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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I. INTRODUCTION

1. The United States welcomes the opportunity to present its views to the Arbitrators. In this submission, the United States will present its views on the proper legal interpretation of certain provisions of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (Anti-Dumping Agreement) that are relevant to this dispute.

2. The United States will address two issues. First, the United States will address Colombia's claim that the Panel erred in law when it concluded that Colombia's Subdirección de Prácticas Comerciales del Ministerio de Comercio, Industria y Turismo (MINCIT[1]) acted inconsistently with Article 5.3 of the Anti-Dumping Agreement because MINCIT did not examine whether the use of third-country sales prices, instead of domestic sales prices, was "appropriate" in the specific facts and circumstances of the investigation at issue.[2]

3. Second, the United States will address Colombia's claim that the Panel erred in law when it concluded that MINCIT's interpretation of the term "dumped imports" in Articles 3.1, 3.2, 3.4, and 3.5 of the Anti-Dumping Agreement is impermissible under Article 17.6(ii) because MINCIT included imports with *de minimis* dumping margins in its injury and causation analysis.[3]

II. APPELLANT'S CLAIMS UNDER ARTICLE 5.3 OF THE ANTI-DUMPING AGREEMENT

4. The Panel found "that Colombia acted inconsistently with Article 5.3 of the Anti-Dumping Agreement because, by failing to examine whether the use of third-country sales prices, instead of domestic sales prices, was 'appropriate' in the specific facts and circumstances of the investigation at issue, MINCIT did not examine the 'adequacy' of the evidence in the application to determine whether there is 'sufficient' evidence to justify the initiation of the investigation."[4]

5. Colombia argues that the Panel misinterpreted the phrase "where appropriate" as it appears in Article 5.2(iii) of the Anti-Dumping Agreement so as to require under Article 5.3 "some form of explanation or justification by the applicant – as well as examination by the investigating authority of that explanation or its absence – for not using domestic sales prices as the source for normal value and instead resorting to either third-country sales prices or cost of production."[5] Colombia contends that, "correctly interpreted, the phrase 'where appropriate' [in Article 5.2(iii)] *indicates discretion on the applicant to choose the type of normal value data* [under Article 5.3] *that it considers 'appropriate'*."[6]

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

[2] *See* Colombia Appellant Submission, paras. 4.1-4.96.

[3] *See* Colombia Appellant Submission, paras. 7.1-7.63.

[4] *Colombia – Frozen Fries (Panel)*, para. 7.79.

[5] Colombia Appellant Submission, para. 4.18.

[6] Colombia Appellant Submission, para. 4.19 (italics original).

6. Article 5.2(iii) of the Anti-Dumping Agreement indicates, in part, that the application requesting the initiation of an investigation shall contain "information on prices at which the product in question is sold when destined for consumption in the domestic markets of the country or countries of origin or export (or, where appropriate, information on the prices at which the product is sold from the country or countries of origin or export to a third country or countries, or on the constructed value of the product)."[7] 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,"[8] including information about "normal value" under subparagraph (iii).[9] 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.[10] The requisite quantity or quality of such information need only be "sufficient evidence to justify the initiation of an investigation."[11]

7. For example, information about prices for sales of the product in question in the origin or export country may be difficult for an applicant to obtain, *i.e.*, this information may not be "reasonably available" to an applicant. In that situation, it would be appropriate for an applicant to submit information on sales of the product to a third country or the constructed value of the product. The term "where appropriate" in Article 5.2(iii) thus anticipates that there may be circumstances in which it is "appropriate" for an applicant to submit third-country sales or constructed value data in its application.[12]

8. That said, Article 5.2 of the Anti-Dumping Agreement does not further indicate that an applicant must establish in its application that there are no sales of the like product destined for consumption in the export country before it may include in its application information about third-country sales or constructed value. The text of Article 5.2 does not require an applicant to justify, or an investigating authority to demonstrate, that the information in the application was the only information reasonably available to the applicant where the information in the application is sufficient to support initiation of an investigation.[13] This contrasts sharply with

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[7] Anti-Dumping Agreement, Art. 5.2(iii) (underline added).

[8] Anti-Dumping Agreement, Art. 5.2 (underline added).

[9] *See* Anti-Dumping Agreement, Art. 5.2(iii).

[10] *See US – Softwood Lumber V (Panel)*, para. 7.84 (in discussing Article 5.3, the panel agreed with other panels on this issue and recognized that "the quantity and quality of the evidence required to meet the threshold of sufficiency of the evidence is of a different standard for purposes of initiation of an investigation compared to that required for a preliminary or final determination"); *China – GOES (Panel)*, para. 7.54, *quoting US – Softwood Lumber V (Panel)*, para. 7.84.

[11] Anti-Dumping Agreement, Art. 5.3.

[12] *See US – Softwood Lumber V (Panel)*, para. 7.55 (in discussing Article 5.2, the panel recognized that an application can comply with the standard set out in that article "even if it does not include all the specified information if such information was simply not reasonably available to the applicant").

[13] *See US- Softwood Lumber V (Panel)*, para. 7.57 ("Considering the requirements of Article 5.2, we are of the view that we have to establish, when considering the specific facts of this case, whether the application contained information on the matters specified in Article 5.2, …, not whether it contained all such information as is reasonably available to the applicant." This finding indicates that there can be other information reasonably available that is not included in an application because the application need not include all information reasonably available).

Article 2.2 of the Anti-Dumping Agreement, which provides that an investigating authority shall calculate normal value based on third-country sales or constructed value only when there are no domestic sales or such sales do not permit a proper comparison.[14] Article 5.2(iii) does not establish a similar requirement or hierarchy.

