DOMINICAN REPUBLIC – ANTI-DUMPING MEASURES ON CORRUGATED STEEL BARS (COSTA RICA)

(DS605)

ORAL STATEMENT OF THE UNITED STATES OF AMERICA AT THE THIRD-PARTY SESSION

September 14, 2022

Mr. Chairperson, Members of the Panel,

1. The United States appreciates the opportunity to appear before you today and provide our views as a third party in this dispute.

2. In our third-party written submission, the United States addressed claims relating to the dumping determination under Articles 2.1 and 2.4 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("AD Agreement"); claims relating to the injury and causation determinations under Articles 3.1, 3.2, and 3.4 of the AD Agreement; and claims relating to the conduct of the investigations under Article 6.5 of the AD Agreement.

3. In our oral statement today, the United States will focus on highlighting three issues. *First*, we will address the standard of review to be applied in the Panel's evaluation of Costa Rica's claims concerning the determinations of the Dominican Republic's investigating authority. *Second*, we will then briefly address what is required under Articles 3.1 and 3.5 of the AD Agreement with respect to the investigating authority's causation analysis and assessment of other known factors. *Third*, and finally, we will address the issues relating to Article 6.5 of the AD Agreement regarding the protection of confidential information.

I. Standard of Review

4. Article 11 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") and Article 17.6 of the AD Agreement, with respect to disputes involving anti-dumping measures, set forth the standard of review to be applied by WTO dispute settlement panels. Thus, Article 11 of the DSU and Article 17.6 of the AD Agreement together establish the standard of review that applies to this dispute.

5. Article 11 of the DSU establishes that "[t]he function of panels is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements." As such, "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."[1]

6. The text of Article 17.6 of the AD Agreement sets forth a specific standard of review for a panel undertaking its objective assessment pursuant to DSU Article 11. Specifically, a panel "shall determine" whether the investigating authority reached a conclusion that an "unbiased and objective" investigating authority *could have reached* "even though the panel might have reached a different conclusion." Under the plain meaning of its terms, Article 17.6 imposes "limiting obligations on a panel"[2] so as "to prevent a panel from 'second-guessing' a determination of a national authority when the establishment of the facts is proper and the evaluation of those facts is unbiased and objective."[3]

7. Therefore, in making its objective assessment under DSU Article 11 and AD Agreement Article 17.6, a panel is not undertaking a *de novo* evidentiary review or serving as "*initial trier of fact*," but is instead acting as "*reviewer* of agency action."[4] 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.[5]

[1] Understanding on Rules and Procedures Governing the Settlement of Disputes, Art. 11.
[2] *See Thailand – H-Beams (AB)*, para. 114.
[3] *Thailand – H-Beams (AB)*, para. 117.
[4] *US – Countervailing Duty Investigation on DRAMS (AB)*, paras. 187-188 (emphasis original).
[5] *US – Coated Paper (Indonesia)*, paras. 7.3-7.7, 7.61, 7.83, 7.113, 7.193.

8. Accordingly, the Panel's task in this dispute is to assess whether the Dominican Republic's investigating authority – the Regulatory Commission for Unfair Trade Practices and Safeguard Measures ("Commission") – properly established the facts and evaluated them in an unbiased and objective manner. The Panel's role is to determine whether an objective and unbiased investigating authority, reviewing the same evidentiary record as the Commission, *could have* – not *would have* – reached the same conclusions that the Commission reached. It would be inconsistent with the Panel's function under DSU Article 11 to exceed its role as reviewer and instead substitute its own assessment of the evidence and judgment for that of the investigating authority.

III. Causation and Assessment of Other Known Factors Under Articles 3.1 and 3.5 of the Anti-Dumping Agreement

9. Turning to Articles 3.1 and 3.5 of the AD Agreement, we note Costa Rica's argument that the Commission acted inconsistently with the obligations of Article 3.5, because the Commission's causation analysis was limited to assessing whether other known factors were simultaneously injuring the domestic industry, and therefore did not make a determination that the dumped imports caused the threat of injury.[6] Costa Rica further argues that the Commission's analysis of other known factors was inconsistent with Articles 3.1 and 3.5 of the AD Agreement because it was neither objective nor based on positive evidence.[7] The

[6] Costa Rica's First Written Submission ("Costa Rica's FWS"), para. 179.
[7] Costa Rica's FWS, para. 191.

