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DOMINICAN REPUBLIC - ANTI-DUMPING MEASURES ON CORRUGATED STEEL BARS

REPORT OF THE PANEL

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EC – Tube or Pipe Fittings	Panel Report, *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WT/DS219/R, adopted 18 August 2003, as modified by Appellate Body Report WT/DS219/AB/R, DSR 2003:VII, p. 2701
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EC – Fasteners (China)	Panel Report, *European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China*, WT/DS397/R and Corr.1, adopted 28 July 2011, as modified by Appellate Body Report WT/DS397/AB/R, DSR 2011:VIII, p. 4289
EC – Fasteners (China) (Article 21.5 – China)	Appellate Body Report, *European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China – Recourse to Article 21.5 of the DSU by China*, WT/DS397/AB/RW and Add.1, adopted 12 February 2016, DSR 2016:I, p. 7
EC – Hormones	Appellate Body Report, *European Communities – Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, p. 135
EC – Bed Linen	Panel Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/R, adopted 12 March 2001, as modified by Appellate Body Report WT/DS141/AB/R, DSR 2001:VI, p. 2077
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EC and certain member States – Large Civil Aircraft	Appellate Body Report, *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/AB/R, adopted 1 June 2011, DSR 2011:I, p. 7
China – X-Ray Equipment	Panel Report, *China – Definitive Anti-Dumping Duties on X-Ray Security Inspection Equipment from the European Union*, WT/DS425/R and Add.1, adopted 24 April 2013, DSR 2013:III, p. 659

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Korea – Stainless Steel Bars	Panel Report, *Korea – Sunset Review of Anti-Dumping Duties on Stainless Steel Bars*, WT/DS553/R and Add.1, circulated to WTO Members 30 November 2020, appealed 22 January 2021
Korea – Certain Paper	Panel Report, *Korea – Anti-Dumping Duties on Imports of Certain Paper from Indonesia*, WT/DS312/R, adopted 28 November 2005, DSR 2005:XXII, p. 10637
Korea – Certain Paper (Article 21.5 – Indonesia)	Panel Report, *Korea – Anti-Dumping Duties on Imports of Certain Paper from Indonesia – Recourse to Article 21.5 of the DSU by Indonesia*, WT/DS312/RW, adopted 22 October 2007, DSR 2007:VIII, p. 3369
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US – Lamb	Appellate Body Report, *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, WT/DS177/AB/R, WT/DS178/AB/R, adopted 16 May 2001, DSR 2001:IX, p. 4051
US – Oil Country Tubular Goods Sunset Reviews	Appellate Body Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, WT/DS268/AB/R, adopted 17 December 2004, DSR 2004:VII, p. 3257
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US – Softwood Lumber V	Panel Report, *United States – Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/R, adopted 31 August 2004, as modified by Appellate Body Report WT/DS264/AB/R, DSR 2004:V, p. 1937
US – Softwood Lumber VI	Panel Report, *United States – Investigation of the International Trade Commission in Softwood Lumber from Canada*, WT/DS277/R, adopted 26 April 2004, DSR 2004:VI, p. 2485
US – Softwood Lumber V (Article 21.5 – Canada)	Appellate Body Report, *United States – Final Dumping Determination on Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada*, WT/DS264/AB/RW, adopted 1 September 2006, DSR 2006:XII, p. 5087
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Guatemala – Cement I	Appellate Body Report, *Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico*, WT/DS60/AB/R, adopted 25 November 1998, DSR 1998:IX, p. 3767
Guatemala – Cement II	Panel Report, *Guatemala – Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico*, WT/DS156/R, adopted 17 November 2000, DSR 2000:XI, p. 5295
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Morocco – Definitive AD Measures on Exercise Books (Tunisia)	Panel Report, *Morocco – Definitive Anti-Dumping Measures on School Exercise Books from Tunisia*, WT/DS578/R and Add.1, circulated to WTO Members 27 July 2021, appealed 28 July 2021
Mexico – Corn Syrup	Panel Report, *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States*, WT/DS132/R, adopted 24 February 2000, and Corr.1, DSR 2000:III, p. 1345
Mexico – Corn Syrup (Article 21.5 – US)	Appellate Body Report, *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States – Recourse to Article 21.5 of the DSU by the United States*, WT/DS132/AB/RW, adopted 21 November 2001, DSR 2001:XIII, p. 6675
Mexico – Steel Pipes and Tubes	Panel Report, *Mexico – Anti-Dumping Duties on Steel Pipes and Tubes from Guatemala*, WT/DS331/R, adopted 24 July 2007, DSR 2007:IV, p. 1207
Pakistan – BOPP Film (UAE)	Panel Report, *Pakistan – Anti-Dumping Measures on Biaxially Oriented Polypropylene Film from the United Arab Emirates*, WT/DS538/R and Add.1, circulated to WTO Members 18 January 2021, appealed 22 February 2021
Russia – Commercial Vehicles	Appellate Body Report, *Russia – Anti-Dumping Duties on Light Commercial Vehicles from Germany and Italy*, WT/DS479/AB/R and Add.1, adopted 9 April 2018, DSR 2018:III, p. 1167
Russia – Commercial Vehicles	Panel Report, *Russia – Anti-Dumping Duties on Light Commercial Vehicles from Germany and Italy*, WT/DS479/R and Add.1, adopted 9 April 2018, as modified by Appellate Body Report WT/DS479/AB/R, DSR 2018:III, p. 1329
Thailand – H-Beams	Appellate Body Report, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, WT/DS122/AB/R, adopted 5 April 2001, DSR 2001:VII, p. 2701
Thailand – H-Beams	Panel Report, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, WT/DS122/R, adopted 5 April 2001, as modified by Appellate Body Report WT/DS122/AB/R, DSR 2001:VII, p. 2741
EU – Biodiesel (Argentina)	Panel Report, *European Union – Anti-Dumping Measures on Biodiesel from Argentina*, WT/DS473/R and Add.1, adopted 26 October 2016, as modified by Appellate Body Report WT/DS473/AB/R, DSR 2016:VI, p. 3077
EU – Biodiesel (Indonesia)	Panel Report, *European Union – Anti-Dumping Measures on Biodiesel from Indonesia*, WT/DS480/R and Add.1, adopted 28 February 2018, DSR 2018:II, p. 605
EU – Footwear (China)	Panel Report, *European Union – Anti-Dumping Measures on Certain Footwear from China*, WT/DS405/R, adopted 22 February 2012, DSR 2012:IX, p. 4585
EU – Cost Adjustment Methodologies II (Russia)	Panel Report, *European Union – Cost Adjustment Methodologies and Certain Anti-Dumping Measures on Imports from Russia (Second Complaint)*, WT/DS494/R and Add.1, circulated to WTO Members 24 July 2020, appealed 28 August 2020

