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DOMINICAN REPUBLIC – ANTI-DUMPING MEASURES ON CORRUGATED STEEL BARS

REPORT OF THE PANEL

Addendum

BCI deleted, as indicated [[***]]

This *addendum* contains Annexes A to C to the Report of the Panel to be found in document WT/DS605/R.

LIST OF ANNEXES

ANNEX A

PANEL DOCUMENTS

Contents		Page
Annex A-1	Working Procedures of the Panel	4
Annex A-2	Additional Working Procedures Concerning Business Confidential Information	11
Annex A-3	Interim review	13

ANNEX B

ARGUMENTS OF THE PARTIES

Contents		Page
Annex B-1	Integrated executive summary of the arguments of Costa Rica	24
Annex B-2	Integrated executive summary of the arguments of the Dominican Republic	46

ANNEX C

ARGUMENTS OF THE THIRD PARTIES

Contents		Page
Annex C-1	Integrated executive summary of the arguments of the United States	72
Annex C-2	Integrated executive summary of the arguments of Japan	77
Annex C-3	Integrated executive summary of the arguments of Mexico	82
Annex C-4	Integrated executive summary of the arguments of the European Union	86

ANNEX A

PANEL DOCUMENTS

Contents		Page
Annex A-1	Working Procedures of the Panel	4
Annex A-2	Additional Working Procedures Concerning Business Confidential Information	11
Annex A-3	Interim review	13

ANNEX A-1

WORKING PROCEDURES OF THE PANEL

Adopted on 12 May 2022

General

1. (1) In this proceeding, the Panel shall follow the relevant provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU"). In addition, the following Working Procedures apply.

(2) The Panel reserves the right to modify these procedures as necessary, after consultation with the parties.

(3) The working language of the Panel shall be Spanish.

Confidentiality

2. (1) The deliberations of the Panel and the documents submitted to it shall be kept confidential. Members shall treat as confidential information that is submitted to the Panel which the submitting Member has designated as confidential.

(2) In accordance with the DSU, nothing in these Working Procedures shall preclude a party or third party from disclosing statements of its own positions to the public.

(3) If a party submits a confidential version of its written submissions to the Panel, it shall also, upon request of a Member, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public. A party should endeavour to promptly provide a non-confidential summary to any Member requesting it, and if possible within 10 days of receiving the request.

(4) Upon request, the Panel may adopt appropriate additional procedures for the treatment and handling of confidential information after consultation with the parties.

Submissions

3. (1) Before the first substantive meeting of the Panel with the parties, each party shall submit a written submission in which it presents the facts of the case and its arguments, in accordance with the timetable adopted by the Panel.

(2) Each party shall also submit to the Panel, before the second substantive meeting of the Panel, a written rebuttal, in accordance with the timetable adopted by the Panel.

(3) Each third party that chooses to make a written submission before the first substantive meeting of the Panel with the parties shall do so in accordance with the timetable adopted by the Panel.

(4) The Panel may invite the parties or third parties to make additional submissions during the proceeding, including with respect to requests for preliminary rulings in accordance with paragraph 4 below.

Preliminary rulings

4. (1) If the Dominican Republic considers that the Panel should make a ruling before the issuance of the Report that certain measures or claims in the panel request or the complainant's first written submission are not properly before the Panel, the following procedure applies. Exceptions to this procedure shall be granted upon a showing of good cause.

    a. The Dominican Republic shall submit any such request for a preliminary ruling at the earliest possible opportunity and in any event no later than in its first written submission to the Panel. Costa Rica shall submit its response to the request before the first substantive meeting of the Panel, at a time to be determined by the Panel in light of the request.

    b. The Panel may issue a preliminary ruling on the issues raised in such a preliminary ruling request before, during or after the first substantive meeting, or the Panel may defer a ruling on the issues raised by a preliminary ruling request until it issues its Report to the parties.

    c. If the Panel finds it appropriate to issue a preliminary ruling before the issuance of its Report, the Panel may provide reasons for the ruling at the time that the ruling is made, or subsequently in its Report.

    d. Any request for such a preliminary ruling by the respondent before the first meeting, and any subsequent submissions of the parties in relation thereto before the first meeting, shall be served on all third parties. The Panel may provide all third parties with an opportunity to provide comments on any such request, either in their submissions as provided for in the timetable or separately. Any preliminary ruling issued by the Panel before the first substantive meeting on whether certain measures or claims are properly before the Panel shall be shared with all third parties.

    (2) This procedure is without prejudice to the parties' right to request other types of preliminary or procedural rulings during the proceeding, and to the procedures that the Panel may follow with respect to such requests.

Evidence

5. (1) Each party shall submit all evidence to the Panel no later than during the first substantive meeting, except evidence necessary for purposes of rebuttal, or evidence necessary for answers to questions or comments on answers provided by the other party. Additional exceptions may be granted upon a showing of good cause.

    (2) If any new evidence has been admitted upon a showing of good cause, the Panel shall accord the other party an appropriate period of time to comment on the new evidence submitted.

6. (1) If the original language of an exhibit or portion thereof is not a WTO working language, the submitting party or third party shall simultaneously submit a translation of the exhibit or relevant portion into the WTO working language of the submission. The Panel may grant reasonable extensions of time for the translation of exhibits upon a showing of good cause.

    (2) Any objection as to the accuracy of a translation should be raised promptly in writing, preferably no later than the next submission or meeting (whichever occurs earlier) following the submission which contains the translation in question. Any objection shall be accompanied by an explanation of the grounds for the objection and an alternative translation.

7. (1) To facilitate the maintenance of the record of the dispute and maximize the clarity of submissions, each party and third party shall sequentially number its exhibits throughout the course of the dispute, indicating the submitting Member and the number of each exhibit on its cover page. Exhibits submitted by Costa Rica should be numbered CRI-1, CRI-2, etc. Exhibits submitted by the Dominican Republic should be numbered DOM-1, DOM-2, etc. If the

last exhibit in connection with the first submission was numbered CRI-5, the first exhibit in connection with the next submission thus would be numbered CRI-6. If a party withdraws an exhibit or leaves one or more exhibits intentionally blank, it should indicate this on the cover page that provides the number of the blank exhibit.

(2) Each party shall provide an updated list of exhibits (in Word or Excel format) together with each of its submissions, oral statements, and responses to questions.

(3) If a party submits a document that has already been submitted as an exhibit by the other party, it should explain why it is submitting that document again.

(4) If a party includes a hyperlink to the content of a website in a submission, and intends that the cited content form part of the official record, the cited content of the website shall be provided in the form of an exhibit along with an indication of the date that it was accessed.

Editorial Guide

8. In order to facilitate the work of the Panel, each party and third party is invited to make its submissions in accordance with the WTO Editorial Guide for Panel Submissions (electronic copy provided).

Questions

9. The Panel may pose questions to the parties and third parties at any time, including:

a. Before any meeting, the Panel may send written questions, or a list of topics it intends to pursue in questioning orally during a meeting. The Panel may ask different or additional questions at the meeting.

b. The Panel may put questions to the parties and third parties orally during a meeting, and in writing following the meeting, as provided for in paragraphs 15 and 21 below.

Substantive meetings

10. The Panel shall meet in closed session.

11. The parties shall be present at the meetings only when invited by the Panel to appear before it.

12. (1) Each party has the right to determine the composition of its own delegation when meeting with the Panel.

(2) Each party shall have the responsibility for all members of its delegation and shall ensure that each member of its delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceeding and the submissions of the parties and third parties.

13. Each party shall provide to the Panel the list of members of its delegation no later than 5.00 p.m. (Geneva time) three working days before the first day of each meeting with the Panel.

14. A request by a party for interpretation from one WTO language to another should be made to the Panel as early as possible, preferably at the organizational stage, to allow sufficient time to ensure availability of interpreters.

15. The first substantive meeting of the Panel with the parties shall be conducted as follows:

a. The Panel shall invite Costa Rica to make an opening statement to present its case first. Subsequently, the Panel shall invite the Dominican Republic to present its point of view. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement, and any other accompanying material, including PowerPoint presentations. If interpretation is needed, each party shall provide additional copies for the interpreters before taking the floor.

b. Each party should avoid lengthy repetition of the arguments in its submissions. Each party is invited to limit the duration of its opening statement to not more than 75 minutes. If either party considers that it requires more time for its opening statement, it should inform the Panel and the other party at least 10 days before the meeting, together with an estimate of the expected duration of its statement. The Panel will accord equal time to the other party.

c. After the conclusion of the opening statements, the Panel shall give each party the opportunity to make comments or ask the other party questions.

d. The Panel may subsequently pose questions to the parties.

e. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with Costa Rica presenting its statement first. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its closing statement, if available.

f. Following the meeting:

i. Each party shall submit a final written version of its opening statement no later than 5.00 p.m. (Geneva time) on the first working day following the meeting. At the same time, each party should also submit a final written version of any prepared closing statement that it delivered at the meeting.

ii. Each party shall send in writing, within the time frame established by the Panel before the end of the meeting, any questions to the other party to which it wishes to receive a response in writing.

iii. The Panel shall send in writing, within the time frame established by the Panel before the end of the meeting, any questions to the parties to which it wishes to receive a response in writing.

iv. Each party shall respond in writing to the questions from the Panel, and to any questions posed by the other party, within the time frame established by the Panel before the end of the meeting.

16. The second substantive meeting of the Panel with the parties shall be conducted in the same manner as the first substantive meeting with the Panel, except that the Dominican Republic shall be given the opportunity to present its oral statement first. The party that presented its opening statement first shall present its closing statement first.

17. Each party shall be given the opportunity to comment on the responses to questions provided by the other party after the second substantive meeting, in accordance with the timetable adopted by the Panel.

18. If, because of the sanitary crisis related to COVID-19, the substantive meetings cannot be physically held in Geneva on the scheduled dates or either party indicates that travel to Geneva will not be possible for its delegation, the Panel may, depending on the circumstances, choose to modify the timetable and the working procedures after consulting the parties.

Third-party session

19. Each third party may present its views orally during a session of the first substantive meeting with the parties set aside for that purpose.

20. Each third party shall indicate to the Panel whether it intends to make an oral statement during the third-party session three weeks in advance of this session.

21. (1) Each third party has the right to determine the composition of its own delegation when meeting with the Panel.

(2) Each third party shall have the responsibility for all members of its delegation and shall ensure that each member of its delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceeding and the submissions of the parties and third parties.

(3) Each third party shall provide, no later than three working days before the third-party session, a list of members of its delegation who will attend the session.

22. To ensure the availability of interpreters, the third parties shall also indicate at least three weeks before the third-party session whether they intend to make their statement in a WTO language other than Spanish, which is the language in which these panel proceedings are being conducted, and whether they would require interpretation from Spanish to any other WTO language.

23. The third-party session shall be conducted as follows:

a. All parties and third parties may be present during the entirety of this session.

b. The Panel shall first hear the oral statements of the third parties, who shall speak in alphabetical order. Each third party making an oral statement at the third-party session shall provide the Panel and other participants with a provisional written version of its statement before it takes the floor. If interpretation of a third party's oral statement is needed, that third party shall provide additional copies for the interpreters before taking the floor.

c. Each third party should limit the duration of its statement to 15 minutes, and avoid repetition of the arguments already made in its submission. If a third party considers that it requires more time for its opening statement, it should inform the Panel and the parties at least 10 days before the meeting, together with an estimate of the expected duration of its statement. The Panel will accord equal time to all third parties for their statements.

d. After the third parties have made their statements, the parties shall be given the opportunity to pose questions to any third party for clarification on any matter raised in that third party's submission or statement.

e. The Panel may subsequently pose questions to any third party.

f. Following the third-party session:

i. Each third party shall submit the final written version of its oral statement no later than 5.00 p.m. (Geneva time) on the first working day following the meeting.

ii. Each party may send in writing, within the time frame established by the Panel before the end of the meeting, any questions to one or more third parties to which it wishes to receive a response in writing.

iii. The Panel may send in writing, within the time frame it established before the end of the meeting, any questions to one or more third parties to which it wishes to receive a response in writing.

iv. Each third party choosing to do so shall respond in writing to written questions from the Panel or a party, within a time frame established by the Panel before the end of the meeting.

Descriptive part and executive summaries

24. The description of the arguments of the parties and third parties in the descriptive part of the Panel Report shall consist of executive summaries provided by the parties and third parties, which shall be annexed as addenda to the Report. These executive summaries shall not in any way serve as a substitute for the submissions of the parties and third parties in the Panel's examination of the case.

25. Each party shall submit just one integrated executive summary. The integrated executive summary shall summarize the facts and arguments as presented to the Panel in the party's written submissions, oral statements and, if possible, its responses to questions posed following the substantive meetings. The timing of the submission of the integrated executive summary shall be indicated in the timetable adopted by the Panel.

26. The integrated executive summary shall be limited to no more than 30 pages.

27. The Panel may request the parties and third parties to provide executive summaries of facts and arguments presented in any other submissions to the Panel for which a deadline may not be specified in the timetable.

28. Each third party shall submit an integrated executive summary of its arguments as presented in its written submission and statement in accordance with the timetable adopted by the Panel. This integrated executive summary may also include a summary of responses to questions. The executive summary to be provided by each third party shall not exceed six pages. If a third-party submission and/or oral statement does not exceed six pages in total, this shall serve as the executive summary of that third party's arguments, unless that third party indicates that it does not wish for the submission and/or oral statement to serve as its executive summary, in which case it shall submit a separate executive summary.

Interim review

29. Following issuance of the Interim Report, each party may submit a written request to review precise aspects of the Interim Report and request a further meeting with the Panel, in accordance with the timetable adopted by the Panel. The right to request such a meeting shall be exercised no later than at the time the written request for review is submitted.

30. If no meeting is requested, each party may submit written comments on the other party's written request for review in accordance with the timetable adopted by the Panel. Such written comments shall be limited to the other party's written request for review.

31. If a meeting is requested, the Panel shall consult with the parties on the timing of the meeting and any further written comments.

Interim and Final Report

32. The Interim Report, as well as the Final Report before its official circulation, shall be kept strictly confidential and shall not be disclosed.

Service of documents

33. The following procedures regarding service of documents apply to all documents submitted by parties and third parties during the proceeding:

a. Each party and third party shall submit all documents to the Panel by submitting them via the Disputes Online Registry Application (DORA) https://dora.wto.org by 5.00 p.m. (Geneva time) on the due dates established by the Panel. The electronic version uploaded into DORA shall constitute the official version for the purposes of submission deadlines and the record of the dispute. Upload of a document into DORA shall also constitute electronic service on the Panel, the other party, and the third parties.

b. By 5.00 p.m. (Geneva time) the next working day following the electronic submission, each party and third party shall submit one paper copy of all documents it submits to the Panel, including the exhibits, to the DS Registry (office No. 2047). The DS Registrar shall stamp the documents with the date and time of the submission. If an exhibit is in a format that is impractical to submit as a paper copy, then the party may submit that exhibit in electronic format only. In this case, the cover page of the exhibit should indicate that the exhibit is only available in electronic format.

c. The Panel shall provide the parties with the descriptive part of the Report, the Interim Report and the Final Report, as well as all other documents or communications issued by the Panel during the proceeding, via DORA.

d. If the parties or third parties have any questions or technical difficulties relating to DORA, they are invited to contact the DS Registry (DSRegistry@wto.org).

e. If any party or third party is unable to meet the 5.00 p.m. deadline because of technical difficulties in uploading these documents into DORA, the party or third party concerned shall inform the DS Registry (DSRegistry@wto.org) without delay and provide an electronic version of all documents to be submitted to the Panel by email including any exhibits. The email shall be addressed to DSRegistry@wto.org, the Panel Secretary, the other party and, if appropriate, the third parties. The documents sent by email shall be submitted no later than 5.30 p.m. on the due date established by the Panel. If the file size of specific exhibits makes transmission by email impossible, or it would require more than five email messages, owing to the number of exhibits to be filed, to transmit all of them by email, the specific large file size exhibits, or those that cannot be attached to the first five email messages, shall be filed with the DS Registry (office No. 2047) and provided to the other party and, if appropriate, the third parties by no later than 9.30 a.m. the next working day on an electronic medium acceptable to the recipient. In that case, the party or third party concerned shall send a notification by email to the DS Registrar, copying the Panel Secretary, the other party, and the third parties, as appropriate, identifying the numbers of the exhibits that cannot be transmitted by email.

f. In case any party or third party is unable to access a document filed through DORA because of technical difficulties, it shall promptly, and in any case no later than 5.00 p.m. on the next working day after the due date for the filing of the document, inform the DS Registrar, the Panel Secretary, and the party or third party that filed the document, of the problem by email and shall, if possible, identify the relevant document(s). The DS Registrar will promptly try to identify a solution to the technical problem. In the meantime, the party or third party that filed the document(s) shall, promptly after being informed of the problem, provide an electronic version of the relevant document(s) to the affected party or third party by email, with a copy to the DS Registry (DSRegistry@wto.org) and the Panel Secretary to allow access to the document(s) while the technical problem is being addressed. The DS Registrar may provide an electronic version of the relevant document(s) by email if the affected party or third party so requests. The DS Registrar shall in that case copy the party or third party that filed the document(s) on the email message.

g. Parties and third parties are responsible, through their DORA account administrators, for creating and updating their DORA accounts. The DS Registry is available to provide assistance with managing the DORA accounts.

Correction of clerical errors in submissions

34. The Panel may grant leave to a party or third party to correct clerical errors in any of its submissions (including paragraph numbering and typographical mistakes). Any such request should identify the nature of the errors to be corrected, and should be made promptly following the filing of the submission in question.

ANNEX A-2

ADDITIONAL WORKING PROCEDURES OF THE PANEL CONCERNING BUSINESS CONFIDENTIAL INFORMATION

Adopted on 17 May 2022

1. For the purpose of this proceeding, business confidential information ("BCI") is defined as any information that has been designated as such by a party submitting the information to the Panel. The parties shall only designate as BCI information that is not available in the public domain, the release of which would cause serious harm to the interests of the originator(s) of the information. BCI may include information that was previously treated by the Regulatory Commission on Unfair Trade Practices and Safeguard Measures of the Dominican Republic as confidential in the course of the anti-dumping proceeding at issue in this dispute.

2. Without prejudice to the provisions of paragraphs 3 and 4, no person may have access to BCI except a Panelist, a member of the Secretariat assisting the Panel, an employee of a party or a third party, or an outside advisor to a party or a third party for the purposes of this dispute. However, an outside advisor is not permitted to access BCI if that advisor is an officer or employee of an enterprise engaged in the production, sale, export, or import of the products that were the subject of the proceeding at issue in this dispute, or an officer or employee of an association of such enterprises.

3. When third parties receive written submissions pursuant to the Working Procedures, the third parties shall receive a version of those submissions and any exhibits with BCI redacted. The BCI-redacted versions of written submissions and exhibits received by third parties shall be sufficient to convey a reasonable understanding of the nature of the information at issue. The written submissions and exhibits, and their BCI-redacted versions, shall be submitted at the same time.

4. A third party may request access to the BCI version of a BCI-redacted written submission or exhibit received pursuant to the Working Procedures. Any such request shall include a list of the third party's representatives and outside advisors who would like to review the BCI and shall specify how they would like to access the BCI. A party requested by a third party to provide that third party with access to BCI must provide such access promptly.

5. A person having access to BCI shall treat it as confidential, i.e. shall not disclose that information other than to those persons authorized to receive it pursuant to these procedures. Each party and third party shall have responsibility in this regard for its employees as well as any outside advisors used for the purposes of this dispute. BCI obtained under these procedures may be used only for the purpose of providing information and argumentation in this dispute and for no other purpose. All documents and electronic storage media containing BCI shall be stored in such a manner as to prevent unauthorized access to such information.

6. When a party or third party includes BCI in a submission, the cover and/or first page of the document containing BCI, and each page of the document, shall be marked to indicate the presence of such information. The specific information in question shall be placed between double square brackets, as follows: [[xx,xxx.xx]]. The first page or cover of the document shall state "Contains Business Confidential Information on pages xxxxxx", and each page of the document shall contain the notice "Contains Business Confidential Information" at the top of the page. BCI presented in the form of, or as part of, an exhibit shall be marked to indicate, in addition to the above, that it contains BCI by putting "BCI" next to the exhibit number (e.g. Exhibit CRI-1 (BCI), Exhibit DOM-1 (BCI)).

7. When BCI is submitted in electronic format, the file name shall include the terms "Business Confidential Information" or "BCI". In addition, where applicable, the label of the storage medium shall be clearly marked with the statement "Business Confidential Information" or "BCI".

8. In the case of an oral statement containing BCI, the party or third party making such a statement shall inform the Panel before making it that the statement will contain BCI, and the Panel will ensure that only persons authorized to have access to BCI pursuant to these procedures are in

the room to hear that statement. The written versions of such oral statements submitted to the Panel shall be marked as provided for in paragraph 4.

9. When a party or third party submits a document containing BCI to the Panel, the other party and third parties, when referring to that BCI in their documents, including written submissions, and oral statements, shall clearly identify all such information in those documents. All such documents shall be marked as described in paragraph 4.

10. If a party considers that information submitted by the other party or a third party should have been designated as BCI and objects to such submission without BCI designation, it shall promptly bring this objection to the attention of the Panel and the other party or third party, together with the reasons for the objection. Similarly, if a party considers that the other party or a third party submitted information designated as BCI, information which should not be so designated, it shall promptly bring this objection to the attention of the Panel and the other party or third party, together with the reasons for the objection. The Panel shall decide whether information subject to an objection will be treated as BCI for the purposes of these proceedings on the basis of the criteria set out in paragraph 1.

11. The Panel will not disclose BCI, in its report or in any other way, to persons not authorized under these procedures to have access to BCI. The Panel may, however, make statements of conclusion drawn from such information. Before the Panel circulates its final report to the Members, the Panel will give each party an opportunity to review the report to ensure that it does not contain any information that the party has designated as BCI.

12. Submissions, exhibits, and other documents or recordings containing BCI will be included in the record forwarded to the Appellate Body in the event of an appeal of the Panel's Report.

ANNEX A-3

INTERIM REVIEW

1 INTRODUCTION

1.1. Pursuant to Article 15.3 of the DSU, this Annex sets out the Panel's discussion and disposition of the requests for review made at the interim review stage. As explained below, where we have found it appropriate, we have modified certain aspects of our Interim Report in the light of the parties' comments. We have also reflected the corrections of typographical errors. Below, we first consider the requests for review made by Costa Rica and, then, those made by the Dominican Republic. The numbering of paragraphs and footnotes in the Interim Report is the same as in the Final Report.

2 COSTA RICA'S REQUESTS FOR REVIEW

2.1 Summary of Costa Rica's claims under Articles 3.1 and 3.7 of the Anti-Dumping Agreement: paragraph 7.233

2.1. Costa Rica requests that the reference to "serious shortcomings" be deleted from the first sentence of paragraph 7.233 to avoid repetition. The Dominican Republic has no specific comments.

2.2. We have modified paragraph 7.233 with a view to improving the clarity of the Final Report.

2.2 Costa Rica's claim under Article 6.7 of the Anti-Dumping Agreement and Annex I thereto: paragraph 7.463

2.3. Costa Rica requests that additional text be included to clarify the wording of the first sentence. The Dominican Republic has no specific comments.

2.4. We have modified paragraph 7.463 with a view to improving the clarity of the Final Report.

2.3 Additional requests

2.5. The other comments submitted by Costa Rica are editorial in nature. The Panel has amended the text directly with respect to these additional comments.

3 THE DOMINICAN REPUBLIC'S REQUESTS FOR REVIEW

3.1 The applicability of Article 2.4 of the Anti-Dumping Agreement: paragraph 7.30

3.1. In paragraph 7.30, the Panel refers to the Dominican Republic's argument that WTO case law supports the position that Article 2.4 does not address the establishment of the normal value and export price, but only the comparison of the two and the possible need for adjustments. However, the Dominican Republic submits that the Panel does not address this issue and also fails to explain how the Panel's conclusions follow previous case law. The Dominican Republic requests that we indicate whether the Panel's conclusions are "in line with" this previous case law.[1]

3.2. Costa Rica asks that we reject the Dominican Republic's request. Costa Rica considers that the Panel has taken into account the Dominican Republic's arguments and references to "previous case law".[2] In particular, Costa Rica notes that, in paragraph 7.30 of the Interim Report, the Panel refers explicitly to the two reports cited by the Dominican Republic, and in paragraphs 7.31 to 7.33, the Panel sets out the reasons why it considered that the Dominican Republic's arguments, including the references to the two previous reports, were not persuasive.[3]

[1] Dominican Republic's request for interim review, para. 5.
[2] Costa Rica's comments on the Dominican Republic's request for interim review, para. 2.
[3] Costa Rica's comments on the Dominican Republic's request for interim review, para. 2.

3.3. We recall that in paragraph 7.30 we outline the Dominican Republic's argument that Article 2.4 addresses only the comparison between both and the possible need to make adjustments, but does not address the separate issue of establishing the export price. Contrary to what the Dominican Republic states, we have responded to that argument. In paragraph 7.31 we disagree with the Dominican Republic that Article 2.3 may properly address all issues that may arise in relation to the export price used in a comparison to determine a margin of dumping. In this regard, we note that Article 2.3 is limited in scope, applying to limited situations described in that article, namely, "[i]n cases where there is no export price or where it appears to the authorities concerned that the export price is unreliable because of association or a compensatory arrangement between the exporter and the importer or a third party".

3.4. Moreover, in paragraph 7.32, we explain that Costa Rica's claim under Article 2.4 is not limited to the components of the comparison in the calculation of the margin of dumping, but rather it also concerns the CDC's comparison of export sales transactions to domestic sales transactions in Costa Rica's home market. In view of this, we consider that Article 2.4 applies to Costa Rica's claim. On this basis, we reject the Dominican Republic's request that we indicate whether the Panel's conclusions are "in line with" this previous case law.

3.2 The data submitted by ArcelorMittal in a communication submitted in November 2019 on the costs of billets: paragraphs 7.43, 7.49, 7.50, 7.51, 7.54, 7.55, 7.61, 7.62, 7.64, 7.70 and 8.1.a.i

3.5. The Dominican Republic mentions various aspects of the data submitted by ArcelorMittal in a communication submitted in November 2019 on the costs of billets, in relation to Costa Rica's claims under Article 2.4 of the Anti-Dumping Agreement. First, the Dominican Republic maintains that, in paragraphs 7.43 and 7.49, the Panel fails to properly reflect that the data submitted by ArcelorMittal in November 2019, were only submitted at the end of the investigation and more than one year after the verification visit. The Dominican Republic argues that, owing to this late submission, there was no time for the CDC to examine the veracity of the statements "on the alleged cost increases".[4] The Dominican Republic further argues that the information submitted was not supported by any invoice or documentary evidence.[5]

3.6. The Dominican Republic also maintains that the Panel's summary of Costa Rica's arguments relating to the costs of billets between the end of 2016 and early May 2017, is incomplete and inaccurate in several respects. This summary is found in paragraphs 7.50, 7.51 and 7.62 of the Interim Report. The Dominican Republic reiterates that ArcelorMittal submitted information on the cost of billets on 11 November 2019, and the CDC reflected that same information in table 5 of the Final Technical Report.[6] The Dominican Republic notes that the information submitted by ArcelorMittal does not include information for 2016. Moreover, the Dominican Republic claims that the data also do not demonstrate that costs increased significantly at the beginning of the period of investigation. In this regard, the Dominican Republic maintains that the difference in costs in April compared to May "was barely 4%"[7] and that an increase of only 11.6% is observed when comparing January 2017 with May 2017.[8] The Dominican Republic thus claims that this reference to 11.6% fails to properly take into account the insignificant differences in the other months of 2017, before the start of the period of investigation. In addition, the Dominican Republic notes that the information submitted by ArcelorMittal does not include information for March 2017.[9]

3.7. With these clarifications, the Dominican Republic submits that the Panel failed to take into consideration the Dominican Republic's arguments that: (a) ArcelorMittal never provided information on costs in 2016 and that, therefore, any assertion about a cost increase between the end of 2016 and May 2017 is not justified; (b) the "assertion"[10] in paragraphs 7.50 and 7.51 that feedstock prices increased between January 2017 and May 2017 is predicated on erroneous comparisons between end points, as the costs in May 2017 were exactly the same as those in February 2017; (c) the information provided by ArcelorMittal does not provide any information on feedstock costs in March 2017, which was the month of the Thorco Logic invoice; and (d) none of these cost data were

[4] Dominican Republic's request for interim review, paras. 6-8.
[5] Dominican Republic's request for interim review, para. 8.
[6] Dominican Republic's request for interim review, paras. 10-12.
[7] Dominican Republic's request for interim review, para. 13.
[8] Dominican Republic's request for interim review, para. 13.
[9] Dominican Republic's request for interim review, para. 13.
[10] Dominican Republic's request for interim review, para. 15.

justified by the evidence on record, which could not have been verified at that late stage of the investigation.[11] The Dominican Republic therefore requests the Panel to reflect on the implications of these arguments and conclude that it was not unreasonable for the CDC to use the exact data on export sales and the normal value that the exporter itself provided in its questionnaire in relation to the POI. The Dominican Republic requests the Panel to thus modify the conclusions of paragraphs 7.54, 7.55, 7.61, 7.62, 7.64, 7.70 and 8.1.a.i.[12]

3.8. Costa Rica responds that the Dominican Republic's request is without merit and asks the Panel to reject it. First, Costa Rica notes that the chronology of the proceedings, and the date on which ArcelorMittal submitted the information is clear to the reader because, in paragraph 7.49, the Panel expressly refers to the date on which the exporter submitted its comments (11 November 2019). Therefore, there is no doubt as to when the comments were received. Costa Rica also considers that the Dominican Republic's argument, that there was no time to examine the veracity of the information submitted by ArcelorMittal, amounts to an *ex post* argument, and it is inappropriate to raise it at the interim review stage.[13] Regarding the other arguments, Costa Rica submits that the Dominican Republic's comments simply repeat arguments on its own appreciation of the facts, none of which the Panel is required to address in the context of the interim review.[14]

3.9. We note that the Dominican Republic's comments appear to address the CDC's lack of time to examine the veracity of the statements on the alleged increase in costs, and the failure to assess whether the alleged increase in costs was significant. The Dominican Republic also refers to a number of arguments that were made in its submissions and statements to the Panel during the proceedings[15], and requests the Panel to consider these arguments again.

3.10. In the context of its analysis under Article 2.4, the Panel clarified that it did not consider the parties' arguments regarding the costs of billets to be a relevant element in this dispute. Thus, the Panel did not take into consideration the arguments of whether the material terms of the Thorco Logic sale were established at the end of December 2016. Nor did the Panel address the arguments concerning the period from January to May 2017 prior to the beginning of the POI. Rather, the Panel took into account the fact that the parties do not disagree that the export sales shipped on the Thorco Logic and the Suzie Q were invoiced before the start of the POI chosen by the CDC.[16] On this basis, the Panel concluded that the Dominican Republic acted inconsistently with the second sentence of Article 2.4 of the Anti-Dumping Agreement because the CDC failed to make a comparison between the export price and the normal value "in respect of sales made at as nearly as possible the same time", in accordance with that provision. Due to this approach, we do not consider it necessary to make any changes to our analysis in the context of Article 2.4, as requested by the Dominican Republic.

3.11. We now turn to the various arguments put forward by the Dominican Republic relating to specific data on the costs of billets, with respect to the Panel's analysis under Article 2.2.1 of the Anti-Dumping Agreement.

3.3 Use of an annual weighted average cost in the cost test: paragraphs 7.97, 7.102, 7.105, 7.106, 7.111 and 8.1.a.iii

3.12. The Dominican Republic submits that certain facts related to the cost of billets are not fully or correctly reflected in section 7.4.3.1 of the Interim Report, with respect to the Panel's consideration of the CDC's use of an annual weighted average cost in the cost test. The Dominican Republic also commented on legal aspects of the Panel's analysis in this same section.

