

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

**(DS591)**

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

**September 17, 2021**

### TABLE OF REPORTS

Short Title	Full Case Title and Citation
<i>Argentina – Poultry Anti-Dumping Duties</i>	Panel Report, <i>Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil</i> , WT/DS241/R, adopted 19 May 2003
<i>Australia – Apples (AB)</i>	Appellate Body Report, <i>Australia – Measures Affecting the Importation of Apples from New Zealand</i> , WT/DS367/AB/R, adopted 17 December 2010
<i>China – GOES (Panel)</i>	Panel Report, <i>China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States</i> , WT/DS414/R and Add.1, adopted 16 November 2012, upheld by Appellate Body Report WT/DS414/AB/R
<i>EC – Bananas III (AB)</i>	Appellate Body Report, <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas</i> , WT/DS27/AB/R, adopted 25 September 1997
<i>EC – Large Civil Aircraft (AB)</i>	Appellate Body Report, <i>European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft</i> , WT/DS316/AB/R, adopted 1 June 2011
<i>EC – Tube or Pipe Fittings (AB)</i>	Appellate Body Report, <i>European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil</i> , WT/DS219/AB/R, adopted 18 August 2003
<i>EC – Tube or Pipe Fittings (Panel)</i>	Panel Report, <i>European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil</i> , WT/DS219/R, adopted 18 August 2003, as modified by Appellate Body Report WT/DS219/AB/R
<i>EU – Fatty Alcohols (AB)</i>	Appellate Body Report, <i>European Union – Anti-Dumping Measures on Imports of Certain Fatty Alcohols from Indonesia</i> , WT/DS442/AB/R and Add. 1, adopted 29 September 2017
<i>EU – Footwear (China)</i>	Panel Report, <i>European Union – Anti-Dumping Measures on Certain Footwear from China</i> , WT/DS405/R, adopted 22 February 2012
<i>Guatemala – Cement I (Panel)</i>	Panel Report, <i>Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico</i> , WT/DS60/R, adopted 25 November 1998, as reversed by Appellate Body Report WT/DS60/AB/R

<i>Korea – Certain Paper</i>	Panel Report, <i>Korea – Anti-Dumping Duties on Imports of Certain Paper from Indonesia</i> , WT/DS312/R, adopted 28 November 2005
<i>Korea – Pneumatic Valves (AB)</i>	Appellate Body Report, <i>Korea – Anti-Dumping Duties on Pneumatic Valves from Japan</i> , WT/DS504/AB/R, and Add.1, adopted 30 September 2019
<i>Korea – Stainless Steel Bars (Panel)</i>	Panel Report, <i>Korea – Sunset Review of Anti-Dumping Duties on Stainless Steel Bars</i> , WT/DS553/R, circulated 30 November 2020
<i>Mexico – Anti-Dumping Measures on Rice (AB)</i>	Appellate Body Report, <i>Mexico – Definitive Anti-Dumping Measures on Beef and Rice, Complaint with Respect to Rice</i> , WT/DS295/AB/R, adopted 20 December 2005
<i>Mexico – Steel Pipes and Tubes</i>	Panel Report, <i>Mexico – Anti-Dumping Duties on Steel Pipes and Tubes from Guatemala</i> , WT/DS331/R, adopted 24 July 2007
<i>Thailand – H-Beams (Panel)</i>	Panel Report, <i>Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland</i> , WT/DS122/R, adopted 5 April 2001, as modified by Appellate Body Report WT/DS122/AB/R
<i>US – Carbon Steel (AB)</i>	Appellate Body Report, <i>United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany</i> , WT/DS213/AB/R and Corr.1, adopted 19 December 2002
<i>US – Cotton Yarn (AB)</i>	Appellate Body Report, <i>United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan</i> , WT/DS192/AB/R, adopted 5 November 2001
<i>US – Countervailing Duty Investigation on DRAMS (AB)</i>	Appellate Body Report, <i>United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea</i> , WT/DS296/AB/R, adopted 20 July 2005
<i>US – Hot-Rolled Steel (AB)</i>	Appellate Body Report, <i>United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan</i> , WT/DS184/AB/R, adopted 23 August 2001

<i>US – Softwood Lumber V (Panel)</i>	Panel Report, <i>United States – Final Dumping Determination on Softwood Lumber from Canada</i> , WT/DS264/R, adopted 31 August 2004, as modified by Appellate Body Report WT/DS264/AB/R
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## 1 CLAIMS UNDER ARTICLE 5.3 OF THE ANTI-DUMPING AGREEMENT

### 1.1 Definition of the product under consideration

**1.1. To the third parties: What are the disciplines under the Anti-Dumping Agreement that apply to the definition of the product under consideration in an anti-dumping duty investigation? In particular, does Article 5.3 of the Anti-Dumping Agreement impose any obligations in this regard? In answering this question, please comment on Colombia’s arguments in paragraph 5.13 of its first written submission that “a complainant cannot challenge the definition of the product under consideration under Article 5.3” because “Article 5.3 contains no such provision” but rather “presumes an earlier definition of the product under investigation”.**

1. Nothing in the Anti-Dumping Agreement, including Article 5.3, imposes an obligation on WTO Members regarding the definition of “product under consideration.”<sup>1</sup> Several WTO Members have observed this fact.<sup>2</sup> Therefore, the Panel should not read into Article 5.3 an obligation that does not appear in the text of that provision.

