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

(DS605)

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

September 29, 2022

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Mexico – Corn Syrup	Panel Report, *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States*, WT/DS132/R, adopted 24 February 2000, and Corr.1
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US – Countervailing Duty Investigation on DRAMS (AB)	Appellate Body Report, *United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea*, WT/DS296/AB/R, adopted 20 July 2005
US – Hot-Rolled Steel (AB)	Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, adopted 23 August 2001

1. Are there elements in the text of Article 2.1 of the Anti-Dumping Agreement that establish that an investigating authority can rely upon the date of importation of a good as a valid criterion to include it within the period of investigation, as opposed to the date of sale of the good in question?

U.S. Response to Question 1:

1. Please see the U.S. third-party submission (paragraphs 12 through 15), in which the United States provided its views on the proper interpretation of the text of Article 2.1 of the Anti-Dumping Agreement ("AD Agreement").

2. Footnote 8 of the Anti-Dumping Agreement defines the "date of sale" of the merchandise (for purposes of currency conversion) as follows: "The date of sale will be that of the instrument that establishes the essential conditions of the sale, be it the contract, the purchase order, the order confirmation or the invoice". Does this understanding of the "date of sale" in footnote 8 also extend to the concept of "sales made" in Article 2.4? If not, why?

U.S. Response to Question 2:

2. As an initial matter, the United States respectfully notes that the translation in Question 2 appears to differ from the English language version of footnote 8 of the AD Agreement. Footnote 8, of the AD Agreement provides that "Normally, the date of sale would be the date of contract, purchase order, order confirmation, or invoice, whichever establishes the material terms of sale." Footnote 8 appears in the context of Article 2.4.1, which specifically applies to "When the comparison under paragraph 4 requests a conversion of currencies," which in turn requires "using the rate of exchange on the date of sale." Footnote 8 of Article 2.4.1 therefore pertains to a specific situation requiring a certain degree of precision. Footnote 8 does not itself apply writ large to the preceding paragraph of Article 2.4. However, it may provide interpretative context. The degree of precision found in footnote 8 may indicate, for example, that the determination of when a sale is made encompasses a range of understandings, one of which may be specified as the date of sale as defined by footnote 8. Even so, footnote 8 by its own terms conveys a significant degree of flexibility in that it uses the term "Normally" and provides a number of options, all of which may presumably qualify as "whichever establishes the material terms of sale" depending on a given factual scenario.

3. The term "sales made" in Article 2.4 of the AD Agreement, as it appears in the phrase "in respect of sales made at as nearly as possible the same time," refers to identifying the sales with which to make the comparison for purposes of establishing a dumping margin. As context, the provisions of footnote 8 may inform the question of when a sale is made, *e.g.*, the date on which the material terms of the sale are established, but footnote 8 should not be understood as governing the interpretation of the Article 2.4 term "sales made."

3. In paragraph 131 of its first written submission, the Dominican Republic alleges that the exporter ArcelorMittal never asked the CDC to make adjustments to ensure a fair comparison regarding sales Thorco Logic and Susie Q. Does an investigating authority's obligation to make "adjustments" within the meaning of Article 2.4 only arise when an interested party demonstrates the need to make such adjustments?

U.S. Response to Question 3:

4. Within the meaning of the text of Article 2.4 of the AD Agreement, an investigating authority may determine, based on the facts of the record of its investigation, that an adjustment is necessary to ensure a "fair comparison" between export price and normal value whether or not an interested party has requested a given adjustment.

5. 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 made at the same level of trade and as nearly as possible the same time) and to make appropriate adjustments to those sales as appropriate (for example, due allowances for differences which affect price comparability).[1]

6. The text of Article 2.4 does not require that an interested party request an adjustment as a prerequisite to the adjustment being made. An investigating authority is obligated within the meaning of Article 2.4 to make "due allowance in each case, on its merits, for differences which affect price comparability," provided that the facts on the record support the adjustments.[2] If an interested party requesting an adjustment has 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 obligation for the investigating authority to make any further adjustment.[3]

[1] For instance, Article 2.4 articulates that to ensure a fair comparison between export price and normal value, due allowance shall be made with respect to models with differing physical characteristics, at distinct levels of trade, pursuant to different terms and conditions, or in varying quantities, all of which may affect price. *See* Anti-Dumping Agreement, Art. 2.4; *EC –Tube or Pipe Fittings (Panel)*, para. 7.157. As the panel in *Egypt – Steel Rebar* explained, "[A]rticle 2.4 in its entirety, including its burden of proof requirement, has to do with ensuring a fair comparison, through various adjustments as appropriate, of export price and normal value." *Egypt – Steel Rebar (Panel)*, para. 7.335.

[2] Anti-Dumping Agreement, Art. 2.4.