9. Article 5.3 of the Anti-Dumping Agreement also does not establish such a requirement. Article 5.3 provides that "[t]he authorities shall 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."[15] 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)."[16] An investigating authority thus is required to examine the evidence provided in the application, and if it determines that the evidence is accurate and adequate, it may conclude that the evidence concerning normal value in an application is "sufficient."

10. An investigating authority enjoys a degree of discretion with respect to the type of evidence it may rely on in determining whether to initiate an investigation if it is satisfied that an application contains "sufficient evidence" as required under Article 5.3 of the Anti-Dumping Agreement.[17] Therefore, if an investigating authority determines, after examining the accuracy and adequacy of the evidence provided in an application, that domestic sales pricing information was not reasonably available to an applicant, that is a circumstance in which it would be appropriate for the applicant to submit information on third country sales, or the constructed value, of the product. An investigating authority is not otherwise required to demonstrate that the information in the application was the only information reasonably available to an applicant.

III. APPELLANT'S CLAIMS UNDER ARTICLES 3.1, 3.2, 3.4, AND 3.5 OF THE ANTI-DUMPING AGREEMENT

11. The Panel found "that Colombia acted inconsistently with its obligations under Articles 3.1, 3.2, 3.4, and 3.5, because MINCIT included in its injury and causation determinations imports from the exporters that were determined to have: (a) final *de minimis* margins of dumping …; and (b) final negative margins of dumping …."[18]

[14] *See* Anti-Dumping Agreement, Art. 2.2.

[15] Anti-Dumping Agreement, Art. 5.3.

[16] *New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press, 1993, 4th ed.), Volume 2, p. 3133 (italics original).

[17] In this regard, 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. *See, e.g., US – Coated Paper (Indonesia),* paras. 7.3-7.7, 7.61, 7.83, 7.113, 7.193.

[18] *Colombia – Frozen Fries (Panel)*, para. 7.307.

12. Colombia argues that the Panel erred in law because it ignored the ordinary meaning of the term "dumped imports" and unduly relied on the second sentence of Article 5.8 as it pertains to the *de minimis* rule in interpreting this term for purposes of Articles 3.1, 3.2, 3.4, and 3.5 of the Anti-Dumping Agreement.[19]

13. The United States does not agree with Colombia's view that the Panel erred in its interpretation. Article 3 of the Anti-Dumping Agreement 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 this [Anti-Dumping] Agreement," on a countrywide basis.[20] The references to "the dumped imports" throughout Article 3 therefore concern all the dumped imports of the product from the countries subject to the investigation. In this respect, the Agreement requires an investigating authority to examine, for example in Articles 3.1 and 3.2, the volume and price effects of "the dumped imports."

14. Imports of an exporter or producer for which an individual margin of dumping is determined to be zero or *de minimis* do not constitute part of "the dumped imports" of the product from the countries subject to the investigation. Article 5.8 of the Anti-Dumping Agreement requires an investigating authority to terminate an anti-dumping investigation in respect of any exporter or producer for which an individual margin of dumping is determined to be zero or *de minimis*.[21] 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 investigating authority's injury analysis of the effect or impact of "the dumped imports."

15. The United States recalls that prior dispute panels have examined this issue and similarly recognized that the failure to exclude such imports was not consistent with Articles 3.1, 3.2, 3.4, and 3.5 of the Anti-Dumping Agreement:

- In *Canada – Welded Pipe*, the panel recognized that "[t]he application of Article 5.8 means that there is no legally cognizable dumping by an exporter with a final *de minimis* margin of dumping. Accordingly, imports from that exporter may not be treated as 'dumped imports' for the purpose of the Article 3 injury analysis."[22]

[19] *See* Colombia Appellant Submission, paras. 7.10, 7.12-7.62. Colombia did not appeal the Panel's finding that MINCIT "acted inconsistently with Articles 3.1, 3.2, 3.4, and 3.5 of the Anti-Dumping Agreement by including in its injury and causation analysis imports from exporters found to have negative dumping margins." *Ibid.*, para. 7.1, n. 116.

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

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

[22] *Canada – Welded Pipe*, para 7.88. *See also EC – Fasteners (China) (Panel)*, para. 7.354 (the panel similarly recognized that "the text of the AD Agreement is perfectly clear in this regard, and that the consideration of 'dumped imports' for purposes of making an injury determination consistent with Articles 3.1, 3.2, 3.4 and 3.5 of the AD Agreement entails the consideration of only those imports for which a margin of dumping greater than *de minimis* is established in the course of the investigation").

- In *EC – Salmon (Norway)*, the panel understood that "Article 5.8 requires termination of the investigation upon a determination of *de minimis* margins for imports from a particular foreign producer or exporter, and thus leads to the conclusion that there is no legally cognizable dumping. A consistent interpretation of the term 'dumped' requires that such imports be excluded from the 'dumped imports' considered in the analysis [in Article 3] of injury (and causation, of course)."[23]

- 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."[24]

The United States agrees with the interpretations reached in these panel reports and finds the reasoning persuasive.

16. The United States considers that the Panel's interpretation is correct as it accords with the ordinary meaning of "dumped imports": The term "dumped imports" in Articles 3.1, 3.2, 3.4, and 3.5 of the Anti-Dumping Agreement excludes the imports of any exporter or producer for which an individual margin of dumping is determined to be zero or *de minimis*.

IV. CONCLUSION

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

[23] *EC – Salmon (Norway)*, para. 7.628. *See also EC – Bed Linen (Article 21.5 – India) (AB)*, para. 113 (the Appellate Body similarly understood 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" (italics original)).

[24] *Argentina – Poultry Anti-Dumping Duties*, para. 7.303; *see ibid.*, paras. 7.306-7.307 (finding that the investigating authority's failure to exclude the imports of two companies found not to have been dumped from its injury analysis breached Articles 3.1, 3.2, 3.4, and 3.5).