### 1.2 Representativeness of the applicant

**1.2 To the third parties: To what extent, if any, does the Anti-Dumping Agreement regulate the manner in which an entity, acting “on behalf” of domestic producers (such as, for example, a trade or industry association) must demonstrate that it represents its member-producers when such an entity files an application requesting the initiation of an anti-dumping duty investigation? In answering this question, please address Colombia’s assertion in paragraph 5.29 of its first written submission that investigating authorities have the discretion to determine whether a trade or industry association represents domestic producers.**

2. Article 5.4 of the Anti-Dumping Agreement provides that an investigation shall not be initiated unless the investigating authority has determined that the application for relief has been made by or on behalf of the domestic industry. Article 5.4 provides as follows:

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<sup>1</sup> See *US – Softwood Lumber V (Panel)*, para. 7.153 (the panel’s analysis of the Anti-Dumping Agreement “could not find any guidance on the way in which the ‘product under consideration’ should be determined”).

<sup>2</sup> See, e.g., *Second Contribution to Discussion of the Negotiating Group on Rules on Anti-Dumping Measures*, Paper by Brazil; Chile; Colombia; Costa Rica; Hong Kong, China; Israel; Japan; Korea; Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; Singapore; Switzerland; and Thailand, TN/RL/W/10, p. 2 (June 28, 2002) (“The AD Agreement does not currently contain any provision defining the product under investigation/consideration”); *Product under Consideration*, Paper by Canada, TN/RL/GEN/73, para. 1 (Oct. 17, 2005) (noting that the Anti-Dumping Agreement does not appear to provide any real guidance as to the selection of the product under consideration); *Draft Consolidated Chair Texts of the AD and SCM Agreements*, TN/RL/W/213, p. 7 (Nov. 30, 2007) (the draft proposals for amending the Anti-Dumping Agreement include a definition of “product under consideration,” which suggests that the current text of the Agreement does not define this term).

The application shall be considered to have been made “by or on behalf of the domestic industry” if it is supported by those domestic producers whose collective output constitutes more than 50 per cent of the total production of the like product produced by that portion of the domestic industry expressing either support for or opposition to the application. However, no investigation shall be initiated when domestic producers expressly supporting the application account for less than 25 per cent of total production of the like product produced by the domestic industry.<sup>3</sup>

Therefore, whenever an application is submitted by an entity on behalf of the domestic industry, an investigating 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.

3. Under Article 5.2 of the Anti-Dumping Agreement, 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).”<sup>4</sup> The application shall also provide, “to the extent possible, a description of the volume and value of domestic production of the like product accounted for by such producers.”<sup>5</sup> 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.”<sup>6</sup> According to 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.”<sup>7</sup> 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.”

4. Previous panels have 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.”<sup>8</sup> The ordinary meaning of the term “sufficient” is defined, in part, as “[a]dequate (esp. in quantity

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<sup>3</sup> Anti-Dumping Agreement, Art. 5.4.

<sup>4</sup> Anti-Dumping Agreement, Art. 5.2(i).

<sup>5</sup> Anti-Dumping Agreement, Art. 5.2(i).

<sup>6</sup> Anti-Dumping Agreement, Art. 5.2 (underline added).

<sup>7</sup> Anti-Dumping Agreement, Art. 5.3 (underline added); *see ibid.*, Art. 5.6 (where an investigating authority self-initiates an investigation, it may do so only if it has “sufficient evidence of dumping, injury and a causal link, as described in paragraph 2, to justify the initiation of an investigation”).

<sup>8</sup> *US – Softwood Lumber V (Panel)*, para. 7.84; *see China – GOES (Panel)*, para. 7.54, quoting *US – Softwood Lumber V (Panel)*, para. 7.84.

or extent) for a certain purpose; enough (*for* a person or thing, *to do* something).”<sup>9</sup> As noted above, 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.”<sup>10</sup> Article 6.6 further 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.”<sup>11</sup> Therefore, where an investigating authority has determined for purposes of Article 5.4 that the evidence of support for an application is accurate and adequate, it may conclude that the application has been made by or on behalf of the domestic industry.

