DOMINICAN REPUBLIC – ANTIDUMPING MEASURES ON CORRUGATED STEEL BARS (COSTA RICA)

(DS605)

THIRD PARTY SUBMISSION OF THE UNITED STATES OF AMERICA

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Short Title	Full Case Title and Citation
China – GOES (AB)	Appellate Body Report, *China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States*, WT/DS414/AB/R, adopted 16 November 2012
China – HP-SSST (AB)	Appellate Body Reports, *China - Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from Japan and the European Union*, WT/DS454/AB/R;WT/DS460/AB/R adopted 28 October 2015
EC – Fasteners (China) (AB)	Appellate Body Report, *European Communities – Definitive Anti- Dumping Measures on Certain Iron or Steel Fasteners from China*, WT/DS397/AB/R, adopted 28 July 2011
EC – Tube or Pipe Fittings (AB)	Appellate Body Report, *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WT/DS219/AB/R, adopted 18 August 2003
EC – Tube or Pipe Fittings (Panel)	Panel Report, *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WT/DS219/R, adopted 18 August 2003, as modified by Appellate Body Report WT/DS219/AB/R
Egypt – Steel Rebar (Panel)	Panel Report, *Egypt – Definitive Anti-Dumping Measures on Steel Rebar from Turkey*, WT/DS211/R, adopted 1 October 2002
EU – Biodiesel (Indonesia)	Panel Report, *European Union – Anti-Dumping Measures on Biodiesel from Indonesia*, WT/DS480/R and Add. 1, adopted 28 February 2018
EU – Footwear (China)	Panel Report, *European Union – Anti-Dumping Measures on Certain Footwear from China*, WT/DS405/R, adopted 22 February 2012
Korea – Pneumatic Valves (AB)	Appellate Body Report, *Korea – Anti-Dumping Duties on Pneumatic Valves from Japan*, WT/DS504/AB/R, and Add.1, adopted 30 September 2019
Thailand – H-Beams (AB)	Appellate Body Report, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, WT/DS122/AB/R, adopted 5 April 2001
Thailand – H-Beams (Panel)	Panel Report, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams*

	from Poland, WT/DS122/R, adopted 5 April 2001, as modified by Appellate Body Report WT/DS122/AB/R
US – Coated Paper (Indonesia)	Panel Report, *United States – Anti-Dumping and Countervailing Measures on Certain Coated Paper from Indonesia*, WT/DS491/R, and Add.1, adopted 22 January 2018
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 – Countervailing Measures on Certain EC Products (Article 21.5 – EC)	Panel Report, *United States – Countervailing Measures Concerning Certain Products from the European Communities – Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS212/RW, adopted 27 September 2005
US – Ripe Olives from Spain (Panel)	Panel Report, *United States – Anti-Dumping and Countervailing Duties on Ripe Olives from Spain*, WT/DS577/R, adopted 20 December 2021
US – Zeroing (Japan) (AB)	Appellate Body Report, *United States – Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/AB/R, adopted 23 January 2007

I. INTRODUCTION

1. The United States welcomes the opportunity to present its views to the Panel. In this submission, the United States will present its views on the proper legal interpretation of certain provisions of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("Anti-Dumping Agreement") as relevant to certain issues in this dispute. First, we address the appropriate standard of review. Second, we address claims relating to the dumping determination under Articles 2.1 and 2.4 of the Anti-Dumping Agreement. Third, we address claims relating to the injury and causation determinations under Articles 3.1, 3.2, and 3.4 of the Anti-Dumping Agreement. Lastly, we address claims relating to the conduct of the investigations under Article 6.5 of the Anti-Dumping Agreement.

II. STANDARD OF REVIEW

2. Article 11 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") and Article 17.6 of the Anti-Dumping 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 Anti-Dumping Agreement together establish the standard of review that applies to this dispute.

3. 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]

4. Article 17.6 of the Anti-Dumping Agreement provides:

> In examining the matter referred to in paragraph 5:
>
> (i) in its assessment of the facts of the matter, the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned;
>
> (ii) the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.[2]

[1] Understanding on Rules and Procedures Governing the Settlement of Disputes, Art. 11.
[2] Anti-Dumping Agreement, Art. 17.6.

