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

(DS591)

THIRD PARTY SUBMISSION
OF THE UNITED STATES OF AMERICA

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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]

[1] DSU, Art. 11.

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

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 '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, a panel need not "simply *accept* the conclusions of the competent authorities,"[6] 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.[7]

7. 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*.[8] 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."[9]

8. 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."[10] 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

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

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

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

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

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

[8] *See, e.g.*, U.S. DSB Statement (February 2009) (WT/DSB/M/265), paras. 77-79.

[9] *Argentina – Poultry Anti-Dumping Duties*, para. 7.45.

[10] *Colombia – Frozen Fries (Article 25)*, para. 4.12 (footnote omitted).

> for the Anti-Dumping Agreement, which was drafted with the understanding that investigating authorities employ different methodologies and approaches.[11]

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."[12]

9. In sum, the Panel's continuing task in this dispute is to assess whether Colombia's investigating authority—Subdirección de Prácticas Comerciales del Ministerio de Comercio, Industria y Turismo (MINCIT[13])—properly established the facts and evaluated them in an unbiased and objective way. Put differently, the Panel's task is to determine whether an unbiased and objective 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 substitute its own assessment of the evidence and judgment for that of the investigating authority.

10. 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.

II. CLAIMS RELATING TO THE DUMPING DETERMINATION

A. Claims Relating to Article 2.4.2 of the Anti-Dumping Agreement

11. The European Union contends that an investigating authority acts inconsistently with Article 2.4.2 of the Anti-Dumping Agreement when it establishes the existence of margins of dumping using a methodology different from those specifically referenced in this article.[14] According to the European Union, MINCIT calculated the existence of margins of dumping on the basis of a comparison of a *simple* average normal value with a weighted average of prices of export transactions.[15] As such, the European Union alleges that Colombia acted inconsistently

[11] *Colombia – Frozen Fries (Article 25)*, para. 4.14 (footnote omitted).

[12] *Colombia – Frozen Fries (Article 25)*, para. 4.14, n.43 (*quoting* D. McRae, "Treaty Interpretation by the WTO Appellate Body: The Conundrum of Article 17(6) of the Anti-Dumping Agreement," in E. Cannizzaro (ed.), *The Law of Treaties Beyond the Vienna Convention* (Oxford University Press, 2011), Chapter 10, p. 179). In prior reports, the Appellate Body simply asserted "the rules and principles of the Vienna Convention cannot contemplate interpretations with mutually contradictory results." *US – Continued Zeroing (AB)*, para. 273. That assertion was unsupported. The ordinary meaning of "permissible" is "allowable" or "permitted" – *i.e.*, an interpretation that *could be* reached under customary rules of interpretation.

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

[14] *See* European Union First Written Submission (Art. 21.5), paras. 23-26.

[15] *See* European Union First Written Submission (Art. 21.5), paras. 17-18, 22, 25, 29.

with its obligations under Article 2.4.2, because this article does not allow for the use of a simple average to establish normal value.[16]

12. Colombia contends that it did not act inconsistently with Article 2.4.2 of the Anti-Dumping Agreement, or Article 2.1, because the methodological step challenged by the European Union is directed at model matching, which falls under the obligations set out under Article 2.4, not those set out under Article 2.4.2.[17] According to Colombia, the European Union's reliance on the "weighted average normal value" language of Article 2.4.2 is not applicable to MINCIT's model matching approach, "which is a matter for Article 2.4 and the 'fair comparison' requirement."[18] However, to the extent that this language is applicable, Colombia avers that MINCIT's two-step weighted-average-to-weighted average comparison is fully consistent with the requirements established under Article 2.4.2.[19]

13. The United States offers the following comments on the interpretation of Article 2.4.2 of the Anti-Dumping Agreement.

