry which it was required to examine,"[50] while ignoring or downplaying the importance of other factors that were positive or improved during the period of investigation.[51]

37. Colombia contends that the European Union is incorrect and that the record of the investigation shows that MINCIT analyzed all the factors listed in Article 3.4 of the Anti-Dumping Agreement.[52] According to Colombia, MINCIT's analysis of the impact of subject imports on the domestic industry was impartial and objective and did not exceed the limits of its discretionary powers under Article 3.4.[53]

38. The United States takes no position on the merits of the European Union's factual claims as related to MINCIT's analysis of the economic factors and indices listed in Article 3.4.

39. Article 3.4 mandates that "[t]he examination of the impact of dumped imports on the domestic industry concerned shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry" and lists specific economic factors to be evaluated.[54] Article 3.4 indicates that its list of factors and indices "is not exhaustive, nor can one or several of these factors necessarily give decisive guidance."[55]

40. Article 3.4 does not dictate the methodology that should be employed in conducting the examination of the impact of dumped imports on the domestic industry, or the manner in which the results of this examination are to be set out in the record of the investigation.[56] A determination, through its demonstration of why the investigating authority relied on the specific factors it found to be material in the case, may disclose why other factors on which it did not make specific findings were accorded little weight or deemed not relevant.

41. Finally, nothing in Article 3.4 requires an investigating authority to reach a negative determination of injury merely because a domestic industry has reported a number of positive or improving economic indicators during the period of investigation. Nor does it follow as matter

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[50] European Union First Written Submission, para. 282; *see ibid.*, paras. 297-314.

[51] *See* European Union First Written Submission, paras. 297-314.

[52] *See* Colombia First Written Submission, paras. 13.109-13.111, 13.141-13.175, 13.182-13.184.

[53] *See* Colombia First Written Submission, para. 13.185.

[54] Anti-Dumping Agreement, Art. 3.4.

[55] Anti-Dumping Agreement, Art. 3.4.

[56] *See* Anti-Dumping Agreement, Art. 3.4; *EC – Tube or Pipe Fittings (AB)*, para. 131 ("By its terms, [Article 3.4] does not address the manner in which the results of this evaluation are to be set out, nor the type of evidence that may be produced before a panel for the purpose of demonstrating that this evaluation was indeed conducted" (footnote omitted)).

of logic from a conclusion that an industry is being injured that every indicator must be negative. As the panel in *EC – Footwear* reasoned, "it [is] clear that it is not necessary that all relevant factors, or even most or a majority of them, show negative developments in order for an investigating authority to make a determination of injury."[57] An authority thus is not required to find that a certain number of injury factors declined during the period of investigation in order to make an affirmative determination of injury.

IV. CONCLUSION

42. The United States appreciates the opportunity to submit its views in connection with this dispute on the proper interpretation of relevant provisions of the Anti-Dumping Agreement.

[57] *EU – Footwear (China)*, para. 7.413 (footnote omitted).