3.13. First, the Dominican Republic claims that the Panel has failed to reflect important factual aspects in paragraphs 7.104 and 7.105 of the Interim Report. In these paragraphs, the Panel

[11] Dominican Republic's request for interim review, para. 15.
[12] Dominican Republic's request for interim review, paras. 16-17.
[13] Costa Rica's comments on the Dominican Republic's request for interim review, paras. 4-5.
[14] Costa Rica's comments on the Dominican Republic's request for interim review, para. 6.
[15] Dominican Republic's request for interim review, fn 1 (referring to the Dominican Republic's second written submission, paras. 57-58; responses to Panel questions Nos. 11 and 77; comments on Costa Rica's response to Panel question No. 77; opening statement at the first meeting of the Panel, para. 27; and opening statement at the second meeting of the Panel, paras. 22-23).
[16] Interim Report, para. 7.47.

analyses the monthly unit costs of billets provided by ArcelorMittal in its comments of 11 November. The Dominican Republic submits that the information provided by ArcelorMittal on the monthly costs of billets does not reveal an obvious difference in the monthly costs. Therefore, the Dominican Republic claims that there were no exceptional circumstances which would have required the CDC to apply a different methodology to determine whether there were below-cost sales that should have been excluded from the normal value calculation. To illustrate its argument, the Dominican Republic states that the cost of billets in May 2017 (USD [[***]] per tonne) was not so different from the price in September 2017 (USD [[***]] per tonne).[17]

3.14. Second, the Dominican Republic claims that the Panel failed to take proper account of ArcelorMittal's arguments and comments on the alleged increases in monthly costs, as the Panel did not note anything in ArcelorMittal's comments that provided "a general overview of costs".[18] The Dominican Republic refers to paragraph 7.88 and footnotes 119 to 121, as well as paragraph 7.104 and footnote 138 of the Interim Report. The Dominican Republic states that ArcelorMittal did not identify an exceptional situation of significant growth, nor did it refer to specific data.[19] The Dominican Republic also states that the Panel does not refer to specific data to support its conclusion in paragraph 7.100 that "production costs had increased significantly during the POI".[20] In this connection, the Dominican Republic reiterates its position that differences in the costs of billets throughout the POI were not of such a magnitude to invalidate the use of annualized costs, particularly as the Anti-Dumping Agreement leaves such decisions to the discretion of the investigating authority. The Dominican Republic states that the cost of billets in July 2017 (USD [[***]] per tonne) was very similar to the cost in October 2017 (USD [[***]] per tonne) or even in December 2017 (USD [[***]] per tonne). According to the Dominican Republic, this was also the case with overall production costs, which did not change much between June (USD [[***]] per tonne) and October 2017 (USD [[***]] per tonne).[21]

3.15. Third, the Dominican Republic reiterates its argument that ArcelorMittal provided monthly cost data only at the end of the investigation, more than a year after the verification visit, with the result that the information was not verified. The Dominican Republic claims that ArcelorMittal could well have provided the monthly cost data from the outset, but instead chose strategically not to do so, allegedly knowing that it would not be possible to verify the data at such a late stage of the investigation.[22] The Dominican Republic claims that the Panel failed to take into account the impact of this information only being available at a late stage.[23]

3.16. Fourth, the Dominican Republic criticizes the Panel's comments in paragraphs 7.101 and 7.102 of the Interim Report. In these paragraphs, the Panel noted that the CDC should have been aware of the alleged increase in billet costs earlier, by virtue of the fact that the applicant, Gerdau Metaldom, provided information in September 2018 on billet costs. However, the Dominican Republic considers that the Panel has failed to provide an adequate explanation of the relevance of this information in the context of the cost test analysis, given that the information was submitted by the applicant in the context of the CDC's injury analysis (in the context of the price suppression analysis).[24]

3.17. Aside from the consideration of certain facts, the Dominican Republic also requests the Panel to clarify what the legal basis is for its conclusion in paragraphs 7.99 and 7.100 of the Interim Report. The Dominican Republic refers to the Panel's comment in these paragraphs that it would be "reasonable" to use a methodology that takes into account the costs at the time of sale determined on a basis other than the annual weighted average per unit cost. The Dominican Republic points out that the term "reasonable" does not appear in Article 2.2.1 of the Anti-Dumping Agreement. The Dominican Republic also seeks clarification on what is understood to be a situation in which prices and costs are "relatively stable", compared to a situation in which costs "increase significantly" during the POI. The Dominican Republic considers that the relevant issue is not only whether the costs increased during the POI, but whether sales are concentrated in a certain period of the POI. According to the Dominican Republic's argument, if sales are distributed in a relatively uniform

[17] Dominican Republic's request for interim review, para. 20.
[18] Dominican Republic's request for interim review, para. 21.
[19] Dominican Republic's request for interim review, paras. 21-22.
[20] Dominican Republic's request for interim review, para. 22.
[21] Dominican Republic's request for interim review, para. 23.
[22] Dominican Republic's request for interim review, para. 25.
[23] Dominican Republic's request for interim review, para. 24.
[24] Dominican Republic's request for interim review, para. 26.

manner, sales below and above the average cost will also cancel each other out, as any other approach means that a measure is unacceptable as soon as there are changes in costs during the POI.[25]

3.18. Lastly, the Dominican Republic requests the Panel to clarify its characterization that there was a very high proportion of below-cost sales in the "initial months" of the investigation. The Dominican Republic considers that the Panel failed to indicate clearly what the concept of "initial" months means. In addition, the Dominican Republic claims that the Panel has ignored the fact that the vast majority of sales over the last six months were higher than costs.[26]

3.19. The Dominican Republic therefore requests the Panel to reconsider the relevant facts and revise its conclusions in paragraphs 7.97, 7.102, 7.105, 7.106, 7.111 and 8.1.a.iii that the CDC acted inconsistently with Article 2.2.1 of the Anti-Dumping Agreement by using an annual weighted average cost for the below-cost sales test.[27]

3.20. Costa Rica requests the Panel to reject all the Dominican Republic's requests and comments as unfounded, because the comments are an attempt to restate issues that have already been resolved in the dispute, and because this is not purpose of the interim review. First, Costa Rica rejects the contention that the Panel has failed to properly reflect and consider important factual aspects of the Dominican Republic's submissions. In this regard, Costa Rica notes that paragraphs 7.91 to 7.94 of the Interim Report summarize and set out all the important arguments and factual points mentioned above by the Dominican Republic.[28] Costa Rica also rejects the comment that the Panel does not refer to specific data to support its conclusion in paragraph 7.100 of the Interim Report that "production costs had increased significantly during the POI".[29] Costa Rica notes that the paragraphs following paragraph 7.100 refer to the data on the record and support the Panel's conclusion.[30] Costa Rica also rejects the Dominican Republic's argument that the Panel failed to take proper account of the fact that ArcelorMittal had submitted monthly cost data in November 2019. Costa Rica submits that the Panel clearly addressed this argument in paragraphs 7.101 to 7.105 of the Interim Report, by concluding that the CDC was aware of the risk of distortion in the analysis before the exporter submitted its concerns for the first time.[31]

3.21. Lastly, Costa Rica rejects the arguments that the Panel failed to properly establish a legal basis to support its conclusions. Costa Rica submits that the Panel's conclusion in paragraph 7.99 is predicated on the detailed reasoning set out by the Panel in paragraph 7.98 of the Interim Report. Similarly, Costa Rica maintains that paragraph 7.100 should be read in conjunction with the subsequent paragraphs. Moreover, Costa Rica considers it illogical that the Dominican Republic criticizes the Panel for using the term "reasonable" in paragraph 7.99. Costa Rica notes that the Dominican Republic has referred to the methodology used by the CDC as not "unreasonable" in its arguments.[32]

3.22. We will respond to the Dominican Republic's comments in the order in which they have been submitted.

3.23. We do not agree with the Dominican Republic's position that the Panel failed to reflect important factual aspects in its analysis under Article 2.2.1 of the Anti-Dumping Agreement. Paragraphs 7.104 and 7.105 cannot be read in isolation. In paragraphs 7.88-7.90, the Panel reflected ArcelorMittal's request in the underlying investigation, in which it asked the CDC to carry out its cost test analysis again. These comments include its explanation of how the methodology used by the CDC would create distortion. The Panel also refers to ArcelorMittal's comments of 11 November 2019, which contain monthly cost information. In paragraphs 7.91-7.94, the Panel

[25] Dominican Republic's request for interim review, paras. 28-29.
[26] Dominican Republic's request for interim review, para. 30.
[27] Dominican Republic's request for interim review, paras. 31-33.
[28] Costa Rica's comments on the Dominican Republic's request for interim review, para. 8.
[29] Dominican Republic's request for interim review, para. 22.
[30] Costa Rica's comments on the Dominican Republic's request for interim review, para. 9.
[31] Costa Rica's comments on the Dominican Republic's request for interim review, para. 10.
[32] In paragraph 11 of its comments on the Dominican Republic's request for interim review, Costa Rica refers to paragraph 7.93 of the Interim Report, in which the Panel notes that the Dominican Republic considers that the use of an annual average was reasonable. In footnote 127 of the Interim Report, the Panel refers to paragraph 51 of the Dominican Republic's second written submission, where the Dominican Republic submits that "[i]t is not clear what would be unreasonable or biased if an authority used actual cost data provided by the exporter".

reflects the Dominican Republic's position as to why the EBITDA-COST data were not comparable for the purposes of carrying out verification. These paragraphs also explain the Dominican Republic's argument that there was nothing particular about the circumstance that had invalidated the decision to examine the prices in the light of the weighted costs corresponding to the POI, and that there was no obvious difference in costs that would have required the use of monthly cost data and comparisons. In its analysis, the Panel explains its interpretation of Article 2.2.1 and the basis for its conclusion that the CDC, acting as an unbiased investigating authority, should have considered the possibility of distortion in its analysis based on using the annual weighted average for the POI.

3.24. Second, we disagree with the Dominican Republic's argument that the Panel failed to consider specific data in its review, or that the Panel somehow failed to recognize the overall situation with respect to upward trends in billet costs during the POI. In paragraph 7.100, the Panel concluded that the CDC was aware that production costs had increased significantly during the POI. In paragraph 7.101, the Panel takes note of the information from the applicant (Gerdau Metaldom) regarding increasing international billet prices during the POI (for example, that "as of December 2017, there is evidence of a 13% increase in domestic industry's prices when compared to December 2016" and "the price of billets in April 2018 compared to April 2017 increased by 26%"). In paragraph 7.103, the Panel analysed the information contained in Exhibit DOM-22. The Panel noted the trend reflected in Exhibit DOM-22, with respect to the declining percentage of below-cost sales, in relation to the rising costs shown by the monthly unit cost data of billets during the POI provided by ArcelorMittal. Nor do we consider that the Dominican Republic's focus on billet prices in specific months invalidates our analysis. It should also be noted that, in a footnote to its comments, the Dominican Republic recognizes "a sharper increase in costs over the last four months of the POI"[33], although the Dominican Republic dismisses this trend as irrelevant to the Panel's conclusion.

3.25. We also disagree with the Dominican Republic's comments that the Panel failed to properly consider the fact that ArcelorMittal submitted the monthly cost data only at the end of the investigation, or that the Panel has failed to provide an adequate explanation as to why it was appropriate to consider the cost information submitted by the applicant. We do not consider it necessary to take into account the Dominican Republic's argument, set out in its comments, on the reason why ArcelorMittal did not provide the information sooner. The observation that, at an earlier stage of the investigation, the applicant, Gerdau Metaldom, submitted information in September 2018 on billet costs and that the CDC was aware of the increase in the international price of billets and in the price of the product, is relevant to our analysis.[34] In the light of this, we conclude that the CDC, acting as an unbiased investigating authority, should have considered the possibility of distortion in its analysis.

3.26. Lastly, we reject the Dominican Republic's request to modify some aspects of our legal interpretation. The Dominican Republic's specific comments were previously presented as arguments to the Panel in earlier stages of these proceedings. These included the argument that an investigating authority would only need to consider a methodology that is not based on an annual weighted average cost in special circumstances, where sales are concentrated in a particular period of the POI. In paragraph 7.98, the Panel set out its interpretation of Article 2.2.1, explaining that the examination of whether sales have been made at prices which do not provide for the recovery of all costs within a reasonable period of time, would be meaningless if prices and costs were not initially compared at the time of sale. In the light of this, the Panel considered that an investigating authority is required to use a methodology that reasonably allows it to identify sales that are above costs "at the time of sale" so as not to unduly exclude them from the margin of dumping calculation. Therefore, in general, it would be reasonable to use a methodology that takes into account the costs at the time of sale determined on a basis other than the annual weighted average per unit cost. We consider that this risk could be particularly high in circumstances when production costs increase significantly during the POI. The Dominican Republic also requests clarification as to what is meant by a very high proportion of below-cost sales in the "initial months" of the investigation. As the Dominican Republic acknowledges, the Panel considered the 12 months of the POI, noting the trend that monthly costs were below the annual average during the six-month period between May and October 2017. This trend differed from the trend over the last months of the POI.

[33] Dominican Republic's request for interim review, fn 3.
[34] See para. 7.102 of the Interim Report.

3.27. On the basis of the foregoing explanation, we consider that we properly evaluated the factual aspects relevant to our analysis, and consider that the totality of circumstances supports our conclusions. We therefore see no basis for reconsidering the arguments – most of which the Dominican Republic has already set out in its submissions and statements during the proceedings. We therefore reject the Dominican Republic's request to reconsider our conclusions in paragraphs 7.97, 7.102, 7.105, 7.106, 7.111 and 8.1.a.iii.

3.4 The examination of profits: paragraphs 7.195, 7.200, 7.231 and 8.1.b.v

3.28. The Dominican Republic requests that we reconsider our conclusions in paragraphs 7.195, 7.200, 7.231 and 8.1.b.v as regards the examination of profits. The Dominican Republic states that the Panel misinterprets the CDC's remark in paragraph 378 of its Final Technical Report.[35] As such, the Dominican Republic claims that the CDC's remark was not "particularly relevant as the real question is whether the decline in profits coincided with the period of increased dumping"; that the CDC referred to the significant decline recorded in 2017, which is the calendar year that largely overlaps with the dumping POI; and that, contrary to our analysis, domestic sales "declined in value".[36] In addition, the Dominican Republic notes that there is no requirement that the different injury data correlate perfectly.[37]

3.29. Costa Rica asks that we reject the Dominican Republic's request as unfounded, in view of the fact that the Panel's analysis was properly focused on the CDC's findings. Costa Rica considers that the Dominican Republic is trying to reopen the discussion and relitigate the matter, and is, in effect, attempting to get the Panel to substitute the CDC's assessment for its own, which is contrary to a panel's standard of review.[38]

3.30. We do not agree with the Dominican Republic's arguments. While the Dominican Republic states that "the real question is whether the decline in profits coincided with the period of increased dumping"[39], this question is not part of the examination that the CDC set out in its profit analysis. The Dominican Republic claims that the Panel misinterpreted domestic sales data because these "decreased in value".[40] The Panel took into account the sales trend, recognizing that "[a]t the beginning of the POI, the volume of sales increased while their value decreased".[41] This is evident from table 26 of the CDC Final Technical Report. We therefore conclude that the sales trend was "fluctuating".[42]

3.31. We recall that an objective investigating authority could not have reached a general conclusion that "[t]he contractions in profits coincide with the decline in sales" without qualifying it and explaining why contradictory trends in the volume of sales did not undermine their conclusion. We do not suggest that the trends in profits and dumped imports must necessarily coincide in order for the profit analysis to be consistent with Articles 3.1 and 3.4 of the Anti-Dumping Agreement. The Panel only examined the conclusion that is part of the CDC's examination of the profit analysis. We consider that this conclusion is not reasonably supported by the evidence for the reasons set out in paragraphs 7.196-7.200 of the Interim Report. We therefore reject the Dominican Republic's request to reconsider our conclusions in paragraphs 7.195, 7.200, 7.231 and 8.1.b.v with respect to the profit analysis.

3.5 Cash flow: paragraphs 7.206, 7.231 and 8.1.b.v

3.32. The Dominican Republic requests that we reconsider our conclusions in paragraphs 7.206, 7.231 and 8.1.b.v with respect to the cash flow analysis. The Dominican Republic argues that Article 3.4 of the Anti-Dumping Agreement does not require that an investigating authority establish a causal relationship among the different factors evaluated under this provision, and that the Panel is wrong "to reject the CDC's factual observations on a correlation between these three factors during the dumping POI, by failing to examine what actually caused the negative cash flow".[43]

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[35] Dominican Republic's request for interim review, para. 34.
[36] Dominican Republic's request for interim review, para. 36.
[37] Dominican Republic's request for interim review, para. 38.
[38] Costa Rica's comments on the Dominican Republic's request for interim review, para. 14.
[39] Dominican Republic's request for interim review, para. 36. (emphasis omitted)
[40] Dominican Republic's request for interim review, para. 36.
[41] Interim Report, para. 7.195.
[42] Interim Report, para. 7.196.
[43] Dominican Republic's request for interim review, para. 42.

3.33. Costa Rica requests that the Panel reject the Dominican Republic's arguments as unfounded, since the Panel's analysis is predicated on the facts on the record and on the CDC's own findings. Costa Rica maintains that the Dominican Republic's arguments do not justify why the Panel's conclusion should be reconsidered as the Dominican Republic fails to give any other reason besides the assertion that Article 3.4 does not require a causation analysis. However, the Dominican Republic fails to demonstrate that the CDC's examination was reasoned and adequate.[44]

3.34. We are not convinced by the Dominican Republic's arguments. We concur with previous panels that, under Article 3.4 of the Anti-Dumping Agreement, an investigating authority must "evaluate" the factors listed, evoking a process of weighing evidence and reaching conclusions thereon.[45] The "evaluation" to which Article 3.4 refers is the process of analysis and interpretation of the facts established in relation to each listed factor and is something different from, and more than, simple compilation of tables of data.[46] The Dominican Republic appears to say that the CDC's remark that "[t]he cash flow performance [wa]s attributable to the fall in profits as a result of Costa Rica's dumping practices" is not relevant to the CDC's cash flow analysis under Article 3.4 of the Anti-Dumping Agreement.[47] If this were the case, the CDC's cash flow evaluation would be limited to the first two sentences of paragraph 389 and table 32. In our view, this is not sufficient to "evaluate" a factor under Article 3.4. For the reasons set out in paragraphs 7.204-7.206 of the Interim Report, we determine that the CDC's consideration does not constitute a reasoned and adequate explanation of how the evidence supports its conclusion regarding cash flow. On this basis, we reject the Dominican Republic's request to reconsider our conclusions in paragraphs 7.206, 7.231 and 8.1.b.v with respect to the cash flow analysis.

3.6 The examination of the domestic industry's loss of market share: paragraphs 7.217, 7.231 and 8.1.b.v

3.35. The Dominican Republic requests that we re-evaluate our conclusion in paragraphs 7.217, 7.231 and 8.1.b.v with respect to the loss of market share. The Dominican Republic states that the Panel based its conclusion on "the fact that the market share of dumped imports did not increase over the last four months of the POI"; that there is no requirement for market share and dumped imports to be perfectly correlated for the whole of the POI; and lastly, that any concern regarding third country imports should have been an matter to be analysed under Article 3.5, not Article 3.4 of the Anti-Dumping Agreement.[48]

3.36. Costa Rica requests that the Panel reject the Dominican Republic's arguments since the Panel's analysis is objective and is predicated on the facts on the record. Costa Rica considers that the comments are simply an attempt by the Dominican Republic to relitigate the case, and that this is not the function of the interim review.[49]

3.37. The Dominican Republic does not argue that we have incorrectly identified the CDC's analysis and conclusions in relation to this factor, as listed in Article 3.4 of the Anti-Dumping Agreement. We recall that the CDC's conclusion on the examination of this final factor is set out in paragraph 305 of its technical report in general terms, namely, that "the domestic industry recorded a loss of market share attributable to Costa Rican imports". We also recall our conclusion that, due to the trend observed, the CDC's assertion that the loss of market share was "attributable to Costa Rican imports", could not constitute a generalization for the entire POI.[50] Nothing in the Panel's conclusion suggests that trends in market share and dumped imports must be perfectly correlated. The Panel examined the relevant conclusion of the CDC and considered that there was no reasoned and adequate explanation as to how the evidence on the record supported that conclusion, in accordance with the applicable standard of review. In view of the foregoing, we reject the Dominican Republic's request to re-evaluate our conclusions on this factor.

3.38. The Dominican Republic requests that we delete the reference in paragraph 7.217 to the alleged decline in market share in the first four months of 2018 compared to the whole of 2017, "as

[44] Costa Rica's comments on the Dominican Republic's request for interim review, para. 16.
[45] Panel Report, *Egypt – Steel Rebar*, para. 7.44.
[46] Panel Report, *Egypt – Steel Rebar*, para. 7.45.
[47] Dominican Republic's request for interim review, para. 42.
[48] Dominican Republic's request for interim review, para. 46.
[49] Costa Rica's comments on the Dominican Republic's request for interim review, para. 17.
[50] Interim Report, para. 7.217.

such a comparison is not appropriate".[51] We find no reason to make this change. We understand that in the case of *relative* (and not absolute) figures for periods of different lengths, such comparisons may be appropriate. Nor do we see anywhere in the CDC's determination that sales of the product were affected by any type of seasonality that would have precluded a comparison between different periods within one year. We also note that the first quarter of 2018 is the most recent period analysed in the context of the dumping POI, and it does not show an increase in the dumped imports' market share, regardless of the point of comparison.[52]

3.39. In view of the foregoing, we reject the Dominican Republic's request to reconsider our conclusions in paragraphs 7.217, 7.231 and 8.1.b.v with respect to the domestic industry's loss of market share, and to make changes to the text of paragraph 7.217.

3.7 Whether the CDC properly considered the positive performance of certain indicators and evaluated the economic factors and indices as a whole: paragraphs 7.231 and 8.1.b.v

3.40. The Dominican Republic requests that we reconsider the conclusions in paragraphs 7.231 and 8.1.b.v of the Interim Report with respect to consideration of the "relative weight" of various factors. The Dominican Republic further requests that we clarify "what exactly [we] require[]" and "whether [we] consider[] that each factor must be examined in the light of the other factors". The Dominican Republic also requests that we identify the legal basis in the Anti-Dumping Agreement that requires an investigating authority to carry out such an examination, and the basis for concluding that the CDC "failed to evaluate all relevant factors …, as it has not identified any factor … that was considered".[53]

3.41. Costa Rica considers that, contrary to the Dominican Republic's claims, the Panel's analysis in section 7.5.3.2.6 is exhaustive and does not require clarifications or additions. Costa Rica considers that the Panel's analysis is appropriately focused on the Investigating Authority's findings. According to Costa Rica, the Dominican Republic requests that the Panel elaborate on the interpretation of Article 3.4 by making statements in the abstract, and does not even explain how the abstract pronouncements it requests could change the findings already made.[54] Costa Rica notes that the title of section 7.5.3.3 and the first sentence of paragraph 7.231 make it clear that the conclusions reproduced in this paragraph stem from the previous analysis set out in paragraphs 7.180-7.230. For Costa Rica, the Panel did not need to repeat these "bases" in paragraph 7.231, which summarizes the conclusions.[55]

3.42. We note that Article 3.4 of the Anti-Dumping Agreement stipulates that "[t]he examination of the impact of the dumped imports on the domestic industry concerned shall include an evaluation of all relevant economic factors and indices". The meaning of "evaluation" has been interpreted by a number of previous panels. As such, in *EC – Tube or Pipe Fittings*, the panel concluded that "an 'evaluation' also implies the analysis of data through placing it in context in terms of the particular evolution of the data pertaining to each factor individually, as well as in relation to other factors examined" and "the investigating authority must … assess the role, relevance and relative weight of each factor".[56] We see no basis to disagree with this interpretation of Article 3.4 of the Anti-Dumping Agreement, nor does the Dominican Republic provide one.

3.43. We therefore reject the Dominican Republic's request to reconsider our conclusions in paragraphs 7.231 and 8.1.b.v with respect to consideration of the "relative weight" of the various factors mentioned in Article 3.4 of the Anti-Dumping Agreement.

3.8 Whether the Dominican Republic acted inconsistently with Articles 3.1 and 3.7: paragraphs 7.264, 7.265, 7.266 and 7.278

[51] Dominican Republic's request for interim review, para. 48.

[52] We note that the parties disagreed about which was the relevant point of comparison, and our conclusions reflect that, regardless of the point of comparison, the CDC's examination of this factor does not constitute a reasoned and adequate explanation as to how the evidence on the record supported the Investigating Authority's conclusion– see paras. 7.214, 7.215 and 7.217 of the Interim Report.

[53] Dominican Republic's request for interim review, paras. 49-50.

[54] Costa Rica's comments on the Dominican Republic's request for interim review, para. 18.

[55] Costa Rica's comments on the Dominican Republic's request for interim review, para. 19.

[56] Panel Report, *EC – Tube or Pipe Fittings*, para. 7.314.

3.44. The Dominican Republic requests that we clarify "where [we] find[] the basis … in Costa Rica's submissions" for the conclusions that we reached with respect to certain elements of the CDC's projections in paragraphs 7.264, 7.265, 7.266 and 7.278 of our report.[57] The Dominican Republic suggests that the Panel may have conducted a *de novo* review.[58]

3.45. Costa Rica considers that the Dominican Republic's request has no merit and should rejected. Costa Rica notes that the Dominican Republic suggests that the Panel conducted a *de novo* review. However, Costa Rica points out that in paragraphs 7.264, 7.265 and 7.278 the Panel is comparing the CDC's analysis against information that was on the record. Costa Rica further notes that paragraphs 7.266 and 7.267 provide, respectively, a summary of the parties' arguments and do not contain the Panel's conclusions, so the Dominican Republic's request does not make sense with regard to these paragraphs. Costa Rica also notes that, in paragraph 7.268, the Panel highlights some of the CDC's conclusions and indicates for each of them where said conclusions are to be found in the record. Therefore, Costa Rica maintains that there is no basis for the Dominican Republic's accusation that the Panel conducted a *de novo* review.[59]

3.46. As a preliminary matter, we recall that nothing limits the faculty of a panel freely to use arguments submitted by any of the parties, or to develop its own legal reasoning, to support its own findings and conclusions on the matter under its consideration, provided that panels are inhibited from addressing legal claims falling outside their terms of reference.[60] In its panel request, Costa Rica requested that we examine whether the Dominican Republic's measures are inconsistent with Article 3.7 of the Anti-Dumping Agreement "because, *inter alia*, the investigating authority based the determination of a threat of material injury not on facts but merely on allegation, conjecture or remote possibility".[61] In its first written submission, Costa Rica developed its claim, mentioning that "the analysis set out in section 7.16 of the Final Technical Report … has a number of shortcomings that undermine the basis of the CDC's conclusion"[62]; that "scenarios 2 and 3 … are predicated on baseless assumptions"[63]; and that "[s]cenarios 2 and 3, which underpin the CDC's alleged finding, are conjecture and are not adequately explained nor supported by positive evidence".[64] In our conclusions, we also note that, under the applicable provisions of the Anti-Dumping Agreement, any projection or assumption made by an investigating authority must be adequately explained and supported by positive evidence on the record.[65] We consider these to be the basis for our analysis of the CDC's projections. Therefore, we do not consider it necessary to make any changes to this section of the Interim Report.

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[57] Dominican Republic's request for interim review, paras. 53-55.
[58] Dominican Republic's request for interim review, para. 52.
[59] Costa Rica's comments on the Dominican Republic's request for interim review, paras. 20-23.
[60] Appellate Body Report, *EC – Hormones (US)*, para. 156.
[61] Panel request, para. 11.
[62] Costa Rica's first written submission, para. 141.
[63] Costa Rica's first written submission, para. 143.
[64] Costa Rica's first written submission, para. 145.
[65] See paras. 7.251 and 7.262 of the Interim Report.

ANNEX B

ARGUMENTS OF THE PARTIES

Contents		Page
Annex B-1	Integrated executive summary of the arguments of Costa Rica	24
Annex B-2	Integrated executive summary of the arguments of the Dominican Republic	46

ANNEX B-1

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF COSTA RICA

I. INTRODUCTION

1. This case is a clear example of failure to comply with the requirements of the Anti-Dumping Agreement and the GATT 1994 for the application of anti-dumping measures. There was no dumping. The Investigating Authority of the Dominican Republic could only find dumping by using different periods of investigation (POIs) for the export price and the normal value, and after having improperly dismissed the exporter's domestic market sales that were made above cost at the time of sale.

2. There was no threat of injury. Quite the contrary, the domestic industry indicators were mostly positive during the POI. Moreover, the Investigating Authority failed to carry out the prospective analysis required under the Anti-Dumping Agreement in cases of a threat of injury, and failed to identify a clearly foreseen and imminent change in circumstances which would create a situation in which the dumping would cause injury. Trends at the end of the POI showed a robust domestic industry and would not have supported a conclusion that the domestic industry was on the verge of material injury.

3. There was also no causal link between imports from Costa Rica and the alleged threat of injury. In fact, the Investigating Authority failed to comply with the affirmative obligation to determine that there was a genuine and substantial relationship between Costa Rica's imports and the alleged threat of injury. The Investigating Authority limited itself to undertaking a non-attribution analysis that fails to comply with the obligations of the Anti-Dumping Agreement. In particular, the non-attribution analysis did not properly consider the effect of imports from China and other third countries during the POI. These imports were made at prices lower than Costa Rica's imports in every year of the POI and at significantly higher volumes.

4. These and other flaws in the investigation are set out in more detail in this submission, in which Costa Rica also responds to the arguments put forward by the Dominican Republic.

II. ARTICLE 2.1 OF THE ANTI-DUMPING AGREEMENT

A. <u>The CDC failed to use comparable prices</u>

5. Article 2.1 of the Anti-Dumping Agreement requires that the export price used for the determination of dumping be "comparable" to the normal value used for that purpose. In this case, the prices used by the Regulatory Commission on Unfair Trade Practices and Safeguard Measures of the Dominican Republic (CDC) were not comparable. The use of "comparable" prices is an express condition of Article 2.1, as stated by the Appellate Body in *US - Hot-Rolled Steel*.[1]

6. The export price used by the CDC reflects the sales made between December 2016 and 30 April 2018. As Costa Rica has explained, the Thorco Logic sale was made by December 2016 at the latest. This is because the material terms of the sale were set out in the contract dated 1 November 2016 and in the invoice dated 13 December 2016. The Suzie Q. sale was also made before the POI. The Dominican Republic has not denied that both sales were made before the POI.

7. On the other hand, the normal value used by the CDC reflects sales made between 2 May 2017 and 30 April 2018. This means that more than five months elapsed between the sales reflected in the export price and the first sales reflected in the normal value. As a result of this difference in the timing of the sales, the export price determined by the CDC in this case cannot be compared with the normal value. As stated by the panel in *US - Stainless Steel (Korea)*, the timing of sales has implications in respect of the comparability of export and home market transactions.[2] Moreover, if the existence of this difference in timing was not sufficient, it is also on the record that market conditions varied significantly in the interval. In particular, the price of billets - the feedstock that the CDC itself found had a significant impact on the price of bars - trended upwards during this period. As demonstrated, the price of billets purchased by the exporting company increased by 12%

[1] Appellate Body Report, *US - Hot-Rolled Steel*, para. 165.
[2] Panel Report, *US - Stainless Steel (Korea)*, para. 6.120.

between January 2017 and May 2017. For this reason, the CDC's determination of dumping is inconsistent with Article 2.1 of the Anti-Dumping Agreement.

B. The CDC failed to determine current dumping

8. The CDC failed to determine that current dumping existed and, for this reason, also acted inconsistently with Article 2.1 of the Anti-Dumping Agreement. The panel in *Pakistan - BOPP Film (UAE)* found that "to act consistently with Article 2.1 a Member's determination of dumping must pertain to current dumping".[3] The CDC's determination of dumping cannot constitute a determination of current dumping. This is because the export price used by the CDC to determine whether there was dumping included a sale completed no later than December 2016, that is, almost six months before the beginning of the POI and more than a year and a half before the initiation of the investigation. Even if the dates applied were those of the sales invoice for the shipments subsequently transported on the ships the Thorco Logic and Suzie Q., the CDC would still have used sales made prior to the POI, more than one year before the initiation of the investigation, so it would still have failed to demonstrate the existence of current dumping.

C. The Dominican Republic's arguments fail to rebut Costa Rica's *prima facie* case

9. The Dominican Republic's arguments focus erroneously on the definition of the POI and fail to respond to Costa Rica's arguments. As Costa Rica explained, the CDC used two sales made *before* the POI in the case of the export price. One of these sales was made at least *five months before* the POI. As a result, the CDC failed to use "comparable" prices and failed to determine current dumping. The Dominican Republic also focuses erroneously on the use of the term "introduced" in Article 2.1. The Dominican Republic fails to mention that the focus of Article 2.1 is on the prices of the exported product and the price for the like product when destined for consumption in the exporting country. Prices have to be "comparable" and this includes a temporal element that requires prices reflect sales made at as nearly as possible the same time.

10. The Dominican Republic also fails to reflect correctly what happened in this case. While the Costa Rican exporter included the sales subsequently transported on the ships the Thorco Logic and Suzie Q. in the questionnaire, the exporter explained, in the same document, the particular situation of those sales. It is understandable that the exporter included more information than was strictly necessary in view of the possible adverse consequences if the CDC considered the exporter's response to be incomplete. In any event, the fact that the exporter included sales in the questionnaire responses does not exempt the CDC, as the Investigating Authority, from ensuring that the prices used in the determination of dumping were "comparable".

11. Lastly, the Dominican Republic argues that the invoices for the two transactions predate the beginning of the POI by one month for one sale, and by three days for the other. This claim is also without merit. First, the sale shipped on the Thorco Logic was made no later than December 2016, i.e. at least five months before the beginning of the POI. In this case, the time that elapsed between when the sale was made and the beginning of the POI is considerably longer than the Dominican Republic suggests. In the case of the sale of the Suzie Q. shipment, less time had elapsed, but it is still true that the sale was made before the beginning of the POI. For all of these reasons, the Dominican Republic's arguments fail to rebut the *prima facie* case put forward by Costa Rica.