[3] *EC – Tube or Pipe Fittings (Panel)*, para. 7.158; *Korea – Certain Paper (Panel)*, para. 7.147.

4. The cost of the raw material for the production of merchandise is not mentioned as a difference which affects price comparability among those that appear in article 2.4. Does the cost of the raw material have the potential to impact price comparability in the same way as the conditions listed in Article 2.4?

U.S. Response to Question 4:

7. Article 2.4 provides an illustrative list of differences which affect price comparability and is not exhaustive; indeed, the text itself contemplates "any other differences which are also demonstrated to affect price comparability."[4] It is therefore possible an investigating authority might need to determine whether a given difference, such as the cost of the raw material for production of merchandise, is a difference which affects price comparability demonstrated by the facts on the record.

8. Article 2.4 does not require that an investigating authority determine whether a given adjustment affects price comparability in any particular way. The text requires only that due allowances be made for differences which affect price comparability. There is no requirement that a given adjustment affect price comparability "in the same way" as any of the conditions listed in Article 2.4.

5. Article 2.2.1 of the Anti-Dumping Agreement refers to circumstances in which prices below unit costs at the time of sale are higher than the weighted average unit costs corresponding to the period of investigation, to determine the existence of sales not in the ordinary course of trade by reason of price. In circumstances where production costs increase during the period of investigation, is it reasonable for an investigating authority to apply a methodology that only considers the annual weighted average unit cost?

U.S. Response to Question 5:

9. Article 2.2.1 anticipates circumstances arising during an investigation in which prices below unit costs at the time of sale are above weighted average per unit costs for the period of investigation, and establishes that such prices shall be considered to provide for recovery of costs within a reasonable period of time. By the plain meaning of Article 2.2.1, an investigating authority is not required to use any particular methodology to determine whether a certain sale is in the ordinary course of trade. Therefore, where production costs increase significantly during

[4] Anti-Dumping Agreement, Art. 2.4.

the period of investigation, it is reasonable to use a methodology that considers average costs determined on a basis other than annual weighted average unit cost.

6. In the analysis of threat of injury performed under Article 3.7 of the Anti-Dumping Agreement, what is the probatory value of the data referring to the most recent part of the period of investigation as compared to the data for the entire period of investigation? What importance should an investigating authority give to the developments in the entire period of investigation as compared to the most recent part of the period?

U.S. Response to Question 6:

10. The text of Article 3.7 does not require an investigating authority to afford particular probative value to data referring to the entire period of investigation or any part thereof, including the most recent part.[5] While investigating authorities have discretion in how they weigh evidence, this discretion is not unbounded, and any analysis of the data must conform with the "positive evidence" and "objective examination" standards specified in Article 3.1.[6]

11. An investigation authority's analysis must likewise conform with the standards of Article 3.5, which requires an authority to examine "all relevant evidence" before it.[7] An investigation authority may focus its analysis on a particular part of the period of investigation, including the most recent part, provided that there is a reasoned and justifiable reason to do so.[8] However, nothing in Articles 3.1, 3.5, and 3.7 specifically requires an investigating authority to do so.

12. The United States further observes that a threat determination necessitates making projections about the imminent future. As the panel in *Mexico – Corn Syrup* stated, "the investigating authorities will necessarily have to make assumptions relating to 'the occurrence of future events' since such *future* events 'can never be definitively proven by facts.'"[9] Consequently, while events that occurred during the period of investigation inform an investigating authority's analysis of threat of material injury, those events do not necessarily limit the scope of projections regarding the imminent future. Further, as the panel in *US – Coated Paper (Indonesia)* explained, "events that took place during the [period of investigation] provide the background against which an investigating authority can evaluate the likely future events, but do not limit the scope of projections that the authority may make concerning future events."[10]

13. The United States also recalls the standard of review that applies to this dispute. As the United States explained in its third-party submission, the text of Article 17.6 of the Anti-Dumping Agreement sets forth a specific standard of review for a panel undertaking its objective

[5] *See EC – DRAMS*, paras. 7.331-7.336; *EC – Tube or Pipe Fittings*, para. 7.277.
[6] Anti-Dumping Agreement, Art. 3.1; *see also Mexico – Anti-Dumping Measures on Rice (AB)*, para. 180.
[7] Anti-Dumping Agreement, Art. 3.5; *see also Mexico – Anti-Dumping Measures on Rice (AB)*, para. 188; *Mexico – Anti-Dumping Measures on Rice (Panel)*, para. 7.787.
[8] *China – Broiler Products*, para. 7.195; *US – Coated Paper (Indonesia)*, para. 7.240; *see also Mexico – Anti-Dumping Measures on Rice (AB)*, paras. 180-82.
[9] *Mexico – Corn Syrup*, para. 85.
[10] *US – Coated Paper (Indonesia)*, para. 7.277.