EXHIBITS REFERRED TO IN THIS REPORT

Exhibit	Short title (if any)	Description/Long title
CRI-1	Resolution on the appeal for reconsideration	CDC, Resolution No. CDC-RD-AD-001-2020 ruling on the appeal for reconsideration filed by ArcelorMittal Costa Rica, S.A. against Resolution No. CDC-RD-AD-007-2019 providing for the application of definitive 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 (17 March 2020)
CRI-2	Final determination	CDC, Resolution No. CDC-RD-AD-007-2019 providing for the application of definitive 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 (27 December 2019)
CRI-3	Final Technical Report	CDC, Final technical report on the anti-dumping investigation into imports of corrugated or deformed steel bars or rods for the reinforcement of concrete originating in the Republic of Costa Rica (public version) (20 December 20109)
CRI-4	Essential Facts Report	CDC, Essential facts report on the anti-dumping investigation into imports of corrugated or deformed steel bars or rods for the reinforcement of concrete originating in the Republic of Costa Rica (public version) (30 October 2019)
CRI-5	Resolution initiating the investigation	CDC, Resolution No. CDC-RD-AD-001-2018 providing for the initiation of the investigation into the alleged existence of dumping in respect of exports of corrugated or deformed steel bars or rods for the reinforcement of concrete originating in the Republic of Costa Rica (30 July 2018)
CRI-6	Initial Technical Report	CDC, Initial technical report on the anti-dumping investigation into corrugated or deformed steel bars or rods for the reinforcement of concrete originating in the Republic of Costa Rica (public version) (20 July 2018)
CRI-7	Minutes of the verification visit	CDC, Minutes of the verification visit of the anti-dumping investigation into corrugated or deformed steel bars or rods for the reinforcement of concrete originating in the Republic of Costa Rica
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CRI-9	Resolution No. CDC-RD-AD-005-2019	CDC, Resolution No. CDC-RD-AD-005-2019 declaring information submitted by Gerdau Metaldom, S.A. confidential in the anti-dumping investigation into corrugated or deformed steel bars or rods for the reinforcement of concrete originating in the Republic of Costa Rica (29 October 2019)
CRI-10	ArcelorMittal's position on the Essential Facts Report	Letter dated 11 November 2019 from ArcelorMittal to the CDC in reference to its position with respect to the Essential Facts Report of 30 October 2019 on the anti-dumping investigation into imports of corrugated or deformed steel bars or rods for the reinforcement of concrete originating in the Republic of Costa Rica
CRI-11	Minutes of the verification visit to ArcelorMittal	CDC, Minutes of the verification visit of the anti-dumping investigation into imports of corrugated or deformed steel bars or rods for the reinforcement of concrete originating in the Republic of Costa Rica (21 November 2018)
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CRI-15 (BCI)		Invoice No. W37441 dated 13 December 2016
CRI-17	Letter from the CDC (22 November 2018)	Letter from the CDC to ArcelorMittal (22 November 2018)
CRI-18	ArcelorMittal's arguments dated 8 February 2019	ArcelorMittal's arguments on the absence of dumping, injury and a causal link (8 February 2019)
CRI-22 (BCI)		Table E-3: sales of corrugated steel rods in Costa Rica
CRI-23 (BCI)		Excel sheet with the "MD" calculation
CRI-25	Definition of "*información*"	Real Academia Española, definition of "*información*" https://dle.rae.es/informaci%C3%B3n (accessed 12 December 2022)

Exhibit	Short title (if any)	Description/Long title
DOM-1	Resolution No. CDC-RD-AD-001-2018	CDC, Public Notice of Resolution No. CDC-RD-AD-001-2018 ruling on the application for the initiation of an anti-dumping investigation into imports of corrugated or deformed steel rods and bars for the reinforcement of concrete originating in the Republic of Costa Rica (30 July 2018)
DOM-2 (BCI)	Essential Facts Report (confidential version)	CDC, Essential facts report on the anti-dumping investigation into imports of corrugated or deformed steel bars or rods for the reinforcement of concrete originating in the Republic of Costa Rica (confidential version) (30 October 2019)
DOM-3 (BCI)	Final Technical Report (confidential version)	CDC, Final technical report on the anti-dumping investigation into imports of corrugated or deformed steel bars or rods for the reinforcement of concrete originating in the Republic of Costa Rica (confidential version) (20 December 2019)
DOM-4		CDC, Anti-dumping questionnaire for exporters
DOM-5 (BCI)	ArcelorMittal's anti-dumping questionnaire	ArcelorMittal, anti-dumping questionnaire for exporters (30 October 2018)
DOM-6 (BCI)	ArcelorMittal's anti-dumping questionnaire, annex D-3	ArcelorMittal, anti-dumping questionnaire, annex D-3 (30 October 2018)
DOM-7 (BCI)	ArcelorMittal's position on the Essential Facts Report	ArcelorMittal's position on the Essential Facts Report of 30 October 2019 (15 November 2019)
DOM-8 (BCI)		ArcelorMittal, section F, production costs
DOM-11 (BCI)	Application for initiation of the investigation (7 May 2018)	Gerdau Metaldom, Application for initiation of an investigation to the Regulatory Commission on Unfair Trade Practices and Safeguard Measures (7 May 2018)
DOM-12	Letter from the CDC to Gerdau Metaldom (24 May 2018)	Letter from the CDC to Gerdau Metaldom in reference to the application for initiation of the investigation (24 May 2018)
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DOM-15 (BCI)	Letter from Gerdau Metaldom to the CDC (7 June 2018)	Gerdau Metaldom, First submission to the CDC in reference to its letter of 4 June 2018 (7 June 2018)
DOM-16 (BCI)	Letter from Gerdau Metaldom to the CDC (11 June 2018)	Gerdau Metaldom, Second submission to the CDC in reference to its letter of 4 June 2018 (11 June 2018)
DOM-17	Comments by ArcelorMittal (30 October 2018)	ArcelorMittal, Annex 23 - Comments on the application, injury and causality, 30 October 2018
DOM-18		Letter from the CDC No. 697 to ArcelorMittal regarding the verification visit (2 November 2018)
DOM-21 (BCI)		Sales invoices in Costa Rica
DOM-25		Letter of notice of the visit to Gerdau Metaldom (15 October 2018)
DOM-30		Documentary evidence related to the CDC informing the parties of relevant laws and regulations on confidential treatment

ABBREVIATIONS USED IN THIS REPORT

Abbreviation	Description
ADC	Apparent domestic consumption
Anti-Dumping Agreement	Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994
ArcelorMittal	ArcelorMittal Costa Rica, S.A.
BCI	Business confidential information
CDC	Regulatory Commission on Unfair Trade Practices and Safeguard Measures of the Dominican Republic
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
GATT 1994	General Agreement on Tariffs and Trade 1994
Gerdau Metaldom	Gerdau Metaldom, S.A.
POI	Period of investigation
Vienna Convention	Vienna Convention on the Law of Treaties, Done at Vienna, 23 May 1969, UN document A/CONF.39/27
WTO	World Trade Organization

1 INTRODUCTION

1.1 Complaint by Costa Rica

1.1. On 23 July 2021, Costa Rica requested consultations with the Dominican Republic pursuant to Articles 1 and 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Article 17 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement), and Article XXII of the General Agreement on Tariffs and Trade 1994 (GATT 1994) with respect to the measures and claims set out below.[1]

1.2. Consultations were held on 20 September 2021 but failed to resolve the dispute.

1.2 Establishment and composition of the Panel

1.3. On 15 November 2021, Costa Rica requested the establishment of a panel pursuant to Articles 4.7 and 6 of the DSU, Article 17.4 of the Anti-Dumping Agreement, and Article XXIII of the GATT 1994, with the standard terms of reference.[2] Based on this request, in accordance with Article 6 of the DSU, the Dispute Settlement Body (DSB) established a panel at its meeting of 20 December 2021.[3]

1.4. The Panel's terms of reference are:

> To examine, in the light of the relevant provisions of the covered agreements cited by the parties to the dispute, the matter referred to the DSB by Costa Rica in document WT/DS605/2 and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.[4]

1.5. On 28 March 2022, Costa Rica requested the Director-General to determine the composition of the Panel, pursuant to Article 8.7 of the DSU. On 8 April 2022, the Director-General accordingly composed the Panel as follows:

Chairperson:	Mr Guillermo VALLES GALMÉS
Members:	Ms María Valeria RAITERI Mr Marco César SARAIVA DA FONSECA

1.6. Canada, China, the European Union, India, Japan, Mexico, the Russian Federation, and the United States notified their interest in participating in the Panel proceedings as third parties.

