

determination using cost information that was different from that used in the final determination, which was deemed inconsistent with Article 2.

7.488. Contrary to those cases, Costa Rica has requested that the Panel consider an alternative calculation submitted by the exporter under investigation, ArcelorMittal, on 7 February 2019.⁸¹⁷ In this alternative calculation, the export price was determined based on seven shipments invoiced in the POI, excluding the sales shipped on the Thorco Logic and the Suzie Q; this resulted in a higher weighted average adjusted export price for each of the diameters.⁸¹⁸ However, the normal value was also calculated using a different baseline. In particular, a new analysis of sales made in the ordinary course of trade found that sales with a unit price that was lower than the unit cost accounted for 38% of total sales.⁸¹⁹ This percentage was lower than that determined by the CDC during its investigation, which found that 54% of sales were below cost.⁸²⁰ As fewer sales (at lower prices) were excluded from ArcelorMittal's alternative calculation, the normal value obtained was lower than that calculated by the CDC.⁸²¹ Based on this alternative analysis, ArcelorMittal concluded that there was no dumping, as the weighted average dumping margin was 0%.⁸²²

7.489. We note the Dominican Republic's argument that the specific details of ArcelorMittal's recalculation were not reviewed, or at least, there is no indication to that effect in the CDC's determination.

7.490. As we explained in section 7.3.4 above, a panel may refrain from examining one or more claims, in accordance with the principle of judicial economy, if it is established that the same measure under consideration is inconsistent with any of the provisions of the covered agreement and if the findings with regard to the additional claims are not necessary to resolve the dispute.⁸²³

7.491. As set out in sections 7.3.3 and 7.4.3 above, we have found that the CDC acted inconsistently with Articles 2.4 and 2.2.1 of the Anti-Dumping Agreement with respect to the determination of dumping. As such, we consider that additional and consequential findings under Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994 will not help to resolve the dispute. We therefore decline to address these claims.

8 CONCLUSIONS AND RECOMMENDATIONS

8.1. For the reasons set forth in this Report, we conclude as follows:

- a. With respect to Costa Rica's claims regarding the CDC's determination of dumping:
 - i. the Dominican Republic acted inconsistently with its obligations under Article 2.4 of the Anti-Dumping Agreement because the CDC failed to comply with the requirement in the second sentence of Article 2.4 to make the comparison between the export price and normal value "in respect of sales made at as nearly as possible the same time", when it considered sales made in different periods, one to determine the normal value and another to determine the export price;
 - ii. we exercise judicial economy with respect to the other claims made by Costa Rica under Article 2.1 and under the first and third sentences of Article 2.4;
 - iii. the Dominican Republic acted inconsistently with Article 2.2.1 of the Anti-Dumping Agreement because, by using an annual weighted average cost, the CDC failed to

⁸¹⁷ ArcelorMittal's arguments dated 8 February 2019 (Exhibit CRI-18); and Excel sheet with the "MD" calculation (Exhibit CRI-23 (BCI)).

⁸¹⁸ ArcelorMittal's arguments dated 8 February 2019 (Exhibit CRI-18), pp. 4-5; and Excel sheet with the "MD" calculation (Exhibit CRI-23 (BCI)).

⁸¹⁹ ArcelorMittal's arguments dated 8 February 2019 (Exhibit CRI-18), p. 6; and Excel sheet with the "MD" calculation (Exhibit CRI-23 (BCI)).

⁸²⁰ See section 7.4.1 above.

⁸²¹ ArcelorMittal's arguments dated 8 February 2019 (Exhibit CRI-18), p. 7; and Excel sheet with the "MD" calculation (Exhibit CRI-23 (BCI)).

⁸²² ArcelorMittal's arguments dated 8 February 2109 (Exhibit CRI-18), p. 6; and Excel sheet with the "MD" calculation (Exhibit CRI-23 (BCI)).

⁸²³ See, for example, Appellate Body Report, *Canada - Wheat Exports and Grain Imports*, para. 133.

properly consider whether prices were lower than unit costs "at the time of sale" in accordance with the second sentence of Article 2.2.1; and

