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

(DS591)

THIRD PARTY EXECUTIVE SUMMARY OF THE UNITED STATES OF AMERICA

September 24, 2021

EXECUTIVE SUMMARY OF U.S. THIRD PARTY SUBMISSION

I. CLAIMS RELATING TO THE DUMPING DETERMINATION

1. Article 2.1 is a definitional provision that, "read in isolation, do[es] not impose independent obligations." 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.

2. Article 6.8 and Annex II set out the conditions in which an investigating authority may make a determination on the basis of facts available. 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. Therefore, 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.

3. Next, Article 6.8 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.

4. 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." 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.

5. 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 …." 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." Therefore, while the text of Annex II, paragraphs 3 and 6, urge the investigating authority to take 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.

6. 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.

7. Finally, 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).

8. However, 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, there would be no basis for the investigating authority to make an adjustment and no requirement to do so. An authority thus is not obligated to accept a request for an adjustment that is unsubstantiated.

9. 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.

II. CLAIMS RELATING TO THE INJURY AND CAUSATION DETERMINATIONS

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

11. Article 5.8, however, requires an 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*. 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."

12. 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." 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. 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."

13. For the above reasons, the United States agrees 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*.

14. Next, 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. 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."

15. 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. A determination, through its demonstration of why the 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.

16. Finally, nothing in Article 3.4 requires an 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 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." 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.

EXECUTIVE SUMMARY OF U.S. THIRD PARTY ORAL STATEMENT

17. Article 3.1 sets forth two overarching obligations. The first obligation is that the injury determination must be based on "positive evidence." The second obligation is that the injury determination must involve an "objective examination" of the volume of the dumped imports, their price effects, and their impact on the domestic industry.

18. Although Article 3.1 indicates that these obligations extend to every aspect of an investigating authority's injury analysis, Article 3.1 does not articulate the analysis that an authority must undertake to determine whether the "volume of the dumped imports," "the effect of the dumped imports on prices in the domestic market for like products," or "the consequent impact of these imports on domestic producers of such products," cause injury. It is the succeeding paragraphs – Articles 3.2, 3.4, and 3.5 – that do so.

19. For example, Article 3.2 addresses the investigating authority's consideration "[w]ith regard to the volume of the dumped imports" and "[w]ith regard to the effect of the dumped imports on price." Article 3.4 discusses the factors that an authority should evaluate in examining the impact of dumped imports on the domestic industry. And Article 3.5 specifically addresses the causation and non-attribution analyses.

20. 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*. However, while it is true that an investigating authority breaching one or more of the obligations of Articles 3.2, 3.4, and 3.5 consequentially breaches Article 3.1, it is not necessarily true that an authority breaching one or more of the obligations of Article 3.1 consequentially breaches Articles 3.2, 3.4, and 3.5.

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

I. CLAIMS UNDER ARTICLE 5.3

21. Article 5.4 provides that an investigation shall not be initiated unless the authority has determined that the application for relief has been made by or on behalf of the domestic industry. Therefore, whenever an application is submitted by an entity on behalf of the domestic industry, an authority may initiate an investigation only after it has determined that the application is supported by the domestic industry according to the requirements set out in Article 5.4.

22. Under Article 5.2, when an entity files an application "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)." Article 5.2 makes clear that "[s]imple assertion [in the application], unsubstantiated by relevant evidence, cannot be considered sufficient to meet the requirements of this paragraph." Further, under Article 5.3, an investigating authority must "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." Therefore, the operative standard by which an authority shall determine under Article 5.4 whether an entity's application has been made on behalf of the domestic industry is "sufficient evidence."

23. The ordinary meaning of the term "sufficient" is defined, in part, as "[a]dequate (esp. in quantity or extent) for a certain purpose; enough (*for* a person or thing, *to do* something)." Article 5.3 requires an authority to "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." Article 6.6 indicates that "[e]xcept in circumstances provided for in [Article 6.8 regarding the use of facts available], the authorities shall during the course of an investigation satisfy themselves as to the accuracy of the information supplied by interested parties upon which their findings are based." Therefore, to the extent an authority relies upon representations by a trade or business association regarding the support for an application, that authority must satisfy itself as to the accuracy and adequacy of those representations. Where it does so, an authority has acted consistent with the obligations set out in Article 5.4.

24. Finally, the term "where appropriate" should be interpreted in the context of the introductory clause of Article 5.2, which states that "[t]he application shall contain such information as is reasonably available to the applicant." 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. The term "where appropriate" in Article 5.2(iii) thus anticipates that there may be circumstances in which it is "appropriate" for the applicant to submit third-country sales or constructed value data in its application as evidence of normal value.