1.3 Panel proceedings

1.7. After consultation with the parties, the Panel adopted its Working Procedures[5] and a timetable on 12 May 2022. Additional Working Procedures concerning Business Confidential Information (BCI) were adopted on 17 May 2022.[6] The Panel revised its timetable during the panel proceedings in the light of subsequent developments.[7]

1.8. Costa Rica submitted its first written submission on 10 June 2022 and the Dominican Republic submitted its first written submission on 29 July 2022. The Panel held a first substantive meeting with the parties on 13 and 14 September 2022. A session with the third parties took place on 14 September 2022. The parties submitted their second written submissions on 26 October 2022.

[1] Request for consultations by Costa Rica, WT/DS605/1-G/ADP/D139/1-G/L/1393 (Costa Rica's consultations request).
[2] Request for the establishment of a panel by Costa Rica, WT/DS605/2 (Costa Rica's panel request).
[3] DSB, Minutes of the meeting held on 20 December 2021, WT/DSB/M/459, para. 5.4.
[4] Constitution note of the Panel, WT/DS605/3.
[5] Working Procedures of the Panel (Annex A-1).
[6] Additional Working Procedures of the Panel Concerning Business Confidential Information (Annex A-2).
[7] The timetable was updated and revised on 23 November 2022 and 7 February 2023.

1.9. The second substantive meeting of the Panel with the parties was held on 22 and 23 November 2022. As a result of force majeure, Mr Marco César Saraiva da Fonseca, was unable to attend the meeting in person, but he participated virtually through the Cisco Webex platform.

1.10. On 7 February 2023, the Panel issued the descriptive part of its Report to the parties. The Panel issued its Interim Report to the parties on 5 May 2023. The Panel issued its Final Report to the parties on 26 June 2023.

2 FACTUAL ASPECTS: THE MEASURES AT ISSUE

2.1. This dispute concerns anti-dumping measures imposed by the Dominican Republic on the importation of corrugated or deformed steel bars or rods for the reinforcement of concrete originating in the Republic of Costa Rica following the investigation by the Regulatory Commission on Unfair Trade Practices and Safeguard Measures of the Dominican Republic (CDC). Costa Rica's panel request refers in particular to the following:

a. Initial Technical Report No. CDC-RD/AD/2018-001, of 20 July 2018, whereby the Authority examined the application for an anti-dumping investigation by the Dominican company, Gerdau Metaldom, S.A. (Gerdau Metaldom).

b. Resolution No. CDC-AD-001-2018, of 30 July 2018, providing for the initiation of the investigation into the alleged existence of dumping in respect of exports of corrugated or deformed steel rods or bars for the reinforcement of concrete originating in the Republic of Costa Rica.

c. Report on the investigation's essential facts, of 30 October 2019.

d. Final Technical Report, of 20 December 2019, for the anti-dumping investigation against imports of the Costa Rican product.

e. Resolution No. CDC-RD-AD-007-2019, of 27 December 2019, providing for the application of definitive 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.

f. Resolution No. CDC-RD-AD-001-2020, of 17 March 2020, ruling on the appeal for reconsideration filed against Resolution No. CDC-RD-AD-007-2019, of 27 December 2019.

g. Any other resolution, instrument, report or determination issued in the anti-dumping investigation or in relation thereto.

2.2. In addition to the aforementioned measures, Costa Rica is challenging any other measures that extend, replace, amend, implement, expand, enforce or otherwise maintain the measures described above.

3 PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATION

3.1. Costa Rica requests that the Panel find 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 I thereto, as well as Article VI:2 of the GATT 1994.

3.2. Costa Rica submits that, having demonstrated the infringement of the Anti-Dumping Agreement and the GATT 1994, the measures at issue constitute a case of nullification or impairment on the basis of Article 3.8 of the DSU.

3.3. Costa Rica further requests the Panel, pursuant to Article 19.1 of the DSU, to recommend that the Dominican Republic bring the anti-dumping measures into conformity with its obligations under the Anti-Dumping Agreement and the GATT 1994.[8]

[8] Costa Rica's first written submission, paras. 298-300; and second written submission, paras. 315-317.

3.4. The Dominican Republic requests that the Panel reject each of the claims submitted by Costa Rica in this dispute.[9]

4 ARGUMENTS OF THE PARTIES

4.1. The arguments of the parties are reflected in their executive summaries, provided to the Panel in accordance with paragraph 25 of the Working Procedures adopted by the Panel (see Annexes B-1 and B-2).

5 ARGUMENTS OF THE THIRD PARTIES

5.1. The arguments of the United States, Japan, Mexico, and the European Union are reflected in their executive summaries, provided in accordance with paragraph 28 of the Working Procedures adopted by the Panel (see Annexes C-1 to C-4). Canada made an oral statement during the third-party session, which it also submitted in writing. China, India, and the Russian Federation did not provide the Panel with a third-party submission and did not make an oral statement at the third-party session of the first substantive meeting with the Panel.

6 INTERIM REVIEW

6.1. On 5 May 2023, the Panel issued its interim report to the parties. On 22 May 2023, Costa Rica and the Dominican Republic submitted their written requests for review. On 5 June 2023, the parties submitted comments on the other parties' written requests for review.

6.2. The parties' requests made at the interim review stage as well as the Panel's discussion and disposition of those requests are set out in Annex A-3.

7 FINDINGS

7.1 Introduction

7.1. This dispute concerns the imposition by the Dominican Republic of anti-dumping duties on imports of corrugated or deformed steel bars and rods for concrete reinforcement originating in Costa Rica. On 20 December 2019, the CDC issued a final determination regarding the investigation into the existence of dumping practices, and on 27 December 2019, the CDC provided for the application of definitive anti-dumping measures.[10] The CDC applied an anti-dumping duty of 15% *ad valorem* on imports of corrugated or deformed steel bars and rods for concrete reinforcement originating in Costa Rica under tariff subheadings 7214.10.00, 7214.20.00, 7214.30.00, 7214.91.00 and 7214.99.00.[11]

7.2. We begin our review with Costa Rica's claims concerning the calculation of the margin of dumping. In section 7.3 , we analyse the claims under Articles 2.1 and 2.4 of the Anti-Dumping Agreement regarding the inclusion in the dumping calculation of certain export sales that were invoiced prior to the period of investigation (POI) but that entered the Dominican Republic during the POI. In section 7.4 , we assess Costa Rica's claims under Article 2.2.1 of the Anti-Dumping Agreement regarding the CDC's examination and the costs it selected to determine whether the sales were made in the ordinary course of trade.

7.3. In section 7.5 , we examine Costa Rica's claims under Articles 3.1, 3.2, 3.4, 3.5 and 3.7 of the Anti-Dumping Agreement regarding the CDC's examination of the existence of a threat of injury and the existence of a causal relationship between the dumped imports and the threat of injury to the domestic industry of the Dominican Republic.

7.4. In sections 7.6 and 7.7 , we evaluate Costa Rica's claims under Articles 5.3 and 5.8 of the Anti-Dumping Agreement concerning the initiation of the investigation.

[9] Dominican Republic's first witten submission, para. 736; and second written submission, para. 335.
[10] Final determination (Exhibit CRI-2).
[11] Final determination (Exhibit CRI-2), para. 142.