5. Colombia asserts that “it is fully under the discretion of each Member to determine which entity, under what legal and factual conditions, is authorized to represent said petitioning companies according to national regulations [for purposes of the initiation of an investigation].”<sup>12</sup> The identity of the applicant does not appear relevant under Article 5.4 with respect to an investigating authority’s determination to initiate an anti-dumping investigation.<sup>13</sup> Nonetheless, 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 investigating authority has acted consistent with the obligations set out in Article 5.4 of the Anti-Dumping Agreement.

### 1.3 Evidence to calculate the normal value

**1.3 To the third parties: In paragraph 58 of its first written submission, the European Union challenges the normal value calculations provided by FEDEPAPA to MINCIT (sales prices to a third country, i.e. the United Kingdom), arguing that, “since the preferred basis for calculation of normal value is the price of sales in the domestic market of the country or countries of origin, as confirmed also in Article 5.2(iii) of the Anti-Dumping Agreement”, “[a]n applicant should only resort to information on prices at which the product is sold to a third country where this is ‘appropriate.’”**

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<sup>9</sup> *The New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press, 1993, 4<sup>th</sup> ed.), Volume 2, p. 3133 (italics original).

<sup>10</sup> Anti-Dumping Agreement, Art. 5.3.

<sup>11</sup> Anti-Dumping Agreement, Art. 6.6.

<sup>12</sup> Colombia First Written Submission, para. 5.29 (English translation of Spanish original).

<sup>13</sup> Article 6.11(iii) of the Anti-Dumping Agreements defines domestic “interested parties” for purposes of the Agreement to include “a producer of the like product in the importing Member or a trade and business association a majority of the members of which produce the like product in the territory of the importing Member.” The text of Article 5 does not include the term “interested parties” and refers to the entity that files the application simply as the “applicant.” Article 5.4, footnote 14, also indicates that “employees of domestic producers of the like product or representatives of those employees may make or support an application for an investigation under [Article 5.1].”

- a. **In your view, for purposes of initiation, can an investigating authority rely on sale prices to a third country to calculate the normal value?**
- b. **Please comment on the meaning of the term “where appropriate” in Article 5.2(iii) of the Anti-Dumping Agreement. How should this term be interpreted for purposes of that provision?**

6. An investigating authority may rely on sale prices to a third country to calculate normal value for purposes of initiation of an investigation. As the Panel’s question notes, 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).”<sup>14</sup>

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,”<sup>15</sup> including information about “normal value” under subparagraph (iii).<sup>16</sup> As explained in our response to Panel question 1.2, 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.<sup>17</sup> The requisite quantity or quality of such information need only be “sufficient evidence to justify the initiation of an investigation.”<sup>18</sup> 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 may be appropriate for the 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 the applicant to submit third-country sales or constructed value data in its application.<sup>19</sup>

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<sup>14</sup> Anti-Dumping Agreement, Art. 5.2(iii) (underline added). The question is directed at the calculation of “normal value,” but Article 5.2(iii) also includes the phrase “where appropriate” in discussing how the application should also contain information about “export price”: “information on export prices or, where appropriate, on the prices at which the product is first resold to an independent buyer in the territory of the importing Member”).

<sup>15</sup> Anti-Dumping Agreement, Art. 5.2 (underline added).

<sup>16</sup> Anti-Dumping Agreement, Art. 5.2(iii).

<sup>17</sup> See *US – Softwood Lumber V (Panel)*, para. 7.84 (“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.

<sup>18</sup> Anti-Dumping Agreement, Art. 5.3.

<sup>19</sup> 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



- c. What, if any, is the relevance of Article 2.1 of the Anti-Dumping Agreement, establishing that the normal value is the comparable price for the like product when destined for consumption in the exporting country, and Article 2.2 of the Anti-Dumping Agreement, establishing, *inter alia*, the circumstances under which investigating authorities can resort to third-country sale prices, for purposes of interpreting the meaning of the term “where appropriate” in Article 5.2(iii)?**

8. Articles 2.1 and 2.2 of the Anti-Dumping Agreement are of limited relevance for purposes of interpreting the meaning of the term “where appropriate” in Article 5.2(iii). Unlike Article 2.1, Article 5.2 does not indicate that an applicant must establish normal value in its application based on the comparable price for the like product when destined for consumption in the export country. Similarly, unlike Article 2.2, Article 5.2 does not indicate that an application must establish that there are no sales of the like product when destined for consumption in the export country before the applicant may include in its application information about third-country sales or constructed value. As explained in our response to Panel question 1.2., 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,<sup>20</sup> and Article 5.2(iii), unlike Article 2.2, does not establish a hierarchy for the information that an applicant must endeavor to file to be considered sufficient evidence of normal value.<sup>21</sup> Therefore, the term “where appropriate” should be interpreted in the context of Article 5.2(iii), which the United States discusses in response to question 1.3(b), above.