5. The text of Article 17.6 of the Anti-Dumping 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"[3] 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."[4]

6. 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."[5] 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.[6]

7. Accordingly, the Panel's task in this dispute is to assess whether the investigating authority, the Dominican Republic's Regulatory Commission for Unfair Trade Practices and Safeguard Measures ("CDC" or "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. CLAIMS RELATING TO THE DUMPING DETERMINATION

A. Claims Relating to Article 2.1 of the Anti-Dumping Agreement

8. Costa Rica claims that the Commission's dumping determination was inconsistent with Article 2.1 of the AD Agreement because it erroneously included two export sales (*i.e.*, the shipments of Thorco Logic and Suzie Q) made prior to, but imported into the Dominican Republic during, the period of investigation, which resulted in a final determination not related to "present" dumping.[7] According to Costa Rica, because the contracts corresponding to these two sales were dated prior to the investigation period, the export sales could not constitute "current" dumping within the meaning of Article 2.1.[8]

9. Costa Rica explains that the Commission initiated its antidumping investigation in July 2018 and decided that the period of investigation for the determination of the dumping margin would start from May 1, 2017 until April 30, 2018. Costa Rica further notes that the first sale (Thorco Logic) was agreed on November 1, 2016, and the second sale (Suzie Q) was made in

[3] *See Thailand – H-Beams (AB)*, para. 114.
[4] *Thailand – H-Beams (AB)*, para. 117.
[5] *US – Countervailing Duty Investigation on DRAMS (AB)*, paras. 187-188 (emphasis original).
[6] *US – Coated Paper (Indonesia)*, paras. 7.3-7.7, 7.61, 7.83, 7.113, 7.193.
[7] *See* Costa Rica's First Written Submission ("Costa Rica FWS"), paras. 27, 35-37.
[8] *See* Costa Rica FWS, para. 37.

April 2017.[9] According to Costa Rica, the long interval between the date when the sales were agreed and the initiation of investigation meant that the prices of those sales were not "relevant" for purposes of a "present" dumping determination when the investigation started.[10] Costa Rica further contends that the Commission's dumping determination does not comply with Article 2.1 because the market situation when the sales were agreed substantially differed from the market situation when the investigation was initiated, further limiting the relevance of the two sales for purposes of a dumping determination upon initiation of the investigation, and for the precise quantification of the dumping margin.[11]

10. The Dominican Republic responds that Costa Rica's claims under Article 2.1 are unfounded because the Commission conducted an objective and unbiased investigation based on a fair comparison of domestic export sales made in Costa Rica and the Dominican Republic during the same period of investigation.[12] According to the Dominican Republic, the invoice date of the sale of Thorco Logic, which entered the Dominican Republic *during* the investigation period, is March 31, 2017 – one month before the start of the investigation period.[13] Similarly, the billing date for the sale of Suzie Q is April 27, 2017 – three days before the investigation period.[14] Therefore, the Dominican Republic notes, the difference between the invoice dates and the start of the investigation period was not meaningful.[15]

11. The Dominican Republic contends that, if the sales made at the beginning of the 12-month investigation period were "current" enough, there is no basis to consider that sales made three days or one month before the investigation period cannot show a "current" dumping.[16] Moreover, the Dominican Republic argues that Costa Rica uses the "contract date" of November 2016 – rather than the invoice date of March 31, 2017 – to make the time gap with the investigation period appear longer, and does not explain why it would be appropriate in this case to use the contract date instead of the export or invoice date.[17] As a result, the Dominican Republic argues that Costa Rica has not presented a *prima facie* case of a breach of Article 2.1.

12. The United States offers the following comments on the interpretation of Article 2.1 of the AD Agreement.

13. Article 2.1 of the Anti-Dumping Agreement provides as follows:

> For the purpose of this Agreement, a product is to be considered as being dumped, i.e. introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the

[9] *See* Costa Rica FWS, para. 36.
[10] *See* Costa Rica FWS, para. 37.
[11] *See* Costa Rica FWS, para. 41.
[12] *See* Dominican Republic's First Written Submission ("Dominican Republic FWS"), para. 105.
[13] *See* Dominican Republic FWS, para. 116.
[14] *Ibid*.
[15] *Ibid*.
[16] *Ibid*.
[17] *See* Dominican Republic FWS, para. 117.

> comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country.[18]

14. The text of 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."

15. 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."[19] As such, Article 2.1 cannot be the legal basis for an independent claim.[20] It follows, therefore, that 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.