7.5. We then consider Costa Rica's claims under Article 6 of the Anti-Dumping Agreement. In section 7.8 , we analyse whether, inconsistently with Article 6.1.3, the CDC failed to provide the exporter under investigation (ArcelorMittal Costa Rica S.A. (ArcelorMittal) with the full text of the written application for the initiation of the investigation. In section 7.9 , we consider Costa Rica's claim that the CDC acted inconsistently with Article 6.4 by failing to provide timely opportunities for all interested parties to see all information that is relevant to the presentation of their cases and to prepare presentations on the basis of this information. In section 7.10 , we analyse Costa Rica's claims concerning the confidential treatment that the CDC afforded to certain information under Article 6.5. In section 7.11 , we consider Costa Rica's claim under Article 6.7 of the Anti-Dumping Agreement and Annex I thereto regarding the information to be verified and any further information which needed to be provided.

7.6. Lastly, in section 7.12 , we analyse Costa Rica's consequential claims that the CDC acted inconsistently with Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994, as it failed to satisfy all the requirements stipulated in the Anti-Dumping Agreement and the GATT 1994.

7.2 General principles regarding treaty interpretation, standard of review and burden of proof

7.2.1 Treaty interpretation

7.7. Article 3.2 of the DSU provides that the dispute settlement system of the WTO serves to "clarify" the existing provisions of the covered agreements "in accordance with customary rules of interpretation of public international law".[12]

7.8. Article 17.6(ii) of the Anti-Dumping Agreement also requires panels to "interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law".

7.9. It is generally accepted that the principles codified in Articles 31 and 32 of the Vienna Convention on the Law of Treaties (Vienna Convention) are such customary rules.[13]

7.2.2 Standard of review

7.10. Article 11 of the DSU sets out a general standard of review for panels, providing, in relevant part, that:

> [A] panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements[.]

7.11. Furthermore, in matters related to claims under the Anti-Dumping Agreement, Article 17.6 of that Agreement provides that:

> (i) in its assessment of the facts of the matter, the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned;
>
> (ii) the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible

[12] We further note that Article 3.2 of the DSU stipulates that "[r]ecommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements".

[13] See, e.g. Appellate Body Report, *Japan - Alcoholic Beverages II*, p. 10.

> interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.[14]

7.12. Pursuant to these provisions, a panel reviewing an investigating authority's determination must not conduct a *de novo* review of the evidence nor substitute its judgement for that of the investigating authority.

7.2.3 Burden of proof

7.13. The DSU does not contain any specific rules governing how the burden of proof is allocated in WTO dispute settlement proceedings. We agree that, in WTO dispute settlement, "the burden of proof rests upon the party … who asserts the affirmative of a particular claim or defence".[15] Lastly, it is Costa Rica that is required "to establish a *prima facie* case of inconsistency with [the] provision [invoked] before the burden of showing consistency with that provision is taken on by the defending party".[16] A *prima facie* case is one which, in the absence of effective refutation by the defending party, requires a panel, as a matter of law, to rule in favour of the complaining party.[17]

7.3 Costa Rica's claims under Articles 2.1 and 2.4 of the Anti-Dumping Agreement: the calculation of the export price

7.3.1 Introduction

7.14. When initiating the investigation on 30 July 2018, the CDC set the POI to determine the margin of dumping as from 1 May 2017 to 30 April 2018.[18] For the purposes of the determination of dumping, the CDC calculated the export price on the basis of the information provided by the exporter, ArcelorMittal, on sales made to the Dominican Republic.[19] ArcelorMittal submitted information on nine exports to the Dominican Republic. Two of the exports - the sales shipped on the vessels, the Thorco Logic and the Suzie Q - were invoiced at dates prior to the start of the dumping investigation period, although they entered the Dominican Republic on dates within that period.[20] The CDC calculated the export price on the basis of the information submitted by ArcelorMittal, including the sales shipped on the vessels, the Thorco Logic and the Suzie Q, "by virtue of the fact that the dates of entry into the Dominican Republic are within the dumping period."[21]

7.15. Costa Rica claims that, by including exports invoiced prior to the POI in its calculation of the margin of dumping, the CDC acted inconsistently with Articles 2.1 and 2.4 of the Anti-Dumping Agreement. With regard to Article 2.1, Costa Rica first submits that the inclusion of export sales made prior to the POI implies that the CDC failed to determine "current" dumping, which must be established in the light of Article 2.1.[22] Second, Costa Rica claims that, by including export sales that were invoiced prior to the POI, the export price used by the CDC was not "comparable" to the normal value used by the CDC and that the CDC therefore failed to comply with the requirements of Article 2.1.[23]

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[14] Article 1.2 of the DSU and Appendix 2 thereto identify Article 17.6 of the Anti-Dumping Agreement as one of the "special or additional rules and procedures" which prevail over the DSU "[t]o the extent that there is a difference" between those provisions and the provisions of the DSU.

[15] Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14.

[16] Appellate Body Report, *EC – Hormones*, para. 104.

[17] Appellate Body Report, *EC – Hormones*, para. 104.

[18] Final Technical Report (confidential version) (Exhibit DOM-3 (BCI)), para. 17.

[19] See ArcelorMittal's anti-dumping questionnaire (30 October 2018) (Exhibit DOM-5 (BCI)), section D, "*Ventas de exportación del PI a la República Dominicana*" (Export sales of the product under investigation to the Dominican Republic); and ArcelorMittal's anti-dumping questionnaire, annex D-3 (Exhibit DOM-6 (BCI)).

[20] As indicated in ArcelorMittal's anti-dumping questionnaire, annex D-3 (Exhibit DOM-6 (BCI)), the exports shipped on the vessel, the Thorco Logic, were invoiced on 31 March 2017, while the exports shipped on the vessel, the Suzie Q, were invoiced on 27 April 2017. ArcelorMittal indicated that the Thorco Logic shipment was made on 17 May 2017, and states that the Suzie Q entered the Dominican Republic "during the POI" without specifying the exact date. ArcelorMittal explained that the criterion used to define the exports that were included "was the entry of [its] sales into the Dominican Republic, in the POI defined by the CDC for the dumping determination". (ArcelorMittal's anti-dumping questionnaire (Exhibit DOM-5 (BCI)), p. 29).

[21] Essential Facts Report (confidential version) (Exhibit DOM-2 (BCI)), para. 124.

[22] Costa Rica's second written submission, paras. 17-20.

[23] Costa Rica's second written submission, paras. 10-16.

7.16. Costa Rica also submits a number of claims where it states that the CDC failed to comply with the provisions of Article 2.4 by including exports invoiced prior to the POI in its calculation of the margin of dumping. In this regard, Costa Rica claims, in particular, that the CDC: (a) failed to make a "fair" comparison for the purposes of the first sentence of Article 2.4[24]; (b) failed to make a comparison in respect of sales made at as nearly as possible the same time, inconsistently with the second sentence of Article 2.4[25]; and (c) failed to make due allowance for differences which affect price comparability, as stipulated in the third sentence of Article 2.4.[26]

7.17. The Dominican Republic responds that Costa Rica's claims under Article 2.1 are devoid of any legal basis as nothing in this provision prevents the authorities from taking the date of entry into the country as a relevant criterion for identifying which sales are considered in the determination of dumping.[27] Moreover, the Dominican Republic does not agree that the sales invoiced for export on dates prior to the POI are considered sales that do not reflect "current" or "actual" dumping under Article 2.1.[28]

7.18. The Dominican Republic also submits that the Costa Rica's claim finds no legal basis in Article 2.4, as Article 2.4 refers to adjustments for differences which affect price comparability and does not directly regulate the determination of the export price.[29] The Dominican Republic argues that Costa Rica's claim concerns adjustments and, in any event, disagrees that an alleged increase in the cost of production during the POI is one of the differences affecting price comparability that would have required an adjustment.[30] Lastly, the Dominican Republic claims that the exporter, ArcelorMittal, never submitted the data needed to make a fair comparison, which the CDC should allegedly have made.[31]

7.19. As set out below, we conclude that the CDC acted inconsistently with Article 2.4, and we exercise judicial economy with regard to Costa Rica's claims under Article 2.1 and to certain additional claims under Article 2.4.

