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

(DS605)

THIRD PARTY EXECUTIVE SUMMARY OF THE UNITED STATES OF AMERICA

October 3, 2022

EXECUTIVE SUMMARY OF U.S. THIRD PARTY SUBMISSION

I. CLAIMS RELATING TO THE DUMPING DETERMINATION

1. Article 2.1 of the AD Agreement provides the definitional character of dumping – a product that is introduced into the commerce of another country at an export price that is less than its normal value. Thus, Article 2.1 is a definitional provision that plays an important role in the interpretation of other provisions of the Anti-Dumping Agreement, but does not specify how an investigating authority should determine which sales are included in the period of investigation. Rather, Article 2.1 reflects that dumping is determined based on a "comparable price, in the ordinary course of trade."

2. While the definitional terms set out in Article 2.1 may guide the interpretation of other provisions in the AD Agreement, when read in isolation, Article 2.1 does "not impose independent obligations." As such, Article 2.1 cannot be the legal basis for an independent claim. Therefore, the text of Article 2.1 does not prescribe the conduct or obligations of the investigating authority and does not establish the temporal scope of evidence for the purposes of a dumping determination. Put differently, Article 2.1 of the AD Agreement, a definitional provision, does not instruct on the manner in which an investigating authority may decide upon the date criteria to determine which transactions should or should not be included in the period of investigation.

3. Next, 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 at the same level of trade and as nearly as possible at the same time) and make appropriate adjustments to those sales (due allowances for differences which affect price comparability).

4. 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. A straightforward consideration of the ordinary meaning of this provision confirms that it has to do not with the basis for and basic establishment of the export price and normal value (which are addressed in detail in other provisions), but with the nature of the comparison of export price and normal value."

5. Further, there would be no basis for the investigating authority to make an adjustment, and no requirement to do so, if the exporters have not provided evidence demonstrating to the authorities that there is a difference affecting price comparability, or argument showing that existing information on the record reflects a difference that affects price comparability.

6. A determination of compliance with Article 2.4 will depend on the specific facts and circumstances at issue. Therefore, consistent with DSU Article 11 and AD Agreement Article 17.6(i), the question of whether the Dominican Republic made a fair comparison – including whether it failed to make adjustments to ensure a fair comparison, or was required to request information from ArcelorMittal to make such adjustments – will depend on whether the Panel

determines that Costa Rica has shown that a fair comparison could not have been made by an unbiased and objective investigating authority on the same basis found by the Commission.

II. CLAIMS RELATING TO THE INJURY AND CAUSATION DETERMINATIONS

7. Article 3.2 recognizes three alternative ways in which subject imports can have an "effect" on prices: through undercutting, "or" through price depression, "or" through price suppression. The inquiry into undercutting, on the one hand, and the inquiry into price depression or suppression, on the other, are separate inquiries, either of which can demonstrate price effects under Article 3.2.

8. To the extent Article 3.2 provides for an investigating authority to examine whether subject imports significantly depressed or suppressed the prices of like domestic products, it does not impose specific obligations on how an authority must conduct a price depression or suppression analysis. Nor does it prescribe a particular methodology or set of factors that must apply in any such analysis. However, Article 3.1 *does* provide that an injury determination must be based on "positive evidence and involve an objective examination of . . . the effect of the dumped imports on prices in the domestic market for like products."

9. Further, for purposes of Article 3.2, the obligation for investigating authorities to "consider" whether there has been a significant price undercutting by the dumped imports or whether the effect of such imports is otherwise to depress prices to a significant degree or to prevent price increases, which otherwise would have occurred, to a significant degree does not require an authority to make a definitive determination. Addressing the obligation to consider the "effect" of dumped imports on prices, the definition of "effect" is, "something accomplished, caused, or produced; a result, a consequence." The definition of this word thus implies that an "effect" is "a result" of something else."

10. Additionally, the term "price undercutting" in Article 3.2 is qualified by the word "significant," which is defined as "important, notable, consequential." The term "price undercutting" requires an investigating authority to undertake a "dynamic assessment of price developments and trends in the relationship between the prices of the dumped imports and those of domestic like products over the duration of the POI," whereas the qualifier "significant" requires an assessment of the "magnitude" of any price undercutting.

11. With the foregoing considerations in mind, the Panel in the present dispute is to assess whether the Commission's price effects analysis was based on positive evidence and involved an objective examination.

12. Next, Article 3.4 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 that an authority must evaluate. Article 3.4 also provides that its list of factors and indices "is not exhaustive, nor can one or several of these factors necessarily give decisive guidance." 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.

13. Article 3.4 does not dictate the methodology that should be employed in conducting the examination of the impact of dumped imports on the domestic industry, or the manner in which the results of this examination are to be set out in the record of the investigation. A determination, through its demonstration of why the investigating authority relied on the specific factors it found to be material in the case, may disclose why other factors on which it did not make specific findings were accorded little weight or deemed irrelevant.

14. Finally, nothing in Article 3.4 requires an investigating authority to reach a negative determination of injury merely because a domestic industry has reported a number of positive or improving economic indicators during the period of investigation. Nor does it follow as matter of logic from a conclusion that an industry is being injured that every indicator must be negative. As the panel in *EC – Footwear* reasoned, "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." Therefore, an authority is not required to find that a certain number of injury factors declined during the period of investigation in order to make an affirmative determination of injury.

III. CLAIMS RELATING TO THE CONDUCT OF THE INVESTIGATIONS

15. The role of a panel in a dispute involving a Member's application of an antidumping or countervailing duty measure is to assess "whether the investigating authorities properly established the facts and evaluated them in an unbiased and objective manner" – and not, therefore, to serve an initial trier of fact.

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. Indeed, in anti-dumping investigations, the submission of confidential information is a necessary and frequent occurrence. 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.

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 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.

EXECUTIVE SUMMARY OF U.S. THIRD PARTY ORAL STATEMENT

18. Article 3.1 of the AD Agreement requires an investigating authority to base its injury determination on "positive evidence," 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. 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."

19. 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.

20. 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 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.

21. 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. 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.

22. 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," 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."

EXECUTIVE SUMMARY OF U.S. THIRD PARTY RESPONSES TO QUESTIONS

I. CLAIMS UNDER ARTICLE 2.4

23. 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.

24. 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."

II. CLAIMS UNDER ARTICLE 2.2.1

25. 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 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.

III. CLAIMS UNDER ARTICLE 3.7

26. 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. 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.

27. 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. 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. However, nothing in Articles 3.1, 3.5, and 3.7 specifically requires an investigating authority to do so.

28. Further, 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.'" 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. 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."

29. 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.

IV. CLAIMS UNDER ARTICLE 5.3

30. 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." 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.

V. CLAIMS UNDER ARTICLES 5.1 AND 6.1.3

31. 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, 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.

32. 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 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.

VI. CLAIMS UNDER ARTICLE 6.7

33. 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." 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.

34. Finally, 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. 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.