III. ARTICLE 2.4 OF THE ANTI-DUMPING AGREEMENT

A. The CDC failed to make a comparison in respect of sales made at as nearly as possible the same time

12. The second sentence of Article 2.4 provides that the comparison between the export price and the normal value shall be made "in respect of sales made at as nearly as possible the same time". It is clear from this provision that the benchmark to be taken into account for the purposes of comparison is the date of sale. The date of sale is the date on which material terms of sale are established, in accordance with footnote 8 of Article 2 of the Anti-Dumping Agreement, which stipulates that "[n]ormally, the date of sale would be the date of contract, purchase order, order confirmation, or invoice, whichever establishes the material terms of sale". At the very least, the footnote, which forms an integral part of Article 2, provides guidance on the context for the interpretation of Article 2.4. Footnote 8 refers specifically to the interpretative question at issue in

[3] Panel Report, *Pakistan - BOPP Film (UAE)*, para. 7.59.

this dispute. The use of the word "[n]ormally" indicates, precisely, that the footnote's provisions are generally applicable. It is therefore indisputable that the definition of "date of sale" in footnote 8 is relevant to the concept of "sales made" in Article 2.4 and supports the interpretation that, for the purposes of that Article, they shall be considered "sales made" at the moment that the material terms of sale are established, and not at the moment of importation.

13. The material conditions of the sale that was subsequently shipped on the Thorco Logic were established in the contract of 1 November 2016 and the invoice of 13 December 2016, i.e. they were established in December 2016 at the latest. In the case of the shipment that was subsequently transported on the Suzie Q., the material conditions of the sale were established in the sales invoice, which is dated 27 April 2017. The shipments' date of entry into the Dominican Republic is not the date of sale. There is no finding by the CDC on the record indicating that the material conditions of both sales were established on the date of *entry* into the Dominican Republic. In contrast, for the purposes of the normal value, the CDC used the invoice date as the benchmark, and the invoices used were those issued between 2 May 2017 and 30 April 2018. Therefore, the sales are not "sales made at as nearly as possible the same time".

B. <u>The CDC failed to make a fair comparison</u>

14. The first sentence of Article 2.4 provides that investigating authorities shall make "[a] fair comparison ... between the export price and the normal value". The term "fair" denotes "impartiality, even-handedness, or lack of bias".[4] Accordingly, the CDC was required to make an impartial, even-handed and unbiased comparison. If there are elements in the comparison that make an affirmative determination of dumping or a higher margin more likely, the comparison could not be considered impartial, even-handed or unbiased.

15. In this case, the CDC comparison was not impartial, even-handed or unbiased, as the CDC used different POIs for the export price and the normal value. The date of sale affects price comparability, as expressly recognized in the second sentence of Article 2.4. Using different POIs leads to the comparison of transactions made at different times and that reflect disparate market conditions. In cases like this one, where the cost of the feedstock is rising and that cost has a significant impact on the price of the final product, using a POI for the export price that predates the normal value POI tends to make an affirmative determination of dumping, as well as a higher margin, more likely. This is because the export price in the earlier POI will tend to be lower (reflecting the lower cost of the feedstock) than the normal value in the later POI. In this instance, the CDC's record contained evidence that the price of the feedstock had increased between December 2016 and May 2017. In view of the foregoing, the comparison made by the CDC fails to comply with the first sentence of Article 2.4.

C. <u>The CDC violated Article 2.4 by failing to make due allowance for differences which affect price comparability</u>

16. The third sentence of Article 2.4 of the Anti-Dumping Agreement provides that investigating authorities shall make "[d]ue allowance ... in each case, on its merits, for differences which affect price comparability". In *US – Softwood Lumber V*, the panel noted that an investigating authority "must at least evaluate identified differences", and when it is "in possession of the requisite evidence substantiating a claimed adjustment would not be justified in rejecting that claimed adjustment".[5]

17. Meanwhile, the last sentence of Article 2.4 states that "[t]he 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". The process under Article 2.4 has been described as a "dialogue" between interested parties and the investigating authority.[6] While exporters must substantiate, "as constructively as possible", their requests for adjustments, "[i]nvestigating authorities must ... indicate what information they will need in order to ensure a fair comparison, 'so that the interested parties will be in a position to make the requested adjustments'" and cannot impose "an unreasonable burden of proof" on those parties.[7]

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[4] Report of the Appellate Body, *US - Softwood Lumber V (Article 21.5 - Canada)*, para. 138 (referring to *Shorter Oxford English Dictionary*, 5th edn, W.R. Trumble, A. Stevenson (eds) (Oxford University Press, 2002), Vol. 1, p. 915).

[5] Panel Report, *US - Softwood Lumber V*, paras. 7.165 and 7.167.

[6] See, for example, Panel Report, *Egypt - Steel Rebar*, para. 7.352.

[7] Panel Report, *Pakistan - BOPP Film (UAE)*, paras. 7.200-7.201. (fns omitted) See also Appellate Body Report, *EC - Fasteners (China)*, paras. 487-489.

18. The Costa Rican exporter learned that the CDC had used sales made prior to the POI in the Essential Facts Report. The company immediately sought to initiate a dialogue with the Investigating Authority on the need to make adjustments. In its comments on the Essential Facts Report, the exporter (i) noted that the sales of the bars shipped on the Thorco Logic and Suzie Q. were made before the POI; (ii) explained why including these sales gave rise to differences that affected price comparability; and (iii) explicitly invoked Article 2.4 of the Anti-Dumping Agreement. It is therefore clear that the exporter fulfilled its obligations under Article 2.4. It is also clear that the differences affected price comparability. As the CDC itself found, the price of billets has a significant impact on the price of the bars. Table 5 of the Final Technical Report shows that this component - which the CDC itself found was significant - was different (i.e. not comparable) before the POI and after the POI. Thus, this difference in the cost of the bars' main feedstock is, in this case, a determinative difference in terms of price comparability.

19. The CDC refused to proceed with the dialogue that the exporter attempted to initiate. Moreover, the CDC failed to comply with the obligation, expressly provided for in Article 2.4, to indicate to the exporter what information was necessary to ensure a fair comparison. Instead of complying with its obligations under Article 2.4, the CDC chose to blame the exporter for allegedly failing to provide evidence in order to make a fair comparison with respect to the normal value for dates prior to the POI. However, the CDC was required to "at least evaluate identified differences". The CDC failed to do so. In view of the foregoing, Costa Rica has demonstrated that the CDC violated its obligations under the third sentence of Article 2.4 of the Anti-Dumping Agreement.

D. The Dominican Republic's arguments fail to rebut Costa Rica's *prima facie* case

20. In its failed attempt to rebut Costa Rica's claim under Article 2.4, the Dominican Republic repeats the same arguments that it made against the claim under Article 2.1. Costa Rica responded to these arguments in section II.C.

21. The Dominican Republic also claims that allegedly: (i) the Costa Rican exporter failed to make the case that an adjustment was necessary; and (ii) the Costa Rican exporter failed to provide evidence of a difference affecting comparability. Both arguments are flawed. First, both arguments only address Costa Rica's third argument, which contends that the CDC failed to make due allowance for differences which affect price comparability. Neither of the two arguments put forward by the Dominican Republic address Costa Rica's arguments under the first and second sentences of Article 2.4. Second, the Dominican Republic's arguments are based on a partial description of what happened during the investigation. As mentioned above, the exporter learned that the CDC had used sales made before the POI in the Essential Facts Report. In its comments on that report, the exporter clearly raised the issue of comparability and invoked Article 2.4. The exporter did provide evidence of differences which affected comparability, as it submitted, among other evidence, information on the evolution of prices of billets in the period prior to the POI. In contrast, the Dominican Republic has failed to point to anything that shows that the CDC entered into the dialogue required with the exporter. It has also failed to point to anything that shows that the CDC had indicated to the exporter what information was necessary to ensure a fair comparison. In short, the Dominican Republic's arguments fail to rebut the *prima facie* case put forward by Costa Rica. Costa Rica therefore respectfully requests that the Panel find that the CDC violated the obligations set forth in Article 2.4 of the Anti-Dumping Agreement.

IV. Article 2.2.1 of the Anti-Dumping Agreement

A. The CDC violated Article 2.2.1 because it failed to determine that below-cost sales were made within an extended period of time or at prices which did not provide for the recovery of all costs within a reasonable period of time

22. Article 2.2.1 of the Anti-Dumping Agreement explicitly requires that the investigating authority, before disregarding sales for not being in the ordinary course of trade by reason of price, determine that: (i) these sales have been made within an extended period of time; (ii) in substantial quantities; (iii) and at prices which do not provide for recovery of all costs within a reasonable period of time. The use of the conjunction "and" means that each of these three elements are concurrent so they must all be present, and that the investigating authority must make an affirmative determination on each of them. The panel in *EC - Salmon (Norway)* noted that the three conditions set out in Article 2.2.1 are required and cumulative. It also stressed that "below-cost sales may be

found to be made outside of the ordinary course of trade only when all three of the conditions in Article 2.2.1 are satisfied".[8]

23. The Final Technical Report contains no indication that the CDC determined that the below-cost sales were made within an extended period of time or at prices which did not provide for the recovery of all costs within a reasonable period of time. These determinations are not documented in the Final Technical Report, in particular in section 5.5.1 on "Cost Test". Nor are they documented in the final determination. Therefore, there is no evidence that the CDC did meet these two requirements under Article 2.2.1.

B. The CDC failed to give due consideration to whether prices were below per unit costs at the time of sale

24. The first sentence of Article 2.2.1 refers to sales of the like product in the domestic market of the exporting country at prices below per unit costs. The last sentence of Article 2.2.1 makes it clear that the reference is to prices which are below per unit costs at the *time of sale*. In particular, the beginning of the last sentence of Article 2.2.1 reads: "If prices which are below per unit costs at the *time of sale*". This language is a clear reference to the analysis under the first sentence of Article 2.2.1 and indicates that this analysis must specify if, at the *time of sale*, the prices of each sale were below the per unit costs that prevailed at the time of that sale.

25. In this particular case, the CDC had details of monthly average costs that would have allowed it to properly determine whether the prices were below per unit costs *at the time of sale*. The monthly average cost for the month in which the sale was made is nearer the date of sale, and therefore better reflects the cost incurred by the company at the time of sale. However, instead of using monthly costs, the CDC used a weighted average cost methodology for a period of one year for the cost test. The annual average cost reflects trends that occurred in months other than the month of the sale. When the costs rise steadily during the period of investigation, as they did in this case, the annual average cost will tend to be higher than the monthly cost at the beginning of the period. This in turn means that, artificially, certain sales are at below-cost prices when, in reality, the selling price was higher than the per unit cost at the *time of sale*. Thus, the use of an annual average cost in this case implies that the CDC has not properly determined whether prices were below per unit costs at the *time of sale*. Given that the CDC did not make the comparison required by Article 2.2.1, and that it failed to provide an explanation as to why it was appropriate in this particular case to make a comparison using an annual weighted average cost, the CDC did not fulfil the obligations set forth in Article 2.2.1.

C. The Dominican Republic's arguments fail to rebut Costa Rica's *prima facie* case

26. Contrary to the Dominican Republic's claims, neither paragraph 193 nor table 8 of the Final Technical Report demonstrate that the CDC complied with the third condition under Article 2.2.1. Paragraph 193 indicates that the CDC considered that the average costs submitted by the exporter were "appropriate" and the CDC states that it used those costs. The production costs are then reproduced in table 8. However, neither paragraph 193 nor table 8 show that the CDC actually fulfilled the obligation under Article 2.2.1 to determine that the sales were made at prices which did not provide for the recovery of all costs within a reasonable period of time. Therefore, the paragraph and table cited by the Dominican Republic do not rebut Costa Rica's claim.

27. Second, even assuming that Article 2.2.1 does not require a specific methodology, the methodology selected by the investigating authority must comply with the three conditions set forth in Article 2.2.1, and the final report must show how these conditions have been met. In this case, the Final Technical Report does not disclose which methodology the CDC used, nor does it show how two of the three conditions under Article 2.2.1 were met. The explanations provided by the Dominican Republic concerning the methodology used by the CDC are all *ex post* explanations.

28. The Dominican Republic's third argument also has no merit. Even if Article 2.2.1 did not require an affirmative determination for each stage of the test, the investigating authority's final report must show that the three conditions under Article 2.2.1 have been met. Costa Rica reiterates that the three conditions set forth in Article 2.2.1 are required and cumulative, and that "below-cost sales may be found to be made outside of the ordinary course of trade only when all three of the conditions

[8] Panel Report, *EC - Salmon (Norway)*, para. 7.315.

in Article 2.2.1 are satisfied".[9] In this instance, neither the Final Technical Report nor the final determination show that two of the three conditions set out in Article 2.2.1 were met.

29. Fourth, the fact that the CDC has used data from one year does not satisfy the condition that below-cost sales have been made within an extended period of time. The determination of whether blow-cost sales occurred "within an extended period of time" requires the investigating authority to analyse the regularity of below-cost sales. For example, the investigating authority may analyse whether such sales were made over several consecutive months or whether they recurred over several months of the POI. Thus, the investigating authority would ensure that below-cost sales were not isolated, intermittent or one-off events. In this case, neither the Final Technical Report nor the final determination can confirm that the CDC conducted this analysis.

30. Fifth, the Dominican Republic argues that the below-cost sales prices were below cost during the POI, so they did not provide for the recovery of all costs within a reasonable period of time. Again, this explanation is not given in the Final Technical Report or in the final determination, and is an *ex post* explanation.

31. The Dominican Republic also claims that the Anti-Dumping Agreement does not require the use of monthly averages over annual averages and, therefore, there is no legal basis requiring the use of monthly average cost data when conducting the third test under Article 2.2.1. Costa Rica considers the Dominican Republic's argument to be flawed. The analysis under Article 2.2.1 must identify whether, *at the time of sale*, the prices of each sale were below per unit costs at the time of that sale. The CDC had access to monthly average costs that would have allowed it to properly determine whether the prices were below per unit costs *at the time of sale*. The use of an annual average cost in this case implied that the CDC did not properly determine whether prices were below per unit costs at the *time of sale*.

32. Lastly, the Dominican Republic claims that the CDC used the cost information that the exporter had allegedly provided. This is incorrect. As Costa Rica explained, the CDC requested data by year in its form. However, during the verification visit, the exporter explained to the CDC representatives that the monthly cost should be used for the cost-benefit analysis. The CDC accepted this proposal and requested the monthly costs, which were submitted to the CDC. Monthly costs were also included in the exporter's document of November 2019. Costa Rica notes that the Dominican Republic has submitted an Excel file that the CDC allegedly used to carry out the cost test. However, nothing in the Excel file corroborates that it was part of the record of the investigation. Without that corroboration, the Panel should disregard the Excel file as an *ex post* explanation.

33. For all of the above reasons, the Dominican Republic's arguments fail to rebut Costa Rica's *prima facie case*, and Costa Rica respectfully requests that the Panel find that the CDC acted inconsistently with Article 2.2.1 the Anti-Dumping Agreement.

V. ARTICLES 3.1 AND 3.2 OF THE ANTI-DUMPING AGREEMENT

A. Price undercutting

34. Article 3.2 requires that the investigating authorities consider whether the "effect of the dumped imports on prices" is a significant price undercutting by the dumped imports as compared with the price of a like product of the importing Member.[10] In this case, contrary to the provisions of Article 3.2 and the findings of the panel in *China - Broiler Products (Article 21.5 - US)*, the CDC's undercutting analysis failed to address the question of whether observed movements in domestic prices were the effect of the prices of the imports from Costa Rica.

35. The prices of imports from Costa Rica increased steadily during the POI and the alleged undercutting margin decreased significantly over the same period. The CDC acknowledged that the undercutting margin trended downwards, but the Final Technical Report does not reflect that the CDC considered this trend. After indicating that the undercutting margin in 2016 was the highest and the margin for the period from January to April 2018 was the lowest, the CDC merely asserts that "[t]his coincides with a contraction in domestic sales of the domestic industry in 2017 and an increase in Costa Rican imports for the same year". This observation concerns just one year of the POI and fails to consider trends over the period, nor does it explain the relationship between the allegedly dumped imports and the domestic industry's prices. Consequently, this assessment of the

[9] Panel Report, *EC - Salmon (Norway)*, para. 7.315.
[10] Panel Report, *Pakistan - BOPP Film (UAE)*, para. 7.297.

alleged coincidence in 2017 does not demonstrate that the CDC has properly considered the effects of the imports.

36. The CDC also fails to explain how the undercutting could have been the effect of the imports from Costa Rica, considering that imports from China and other countries were entering the Dominican market at significantly lower prices than the prices of Costa Rican imports. In the same year, the volume of imports from China (34,065.48 metric tonnes) was more than 2.5 times the volume imported from Costa Rica. In this context, the price of Costa Rica's imports would barely have had an effect on the domestic industry's prices. The Final Technical Report also shows that, in 2017, with the exception of Chinese imports that were subject to an anti-dumping duty, Costa Rica's imports had the highest price of imports to the Dominican Republic. The Final Technical Report shows that imports from Italy, Japan, Mexico, Spain, Chinese Taipei and the United States entered at prices lower than those of imports from Costa Rica, and that the total volume of those imports was significantly higher than the volume imported from Costa Rica. The same was true in the first four months of 2018, when all other sources of imports recorded lower prices than those of imports from Costa Rica, and the volume of imports from those sources was more than three times the volume of imports from Costa Rica. Once again, in these circumstances, imports from Costa Rica could hardly have had an effect on the domestic industry's prices. In view of the foregoing, the CDC's price undercutting analysis fails to comply with Article 3.2 of the Anti-Dumping Agreement, considered in conjunction with Article 3.1.

37. The Dominican Republic claims, first, that undercutting does not include any effects-based element. This argument is not supported by the text of Article 3.2. The opening clause of the second sentence of Article 3.2 refers to "the effect of the dumped imports on prices". This opening clause applies to price undercutting, as well as price depression and price suppression. This was confirmed by the panel in *China - Broiler Products (Article 21.5 - US)*.[11] Therefore, to comply with Article 3.2, it is not sufficient that the investigating authority simply compares the price of the allegedly dumped product and the domestic industry price. Second, the Dominican Republic highlights the undercutting margin. However, the import prices of China and other countries were lower than the price of imports from Costa Rica throughout the entire POI. The CDC failed to consider this and therefore failed to properly consider whether it was, in fact, imports from Costa Rica that were having an effect on the domestic industry's prices. In conclusion, the Dominican Republic's arguments fail to rebut Costa Rica's *prima facie* case.

B. Price depression

38. There was no price depression in the POI. On the contrary, the record shows that the trend throughout the POI was for the domestic industry's prices to increase. The applicant company acknowledged that "as of December 2017, there is evidence of a 13% increase in the domestic industry's prices when compared to December 2016" and that the domestic industry's domestic market price "increased by 4%" between April 2017 and April 2018. The absence of price depression can also be seen in table 24 of the Final Technical Report. While the domestic industry's prices fell in 2016, these prices rose in 2017 and continued to rise in 2018. In fact, the price in 2018 is almost at the same level as in 2015. There is therefore no decreasing trend in prices that justifies a finding of price depression under the second sentence of Article 3.2. In conclusion, the CDC's price undercutting analysis fails to comply with Article 3.2 of the Anti-Dumping Agreement, considered in conjunction with Article 3.1.

39. In its arguments in response, the Dominican Republic focuses on the price difference between 2015 and 2017. However, this perspective fails to satisfy the requirements under Articles 3.1 and 3.2 for a number of reasons. First, this is an incomplete view because it fails to consider price developments throughout the entire POI. The four-month period of 2018 is part of the POI established by the CDC and what happened during that period cannot be ignored. The domestic industry's price between January and April 2018 was at almost the same level as that of 2015.

40. Second, the Dominican Republic's argument improperly disregards the trends *within* the POI. The domestic industry's price rose between 2016 and 2017, and continued to rise in the period January-April 2018. The prevailing trend within the POI is one of growth. Moreover, the CDC failed to consider the prices of imports from other sources in its analysis. Imports from China and other sources entered at lower prices than Costa Rica's imports throughout the entire POI, and imports from China and other sources accounted for a significantly larger volume than those from Costa Rica. The CDC should have taken this information into account when considering whether the alleged price

[11] Panel Report, *China - Broiler Products (Article 21.5 - US)*, para. 7.98.

depression was the effect of imports from Costa Rica. This was particularly important as the CDC referred generally to "the high elasticity of substitution between imported and domestically-produced bars due to the product's homogeneity", which is an acknowledgement that domestic bars could be supplanted by imported bars from sources other than Costa Rica.

41. The Dominican Republic also claims that the CDC considered that the price rise in the first four months of 2018 could be explained by the increase in the price of billets. Assuming that this were true, it would instead lead to the summary dismissal of the conclusion that there was price *depression* in the POI, as it is rather an acknowledgement by the CDC itself that prices were *increasing*. In short, the Dominican Republic's arguments fail to rebut Costa Rica's *prima facie* case.

C. Price suppression

42. Costa Rica has further demonstrated that the CDC failed to properly consider whether there was price suppression and, much less, whether this alleged suppression was an effect of Costa Rica's imports. The CDC's price suppression analysis was based on a comparison between the domestic industry's prices and its alleged average total costs. The analysis failed to consider imports from Costa Rica. Neither the Final Technical Report nor table 24 refer to imports from Costa Rica. In this respect, neither the sections nor table 24 demonstrate a relationship with imports from Costa Rica or that the domestic industry's alleged inability to increase the price was the effect of imports from Costa Rica. Given that the CDC did not consider imports from Costa Rica in its price suppression analysis, it failed to comply with the requirement under Article 3.2 to consider whether price suppression was the effect of allegedly dumped imports.

43. First, the Dominican Republic seeks to justify the CDC's actions by referring to paragraph 439 of the Final Technical Report, which is in another section of that report. In that paragraph, the CDC makes reference to the volume of imports from Costa Rica, and states that imports from Costa Rica "account for more than 3% of the total volume of Dominican imports of steel bars and rods". This paragraph does not reflect that the CDC has considered whether price suppression was the effect of imports from Costa Rica, but simply refers to a volume of more than 3% of the total volume of imports. In any event, this paragraph contains no evidence of an analysis of trends during the POI, nor does it explain why the entry of Costa Rican imports prevented the domestic industry from raising its prices, let alone provide any estimate that quantifies and objectively supports that presumption of suppression of the domestic industry's prices.

44. Second, the Dominican Republic claims that "the price depression of the cost prices referred to by the CDC was clearly correlated with the increase in dumped imports". It is not clear to Costa Rica to what the Dominican Republic is referring with "price depression of the cost prices". To the extent that the Dominican Republic refers to price depression, the argument is flawed. As indicated above, there was no depression of the domestic industry's prices. To the extent that it is referring to the margin between the domestic industry's prices and costs, the Dominican Republic fails to identify where the CDC analyses the relationship between the alleged depression of the domestic industry's price/cost margin and the Costa Rican imports. Costa Rica reiterates that the section of the Final Technical Report on "Price suppression" does not refer to imports from Costa Rica, nor does it provide any estimates that objectively support the alleged suppression of the domestic industry's prices. The Dominican Republic's argument is *ex post* and is not properly supported.

45. Third, the Dominican Republic claims that Costa Rica's argument on price suppression concerns non-attribution, and that Article 3.2 does not require a non-attribution analysis. However, what Costa Rica claims is that the alleged price suppression analysis by the CDC failed to consider whether the effect of the imports from Costa Rica was to prevent to a significant degree, the alleged price increases, which would otherwise have occurred. This is precisely the analysis that the second sentence of Article 3.2 requires, and is not a non-attribution analysis. As the Appellate Body stated in *China - GOES*, an investigating authority may not disregard evidence that calls into question the explanatory force of subject imports for significant suppression of domestic prices. Rather, where an authority is faced with elements other than subject imports that may explain the significant suppression of domestic prices, it must consider relevant evidence pertaining to this element for purposes of understanding whether subject imports indeed have a suppressive effect on domestic prices.[12] For the foregoing reasons, the Dominican Republic has failed to rebut Costa Rica's *prima facie* case that the price suppression analysis by the CDC does not comply with the requirements under Article 3.2 of the Anti-Dumping Agreement, considered in conjunction with Article 3.1.

[12] Appellate Body Report, *China - GOES*, para. 152.

VI. ARTICLES 3.1 AND 3.4 OF THE ANTI-DUMPING AGREEMENT

46. Article 3.4 is applicable in cases of threat of injury such as this. As confirmed by the panel in *Mexico - Corn Syrup*, "consideration of the Article 3.4 factors in examining the consequent impact of imports is required in a case involving threat of injury in order to make a determination consistent with the requirements of Articles 3.1 and 3.7".[13]

47. The analysis of the factors listed in Article 3.4 "could not take into account only factors which support an affirmative determination, but would have to account for all relevant factors, including those which detract from an affirmative determination, and explain why the particular factors considered were deemed relevant".[14] In this regard, the panel in *Thailand - H-Beams* noted that "such positive movements in a number of factors would require a compelling explanation of why and how, in light of such apparent positive trends, the domestic industry was, or remained, injured within the meaning of the Agreement". Where several factors show positive trends, the situation requires "a thorough and persuasive explanation as to whether and how such positive movements were outweighed by any other factors and indices which might be moving in a negative direction during the IP".[15] Furthermore, the obligation to "evaluat[e]" under Article 3.4 "require[s] an analysis and interpretation of the data relating to the economic factors and indices, and an assessment of the 'role, relevance and relative weight of each factor in the particular investigation'".[16]

48. Article 3.4 also requires the investigating authorities to examine "the impact of the ... imports on the domestic industry concerned". As noted by the panel in *Pakistan - BOPP Film (UAE)*, "the text of Article 3.4 creates a link between dumped imports and the state of the domestic industry". This implies that "an investigating authority is required to identify the trends in the injury factors and place those trends in the relevant context that is informative of the injury suffered by the domestic industry, taking into account the relevant evidence and explanations that are on its record". Furthermore, "[w]here the evidence on the investigating authority's record suggests alternative readings of the trends observed, an objective examination would include considering that evidence, and reconciling it with the authority's reading of the trends it observes".

49. An investigating authority's examination under Article 3.4 must also comply with Article 3.1, which requires that a determination of threat of injury be based on positive evidence and involve an objective examination of the impact of the dumped imports on domestic producers of such products.[17]

50. In this case, several of the economic factors and indices of the domestic industry showed positive trends. The following factors performed positively during the investigation period or at least in the first four months of 2018: the volume and value of the domestic industry's domestic market sales; output; productivity; utilization of productive capacity; return on investments; inventories; and the ability to raise capital or investments. Neither the Final Technical Report nor the final determination shows how the CDC evaluated these indicators. Considering that several factors showed positive trends, it was incumbent upon the CDC to provide a thorough and persuasive explanation as to how such positive movements were outweighed by factors and indices which might be moving in a negative direction during the period of investigation.[18] The CDC fails to provide any such explanation in the Final Technical Report or in the final determination.

51. Moreover, the CDC failed to properly evaluate the factors it identified as negative, in particular profits, cash flow, employment and the loss of market share allegedly attributable to Costa Rican imports. Regarding profits, the CDC's assertion is not supported by the information on the record. The CDC itself found that the domestic sales of the domestic industry had *increased* in terms of volume in 2016 and January-April 2018, and in terms of value in January-April 2018. The figures on

[13] Panel Report, *Mexico - Corn Syrup*, para. 7.127.
[14] Panel Report, *Mexico - Corn Syrup*, para. 7.133.
[15] Panel Report, *Thailand - H-Beams*, para. 7.249. See also Panel Report, *China - Cellulose Pulp*, para. 7.129.
[16] Panel Report, *Pakistan - BOPP Film (UAE)*, para. 7.351 (referring to Panel Report, *EC - Bed Linen (Article 21.5 - India)*, para. 6.162, and Panel Report, *Egypt - Steel Rebar*, paras. 7.43-7.44). The panel further noted that "[t]herefore, an investigating authority may not limit itself to setting out trends relating to the economic factors and indices". (Ibid.)
[17] Panel Report, *Pakistan - BOPP Film (UAE)*, para. 7.366.
[18] Panel Report, *Thailand - H-Beams*, para. 7.249. See also Panel Report, *China - Cellulose Pulp*, para. 7.129.

the record therefore contradict the CDC's conclusion regarding the alleged coincidence between the contraction in profits and the decline in sales of the domestic industry.

52. Nor does the CDC provide any basis for asserting that the alleged reduction in the profit margin recorded by the domestic industry occurred "as a result of the entry into the country of Costa Rican imports at dumped prices". Imports from Costa Rica accounted for up to 10% of apparent consumption in the Dominican market, and their share of apparent consumption fell to 6% in the period January-April 2018. Furthermore, the price of imports from Costa Rica increased during the POI. During this period, the domestic industry increased its output and sales. This undermines any suggestion that the decline in profits (or in the profit margin of the domestic industry) is attributable to imports from Costa Rica. It also undermines the assertion that the cash flow performance was attributable to the fall in profits as a result of Costa Rica's dumping practices.

53. Employment performance is mixed or even stable, and not negative as suggested by the CDC. Total employment increased during the investigation period and then fell to its initial level. Moreover, the domestic industry's productivity improved significantly (53.4%) in the last four months of the investigation period. In this context, the CDC was under an obligation to explain why the change in direct labour showed that the domestic industry was in a state of vulnerability rather than on a path towards greater efficiency.

54. The last negative factor referred to by the CDC is the domestic industry's loss of market share allegedly attributable to Costa Rican imports. The domestic industry's lost share of 4 percentage points between 2017 and January-April 2018 cannot be attributed to imports from Costa Rica, since the latter also lost market share. Even when comparing the period January-April 2018 to the period January-April 2017, the decline in the domestic industry's share cannot be attributed to imports from Costa Rica since the market share of the latter did not increase. Therefore, the CDC's conclusion that the domestic industry's loss of market share is attributable to Costa Rican imports is not based on an objective evaluation or positive evidence.

55. In sum, in this case, the rate of change for several factors during the POI was positive. However, the CDC failed to properly explain why these movements were outweighed by the factors on which it based its determination of alleged threat of injury. Furthermore, the CDC's findings concerning the alleged negative factors are not based on an objective evaluation or positive evidence. Moreover, the CDC failed to provide a reasoned explanation as to how the CDC considered these indicators in their entirety.

56. The CDC also failed to satisfy the obligation to properly examine the link between the dumped imports and the state of the domestic industry. Article 3.4 required the CDC to examine "the impact of the ... imports on the domestic industry concerned". However, the CDC failed to consider the relationship between the economic factors and indices, and did not properly examine the link with the allegedly dumped imports. The CDC failed to properly consider the economic factors and indices in a broader context in order to understand the impact of the dumped imports on the domestic industry. Nor is there any explanation as to how the CDC evaluated these indicators when analysing whether imminent further subject imports would affect the industry's state in such a manner that material injury would occur in the absence of protective action. For all of the above reasons, Costa Rica has established that the CDC violated Article 3.4 of the Anti-Dumping Agreement, read together with Article 3.1.

57. In its first written submission, the Dominican Republic only cited one paragraph of the Final Technical Report in its attempt to show that the CDC did consider the relationship between the factors and indices. In that paragraph, however, the CDC only "highlighted certain factors" without relating them to other economic factors and indices. The paragraph cited by the Dominican Republic does not consider the evolution of the domestic industry's sales volume, production, productivity, inventories or ability to raise capital or investments, each of which showed a positive trend at the end of the investigation period. Nor did the CDC consider the very high rate of return on investment throughout the POI. The CDC itself found that "the performance of the domestic industry's investments was positive throughout the period reviewed, reflecting high rates of return on investment". However, there is no indication that the CDC weighed this factor in its analysis.

58. Contrary to the Dominican Republic's claims, Costa Rica's argument is not *de novo*, but is based on the CDC's findings, which show that several of the factors and indicators displayed positive

trends, but that the CDC failed to evaluate them as it should have done pursuant to Article 3.4. Moreover, the period from January to April 2018 is part of the POI and, therefore, the CDC should not have ignored trends during this period. In a threat of injury case such as this, trends at the end of the POI are important for understanding whether the change in circumstances which would create a situation in which the dumping would cause injury is clearly foreseen and imminent.

VII. ARTICLE 3.7 OF THE ANTI-DUMPING AGREEMENT

59. The CDC's determination of threat of injury in this case violated Article 3.7 because the CDC failed to properly consider the factors identified in that provision, and the record does not show that a change in circumstances which would create a situation in which the dumping would cause injury was clearly foreseen and imminent. Quite the contrary, the record shows a domestic industry with a very high profitability rate and with indicators clearly trending upwards.

A. <u>Likelihood of entry of further imports</u>

60. Costa Rica has demonstrated that the CDC's analysis of the likelihood of entry of further imports does not comply with Article 3.7 of the Anti-Dumping Agreement. The CDC addressed the likelihood of entry of further Costa Rican imports in section 7.16 of the Final Technical Report and, to that end, used what it claimed was a Monte Carlo estimate, but that in reality was not supported by historical data, and instead of iteratively repeating the estimate a large number of times, it appears to have limited itself to essentially considering two alternative and mutually exclusive scenarios, the parameters of which were defined in a completely arbitrary manner. It should be recalled that Article 3.7 of the Anti-Dumping Agreement expressly prohibits the determination of a threat of injury based on conjecture. The grounds forming the basis for a threat of injury determination cannot include figures resulting from a calculation based on scenarios that are defined arbitrarily using unsubstantiated theoretical assumptions, when the correct thing to do would have been to base the determination on facts.