B. Claims Relating to Article 2.4 of the Anti-Dumping Agreement

16. Costa Rica contends that the Commission acted inconsistently with Article 2.4 of the AD Agreement when it included the Thorco Logic and Suzie Q export sales in its dumping calculation, because these shipments were made when market conditions differed from those during the investigation period.[21] According to Costa Rica, the inclusion of these export sales resulted in an unfair comparison with sales to the domestic market during the investigation period because the prices of the main input (billets) were allegedly lower before the investigation period when these sales were agreed.[22] Costa Rica therefore argues that the price comparison of these sales with sales made during the investigation period does not constitute a fair comparison for the purposes of Article 2.4.[23] Costa Rica also argues that the Dominican Republic acted inconsistently with Article 2.4 because the Commission should have made adjustments to account for the inclusion of these two sales for the calculation of export price to ensure a fair comparison.[24] Costa Rica additionally contends that the Dominican Republic has breached Article 2.4 because the Commission was required to request information to make such adjustments but did not request any such information.[25]

17. In response, the Dominican Republic argues that it has complied with its duty to make a fair comparison by establishing a single investigation period that is equally applicable to

[18] Anti-Dumping Agreement, Art. 2.1.
[19] *US – Zeroing (Japan) (AB)*, para. 140.
[20] *EU – Footwear (China) (Panel)*, para. 7.260.
[21] *See* Costa Rica FWS, para. 43.
[22] *See* Costa Rica FWS, para. 52.
[23] *Ibid*.
[24] *See* Costa Rica FWS, paras. 56-58.
[25] *See* Costa Rica FWS, paras. 58-62.

domestic and export sales, because Article 2.4 does not require that the comparison use "the invoice or contract date instead of the entry date" when selecting sales upon which to make the comparison.[26] According to the Dominican Republic, the term "sales" relates to transactions in general and not to a specific sale date.[27] The Dominican Republic further argues that, under Article 2.4, an investigating authority is obligated to make adjustments only when an interested party demonstrates the need for such adjustments.[28] The Dominican Republic notes that, in the present dispute, ArcelorMittal never requested the Commission to make adjustments for the time difference between domestic and export sales.[29] In response to Costa Rica's third contention, the Dominican Republic argues that, despite having ample opportunity to do so, ArcelorMittal did not provide the necessary data to conduct the necessary analysis.[30] Therefore, the Dominican Republic contends that it has acted consistently with Article 2.4.

18. The United States provides the following observations on Article 2.4 of the AD Agreement.

19. Article 2.4 of the AD Agreement provides in relevant part:

> A fair comparison shall be made between the export price and the normal value. This comparison shall be made at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time. Due allowance shall be made in each case, on its merits, for differences which affect price comparability, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability.. . . The authorities shall indicate to the parties in question what information is necessary to ensure a fair comparison and shall not impose an unreasonable burden of proof on those parties.[31]

20. 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).[32]

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[26] *See* Dominican Republic FWS, paras. 125, 130.
[27] *Ibid*.
[28] *See* Dominican Republic FWS, para. 131.
[29] *Ibid*.
[30] *See* Dominican Republic FWS, paras. 135-136.
[31] Anti-Dumping Agreement, Art. 2.4.
[32] For instance, Article 2.4 provides 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.

21. 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."[33]

22. 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.[34]

23. A determination of compliance with Article 2.4 will depend on the specific facts and circumstances at issue. Accordingly, 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.

IV. CLAIMS RELATING TO THE INJURY AND CAUSATION DETERMINATIONS

A. Claims Relating to Articles 3.1 and 3.2 of the Anti-Dumping Agreement

24. Costa Rica argues that the Commission's price effects analysis was inconsistent with Articles 3.1 and 3.2 of the AD Agreement because it did not provide reasons as to why it considered the alleged undercutting to be significant and it did not consider whether such undercutting was the effect of the dumped imports.[35] Costa Rica further argues that the Commission's price depression analysis did not acknowledge price increases earlier in the period examined, and that its price suppression analysis did not consider whether dumped imports had the effect of preventing to a significant extent price increases that would otherwise have occurred.[36]

25. The Dominican Republic responds that the Commission's price effects analysis complied with its obligations in Articles 3.1 and 3.2 of the AD Agreement. Specifically, it maintains that the Commission examined the significance of undercutting, as evidenced by its discussion in its reports of the importance of price undercutting margins.[37] The Dominican Republic further maintains that consideration of price undercutting does not mandate an effects-based analysis.[38] The Dominican Republic also argues that the Commission acknowledged price trends in the earlier part of the period examined in its price depression analysis, that it considered the

[33] *Egypt – Steel Rebar (Panel),* para. 7.333.
[34] *See, e.g.*, *EC – Fasteners (China) (AB)*, para. 488 (*quoting EC – Tube or Pipe Fittings*, para. 7.158, and *citing Korea – Certain Paper (Panel)*, para. 7.147).
[35] *See* Costa Rica FWS, paras. 93-97.
[36] *See* Costa Rica FWS, paras. 98-108.
[37] *See* Dominican Republic FWS, paras. 233-242.
[38] *Ibid*.

existence of price suppression based on positive evidence, and linked such price suppression to dumped imports from Costa Rica.[39]

26. The United States offers the following views on the appropriate legal interpretation of Article 3.1 and the second sentence of Article 3.2 of the AD Agreement.