14. Article 2.4.2 of the Anti-Dumping provides as follows:

> Subject to the provisions governing fair comparison in paragraph [2.]4, the existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions or by a comparison of normal value and export prices on a transaction-to-transaction basis. A normal value established on a weighted average basis may be compared to prices of individual export transactions if the authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods, and if an explanation is provided as to why such differences cannot be taken into account appropriately by the use of a weighted average-to-weighted average or transactions-to-transaction comparison.[20]

15. 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

[16] *See* European Union First Written Submission (Art. 21.5), paras. 31, 33-34.

[17] *See* Colombia First Written Submission (Art. 21.5), paras. 5.9-5.10, 5.12.

[18] Colombia First Written Submission (Art. 21.5), para. 5.25; *see ibid.*, paras. 5.8-5.9.

[19] *See* Colombia First Written Submission (Art. 21.5), paras. 5.40-5.49.

[20] Anti-Dumping Agreement, Art. 2.4.2.

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 are restricted to those set forth in this article.

16. The text of Article 2.4.2 further requires that the transactions included in the W-W methodology be comparable.[21] 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.

17. 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.

B. Claims Relating to Articles 2.4 and 2.1 of the Anti-Dumping Agreement

18. The European Union contends that Colombia acted inconsistently with Articles 2.4 and 2.1 of the Anti-Dumping Agreement because Colombia excluded comparable domestic transactions from its calculation of normal value.[22] According to the European Union, an investigating authority acts inconsistently with the fair comparison requirement of Article 2.4 (as well as the definition of dumping in Article 2.1) whenever "the investigating authority compares export sales with only a part of the comparable domestic sales transactions that are all equally comparable to the export sales transactions in question."[23]

19. Colombia contends that MINCIT did not act inconsistently with Articles 2.4 and 17.6 of the Anti-Dumping Agreement when it compared export price and normal value at the most precise level possible.[24] According to Colombia, "the significant differences between the average weighted prices of the different [domestic] articles within each reference … is so large that it could hardly be argued that they are comparable."[25] Therefore, since Article 2.4 required MINCIT to take into account any and all difference that affect comparability, MINCIT "acted

[21] 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.

[22] *See* European Union First Written Submission (Art. 21.5), paras. 35, 39-42, 94.

[23] *See* European Union First Written Submission (Art. 21.5), para. 100; *see ibid.*, paras. 102-103.

[24] *See* Colombia First Written Submission (Art. 21.5), para. 4.59.

[25] Colombia First Written Submission (Art. 21.5), para. 4.40.

both within its discretion and consistently with Article 2.4 by making comparisons [based on] the closest or more precise possible matches."[26]

20. The United States offers the following comments on the interpretation of Articles 2.1 and 2.4 of the Anti-Dumping Agreement.

1. Article 2.1 of the Anti-Dumping Agreement

21. 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.[27]

22. 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."[28] Article 2.1 thus cannot be the legal basis for an independent claim.[29] 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."

2. Article 2.4 of the Anti-Dumping Agreement

23. 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.[30]

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[26] Colombia First Written Submission (Art. 21.5), para. 4.60.

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

[28] *US – Zeroing (Japan) (AB)*, para. 140.

[29] *EU – Footwear (China)*, para. 7.260.

[30] Anti-Dumping Agreement, Art. 2.4 (footnote omitted).

24. 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.[31]

25. 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 …").[32] 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.

26. 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.[33]

III. CONCLUSION

27. 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.

[31] *See* Anti-Dumping Agreement, Art. 2.4; *EC –Tube or Pipe Fittings*, 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 (Panel),* para. 7.335.

[32] Anti-Dumping Agreement, Art. 2.1. Article 2.6 defines the term "like product" "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." Anti-Dumping Agreement, Art. 2.6.

[33] The United States otherwise disagrees with Colombia's assertions (*see* Colombia First Written Submission (Art. 21.5), paras. 4.47, 5.15-5.17) that the anti-dumping methodology of the U.S. Department of Commerce to the extent that it makes due allowance for differences in physical characteristics that affect price comparability supports Colombia's understanding of the obligations set forth under Article 2.4.