61. The Final Technical Report presents three scenarios. The first scenario (baseline) arbitrarily assumes that the trend observed in 2017-2018 will continue exactly the same and unchanged in the years to come, with imports increasing by 2.66% a year until 2022. The second scenario (price adjustment) assumes that the prices of bars will fall and that, in turn, the demand for bars from all sources will increase. In this scenario, the CDC projects that imports, including those from Costa Rica, will increase by 7.48% a year until 2022. The third scenario (quantity adjustment) assumes that the domestic industry will simply allow its production to be displaced by imports, a highly unlikely reaction from the domestic industry. Such a decision by the domestic industry would imply irrational behaviour, that it was resigning itself to being unable to compete with imports and to handing over a large part of its market share, just because it did not want to lower prices. In this scenario, imports from Costa Rica are alleged to increase (and displace domestic production) more rapidly, particularly in the early years. As indicated in table 40, the annual growth rates for imports from Costa Rica in this third scenario would be: 88% between 2017 and 2018, 47% between 2018 and 2019, 32% between 2019 and 2020, 2.66% between 2020 and 2021, and 2.66% between 2021 and 2022.

62. While the CDC substantiates the threat of injury in scenarios 2 and 3, both scenarios are extreme and are predicated on baseless assumptions. In the second scenario, no explanation is provided as to the cause of the drop in the price or its magnitude, or as to how the CDC determined these factors or estimated the increase in demand that would allegedly result from the drop in the price. As for the third scenario, no basis is provided for the various assumed growth rates for imports from Costa Rica in the early years, or for the assumption that the domestic industry would simply remain unperturbed and let its production be displaced by imports. Such an explanation is particularly necessary in this case, as the applicant company holds a dominant position in the market, something that the CDC fails to analyse or question, and, in any event, such behaviour would not be rational for a company like this, which holds substantial power in its domestic market.

63. Another shortcoming is that the CDC fails to substantiate its premise regarding the likelihood of <u>substantially</u> increased imports. In the table 40 exercise, the increase in imports is merely assumed (either directly or indirectly), and the CDC fails to assess the likelihood of how these scenarios occur and what happens in each of them. For the foregoing reasons, the CDC's conclusions are inconsistent with Article 3.7(i) of the Anti-Dumping Agreement.

64. The Dominican Republic claims that "the CDC's actual analysis of this factor in Article 3.7 is based on an analysis of the volumes of dumped imports from Costa Rica during the POI, as is clear from section 6.1 of the Final Technical Report". However, none of the paragraphs cited by the Dominican Republic show that the CDC used the import volumes during the POI to consider the likelihood of substantially increased imports. Second, the Dominican Republic argues that market conditions at a certain point in time ("current … conditions") may be relevant for drawing conclusions regarding likely future market conditions. The problem is that, in this case, the CDC did not draw inferences regarding likely future market conditions on the basis of its "current … conditions". The CDC relied on a theoretical analysis without merit.

65. Third, the Dominican Republic claimed that the CDC's conclusion was based on figures from 2019. This is another attempt to redo the CDC's analysis *ex post*. In fact, the Dominican Republic's argument contradicts what the CDC expressly indicated in the Final Technical Report regarding the use of figures from 2019. In paragraph 449, the CDC <u>rejected</u> the use of the figures from 2019. It is therefore incorrect to say that the CDC based its conclusion on the figures from 2019. On the contrary, the CDC rejected the relevance of those figures. Fourth, the Dominican Republic claims that the CDC's findings "speak for themselves", and refers to the growth rates of imports from Costa Rica in 2016, 2017 and 2018. However, it is clear that the CDC's "findings" on the likelihood of substantially increased imports from Costa Rica were based on the alleged Monte Carlo analysis and not on growth rates during the POI. Section 7.16 of the Final Technical Report, which is entitled "Likelihood of entry of further Costa Rican imports and possible impact on the domestic industry", makes no mention at all of the growth rates of imports from Costa Rica.

66. In any event, the fact that the CDC has referred to the growth rates of imports from Costa Rica in the final determination is not sufficient to demonstrate that the CDC properly complied with Article 3.7(i). Costa Rica reiterates that Article 3.7(i) requires the investigating authority to consider prospectively the likelihood of substantially increased importation. The paragraphs of the final determination to which the Dominican Republic refers - paragraphs 146 and 147 - are entirely retrospective. Neither of the two paragraphs goes beyond developments during the POI, and in them, the CDC does not refer specifically to the likelihood of substantially increased imports from Costa Rica.

67. To the extent that the CDC had relied on the growth rate of imports (which it did not in this case), the CDC was required to explain why the rate of increase of the allegedly dumped imports supported the likelihood of substantially increased imports. The CDC failed to provide such an explanation. It should be noted that the rate of growth of Costa Rican imports slowed towards the end of the POI, and the record shows that imports from Costa Rica were losing market share in the Dominican Republic. The CDC should have considered these trends and explained objectively and with factual support why, despite the trends, it believed there could be a likelihood of substantially increased imports from Costa Rica.

68. Fifth, in its opening statement, the Dominican Republic appears to resume the defence of the alleged Monte Carlo analysis, after having abandoned it in its first written submission. The Dominican Republic now argues that in the alleged Monte Carlo analysis "[it] went beyond its obligations", "that this analysis is only an additional and voluntary element" and that "it is normal according to prospective theory and practice, that certain assumptions have been made, to explore certain scenarios". Contrary to what the Dominican Republic claims, the CDC based its findings on the likelihood of increased imports from Costa Rica in table 40 and the alleged Monte Carlo analysis. In fact, all the discussion in section 7.16 of the Final Technical Report revolves around table 40 and the alleged Monte Carlo analysis. To the extent that the CDC based its threat of injury determination on that analysis, the analysis itself must meet the requirements of Article 3.7, even if the CDC was not obliged to use that particular methodology.

69. With regard to the claim that it is "normal" to use "certain assumptions … to explore certain scenarios", any "assumption" made by an investigating authority must be duly substantiated. In particular, the Panel should be reminded of the importance of questioning the objectivity of the CDC's action in arbitrarily defining several of the assumptions for the Monte Carlo analysis that are referred to above. For example, conveniently choosing, on a whim, the assumption that other import origins would not follow the same price strategy as the Costa Rican exporter, specifically and exclusively in the scenario in which the domestic industry was assumed to have declined to adjust its prices and to have resigned itself to ceding domestic market share to imports, is nothing other

than to artificially overestimate the alleged impact of Costa Rican exports on the domestic industry, thereby further reducing the objectivity and credibility of those calculations.

70. The Dominican Republic's belated attempt to substantiate the CDC's assumptions is *ex post* and must be rejected. Without prejudice to the foregoing, Costa Rica considers it appropriate to raise some additional points in this regard. First, the relative change in the volume of demand is estimated at 3%, but the CDC does not specify which years this historical information relates to, or which period forms the basis for the assumption that this value is 3%. Nor is it clear on what basis the CDC assumed an annual variation of 1% in the price of billets. Importantly, these necessary definitions are not on the record. Second, use is made of the assumption that the volume supplied by the domestic industry varies in exactly the same proportion as total apparent consumption. Third, if the domestic industry decided to lower prices, it is not logical to expect its market share to also fall. Fourth, no reason whatsoever is given as to why other importers would behave in exactly the same way as Costa Rica in respect of the price. Fifth, in addition to not being properly substantiated, it is not objective that in scenario 1 it is assumed that all other bar suppliers follow the same price strategy and that in the other scenario (by quantity) it is assumed that other trading partners do not follow the same price strategy. In conclusion, the Dominican Republic has failed to rebut Costa Rica's *prima facie* case.

B. Sufficient freely disposable, or an imminent, substantial increase in, capacity of the exporter indicating the likelihood of substantially increased dumped exports to the importing Member's market

71. The CDC's reasoning regarding the likelihood of a significant increase in Costa Rican exports to the Dominican Republic was based on two considerations: (1) that the exporting company was export-oriented; and (2) that the Dominican Republic was an attractive destination for the company. As Costa Rica has demonstrated, these two considerations are clearly insufficient to support the existence of a likelihood that freely disposable capacity would result in substantially increased dumped exports to the Dominican Republic.

72. Many companies are export-oriented, but that in itself is insufficient to conclude that there is a likelihood of a *substantial* increase in the exports of the company in question and that the increase would be directed to a *specific* market. Furthermore, the information before the CDC in this case showed that the Costa Rican company had exported bars to another seven markets in 2017 and 2018. Total exports to these markets were higher in 2016 and 2017 than the company's exports to the Dominican Republic. The CDC failed to explain why these other markets (or even new markets) would not absorb any eventual increase in the use of the installed capacity of the exporting company. In fact, the figures provided by the exporting company show that total sales to these other markets increased steadily between 2015 and 2018.

73. The CDC also ignored the behaviour of exports to the Dominican Republic from other countries. The CDC simply assumes that Costa Rica's exports would displace exports from other countries (and, as previously mentioned, conveniently chose some assumptions in its calculations that resulted in an outcome along the same lines). However, the figures on the record show quite the opposite. The share of imports from Costa Rica in the Dominican Republic's total imports and in apparent domestic consumption declined in the period January-April 2018. This fact, which the CDC failed to consider, undermines the conclusion that there was a likelihood of substantially increased exports from Costa Rica to the Dominican Republic. For all of these reasons, the CDC failed to conduct an objective examination, based on the evidence before it, of the likelihood of a significant increase in imports from Costa Rica under Article 3.7(ii) of the Anti-Dumping Agreement.

74. In its response, the Dominican Republic focused on the exporter's installed capacity and claimed that the amount of freely disposable capacity is "the essence of what Article 3.7(ii) requires the authorities to examine". This argument is incorrect. While the exporter's capacity is the starting point for the analysis under Article 3.7(ii), it is nothing more than that: the starting point. The real focus of Article 3.7(ii) is the likelihood of increased exports. The Dominican Republic also referred to the size of Costa Rica's disposable capacity in relation to the size of the Dominican market. However, as Costa Rica also explained, this comparison is silent on the likelihood of increased exports from Costa Rica to the Dominican Republic; it is a simple comparison of scales that gives no consideration whatsoever to all the factors determining the attractiveness of the market and the interest of the exporter.

75. Second, the Dominican Republic noted that the CDC had determined that the Costa Rican company had developed a strategy for exporting its products to international markets, which included exporting at dumped prices to the Dominican Republic. This argument was also rebutted by Costa Rica. A company's export-oriented nature says nothing about the possible destination of its exports, which depends on factors relating to both strategy and the situation of the various markets. Furthermore, as acknowledged by the Dominican Republic itself, the Costa Rican company exported to a number of countries and even had plans to sell in new destinations. Therefore, there are insufficient objective elements to conclude that the disposable capacity would necessarily result in increased exports from Costa Rica to the Dominican Republic.

76. Third, the Dominican Republic claimed that "the CDC also determined why the Dominican Republic was a particularly attractive export market - for example, on the basis of specific export data pertaining to the company, contractual obligations to continue supplying large volumes to the Dominican Republic, and preferential trade conditions". As demonstrated by Costa Rica, none of the paragraphs of the Final Technical Report or final determination support the Dominican Republic's argument. It is therefore not correct that the CDC had other elements to support the alleged conclusion that the Dominican Republic was a "particularly attractive" export market for the Costa Rican exporter.

77. Fourth, the Dominican Republic claimed that the CDC found that third-country export markets could not absorb the potential production volumes of the Costa Rican company. The Dominican Republic cited the same paragraphs of the Final Technical Report and the final determination. In its opening statement, Costa Rica demonstrated that these paragraphs also fail to support the Dominican Republic's claim. For all of the above reasons, the Dominican Republic's arguments have failed to rebut Costa Rica's *prima facie* case.

C. <u>Effect on prices</u>

78. Costa Rica has demonstrated that the CDC's price effect analysis does not comply with Article 3.7 of the Anti-Dumping Agreement. The third subparagraph of Article 3.7 requires that "imports are entering at prices that will have a significant depressing or suppressing effect on domestic prices".

79. In its conclusions regarding threat of injury, the CDC indicates that "[w]hile it is true that there was an increase in imports from other origins for the most recent period of the investigation (January-April 2018), it is the dumped imports from Costa Rica with a 15% margin of dumping that are depressing sales prices in the domestic market and, consequently, negatively impact the economic and financial indicators of the domestic industry". In addition to this assertion, the final conclusions also mention that "[h]igh price undercutting margins of up to 63% are recorded for the Costa Rican imports. With respect to the most recent period of the investigation, a level of undercutting of 21% was observed".

80. Neither of these two assertions is sufficient to comply with Article 3.7(iii), since neither refers to the prospective effect of the imports. Article 3.7(iii) requires an analysis of the future effect of import prices. This is clear from the text of the provision itself, which uses a verb in the simple future tense, "will have". Both assertions by the CDC refer exclusively to the past, without providing any explanation as to the prospective effect of imports from Costa Rica. These findings are therefore insufficient to comply with Article 3.7(iii).

81. Both assertions also reflect a partial and incomplete picture of what was happening during the POI according to the record. Imports from other sources entered the Dominican Republic at prices lower than the prices of imports from Costa Rica during each year of the POI, and accounted for significantly higher volumes than imports from Costa Rica. In its analysis, the CDC should have taken into account the price of these imports from other sources. The CDC should also have considered the fact that the domestic industry price followed an upward trend in 2017 and the first four months of 2018. However, there is no prospective analysis to support the assumption that the same price difference that existed in 2017 would continue in the future.

82. Furthermore, the CDC's price suppression analysis cannot serve as grounds for the conclusion under Article 3.7(iii) because it is completely retrospective. The information presented in table 24 covers the period from 2015 to the first quarter of 2018. There is no analysis of what the CDC

considered would happen beyond this period. Thus, the CDC does not provide an explanation, let alone a reasoned conclusion, as to how imports from Costa Rica will have a significant suppressing effect on domestic prices within the meaning of Article 3.7. For the foregoing reasons, this aspect of the CDC's determination violates Article 3.7(iii) of the Anti-Dumping Agreement.

83. The Dominican Republic recognizes that "[i]t is true that the analysis [by the CDC] was based on data from the POI and therefore analysed the existing market conditions during the POI". This constitutes an admission by the Dominican Republic that the CDC's analysis was retrospective and not prospective as required by Article 3.7(iii).

84. The Dominican Republic, however, attempts to justify the CDC's actions by putting forward two arguments that have no merit. First, the Dominican Republic claims that "these facts are relevant for inferring potential future effects and are fully consistent with the text of Article 3.7(iii), which ... is also focused on current prices". Even if the POI data were "relevant" and "consistent with the text of Article 3.7(iii)", the fact is that Article 3.7 requires an additional step that the CDC failed to perform and that consists of the investigating authority making reasoned inferences about the price effect that imports "will have". Therefore, the CDC's analysis, which focused exclusively on what happened in the past, is insufficient to meet the requirements of Article 3.7(iii).

85. The other argument put forward by the Dominican Republic is that "the CDC supplemented the considerations regarding price effects with an analysis of likely future effects on the volume and prices of imports from Costa Rica". The Dominican Republic specifically refers to paragraphs 408-415, 518 and 519 of the Final Technical Report. These paragraphs do not show that the CDC has fully complied with Article 3.7(iii). Paragraphs 408-415 contain table 40 and the alleged Monte Carlo analysis. The Dominican Republic itself has sought to downplay the importance of this same section of the Final Technical Report. Costa Rica has demonstrated that this analysis is based on conjecture and that it has a number of other flaws. Moreover, the Dominican Republic itself has denied that the CDC's price effect findings are based on this analysis.

86. In addition, paragraphs 408-415 do not refer to the price of imports from Costa Rica. Paragraph 408 briefly refers to the volume of imports from Costa Rica in 2017, which is described as the base year. There is no reference to the price of imports from Costa Rica in paragraphs 408-415. Article 3.7, for its part, refers to the effect that import prices will have. Therefore, even if they were not based on conjecture, paragraphs 408-415 would not be relevant for the purposes of the analysis required under Article 3.7(iii).

87. In paragraphs 518 and 519 of the Final Technical Report, the CDC simply repeats some of the conclusions drawn by the CDC in paragraphs 408-415. In addition to being based on conjecture, these paragraphs make no reference to the prices of imports from Costa Rica or the effect they would have on domestic prices. Nor is there any link between the prices of imports from Costa Rica, the effect on domestic prices, and the likelihood of increased demand for further imports. Therefore, these paragraphs are also inconsistent with Article 3.7(iii) of the Anti-Dumping Agreement. In conclusion, the Dominican Republic has failed to rebut Costa Rica's *prima facie* case.

D. <u>Inventories</u>

88. The CDC did not rely on inventories as a basis for its threat of injury determination because it found that the level of inventories maintained by the Costa Rican company was not high. The Final Technical Report indicates that the exporting company's inventories varied between 10% and 5% of the total output of the product concerned at the end of each fiscal year. While the percentage was higher in April 2018, the inventory level for that month was lower than the inventory level at the end of 2017. In any event, the CDC made no finding, in the Final Technical Report or in the final determination, that the inventories of the product under investigation indicated that further allegedly dumped exports were imminent, within the meaning of Article 3.7(iv).

89. In its first written submission, the Dominican Republic referred to paragraph 361(xv) of the Final Technical Report. However, this paragraph focuses on alleged idle production capacity and not on inventories. Rather, the use of the words "notwithstanding their behaviour" indicates that the CDC is seeking to detract from the relevance of inventory levels. Nothing in this paragraph suggests that the inventory level is an indication of threat of injury. Moreover, it is incorrect to confuse

inventory (which, by definition, already exists, hence the use of the term "*existencias*" in Spanish) with idle capacity, as it would seem the Dominican Republic is attempting to do.

90. In its opening statement, the Dominican Republic recognizes that the inventory levels do not support the threat of injury determination. However, the Dominican Republic then attempts to present the inventory levels as if they support the threat of injury. This is another *ex post* attempt by the Dominican Republic to reconstruct the CDC's actions. The reality, as clearly reflected in the Final Technical Report, is that the CDC rejected the relevance of inventory levels and failed to consider them as a factor indicating threat of injury. In view of the foregoing, the inventories fail to provide any support for the CDC's threat of injury determination. In short, Costa Rica has demonstrated that the CDC's threat of injury determination does not comply with Article 3.7 of the Anti-Dumping Agreement.

VIII. Articles 3.1 and 3.5 of the Anti-Dumping Agreement

A. Causality

91. Costa Rica has demonstrated that the CDC did not satisfy the requirement of Article 3.5 of the Anti-Dumping Agreement because it failed to examine whether Costa Rica's imports qualify as a "genuine and substantial" cause of the threat of injury. The existence of a causal relationship between the dumped imports and the threat of injury is an essential prerequisite that must be met to be able to apply an anti-dumping measure. An investigating authority must meet the "positive requirement" in Article 3.5 and it therefore falls to a panel to examine whether the investigating authority has "identified and explained the positive evidence establishing a genuine and substantial relationship of cause and effect between imports and threat of injury".[19]

92. Neither the Final Technical Report nor the final determination in this case indicate that the CDC has complied with the positive requirement of Article 3.5 by demonstrating that there was a genuine and substantial relationship between imports from Costa Rica and the threat of injury. Section D of the final determination is entitled "Final determination of the causal relationship between the dumping and the threat of injury in the period of investigation". However, as is clear in the first paragraph of that section, and in the following paragraphs, the CDC limited itself to analysing alleged other factors. The conclusion regarding the "causal relationship between the increase in dumped imports and the threat of injury to the domestic industry" is based exclusively on the alleged finding that there are no other factors besides Costa Rican imports of steel bars and rods at dumped prices that could be the cause of the threat of injury. The section does not contain an analysis of the causal relationship between the allegedly dumped imports and the alleged injury. The causal relationship is inferred from the alleged absence of other factors.

93. Another threat of injury case, *US - Softwood Lumber VI (Article 21.5 - Canada)*, highlighted the importance of verifying that the investigating authority has complied with the positive requirement under Article 3.5 by demonstrating that further dumped imports would cause injury. As part of this determination, the investigating authority must explain the reasons and positive evidence that support the existence of a causal relationship, as well as demonstrate the adequacy of these reasons in the light of the plausible alternative explanations put forward by the interested parties.[20] In this case, the CDC failed to provide any reasons or positive evidence to support the existence of a causal relationship, as a result of which, following the logic in *US - Softwood Lumber VI (Article 21.5 - Canada)*, its determination fails to meet the requirements of Article 3.5. Costa Rica has thus established that the CDC's causality determination does not comply with Article 3.5 of the Anti-Dumping Agreement.

94. In its first written submission, the Dominican Republic claimed that the CDC did satisfy the positive requirement of Article 3.5, referring to some isolated statements made by the CDC on the alleged correlation in the time between the increase in imports from Costa Rica and certain negative indicators of the domestic industry. However, Costa Rica has demonstrated that these statements fail to satisfy the positive requirement of Article 3.5. Even if that alleged correlation existed in this case, it would be insufficient to demonstrate a genuine and substantial causal relationship under Article 3.5. A correlation is simply a parallel or similar trajectory between two variables, which does not prejudge nor allow absolutely anything to be determined as to whether one of them may be responsible for the occurrence of the other, or *vice versa*.

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[19] Appellate Body Report, *US - Softwood Lumber VI (Article 21.5 - Canada)*, para. 132.
[20] Appellate Body Report, *US - Softwood Lumber VI (Article 21.5 - Canada)*, para. 132.

95. The panel in *China - X-Ray Equipment* stated that a correlation analysis "is not dispositive of the causation question".[21] The same panel emphasized that "causation and correlation are two distinct concepts".[22] As a result, in line with the reasoning of the panel in *China - X-Ray Equipment*, the potential existence of a correlation in time, even if it were true, remains insufficient in this case.

96. In addition, in this case, the exporting company presented arguments and evidence questioning whether there was a coincidence in time between the movements in the imports and the movements in injury factors. The exporting company explained that the record demonstrated that the domestic industry's indicators showed a significant recovery in 2018, despite the imports from Costa Rica. As explained by the exporting company, there was therefore no coincidence in time between the movements in imports and the movements in injury factors to conclude that the evolution of industry indicators was linked to the evolution of imports of Costa Rican origin. The CDC had an obligation to examine these arguments and determine whether the circumstances did, in fact, show that there was a genuine and substantial relationship of cause and effect between Costa Rican imports and the threat of injury. However, the CDC failed to do so. The Dominican Republic has failed to rebut Costa Rica's *prima facie* case. The CDC's determination of causality does therefore not comply with Article 3.5 of the Anti-Dumping Agreement.

B. <u>Non-Attribution</u>

97. Costa Rica has also demonstrated that the CDC's non-attribution analysis does not comply with Article 3.5 of the Anti-Dumping Agreement. The CDC's non-attribution analysis has a number of shortcomings and the CDC's conclusions do not reflect an objective examination based on positive evidence. In particular, the CDC failed to conduct a proper non-attribution assessment of the following factors: (i) the volume and prices of non-dumped imports; (ii) the decline in the domestic industry's exports; and (iii) developments in technology.

1. Non-dumped imports

98. Costa Rica has demonstrated that the CDC's conclusion that imports from third countries could not be a cause of threat of injury is neither reasoned nor based on positive evidence, and therefore fails to satisfy the requirements of Articles 3.1 and 3.5 of the Anti-Dumping Agreement.

99. First, the CDC failed to properly consider China's imports at the beginning of the POI. As shown in table 41 of the Final Technical Report, in 2016, the volume of imports from China was 2.5 times greater than the import volume from Costa Rica. The CDC itself found that Chinese imports accounted for almost half of total imports in 2016. Moreover, as shown in table 42, the unit price of the product imported from China was significantly lower than the unit price of the product imported from Costa Rica. However, in its non-attribution analysis, the CDC failed to consider the effect of Chinese imports (in terms of both volume and price) on the domestic industry. In its analysis, the CDC focuses on the reduction in the volume of Chinese imports in 2017, but it does not consider the effect that these imports would have had in 2016 when they accounted for almost half of the import volume and their unit price was significantly lower than the unit price for imports from Costa Rica.

100. Second, the CDC failed to properly consider imports from other sources during the POI. Table 41 shows that the volume imported from other sources was greater than the volume imported from Costa Rica throughout the POI. Meanwhile, table 42 shows that the unit price of imports from these other sources were, in many cases, lower than the unit price of imports from Costa Rica. For example, in 2016, the unit price of imports from Japan was much lower than the price of imports from Costa Rica, and the volume imported from Japan was almost equivalent to the volume imported from Costa Rica. In 2017 and January-April 2018, the unit price of Costa Rican imports was higher than the unit price of imports from each of the other sources, with the exception of imports from China that were subject to an anti-dumping duty. It is important to emphasize that while they entered at lower prices, these imports accounted for a higher volume than imports from Costa Rica. In 2017, the volume of imports from other sources (excluding China) was almost 1.5 times greater than that of imports from Costa Rica. In January-April 2018, imports from other sources were 3.6 times the imports from Costa Rica. Given the significantly greater volume of imports from other sources and that the unit price of these imports was lower than the price of imports from Costa Rica, an objective and unbiased authority would not have concluded that the imports from these other sources could not be a cause of threat of injury.

[21] Panel Report, *China - X-Ray Equipment*, para. 7.247.
[22] Panel Report, *China - X-Ray Equipment*, para. 7.247.

101. The CDC's conclusion that imports from third countries could not be a cause of threat of injury is thus neither reasoned nor based on positive evidence, and therefore fails to satisfy the requirements of Articles 3.1 and 3.5 of the Anti-Dumping Agreement.

102. The Dominican Republic has argued that Costa Rica focuses unduly on the first four months of 2018. This is not accurate. Costa Rica has demonstrated that Chinese imports entered the Dominican Republic in greater volumes and at lower prices in 2016. In addition, Costa Rica has demonstrated that, in 2016, imports from Japan entered at lower prices than imports from Costa Rica and in an equivalent volume. Costa Rica has also demonstrated that, during 2017 and January-April 2018, imports from other sources (with the exception of China) entered at lower prices and that the volume of these imports was greater than the volume imported from Costa Rica. It is therefore incorrect to state that Costa Rica's argument was unduly focused on the last four months of the POI.

103. In any event, as Costa Rica has already explained, the last period of the POI is particularly relevant, especially when it concerns an alleged threat of material injury which requires a prospective analysis that clearly assesses whether there are clear and observable trends that demonstrate that future injury is imminent. The Dominican Republic does not deny that, during this four-month period, imports from other origins were increasing more quickly than imports from Costa Rica, and were entering at lower prices. In the circumstances, the CDC was required to adequately explain why it did not consider that the non-dumped imports could be a cause of threat of injury. However, the CDC failed to do so.

104. In its responses to the Panel's questions, the Dominican Republic notes that Chinese imports "essentially stopped in 2017, when they fell to 1% of the total imports, which enabled imports from other origins to take their place". If the Dominican Republic's approach - that all imports from third countries (including Costa Rica) took the place previously held by imports from China - is followed, the onus lay with the CDC to explain why it was imports from Costa Rica and not those from other countries that caused the threat of injury.[23] The data for 2018 clearly show a much steeper upward trend in imports from countries other than Costa Rica and, even in 2017, the combined total imports from these other countries exceeded those from Costa Rica. In other words, if 34,876 metric tonnes are allegedly sufficient to cause a threat of injury, one would think that 49,321 metric tonnes would cause greater injury. None of this was explained in the Final Technical Report.

105. The Dominican Republic has also stated that imports from third countries "decreased in 2016 (-28%) and in the important year of 2017 (-15%) before increasing by +77% in the most recent period in 2018". In regard to this statement, it is important to clarify that table 41 in fact shows that imports from third countries (excluding China) increased in 2017. Second, an increase of this magnitude during the latter period deserves an adequate explanation from the CDC, particularly in the case of an alleged threat of injury.

106. Moreover, the Dominican Republic attempts to justify the CDC's actions by claiming that Japan, Chinese Taipei and the United States were the only third countries with imports throughout the whole dumping POI, and that the CDC found that the volumes from all of these countries were lower than imports from Costa Rica. The Dominican Republic fails to explain why imports from a country must be considered only if they occur in each of the years of the POI. The Dominican Republic also fails to mention that, altogether, the imports from third countries were greater than imports from Costa Rica. The CDC should have considered the effect of these imports as a whole. Costa Rica further recalls that, in 2016, imports from Japan entered at a lower price than imports from Costa Rica and that, in 2017 and January-April 2018, imports from Japan, the United States and Chinese Taipei entered at a lower price than imports from Costa Rica. The Dominican Republic's argument is thus not valid.

107. The other argument presented by the Dominican Republic is that prices in 2017 were significantly lower than in 2015, even though there was no longer competition from dumped Chinese imports. Again, it is important to note that the lowest prices in 2017 were not those of imports from Costa Rica. Table 42 shows that, in 2017, Costa Rica's unit price was much higher than the prices of imports from Italy, Japan, Mexico, Chinese Taipei and the United States. The volume of imports from these third countries in 2017 was almost 1.5 times the volume of Costa Rica's imports. In this regard, if the low prices in 2017 were an important element of causality, as the Dominican Republic claims, it is not plausible that the CDC would disregard the effect of third-country imports,

[23] Panel Report, *China - Cellulose Pulp*, para. 7.192.

considering that their prices were significantly lower than the price of imports from Costa Rica and that their volume was much greater.

108. The Dominican Republic appears to suggest that the onus is on the exporter to request the collective assessment of third-country imports. This argument is not supported by the text of Article 3.5, which refers to "the volume and prices of imports not sold at dumping prices". The use of the plural indicates that non-dumped imports are relevant as a whole, not individually. The Dominican Republic also attempts to justify the CDC's actions by arguing that the exporter focused on the trends in the first four months of 2018. The exporter highlighted that, in the first four months of 2018, imports from Costa Rica lost Dominican market share and were priced higher than imports from other sources. However, there is no doubt that the behaviour of imports from other sources throughout the POI was a factor known to the CDC within the meaning of Article 3.5. The CDC itself raised the need to examine the volume and the prices of imports not sold at dumping prices, in accordance with its domestic legislation. In taking this approach, the CDC does not suggest that its obligation was limited to the first four months of 2018. The CDC also mentioned that the exporter had raised the need to examine the effect of third-country imports. Contrary to what the Dominican Republic now posits, this summary does not suggest that the exporter's argument was limited to the first four months of 2018. Thus, the Dominican Republic's argument about the focus on 2018 is not valid. In conclusion, the Dominican Republic has failed to rebut Costa Rica's *prima facie* case.

2. Export performance

109. In its first written submission, Costa Rica demonstrated that the CDC had failed to properly assess the decline in the domestic industry's exports.

110. The Costa Rican exporting company raised the issue of the decline in the domestic industry's exports in its comments on the Essential Facts Report. The CDC dismissed the approach of the Costa Rican exporter. Costa Rica has demonstrated that the CDC's reasoning suffers from at least two weaknesses. First, the CDC fails to provide any explanation of why the indicators cited are "associated with export performance". Second, the reasoning is internally contradictory. If the indicators are "associated with export performance", they cannot be explained by Costa Rican imports because Costa Rican imports do not compete in the Dominican Republic's market with the domestic industry's exports. An objective and unbiased investigating authority would therefore not have disregarded the behaviour of exports as a possible causal factor on the basis of the CDC's reasoning.

111. In its response to a question from the Panel, the Dominican Republic tries to show that there was no correlation between the export performance and the production volume and productivity. The Dominican Republic's arguments are *ex post* explanations. They are not explanations provided by the CDC in the Final Technical Report or the final resolution. Indeed, the CDC's assertion on export performance does not even refer to the production volume or productivity. The Dominican Republic has therefore failed to rebut Costa Rica's *prima facie* case.

3. Technology

112. Costa Rica demonstrated that, although the CDC itself found that one of the domestic industry's rolling mills had problems of "obsolescence", the CDC did not consider whether this obsolescence could be a causal factor. Considering that it was the CDC itself that found that one of the rolling mills was obsolete, it is clear that this factor was "known" to the CDC and, therefore, the CDC had an obligation to ensure that the injury caused by this factor was not attributed to imports from Costa Rica. The CDC failed to do so and therefore violated Article 3.5.

113. The Dominican Republic's arguments fail to demonstrate otherwise. In its first written submission and opening statement, the Dominican Republic chose to ignore the CDC's finding on the obsolescence of the domestic industry's machinery. However, the CDC's finding is clear. In addition, in its responses to the Panel's questions, the Dominican Republic confirmed that the CDC included the capacity of rolling mill 3 in the calculation of the domestic industry's productive capacity. To the extent that the CDC included rolling mill 3 in its analysis, the technological obsolescence of this rolling mill was a relevant factor for at least some of domestic industry's indicators, such as production, productivity and the use of productive capacity.