assessment pursuant to DSU Article 11.[11] In making its objective assessment under DSU Article 11 and AD Agreement Article 17.6, the panel is not undertaking a *de novo* evidentiary review nor serving as "*initial trier of fact*", but is instead reviewing the action of the investigating authority to assure that its determination was objective and based on positive evidence.[12]

14. Accordingly, the Panel's task in this dispute is not to assess for itself the probative value or importance of certain data considered by the investigating authority, but rather whether the Commission properly established the facts and evaluated them in an unbiased and objective manner. Even if the Panel might have reached different conclusions regarding the probative value or importance of certain data, its task in this dispute still remains the same: to determine whether a reasonable, unbiased investigating authority, looking at the same evidentiary record as the Commission, could have – not would have – reached the same conclusions that the Commission reached.[13]

7. In paragraph 7.277 of the Panel Report, *US - Coated Paper*, the panel mentioned it would "expect the authority to rely on facts from the present to support the projections it makes about the future". In what way or form should the authority "rely on facts from the present" in order to not turn the projections made by it into "conjecture"?

U.S. Response to Question 7:

15. The first sentence of Article 3.7 provides that "A determination of a threat of material injury shall be based on facts and not merely on allegation, conjecture or remote possibility." However, nothing in Article 3.7 dictates the way or form that an investigating authority must form the basis for its determination. Rather, Article 3.7 leaves latitude for authorities to draw reasonable inferences from the facts. The observations of the panel in *US – Coated Paper* are not necessarily informative in this regard.

8. In situations where anti-dumping measures are applied sequentially with respect to imports of the same product originating from different countries, and the corresponding periods of investigation overlap with the period of investigation in an on-going investigation, how should an investigating authority consider the impact of those imports in its analysis relative to the determination of injury and causal link?

U.S. Response to Question 8:

16. As discussed in the United States' third-party statement, the third sentence of Article 3.5 of the AD Agreement 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." The purpose of these requirements is to ensure the existence of an un-severed causal link between the dumped or

[11] U.S. third-party submission, paras. 2-7.
[12] *See US – Countervailing Duty Investigation on DRAMS (AB)*, paras. 187-188 (emphasis original).
[13] *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)).

subsidized imports and the injury to the domestic industry. The analysis of other known factors "obligates investigating authorities in their causality determinations not to attribute to dumped imports the injurious effects of other causal factors, so as to ensure that dumped imports are, in fact, "causing injury" to the domestic industry."[14] In other words, an investigating authority's analysis under Article 3.5 ensures that dumped and subsidized imports are causing material injury to the domestic industry, and that the injury attributed to subject imports is not in fact caused by other known factors.

17. In the scenario posed by the Panel in this question, the presence of imports of the same product originating from different countries during the period of investigation that are not the subject of that particular investigation may require an assessment of other known factors under Article 3.5. An analysis of such nonsubject imports may therefore be necessary if (1) they are known factors other than the dumped imports that (2) are injuring the domestic industry (3) at the same time.

18. The AD Agreement does not specify the particular methods and approaches an authority may use to conduct an analysis of other known factors.[15] Therefore, 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.[16] This is true even under the scenario posed by the Panel involving imports of imports of the same product originating from different countries, with overlapping periods of investigation.

19. 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.[17]

20. In the scenario posed by the Panel, the nonsubject imports may not necessarily be causing injury at the same time as the imports that are subject to an investigation, notwithstanding the similar nature of the products and the overlapping period of investigation. For example, if the imports from the initial investigation reduced their presence in the investigating country's market following the imposition of provisional measures in the initial investigation, they may have ceased to have caused injury at the same time as the imports currently subject to investigation.

21. 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,"[18] 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."[19] To make this assessment, a Panel

[14] *EC – Tube or Pipe Fittings (AB)*, para. 188.
[15] *US – Hot-Rolled Steel (AB)*, para. 224.
[16] *EC – Tube or Pipe Fittings (AB)*, para. 189.
[17] *China – GOES (Panel)*, paras. 7.624-7.628.
[18] *EC – DRAMS (Panel)*, para. 7.272.
[19] Anti-Dumping 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.").

must determine whether an unbiased and objective investigating authority reviewing the same evidentiary record, *could have* – not *would have* – reached the same conclusions that the investigating authority reached in its causation analysis and assessment of other known factors.

9. In paragraph 233 of its first written submission, Costa Rica states that "the invoices [in question] corresponded to sales allegedly made almost a year before the filing of the application", and as such, "the invoices could not constitute evidence of *present* dumping". In your opinion, does Article 5.3 of the Anti-Dumping Agreement impose any kind of temporal limitation on the evidence on which the initiation of an investigation must be based?