Dominican Republic disagrees and argues that the Commission properly established a causal relationship,[8] including with respect to its analysis of other known factors.[9]

10. The United States observes that Article 3.1 of the AD Agreement requires an investigating authority to base its injury determination on "positive evidence,"[10] and that its injury determination also involve an "objective examination" of the volume of the dumped imports, their price effects, and their impact on the domestic industry.[11] However, Article 3.1 does not prescribe the assessment that an authority must undertake to demonstrate the "causal relationship between the dumped imports and the injury to the domestic industry."[12]

11. Rather, the second sentence of Article 3.5 requires an authority to examine "all relevant evidence" before it to ascertain whether there was a causal link between the dumped imports and the injury experienced by the domestic industry, and to examine whether known factors other than the dumped imports were also injuring the domestic industry.

12. The third sentence of Article 3.5 requires an authority to examine "any known factors other than the dumped imports which at the same time are injuring the domestic industry" and not to attribute "the injuries caused by these other factors … to the dumped imports." An

[8] Dominican Republic's First Written Submission ("Dominican Republic's FWS"), para. 373.
[9] Dominican Republic's FWS, paras. 404, 411.
[10] Anti-Dumping Agreement, Art. 3.1; *see Mexico – Anti-Dumping Measures on Rice (AB)*, paras. 163-164.
[11] Anti-Dumping Agreement, Art. 3.1; *see Mexico – Anti-Dumping Measures on Rice (AB)*, para. 180.
[12] Anti-Dumping Agreement, Article 3.

analysis of other known factors is therefore necessary if (1) there are one or more known factors other than the dumped imports that (2) are injuring the domestic industry (3) at the same time.

13. When examining "all relevant evidence" in its determination of the causal link between the dumped imports and injury to the domestic industry, an authority has discretion to choose the methodology that it will use.[13] Further, the extent to which a factor other than the dumped imports is causing injury and becomes "known" to an authority may vary according to the nature of the alleged factor, and the manner in which the authority evaluates it in a given investigation.[14]

14. While an authority is not expressly required to "seek out and examine in each case on their own initiative the effects of all possible factors other than imports that may be causing injury to the domestic industry under investigation,"[15] an authority's analysis and findings under Article 3.5 "demonstrat[ing] that the dumped imports … are causing injury within the meaning of this Agreement" must comply with the "positive evidence" and "objective examination" requirements of Article 3.1 for a "determination of injury".[16] To make this assessment, the United States submits that the Panel in this dispute must determine whether an unbiased and objective investigating authority reviewing the same evidentiary record, *could have* – not *would*

[13] *EC – Tube or Pipe Fittings (AB) (DS219)*, para. 189.
[14] *China – GOES (Panel)*, paras. 7.624-7.628.
[15] *EC – DRAMS (Panel)*, para. 7.272.
[16] AD Agreement, Art. 3.1 ("A determination of injury for purposes of Article VI of GATT 1994 shall be based on positive evidence and involve an objective examination of both (a) the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products, and (b) the consequent impact of these imports on domestic producers of such products.").

have – reached the same conclusions that the Commission reached in its causation analysis and assessment of other known factors.

IV. Claims Relating to the Conduct of the Investigations: Article 6.5 of the Anti-Dumping Agreement

15. With respect to Costa Rica's claims regarding Article 6.5, the United States provides the following observations.

16. Article 6 of the AD Agreement balances the protection of confidential information with the parties' right to be given a full and fair opportunity to see relevant information and defend their interests.[17] Indeed, in anti-dumping investigations, the submission of confidential information is a necessary and frequent occurrence. The United States considers that Article 6.5 requires investigating authorities to ensure that information receives confidential treatment upon a showing of good cause. Additionally, footnote 17 of the AD Agreement provides a means by which authorities can balance this competing interest – through a narrowly-drawn protective order.[18]

17. Under Article 6.5, investigating authorities must treat information as confidential that is "by nature" confidential or that is provided "on a confidential basis," and for which "good cause" is shown for such treatment. In the present dispute, under the chapeau of Article 6.5, the Panel should first determine whether an unbiased and objective investigating authority could have determined that the information was "by nature" confidential or was "provided on a confidential basis" by an interested party. The Panel should then determine whether the investigating

[17] *See*, *e.g.*, Anti-Dumping Agreement, Art. 6.2, first sentence; Art. 6.9, second sentence.
[18] Anti-Dumping Agreement, footnote 17 ("Members are aware that in the territory of certain Members disclosure pursuant to a narrowly-drawn protective order may be required.").

authority ensured that a summary of that confidential information was provided to other parties in sufficient detail to permit a reasonable understanding of the substance of the information. Where an investigating authority does not provide a way to effectively communicate pertinent information to interested parties to an investigation, such parties are unable to adequately defend their interests.

V. Conclusion

18. This concludes the U.S. oral statement. The United States would like to thank the Panel for its consideration of our views, and we look forward to responding to the Panel's questions.