COLOMBIA – ANTI-DUMPING DUTIES ON FROZEN FRIES FROM BELGIUM, GERMANY AND THE NETHERLANDS (ARTICLE 21.5)

(DS591)

THIRD PARTY EXECUTIVE SUMMARY OF THE UNITED STATES OF AMERICA

June 6, 2025

EXECUTIVE SUMMARY OF U.S. THIRD PARTY SUBMISSION

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

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

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

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

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

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

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

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

5. The text of Article 2.4.2 provides that margins of dumping "shall normally be established" according to one of two methodologies: a comparison of a weighted average of normal value to a weighted average of the prices for export transactions (W-W); or a comparison of normal value transactions to export price transactions (T-T). Article 2.4.2 also permits, under certain circumstances, a comparison of individual export transactions to a normal value established on a weighted average basis (W-T). Article 2.4.2 does not otherwise indicate that margins of dumping may be established based on a comparison of a simple average normal value to a weighted average of prices of comparable export transactions. Indeed, the detail in which Article 2.4.2 requires an explanation before an investigating authority may establish margins of dumping based on a W-T methodology underscores that the methodologies for establishing the existence of margins of dumping when comparing normal value to export price are restricted to those set forth in this article.

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

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

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

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

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

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

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

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

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

I. U.S. RESPONSE TO PANEL QUESTION 1

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

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

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

II. U.S. RESPONSE TO PANEL QUESTION 2

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

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

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

18. Finally, Article 2.6 of the Anti-Dumping Agreement establishes a rule of interpretation for the term "like product." Article 2.6 states that "[t]hroughout … [the Anti-Dumping] Agreement the term 'like product' … shall be interpreted to mean a product which is identical, i.e. alike in all respects to the product under consideration, or in the absence of [an identical] … product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration." Article 2.6 thus makes clear that whether a product is a like product is to be determined on the basis of a comparison to the product under consideration.[3]

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

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

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

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

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

III. U.S. RESPONSE TO PANEL QUESTION 3

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

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

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