27. Article 3.1 of the AD Agreement provides the following:

> A determination of injury for the 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 process in the domestic market for like products, and (b) the consequent impact of these imports on domestic producers of such products.

28. Further, the second sentence of Article 3.2 of the AD Agreement states:

> * * * With regard to the effect of the dumped imports on prices, the investigating authorities shall consider whether there has been a significant price undercutting by the dumped imports as compared with the price of a like product of the importing Member, 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. No one or several of these factors can necessarily give decisive guidance.

29. Article 3.2 thus explicitly 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.[40]

30. 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.[41] 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."

31. 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

[39] *See* Dominican Republic FWS, paras. 243-258.
[40] *See, e.g.*, *China – HP-SSST (AB)*, para. 5.156.
[41] *Thailand – H-Beams (Panel)*, para. 7.159; *EU – Biodiesel (Indonesia) (Panel)*, para. 7.137.

prevent price increases, which otherwise would have occurred, to a significant degree does not require an authority to make a definitive determination. As the panel explained in *US – AD and CVD on Ripe Olives from Spain*:

> [T]he ordinary meaning of "consider" includes "[t]o view or contemplate attentively, to survey, examine" and "[t]o contemplate mentally, fix the mind upon; to think over, meditate or reflect on, bestow attentive thought upon, give heed to take note of." To "consider" indicates a requirement that an investigating authority take something into account in reaching its decision, not a requirement to arrive at a particular conclusion.[42]

32. 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."[43]

33. Additionally, the term "price undercutting" in Article 3.2 is qualified by the word "significant," which is defined as "important, notable, consequential."[44] 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.[45]

34. 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.

B. Claims Relating to Articles 3.1 and 3.4 of the Anti-Dumping Agreement

35. Costa Rica argues that the Commission acted inconsistently with Articles 3.1 and 3.4 of the AD Agreement.[46] Specifically, Costa Rica maintains that the Commission's analysis was not based on an objective assessment or positive evidence because it looked at individual negative economic factors and indices without considering the "role, relevance, or relative importance" of such factors, in light of other factors and indices that exhibited positive or mixed trends.[47] Costa Rica also argues that the Commission did not conduct a proper examination of the link between the dumped imports and the alleged deterioration of certain economic factors.[48]

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[42] *US – Anti-Dumping and Countervailing Duties on Ripe Olives from Spain*, para.7.229 (internal footnotes omitted), citing Oxford Dictionaries online, definition of "consider" https://www.oed.com/view/Entry/39593?redirectedFrom=consider#eid (accessed 7 July 2021), v., meaning 3.a; *China – GOES (AB)*, para. 130.
[43] *China – GOES (AB)*, para. 135.
[44] *China – HP-SSST (AB)*, para. 5.161.
[45] *Ibid*.
[46] *See* Costa Rica FWS, paras. 115-132.
[47] *See* Costa Rica FWS, paras. 115-125.
[48] *See* Costa Rica FWS, paras. 125-132.

36. The Dominican Republic maintains that Costa Rica's claims under Articles 3.1 and 3.4 of the AD Agreement are unfounded[49] because the Commission examined all relevant injury factors listed under Article 3.4, based its examination on positive evidence, and provided a reasoned link between the subject imports and the impact on the domestic industry.[50] The Dominican Republic argues that Costa Rica seeks to have the Panel conduct a *de novo* review of the facts on the record.[51] The Dominican Republic further contends that it is unclear how the Commission's analysis was inconsistent with Article 3.4 because the Commission did not make an injury determination under Article 3.4, but rather based its determination on threat of harm under Article 3.7.[52]

37. The United States offers the following views on the appropriate legal interpretation of Article 3.4 of the AD Agreement.