7.20. We now turn to the claims under Article 2.4. First, we set out the applicable requirements of Article 2.4 (section 7.3.2), before applying that standard to the facts of this case to assess whether the CDC acted inconsistently with Article 2.4, and we conclude that it did (section 7.3.3). Lastly, we exercise judicial economy under Article 2.1 and in respect of certain additional claims brought by Costa Rica under Article 2.4 (section 7.3.4).

7.3.2 The applicable requirements of Article 2.4 of the Anti-Dumping Agreement

7.21. The relevant part of Article 2.4 provides that:

> A fair comparison shall be made between the export price and the normal value. This comparison shall be made at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time. Due allowance shall be made in each case, on its merits, for differences which affect price comparability, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability. … The authorities shall indicate to the parties in question what information is necessary to ensure a fair comparison and shall not impose an unreasonable burden of proof on those parties.[32]

7.22. Article 2.4 requires the investigating authorities to make a "fair comparison" between the export price and the normal value when determining dumping and when calculating the dumping margin. The word "*equitativo*" ("fair") means that something has the quality of "*equidad*" ("fairness"), i.e. "*[d]isposición del ánimo que mueve a dar a cada uno lo que merece*" ("[s]tate of

[24] Costa Rica's second written submission, paras. 37-41.
[25] Costa Rica's second written submission, paras. 29-36.
[26] Costa Rica's second written submission, paras. 42-47.
[27] Dominican Republic's first written submission, para. 107.
[28] Dominican Republic's first written submission, paras. 108-110.
[29] Dominican Republic's first written submission, paras. 90, 125 and 133-134.
[30] Dominican Republic's first written submission, para. 132.
[31] Dominican Republic's first written submission, para. 135.
[32] Fn omitted.

mind that moves one to give everyone their due").[33] Article 2.4 sets forth certain requirements that must be complied with in order to ensure that the comparison is fair.[34] The second sentence of Article 2.4 provides that the comparison should be made "at the same level of trade" and "with respect to sales made at as nearly as possible the same time". The third sentence of Article 2.4 requires that investigating authorities make "[d]ue allowance ... in each case, on its merits, for differences which affect price comparability".

7.23. We understand that the relevant differences are the differences in the characteristics of the compared transactions that have an impact, or are likely to have an impact, on the price of the transactions, as already mentioned. Moreover, when it is established that the comparison between the export price and the normal value is made "in respect of sales made at as nearly as possible the same time", we consider that the date of sales may have an impact on the comparability of export and home market transactions.

7.24. The requirement to make due allowance for differences which affect price comparability means that the authority must evaluate the differences identified. The last sentence of Article 2.4 requires that investigating authorities indicate to the parties in question what information is necessary to ensure a fair comparison. Investigating authorities must thus indicate what information they will need in order to make a fair comparison. In addition, we recall that the last sentence of Article 2.4 requires that investigating authorities "not impose an unreasonable burden of proof on those parties".

7.25. We understand that exporters, for their part, bear the burden of substantiating, as constructively as possible, their requests for adjustments under Article 2.4.

7.26. Lastly, we agree that 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 have an impact on price comparability.

7.3.3 Whether the Dominican Republic acted inconsistently with Article 2.4 of the Anti-Dumping Agreement

7.27. 7.27. In the light of the parties' arguments, we consider that in order to resolve Costa Rica's claim under Article 2.4, we need to examine the following issues: (a) the applicability of Article 2.4 to Costa Rica's claim; and (b) whether the CDC made a comparison "in respect of sales made at as nearly as possible the same time", consistent with Article 2.4, when it included exports invoiced prior to the POI in its calculation of the export price.

7.3.3.1 The applicability of Article 2.4 to Costa Rica's claim

7.28. Costa Rica considers that, by expressly providing in the second sentence of Article 2.4 that the comparison between the export price and the normal value be made "in respect of sales made at as nearly as possible the same time", "[the] reference to 'sales' in the plural, which are the 'basis' for the comparison, confirms that Article 2.4 does indeed regulate the establishment of the components of the comparison as it refers to the individual transactions that form the basis of the two elements to be compared".[35] For Costa Rica, the second sentence therefore "seeks to ensure that the sales used, on the one hand, to calculate the export price and, on the other hand, to calculate the normal value have been made at as nearly as possible the same time".[36]

7.29. The Dominican Republic argues that Costa Rica has not identified a legal basis for its claim under Article 2.4 because its argument "actually refers to the exclusion of two export transactions from the export price".[37] The Dominican Republic therefore considers that Costa Rica's claim does not refer to the comparison, but rather to the establishment of the export price. In this regard, the Dominican Republic is of the view that Article 2.4 "does not refer to the determination of the normal

[33] *Diccionario de la Real Academia Española*, definition of "*equidad*" ("fairness"), https://dle.rae.es/equidad (accessed 19 April 2023), definition No. 5.
[34] Panel Report, *Pakistan — BOPP Film (UAE)*, appealed 22 February 2021, para. 7.197.
[35] Costa Rica's opening statement at the second meeting of the Panel, para. 13.
[36] Costa Rica's opening statement at the second meeting of the Panel, para. 13.
[37] Dominican Republic's first written submission, para. 125.

value and the export price, but only to the nature of the comparison once both have been established".[38] Moreover, the Dominican Republic claims that the determination of the normal value and the export price is regulated by other sub-paragraphs of Article 2, referring specifically to Article 2.3 as the provision governing the determination of the export price.[39] Given that Costa Rica did not make any claim under Article 2.3, the Dominican Republic considers that "[t]he argument of Costa Rica in favour of the exclusion of certain export prices from the determination of the export price is therefore erroneous and has no legal basis in Article 2.4".[40]

7.30. The Dominican Republic has cited the *Egypt - Steel Rebar*[41] and *EU - Footwear (China)* panel reports to support its argument that Article 2.4 does not refer to the establishment of the export price and that "[n]othing in [this provision] suggests that the fair comparison requirement provides guidance with respect to the determination of the component elements of the comparison to be made".[42]

7.31. First, we observe that, while Article 2.3 addresses the establishment of the export price, it is limited in scope, applying to the 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". In these cases, the authority may take measures to construct the export price on the basis of the price at which the imported products are first resold to an independent buyer, or if the products are not resold to an independent buyer, or not resold in the condition as imported, on such reasonable basis as the authorities may determine. In this regard, we do not see how Article 2.3 can adequately address all of the issues that may arise in relation to the export price used in a comparison to determine a margin of dumping.

7.32. Contrary to the Dominican Republic's argument, as discussed below, we consider the issue of whether an authority makes a fair comparison under Article 2.4 to be directly related to the issue of the individual sales selected to establish the normal value and the export price. In other words, the Dominican Republic's argument does not address the nature of the issue raised by Costa Rica's claim. That is, Costa Rica's arguments are not limited to the components of the comparison, but rather they also refer to the CDC's comparison of export sales transactions to domestic sales transactions in Costa Rica's home market. In particular, the CDC selected the set of export transactions that would form the basis of the representative average export price. The CDC also requested information on domestic transactions and used these as the basis for the normal value for comparison purposes and to establish a margin of dumping. Costa Rica has also submitted arguments as to why the CDC's calculation was biased and therefore not "fair".[43]

7.33. In the light of the foregoing, we reject the Dominican Republic's argument that Costa Rica has not identified a legal basis for its claim under Article 2.4, and, as a result, we will now consider whether Costa Rica has established its claim that the CDC acted inconsistently with Article 2.4 by including exports invoiced prior to the POI in its calculation of the export price.