- d. Please comment on Colombia’s assertion in paragraph 5.45 of its first written submission that any interpretation of the term “where appropriate” must reflect the fact that investigating authorities enjoy certain discretion when determining whether to initiate an investigation.**

9. The United States agrees that an investigating authority enjoys a degree of discretion in determining whether to initiate an investigation. However, the phrase “reasonably available” in Article 5.2 of the Anti-Dumping Agreement and the term “where appropriate” in Article 5.2(iii)

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information if such information was simply not reasonably available to the applicant”). An investigating authority has the discretion to determine in a particular matter whether the information in question was not “reasonably available” to the applicant when it filed its application.

<sup>20</sup> See *Argentina – Poultry Anti-Dumping Duties*, para. 7.62 (“We do not of course mean to suggest that an investigating authority must have before it at the time it initiates an investigation evidence of dumping within the meaning of Article 2 of the quantity and quality that would be necessary to support a preliminary or final determination”); *Guatemala – Cement I (Panel)*, para. 7.64 (the panel recognize that, although Article 5.3 should be read in the context of Article 2, the evidence of “dumping” in the application does not need to “be of the quantity and quality that would be necessary to make a preliminary or final determination of dumping”).

<sup>21</sup> Compare Article 5.2(iii) (the application shall contain information on home market sales or, where appropriate, information on third-country sales or constructed value) with Article 2.2 (an authority may calculate normal value based on third-country sales or constructed value when there are no home market sales or such sales do not permit a proper comparison).

do not excuse any inadequacy in an application that could have been avoided or cured by reasonable efforts on the part of the applicant. Article 5.3 clearly requires an authority to “examine the accuracy and adequacy of the evidence provided in the application to determine whether there is sufficient evidence [in the application] to justify the initiation of an investigation.”<sup>22</sup> And while this standard is lower than is required to support a preliminary or final determination, it is not so low as to excuse an authority’s acceptance of a clearly deficient application.

10. In this regard, in accordance with Article 17.6(i) of the Anti-Dumping Agreement, the issue is whether the information relied on by MINCIT and reasonably available to FEDEPAPA was sufficient to persuade an *objective and unbiased investigating authority* that sufficient evidence of “dumping,” “injury,” and “a causal link between the dumped imports and alleged injury” existed to initiate the anti-dumping investigation subject to this dispute. The Panel’s role in this dispute is not to reweigh the evidence before MINCIT to determine whether FEDEPAPA’s application contained information sufficient for initiation.

## **2 CLAIMS UNDER ARTICLES 6.5 AND 6.5.1 OF THE ANTI-DUMPING AGREEMENT**

### **2.1 Good cause shown**

**2.1 To the third parties: In paragraph 73 of its first written submission, the European Union asserts that Colombia acted inconsistently with Article 6.5 of the Anti-Dumping Agreement “because MINCIT treated as confidential a substantial part of the information supplied by the applicant without requiring it to show good cause”. Please comment on the scope of the obligations that Article 6.5 imposes on investigating authorities. In particular, does Article 6.5 oblige an investigating authority to “request” that a party that has provided information shows good cause that the information should be accorded confidential treatment?**

11. Please see the U.S. response to Panel question 2.2(c) for the U.S. views on this issue.

**2.2 To the third parties: With respect to the term “good cause” in Article 6.5 of the Anti-Dumping Agreement?**

- a. Is the fact that financial information may be sensitive information that is protected under domestic law sufficient to establish “good cause” within the meaning of Article 6.5?**

12. Please see the U.S. response to Panel question 2.2(c) for the U.S. views on this issue.

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<sup>22</sup> Anti-Dumping Agreement, Art. 5.3.

**b. How is “good cause” to be shown for purposes of Article 6.5? In particular, what kind or level of supporting information must a party requesting confidential treatment provide to establish such “good cause”?**

13. Please see the U.S. response to Panel question 2.2(c) for the U.S. views on this issue.

**c. Can only the party submitting the information for which confidential treatment is sought establish “good cause”, or do investigating authorities have the discretion to presume or infer that “good cause” exists to treat certain information as confidential?**

14. Article 6.5 of the Anti-Dumping Agreement provides as follows:

Any information which is by nature confidential (for example, because its disclosure would be of significant competitive advantage to a competitor or because its disclosure would have a significantly adverse effect upon a person supplying the information or upon a person from whom that person acquired the information), or which is provided on a confidential basis by parties to an investigation shall, upon good cause shown, be treated as such by the authorities. Such information shall not be disclosed without specific permission of the party submitting it.<sup>23</sup>

15. The language of Article 6.5 does not obligate an investigating 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.”<sup>24</sup> 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.”<sup>25</sup> Instead, “the nature and the degree of the requirement to show good cause depends on the information concerned.”<sup>26</sup>

16. The merits underlying the grant of confidential treatment in an anti-dumping proceeding may be plain on the face of the record of the proceeding.<sup>27</sup> An authority may also set up a

<sup>23</sup> Anti-Dumping Agreement, Art. 6.5 (footnote omitted).