114. In conclusion, Costa Rica has demonstrated that the CDC's non-attribution analyses with respect to non-dumped imports, export performance and developments in technology do not satisfy

the requirements of Articles 3.1 and 3.5 of the Anti-Dumping Agreement. The Dominican Republic has failed to rebut the arguments of Costa Rica.

IX. ARTICLE 6.1.3 OF THE ANTI-DUMPING AGREEMENT

115. Costa Rica has demonstrated that the CDC violated Article 6.1.3 of the Anti-Dumping Agreement because it failed to provide the Costa Rican exporter with the full text of the written application submitted by the applicant. The obligation in Article 6.1.3 has been described as a "clear" obligation, under which, "[s]ubject to the proviso of protection of confidential information, investigating authorities must provide the text of the written application to the known exporters and to the authorities of the exporting Member". This obligation "applies as soon as the investigation has been initiated".[24] Moreover, the term "provide" requires proactive action by the investigating authority. In this regard, the panel in *Argentina - Poultry Anti-Dumping Duties* stated that "an investigating authority cannot comply with the obligation to 'provide the (…) application (…) to the known exporters and to the authorities of the exporting Member' simply by permitting them access to that application".[25]

116. The phrase "the full text of the … application" refers to the application as a whole, including annexes and any material submitted by the applicant to supplement the application prior to the initiation of the investigation. The European Union and the United States agree on this interpretation. The use of the adjective "full" shows the intention to give a broad meaning to the obligation. The use of the term "text" must be considered in context. It is used because Article 6.1.3 refers to the "written application" and to the written content of the application. Understanding the term "text" as restrictive would be contrary to the broad meaning sought from the use of the term "full". This broad scope is consistent with the purpose of Article 6.1.3, which is to ensure transparency and guarantee due process. Limiting the content of what is provided to interested parties is contrary to this purpose.

117. In this case, the CDC only provided the exporter with an eight-page document and not with the application submitted by the applicant in its entirety. There is a large difference between what was submitted by the applicant and the inventory made by the CDC of the information it received, on the one hand, and what the CDC provided to the exporter when it initiated the investigation, on the other. This shows that the CDC did not provide the exporter with the full text of the application. In addition, the CDC did not provide the exporter with information submitted by the applicant subsequent to the application, which was information that corrected or completed that application. To the extent that the information corrected or completed the application, this information forms part of the "full text of the … application". The exchange between the CDC and the applicant clearly shows that the information was intended to correct or complete the application. In the light of the foregoing, the CDC acted inconsistently with Article 6.1.3 of the Anti-Dumping Agreement.

X. ARTICLES 5.3 AND 5.8 OF THE ANTI-DUMPING AGREEMENT

118. The CDC violated Article 5.3 because an objective and unbiased investigating authority would not have determined, in the light of the facts before the CDC, that there was sufficient evidence of the existence of dumping to justify the initiation of an anti-dumping investigation. The applicant company submitted an application to initiate an investigation on 7 May 2018. As evidence of the normal value, it included four invoices. Two of these invoices were issued on 2 June 2017 and the other two were issued on 17 July 2017. This means that the invoices corresponded to sales allegedly made almost a year before the filing of the application. In view of the time that had elapsed, the invoices could hardly indicate the existence of dumping at the time the application was filed. Moreover, the invoices were not representative. The amount quoted on each invoice was, on average, less than 1 tonne and the invoices referred to one type of bar only, when the imported product covered by the application to initiate an investigation, as described by the applicant company, included five different types.

119. The CDC itself questioned the representativeness and relevance of the invoices provided by the applicant. However, the applicant refused to provide additional evidence, without offering any justification for that inaction. The CDC, in a surprising change of position, simply accepted the four invoices as sufficient evidence, without asking for additional explanations, despite having previously questioned the sufficiency of the evidence. The CDC's action is not in line with how an objective and unbiased investigating authority should proceed, and is inconsistent with Article 3.5.

[24] Panel Report, *Argentina - Poultry Anti-Dumping Duties,* para. 7.168.
[25] Panel Report, *Argentina - Poultry Anti-Dumping Duties*, para. 7.169.

120. As has been established by Costa Rica, and not refuted by the Dominican Republic, the CDC did not have sufficient information on the existence of dumping and, pursuant to Article 5.8, should have rejected the application and terminated the investigation promptly. The CDC's decision to initiate the investigation is therefore also inconsistent with Article 5.8 of the Anti-Dumping Agreement.

XI. ARTICLE 6.4 OF THE ANTI-DUMPING AGREEMENT

121. In this case, the CDC did not provide the exporting company with an opportunity to see certain reports of the findings and information from verification visits, and certain documents that the CDC received during the verification visit. The findings and information gathered during the verification visits, and the documents received by the CDC at that time, was "relevant" information within the meaning of Article 6.4. This information would have allowed the exporting company to have a fuller understanding of the situation of domestic industry in order to prepare its arguments on the alleged existence of injury and the alleged causal relationship between the injury and Costa Rican imports. This would have allowed the exporting company to prepare its claims with a clearer and more comprehensive understanding. This violated its right of defence. It is also clear that the information was used by the CDC in its anti-dumping investigation. The verification visit record does not indicate that the CDC accepted the applicant's request for confidential treatment of the information. In short, the information was relevant, was not declared confidential by the CDC under Article 6.5 and was used by the CDC. Costa Rica has thus demonstrated that the CDC violated Article 6.4.

122. The text of the provision does not support the Dominican Republic's argument that Article 6.7 limits Article 6.4. Article 6.4 refers to "all information that is relevant". This phrase indicates broad coverage. Limitations on its scope are expressly stated in the article and this explicit list is a strong indication that there are no other limitations. Moreover, Article 6.4 does not contain a cross-reference to Article 6.7, although it does refer to Article 6.5. This also suggests that when the negotiators wanted to link the obligations to another provision of the Agreement, they did so explicitly. As regards confidentiality, the Dominican Republic has not demonstrated that the CDC granted the information confidential treatment. Furthermore, the Dominican Republic's arguments that the information meets the definition in Article 6.5 are *ex post* arguments. As regards the argument that the exporting company did not request the information, this requirement raised by the Dominican Republic was rejected by the panel in *China — Broiler Products (Article 21.5 - US)*. The panel did not find "any basis for requiring a 'request' to see information before a claim of violation of Article[] 6.4".[26] In conclusion, the Dominican Republic has failed to rebut Costa Rica's *prima facie* case.

XII. ARTICLE 6.5 OF THE ANTI-DUMPING AGREEMENT

123. Under Article 6.5, the CDC had the obligation to (i) assess the reasons furnished by the domestic industry to justify the confidential treatment of certain information; and (ii) determine, objectively, whether the domestic industry had shown good cause for the confidential treatment of its information.[27]

124. The CDC granted confidential treatment to information furnished by the applicant company pursuant to Resolution No. 003 and Resolution No. 005. However, neither of the two resolutions show that the CDC assessed the reasons provided by the domestic industry, or that it had determined, objectively, whether the domestic industry had shown good cause for the confidential treatment of its information. Therefore, the CDC acted inconsistently with Article 6.5 by failing to carry out such an assessment.

XIII. ARTICLE 6.7 OF AND ANNEX 1 TO THE ANTI-DUMPING AGREEMENT

125. In the Final Technical Report, the CDC criticized the exporting company for not providing information on sales made prior to the POI, even though the CDC had not specified that the exporting company had to supply such information. In fact, the CDC failed to inform the exporting company prior to the verification visit that it had to provide this information. By failing to inform the company of this before the verification visit, the CDC violated Article 6.7 and Annex I. The Dominican Republic acknowledged that the CDC did not request, prior to the verification visit, information on sales made before the POI from the exporter.

[26] Panel Report, *China - Broiler Products (Article 21.5 - US)*, para. 7.291.
[27] Appellate Body Report, *EC - Fasteners (China) (Article 21.5 - China)*, para. 5.68. (fn omitted)

XIV. ARTICLE 9.3 OF THE ANTI-DUMPING AGREEMENT AND ARTICLE VI:2 OF THE GATT, 1994

126. Costa Rica has demonstrated, and the Dominican Republic has failed to refute, that the CDC did not calculate the margin of dumping in accordance with Articles 2.1, 2.2.1 and 2.4 of the Anti-Dumping Agreement. Costa Rica has also demonstrated that the anti-dumping duty applied by the CDC exceeds the margin of dumping that would have been established if the CDC had complied with Article 2. The exporting company submitted to the CDC an alternative calculation of the margin of dumping that demonstrated the absence of dumping. The margin of dumping calculation produced by the exporting company, which is part of the record, is sufficient to demonstrate that the amount of anti-dumping duty in this case exceeds the margin of dumping that would have been established if the CDC had complied with Article 2. Consequently, Costa Rica has demonstrated that the Dominican Republic's anti-dumping measures violate Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994.

XV. CONCLUSION

127. For all of these reasons, Costa Rica respectfully requests that the Panel find that the Dominican Republic's anti-dumping measures are inconsistent with Articles 2.1, 2.2.1, 2.4, 3.1, 3.2, 3.4, 3.5, 3.7, 5.3, 5.8, 6.1.3, 6.4, 6.5, 6.7 and 9.3 of the Anti-Dumping Agreement and Annex 1 thereto, as well as with Article VI:2 of the GATT 1994. Article 3.8 of the DSU stipulates that in cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment. Since infringement of the Anti-Dumping Agreement and the GATT 1994 have been demonstrated in this case, there is nullification and impairment. Pursuant to Article 19.1 of the DSU, Costa Rica respectfully requests that the Panel recommend that the Dominican Republic bring the anti-dumping measures applied into conformity with its obligations under the Anti-Dumping Agreement and the GATT 1994.

ANNEX B-2

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE DOMINICAN REPUBLIC

I. INTRODUCTION

1. This dispute concerns the imposition by the Dominican Republic of definitive anti-dumping duties on corrugated or deformed steel bars or rods for the reinforcement of concrete originating in the Republic of Costa Rica, as provided in the final determination of 27 December 2019 (hereinafter "final determination") by the Regulatory Commission on Unfair Trade Practices and Safeguard Measures (CDC). Costa Rica submitted 15 claims under the Anti-Dumping Agreement and the General Agreement on Tariffs and Trade (GATT) 1994, which consist of a combination of substantive claims under Articles 2 and 3 of the Anti-Dumping Agreement and procedural claims relating to the principles laid down in Articles 5 and 6 of the Anti-Dumping Agreement. It also included a purely consequential claim under Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994.

2. The Dominican Republic considers that Costa Rica's claims are unfounded. Specifically, the decision to impose anti-dumping duties on imports of corrugated or deformed steel bars or rods for the reinforcement of concrete originating in the Republic of Costa Rica was the outcome of a comprehensive and objective examination by the CDC, which was based on positive evidence of dumping, threat of injury and a causal link, and in which the CDC respected interested parties' rights of defence and all other associated procedural rights, as provided for in the Anti-Dumping Agreement.

II. STANDARD OF REVIEW

3. The standard of review for World Trade Organization (WTO) panels in anti-dumping proceedings is set out in Article 11 of the Dispute Settlement Understanding (DSU), in combination with Article 17.6 of the Anti-Dumping Agreement. These two Articles together establish the standard of review to be applied to both the factual and legal aspects of this dispute.

4. Article 11 of the DSU requires a WTO panel to review whether the investigating authority has provided a reasoned and adequate explanation as to: (a) how the evidence on the record supports its factual findings; and (b) how those factual findings support the overall determination.

5. It is not for a WTO panel to conduct a *de novo* review of the evidence provided in the underlying anti-dumping investigation and a panel must not give preference to its judgement over that of the investigating authority. A panel must limit its examination to the evidence that was before the investigating authority during the investigation and may not reject an agency's conclusions simply because the panel would have arrived at a different outcome if it were making the determination itself. When examining an anti-dumping measure, WTO panels are not the triers of facts. They merely review the relevant determination by the investigating authority and determine whether the establishment of the facts "was proper" and whether the evaluation of those facts was unbiased and objective.

6. A panel must take into account all the facts on the record, including those that were not disclosed or discernible by the interested parties at the time of the final determination.

7. It has been deemed inadvisable for a panel to examine individual evidence in isolation. Instead, a holistic approach is preferable when reviewing the investigating authority's evaluation of the evidence.

8. Lastly, in WTO dispute settlement proceedings, it is the complaining party that bears the burden of proving that a challenged measure is inconsistent with a covered agreement.

III. COSTA RICA'S CLAIM THAT THE EXPORT SALES THAT ENTERED THE DOMINICAN REPUBLIC DURING THE PERIOD OF INVESTIGATION WERE ILLEGALLY INCLUDED IN THE DOMINICAN REPUBLIC'S DUMPING CALCULATION

9. Costa Rica disagrees with the inclusion in the dumping calculation of two export sales transactions, arguing that they were "sold" prior to the period of investigation (POI) and, as a result, did not constitute "current" dumping in violation of Article 2.1. Costa Rica also submits that the inclusion of these export sales violates Article 2.4 because the comparison of these export sales with the domestic sales during the POI was not "fair" due to alleged changes in feedstock costs between the time of sale and the period of time considered for dumping.

10. However, the CDC properly followed Articles 2.1 and 2.4 by establishing a 12-month POI, which began close to the date of initiation, and includes all sales in the relevant domestic and export markets made by the Costa Rican exporter, ArcelorMittal Costa Rica (hereinafter "ArcelorMittal"), during this POI. In its response to the questionnaire, the Costa Rican exporter provided information based on all the export sales that entered the Dominican Republic during the POI. The CDC included all of these sales in the calculation. This approach is based on the definition of dumping in Article 2.1, which Costa Rica completely disregards in its submission. It is clear from Article 2.1 that dumping relates to the matter of whether the products entered the country's commerce at less than their normal value. Costa Rica does not indicate any legal grounds under the Anti-Dumping Agreement requiring the use of a different basis, such as the date of the contract related to the sale or the date of the invoice, rather than the date of entry into the Dominican Republic.

11. There is also no legal basis for Costa Rica's claim under Article 2.4 of the Anti-Dumping Agreement, since the Costa Rican exporter never requested an adjustment for alleged differences in respect of the sales' lack of proximity in time. Costa Rica also fails to do so in these dispute settlement proceedings. Instead, it simply requested that two export sales be completely excluded from the determination of the export price. This is not a matter governed by Article 2.4. The matter of the export price is determined under Article 2.3, which is a provision that was not invoked by Costa Rica in its panel request and is not, therefore, before the Panel. In addition, the CDC concluded that the exporter never provided evidence of the domestic sales that it considered to be closer to the time of the export sales, which would have allowed for a comparison to be made. Furthermore, it is important to highlight certain factual aspects of the situation, as they are unclear from Costa Rica's presentation of the facts. Despite Costa Rica's attempts to suggest that a long period of time elapsed between the sale of these products and their importation during the POI, the record shows that the date of invoice for one of the export sales was just one month before the initiation of the POI and, for the other export sale, just three days before the POI. No evidence was ever provided to demonstrate that these sales had not been made sufficiently close to the dates of the domestic sales made during the POI and that an adjustment would therefore be necessary, assuming that such an adjustment had been requested. Moreover, the parties did not discuss the fact that these export sales entered the Dominican Republic during the POI. Accordingly, there is no factual or legal basis for Costa Rica's claim that the CDC violated Articles 2.1 and 2.4.

12. The CDC was not required to use a different criterion to identify the relevant export sales and instead applied one used by the exporter itself. This criterion is reasonable and was applied systematically by the CDC. The resulting comparison of the export price and the normal value was also consistent with Article 2.4, as it was made on the basis of all relevant transactions that entered the Dominican Republic during the POI between 1 May 2017 and 30 April 2018, inclusive.

13. With regard to the determination of the normal value, the CDC carried out the necessary cost test and explained that certain domestic sales were excluded as they were below cost and not, therefore, made in the ordinary course of trade.

III.1. The CDC did not violate Article 2.1 by including the Thorco Logic and Suzie Q sales in its analysis

14. The transaction relationship criterion used by the CDC to calculate the export price, namely, the time at which the investigated product was "introduced" into the commerce of the

importing country, is consistent with and reflects the text of Article 2.1. As a preliminary matter, it is important to highlight that it is not disputed that the two export sales transactions in question entered the Dominican Republic during the POI. Moreover, as explained in our presentation, it was the *Costa Rican exporter itself* that had included these two sales transactions in its questionnaire response, using the date of entry of the goods as the determinative criterion.

15. Costa Rica's argument that the CDC's inclusion of two sales that entered the country during the POI does not demonstrate "current" dumping and is not "as close as possible" to the initiation confuses the jurisprudence and guidelines on POIs of the Committee on Anti-Dumping Practices with Costa Rica's preferences regarding the criteria for determining whether a sale is considered to be within the POI.

16. Costa Rica does not provide a legal basis for saying that the date of contract or the date of sale must be used when determining whether the sales fall within the POI and are therefore indicative of current dumping. The fact that the Costa Rican exporter clearly considered it reasonable to provide information on the covered export sales by using the dates of entry into the commerce of the importing country demonstrates that there was nothing improper, biased, subjective or unreasonable in the application of this criterion in the absence of specific guidance in the Anti-Dumping Agreement.

17. Costa Rica submits that the sale involving the Thorco Logic was concluded on 1 November 2016 and that the time that elapsed between the sale and the *initiation* of the investigation was such that the sale reflected prices from 21 months prior to the initiation of the investigation for the Thorco Logic and from 14 months prior in the case of the Suzie Q. On this basis, Costa Rica develops an argument that seeks to show that the prices of the main feedstock inputs in November 2016 were different to those during the POI. However, this presentation of the facts is incomplete and incorrect.

18. Firstly, the Thorco Logic sales invoice is dated just one month prior to the start of the POI. The Suzie Q sales invoice is dated just three days prior to the POI. Accordingly, there was not a gap of months between the dates of invoice and the start of the POI or the shipment date. Thus, the argument that there was no reliable evidence of "current" dumping is also unfounded. It is incorrect to consider that sales made three days or even one month prior - which entered the Dominican Republic during the POI - cannot demonstrate "current" dumping.

19. Secondly, Costa Rica is not actually using the invoice date of late March 2017 to develop its argument. It prefers to rely on the alleged "date of contract" of November 2016 to make the gap between the POI and the initiation appear longer. However, Costa Rica fails to explain why it would be appropriate in this case to use the date of contract instead of the date of export or the invoice date. Moreover, the contract referred to by Costa Rica is, in actual fact, related to the transformation of billets into corrugated steel bars.

20. With regard to the sale involving the Suzie Q, Costa Rica does not even submit a single document, but simply refers to the mention in the Final Technical Report of ArcelorMittal's argument that the sale was effective as of April 2017. It also fails to provide evidence of a difference in feedstock costs between 27 April 2017 and 1 May 2017 of such significance that it would be inappropriate to keep the sale involving the Suzie Q in the calculation, given that its shipment date fell within the POI.

21. As regards the need for parallelism between the criterion used for the normal value POI and that used for the export price POI, Costa Rica argued that, even if the authority had discretion to establish the POI, it does not have discretion to use one POI for the export price and another for the normal value. However, this is not what the CDC did. The CDC used the same POI for the normal value and the export price, relying upon the information provided by the exporter in relation to this dumping POI. There was complete parallelism.

22. In summary, Costa Rica's claim under Article 2.1 must be rejected.

III.2 The CDC did not violate Article 2.4 when it included the Thorco Logic and Suzie Q sales in its analysis

23. The CDC made a fair comparison in accordance with Article 2.4 when it compared ArcelorMittal's export prices for the goods that entered the Dominican Republic during the POI with its domestic sales during the POI. However, Costa Rica makes a claim of a violation of Article 2.4 that appears to revolve around three arguments: (i) that Article 2.4 imposes criteria for the selection of transactions for the purposes of determining the export price; (ii) that, given the inclusion of the transactions in question in the calculation of the export price, the CDC should have made "adjustments" to ensure a fair comparison within the meaning of Article 2.4; and (iii) that the CDC should have requested information to make such adjustments.

24. The first argument is based on an erroneous legal interpretation. Article 2.4 imposes a requirement for a fair comparison that presupposes the prior determination of the normal value and the export price. It is legally incorrect to consider that this requirement may have a bearing on the determination of the sales that should be included in order to establish the export price.

25. Article 2.4 does not require that the comparison use the date of invoice or contract instead of the date of entry. Article 2.4 concerns the comparison once the normal value and the export price have been determined. Costa Rica's argument actually relates to the exclusion of two export transactions from the export price. This issue may be raised under Article 2.3, which concerns the establishment of the export price. However, Costa Rica makes no claims under Article 2.3. Article 2.4 refers solely to the comparison between the normal value and the export price, once both have been established.

26. In any event, as long as a consistent and reasonable approach is followed, there is no obligation under the Anti-Dumping Agreement that indicates whether the date of contract, the invoice date or the actual date of entry should be used as the basis for including a transaction in the POI. In this case, the CDC's approach was consistent and reasonable. It used the same period for both domestic sales and export sales, used a reasonable period of time (12 months) and established the period close to the date of initiation of the investigation. It also used the exact information provided by ArcelorMittal in its questionnaire response.

27. It is unclear why using the information provided by ArcelorMittal and comparing it with the company's domestic sales during the same POI would be unfair. During the investigation, ArcelorMittal did not request any changes to the POI's range of dates. Instead, after having seen the result of the calculations in the determination of the essential facts, it simply argued that these two sales should be completely excluded. In addition, ArcelorMittal reported these two sales as it considered them to fall within the POI because they had entered the Dominican Republic during the POI. It is for this reason that it provided information on the two export sales that it subsequently argued should have been excluded. Accordingly, it is incorrect to argue that ArcelorMittal was only informed for the first time in the Essential Facts Report that these two sales, which it had previously reported, would be used for the purposes of determining the normal value.

28. In contrast to the CDC's consistent approach with regard to the POI, Costa Rica suggests that the CDC should have used three different dates of sale. Doing so would be burdensome, inconsistent and unreasonable. Of course, there is no legal basis for this mixed approach.

29. Costa Rica incorrectly asserts that the reference in Article 2.4 to "sales" somehow *excludes* the date of entry and *includes* the date of contract or invoice. This interpretation is unfounded. The term "sales" relates more to the transactions in general and not to a specific date of sale. This is demonstrated by the fact that Article 2.4 does not mention which document or date establishes that a sale has been made and, of course, does not require the use of a specific date of sale. Moreover, there is no specific requirement for the date of sale to be the date of the invoice or contract.

30. With regard to Costa Rica's second argument, the obligation of an investigating authority to make "adjustments" within the meaning of Article 2.4 only arises when an interested party

demonstrates the need for such adjustments to be made. It is for the party requesting an adjustment to "demonstrate" that there is a difference and that it affects price comparability; if this is not the case, the authority is not required to make an adjustment. In the present case, it is clear that ArcelorMittal never asked the CDC to make *adjustments* to ensure a fair comparison in view of the alleged difference between the times of the domestic sales and the export sales. It merely asked for these sales to be *excluded*. This argument was clearly incorrect, as the same POI of 1 May 2017 to 30 April 2018 was used, as required, for the normal value and the export sales. Costa Rica's argument that a different POI was used for the domestic sales and the export sales simply has no merit.

31. Even if the requirement to make adjustments were applicable, Costa Rica states that Article 2.4 requires the investigating authority to consider the "differences which affect price comparability" when comparing the export price and the normal value. Once again, the provision does not refer to the "date of sale", but, rather, to a list of differences that are mostly specified and that usually give rise to price adjustments for the calculation. The cost of feedstock for the production of the goods in question is not a difference similar to those listed in the Article.

32. The CDC gave the exporter ample opportunity to request adjustments and initiated a dialogue with the exporter on all such adjustments. It should be noted that there were no specific discussions on the two transactions because it was the exporter itself that had included these transactions and that provided similar information on the normal value, without requesting any adjustments related to these two transactions. The CDC accepted the information on the normal value and the export price, and initiated a dialogue on the points that needed to be discussed.

33. Costa Rica has stressed that the CDC failed to make use of any of the options proposed by footnote 8 of the Anti-Dumping Agreement, despite the fact that, in its view, the usual practice is to take the date of invoice as the date referred to by this footnote.

34. The footnote is perfectly comprehensible in the context of Article 2.4.1 when it is a matter of determining when a currency conversion has taken place. However, it is telling that, even in the context of a currency conversion, footnote 8 still provides a large degree of flexibility and does not impose a specific criterion, giving the authority the option of using several points in time for the purposes of carrying out the currency conversion. The presence of this footnote just serves to highlight the absence of similar guidance in Articles 2.1 or 2.4.

35. With regard to the third argument, ArcelorMittal never submitted the information needed to carry out what Costa Rica now implies would be a "fair comparison". Despite having ample opportunity to do so, ArcelorMittal never reported the domestic sales for the assessment of the normal value at which they were invoiced or contracted at allegedly the same time as the sales shipped on the vessels, the Thorco Logic and the Suzie Q, in November 2016 and April 2017.

36. The CDC made a fair comparison when it established the POI and conducted a reasonable analysis on this basis. Even assuming that Costa Rica's arguments on this matter had merit and were supported by the Agreement (*quod non*), ArcelorMittal failed to provide the information required to carry out the proposed analysis.

37. In view of the foregoing, the Dominican Republic considers that Costa Rica has failed to present a case of inconsistency with Article 2.4 of the Anti-Dumping Agreement.

IV. COSTA RICA'S CLAIM THAT BELOW-COST TRANSACTIONS WERE EXCLUDED IN VIOLATION OF ARTICLE 2.2.1 OF THE ANTI-DUMPING AGREEMENT

38. Costa Rica develops two related, but somewhat contradictory, arguments with respect to the exclusion of domestic sales due to the fact that they were made below cost.

39. Firstly, Costa Rica submits that the CDC failed to conduct two of the three tests under Article 2.2.1 as to whether below-cost sales were made within an "extended period of time" and "at prices which do not provide for the recovery of all costs within a reasonable period of

time". However, the CDC's published reports clearly show that these tests were conducted, since the CDC examined the sales and costs within the entire one-year dumping POI and examined whether the sales prices that were below per unit costs were above weighted average per unit costs for the POI. Costa Rica's assertion to the contrary is not supported by the record.

40. Secondly, Costa Rica argues that the CDC failed to correctly apply the test of whether the sales did not provide for the recovery of costs within a reasonable period of time. It submits that this is because the CDC used annual cost data rather than monthly data. This argument necessarily signifies that Costa Rica agrees that the analysis required under Article 2.2.1 was conducted (albeit allegedly not properly) and, therefore, that its previous argument concerning the lack of such an analysis is unfounded. Moreover, Costa Rica fails to explain under which legal obligation the CDC was required to disregard the annual cost data provided by ArcelorMittal in its questionnaire response in favour of the monthly data. The CDC used the annual cost data provided in Annex F-4 to ArcelorMittal's questionnaire response. Nothing in Article 2.2.1 requires an authority to use monthly data in this analysis. Importantly, the Costa Rican exporter recognized this during the underlying investigation when it confirmed that nothing in the Anti-Dumping Agreement provides a methodology for determining the per unit costs that should be used when determining below-cost sales. Accordingly, Costa Rica's claims under Article 2.2.1 lack a legal and factual basis.

IV.1. Costa Rica's claim that the Dominican Republic violated Article 2.2.1 by failing to determine that the below-cost sales were made within an "extended period of time" and "at prices which do not provide for the recovery of all costs within a reasonable period of time" is unfounded

41. The CDC made the determinations required by Article 2.2.1 in order to disregard the below-cost sales and applied the appropriate tests when doing so. Costa Rica claims that, of the three criteria under Article 2.2.1 that must be met in order for below-cost sales to be disregarded, the CDC failed to make appropriate determinations on the first and third criteria. Therefore, its assertion is not that the CDC failed to properly apply these two criteria, but that it did not examine them at all. This is factually incorrect.

42. First, the CDC ensured that the below-cost sales were made within an extended period of time by including all the sales made during the relevant one-year period. Costa Rica asserts otherwise. However, it does not explain what kind of test it considers should have been conducted by the CDC in order to fulfil this requirement. It would appear that Costa Rica is seeking to impose on the CDC an obligation not laid down in the Anti-Dumping Agreement. This has no basis: an investigating authority should not have an additional obligation to fulfil on top of complying with the requirement to examine the entire extended period of time of the POI. The CDC determined that the below-cost sales were made "within" the one-year POI and, therefore, "within an extended period of time", in accordance with Article 2.2.1. Moreover, the evaluation carried out by the CDC shows that below-cost sales were made during each of the 12 months of the POI.

43. Second, Costa Rica does not dispute that the CDC made an adequate determination in relation to the second criterion of Article 2.2.1 (namely, that below-cost sales were made "in substantial quantities"). In fact, the CDC conducted the required test and determined, in accordance with footnote 5, that the volume of sales below per unit costs represented more than 20% of the volume sold in the transactions under consideration for the determination of normal value.

44. Third, contrary to Costa Rica's assertion, the CDC also determined that the below-cost sales were "at prices which do not provide for the recovery of all costs within a reasonable period of time". When making its determination, the CDC applied the same test as that used to assess the volume of below-cost sales, since ArcelorMittal provided it with information on the cost of production over the whole POI, which was used by the CDC. The prices of the below-cost sales were below cost during the investigation period.

45. The CDC excluded the below-cost sales only after having examined whether the low-cost sales were made within an "extended period of time", in "substantial quantities" and "at prices which

do not provide for the recovery of all costs within a reasonable period of time". The CDC examined the sales and cost data over the entire one-year dumping POI, thereby complying with footnote 4 of the Anti-Dumping Agreement.

46. Accordingly, Costa Rica's assertion that the Dominican Republic failed to make the three determinations required under the cost test in Article 2.2.1 is incorrect. The CDC made the three determinations and applied the appropriate tests to each one.

IV.2. Costa Rica's assertion that the Dominican Republic violated Article 2.2.1 by using an annual weighted average per unit cost instead of a lower monthly weighted average per unit cost in the cost test is without merit

47. The Dominican Republic properly conducted the test provided for under Article 2.2.1 of the Anti-Dumping Agreement. Nothing in Article 2.2.1 or the jurisprudence requires an investigating authority to use monthly costs in this analysis. In the absence of such a legal obligation, it is difficult to understand how the objective and frequently applied method of using annual costs could be considered biased, unobjective or unreasonable to the extent that it constitutes a violation of the Anti-Dumping Agreement.

48. Costa Rica's only argument is that the costs increased during the POI and that, as a result, the use of an annual average raises the risk of finding below-cost sales during the initial period of the POI. However, if an authority were required to use monthly cost data instead of annual cost data each time that the costs increased during the POI, this would have been explicitly stated in the Anti-Dumping Agreement. Moreover, Costa Rica fails to prove that this methodology led to the improper exclusion of sales. It is important to emphasize that Costa Rica's claim lacks any legal basis. In fact, its claim ignores the fact that the test set out in the last sentence of Article 2.2.1 specifically instructs investigating authorities to use "weighted average per unit costs for the period of investigation". This is exactly what the CDC did when it calculated the annual weighted average per unit cost for the year that constituted the POI, as was reported in the questionnaire for the exporter.

49. While ArcelorMittal and Costa Rica would have preferred monthly weighted average costs, investigating authorities are not required to use monthly costs and the CDC explained that the annual costs it used in the Essential Facts Report were appropriate. It was only after the Essential Facts Report had been published and the CDC had conducted the relevant below-cost tests that ArcelorMittal requested, in its response to the report, that the adjusted monthly data be used. The CDC considered the exporter's request concerning the adjusted monthly data and determined that the calculations presented by ArcelorMittal for the analysis were inadequate.

50. In addition, there is no legal basis in the text of the Anti-Dumping Agreement for prohibiting an authority from using the annual cost data submitted by the exporter in its questionnaire response.

51. Moreover, Costa Rica misrepresented the facts in its response to Panel question No. 22 when it stated that the exporter explained at the time of verification that the monthly cost data should have been used.

52. Article 2.2.1 requires investigating authorities to use the weighted average per unit cost for the period of investigation, which is exactly what the CDC did in this case. Firstly, during verification, the exporter provided information on the cost with earnings before interest, taxes, depreciation and amortization (EBITDA), which was generated on a monthly basis. In other words, what happened during verification was that the exporter argued that the cost analysis should be based on all the EBITDA data and provided this monthly data set.

53. In addition, when the CDC wished to double-check the monthly EBITDA data with the help of a costs expert, it was denied access to the facilities, after the visit had been notified and accepted, as the exporter took issue with the presence of this costs expert, so the second verification visit could not take place. In any event, the CDC provided a reasoned and adequate explanation in the Final Technical Report as to why it did not use the EBITDA data to determine the cost of production, in line with the practices of investigating authorities in general. Costa

Rica has not contested this rejection of the EBITDA data as a basis for the determination of costs.

54. For all of the aforementioned reasons, the Dominican Republic requests the Panel to reject Costa Rica's claims under Article 2.2.1 of the Anti-Dumping Agreement.