7.3.3.2 Whether the CDC made a comparison in respect of sales made at as nearly as possible the same time.

7.34. We begin our evaluation with Costa Rica's claim under the second sentence of Article 2.4 that the CDC did not made a comparison "in respect of sales made at as nearly as possible the same time".

[38] Dominican Republic's second written submission, para. 14.
[39] Dominican Republic's first written submission, paras. 90, 125 and 133-134.
[40] Dominican Republic's first written submission, para. 125.
[41] Dominican Republic's response to Panel question No. 70, para. 13 (referring to Panel Report, *Egypt - Steel Rebar*, paras. 7.333-7.335).
[42] Dominican Republic's first written submission, para. 133 (citing Panel Report, *EU — Footwear (China)*, para. 7.263).
[43] Costa Rica argues that in cases where the cost of the feedstock is increasing and this cost has a significant effect on the price of the end 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. (Costa Rica's second written submission, para. 40).

7.35. Costa Rica's claim is based on its argument that the CDC used two different periods to establish the export price and the normal value. Owing to this inconsistency, Costa Rica states that the CDC failed in its duty 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 particular, Costa Rica considers that the requirement to make the comparison "in respect of sales made at as nearly as possible the same time" makes it clear that the benchmark that an authority must take into account for comparison purposes is the date of sale.[44] In this regard, Costa Rica indicates that the second sentence of Article 2.4 refers to the dates of sale as close "as possible" ("*más*" in the Spanish version of the Agreement), and considers that "[t]he use of the term '*más*' is an express indication that the greatest degree of temporal proximity is required".[45]

7.36. Costa Rica also considers that "[t]he date of sale is the date when the material terms of the sale are established".[46] Costa Rica bases its argument on footnote 8 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". While footnote 8 refers to the "date of sale" in Article 2.4.1, which regulates the circumstances of the comparison mentioned in Article 2.4 when this requires a conversion of currencies, Costa Rica considers that footnote 8 forms an integral part of Article 2 and provides context for understanding the concept of "sales made" in Article 2.4.[47] Costa Rica considers the use of the word "[n]ormally" ("[*p*]*or regla general*" in the Spanish version) precisely to indicate that the provisions of the footnote are generally applicable.[48]

7.37. Costa Rica has submitted to this Panel the contract dated 1 November 2016[49] and the invoice dated 13 December 2016[50] that concern the bars exported to the Dominican Republic on the vessel, the Thorco Logic. Costa Rica argues that the material terms of sale were set out in those two contracts, which demonstrates that the material terms for the sale transported on the vessel, the Thorco Logic, were established "no later than December 2016".[51] Moreover, Costa Rica argues that the material terms of the sale transported on the vessel, the Suzie Q, "were set in the sales invoice, which is from 27 April 2017".[52] Costa Rica therefore maintains that the material terms for the sales transported in the vessels, the Thorco Logic and the Suzie Q, "were set prior to the POI".[53] Costa Rica also submits that ArcelorMittal provided this information to the CDC during the investigation specifically to point out that the sales in the two cases were agreed and made prior to the beginning of the POI, but that the CDC failed to take this information into account.[54]

[44] Costa Rica's second written submission, para. 29.
[45] Costa Rica's opening statement at the second meeting of the Panel, para. 16.
[46] Costa Rica's second written submission, para. 30.
[47] Costa Rica claims that "if the negotiators had wanted to limit the scope of application of the footnote, they would have used other language, such as, for example, 'for the purposes of this sub-paragraph', similar to the language used in footnote 11". Costa Rica continues to argue that "even if footnote 8 were only directly applicable under Article 2.4.1, it would constitute context for the purposes of interpreting the second sentence of Article 2.4". (Costa Rica's opening statement at the second meeting of the Panel, para. 14; and second written submission, para. 31.
[48] Costa Rica's second written submission, para. 31.
[49] Contract dated 1 November 2016 (Exhibit CRI-14 (BCI)).
[50] Invoice No. W37441 dated 13 December 2016 (Exhibit CRI-15 (BCI)).
[51] In particular, Costa Rica argues that:
"[T]he contract dated 1 November establishes, among other things [[***]]".
(Costa Rica's second written submission, para. 32; contract dated 1 November 2016 (Exhibit CRI-14 (BCI))).
Costa Rica also argues that "[[***]]". (Costa Rica's second written submission, para. 32; invoice No. W37441 dated 13 December 2016 (Exhibit CRI-15 (BCI))).
[52] Costa Rica's second written submission, para. 32. See also Costa Rica's opening statement at the second meeting of the Panel, para. 15.
[53] Costa Rica's opening statement at the second meeting of the Panel, para. 15.
[54] Costa Rica's first written submission, para. 36; and comments on the Dominican Republic's response to Panel question No. 69, para. 2. Costa Rica maintains that the Dominican Republic has failed to provide any evidence that rebuts the claim that the material terms of the Thorco Logic and Suzie Q sales were set in December 2016 and on 27 April 2017, respectively. (Costa Rica's second written submission, para. 34; and opening statement at the second meeting of the Panel, para. 15).

7.38. In contrast, to determine the normal value, Costa Rica argues that the CDC used the invoice dates as a benchmark, and the invoices used were issued between 2 May 2017 and 30 April 2018.[55] Costa Rica thus submits that the difference between the date of sale of the exports on the Thorco Logic, and the first sale used to calculate the normal value "is at least five months". Costa Rica maintains that this is "a significant difference" and that the sales made in December 2016, on the one hand, and in May 2017, on the other, are not "sales made at as nearly as possible the same time" within the meaning of Article 2.4. Costa Rica states that "[i]f the CDC defined the POI as starting on 1 May 2017, and used invoices for sales made in Costa Rica from 2 May, the export sales made at as nearly as possible the same time would be those made on 2 May or possibly 1 May 2017".[56] Costa Rica thus notes that "even in the case of the sale [of exports] shipped on the Suzie Q, these are not sales made at as nearly as possible the same time".[57]

7.39. The Dominican Republic disagrees with Costa Rica's interpretation of Article 2.4 that the CDC failed to comply with its duty to make the dumping calculation by means of a fair comparison of the export price and the normal value, pursuant to Article 2.4 of the Anti-Dumping Agreement.

7.40. In this connection, the Dominican Republic maintains that "[nothing in] Articles 2.1 or 2.4 … require[s] an investigating authority to use the date of the contract or of an invoice, let alone an invoice issued prior to the entry into the country of the importing market, to determine which transactions must be included (or not) in its dumping analysis".[58] The Dominican Republic disagrees with Costa Rica's interpretation that the reference to "sales" in Article 2.4 expressly refers to the "date of sale" and that it prohibits an authority from basing the export price calculation on the entry date of the export transaction. The Dominican Republic considers the second sentence of Article 2.4 to refer to "sales made" in a general sense, i.e. to export sales and normal value sales made at the same time, and in no way indicates the use of a specific date of sale.[59] The Dominican Republic also points out that Article 2.1 refers to the product under investigation as "*introduced into the commerce of another country* at less than its normal value".[60]

7.41. Moreover, the Dominican Republic rejects Costa Rica's argument that the reference to the "date of sale" in footnote 8 of Article 2.4.1 applies to the interpretation of Article 2.4. For the Dominican Republic, the reference to the "date of sale" is understood in the context of Article 2.4.1 in relation to the determination of the exchange rate in view of exchange rate volatility, but it is neither relevant nor applicable to the broader term "sales" in Article 2.4.[61] The Dominican Republic also disagrees that the use of the phrase "[*p*]*or regla general*" in the Spanish version of the Agreement (usually translated as "as a general rule" in English) establishes that footnote 8 is a rule of general application. Rather, the Dominican Republic argues that this footnote "[r]efers to what would 'normally' (as in the English version of the Agreement) be the case … and not to what is the general rule".[62] The Dominican Republic considers it "significant" that footnote 8 does not appear in Article 2.4 when the term "sales" occurs and maintains that "[i]f the drafters had wanted Article 2.4 to be applied more generally, they would not have placed the footnote [just after] the term 'date of sale' in Article 2.4.1".[63] The Dominican Republic also highlights that 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".[64]

[55] Costa Rica's response to Panel question No. 5; table E-3: sales of corrugated steel bars in Costa Rica (Exhibit CRI-22 (BCI)); and Costa Rica's second written submission, para. 36. See also Costa Rica's first written submission, paras. 50-52 and 63.