<sup>24</sup> *EU – Footwear (China)*, para. 7.728 (footnotes omitted).

<sup>25</sup> *Korea – Stainless Steel Bars (Panel)*, para. 7.206 (footnote omitted).

<sup>26</sup> *Korea – Stainless Steel Bars (Panel)*, para. 7.206 (citing as support the panel reports in *Mexico – Steel Pipes and Tubes*, para. 7.378; *Korea – Certain Paper*, para. 7.335; and *EU – Footwear (China)*, para. 7.728).

<sup>27</sup> For example, where a party submits sensitive information (costs or prices for specific customers), the good cause for confidential treatment is plainly evident.

procedure in which a party requesting confidential treatment may certify that specific information is confidential because it is not publicly available and the release will cause harm to the submitter. In such situations, an investigating authority may infer that “good cause” exists to treat such information as confidential.<sup>28</sup>

### **3 CLAIMS UNDER ARTICLE 2.1, ARTICLE 6.8, AND ANNEX II OF THE ANTI-DUMPING AGREEMENT**

**3.1 To the third parties: Colombia asserts that MINCIT did not resort to facts available when it used data contained in the DIAN database to calculate export price because the DIAN data “constitute primary information” as they are “identical, in essence and origin”, to the data contained in the exporters' questionnaire responses (Colombia's first written submission, paras. 8.2, 8.7, 8.37, 8.47, 8.51, and 8.59). Please comment on Colombia's assertion that an authority cannot be considered to have made a determination on the basis of the facts available when it uses data that is “identical, in essence and origin”, to data provided by an interested party in its questionnaire response?**

17. The United States respectfully disagrees with Colombia's assertion in respect of determinations made by an investigating authority under Article 2 of the Anti-Dumping Agreement.

18. 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.<sup>29</sup> Article 6.8 indicates that an investigating 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.”<sup>30</sup> Paragraph 1 of Annex II indicates that an investigating 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.”<sup>31</sup> 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

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<sup>28</sup> See *Korea – Stainless Steel Bars (Panel)*, para. 7.206 (recognizing that an “implicit assertion” of good cause by a submitting party “could well suffice” in certain circumstances); *ibid.*, para. 7.206, n. 626 (“For some types of information, it will be self-evident that the information falls within one of the enumerated categories and would cause commercial harm if disclosed. Thus, whether such “implicit assertions” suffice depends on the information at issue in a given case”).

<sup>29</sup> See *Mexico – Anti-Dumping Measures on Rice (AB)*, paras. 287-288 (following a review of Article 6.8 and Annex II, the Appellate Body recognized that as long as “a respondent acted to the best of its ability, an agency must generally use, in the first instance, the information the respondent did provide, if any”).

<sup>30</sup> Anti-Dumping Agreement, Art. 6.8. According to Article 6.8, “[t]he provisions of Annex II shall be observed in the application of this paragraph.”

<sup>31</sup> Anti-Dumping Agreement, Annex II, para. 1.

significantly impede an investigation, the information so provided should be used by the investigating authority.<sup>32</sup>

19. Paragraphs 5 and 6 of Annex II further indicate that an investigating 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.”<sup>33</sup> 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.”<sup>34</sup>

20. For the above reasons, an investigating authority should begin its calculation of “export price” with an examination of the export-market sales transaction data submitted by the interested parties in response to the investigating 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.<sup>35</sup> This is true even where there exists an official importer database that the authority deems identical “in terms of its essence and origin” to the information provided by the interested party.

**3.2 To the third parties: Please comment on Colombia’s argument that an investigating authority cannot be said to resort to the facts available mechanism if, as allegedly in the case at issue, it makes no explicit and formal determination to use facts available. (Colombia’s first written submission, paras. 8.63-8.87).**

21. The United States does not agree with Colombia’s argument that an investigating authority cannot be said to resort to facts available absent an explicit and formal determination that it is doing so. As explained in our response to Panel Question 3.1, 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.<sup>36</sup> The fact that an

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<sup>32</sup> See *US – Hot-Rolled Steel (AB)*, para. 82 (The Appellate Body recognized that, given “Article 6.8 and paragraph 1 of Annex II provide that investigating authorities may use facts available only if information is not submitted within a reasonable period of time, ... [this], in turn, indicates that information which *is* submitted in a reasonable period of time should be used by the investigating authorities” (italics original)).

<sup>33</sup> Anti-Dumping Agreement, Annex II, para. 5.

<sup>34</sup> Anti-Dumping Agreement, Annex II, para. 6.