V. COSTA RICA'S CLAIM REGARDING THE CONSIDERATION OF PRICE EFFECTS UNDER ARTICLES 3.1 AND 3.2 OF THE ANTI-DUMPING AGREEMENT

55. Costa Rica takes issue with the price-related analysis and argues that it was not an objective examination based on positive evidence, but does not explain why the CDC's conclusions, which were supported by the facts on the record, were biased. With respect to the price undercutting analysis, Costa Rica fundamentally misinterprets the summary table contained in the non-confidential version of the Final Technical Report and attempts, inconsequentially, to argue that the CDC did not use the term "significant" when it found a price undercutting of 21-63%. Regarding the price decrease analysis, Costa Rica cannot contest that the prices decreased when comparing 2017 with 2015, but suggests that other price information on the record shows that prices were increasing in the most recent part of the POI. In fact, the CDC clearly mentions these developments and does not ignore this increase; rather, it contextualizes the increase within the framework of the price suppression analysis. Lastly, with regard to the price suppression analysis, Costa Rica's argument essentially relies on the claim that the CDC did not do enough to assess the alleged causes of price suppression. However, the CDC found significant price undercutting and explained - with the support of the facts on the record - that costs increased more than prices at the very moment when dumped imports from Costa Rica rose significantly. Costa Rica's claim of a violation of Articles 3.1 and 3.2 is therefore inadmissible. The CDC was not required to provide a more exhaustive causal link analysis under Article 3.2.

V.1. Price undercutting analysis

56. Costa Rica submits that there are various problems with the CDC's price undercutting analysis. Many of the alleged problems seem to arise from the fact that Costa Rica bases its arguments on the non-confidential version of the Final Technical Report although, during the course of this dispute, Costa Rica failed to consider that table 22 does not show the alleged levels of price undercutting mentioned by the CDC. The confidential version of the report fully supports the finding of price undercutting and reveals that Costa Rica's concerns are unfounded, since it clearly shows the extent of price undercutting and supports the conclusions outlined by the CDC.

57. The CDC's reports clearly considered the significance of the price undercutting margins. The CDC explicitly indicated the significant magnitude, i.e. the high value, of the price undercutting margins. This conclusion is sufficient to satisfy the requirement to consider the price effects under Article 3.2.

58. The CDC conducted the necessary analysis of the significance of the price undercutting margins in accordance with Articles 3.1 and 3.2, and found them to be "high" in the light of the fierce competition between imported and domestic products on the market and their high degree of substitutability. Costa Rica does not fully explain why undercutting margins of between 63% and 21% would not be significant by any standard. The undercutting continued throughout the POI, and Costa Rica does not indicate any other aspect that the CDC should have considered in this regard.

59. Costa Rica submits that the CDC has not considered whether the price undercutting margins were the effect of dumped imports. This argument lacks any legal basis, since price undercutting does not refer to price effects, but to the difference between two sets of prices: those of the domestic producer and those of the exporter in question. Unlike price depression or suppression, the concept of price undercutting does not include any effects-based element. Article 3.2 establishes a link between the price of subject imports and that of like domestic products, by requiring that a comparison be made between the two. This is the scope of the analysis required in relation to price undercutting. That is what the CDC did, and Costa Rica has failed to show otherwise.

60. Costa Rica's reference to the panel's finding in *China - Broiler Products (Article 21.5 - US)* is erroneous. When the panel in *China - Broiler Products (Article 21.5 - US)* referred to the need to examine the effects under Article 3.2 also in the context of price undercutting, it was referring to potential differences in terms of the "basket" of products that could render an undercutting analysis largely irrelevant. The question in that case concerned the dissimilarity in the "basket" of products, which meant that the findings provided no information about the price effects of dumped imports. That consideration was clearly irrelevant to the CDC's investigation. The two baskets of products were comparable and, as such, the outcome of the price comparison of these products was highly relevant to consideration of the price effects of dumped imports.

61. Costa Rica argues that price undercutting was at its lowest level when imports increased, and claims that this inverse movement contradicts the conclusion that price undercutting was the effect of dumped imports. However, apart from suggesting that a smaller undercutting margin would in some way make it less significant in terms of quantities or would undermine the relevance of the finding of undercutting for a general effects analysis, Costa Rica does not explain its argument. The fact that undercutting reached its highest level upon the initial entry of dumped imports, once it had been established that the prices of these imports could increase slightly while maintaining a high undercutting margin, does not *prima facie* undermine the relevance of the finding of price undercutting.

V.2. Price depression analysis

62. Costa Rica considers that the finding of a 6% price depression does not reflect the trend for the period and, therefore, the CDC's analysis does not meet the requirements under Article 3.2, considered in conjunction with Article 3.1. It is not clear what, exactly, Costa Rica's argument of a violation is. Costa Rica does not link this assertion with any legal obligation. Rather, it states that Article 3.2 requires a dynamic analysis of price developments and trends. However, Costa Rica cannot deny the accuracy of the CDC's finding based on the facts on the record. Furthermore, Costa Rica's argument does not appear to assess fully the CDC's price analysis and mistakenly separates the examination of the fall in prices from the CDC's other price-related findings, with which it forms a whole.

63. First, it is clear that the CDC's conclusion is correct in practice, and Costa Rica does not claim otherwise: prices were lower in 2017 than in 2015. In the context of a price effects analysis, it is common practice to examine the price level close to the end of the POI and compare it with the price level at the start of the injury POI. This is what the CDC did when it examined the price increases in 2017 and 2018 in the context of the price suppression analysis, which is an integral part of the CDC's examination of price effects, as set out in section 6.3 of the Final Technical Report. The consideration of the decrease in prices must therefore be viewed in the context of the CDC's findings as a whole, which clearly show that the CDC also examined price trends and contextualized these price changes while also assessing changes in costs.

64. Furthermore, Costa Rica is mistaken in its assertion that the CDC only examined the increase in prices in the last four-month period. Even Costa Rica acknowledges that table 24 clearly shows that the CDC also examined the price increases in 2017. The mere fact that the CDC would conclude that there had been price suppression actually shows that Costa Rica is wrong in its approach. A proper reading of the CDC's price effects analysis is that it examined the facts and found that prices decreased between 2015 and 2017 and, although prices rose in the last two years, they increased less than costs. Both findings of fact form part of a whole, and Costa Rica's attempt to isolate the finding of a fall in prices to argue that the CDC ignored the upward price trends is misguided. The CDC acted as an objective investigating authority, and based its price effects analysis on all the facts and evidence on the record.

V.3. Price suppression analysis

65. Costa Rica submits that the CDC's consideration of price suppression failed to demonstrate that there was suppression, or that any suppression was the result of dumped imports from Costa Rica. It argues that the CDC failed to examine whether prices would have been higher than for dumped imports. It also states that table 24 of the Final Technical Report does not show imports from Costa Rica. However, it does not explain what exactly it believes the CDC

should have done in this respect. The claims are unfounded and wrong. The reports published clearly show that the CDC considered the existence of price suppression based on positive evidence and linked the price suppression to the increase in dumped imports.

66. The CDC explained that it assessed price suppression by considering the extent to which domestic prices provided for the recovery of the production cost increase. It found that domestic prices had not followed the increase in production costs, based on a comparison of average selling prices with average total production costs. This analysis showed that the domestic industry's cost of production as a percentage of the selling price was constantly increasing throughout the POI. The CDC also explained that the suppression of domestic prices and the decline in profitability coincided with the significant increase in dumped imports from Costa Rica.

67. The pressure in terms of cost of production that was being exerted on the domestic industry, which meant that prices increased less than could be expected, is linked to the rise in Costa Rican imports. Costa Rica is therefore wrong to suggest that the CDC failed to take into account Costa Rican imports in the price suppression analysis. In a "normal" situation, prices increase as much as, or more than, costs. The opposite occurred precisely during the period when dumped imports increased. It is unclear what more Costa Rica was expecting the CDC to find.

68. Costa Rica prefers to disregard the fact that the CDC has already found significant price undercutting by these same dumped imports, which exerts obvious pressure on domestic prices. In summary, Costa Rica has failed to establish any *prima facie* case that the CDC acted in violation of Articles 3.1 and 3.2.

69. Lastly, Costa Rica offers an irrelevant argument as to how the domestic industry had sufficient margin to increase its prices: "there was a significant margin between the domestic industry's ex-factory price and its average total cost". It suggests that this demonstrates that "the domestic industry was not prevented from increasing prices and that the price adjustment was not an effect of imports from Costa Rica".

70. However, the facts show that the cost-price squeeze experienced by the domestic industry increased throughout the POI, which suggests that the domestic industry was not in a position to increase prices so easily. This argument by Costa Rica is speculative and entirely irrelevant since the facts are what they are, and they show that prices were suppressed precisely when dumped imports massively increased at prices that undercut those of the domestic industry.

71. In sum, contrary to Costa Rica's argument, the CDC correctly and objectively considered the significance of any price suppression, based on positive evidence.

VI. COSTA RICA'S CLAIM REGARDING THE FINDING OF INJURY UNDER ARTICLES 3.1 AND 3.4 OF THE ANTI-DUMPING AGREEMENT

72. With regard to the impact on the domestic industry, the CDC examined all the injury factors, including all those listed in Article 3.4 of the Anti-Dumping Agreement. It observed that the factors examined showed that the domestic industry's performance fluctuated throughout the POI. In 2016, some improvement was observed in all the factors, followed by generally negative trends in 2017 (when dumped imports from Costa Rica increased considerably), and a continuous decline in profits and cash flow in the most recent period. Although the CDC examined all the injury factors under Article 3.4 objectively and based on positive evidence, its final determination was, however, that of a mere threat of injury rather than material injury. This finding reflects the varied nature of the picture painted by the injury factors analysis. WTO panels and the Appellate Body have taken the view that the determination of a threat of material injury must take into account events during the POI as well as assumptions about future events. In fact, several WTO panels have acknowledged that, having regard to Article 3.4, the factors "establish the basis" on which to assess whether there could be a threat of injury. It would therefore be appropriate to evaluate the current situation of the domestic industry in the POI in order to assess likely future developments, but it is not required for determining threat of injury. For example, the Appellate Body has observed that "current market conditions are relevant as a basis to draw reasoned conclusions regarding likely future

market conditions". The Dominican Republic agrees with this statement, and that is why the CDC examined all these factors. However, to be clear, in the absence of a finding of material injury under Article 3.4, there is no basis for a finding of violation of that article. Any concern related to the examination of injury factors in a threat of injury situation is governed by Article 3.7 of the Anti-Dumping Agreement, not Article 3.4.

73. In any event, Costa Rica fails to explain why this factor analysis under Article 3.4 was biased.

74. Costa Rica attempts to present the facts differently, by focusing on trends in the last four months of the POI, without explaining why the CDC's evaluation of trends throughout the POI (insofar as necessary) was biased. Costa Rica ignores the fact that, precisely because of certain positively trending factors, as was the case in the most recent period, the CDC did not arrive at a finding of material injury. It is therefore untrue that the injury examination did not reflect the reality of the last four months. The CDC examined and acknowledged some positive developments, but also pointed out that others remained negative, contrary to what Costa Rica wrongly argues. Costa Rica's claim under Article 3.4 is unfounded.

75. First, with respect to Costa Rica's argument that seven factors showed positive trends, the Dominican Republic points out that the factual basis for Costa Rica's claim is not what the CDC did, but rather Costa Rica's own attempt to represent the facts without explaining why this representation is more objective than that of the CDC, which was based on a dynamic analysis. Presenting the facts differently by focusing on specific periods of the POI is insufficient to establish a *prima facie* case of violation. The WTO dispute settlement mechanism is not an instance in which to "appeal" a national determination, and a disagreement over how the national authority interpreted the facts cannot constitute sufficient grounds for finding a violation of the Anti-Dumping Agreement.

76. The Dominican Republic disagrees with Costa Rica's presentation of the facts, in which it outlines seven positive factors and conflates the POI as a whole with the most recent period. The crux of the matter is that Costa Rica fails to demonstrate that there was anything wrong with the CDC's examination or the evidence underlying the evaluation. Rather, Costa Rica simply chooses to present the data differently from the CDC. However, this is not a basis for finding a violation of Articles 3.1 and 3.4. In fact, the CDC's examination was not at all biased and the data used were not unsuitable in any way. If a similar approach is taken and the trends for the entire POI are conflated with trends for only part of that period, it could likewise be concluded that up to 11 injury factors showed a negative trend. This demonstrates that data relating to injury trends can be presented in various ways depending on the part of the POI chosen. However, what is essential for this dispute is not what could be done, but what the CDC in fact did, whether it was impartial, and whether it carried out its work properly. However, this is not what Costa Rica did. In any event, the CDC evaluated the injury factors properly.

77. Second, Costa Rica claims that the CDC mentions four negatively trending factors. However, Costa Rica cites a part of the Final Technical Report where these factors are listed as examples of negatively trending factors. The negatively trending factors referred to in Costa Rica's argument are therefore just examples. Although they are examples of negatively trending factors at each point of the POI, this does not mean that the other factors were considered to show positive trends, as Costa Rica appears to suggest by highlighting only recent developments in the last four months of the POI.

78. Third, Costa Rica submits that the CDC failed to assess the role, relevance and relative weight of each factor, and that the CDC failed to show how it evaluated dissimilar trends in the different indicators. It is unclear what Costa Rica expected the CDC to do, or why what it did was not objective. Costa Rica disagrees with the CDC's weighting of the various injury factors, but does not point to any particular finding of material injury that was reached in a biased manner. What is clear, however, is that the CDC evaluated all the relevant injury factors and their respective trends during the POI. The CDC even highlighted certain negatively trending factors that were especially important because they coincided with a significant increase in dumped imports from Costa Rica.

79. Fourth, Costa Rica contradicts the specific findings of the CDC relating to four factors that it claims show negative trends (profits, cash flow, employment and market share), by arguing that the CDC failed to examine them objectively based on positive evidence.

80. Regarding profits, Costa Rica does not cite any rule to support its assertion that profits are irrelevant when examining the state of the domestic industry, nor does it give any reason as to why it was obvious that this factor was particularly irrelevant to the industry in question.

81. Furthermore, Costa Rica has failed to refer to any WTO panel or Appellate Body report that has disregarded this factor as irrelevant. Conversely, ample jurisprudence underscores the need to evaluate each and every factor listed in Article 3.4. "Profits" are listed in Article 3.4 as a factor to be evaluated. It defies economic common sense to argue, as Costa Rica does, that profits are not a good indicator of the state of the domestic industry. Moreover, contrary to Costa Rica's contention, there is a correlation between the negative trend in the domestic industry's profits and the decline in other factors, such as sales. Costa Rica also fails to explain why only coincidence with sales would be relevant to evaluating profits, which is among the 15 factors listed in Article 3.4. It is more relevant that profits decreased in 2017 and in the most recent period, when the volume of dumped imports continued to increase.

82. Costa Rica also submits that the CDC refers to a decrease in "profit margin" without providing figures to support it, and alleges that this means that the CDC's conclusion is not based on positive evidence. It also claims that the CDC's conclusion is circular given the direct relationship between "profit margin" and profitability. Neither of Costa Rica's arguments are developed and both are unfounded. It is clear that, on reading the CDC's results in the context of the analysis as a whole, the reference to the "profit margin" is a cross-reference to the fall in the profit-cost ratio mentioned previously in the Final Technical Report (paragraph 355), where the actual numbers are provided. That these two methods of examining the issue of profitability are closely linked does not mean that they are irrelevant. The complete opposite is true, and the CDC was acting in a very reasonable manner when it drew this link.

83. Costa Rica further submits that the CDC does not "provide any basis" to show that the decline in profits is connected to the increase in dumped imports from Costa Rica. While it is true that the CDC did not address this fact in the paragraph of the Final Technical Report cited by Costa Rica, the CDC did consider it explicitly in related parts. The CDC also determined that the strongly negative trend in profits (both before and after tax) throughout the injury POI coincided with the decline in sales on the domestic market and the decrease in the domestic industry's profit margin owing to the entry into the country of Costa Rican imports at dumped prices. The CDC's statements thus refute Costa Rica's argument that there was no basis for finding a link between the two.

84. Costa Rica mentions its allegedly limited share of total imports and submits that its prices were increasing in the most recent period. In fact, the CDC found that the volume of dumped imports increased in 2017 and in the most recent period of 2018, that dumping continued, and that exports entered the country at prices that significantly undercut the sales of the domestic producer. In terms of coincidence in trends, it is difficult to see how the CDC's conclusion regarding the link in terms of evolution could have been biased or baseless.

85. As for cash flow, Costa Rica does not refute the CDC's conclusion regarding the trend in this factor (i.e. that it decreased throughout the injury POI). Costa Rica does, however, refute the CDC's statement that the negative cash flow is attributable to the fall in profits as a result of Costa Rica's dumping practices. Nevertheless, the CDC explicitly determined a link between the decline in the domestic industry's profits and the significant increase in dumped imports from Costa Rica.

86. With regard to employment, Costa Rica submits that the trend is mixed or even stable, and not negative. It points out that total employment was stable, and claims that the CDC focuses on the number of workers and not on total employment. However, it is unclear what the factual basis of Costa Rica's argument is, and Costa Rica does not explain what legal obligation with respect to the undefined term "employment" the CDC allegedly violated.

87. The CDC's analysis of the "employment" factor was by no means incomplete or biased. The CDC presented the relevant data pertaining to direct labour, workers and employees during the POI and included the relevant trends. It later pointed out, in direct contradiction to Costa Rica's argument concerning an alleged focus on the "number of workers", that the total number of workers and the total number of employees both increased in 2016, but fell in 2017 and during the most recent period.

88. Costa Rica also submits that, in the section on employment, the CDC was under an obligation to explain why the change in direct labour showed that the domestic industry was in a state of vulnerability rather than on a path towards greater efficiency. It is nonetheless unclear what the legal basis for this alleged obligation is and why what the CDC did was biased. The CDC was examining the injury factors listed in Article 3.4 and did not have to explain why it was doing so. Nevertheless, it studied the link between the total number of workers and output in relation to the productivity factor, and observed that productivity decreased in 2016 and 2017, but increased in the first four months of 2018, since the workforce had declined.

89. The CDC's examination was therefore objective and contained reasoned conclusions based on the positive evidence available to it, and the injury analysis as a whole addressed the link between employment and output under the "productivity" section.

90. Lastly, Costa Rica refers to the increase in employment in 2016 and submits that the CDC does not provide any basis for asserting that "the domestic industry has been forced to reduce its workforce owing to the entry of imports at dumped prices", as it claims that the CDC determined that employment had in fact increased in 2016. This is a good example of the misleading and erroneous nature of Costa Rica's arguments.

91. There is no doubt that the employment figures fell in 2017 and 2018, the years in which dumped imports from Costa Rica increased considerably. Costa Rica makes an irrelevant reference to 2016 in its argument. The CDC explained this relationship in other parts of the Final Technical Report. The correlation between the increase in dumped imports and the drop in employment figures was what led the CDC to conclude that the domestic industry had been forced to reduce its workforce owing to the entry of imports at dumped prices, in order to reduce its fixed costs and thereby lower its average cost.

92. With respect to the argument concerning 2016, the CDC pointed out that dumped imports from Costa Rica began to arrive in November 2016. Therefore, the fact that dumped imports only entered the Dominican Republic in the last two months of 2016 can explain the fact that employment figures for 2016 were less affected than those for the subsequent part of the POI.

93. Furthermore, the fact that the domestic industry's employment figures were negatively affected throughout the POI is borne out by the facts on the record with respect to direct labour, the number of workers, the total number of employees and total employment.

94. As for market share, Costa Rica disagrees with the CDC's conclusion that the domestic industry's loss of market share was attributable to imports from Costa Rica, asserting that it "is not based on an objective assessment or positive evidence". This argument is again completely centred on the growth in imports from Costa Rica in the first four months of 2018, in relation to which Costa Rica submits that its imports' share of apparent domestic consumption in the Dominican Republic did not remain "unchanged" during the most recent period.

95. This argument is unfounded and, once again, does not point to any violation of Article 3.4 of the Anti-Dumping Agreement.

96. First, the CDC's conclusion that the domestic industry's loss of market share was attributable to imports from Costa Rica was not based solely on the first four months of 2018, but took into account evidence from the POI as a whole, which included 2017. The coincidence in time between the dumped imports and the growth in market share supports this conclusion. Costa Rica's only response is to focus exclusively on the first four months of 2018.

97. Second, the facts on the record clearly show that the domestic market share of imports from Costa Rica remained stable over the first four months of 2018 compared to the same period of 2017. Thus, Costa Rica's argument that the share of Costa Rican imports over the period January-April 2018 was lower than their share in 2017 is based on a comparison of different periods. It is based on a comparison of data for the entire year of 2017 with the first four months of 2018, whereas the CDC compared the first four-month period of 2017 with the same period of 2018. In the Dominican Republic's view, comparing the same periods of 2017 and 2018 gives a more accurate picture of the trend in imports from Costa Rica. Based on the analysis of the comparable periods of 2017 and 2018, it is obvious that imports from Costa Rica retained the same share of the entire domestic market.

98. Furthermore, it is perfectly reasonable for the CDC to highlight the link between the domestic industry's loss of market share and dumped imports, even if the dumped imports' market share did not increase in the last four months. The domestic industry lost market share in 2017 when the share of Costa Rican imports increased and retained their share of a growing market over the first four months, as dumped imports continued to increase and the domestic industry's share of the domestic market continued to fall. Costa Rica fails to show that there was anything not objective about this conclusion.

99. Costa Rica's claim that the market share analysis was not based on "positive evidence" is similarly baseless and unsubstantiated. It provides no supporting arguments as to why data used by the CDC did not constitute "positive evidence". It has not presented any arguments as to why the data were not *prima facie* of an "affirmative, objective and verifiable character" or why they were not *prima facie* "credible". The Dominican Republic therefore considers that Costa Rica's argument with respect to the CDC's consideration of market share and the impact of dumped imports from Costa Rica must be dismissed.

100. Costa Rica further argued against the analysis by claiming that the CDC failed to properly examine the link between dumped imports and the state of the domestic industry. However, Costa Rica is clearly wrong to argue that the CDC never provided a reasoned explanation regarding the link between dumped imports and the impact on the domestic industry. The CDC did so in considerable detail. Costa Rica may disagree and argue that it would have weighed certain factors differently, but it cannot seriously deny that the CDC engaged in an evaluation that placed the injury factors within the context of dumped imports. The CDC examined the injury factors relevant to the domestic industry in the light of the significant increase in dumped imports from Costa Rica, and concluded that there was a strong coincidence in time between the negative performance of several factors and the significant increase in the volume of dumped imports.

VII. COSTA RICA'S CLAIM REGARDING THE FINDING OF A CAUSAL RELATIONSHIP UNDER ARTICLES 3.1 AND 3.5 OF THE ANTI-DUMPING AGREEMENT

101. With regard to the determination of a causal relationship, the CDC examined the causality between the dumped imports and the determination of the threat of material injury. It also examined any other factor that might have injured the domestic industry at the same time. The CDC established a correlation in time and concluded that there was a causal relationship between dumped imports and the trends in the injury factors concerning the domestic industry, and that there was an imminent threat of injury.

102. Costa Rica attempts to develop the argument that the CDC failed to establish any causal relationship and examined only non-attribution factors by referring to section D of the final determination. However, its argument is purely formalistic and incorrect, since Costa Rica deliberately ignored the relevant section of the published report in which the issue of causation was addressed. In fact, section D of the final determination is not the only relevant part of the CDC's examination and findings concerning the existence of a causal relationship. The CDC also presented the relevant analysis in sections 7 and 8 of the Final Technical Report, section 9 of the Essential Facts Report, and section C of the final determination. An authority is under no obligation to present the facts and analysis under a heading of a published report in order to act in accordance with Article 3.5. It would also be incorrect, from a substantive point of view, to ignore the conclusions set out in reports other than the final determination, as they are intrinsically linked to the conclusions summarized in the final determination. The CDC conducted an assessment and determined that there was a causal link between the increase

in dumped imports from Costa Rica and the decrease in injury factors from 2016, which continued throughout the POI. Certain factors showing a positive trend suggested that the industry was not suffering material injury at that time, but that there was a threat of injury. The correlation in time was clearly part of the CDC's analysis and confirmed the findings.

103. There is no prescribed methodology in the Anti-Dumping Agreement for determining causality. WTO jurisprudence endorses the practice used by many investigating authorities of determining causality by examining whether there is a coincidence in trends (i.e. a correlation) between the volume and price effects of dumped imports and injury-related developments in the domestic market, provided that any coincidence is supported by an adequate and reasonable explanation that demonstrates the causal link. The finding of a coincidence in trends between dumped imports and the injury factors is, therefore, an important consideration that supports the determination by an investigating authority of a genuine and substantial relationship of cause and effect between dumped imports and injury. If Costa Rica considers that more detailed conclusions should have been included in the final determination itself, it should have submitted a claim under Article 12.2 of the Anti-Dumping Agreement. It did not do so.

104. In terms of non-attribution, the CDC examined other known factors that could have injured the domestic industry at the same time as the dumped imports. It found that no factor of this type broke the causal relationship between dumped imports from Costa Rica and the threat of material injury to the domestic industry.

105. Costa Rica focuses its non-attribution argument on the increase in imports from third countries during the last four months of the POI. However, Costa Rica's focus on these last four months is erroneous. It does not acknowledge that the authority examined the POI as a whole, as was necessary, and provided a reasonable and reasoned explanation as to why this recent increase in imports from third countries did not break the causal relationship, especially as imports from Costa Rica continued to rise even during this last four-month period. Costa Rica's affirmation is therefore unfounded and is not focused on the CDC's actual conclusions.

106. For example, with regard to the volume of imports from third countries, the CDC assessed the customs data and determined that relevant imports had come from various countries, but in significantly lower volumes compared to imports from Costa Rica. Furthermore, the volume of imports from third countries as a whole decreased in 2016 and 2017, before increasing in the most recent period. The CDC pointed out that imports from third countries increased in this period alone, and that the domestic industry showed signs of positive growth precisely in this most recent period. This limited period of rising imports from third countries was therefore not considered to have broken the causal relationship with dumped imports from Costa Rica.

107. The CDC explained its finding in a reasonable and reasoned manner, and considered alternative explanations for the data. It is not enough for Costa Rica to argue that a different conclusion could have been reached by strictly focusing on the 2018 trends. It is well established that the panel's task is not to engage in a *de novo* review, since it is not the tribunal of fact in anti-dumping disputes. Furthermore, Article 17.6 of the Anti-Dumping Agreement is very clear: an authority's determination must be upheld even though the panel might have reached a different conclusion, provided that the establishment of the facts was proper and the evaluation was unbiased and objective.

108. In a similar vein, it was found that the domestic industry's export performance had not broken the causal relationship. It fluctuated throughout the injury POI, but was significantly higher in 2018 compared to 2017. Furthermore, when comparing the domestic industry's export performance with certain key injury factors, the CDC found no correlation. The CDC therefore concluded that exports rose and fell, while export performance was positive and very positive during the dumping POI. It is unclear what Costa Rica deems to be partial or biased in this description of the facts. This argument does not establish a *prima facie* case of violation of Articles 3.1 and 3.5.

109. Costa Rica also appears to argue that the CDC was required to conduct a separate injury analysis for export sales and for the domestic industry's sales on the domestic market. There is clearly no such requirement in Article 3.4 or 3.5.

110. As for developments in technology, Costa Rica does not establish a *prima facie* case of violation of Articles 3.1 and/or 3.5. It does not present sufficient arguments to demonstrate the absence of an objective examination of "developments in technology". The factors to which Costa Rica refers and which were examined by the CDC are part of the ordinary course of business and not genuine structural differences in technology. With respect to Costa Rica's assertion about how ArcelorMittal had, unlike the domestic industry, updated its machinery, it is unclear what in the record forms the basis of this claim, since ArcelorMittal does not provide any such explanations in its communications to the CDC. The CDC determined that there were no genuine differences in technology between the domestic producer and the Costa Rican producer, thus considering and rejecting another possible "other factor". In any event, Article 3.5 does not require authorities to look for or examine, on their own initiative, the effects of all possible factors.

VIII. COSTA RICA'S CLAIM REGARDING THE THREAT OF INJURY FINDING UNDER ARTICLE 3.7 OF THE ANTI-DUMPING AGREEMENT

111. The determination of threat of injury was based on an examination of the factors listed in Article 3.7 of the Anti-Dumping Agreement, as well as on the impact examination provided for under Article 3.4. On the basis of this examination, the CDC determined, *inter alia*, that dumped imports from Costa Rica had increased significantly, at a high rate, during the POI; that they accounted for around 30% of total imports; that they caused the significant undercutting of domestic prices; that ArcelorMittal had significant excess production capacity; that ArcelorMittal had more than enough capacity to meet a significant part of total demand in the Dominican Republic; and that the Dominican Republic was Costa Rica's main export market for various reasons. Based on these intermediate findings, the CDC concluded that there was an imminent threat of injury from dumped imports originating in Costa Rica.

112. Costa Rica submits that this conclusion of threat of injury does not hold, arguing essentially that imports from Costa Rica lost some market share over these last four months of the POI. This assertion is untenable. Even Costa Rica agrees that imports from Costa Rica continued to increase, including during this last four-month period. Costa Rica cannot refer to any improper determination of the facts by the CDC in relation to the factors in Article 3.7, all of which were examined at great length by the CDC. Costa Rica wrongly ignores a large part of the CDC's analysis that explained why an additional increase in dumped imports was likely by focusing on Section 7.16 of the Final Technical Report while ignoring all the conclusions in Section 6 of the same report. Costa Rica disagrees with the CDC's prospective analysis, but fails to explain why this analysis - which is not strictly necessary under the Anti-Dumping Agreement - constitutes a violation. Nor does it deny that ArcelorMittal had significant production and export capacity, that ArcelorMittal had an export-oriented strategy and that the Dominican Republic was ArcelorMittal's largest export market in recent years.

113. Costa Rica's argument concerning the importance of other import sources does not address the issue at hand. As regards the effect on prices, Costa Rica simply repeats its flawed arguments developed under Article 3.2. Lastly, as regards inventories, Costa Rica does not disagree with the CDC's factual conclusions regarding the level of inventories. In fact, it confirms that it agrees with the CDC that this was not an important factor in this industry. In sum, Costa Rica's claim that Article 3.7 has been violated is unfounded.

VIII.1. Significant rate of increase of dumped imports and likelihood of substantially increased imports

114. Costa Rica overlooks the fact that the CDC's actual analysis of this Article 3.7 factor is based on an analysis of volumes of dumped imports from Costa Rica during the POI. The situation during the POI is obviously relevant as a basis for drawing inferences about future events. Costa Rica's deliberate choice to ignore the relevant factual conclusions reveals the weakness of its argument.

115. The CDC's analysis of the data from the POI shows that dumped imports from Costa Rica increased significantly in 2016, followed by another significant increase in 2017. This upward trend in imports continued during the most recent period.

116. As regards the volume of imports relative to consumption in the Dominican Republic, the CDC determined that imports from Costa Rica had a 0% market share in 2015 (there being no imports), but this share increased to 3% in 2016 (only two months of imports) and to 10% in 2017, and remained at 6% in the most recent period, as in the first four months of 2017. The market share of dumped imports from Costa Rica was approximately 50% higher at the end of the injury POI than in 2016. In addition, the CDC noted that the full-year data for 2018, when compared to the full-year data for 2017, also showed that imports from Costa Rica had continued to increase - in this case by 13.1%. Data were also submitted by the applicant indicating that imports from Costa Rica had continued to increase considerably in the first quarter of 2019.

117. While the CDC has been careful to note that the data for the year 2018 in full and the first quarter of 2019 fell outside the POI, the fact that it does not ignore data that is relevant for assessing the likely future increase in dumped imports reveals the exhaustive and objective nature of its analysis. The CDC conclusively showed that these dumped imports continued to increase at a significant pace and to flow into the Dominican Republic in significant volumes. In addition, the CDC concluded that imports from Costa Rica were the main source of total imports. The only third countries supplying imports throughout the dumping POI were Japan, the United States and Chinese Taipei, but their volumes were significantly lower compared to imports from Costa Rica. Furthermore, the fact that Costa Rica's prices were higher than those of other exporters in almost all the periods of the POI, including in 2017, and that Costa Rica's exports continued to increase, indicates that there was no competition from third countries. Moreover, the CDC went beyond the call of duty and developed a new analytical method to assess the likelihood of future import volumes in the context of its injury analysis.

VIII.2. Sufficient freely disposable capacity in Costa Rica

118. First, it is important to note that Costa Rica does not object to the CDC's conclusion that the data show that there was freely disposable capacity in Costa Rica. These CDC conclusions have not been challenged and are the essence of what Article 3.7(ii) requires the authorities to examine. Rather, its main argument is that the analysis was, in its view, insufficient to demonstrate that this capacity could be used for exports to the Dominican Republic. Therefore, the question is whether there was "sufficient" information to support the likelihood that additional production could be exported to the Dominican Republic.

119. In this regard, the CDC determined that ArcelorMittal had developed a strategy for exporting its products to international markets, which included exportation at dumped prices to the Dominican Republic.