[56] Costa Rica's second written submission, para. 36.

[57] Costa Rica's second written submission, para. 36. See also Costa Rica's first written submission para. 63.

[58] Dominican Republic's first written submission, para. 75. See also Dominican Republic's first written submission, paras. 81, 89, 107, 113 and 125; and second written submission, para. 14.

[59] Dominican Republic's first written submission, para. 130.

[60] Emphasis added.

[61] Dominican Republic's first written submission, para. 130; second written submission, paras. 27-32; and responses to questions No. 8, paras. 17-19; No. 71, paras. 16-20; and No. 72, paras. 21-24.

[62] Dominican Republic's second written submission, para. 31.

[63] Dominican Republic's second written submission, para. 29; and response to Panel question No. 8, para. 17.

[64] Dominican Republic's second written submission, para. 30.

7.42. With respect to the investigation, the Dominican Republic alleges that the criterion used by the CDC to include the transactions in the calculation of the export price was compatible with, and also reflects, the text of Article 2.1. In particular, the Dominican Republic expects that the CDC duly complied with Articles 2.1 and 2.4 when: (a) it established a POI of 12 months; (b) this period was "close" to the date of initiation; and (c) it includes all of the sales that entered the country during this POI for the purposes of its dumping determination "using a reasonable and systematically applied criterion".[65] On this latter point, the Dominican Republic is of the view that "the CDC's approach was consistent and reasonable", as the CDC "used the same period for both domestic market and export sales".[66] In deciding which sales are within the POI, the Dominican Republic maintains that "[w]hat matters is that a consistent and reasonable approach is taken to avoid the risk of distortion in the analysis".[67]

7.43. The Dominican Republic also emphasized that the CDC only chose to use the exact data provided by ArcelorMittal, including the Thorco Logic and Suzie Q sales, which demonstrates that ArcelorMittal recognized the date of entry of the merchandise as a determinative criterion.[68]

7.44. We note in section 7.3.2 above that the first sentence of Article 2.4 requires the investigating authority to ensure that the comparison between the export price and the normal value is "fair". Among other meanings, the term "fair" implies a lack of bias. Article 2.4 establishes certain requirements that must be met to ensure that the comparison is fair. First, the authority must ensure that the comparison is fair by making the comparison in respect of sales made at as nearly as possible the same time, as required by the second sentence of Article 2.4. In addition, the authority must consider differences, if any, which affect comparability, particularly elements that have an impact on the price of transactions.

7.45. We do not agree with the Dominican Republic's statements that the CDC "used the same period for both domestic market and export sales"[69], or that the CDC used a "reasonable" or "systematically applied" criterion in the manner in which it decided which export sales and which domestic sales belonged to the POI. As we explain below, we disagree with the Dominican Republic's argument that the CDC complied with its duty to make the 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 the second sentence of Article 2.4.

7.46. As regards the facts on the record, in the anti-dumping questionnaire sent to ArcelorMittal, the CDC requested, *inter alia*, "specific information on all export sales of the [product under investigation] to the Dominican Republic during the POI".[70] ArcelorMittal reported nine shipments to the Dominican Republic of the product under investigation[71] and explained that the criterion used to include these shipments "was the entry of [the company's] sales to [the] Dominican Republic, in the POI defined by the CDC for the dumping calculation".[72]

7.47. The parties do not disagree that the export sale shipped on the vessel, the Thorco Logic, was invoiced for export on 31 March 2017, one month before the start of the POI, and was introduced into the Dominican Republic on 17 May 2017. Similarly, the export sale shipped on the vessel, the Suzie Q, was invoiced for export on 27 April 2017, three days before the start of the POI, and

[65] Dominican Republic's second written submission, para. 11. See also Dominican Republic's first written submission, paras. 112 and 125-126.
[66] Dominican Republic's first written submission, para. 126.
[67] Dominican Republic's first written submission, para. 89.
[68] Dominican Republic's first written submission, para. 126; and second written submission, paras. 12 and 21.
[69] Dominican Republic's first written submission, para. 126.
[70] CDC, Anti-dumping questionnaire for exporters (Exhibit DOM-4), p. 14. In this regard, it indicated that "information is requested on imports ... falling exclusively within the POI, i.e. from 1 January 2015 to 31 December 2017 and a more recent period from 1 January to 30 April 2018". However, the parties agree that the POI relating to the dumping determination was from 1 May 2017 to 30 April 2018. (CDC, Anti-dumping questionnaire for exporters, (Exhibit DOM-4), p. 14; Dominican Republic's response to Panel question No. 1, paras. 2-3.)
[71] ArcelorMittal included the information requested on these exports in table D-3 in line with the format requested. ArcelorMittal's anti-dumping questionnaire (Exhibit DOM-5 (BCI)), p. 28.
[72] ArcelorMittal's anti-dumping questionnaire, (Exhibit DOM-5 (BCI)), p. 29.

introduced into the Dominican Republic during the POI.[73] These two shipments were therefore invoiced for export before the start of the POI chosen by the CDC.

7.48. The parties also agree that, in establishing the information that would form the basis for defining the normal value in the investigation, the CDC considered sales with invoices issued between 2 May 2017 and 20 April 2018.[74]

7.49. Although the Dominican Republic emphasizes that the CDC used the exact data provided by ArcelorMittal in its questionnaire response, it also emerges from the record that ArcelorMittal indicated to the CDC in its comments of 11 November 2019 that there was "an inconsistency in relation to the information that will serve as the basis for determining the export price".[75]

7.50. As regards the CDC's decision to include the sales shipped on the Thorco Logic and the Suzie Q, ArcelorMittal argued that the CDC "should establish for each of the import shipments the date on which [ArcelorMittal] *made* the sale of the merchandise to the buyer, and not the date of entry into the Dominican Republic".[76] ArcelorMittal also noted that the evidence on the record showed that the two shipments were invoiced outside the POI. In addition, it submitted that the price of the main feedstock used, billets, had increased steadily in 2017, as indicated in the information provided on 30 August 2019. It also submitted a table reflecting the price of billets purchased by the company for the period from January 2017 to April 2017. The prices increased by 11.6%.[77]

7.51. From the record, it can be concluded that ArcelorMittal also argued that the evidence provided established that the sale shipped on the vessel, the Thorco Logic, was agreed in late 2016 when the price was lower than the price in effect from May 2017, and in relation to this, it argues that "an objective and unbiased authority could not include in the export price determination sales that were made and agreed at prices in force between late 2016 and early 2017, without carrying out a comparison with the normal value for that same period".[78] In its comments, ArcelorMittal made explicit reference to the fact that Article 2.4 of the Anti-Dumping Agreement requires that the comparison be made between the export price and the normal value at as nearly as possible the same time. It therefore warned that "[c]ontrary [to Article 2.4], [the CDC] proposes including sales outside the [POI] on the basis that [the sales] entered the Dominican Republic during that period", thereby violating "the order to make the comparison with the normal value at as nearly as possible the same time []".[79] ArcelorMittal also claimed that these considerations also applied to the sales shipped on the vessel, the Suzie Q, the sale of which was made in April 2017.[80]

7.52. In its comments, ArcelorMittal highlighted that on 7 February 2019 it had provided a calculation of the margin of dumping in which the determination of the export price did not take into account the exports shipped on the Thorco Logic and the Suzie Q, and that, as a result, "the CDC had ample notice of [its] argument so that if the CDC's decision was to include [those exports] in the analysis, it had sufficient time and opportunity to request sales prices in the Costa Rican market on dates close to those exports so as to make a fair comparison".[81]

[73] ArcelorMittal's anti-dumping questionnaire, annex D-3 (Exhibit DOM-6 (BCI)); ArcelorMittal's anti-dumping questionnaire (Exhibit DOM-5 (BCI)), p. 29. ArcelorMittal stated that the Suzie Q entered the Dominican Republic "during the POI", without specifying the exact date. (ArcelorMittal's anti-dumping questionnaire, (Exhibit DOM-5 (BCI)), p. 29).