38. Article 3.4 provides 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.[53] 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."[54]

39. 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.[55] 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.[56]

40. 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

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[49] *See* Dominican Republic FWS, paras. 260-334.
[50] *See* Dominican Republic FWS, paras. 289-333.
[51] *See* Dominican Republic FWS, paras. 262-263.
[52] *See* Dominican Republic FWS, para. 264.
[53] Anti-Dumping Agreement, Art. 3.4.
[54] Anti-Dumping Agreement, Art. 3.4.
[55] *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").
[56] *Thailand – H-Beams (Panel)*, para. 7.236 (footnote omitted).

the results of this examination are to be set out in the record of the investigation.[57] 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.

41. Additionally, 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."[58] 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.

42. The United States observes that the Panel in the present dispute must be able to discern that the authority's examination of the impact on the domestic industry – an examination that necessarily includes an evaluation of relevant economic factors – is based on positive evidence and an objective examination. To make this assessment, the Panel must determine whether an "unbiased and objective" investigating authority *could have* reached the same conclusion as the Commission. As explained above, 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"[59] – and not, therefore, to serve an initial trier of fact.

V. CLAIMS RELATING TO THE CONDUCT OF THE INVESTIGATIONS: ARTICLE 6.5 OF THE ANTI-DUMPING AGREEMENT

43. Costa Rica claims that the Commission acted inconsistently with Article 6.5 of the AD Agreement because on two occasions, without sufficient justification, it granted confidential treatment to information submitted by the National Production Branch (RPN) of the Dominican Republic.[60] According to Costa Rica, while Resolution 003 granted confidential protection to a series of information deposited by the requesting company, the Resolution did not demonstrate that the Commission evaluated the reasons provided by the requesting company to treat the information as confidential.[61] Similarly, Costa Rica asserts that Resolution 005 accepted as confidential a series of information provided by the requesting company "because it is

[57] *See* Anti-Dumping Agreement, Art. 3.4; *EC – Tube or Pipe Fittings (AB)*, para. 131 ("By its terms, [Article 3.4] 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)).
[58] *EU – Footwear (China)*, para. 7.413 (footnote omitted).
[59] *See* Anti-Dumping Agreement, Art. 17.6(i); *US – Countervailing Measures on Certain EC Products (Article 21.5 – EC) (Panel)*, para. 7.82. *See also ibid*., paras. 7.78-7.83; *US – Supercalendered Paper (Panel)*, paras. 7.40, 7.150, 7.202; *US – Coated Paper (Indonesia) (Panel)*, paras. 7.61, 7.83; *US – Countervailing Measures (China) (Panel)*, para. 7.382; *China – GOES (Panel)*, paras. 7.51-7.52; *EC – Countervailing Measures on DRAM Chips (Panel)*, paras. 7.335, 7.373.
[60] *See* Costa Rica FWS, para. 272.
[61] *See* Costa Rica FWS, para. 277.

information that may compromise the company."[62] However, Costa Rica argues, beyond certain assertions, Resolution 005 did not contain a substantiated explanation that showed that the Commission objectively evaluated the reasons provided by the RPN.[63]

44. In response, the Dominican Republic argues that it did not act inconsistently with Article 6.5 because the Commission undertook a "rigorous analysis" to ensure that the information for which confidential treatment was being requested required it.[64] The Commission conducted an analysis of different information that the Applicant provided, and verified both the domestic regulations and the WTO Agreements with respect to it.[65] According to the Dominican Republic, Costa Rica erroneously asserts that a "reasoned explanation" is required from the authority regarding "good cause shown" for the protection of each confidential data, and Costa Rica does not demonstrate that the information referred to in resolutions 003 and 005 did not deserve such confidential protection, nor that the Commission's grant of such protection was unreasonable.[66]

45. The United States provides the following observations on the legal obligations under Article 6.5.

46. The chapeau of Article 6.5 of the AD Agreement provides:

> 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 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.

47. 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.[67] 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

[62] *See* Costa Rica FWS, para. 278.
[63] *Ibid*.
[64] *See* Dominican Republic FWS, para. 668.
[65] *See* Dominican Republic FWS, para. 679.
[66] *See* Dominican Republic FWS, para. 677.
[67] *See*, *e.g.*, Anti-Dumping Agreement, Art. 6.2, first sentence ("Throughout the anti-dumping investigation all interested parties shall have a full opportunity for the defence of their interests."); Anti-Dumping Agreement, Art. 6.9, second sentence ("Such disclosure should take place in sufficient time for the parties to defend their interests.").

which authorities can balance this competing interest – through a narrowly-drawn protective order.[68]

48. 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.

VI. CONCLUSION

49. The United States appreciates the opportunity to submit its views in connection with this dispute on the proper interpretation of relevant provisions of the Anti-Dumping Agreement.

[68] 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.").