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

(DS591)

RESPONSES OF THE UNITED STATES OF AMERICA TO QUESTIONS FROM THE PANEL TO THIRD PARTIES

May 23, 2025

1. <u>To the third parties</u>: Article 2.4.2 of the Anti-Dumping Agreement states, in relevant part, that, "[s]ubject to the provisions governing fair comparison in [Article 2.4], the existence of margins of dumping shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of all comparable export transactions". This is often described as the "W-W" methodology. Article 2.4.2 also states that an authority may determine the existence of a margin of dumping based on either what is often described as the "T-T" methodology or the "W-T" methodology. Please comment on whether an authority may determine a margin of dumping using a methodology other than the three methodologies identified in Article 2.4.2.

1. An interpretive analysis of the second sentence of Article 2.4.2 of the Anti-Dumping Agreement must begin with the text of that provision. Article 2.4.2 provides as follows:

> Subject to the provisions governing fair comparison in paragraph 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 transaction-to-transaction comparison.[1]

2. 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."[2] The two primary comparison methodologies thus available to an investigating authority are the W-W comparison methodology and the T-T comparison methodology.

3. 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

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

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

average-to-weighted average or transaction-to-transaction comparison."[3] The W-T methodology is thus provided in addition to the two comparison methodologies that an authority "normally" uses.

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

2. <u>To the third parties</u>: Colombia states at paragraph 2.32 of its first written submission that, once MINCIT "decided to conduct intermediate price comparisons at the article level, the next steps … were to calculate the prices for each article, to identify appropriate matches for export sales, to calculate intermediate margins and, finally, to calculate the overall weighted average dumping margin for each exporter". Colombia also states, at paragraph 2.42 of its first written submission that, "in accordance with standard practice, all intermediate 'dumping margins' – both those resulting from the identical matches and the non-identical matches just described – were combined into one single overarching weighted average dumping margin for the product as a whole". As such, Colombia explains, at paragraph 2.55, that MINCIT, "aggregated all of the intermediate comparisons into one single dumping margin." Lastly, Colombia states, at paragraph 5.6 of its first written submission, that MINCIT calculated dumping margins using a "weighted average to weighted average ('W-W') comparison methodology based on multiple averages."

In view of the above, please comment on whether (for those "articles" that have export sales but no identical domestic sales) a simple average of a series of weighted average normal values will be considered to have determined a weighted average normal value (and thus will comply with Article 2.4.2's "W-W" methodology), so long as this simple averaging is used to calculate an "intermediate" dumping margin that is subsequently aggregated into a "overall" single dumping margin?

5. 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."[4]

6. 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."[5] This includes allowances for

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

[4] Colombia Second Written Submission (Art. 21.5), para. 3.23.

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

"differences in … physical characteristics" between the export price of the product under consideration and the normal value of the like product.[6]

7. 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."[7] 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.

8. 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."[8] 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.[9]

9. As noted in the Panel's question, and as confirmed in Colombia's second written submission,[10] 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,

> 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

[6] 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.

[7] Anti-Dumping Agreement, Art. 2.4.2 (underline added).

[8] Anti-Dumping Agreement, Art. 2.6.

[9] 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."

[10] *See* Colombia Second Written Submission (Art. 21.5), paras. 3.41, 3.44.

> referencia when sold in the domestic market that could affect price comparability.[11]

10. 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).

3. <u>To the third parties</u>: Please comment on what options an investigating authority has to determine normal value when a product sold in the domestic market does not match "exactly" a product sold in the export market (assuming that other similar – but non-exact – products are sold domestically).

11. 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."[12]

12. 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.

[11] Colombia Second Written Submission (Art. 21.5), para. 3.41 (italics original, underline added). *See also ibid.*, 3.40 ("To be sure, Colombia is <u>not</u> arguing that differences in prices between the exported product and the product sold domestically need to be adjusted under Article 2.4" (underline added)).

[12] Anti-Dumping Agreement, Art. 2.2 (footnote omitted).