<sup>35</sup> Article 2.3 of the Anti-Dumping Agreement does permit an investigating authority to construct “export price” “where there is no export price or where it appears to the authorities concerned that the export price is unreliable because of association or a compensatory arrangement between the exporter and the importer or a third party.” However, the provisions of Article 2.3 are not relevant to the Panel’s inquiry because Colombia does not argue that it rejected the export-market sales information provided by interested parties for the reasons set out in Article 2.3. See Colombia First Written Submission, paras. 8.76-8.77 (MINCIT did *not* reject the information submitted by the European companies because it found it deficient).

<sup>36</sup> See Anti-Dumping Agreement, Annex II, paras. 5 and 6.

authority makes no explicit and formal determination about the use of facts available does not release it from this requirement.

#### 4 CLAIM UNDER ARTICLE 3.1 OF THE ANTI-DUMPING AGREEMENT

##### 4.1 **To the third parties: How do you relate the “immediate termination” requirement under Article 5.8 in cases where an investigating authority determines that the margin of dumping is *de minimis* to an authority’s injury and causation analyses under Article 3 of the Anti-Dumping Agreement?**

22. Article 5.8 of the Anti-Dumping Agreement requires an investigating authority to terminate an anti-dumping investigation where it determines the margin of dumping is *de minimis*.<sup>37</sup> Since the Article 3 injury determination can only be rendered as part of an “investigation,”<sup>38</sup> once an investigation of a country, producer, or exporter has been terminated under Article 5.8, the vehicle for making any injury determination with respect to that country, producer, or exporter 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.”

23. For example, in the United States, once the U.S. Department of Commerce (*i.e.*, the investigating authority in charge of the “dumping” analysis) publishes a final determination that it has found margins of dumping to be *de minimis* for a particular foreign exporter or producer, the U.S. International Trade Commission (*i.e.*, the investigating authority in charge of the “injury” analysis) treats the imports of the exporter or producer as non-subject (*i.e.*, non-dumped) for purposes of its injury analysis.

##### 4.2 **To the third parties: To what extent does Article 17.6(ii) of the Anti-Dumping Agreement inform the interpretation of the term “dumped imports” in Article 3? In particular, does the Article 3 term “dumped imports” admit “of more than one permissible interpretation” within the meaning of Article 17.6(ii)? And, if so, is the interpretation advanced by Colombia in paragraphs 13.16-13.28 of its first written submission one such “permissible interpretation”?**

24. Colombia argues that the term “dumped imports” as it appears in Article 3, concerning the determination of injury, can be interpreted as encompassing “all imports originating from origins for which a margin of dumping above zero (a positive margin of dumping) has been calculated, which includes *de minimis* dumping margins.”<sup>39</sup> Colombia also argues that Article

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<sup>37</sup> See Anti-Dumping Agreement, Art. 5.8.

<sup>38</sup> See, e.g., Anti-Dumping Agreement, Art. 5.7 (“[t]he evidence of both dumping and injury shall be considered simultaneously ... during the course of the investigation”).

<sup>39</sup> Colombia First Written Submission, para. 13.22 (English translation of Spanish original).

9.1 of the *Agreement on Safeguards*,<sup>40</sup> Article 11.9 of the *Agreement on Subsidies and Countervailing Measures* (SCM Agreement),<sup>41</sup> and the negotiations of the Kennedy Round Antidumping Code,<sup>42</sup> support its interpretation.

25. Article 17.6(ii) expressly acknowledges that the provisions of the Anti-Dumping Agreement may “admit[] of more than one permissible interpretation.”<sup>43</sup> Article 17.6(ii) further requires that a panel find a measure “to be in conformity with the [Anti-Dumping] Agreement if it rests upon one of those permissible interpretations.”<sup>44</sup>

26. Colombia’s interpretation, however, would not appear to be supported by the text of Article 3. Article 3.1 refers to “the” dumped imports, which suggests something less than the total imports from the origins found to be dumping. Article 3.1 also speaks to the impact of “these imports,” referring back to “the” dumped imports and not to imports more generally. Article 3.3 also addresses the cumulative assessment of the effects of imports if “the margin of dumping ... is more than *de minimis*,” not “the dumped imports” as defined by Colombia. Finally, Article 3.5 refers to injury caused by “the dumped imports ... through the effects of dumping,” which cannot be said to include imports for which there is not sufficient evidence of dumping under Article 5.8.

27. Therefore, Colombia’s interpretation cannot be considered a permissible interpretation of the term “dumped imports” within the meaning of Article 17.6(ii) of the Anti-Dumping Agreement.

**4.3 To the third parties: Please comment on Colombia’s argument in paragraph 13.37 of its first written submission that “a panel cannot simply find errors or flaws in the injury or causation examinations, but instead must investigate whether those errors or failures undermined the objectivity of the authority’s analysis and conclusion”.**

28. The United States generally agrees with Colombia’s statement.

29. Panels should exercise special care to avoid the risk that they may be substituting their own judgment for that of the investigating authority.<sup>45</sup> Beyond where expressly provided, the

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<sup>40</sup> Colombia First Written Submission, paras. 13.19-13.20.

