

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

(DS591)

**THIRD PARTY ORAL STATEMENT
OF THE UNITED STATES OF AMERICA
TO THE ARBITRATORS**

November 15, 2022

I. INTRODUCTION

Mr. Chairperson and Arbitrators:

1. In this statement, the United States will present its systemic views on certain claims raised under the DSU.¹

II. APPELLANT’S CLAIMS UNDER ARTICLE 6.5 OF THE ANTI-DUMPING AGREEMENT AND ARTICLE 6.2 OF THE DSU

2. The United States takes no position in this proceeding on the Agreed Procedures² reached by the parties. However, should the Arbitrator find that the claims under Article 6.5 of the Anti-Dumping Agreement and Article 6.2 of the DSU relate to “issues of law” and “legal interpretation,” as specified in paragraph 9 of the Agreed Procedures, the United States provides the following observations about the interpretation of DSU Article 6.2.

3. The identification of the specific measures at issue and setting out the legal basis of the complaint under DSU Article 6.2 defines the “matter” that is the subject of the panel’s examination. The panel’s terms of reference under DSU Article 7.1 are to examine that matter, and no other, and then to make such findings as will assist the DSB in providing a recommendation under the covered agreements as set out in DSU Article 19.1.

4. By defining the “matter” that is subject to the panel’s examination, the panel request also permits the respondent to begin preparing its defense and other Members to assess whether they have an interest in the matter and wish to exercise their rights to participate as a third party.

5. Because the panel’s terms of reference are set in relation to the “matter” set out in the panel request, that “matter” comprises only the specific measures and legal basis reflected on the face of the panel request. Defects cannot be cured in subsequent submissions. Still, in considering the sufficiency of a panel request, a panel may consider submissions and statements made by the parties in order to confirm the meaning of the words used in the panel request.

6. In examining the sufficiency of a panel request, a distinction must be drawn between “claims” and “arguments.” Article 6.2 calls for a “brief summary of the legal basis” of the complaint. That “legal basis” is a “claim” that the respondent party has breached an identified provision of a covered agreement, as reflected in DSU Articles 7.1, 11,³ and 12.7.⁴

7. Specifically, DSU Article 11 states, “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, ...*” DSU Article 12.7 further states, “In such cases, the report of a panel shall set out the findings of fact, *the*

¹ *Understanding on Rules and Procedures Governing the Settlement of Disputes* (“DSU”).

² *Agreed Procedures for Arbitration under Article 25 of the DSU* (WT/DS591/3/Rev.1) (“Agreed Procedures”).

³ Italics added.

⁴ Italics added.

applicability of relevant provisions and the basic rationale behind any findings and recommendations that it makes.”

8. In contrast, “arguments” are statements put forth by the complainant to demonstrate, or prove its claim, that the respondent’s measure is not consistent with the identified provision. DSU Article 6.2 requires that a panel request set out the legal basis or claims put forward by the complainant, but the DSU nowhere requires a panel request to identify the complainant’s arguments. To the contrary, the standard Working Procedures in DSU Appendix 3 clarify that “facts” and “arguments” are to be presented in a party’s written submission.⁵ Specifically, paragraph 4 of Appendix 3 states that, “Before the first substantive meeting of the panel with the parties, the parties to the dispute shall transmit to the panel *written submissions in which they present the facts of the case and their arguments.*”⁶

9. Given the above interpretation, a panel request does not need – contrary to Colombia’s argument⁷ – to identify, under Article 17.5(ii) of the Anti-Dumping Agreement, the “facts made available” to the investigating authority.

10. Article 17.5(ii) states, “The DSB shall, at the request of the complaining party, establish a panel to examine the matter based upon ... the facts made available ... to the authorities of the importing Member.”⁸ Article 17.6(i) then states, “In examining the matter referred to in paragraph 5[,] ... 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”⁹

11. As the text demonstrates, the phrase “the facts of the matter” in Article 17.6(i) refers to “the authorities’ establishment of the facts,” which are “the facts made available ... to the authorities of the importing Member” as referenced in Article 17.5(ii).” (Note that a prior report correctly reached this conclusion based on the plain meaning of Articles 17.5 and 17.6.)¹⁰ Article 17.5(ii) thus delineates the scope of a panel’s evidentiary review of the investigating authority’s evaluation of the facts before it, while Article 17.6(i) identifies the standard of review to be applied by the panel.

12. For these reasons, Article 17.5(ii) does not address, nor concern itself with, the identification of the specific measures at issue and of the legal basis of the complaint under Article 6.2 of the DSU.

⁵ DSU, Appendix 3 (Working Procedures), para. 4 .

⁶ Italics added.

⁷ See Colombia Appellant Submission, paras. 6.17-6.18.

⁸ Anti-Dumping Agreement, Art. 17.5.

⁹ Anti-Dumping Agreement, Art. 17.6(i).

¹⁰ *Thailand – H-Beams (AB)*, para. 117.

III. CONCLUSION

13. This concludes the U.S. oral statement. The United States thanks the Arbitrators for their consideration of these views.