120. Costa Rica takes the view that this finding was not based on an objective examination and positive evidence, as required by Article 3.1 of the Anti-Dumping Agreement. As noted, Costa Rica did not present, in its request for the establishment of a panel, any claim under Article 3.1 regarding the CDC's threat of injury determination. It is therefore not within the Panel's terms of reference.

121. In any event, Costa Rica's argument is without merit. It merely asserts that there was no evidence to support the CDC's conclusion regarding the fact that ArcelorMittal's export strategy proves that the company was likely to continue exporting to the Dominican Republic. Costa Rica's entire argument is reduced to one short paragraph, covering two sentences, in which it makes baseless assertions that are not supported by any evidence. These assertions alone do not constitute a *prima facie* case of violation by the CDC.

122. With regard to the positive evidence confirming ArcelorMittal's contractual obligations to continue supplying large volumes to the Dominican Republic, Costa Rica suggests that it "does not allow for a clear determination as to whether sales to the Dominican market of the product under investigation would indeed increase". Article 3.7 does not require a clear determination that exports will occur in the future. It requires an investigating authority to examine whether these exports are likely to occur. In addition, Article 3.7 recognizes that the investigating authority has some discretion to draw reasonable inferences from the facts before it.

123. Costa Rica submits that the CDC failed to explain why other markets could not absorb additional ArcelorMittal exports. Nevertheless, Costa Rica appears to choose to ignore the CDC's relevant analysis in the report. The CDC examined whether there were export markets other than the Dominican Republic that could absorb any additional exports from Costa Rica, if the large freely disposable production capacity were used.

124. None of Costa Rica's other arguments address the question of relevance under Article 3.7(ii), which refers to freely disposable capacity and the likelihood of substantially increased imports into the Dominican Republic.

125. Furthermore, contrary to Costa Rica's assertions, it is not true that the CDC "ignored" imports from third countries in its analysis. That said, Costa Rica fails to explain why these imports from third countries are particularly relevant in the context of the second factor in Article 3.7 or what exactly the CDC has done that would amount to a violation of that provision.

VIII.3. Likely price effects

126. Costa Rica submits that the CDC's analysis of the likely price effects of future imports from Costa Rica violated Article 3.7, without explaining what this violation involved. Its argument consists of a series of baseless assertions, without establishing a *prima facie* case of violation. What Costa Rica seeks to argue is not very clear, as the Dominican Republic has demonstrated by contradicting each of these assertions with facts.

127. In terms of the likely price effects of dumped imports, the significant degree of price undercutting and the undisputed increase in the cost-price ratio support the conclusion of threat of injury. The analysis was obviously based on POI data and the market conditions that existed during the POI. This is what an authority is required to do in order to ensure that its analysis is based on facts and not on conjecture or speculation. This is fully consistent with the text of Article 3.7(iii), which also focuses on current prices. Furthermore, the CDC supplemented the price effect considerations with a quantitative analysis of the possible future volume and price effects of imports from Costa Rica.

VIII.4. Inventories

128. Fourth, inventories are a factor that an authority is required to examine under Article 3.7(iv), although, depending on how an industry operates, they are not always a very important factor. The CDC determined that the inventory level accounted for around 5-10% of total production at the end of each calendar year, and that in 2018 this level was higher, reaching 17%. Inventory levels had also increased throughout the POI, and Costa Rica confirms that this inventory level represented "5.8% of the Dominican Republic's total annual imports in 2017". While this factor is not so important in this industry, as acknowledged by the CDC, it certainly supported the overall conclusion of threat of injury.

129. In sum, as explained by the CDC, its threat conclusion was based on an examination of the factors listed in Article 3.7 of the Anti-Dumping Agreement, as well as on the impact examination provided for under Article 3.4. The four factors in Article 3.7 all pointed in the same direction and supported a reasonable conclusion of threat of injury.

130. Costa Rica cannot deny that dumped imports from Costa Rica continued to increase significantly, including during the most recent period of the POI, and that this is, according to the text of Article 3.7 and footnote 10, a key factor in the determination of threat of injury.

IX. COSTA RICA'S CLAIM REGARDING THE ASSESSMENT OF THE EVIDENCE PROVIDED IN THE INVESTIGATION APPLICATION UNDER ARTICLE 5.3 OF THE ANTI-DUMPING AGREEMENT AND THE REQUIREMENT TO TERMINATE THE INVESTIGATION UNDER ARTICLE 5.8

131. The investigation was initiated on the basis of an application that provided sufficient information on dumping, injury and a causal link in relation to imports from Costa Rica. Before initiating the investigation, the CDC fully examined the application. On the basis of this review, the CDC made a number of requests to the applicant for additional information. The CDC

sought to confirm the accuracy and adequacy of this information and confirmed that the invoices corresponded to the established distributors of ArcelorMittal products in Costa Rica. In addition, the CDC used price information from the website of the distributor Construplaza to examine the normal value as close as possible to the initiation of the investigation and compared it to the official information on export prices for the same period to confirm the evidence submitted by the applicant.

132. Following such an active investigation, and after noting the inevitable difference in terms of the quality and quantity of the evidence at the time of initiation when compared with subsequent preliminary and final determinations, the CDC determined that there was sufficient evidence to justify initiation. It found that the application was supported by actual invoices from reliable sources, meaning that these invoices could be given appropriate weight.

133. Costa Rica asserts that the CDC failed to properly examine the accuracy and adequacy of the evidence provided in the application to determine whether there was sufficient evidence of dumping to justify the initiation of an investigation. It focuses, in particular, on the fact that the applicant only provided four Costa Rican domestic market sales invoices to establish the normal value.

134. These invoices nevertheless constituted relevant evidence, as Costa Rica does not disagree with their accuracy or reliability. Nor is there any calling into question of the fact that the CDC did not remain impassive in the light of the information in the application, but actively examined the accuracy and adequacy of the information provided and sought to obtain additional information. Therefore, the CDC did not simply accept the information submitted by the applicant, but took a critical and investigative approach to ensure that the available evidence was sufficient to initiate the investigation. In reality, it is quite noteworthy that actual sales invoices have been obtained and included. The actual invoices for domestic sales made during a relevant period for the product under consideration are the best source of information for establishing the normal value. As confirmed by the panel in *Morocco - Definitive AD Measures on Exercise Books (Tunisia)*, "invoices for sales of the product concerned during the relevant period normally have a high probative value". Often, applicants provide sufficient information to establish the normal value by constructing the domestic price based on an accumulation of costs and profits or use price ranges for a group of products based on consultancy data or trade publications. Such evidence is clearly of lower quality than the actual invoices submitted by the applicant. The relevant jurisprudence also recognizes that applicants do not normally have at their disposal multiple invoices for a large sample of transactions and models of the product concerned over the period covered by the complaint. In this case, there were four invoices of this type from two distributors other than ArcelorMittal from slightly different time periods. It is important to note that the CDC did not limit itself to these invoices, but examined additional evidence to assess whether there was sufficient evidence of dumping.

135. It is not clear what more the CDC could have done prior to initiation, especially in view of it being an authority in a developing country. The Anti-Dumping Agreement clearly does not impose any specific obligation on investigating authorities as to type of evidence. In this investigation, there were sufficient indications of a possible dumping situation involving imports from Costa Rica. Therefore, Costa Rica's claim that Article 5.3 has been violated should be rejected, as should its entirely consequential and undeveloped claim under Article 5.8 of the Anti-Dumping Agreement.

136. It remains undisputed that the decision to initiate was not based on mere conjecture or allegation, but was supported by relevant evidence of dumping that caused injury. The only question raised in Costa Rica's claim is whether that information was "sufficient" to justify initiation. This is important, as initiation requires only evidence that constitutes more than mere allegations or assumptions. As such, the evidence submitted by the applicant was *prima facie* adequate to initiate the investigation. Nor does Costa Rica disagree with the accuracy or reliability of the invoices as such. It does not deny that they refer to products produced by ArcelorMittal that were covered by the underlying investigation. Therefore, the *prima facie* conclusion is that there was relevant evidence to justify initiation and it was not mere conjecture.

137. Second, it is further undisputed that the CDC did not adopt a passive position, but actively examined the accuracy and adequacy of the evidence provided and sought to obtain additional evidence, acting as a reasonable and impartial authority.

138. Third, none of the reasons put forward by Costa Rica to argue against the reliability of the four invoices are valid. Costa Rica submits that the invoices were not representative in terms of their time coverage or types of product. However, it is not at all necessary for the evidence to cover the entire time period and all product types, provided that it covers some. This was the case with these four invoices. Costa Rica does not at all demonstrate why, in the circumstances of this case, the invoices relating to the months of June and July were obviously unrepresentative, despite clearly forming part of the POI and covering the exact type of product under consideration. Nor does Costa Rica demonstrate that the fact that the invoices related to grade 40 instead of grade 60 has had a significant impact on the relevance or representativeness of these invoices for the product under investigation. The product under investigation was not defined according to qualities, but according to HS codes and certain product characteristics other than qualities. There is no evidence on the record to show that this difference in grade had an impact on prices. The exporter in the investigation, as well as Costa Rica in this dispute, develop theoretical arguments about what might have been more exemplary evidence at the time of initiation, but never actually provided contrary evidence to demonstrate that the evidence relied upon by the CDC was not sufficiently reliable and accurate to justify the initiation of the investigation.

139. Lastly, Costa Rica argues that the CDC should have rejected the application and terminated the investigation due to having insufficient information on the existence of dumping, in accordance with Article 5.8 of the Anti-Dumping Agreement. However, the text of Article 5.8 does not support Costa Rica's purely consequential argument. Costa Rica does not respond to our argument, supported by established jurisprudence, that Article 5.8 is not merely consequential to Article 5.3. What follows from the text of Article 5.8 is that this only applies once the authority finds that there is *not* sufficient evidence to justify initiation. The CDC did not make any such determination.

X. COSTA RICA'S CLAIM UNDER ARTICLE 6.1.3 OF THE ANTI-DUMPING AGREEMENT IS NOT SUPPORTED BY THE FACTS

140. The CDC complied with Article 6.1.3 of the Anti-Dumping Agreement by providing the non-confidential version of the application to ArcelorMittal immediately after initiating the investigation. ArcelorMittal acknowledged receipt of the relevant application and made comments based thereon. Its rights of defence were therefore safeguarded by the CDC in the investigation.

141. Costa Rica erroneously focuses on the fact that the application - which was immediately shared with ArcelorMittal - was not the full version with the most recent updates in the annexes, but a non-confidential version of the actual application as originally submitted. However, nothing in Article 6.1.3 specifies that all annexes and updates must be provided immediately. Reference is made only to the "full text of the ... application". The non-confidential version of the "text" of the application ("application for initiation") was provided upon the initiation of the investigation. In addition, the CDC subsequently provided non-confidential information in the annexes when requested, and allowed ArcelorMittal enough time to comment thereon, so that its rights of defence were safeguarded.

X.1. The CDC provided the application to the exporting company as soon as it initiated the investigation

142. Contrary to what Costa Rica maintains, the CDC provided the text of the application for initiation on the same day as it initiated the investigation process. Therefore, Costa Rica's argument is factually incorrect. As indicated in Resolution CRC-RD-AD-001-2018 of 30 July 2018 and the Final Technical Report, the CDC shared with the exporting company the non-confidential version of the written application for initiation on 30 July 2018. The application was transmitted to the exporting company *immediately*.

143. Article 6.1.3 requires only that the "full text of the ... application" be provided, but does not require that annexes containing specific information in support of the application be shared with the exporter. The fact that Article 6.1.3 does not refer only to the full "application", but to the "full text" of the application, intentionally limits the obligation to the "text" of the application and not to all the information that may have been provided in an annex or other forms relating to the application. It was therefore entirely reasonable for the CDC to consider that the application for initiation should be shared with the exporter, but not the initiation form.

X.2. The CDC provided the full version of the application

144. Costa Rica argues that the CDC did not provide the full text of the application to the exporting company.

145. On 29 May 2018, the applicant submitted the required revised public version of the application form for the initiation of an investigation, as well as the written application for initiation, in response to a request made by the CDC on 24 May 2018. On 4 June 2018, the CDC requested additional information that was required to properly consider the application. This was submitted by the applicant on 11 June 2018. However, this additional information did not form part of the "full text of the ... application", but consisted of information that enabled the CDC to examine the accuracy and adequacy of the information contained in the application filed on 29 May 2018, the non-confidential version of which was made available to the known exporter immediately after initiating the investigation on 30 July and, again, with its annexed questionnaire on 22 November 2018. No changes have ever been made to the full text of the application for initiation that was provided to the known exporter and, therefore, there was nothing more to provide.

146. Regarding the power of the CDC plenary to reserve the right to decide on the confidentiality of the information submitted by the applicant, we recall that the obligation to provide the text of the written application is conditioned by the investigating authorities' obligation to protect confidential information. Therefore, an application that includes confidential information, as defined in Article 6.5 of the Anti-Dumping Agreement, cannot be "provided" or "made available" to other interested parties.

X.3. The application for the initiation of an investigation was commented on by the exporting company on 30 October 2018

147. The most conclusive evidence that Costa Rica's arguments concerning Article 6.1.3 of the Anti-Dumping Agreement are fallacious and that the full text of the application was submitted to the exporting company before 22 November 2018, is the fact that on 30 October 2018, the exporting company was able to submit detailed comments on the application to the CDC, in proper exercise of its rights of defence, as an annex to the anti-dumping questionnaire for exporters of 30 October 2018, in which it shared at length its comments on the application.

XI. <u>COSTA RICA'S CLAIM UNDER ARTICLE 6.4 OF THE ANTI-DUMPING AGREEMENT</u>

148. Costa Rica disagrees with the verification report relating to the verification visit to the DI, arguing that none of the documents mentioned in this verification report were made available to the Costa Rican exporter. Costa Rica's assertion runs counter to the text of Article 6.4, which does not require that all documents collected at the time of verification be made available to other interested parties. It does not impose an active disclosure obligation and does not require the disclosure of confidential information. It is important to recall (1) that the exporter never asked to be given an opportunity to see these documents and (2) that, in any case, they were of a confidential nature. Given that Article 6.4 does not impose an active disclosure obligation or require the disclosure of confidential information, there was no basis for Costa Rica's complaint.

149. In fact, Article 6.7, which relates directly to the verification report, indicates otherwise, since it requires the authority to make the verification report available to the interested party and only permits the authority to provide it to other interested parties. In the absence of any obligation to share the report, it is not clear what legal obligation the CDC has violated.

150. In addition, the CDC shared the DI verification record with ArcelorMittal, providing detailed information summarizing what had happened, what information was verified and which supporting documents were obtained during verification. Only certain confidential information supporting the information contained in the questionnaire response was not shared. The CDC was under no obligation to disclose the confidential information, which, in any case, was not information on which the CDC relied, since it simply enabled the CDC to verify the information provided by the DI, which had been shared on a non-confidential basis with the exporter. Costa Rica's claim that Article 6.4 has been violated is without merit.

151. The text of the Anti-Dumping Agreement contradicts the argument that the verification results should be shared with a party other than the verified company. Article 6.7 expressly provides that there is no such obligation. Article 6.7 refers to the authorities' verification of the information provided by investigated companies. When the authorities conduct on-the-spot verifications of investigated companies, they are required to disclose the "results of any such investigations" to the investigated companies. However, even in this case, there is no obligation to communicate these verification results to any other party. Moreover, Article 6.7 expressly provides that such disclosure may take place, in accordance with Article 6.9, in the context of the disclosure of the essential facts. Consequently, Costa Rica's argument that the results of the CDC's verification should have been provided to ArcelorMittal in the form of "findings" after the verification visit has no legal basis.

152. Second, the documents received, as well as the CDC's conclusions relating to those documents, fall within the definition of confidential information in Article 6.5 and are therefore not required to be disclosed. Costa Rica claims that the information received for verification during the verification visits was never "declared confidential". This argument has no legal basis. Article 6.4 requires the authorities to provide opportunities for interested parties to see information that "is not confidential as defined in paragraph 5". Article 6.5, in turn, defines confidential information as (a) information which is by nature confidential; and (b) information which is provided on a confidential basis. Therefore, there is no legal basis for a claim that the information must be "declared confidential" by an investigating authority so as not to fall within the scope of Article 6.4.

153. It is important to note that ArcelorMittal was well aware of the documents collected during the verification, as it was given an opportunity to review the verification record detailing what happened during the verification of the domestic producer. Moreover, this information was by nature confidential and its disclosure "would be of significant competitive advantage to a competitor" or "would have a significantly adverse effect upon a person supplying the information or upon a person from whom that person acquired the information". Furthermore, the final paragraph of the verification record clearly states that the domestic producer requested that these documents be treated as confidential. This request was accepted, as the final determination reflects that they were included in the confidential record. It is not necessary to declare such documents confidential, provided that they meet the definition in Article 6.5. ArcelorMittal never refuted the confidential treatment given to that information.

154. Third, Costa Rica cites two paragraphs of the CDC's Final Technical Report that allegedly illustrate that the "information" collected during the verification visit was "used" by the CDC. However, these two excerpts describe only the purpose of the verification and what happened during this visit. Accordingly, Costa Rica has failed to prove that the alleged "information" complies with the legal standard of being "used" by the investigating authorities within the meaning of Article 6.4.

155. Fourth, there is no evidence on the record to suggest that the interested party requested an opportunity to see the alleged "information" and that this request was denied. This is important in this case because ArcelorMittal knew exactly what had happened during the verification at the premises of the domestic producer and what documents had been collected, since it was given an opportunity to see the verification record. Therefore, this was not a situation in which an interested party was in the dark about the information it could have and should have had an opportunity to see. Article 6.4 requires the authorities to provide "timely opportunities ... to see" information, which is different, as claimed by Costa Rica, from the requirement to "provide [information] to the exporting company". Past dispute settlement practice has clarified that Article 6.4 does not impose an obligation to "actively disclose" information to interested parties. The text of Article 6.4 in this context is markedly different

from Article 6.9, which contains an obligation to actively disclose "essential facts". In the present case, there is no evidence to suggest that the interested party, despite its obvious knowledge of the documents gathered, had requested an opportunity to see the alleged information and was denied this opportunity. If the interested party considered the alleged information to be "relevant to the presentation of [its] cases", it could have requested and should have requested an opportunity to see that information. It did not do so.

156. Costa Rica argues that it is not true that Article 6.4 is applicable only when the interested party has requested to see the information. In this regard, Costa Rica considers that there is no basis for requiring a request to see information before a claim of violation of Article 6.4 can be made. Costa Rica's argument is beside the point. The Dominican Republic's argument is that Article 6.4 does not impose an active disclosure obligation. This means that the burden falls on Costa Rica to demonstrate that the authorities did not provide opportunities to see the information in question. In this situation, the exporter cannot be faulted for not having requested information from the authorities that may be relevant to its case, since the authorities rely on it. The Costa Rican exporter knew exactly what had happened during the verification given that the verification record was part of the public record. Thus, it knew about the preparation of a "verification report" and also knew exactly what additional evidence was collected during the verification.

157. In any event, the documents collected at the time of the verification at the premises of the domestic producer are not "information" within the meaning of Article 6.4, but rather constitute documentary evidence supporting the information already provided in the questionnaire response. Since the actual information contained in the questionnaire response, insofar as it was not confidential, had already been made available to the exporter, giving it the opportunity to comment on that information and to make presentations in that respect, there was no additional obligation for the CDC to also provide an opportunity to see additional documentary evidence related to such information.

158. Costa Rica also argues that the fact that Article 6.4 refers to "all information that is relevant" means that Article 6.7 does not limit its scope and that it should be understood to have a "broad coverage" limited only by the limitations expressly indicated in the Article. Costa Rica points out that Article 6.4 does not contain any cross-reference to Article 6.7.

159. This may be correct, but an appropriate approach to interpretation requires the interpreter to take into account the context of a provision. This is all the more true when reference is made to a general provision such as Article 6.4, which refers to "information" in general, while Article 6.7 applies specifically to verification and establishes what type of disclosure is required for verification results. The principle of *lex specialis* applies in this context and requires that the interpreter give priority to the specific provision that deals with verification results, which constitute the matter at issue. However, Costa Rica did not include any claims under Article 6.7 concerning the results of the verification visit to the domestic producer. This is understandable because Article 6.7 clearly does not impose any obligation to actively disclose verification results to any party other than the verified party. Thus, it is clear that the CDC did not violate the specific Anti-Dumping Agreement provision concerning verification results by not actively disclosing to the exporter the information (confidential) gathered during the verification of the domestic producer. This necessarily means that there can be no violation of the more general provision on access to information in Article 6.4.

XII. <u>COSTA RICA'S CLAIM UNDER ARTICLE 6.5 OF THE ANTI-DUMPING AGREEMENT</u>

160. The CDC objectively considered whether "good cause" had been shown for the information that had been treated as confidential pursuant to Article 6.5.

161. Costa Rica considers that a "reasoned and developed explanation" of each case of confidential treatment was required, while there is clearly no legal basis in the text of the Anti-Dumping Agreement for such an obligation. It is sufficient to be able to infer from the record that consideration had been given to whether good cause had been shown. This is clearly the case here, as a number of interim resolutions addressed the question of why confidential treatment was justified for certain information, but also because of the fact that certain requests for confidential treatment were rejected. Costa Rica does not even attempt to demonstrate that

some of the information treated as confidential did not warrant such protection, and therefore its argument concerning Article 6.5 should be rejected.

162. The CDC analysed the various pieces of information submitted by the applicant, and checked both domestic regulations and WTO rules in this respect to assess whether it was appropriate to grant confidential treatment to the documentation submitted by that company, which it did on 29 October 2019. The confidentiality rulings were shared with the parties to the investigation at the time they were issued, and ArcelorMittal therefore had the right to request the CDC to review any information that had been considered confidential and that ArcelorMittal considered not applicable in the light of Article 6.5 of the Agreement. This confidential treatment was granted because, as explained by the CDC itself, the CDC conducted an analysis as to whether the applicant had shown good cause when requesting confidential treatment. The existence of this analysis was reflected in the text of Resolutions No. CDC-RD-AD-003-2018 and No. CDC-RD-AD-005-2019. As such, respect for the criteria imposed by Article 6.5 of the Anti-Dumping Agreement was undoubtedly the CDC's greatest concern when analysing the applicant's requests for confidential treatment to be granted to certain information that it was supplying to the CDC.

163. We note that Costa Rica does not at all address the specific type of information that was granted confidential treatment in the two Resolutions No. CDC-RD-AD-003-2018 and No. CDC-RD-AD-005-2019. Nor does it explain why the information in these Resolutions was such that it did not clearly merit protection, in accordance with what is established in domestic law. It therefore fails to establish a *prima facie* case.

164. The investigating authorities must treat information as confidential if it is "by nature" confidential or if it was provided "on a confidential basis" and upon "good cause shown". All the information declared confidential would have afforded a significant advantage to a competitor, and would have had an adverse effect upon the person supplying the information, i.e. the applicant. The information concerned was, in particular, commercially sensitive information not typically disclosed in the normal course of business, which would normally be treated as confidential in anti-dumping investigations. As such, the classification of this information as confidential is fully justified.

165. Costa Rica fails to demonstrate that any of the information given confidential status is inconsistent with any of the legal criteria. It focuses entirely on the alleged lack of "good cause" in the two Resolutions. However, first, the record contains many indications that the CDC examined the need for the confidential protection requested by the domestic producer and provided an explanation as to why such information met the legal criteria. The CDC clearly assessed whether cause had been shown.

166. Second, the argument really made by Costa Rica is that more than one explanation was required from the CDC in the form of a "reasoned explanation". Costa Rica never elaborated upon this point and does not indicate what exactly it expects an authority to do with respect to each request for confidential treatment. In any event, Article 6.5 does not require any particular detail in the presentation of the reasoning in support of its decision to consider information as confidential. The Article imposes a substantive obligation not to treat as confidential information that does not merit such treatment. While some indication is required of the fact that this assessment was conducted, there is no obligation to provide specific details in the Article 6.5 explanation.

167. Instead of recognizing that it should simply be able to infer from the published report or the related supporting documents that the authority conducted an objective assessment as to whether "good cause" was shown, Costa Rica claims that a "reasoned explanation" is necessary as for a determination of dumping, injury or causation. This would be a very different and much stricter criterion than that which was described in the jurisprudence. As such, Costa Rica's argument is not acceptable.

168. Moreover, in Resolutions CDC-RD-AD-003-2018 and CDC-RD-AD-005-2019, the CDC fully complied with the standard articulated by the Appellate Body by setting out the criteria according to which it would assess whether good cause had been shown (by citing Article 6.5 of the Anti-Dumping Agreement and the various articles of the Implementing Regulations for

Law No. 1-02) and by explaining that it had analysed whether it was appropriate to grant confidential treatment to the information supplied by the applicant.

169. Costa Rica attempts to shift its burden of proof as the complainant in this case to the Dominican Republic. The burden of proof for establishing a *prima facie* violation clearly rests upon the complaining party. Costa Rica claims that the CDC did not examine whether good cause had been shown. Therefore, it falls to Costa Rica to provide evidence in support of this claim. It is not for the Dominican Republic to demonstrate compliance with the Agreement. In fact, the Dominican Republic is considered to have acted in conformity with the Agreement until proven otherwise.

XIII. COSTA RICA'S CLAIM UNDER ARTICLE 6.7 AND ANNEX I OF THE ANTI-DUMPING AGREEMENT

170. Although not strictly required by the Anti-Dumping Agreement, the CDC properly notified ArcelorMittal of the scope and general dates of the visits prior to the on-the-spot verifications, and complied with Article 6.7 and Annex I of the Anti-Dumping Agreement.

171. Costa Rica includes a strange argument that bears no relation to the issue of verification and is therefore irrelevant. It seeks to blame the CDC for not having notified, prior to verification, that ArcelorMittal was to provide data on sales in the domestic market from before the start of the POI for the purpose of evaluating ArcelorMittal's argument that certain export sales should be excluded. This has nothing to do with verification. Verification has to do with documentary support for the information already provided. If ArcelorMittal did not provide information on domestic sales in November 2016 or April 2017, there was nothing to verify. The burden of providing evidence to support its claim lies with ArcelorMittal.

172. It is clear that there is no legal obligation under Article 6.7, Annex I or any other provision of the Anti-Dumping Agreement, for investigating authorities to "[advise] the company … prior to the visit" of "the general nature of the information [they seek] to verify and of any further information the company [needs] to provide". Costa Rica has not established that such a requirement is mandatory under the Anti-Dumping Agreement. In fact, as noted, paragraph 7 of Annex I merely recommends that investigating authorities should "[consider it] standard practice" to advise the parties concerned of the general nature of the information to be verified. This is exactly what the CDC did.

173. Costa Rica questions the fact that two export sales that clearly entered the Dominican Republic during the POI and that ArcelorMittal itself included in its questionnaire response as relevant export sales made during the POI should not be included in the examination of dumping. However, its presentation of the facts is completely distorted, in addition to being legally irrelevant.

174. Costa Rica suggests that the CDC blamed the exporting company for not providing that information, despite the CDC not having specified that the exporting company needed to supply it. However, this is not what the CDC did. The CDC never said that ArcelorMittal had to provide evidence during the verifications and that this evidence was required or requested to verify the questionnaire response. The CDC noted that ArcelorMittal did not provide evidence to support its argument that the CDC had failed to make a fair comparison between the export price and the normal value. This response related to the argument of ArcelorMittal (and that of Costa Rica in this dispute) that two export sales transactions were erroneously included in the CDC's dumping calculation. However, the CDC explained how these two sales entered the Dominican Republic during the dumping POI and were therefore included in the calculation. Thus, these sales were duly taken into account by the CDC.

175. ArcelorMittal itself reported these sales in its response to the questionnaire for exporters because they entered the Dominican Republic during the POI. The company commented on the inclusion of these two sales in its presentation of the essential facts, and could have presented, but did not, the type of evidence that the CDC considers it should have provided to support its argument. It was ArcelorMittal's argument, and therefore ArcelorMittal bore the burden of presenting the evidence that would allow the CDC to examine the validity of that argument. Once that information had been provided, the CDC may have had an interest in

verifying it on-the-spot. But none of this happened. What the CDC noted in the Final Technical Report is that ArcelorMittal failed to present evidence to support its argument.

176. Furthermore, what is clear is that, at the time of the verification, the CDC *did not know* that ArcelorMittal would later oppose the inclusion of these two operations, given that it was ArcelorMittal itself that had included them in Section D of the questionnaire response of 30 October 2018, on the basis of the "date of entry" criterion. The verification took place less than one month later, on 19 November 2018.

XIV. COSTA RICA'S CLAIM UNDER ARTICLE VI:2 OF THE GATT 1994 AND ARTICLE 9.3 OF THE ANTI-DUMPING AGREEMENT

177. Costa Rica also includes a purely consequential assertion that should be rejected.

178. Costa Rica erroneously claims that it was demonstrated that the exclusion of the two export sales that entered the Dominican Republic during the POI, but which Costa Rica claims were made before the POI, resulted in a determination of non-dumping and, therefore, that the imposition of duties violated Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994. This argument is not correct, as it flows entirely from the argument relating to Articles 2.1 and 2.4. Moreover, it is incorrect that the CDC accepted ArcelorMittal's calculations excluding these two sales, as it allegedly "did not determine errors in the calculations". The CDC did not accept the above-mentioned condition for the exclusion of the two export sales on which the calculation was based. Therefore, the CDC never examined the accuracy of these calculations and did not reach any conclusions thereon.

XV. CONCLUSION

179. For the foregoing reasons, the Dominican Republic respectfully requests the Panel to reject all of Costa Rica's claims that the decision to impose anti-dumping measures on imports of corrugated steel bars from Costa Rica was inconsistent with the Anti-Dumping Agreement and the GATT 1994.

ANNEX C

ARGUMENTS OF THE THIRD PARTIES

Contents		Page
Annex C-1	Integrated executive summary of the arguments of the United States	72
Annex C-2	Integrated executive summary of the arguments of Japan	77
Annex C-3	Integrated executive summary of the arguments of Mexico	82
Annex C-4	Integrated executive summary of the arguments of European Union	86

ANNEX C-1

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE UNITED STATES*

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

* In English original language.

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 anti-dumping 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 US 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 US 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.

ANNEX C-2

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF JAPAN[*]

I. INTRODUCTION

1. As a third party, Japan has a systemic interest in ensuring the proper and consistent interpretation of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("Anti-Dumping Agreement") discussed in this case. Japan notes that it does not take any views on the specific factual aspects of this dispute.

II. TERMS OF REFERENCE

2. With regard to the Panel's terms of reference, Japan disagrees with the Dominican Republic's argument that Costa Rica's claim under Articles 3.1 and 3.2 of the Anti-Dumping Agreement regarding the alleged failure to examine the significant nature of the price effects and the explanatory force of the dumped imports for those price effects[1] is outside the Panel's terms of reference.

3. Article 6.2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes requires a complaining party to provide "a brief summary of the legal basis of the complaint sufficient to present the problem clearly". Japan submits that, in assessing whether the Panel request is sufficiently precise to meet the requirements of Article 6.2, the Panel is to read the request as a whole, while also considering the particular circumstances of the case. Such circumstances may include the nature of the provision of the covered agreements alleged to have been breached.

4. In its request for the establishment of the Panel, Costa Rica raises a claim under Articles 3.1 and 3.2 of the Anti-Dumping Agreement referring to the investigating authority's analysis of the effects of the imports under investigation on prices in the domestic market for like products.[2] Article 3.1 requires that a determination of injury be based on positive evidence and involve, amongst other things, an objective examination of the effect of the dumped imports on prices in the domestic market for like products. Further, Articles 3.1, 3.2, 3.4 and 3.5 "contemplate a logical progression of inquiry leading to an investigating authority's ultimate injury and causation determination".[3] Therefore, each analytical step pursuant to the paragraphs of Article 3, including the price effects analysis, needs to be logically consistent in demonstrating injury, if any, and needs to reasonably explain the whole picture of what the situation would have been but for the dumping. Read together, it appears to be clear that Costa Rica's claim relates to whether the price effects analysis in the meaning of Article 3.2 was reasoned and adequate, and was based on positive evidence as required under Article 3.1.

5. In addition, the text in Article 3.2 requires an analysis as to whether there has been a "significant" price effect; be it a "significant" price undercutting, a "significant" price depression or a "significant" price suppression. As such, it could be said that the claim under Articles 3.1 and 3.2 also indicates a claim regarding an examination as to whether the price effect is "significant" and whether such examination was conducted in an objective manner based on positive evidence.

III. ARGUMENTS RELATING TO THE "THREAT OF MATERIAL INJURY" DETERMINATION UNDER ARTICLE 3.7 OF THE ANTI-DUMPING AGREEMENT

6. Article 3.7 of the Anti-Dumping Agreement requires the investigating authority to evaluate "how the future will be different from the immediate past, such that the situation of no present material injury will change in the imminent future to a situation of material injury, in the

[*] In English original language.
[1] Dominican Republic's first written submission, para. 203.
[2] Request for establishment of a Panel by Costa Rica, WT/DS605/2, Section II, claim 8.
[3] Appellate Body Report, *China – GOES*, para. 128.

absence of measures".[4] Further, the provision provides a number of factors that an investigating authority should consider, and also clarifies that not one of such factors alone can necessarily give decisive guidance. The totality of the factors considered must lead to the conclusion that further dumped exports are imminent and that, unless protective action is taken, material injury would occur. The totality of the factors considered must lead to the conclusion that further dumped exports are imminent and that, unless protective action is taken, material injury would occur.