- iv. we exercise judicial economy with regard to Costa Rica's other claims under Article 2.2.1.
- b. With respect to Costa Rica's claims regarding the CDC's determinations of injury and causation:
- i. the Dominican Republic has failed to demonstrate that several of the arguments put forward by Costa Rica in its first written submission regarding Articles 3.1 and 3.2 of the Anti-Dumping Agreement do not relate to the claim made by Costa Rica in its panel request, and that, as a result, that claim and the arguments supporting it are not within the Panel's terms of reference;
 - ii. the Dominican Republic did not act inconsistently with Articles 3.1 and 3.2 of the Anti-Dumping Agreement, as the CDC considered whether price undercutting was "significant" and whether it was "the effect of" the dumped imports;
 - iii. the Dominican Republic acted inconsistently with Articles 3.1 and 3.2 of the Anti-Dumping Agreement because, in its consideration of the price depression, the CDC failed to explain the upward price trend throughout the entire POI from 2016 to 2018 and, therefore, failed to conduct an objective examination;
 - iv. the Dominican Republic did not act inconsistently with its obligations under Articles 3.1 and 3.2 of the Anti-Dumping Agreement because, in its price suppression analysis, the CDC properly considered that there was price suppression and established that the suppression was a consequence of the effect of imports from Costa Rica;
 - v. the Dominican Republic acted inconsistently with its obligations under Articles 3.1 and 3.4 of the Anti-Dumping Agreement because: (a) with respect to factors concerning the profits, cash flow, employment and market share of the domestic industry, the CDC's examination could not constitute a proper and objective analysis of how the evidence on the record supported the CDC's conclusions in this regard; and (b) the CDC failed to conduct an evaluation of all relevant economic factors and indices having a bearing on the state of the domestic industry, as required by Article 3.4;
 - vi. the Dominican Republic has failed to demonstrate that Costa Rica's claims put forward in its first written submission regarding the determination of a threat of material injury under Article 3.1 are not within the Panel's terms of reference;
 - vii. the Dominican Republic acted inconsistently with Articles 3.1 and 3.7 of the Anti-Dumping Agreement because the CDC's conclusions on the imminence of further exports and on the likely effects of further dumped imports on the domestic industry could not form the basis for its threat of injury determination under these provisions; and
 - viii. the Dominican Republic acted inconsistently with Articles 3.1 and 3.5 of the Anti-Dumping Agreement because the CDC failed to conduct a proper analysis of the existence of a causal relationship between further dumped imports and the threat of material injury. Moreover, we find no basis on which to make findings with respect to Costa Rica's claims under Article 3.5 concerning the CDC's non-attribution analysis.
- c. With respect to Costa Rica's claims regarding the CDC's determination to initiate the underlying investigation:
- i. the Dominican Republic did not act inconsistently with its obligations under Article 5.3 as the CDC determined, in an unbiased and objective manner, that the invoices submitted by the applicant as evidence of the normal value - which concerned a single type of rod, covered a very low volume and were issued at around the same time,

- almost a year before the submission of the application - constituted sufficient evidence of dumping to justify the initiation of the investigation; and
- ii. the Dominican Republic did not act inconsistently with its obligations under Article 5.8 as the CDC did not err when it determined that there was sufficient evidence to justify initiating the investigation.
- d. With respect to Costa Rica's claims regarding the CDC's provision of the "full text of the written application" received:
- i. the Dominican Republic acted inconsistently with Article 6.1.3 of the Anti-Dumping Agreement because, by providing the initiation form and the annexes thereto to the known exporter almost four months after the initiation of the investigation, the CDC failed to provide the "full text of the written application" submitted by the applicant "as soon" as the investigation was initiated; and
 - ii. having determined that the "full text of the written application" within the meaning of Article 6.1.3 includes all documents or written submissions that are necessary for the purposes of applying for the initiation of an investigation, we do not consider that these additional findings requested by Costa Rica with respect to the fact that the CDC failed to provide the additional information submitted by the applicant subsequent to the application (that is, in its letters dated 7 and 11 June 2018) are necessary to resolve this dispute.
- e. With respect to Costa Rica's claims regarding the opportunity to see relevant, non-confidential information that the CDC used:
- i. the Dominican Republic did not act inconsistently with Article 6.4 because, with respect to the documents that the CDC received from the applicant during the verification visit, as well as the CDC reports on the findings and information from the verification visit, Costa Rica did not demonstrate that the CDC failed to provide timely opportunities for the Costa Rican interested parties to see the information contained in those documents and to prepare presentations on the basis of that information.
- f. With respect to Costa Rica's claims regarding the confidential treatment granted by the CDC to certain information:
- i. the Dominican Republic did not act inconsistently with Article 6.5 of the Anti-Dumping Agreement with respect to the information which was granted confidential treatment in Resolutions Nos. 003 and 005 because Costa Rica failed to demonstrate that the CDC (a) failed to assess the "reasons" provided by the applicant to justify the confidential treatment requested; and (b) failed to "objectively" determine that the applicant had shown good cause for the confidential treatment of its information.
- g. With respect to Costa Rica's claims regarding information to be verified and any further information which needs to be provided:
- i. the Dominican Republic has failed to demonstrate that Costa Rica did not present the problem clearly in its panel request with respect to its claims under Article 6.7 of the Anti-Dumping Agreement and paragraph 7 of Annex I thereto; and
 - ii. the Dominican Republic did not act inconsistently with Article 6.7 of the Anti-Dumping Agreement and Annex I thereto by not advising the exporting company, prior to the verification visit, that it had to provide information on sales made before the POI.
- h. With respect to Costa Rica's claims regarding the margin of dumping determination calculated by the CDC:
- i. we apply the principle of judicial economy with respect to Costa Rica's claims under Article 9.3 of the Anti-Dumping Agreement and Article VI: 2 of the GATT 1994.

8.2. Under Article 3.8 of the DSU, 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. We conclude that, to the extent that the measures at issue are inconsistent with the Anti-Dumping Agreement, they have nullified or impaired benefits accruing to the Costa Rica under the Anti-Dumping Agreement and the GATT 1994.

8.3. Pursuant to Article 19.1 of the DSU, we recommend that the Dominican Republic bring its measures into conformity with its obligations under the GATT 1994 and the Anti-Dumping Agreement.