U.S. Response to Question 9:

22. The text of Article 5.3 of the AD Agreement requires investigating authorities 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."[20] On its face, Article 5.3 does not refer to a temporal limitation on the information provided in an application. Accordingly, Article 5.3 does not impose a temporal limitation on the relevant evidence.

10. In paragraph 617 of its first written submission, the Dominican Republic notes that "the fact that Article 6.1.3 does not only refer to the complete 'application', but instead refers to the 'complete text' of the application, intentionally limits the obligation to the 'text' of the application and not to all information that could have been provided in an annex or other forms related to the application." For its part, in paragraphs 106 and 108 of its opening oral statement at the first meeting of the Panel, Costa Rica notes that the use of the term "complete" in Article 6.1.3 indicates a "broad and exhaustive sense" and that "[the information subsequently provided on June 11] was intended to complete and correct the application" and therefore this information is part of the "full text of the application".

a. Please indicate what is the relevance, if any, of Article 5.2 of the Anti-Dumping Agreement regarding the information that an application must contain to the meaning of the phrase "full text of the written application" in Article 6.1.3?

U.S. Response to Question 10(a):

23. As provided in Article 5.1 of the AD Agreement, an investigation is to be initiated "upon a written application by or on behalf of the domestic industry." Article 5.2 of the AD Agreement further provides what must be contained within the same "written application." Therefore, it is the position of the United States that the use of the phrase "written application" and "application" throughout the AD Agreement is intended to be interpreted to mean the same "written application" provided for in Article 5.1.

24. The United States notes that footnote 16 to the AD Agreement, located in Article 6.1.3, explains that providing the "full text of the written application" to "the known exporters" would be burdensome to the investigating authority if the number of exporters involved is particularly

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

high, and that instead, the "full text of the written application" need only be provided to the authorities of the exporting Member or to the relevant trade association. This explanation indicates an understanding by the Members that the "written application" that is to be provided constitutes the written application filed by or on behalf of the domestic industry, including any supplemental aspects of the written application.

b. Please indicate whether, in your view, the phrase "full text of the written application" in Article 6.1.3 refers to (or also includes) responses and information that an applicant provides pursuant to requests made by an investigating authority in the scope of the examination of evidence under Article 5.3 of the Anti-Dumping Agreement.

U.S. Response to Question 10(b):

25. Please refer to the U.S. response to Question 10(a).

11. Please provide your views on the interpretation of the term "good cause" in Article 6.5 of the Anti-Dumping Agreement. In particular, please explain: Who in your view must show "good cause" as provided for in Article 6.5? Do you consider that the submitter of the information for which confidential is sought must show "good cause" for the granting of such treatment, or could "good cause" be presumed or inferred by investigating authorities?

U.S. Response to Question 11:

26. 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.[21]

27. 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."[22] The panel in *Korea – Stainless Steel Bars* further observed that "Article 6.5 does not specify the manner in which

[21] Anti-Dumping Agreement, Art. 6.5 (footnote omitted).
[22] *EU – Footwear (China)*, para. 7.728 (footnotes omitted).

'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."[23] Instead, "the nature and the degree of the requirement to show good cause depends on the information concerned."[24]

28. 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.[25] An authority may also set up a 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.[26]

12. Does Article 6.7 of the Anti-Dumping Agreement require an investigating authority to make available (within the sense of Article 6.4) to an interested party information resulting from an on-site verification of another party?

U.S. Response to Question 12:

29. Article 6.7 of the AD Agreement provides that, subject to the requirement to protect confidential information, an investigating authority "shall make the results of any such investigations available, or shall provide disclosure therefore pursuant to paragraph 9, to the firms to which they pertain and *may* make such results available to the applicants."[27] Thus, the text of Article 6.7 does not have an affirmative disclosure obligation to any other interested party of the results of a verification investigation carried out in the territory of other Members, and indeed only references the applicant as an interested party to which the investigating authority may consider making such a disclosure.

30. Further, Article 6.4 of the AD Agreement explains that an investigating authority shall "whenever practicable" provide timely opportunities for all interested parties to see all information that is relevant to the presentation of their cases, subject to the requirement to protect confidential information.[28] As such, it is possible that an investigating authority may choose to make the results of a verification investigation carried out in the territory of a Member available to all interested parties, but it is not obligated to do so.

[23] *Korea – Stainless Steel Bars (Panel)*, para. 7.206 (footnote omitted).
[24] *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).
[25] For example, where a party submits sensitive information (costs or prices for specific customers), the good cause for confidential treatment is plainly evident.
[26] *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").
[27] Anti-Dumping Agreement, Art. 6.7 (emphasis added).
[28] Anti-Dumping Agreement, Art. 6.4.