7. In this regard, mere speculation is not sufficient as Article 3.7 also makes it clear that investigating authority should provide an adequate and appropriate explanation of the current situation and the prospects for a change in that situation based on positive evidence. If there are both negative and positive factors, there must be an adequate explanation of how the case was assessed as a whole and how the decision was reached.

8. Accordingly, the Panel should carefully consider whether the investigating authority explained that volume effects and price effects would occur in the future due to the allegedly dumped imports. More precisely, it must be considered whether the investigating authority has indeed recognized and reasonably explained that the allegedly dumped imports and the domestic products actually compete in the domestic market, in order to determine the likelihood of future volume/price effects. If the finding concludes that there is a competitive relationship among the two groups of products and therefore a threat of material injury, positive evidence and objective analysis on this point should be recorded in the final report.

9. Japan highlights that Article 3.7 also requires the change in situation to be "imminent" based on objective evidence that the foreseeable occurrences of material injury would arise with "a high degree of likelihood (imminence)".[5]

10. In a case where current figures can be seen as not having impact on the domestic industry, in order for the investigating authority to determine that such situation may change and material injury may be caused in the near future due to the allegedly dumped imports, the investigating authority should explain the reason why it reached the decision that such change in the situation may occur imminently, despite that, at the moment, there seems to be no material injury caused by the allegedly dumped imports.

11. Taking into account the "overarching" nature of Article 3.1, as noted above, Japan highlights that the investigating authority is required to carefully conduct its analysis based on positive evidence and objective analysis. Otherwise, anti-dumping duties may be too easily imposed based on Article 3.7, even in the absence of any threat of material injury. This conclusion is supported by "special care" required under Article 3.8, which serves as a context for the interpretation of the investigating authority's obligations under Article 3.7. Bearing in mind the "high standard" for the determination of a threat of material injury[6], Japan emphasizes that affirmative findings of a threat of material injury should be allowed on limited occasions, so that it will not become a loophole of the strictly applied injury analysis.

IV. ARGUMENTS RELATING TO THE "THREAT OF MATERIAL INJURY" DETERMINATION AND THE INTERPRETATION OF ARTICLES 3.1, 3.2, 3.4 AND 3.5 OF THE ANTI-DUMPING AGREEMENT

A. The Interpretation of Article 3 of the Anti-Dumping Agreement

12. As the Appellate Body clarified in *China - GOES*, the paragraphs of Article 3 "contemplate a logical progression of inquiry leading to an investigating authority's ultimate injury and causation determination".[7] Based on this overall structure of Article 3, Japan highlights that the inquiries under Articles 3.2 and 3.4 are necessary in order to answer the ultimate question in Article 3.5 as to whether subject imports are causing injury to the domestic industry. The outcomes of these inquiries thus form the basis for the overall causation analysis contemplated

[4] Panel Report, *US – Softwood Lumber VI*, para. 7.58.
[5] Panel Report, *US – Coated Paper (Indonesia)*, para. 7.261.
[6] See e.g. Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 100.
[7] Appellate Body Report, *China – GOES*, para. 128.

in Article 3.5.[8] Without a proper examination under these provisions, an affirmative finding of the effect of the dumped imports or the impact of the dumped imports would neither be reasonable nor objective because it would lack positive evidence as required by Article 3.1.

13. These specific obligations are important both individually, and in how they fit together. The overall finding that dumped imports caused injury under Article 3 must tie these different elements into an internally consistent, persuasive, fact-based written explanation by the investigating authority. The written explanation at the time of the determination is the authority's opportunity to show that they are complying with the important requirements of the injury determination of Article 3.

14. The plain text of footnote 9, as confirmed by the Appellate Body[9], requires that all Anti-Dumping Agreement provisions on "injury" apply to a determination of "threat of material injury". This includes the core disciplines governing an authority's determination of "injury" under Article 3 (i.e., Articles 3.1, 3.2, 3.4 and 3.5).[10] Therefore, the above reasoning is also relevant for the determination of a "threat of material injury" although the investigation in this case is focused on projections relating to the occurrence of future events. The analysis of a threat of material injury cannot be conducted merely based on the requirements prescribed in Article 3.7, but requires consideration on whether the consequent impact of the continued dumped imports will likely cause a material injury to the domestic industry.

15. As such, as in a typical injury analysis, the investigating authorities should analyse the likelihood of the significant (i) price effect of dumped imports on domestic like products, and (ii) volume increases of the dumped imports, revealing whether there are market interactions between the dumped imports and domestic like products in terms of their sales prices and/or volume, thus providing a logical basis for the analysis of the impact of the dumped imports on the domestic industry producing the domestic like products.

B. The Threat of Material Injury Determination and the Interpretation of Articles 3.1 and 3.2 of the Anti-Dumping Agreement

16. With respect to the price effects analysis under Article 3.2, an analysis on "whether there has been significant price undercutting *by the* [*dumped […]*] *imports as compared with* the price of a like product of the importing Member" is required. Further, the price effects analysis must contain a consideration on "'*whether the effect of such* [*dumped […]*] *imports' on the prices of the like domestic products* is to depress or suppress such prices to a significant degree".[11] Panels and the Appellate Body have recognized that investigating authorities enjoy a certain degree of discretion in adopting a methodology to guide their injury analysis.[12] Yet, without an analysis of factors that show what the price would have been but for the dumping when determining price effects in the meaning of Article 3.2, it is questionable whether such an analysis is objective and is based on positive evidence. This equally applies to the analysis of a threat of material injury. Moreover, the price effect analysis logically requires an examination as to whether the subject imports and the domestic like products are actually in a competitive relationship.

17. In Japan's view, the Panel should carefully review whether the investigating authority's view is explained in the final determination, notably focusing on whether the authority provides a sufficient basis on how the price of dumped imports will have an effect on the price of domestic like products. A mere identification of price trends without any explanation of how, in the investigating authority's view, the price trends show the existence of price effect will fail to comply with the request for an objective examination based on positive evidence.[13]

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[8] Ibid.

[9] See Appellate Body Report, *US - Oil Country Tubular Goods Sunset Reviews*, para. 276 ("At the outset, we would agree with Argentina that, by virtue of its opening phrase, footnote 9 defines "injury" for the whole of the Anti-Dumping Agreement.").

[10] See e.g. Panel Report, *Egypt – Steel Rebar*, paras. 7.92-7.93.

[11] Appellate Body Report, *China – GOES*, para. 136. (emphasis added by the Appellate Body)

[12] See, for example, Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 204; Panel Report, *EC – Tube or Pipe Fittings*, paras. 7.278 and 7.281.

[13] See, for example, Panel Report, *China – Cellulose Pulp*, para. 7.77.

C. The Threat of Material Injury Determination and the Interpretation of Articles 3.1 and 3.4 of the Anti-Dumping Agreement

18. In accordance with Article 3.4, a finding of a threat of material injury, must rest on an actual "evaluation" of all the enumerated factors.[14] This evaluation is a key part of the overall logical progression and needs to serve as the "meaningful basis" for the eventual finding of causation under Article 3.5.[15] The less discussion of each positive factor, the greater the risk that the discussion does not rise to the level of the required evaluation. A mere listing of positive factors without any discussion will rarely be sufficient.

19. In order to conclude that material injury would occur unless protective action is taken, it is necessary, as a precondition, to provide an analysis of forecast based on facts on what the impact of dumped imports on the domestic industry is under the current situation, and how the relevant figures could change from the present situation to the future due to continued dumped imports.

20. Although Japan does not take any position as to the facts, it notes that if most of the indicators relating to the current status show positive trends and the evidence of negative impact is not shown by positive evidence, without further explanation on the fact that the trends may turn negative leading to a material injury in the future, it appears to be unlikely that there would be a threat.

21. A question on whether there is a competitive relationship between the subject imports and domestic products may arise when most of the economic indicators do not demonstrate any negative impacts on the domestic industry. The existence of a competitive relationship is important as a precondition for determining whether imports have had an impact, and a careful determination of the existence of such a competitive relationship should also be made in the determination of the threat of material injury.

22. Japan emphasizes that Article 3.4 also requires "an examination of *the explanatory force of subject imports for the state of the domestic industry*".[16] As in the case of price effect analysis, the competitive relationship between the subject imports and the domestic like products form the basis of the impact analysis. Moreover, as referred to earlier, since Article 3 contemplates a "logical progression", "the impact of" the dumped imports on the state of the domestic industry within the meaning of Article 3.4 is the impact that follows as an effect of an increase in the volume of dumped imports and/or the "effect of "the dumped imports on domestic prices that are subject to an inquiry under Article 3.2. It would therefore be necessary to consider whether and to what extent declining trends, if any, can be explained by the dumped imports, in the sense that such trends follow as a result of an increase in the dumped imports and/or the effect of the dumped imports on domestic prices that have been identified in an inquiry under Article 3.2.

23. As such, the Panel should carefully review whether there is positive evidence that demonstrates the competitive relationship and an explanation on whether and to what extent the changes in the relevant factors are the "impact of" or "effect of" the dumped imports on the domestic industry.

D. The Threat of Material Injury Determination and the Interpretation of Articles 3.1 and 3.5 of the Anti-Dumping Agreement

24. Article 3.5 requires careful analysis and not simplistic conclusions. The investigating authority must provide a written analysis that shows how it "demonstrated" the causal link based on a careful "examination" of the record. It is not enough to note a mere correlation. Nor is it enough to assert a connection that has not actually been demonstrated through careful examination of "all relevant evidence", including the evidence that suggests that there may not be a threat of material injury and any negative trends may not be caused by imports. That

[14] See Panel Report, *Mexico – Corn Syrup*, paras. 7.131-132.
[15] Appellate Body Report, *China – GOES*, paras. 156 and 154 (quoted in Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.211).
[16] Appellate Body Report, *China – GOES*, para. 149. (emphasis added)

is precisely why Article 3.5 specifically requires that other factors be examined, and injuries they cause "must not be attributed" to the dumped imports.

25. With respect to the threat of material injury determination, it is required to make the determination based on facts, taking into consideration various factors, including those listed in the subparagraphs of Article 3.7. To analyse the causal relationship, it must be borne in mind that the inquiries and factual analyses under each subparagraph of Article 3.7 are conducted. Then, building on the outcomes of such inquiries and analyses, the investigating authority must consider and explain the overall picture of what situation may be clearly foreseen and would be highly likely to occur but for the dumping.

26. The investigating authority is also required to conduct a non-attribution analysis with regard to, for example, the combined effect of the dumping and other factors causing injury. When conducting the non-attribution analysis, it is equally important that the conclusions are based on a careful examination of all the evidence and a discussion of what it means. It is not enough to describe other factors, and then to dismiss them without a complete and adequate explanation of why, let alone not mentioning any other known factors will not meet the obligations.

ANNEX C-3

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF MEXICO

3. In paragraph 131 of its first written submission, the Dominican Republic claims that the exporter ArcelorMittal never asked the CDC to make adjustments to ensure a fair comparison regarding the Thorco Logic and Susie Q sales. 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?

As indicated in Article 2.4 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("AD Agreement"), the investigating authority is responsible for ensuring a fair comparison between the export price and the normal value, making allowance for differences that may affect price comparability. However, in the dispute *EC - Fasteners (China)* (DS397), the Appellate Body noted that, while the investigating authority bears this burden, the interested parties, for their part, bear the burden of substantiating their requests for adjustments, and that, otherwise, the authority has no obligation to make the adjustment that those parties request:

> 488. "[...] this does not mean that the interested parties do not have a role to play in the process of ensuring a fair comparison. Rather, […] exporters bear the burden of substantiating, "as constructively as possible", their requests for adjustments. [...] If it is not demonstrated to the authorities that there is a difference affecting price comparability, there is no obligation to make an adjustment."

As such, there is a difference between an investigating authority's obligation to ensure price comparability, and simply making the adjustments requested by exporters without any further formalities. The investigating authority must indeed make a fair comparison, so where there is an obvious problem in this regard, it must make the relevant adjustments. However, where a party requests that adjustments be made, the need to make them must be demonstrated by that requesting party, since, as noted by the Appellate Body, if the request is not substantiated, there is no obligation for the authority to make those adjustments.

Therefore, if the exporters fail to demonstrate that the requested adjustment is necessary and there is no obvious comparability problem for the investigating authority, there is no obligation to make that adjustment.

4. The cost of the raw material for the production of merchandise is not mentioned as a difference that affects price comparability among those that appear in Article 2.4 of the Anti-Dumping Agreement. Nevertheless, 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?

Yes, there may well be distortions in the cost of an input that could affect price comparability. In fact, the AD Agreement itself provides for such a situation in Article 2.2.1.1.

In this investigation, however, the focus is the variation in the cost of the raw material in relation to sales transactions that took place before the period of investigation (POI) compared to the market conditions during the POI, and not as a result of problems inherent in the costs themselves that may affect comparability. In other words, the point on the table is that it is not that the costs *per se* have experienced a problem, but that the market conditions changed. Therefore, in our view, the parties have not suggested that the costs experienced a problem affecting comparability. The point of discussion is actually whether or not such sales are included in the price comparison. Claiming merely that the market conditions have changed and that, as a result, the costs have increased, clearly does not involve any aspect whatsoever that affects the comparability of the prices deriving from those costs. The market simply changed and that would have been all. If a simple change in the market were considered a comparability problem, then one would go as far as requiring that all transactions made during the POI had been made at the same price, which makes no sense.

7. In paragraph 7.277 of the report in *US - Coated Paper (Indonesia)*, the panel mentioned that "we would expect the authority to rely on facts from the present to support the projections it makes about the future and its resulting conclusions about the future". In what way should an investigating authority "rely on facts from the present" to ensure that its projections do not become "conjecture"?

In Mexico's view, the investigating authority must evaluate the present facts before it (the existence of which has been established) to determine how they are relevant to the projections it seeks to make. Subsequently, the authority must objectively and impartially analyse the outcomes that these present facts would generate in the future, making the corresponding inferences and engaging in the corresponding reasoning. The projections will not be conjecture insofar as it may be concluded, in view of the foregoing, that the facts from the present on which the investigating authority has relied provide a reasonably sound basis for concluding that there is considerable likelihood that its projections will actually occur.

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 current 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?

Not expressly. However, with regard to examining the accuracy and adequacy of the evidence for the initiation of an investigation, the panel in *Pakistan - BOPP Film (UAE)* (DS538), noted that "for evidence to be 'sufficient evidence to justify the initiation of an investigation' under Article 5.3, it must pertain to *current* dumping, injury, and causation" and that "[w]hether a temporal gap between the date of initiation and the evidence on which initiation is based means that the evidence does not relate to current dumping, injury, and causation, must be assessed case by case in light of the relevant circumstances" (paragraph 7.29).

The panel also noted that "[t]he more recent the data are at the time of initiation, the more likely they will be to provide evidence of current dumping, injury, and causal link, and vice versa" (paragraph 7.29). In this respect, while Article 5.3 of the AD Agreement does not impose temporal limitations on the evidence examined for the initiation of an investigation, temporal-gap issues must be analysed within the context of each particular case.

As for invoices not being able to constitute evidence of current dumping because they correspond to sales made almost one year before the application was filed, we view this situation as one that must be examined on a case-by-case basis. There are times when it is not possible to disregard invoices with these characteristics because of their age. For example, suppose the dumping POI runs from 1 January to 31 December 2021 and that the application had been filed on 1 March 2022. In this case, many of the sales transactions included in the January-December 2021 period could have been made more than one year before the date when the application for initiation was filed (all of those made in January and February 2021). It would, however, be difficult to successfully argue that the POI is too remote in time to conclude the existence of current dumping, since the application would have been filed only three months after the expiry of that POI. Thus, even if those transactions date back more than one year, they cannot be considered inappropriate for reflecting current dumping, as they fall within an entirely proper POI.

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

The relevance of Article 5.2 of the AD Agreement in this regard is that it establishes, with a good level of precision, what should be considered as the "application" referred to in Article 6.1.3 of the AD Agreement, as detailed below.

First, we note that AD Agreement Article 6.1.3 itself expressly states that what must be provided to exporters is the "full text" of the application received under Article 5.1 of that Agreement. Thus, in order to understand what is meant by "full text of the [...] application" in Article 6.1.3, it is appropriate to look to Article 5.1 of the AD Agreement. We note that Article 6.1.3 makes no differentiation between the application and the elements that support it. It only mentions the "application" as a single set of information and indicates that it is the same set of information as that referred to in Article 5.1 of the AD Agreement. In other words, there is an identity between the set of information that Article 6.1.3 identifies as the "application" and that which, for its part, Article 5.1 identifies as the "application".

In this context, we note that Article 5.1 does not specify what we are to understand by the "application", but only mentions that investigations shall be initiated upon a written application by or on behalf of the domestic industry. However, Article 5.2 of the AD Agreement *does* explain what is to be included in the application referred to in Articles 5.1 and 6.1.3 ("*The application shall contain such information as is reasonably available to the applicant on the following:*[...]"). The same idea is also clearly set out in the [Spanish] and French versions of the AD Agreement. Clearly, Article 5.2 of the AD Agreement is the provision that provides a fairly precise idea of what the "application" referred to in those Articles comprises.

Indeed, we can assert that the "application" comprises the set of elements contained in the request to initiate an investigation, and all the pieces of evidence, inferences and lines of reasoning, etc. that support that request, including those listed in Article 5.2 of the AD Agreement. The "application" is therefore this entire set of information, regardless of the format in which it has been submitted. Nothing in the AD Agreement suggests that the Agreement, when referring to the "application", excluded supporting information merely because it was presented in annexes, or other elements.

In addition, the findings contained in paragraph 8.102 of the final report of the panel in *Guatemala - Cement II* (DS156) treat as synonyms the terms the "full text of the application" and "the application", which suggests that there is no conceptual difference between them and that, therefore, the Dominican Republic's position is not permissible.

> 8.102 We further consider that the timeliness of the provision of the text of the application should be evaluated in the context of its purpose and function. Timely access to the application is important for the exporters to enable preparation of the arguments in defence of their interests before the investigating authorities. [...] Since deadlines in the timetable of the investigation are counted from the date of initiation it is critical that the investigating authority provide the text of the application "as soon as an investigation has been initiated", for the exporter to be able to devise a strategy to defend the allegations it is being confronted with.

Accordingly, the Dominican Republic's position would completely defeat the purpose of Article 6.1.3, since, as we said earlier, making the conceptual difference that the Dominican Republic proposes, and consequently submitting the supporting information in annexes, would be enough to leave the exporters defenceless, by preventing them from learning about the substance of the request to initiate and, in doing so, by preventing them from properly defending themselves.

In fact, as well as being inconsistent with Articles 6.1.3, 5.1 and 5.2, this position leads to outcomes that are difficult to justify, since it is tantamount to saying that under the AD Agreement, if the applicants submit a relatively simple written submission, in which they make cross-references to a series of annexes, and those annexes detail the reasoning and evidence to request the initiation of the investigation, then the investigating authority could withhold the information that actually contains the substance of the case and only make known to the exporters the information on the basis of which, for practical purposes, virtually no argument can be built.

In other words, this position is tantamount to saying that the AD Agreement allows, for reasons pertaining merely to form (the manner in which the supporting elements of the application have been submitted), action that runs counter to due process, which is inadmissible. For practical purposes, this would render a good number of articles inutile.

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 within the scope of the examination of evidence under Article 5.3 of the Anti-Dumping Agreement.

Yes. Article 5.3 of the AD Agreement establishes the investigating authority's obligation to examine whether the evidence provided in the application is sufficient to justify the initiation of an investigation. Accordingly, if the investigating authority perceives any deficiency or inaccuracy requiring the clarification, correction or addition of information in respect of what was originally submitted, and if, with that, the initiation of an investigation is justified, it should be considered as a complementary part of the original text, since without it the initiation of the investigation itself could not have taken place. Therefore, since Article 6.1.3 of the AD Agreement indicates that once the investigation has been initiated, the full text of the application must be provided, it is understood that this includes all the information, including that submitted in compliance with a request, that led to the initiation of the said investigation.

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 party submitting the information for which confidential treatment is sought must show "good cause" for the granting of such treatment, or could "good cause" be presumed or inferred by the investigating authorities?

Article 6.5 of the AD Agreement provides that any information which is by nature confidential, or which is provided on a confidential basis, shall be treated as such, upon good cause shown. In response to the question, it will clearly fall to the parties providing the information to show relevant cause for that information to be given confidential treatment. This is supported by paragraph 8.220 of the final report of the panel in *Guatemala - Cement II* (DS156).

12. In your view, does Article 6.7 of the Anti-Dumping Agreement require an investigating authority to make available (under Article 6.4) to an interested party information resulting from a verification visit made to another party?

It is AD Agreement Article 6.4 itself that establishes this obligation, provided that the requirements laid down therein are met. In the case of the results of a verification visit, whenever practicable and where the information is relevant to the presentation of their cases, is not confidential under Article 6.5 of the AD Agreement and is information used by the authority in the investigation, the interested parties must be provided with opportunities to see all that information. In this respect, as determined by the Appellate Body in *European Communities - Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil* (DS219)[1] if the interested parties consider the information relevant to the presentation of their cases, the information is relevant for the purposes of Article 6.4 of the AD Agreement. Furthermore, if the authority has used that information in the investigation, as provided for in the same Article, it is clear that the authority must provide the parties with opportunities to see it.

[1] Appellate Body Report, paras. 145-147.

ANNEX C-4

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE EUROPEAN UNION[*]

1. INTRODUCTION

1. The European Union exercises its right to participate as a third party in this case because of its systemic interest in the correct and consistent interpretation and application of the covered agreements, and the multilateral nature of the rights and obligations contained therein, in particular the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade* ("ADA").

2. CLAIMS CONCERNING THE DUMPING DETERMINATION

2.1. <u>Article 2.1 of the ADA</u>

2. In *US - Zeroing* (Japan), the Appellate Body noted that Article 2.1 of the ADA is definitional provision setting a definition of "dumping". Yet, in that case, the Appellate Body did not find that a claim under Article 2.1 of the ADA is inapposite; rather, in that case, because a violation of Article 2.4.2 of the ADA had already been established, there was no need to make additional findings under Article 2.1 of the ADA. Indeed, in *US - Hot-Rolled Steel*, the Appellate Body noted that Article 2.1 of the ADA requires investigating authorities to exclude sales not made "in the ordinary course of trade", from the calculation of normal value, precisely to ensure that normal value is the "normal" price of the like product in the home market of the exporter (paras. 140 and 153). Therefore, the European Union considers that a claim of breach of Article 2.1 of the ADA can be made in isolation. Members may question the existence of "dumping" as defined in that provision.

3. Article 2.1 of the ADA is silent as to the selection of "historical data". Yet, Article 2.1 of the ADA refers to "dumping" when "the export price of the product exported from one country to another is less than the *comparable* price" (emphasis added). Embedded in the notion of comparability is the requirement to compare prices from the same time period, *i.e.* the POI. Investigating authorities may have certain discretion in selecting data for establishing the existence of "dumping", as defined in such provision. However, as noted by the Appellate Body in *US - Hot-rolled Steel*, para. 148, "[such] discretion must be exercised in an even-handed way that is fair to all parties affected by an anti-dumping investigation". Whether the investigating authority takes the date of the sales contract, the invoice date or any other point in time belongs to the discretion given to the investigating authorities. In contrast, once a reference point is chosen, it must be consistently applied to both sides, export prices and normal value, for those prices to remain *comparable*.

2.2. <u>Article 2.4 of the ADA</u>

4. Article 2.4 of the ADA requires that investigating authorities make a fair comparison between the export price and the normal value, and sets forth certain requirements to ensure that the comparison is fair. The relevant differences are those "which affect price comparability". However, the existence of one of the differences listed in Article 2.4 does not automatically mean that price comparability has been affected, as "there may be situations when those differences do not affect price comparability".[1] Indeed, Article 2.4 does not require that an adjustment be made automatically in all cases where a difference is found to exist, but only where, based on the merits of the case, that difference is demonstrated to affect price comparability.[2] Thus, in order to make a *prima facie* case of violation of Article 2.4, a complaining party must demonstrate that due allowance should have been made with respect to (i) a difference, (ii) that was demonstrated to affect price comparability between the normal value and the export price, and (iii) that the investigating authority failed to make the

[*] In English original language.
[1] Appellate Body Report, *EU–Fatty Alcohols (Indonesia)*, para. 5.23.
[2] Panel Report, *US–Softwood Lumber V*, para. 7.165.

adjustment.[3] The European Union considers that a fair comparison requires using consistent data having the same reference points from the same time periods. Once the POI has been chosen, investigating authorities should match export and domestic prices falling within the same POI and on the basis of the same criteria (e.g. the date of the invoice). Whether the investigating authority should make an adjustment for differences in costs depends on whether such differences affect prices, a matter for the party requesting the adjustment to show.

2.3. Article 2.2.1 of the ADA

5. As noted by the Panel in *EC - Bed Linen (Article 21.5 DSU - India)*, Article 2.2.1 of the ADA does not contain any guidance on how the weighted average should be calculated and, thus, it should be up to the investigating authority to choose the most appropriate method in view of the specific circumstances of the case.[4] Generally, because Article 2.2.1 of the ADA explicitly refers to the "weighted average per unit costs *for the period of investigation*" (as opposed to the specific "time of sale" used for the reference point as regards domestic prices), the use of an annual weighted average would appear appropriate in most cases. That being said, investigating authorities may take into account certain elements, such as the concentration of sales in a particular period of time within the POI, with a view to being more granular in the application of this sentence.

3. CLAIMS CONCERNING THE INITIATION OF THE INVESTIGATION (ARTICLE 5.3 OF THE ADA)[5]

6. Article 5.3 of the ADA imposes a comprehensive obligation on the investigating authority to determine whether the initiation of an investigation would be justified in view of the objectively available evidence. This obligation does not only encompass an examination of the application, but it may also require the investigating authority to take further steps in gathering the necessary evidence before initiating an investigation.[6]

7. The fact that a complainant must provide such information as is "reasonably available" to it[7] confirms that the quantity and quality of the evidence required at the stage of initiating an investigation is not of the same standard as that required for a provisional or definitive finding.[8] That being said, an investigation cannot be justified where, for example, there is no evidence of the existence of dumping before an investigating authority, even if such evidence is not "reasonably available" to the applicant. Indeed, to justify initiation, an investigating authority must have "sufficient evidence" (whether from the applicant or arising out of its own enquiries). A mere assertion will not suffice.[9] The question of the existence of "sufficient evidence" in a particular case has to be adjudicated in the light of the standard set in Article 17.6(i) of the ADA.[10] It is in accordance with those principles that the Panel will have to examine the CDC's decision as to the sufficiency of the evidence available to it.

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[3] Panel Report, *EU – Footwear (China)*, para. 7.278.

[4] Panel Report, *EC – Bed Linen (Article 21.5 DSU - India)*, para. 6.87.

[5] The European Union focuses its comments on Article 5.3 of the ADA, since, as a previous panel found, the part of Article 5.8 of the ADA which refers to the stage prior to the initiation of an investigation does not impose on the authorities concerned, as regards the initiation of an investigation, any substantive obligations additional to those arising from Article 5.3 (Panel Report, *Mexico – Steel Pipes and Tubes*, para. 7.25).

[6] Panel Report, *Guatemala – Cement I*, para. 7.53; and Panel Report, *Guatemala – Cement II*, para. 8.31.

[7] Panel Report, *US – Softwood Lumber V*, para. 7.87.

[8] For instance, "evidence of government ownership may be considered to amount to evidence 'tending to prove or indicating' that an entity is a public body capable of conferring a financial contribution" (see Panel Report, *US – Countervailing Measures (China)*, para. 7.152).

[9] See Panel Report, *China – GOES*, paras. 7.55 and 7.56; and Panel Report, *US – Countervailing Measures (China)*, WT/DS437/R, para. 7.146.

[10] Panel Report, *Guatemala – Cement I*, para. 7.57 (confirmed in Panel Report, *Mexico – Corn Syrup*, paras. 7.94 *et seq*).

4. CLAIMS CONCERNING PROCEDURAL RIGHTS OF INTERESTED PARTIES

4.1. Article 6.4 of the ADA

8. The European Union recalls that Article 6.4 of the ADA requires that, wherever practicable, authorities provide timely opportunities for all interested parties to see and prepare presentations on the basis of "all information" that is relevant to the presentation of the interested parties' cases, not confidential as defined in Article 6.5, and is used by the authorities in an anti-dumping investigation.[11] The obligation in Article 6.4 is limited by the requirements that providing opportunities be "practicable" and that the information be "relevant", "not confidential" and "used".[12] Further, the obligation in Article 6.4 of the ADA is not an "active" disclosure obligation in the sense that it requires an investigating authority to reach out to the interested parties, in particular by giving notice to, or otherwise informing the interested parties.[13] The permissive language in Article 6.7 of the ADA should be read together with the obligation to have access to file in Article 6.4 of the ADA. Therefore, to the extent that the information contained in the verification report of the domestic producers is not confidential as defined in Article 6.5, and is used by the authorities in an anti-dumping investigation, it should be made available to interested parties. In this respect, the European Union observes that the type of information contained in those verification reports, as noted by the Panel in *EU - Fatty Alcohols*[14],will be either quite generic (e.g. a particular section of the questionnaire was verified) or subject to confidential treatment (because of the nature of the information collected during the visit).

4.2. Article 6.5 of the ADA

9. The European Union recalls that, according to Article 6.5 of the ADA, information that is "by nature" confidential or "provided on a confidential basis" shall, upon "good cause" shown, be treated as such by the investigating authorities. Such information shall not be disclosed without specific permission of the party submitting it. The Appellate Body in *EC - Fasteners (China)* considered that Article 6.5 of the ADA "set[s] out specific rules governing an investigating authority's acceptance and treatment of confidential information".[15] Article 6.5 imposes two conditions in order for the investigating authority to be obliged to treat information submitted by the parties to an investigation as "confidential". The first condition is split up in two alternatives. Authorities must treat information as confidential (i) if it is "by nature" confidential or if it is "provided on a confidential basis" and (ii) "upon good cause shown". With regard specifically to the first alternative in the first condition (information that is "by nature" confidential), the Appellate Body has noted that the "question whether information is 'by nature' confidential depends on the content of the information".[16] The Appellate Body noted that commercial sensitive information that is not typically disclosed in the normal course of business, and which would likely be regularly treated as confidential in anti-dumping investigations, such as certain profit or cost data or proprietary customer information, qualifies as such information.[17]

10. The second condition to be met in order for the investigating authority to be obliged to treat information submitted by the parties to an investigation as "confidential" is that a "good cause" must be shown. This requirement applies to both information that is "by nature" confidential

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[11] Appellate Body Report, *EC – Fasteners (China)*, para. 5.97.
[12] Panel Report, *China – Broiler Products (Article 21.5 - US)*, para. 7.290.
[13] Panel Report, *China – Broiler Products (Article 21.5 - US)*, para. 7.277.
[14] Panel Report, *EU – Fatty Alcohols (Indonesia)*, para. 7.224 ("At a minimum, the authorities should disclose the part of the questionnaire response or other information supplied for which supporting evidence was requested, whether any further information was requested, and whether documents were collected by the authorities. Further, the results of the verification should state whether the producer made available the evidence and additional information requested and indicate whether the investigating authorities were or were not able to confirm the accuracy of the information supplied by the verified companies in, inter alia, their questionnaire responses").
[15] Appellate Body Report, *EC – Fasteners (China)*, para. 535.
[16] Appellate Body Report, *EC – Fasteners (China)*, para. 536.
[17] Appellate Body Report, *EC – Fasteners (China)*, para. 536.

and that which is provided to the authority "on a confidential basis".[18] Such "good cause" must be a reason that is sufficient to justify the withholding of information from both the public and from the other parties interested in the investigation.

11. A panel tasked with reviewing whether an investigating authority has objectively assessed the "good cause" alleged by a party must examine this issue on the basis of the investigating authority's published report and its related supporting documents, and in the light of the nature of the information at issue and the reasons given by the submitting party for its request for confidential treatment. This does not entail a *de novo* review of the record of the investigation in order determine whether the existence of "good cause" has been sufficiently substantiated by the submitting party.[19] It does, on the other hand, entail asking whether there is evidence that the investigating authority objectively assessed the alleged "good cause".[20] The fact that the investigating authority has conducted this objective assessment must be discernible from its published report or related supporting documents.[21]

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[18] Appellate Body Report, *EC – Fasteners (China)*, para. 537, referring to Panel Report, *EC – Fasteners (China)*, para. 7.451; Panel Report, *Korea – Certain Paper*, para. 7.335; and Panel Report, *Guatemala - Cement II*, para. 8.219.

[19] Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.97.

[20] Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.98.

[21] Appellate Body Report, *Korea – Pneumatic Valves (Japan)*, paras. 5.416 and 5.417.