<sup>41</sup> Colombia First Written Submission, para. 13.21.

<sup>42</sup> Colombia First Written Submission, para. 13.23-13.26.

<sup>43</sup> Anti-Dumping Agreement, Art. 17.6(ii).

<sup>44</sup> Anti-Dumping Agreement, Art. 17.6(ii).

<sup>45</sup> See *US – Cotton Yarn (AB)*, para. 74 (recognizing that the standard under Article 11 of the DSU indicates that “panels must not conduct a *de novo* review of the evidence nor substitute their judgement for that of the competent authority”); *EU – Fatty Alcohols (AB)*, para. 5.99 (finding that the panel did not substitute its judgment for that of the competent authority, but rather “was assessing whether, in light of the evidence on the record, the conclusions reached by those authorities were reasoned and adequate, given the facts and circumstances of the case” (footnote omitted)).

Anti-Dumping Agreement does not contain specific standards regarding the evidence that an authority must use to support a determination. Therefore, whether the conclusions reached by an investigating authority are not ones that an objective and unbiased authority could have reached will depend on the facts and circumstances of the particular case.<sup>46</sup>

30. The function of a panel as set out in Article 11 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU) suggests that the Panel’s task in this dispute is not to determine whether potatoes, prepared or preserved otherwise than by vinegar or acetic acid, frozen, classified under tariff subheading 2004.10.00.00, from Belgium, Germany, and the Netherlands, were dumped, or whether the associated domestic industry was injured. Rather, the Panel’s function is to assess whether MINCIT properly established the facts and evaluated them in an unbiased and objective way. Put differently, even if the Panel should find errors or flaws in MINCIT’s injury or causation analysis, its task in this dispute still remains the same: to determine whether a reasonable, unbiased investigating authority, looking at the same evidentiary record as MINCIT, could have – not would have – reached the same conclusions that MINCIT reached.<sup>47</sup>

## 5 CLAIMS UNDER ARTICLES 3.4 AND 3.1 OF THE ANTI-DUMPING AGREEMENT

### 5.1 Alleged insufficiency in MINCIT’s analysis of factors with “favourable” trends for the domestic industry

**5.1 To the third parties: In paragraph 13.139 of Colombia’s first written submission, “Colombia requests the Panel to reject the proposition that certain factors listed in Article 3.4 of the Anti-Dumping Agreement are ‘key’ in comparison to others.” To what extent, if any, may any of the factors listed in Article 3.4 be considered as being “key” – or more important than other factors – when an investigating authority evaluates the impact of dumped imports on the domestic industry?**

31. As the United States observed in its third-party submission,<sup>48</sup> Article 3.4 of the Anti-Dumping Agreement 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.<sup>49</sup> Compliance with Article 3.4 requires the collection of a broad range of information concerning domestic industry performance, including sales, profits, output, market share,

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<sup>46</sup> *US – Coated Paper (Indonesia) (Panel)*, paras. 7.3-7.7, 7.61, 7.83, 7.113, 7.193.

<sup>47</sup> See *US – Countervailing Duty Investigation on DRAMS (AB)*, paras. 187-188 (it is well established that the Panel must not conduct a *de novo* evidentiary review, but instead should “bear in mind its role as *reviewer* of agency action” and not as “*initial trier of fact*” (italics in original)).

<sup>48</sup> U.S. Third-Party Submission, paras. 39-41.

<sup>49</sup> Anti-Dumping Agreement, Art. 3.4.



productivity, return on investments, utilization of capacity, cash flow, inventories, employment, wages, growth, and ability to raise capital or investments.<sup>50</sup>

32. 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.”<sup>51</sup> Importantly, 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.<sup>52</sup>

33. Accordingly, none of the factors listed in Article 3.4 of the Anti-Dumping Agreement 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 investigating 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.<sup>53</sup> As the panel in *Thailand – H-Beams* recognized,

Article 3.4 requires the authorities properly to establish whether a factual basis exists to support a well-reasoned and meaningful analysis of the state of the industry and a finding of injury. This analysis does not derive from a mere characterization of the degree of “relevance or irrelevance” of each and every individual factor, but rather must be based on a thorough evaluation of the state of the industry and, in light of the last sentence of Article 3.4, must contain a persuasive explanation as to how the evaluation of relevant factors led to the determination of injury.<sup>54</sup>

**5.2 To the third parties: Does Article 3.4 of the Anti-dumping Agreement require an investigating authority to explicitly analyse the impact of each of the factors with a “trend favourable” for the domestic industry as part of its injury analysis?**

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<sup>50</sup> See Anti-Dumping Agreement, Art. 3.4.

<sup>51</sup> Anti-Dumping Agreement, Art. 3.4.