II. CLAIMS UNDER ARTICLES 6.5 AND 6.5.1

25. The language of Article 6.5 does not obligate an authority to "request" that a party providing information show good cause that the information should be accorded confidential treatment. As the panel in *EU – Footwear (China)* recognized, "there is nothing in Article 6.5 which would require any particular form or means for showing good cause, or any particular type or degree of supporting evidence which must be provided" and "the nature of the showing that will be sufficient to satisfy the 'good cause' requirement will vary, depending on the nature of the information for which confidential treatment is sought." The panel in *Korea – Stainless Steel Bars* further observed that "Article 6.5 does not specify the manner in which 'good cause' is to be established. This lack of specificity necessarily means that the exact manner in which 'good cause' should be established is not prescribed." Instead, "the nature and the degree of the requirement to show good cause depends on the information concerned."

III. CLAIMS UNDER ARTICLE 2.1, ARTICLE 6.8, AND ANNEX II

26. Article 6.8 and Annex II establish the expectation that an investigating authority will use the information that it requires from an interested party to the extent that such information can be used. Article 6.8 indicates that an authority may make a determination based on information not provided by an interested party, but only where the "interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation." Paragraph 1 of Annex II indicates that an authority should "specify in detail the information required from any interested party" and "ensure that the party is aware that if information is not supplied within a reasonable time, the authorities will be free to make determinations on the basis of the facts available." Therefore, given Article 6.8 and paragraph 1 of Annex II, where an interested party provides access to necessary information within a reasonable period of time and does not otherwise significantly impede an investigation, the information so provided should be used by the authority.

27. Paragraphs 5 and 6 of Annex II further indicate that an authority should not arbitrarily disregard the information provided by an interested party. According to paragraph 5, even when such information "may not be ideal in all respects, this should not justify the authorities from disregarding it, provided the interested party has acted to the best of its ability." Meanwhile, paragraph 6 notes that where "the evidence or information is not accepted, the supplying party should be informed of the reasons therefor, and should have the opportunity to provide further explanations within a reasonable period."

28. In sum, an investigating authority should begin its calculation with an examination of the sales transaction data submitted by the interested parties in response to the authority's request for this information absent a finding that this information could not be used for the reasons set forth in Article 6.8 and Annex II. The Anti-Dumping Agreement establishes the expectation that an authority will use the information that it requires from an interested party, even if that information is not ideal in all respects. The fact that an authority makes no explicit and formal determination about the use of facts available does not release it from this requirement.

IV. CLAIMS UNDER ARTICLE 3 AND ARTICLE 3.4

29. Article 5.8 requires an authority to terminate an anti-dumping investigation where it determines the margin of dumping is *de minimis*. Since the Article 3 injury determination can only be rendered as part of an "investigation," once an investigation has been terminated under Article 5.8, the vehicle for making any injury determination likewise terminates. Therefore, where an authority terminates an investigation of a country, producer, or exporter under Article 5.8 based on a determination that the margin of dumping is *de minimis*, this termination results in the exclusion of the imports of that country, producer, or exporter from the injury analysis under Article 3 of the effect or impact of "the dumped imports."

30. 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. Compliance with Article 3.4 requires the collection of a broad range of information concerning domestic industry performance, including sales, profits, output, market share, productivity, return on investments, utilization of capacity, cash flow, inventories, employment, wages, growth, and ability to raise capital or investments.

31. 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." Nothing in Article 3.4, or any other provision of the Agreement, provide further guidance on which factors may "give decisive guidance" as to the impact of dumped imports on the domestic industry. Article 3.4 also does not dictate the methodology that should be employed by the authority, or the manner in which the results of this evaluation are to be set out. Accordingly, none of the factors listed in Article 3.4 is "key" relative to any of the other factors listed in this provision. Indeed, the importance of certain factors may vary significantly from case to case, and the relative weight that an authority may give to certain factors in an investigation has no bearing on their importance vis-à-vis other factors addressed in Article 3.4.

32. Finally, Article 3.4 does not require an authority to explicitly analyze the impact of each of the factors with a "trend favourable" for the domestic industry as part of its injury analysis. For example, in *EC – Tube or Pipe Fittings*, the Appellate Body report explained that an investigating authority need not make specific findings for every factor set forth in Article 3.4. The report went on to observe that, while it is mandatory to evaluate all fifteen factors set forth in Article 3.4, "because Articles 3.1 and 3.4 do not regulate the *manner* in which the results of the analysis of each injury factor are to be set out in the published documents, … it is not required that in every anti-dumping investigation a separate record be made of the evaluation of each of the injury factors listed in Article 3.4."