<sup>52</sup> See *EC – Tube or Pipe Fittings (AB)*, para. 131 (recognizing that Article 3.4, “[b]y its terms, ... does not address the manner in which the results of this evaluation are to be set out, nor the type of evidence that may be produced before a panel for the purpose of demonstrating that this evaluation was indeed conducted” (footnote omitted)).

<sup>53</sup> See *Korea – Pneumatic Valves (AB)*, para. 5.172 (“while Article 3.4 requires an examination of the explanatory force of subject imports on the state of the domestic industry through an evaluation of all the relevant factors collectively, it does not follow that a particular factor should be evaluated in a particular manner or given a particular relevance or weight”).

<sup>54</sup> *Thailand – H-Beams (Panel)*, para. 7.236 (footnote omitted).

34. The text of Article 3.4 of the Anti-Dumping Agreement does not require an investigating 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. Past reports have come to similar conclusions.

35. For example, in *EC – Tube or Pipe Fittings*, Brazil argued that the European Communities did not specifically make factual findings for the industry’s growth in its determination and thus failed to evaluate this issue, as required by the provisions in Article 3.4.<sup>55</sup> The Appellate Body report rejected the argument, explaining that an investigating authority need not make specific findings for every factor set forth in Article 3.4.<sup>56</sup> The report went on to observe that, while it is mandatory to evaluate all fifteen factors set forth in Article 3.4,<sup>57</sup> “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.”<sup>58</sup>

36. Furthermore, as the panel report in *EC – Tube or Pipe Fittings* recognized, the obligations under Article 3.4 do not require “that each and every injury factor, *in isolation*, ... be indicative of injury[, but rather involve] an evaluation of all relevant economic factors having a bearing on the state of the industry to provide an overall impression of the state of the domestic industry.”<sup>59</sup>

## 5.2 Alleged failure to properly assess six injury factors

### **5.3 To the third parties: Please comment on Colombia’s assertion in paragraph 13.162 of its first written submission that the European Union “decided not to bring this claim under Article 3.6, so it cannot now simply claim a violation of Article 3.4 and force Colombia to invoke Article 3.6 of the Anti-Dumping Agreement as a defence or justification.”**

37. The United States understands Colombia’s assertion at paragraph 13.162 of its first written submission as a request for a preliminary ruling about whether the European Union correctly identified certain claims in its panel request. The United States takes no position on the merits of Colombia’s request.

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<sup>55</sup> See *EC – Tube or Pipe Fittings (AB)*, para. 152.

<sup>56</sup> See *EC – Tube or Pipe Fittings (AB)*, paras. 157-166.

<sup>57</sup> See *EC – Tube or Pipe Fittings (AB)*, para. 160 (“The obligation to evaluate all fifteen factors [of Article 3.4] is distinct from the *manner* in which the evaluation is to be set out in the published documents” (italics original)).

<sup>58</sup> *EC – Tube or Pipe Fittings (AB)*, para. 161 (italics original).

<sup>59</sup> *EC – Tube or Pipe Fittings (Panel)*, para. 7.329 (italics original); see *EU – Footwear (China)*, para. 7.413 (“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” (footnote omitted)).

38. Article 6.2 of the DSU provides in relevant part that the request for the establishment of a panel “shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.”<sup>60</sup> Article 6.2 thus requires two elements to be included in a panel request: (1) identification of the specific measures at issue; and (2) a brief summary of the legal basis of the complaint (the claims). These elements comprise the matter referred to the DSB, which is the basis for a panel’s terms of reference under Article 7.1 of the DSU.<sup>61</sup>

39. A claim that is not set out in the request for establishment of a panel would not form part of the “matter” referred to the DSB that the DSB has established the panel to examine. Because of the requirement to set out in writing the request for establishment of a panel, and its constituent features of the specific measures at issue and the legal basis of the complaint, the *EC – Bananas III (AB)* report correctly reasoned that “[i]f a *claim* is not specified in the request for the establishment of a panel, then a faulty request cannot be subsequently ‘cured’ by a complaining party’s argumentation in its first written submission to the panel or in any other submission or statement made later in the panel proceeding.”<sup>62</sup>

40. In sum, whether a measure or a claim is set out in the panel request “must be objectively determined on the basis of the panel request as it existed at the time of filing”<sup>63</sup> and be “demonstrated on the face of the request for the establishment of a panel.”<sup>64</sup>

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<sup>60</sup> DSU, Art. 6.2.

<sup>61</sup> See *Australia – Apples (AB)*, para. 416 (“Together, these two elements constitute the ‘*matter*’ referred to the DSB”, so that, if either of them is not properly identified, the matter would not be within the panel’s terms of reference” (italics original) (footnote omitted)).

<sup>62</sup> *EC – Bananas III (AB)*, para. 143 (italics original).

<sup>63</sup> *EC – Large Civil Aircraft (AB)*, paras. 642 and 787.

<sup>64</sup> *US – Carbon Steel (AB)*, para. 127.