[74] The home-market sales are reflected in table E-3 in ArcelorMittal's response to the anti-dumping questionnaire, as documented in Exhibit CRI-22 (BCI). These data correspond to the data submitted by the Dominican Republic in Exhibit DOM-22 (BCI).

[75] ArcelorMittal's position on the Essential Facts Report (Exhibit DOM-7 (BCI)), p 5.

[76] ArcelorMittal's position on the Essential Facts Report (Exhibit DOM-7 (BCI)), p 6. (emphasis added)

[77] ArcelorMittal's position on the Essential Facts Report (Exhibit DOM-7 (BCI)), pp. 6-7.

[78] ArcelorMittal's position on the Essential Facts Report (Exhibit DOM-7 (BCI)), p 7.

[79] ArcelorMittal's position on the Essential Facts Report (Exhibit DOM-7 (BCI)), p 8.

[80] ArcelorMittal's position on the Essential Facts Report (Exhibit DOM-7 (BCI)), p 8.

[81] ArcelorMittal's position on the Essential Facts Report (Exhibit DOM-7 (BCI)), p 8.

7.53. In its final resolution, the CDC rejected ArcelorMittal's arguments on the sales shipped on the Thorco Logic and the Suzie Q, reiterating its position that "there is no contradiction of the criteria used to select the transactions considered for the calculation of the export price".[82]

7.54. As mentioned above, the CDC was thus aware of ArcelorMittal's concerns regarding the inclusion of the exports shipped on the Thorco Logic and the Suzie Q in the calculation of the export price, and, in particular, of its concern about the existence of an inconsistency if a comparison with the normal value of the same period was not made.

7.55. We are of the view that the CDC failed to comply with the obligation in the second sentence of Article 2.4 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", given that it considered sales made in different periods, one to determine the normal value and another to determine the export price. We also understand that to properly ensure that the comparison is based on sales made at as nearly as possible the same time, the Investigating Authority, after having established the POI, should have chosen the sales on the basis of the same criteria. This means that as the normal value was established on the basis of the invoice date, the export price should have followed the same approach.[83]

7.56. On the other hand, we note that the CDC correctly considered, in the context of initiating the investigation, the information on export prices based on when the exports were introduced into the commerce of the importing country, taking into account that it did not have information from the producer/exporter at that time. This would have also applied in the subsequent stages of the investigation had the exporting producer ArcelorMittal, which offered its export prices, not come forward.[84]

7.57. The Dominican Republic argues that, having identified export sales by dates of entry into the Dominican Republic, "there is no equivalent on the domestic sales (normal value) side for the 'time of entry' into the importing country".[85] The Dominican Republic is therefore of the view that "[i]nevitably, a different criterion would be used".[86] The Dominican Republic also highlights that it was ArcelorMittal that used different criteria to complete its anti-dumping questionnaire without considering this difference problematic. However, whatever reason ArcelorMittal could have had to provide information on the sales shipped on the Thorco Logic and the Suzie Q, we do not consider this exempts the CDC from its obligations relating to its determination of dumping under Article 2.4.

7.58. The Dominican Republic argues that there is no clear legal basis in the text of the Anti-Dumping Agreement on the need for "parallelism" in the criteria applied to both sides of the comparison. In this regard, the Dominican Republic disagrees that the reference to dates of sale "at as nearly as possible the same time", and, in particular, the use of the term "as possible" ("*más*" in the Spanish version of the Agreement) serves as an express indication that the comparison in Article 2.4 requires a greater degree of temporal proximity.[87] The Dominican Republic states that "the English version of this sentence, which refers to sales made 'at as nearly as possible the same time'", indicates "a certain degree of flexibility".[88] According to the Dominican Republic, this flexibility is what enables an authority to designate a POI in which all sales can be compared by means of an average. The Dominican Republic therefore claims that the concept of comparing sales made at as nearly as possible the same time "is relevant, in particular when dealing with a comparison between the normal value and the export prices on a transaction-to-transaction basis".[89] In contrast, the

[82] Final Technical Report (confidential version) (Exhibit DOM-3 (BCI)), para. 128. The CDC confirmed the decision to include the Thorco Logic and Suzie Q exports to calculate the export price in the final resolution and in the resolution on the appeal for reconsideration filed by ArcelorMittal. (Final Resolution (Exhibit CRI-2), para. 138; Resolution on the appeal for reconsideration (Exhibit CRI-1), para. 75: "the [CDC] is of the view that the criterion of the date of the entry of the imports adopted by the CDC in its Final Technical Report was appropriate in the context of the investigation conducted").

[83] We note that the European Union and Japan agree with our interpretation. (European Union's third-party submission, para. 20; and Japan's third-party response to Panel question No. 2, para. 3.)

[84] Initial Technical Report, (Exhibit CRI-6), para. 71.

[85] Dominican Republic's second written submission, para. 21.

[86] Dominican Republic's second written submission, para. 21.

[87] Dominican Republic's response to Panel question No. 73, para. 26.

[88] Dominican Republic's response to Panel question No. 73, para. 26.

[89] Dominican Republic's response to Panel question No. 73, para. 26.

Dominican Republic claims that this temporal aspect of the comparison does not have a particular role to play in the methodology of a comparison between the weighted average normal value and the weighted average export price.[90]

7.59. We note that the Dominican Republic refers to the panel report in *US - Stainless Steel (Korea)*[91] in support of its argument that the requirements of the second sentence are not relevant when making a comparison between the weighted average export price and the weighted average domestic sales (normal value). According to the logic of its argument, the nature of the average-to-average comparison methodology allows for the comparison of transactions from different periods throughout the POI. The logical premise implies that the requirement to compare sales made at as nearly as possible the same time is fulfilled when the authorities compare sales made during the POI, irrespective of any difference between the sales made at the start of the POI or the end of the POI.[92]

7.60. This observation on the use of averages, however, does not support its argument. The fact that Article 2.4 allows for an average-to-average comparison does not mean that Article 2.4 does not establish requirements in terms of the particular sales considered and used to calculate the averages. The premise of the Dominican Republic's argument cannot be reconciled with the text of the provision. We also find no support for this argument in *US - Stainless Steel (Korea)*, to which the Dominican Republic refers and which expressly concluded that:

> [W]e consider that, in the context of weighted average to weighted average comparisons, the requirement that a comparison be made between sales made at as nearly as possible the same time requires as a general matter that *the periods on the basis of which the weighted average normal value and the weighted average export price are calculated must be the same*.[93]

7.61. As discussed above, the use of different criteria to determine the normal value and export price resulted in different time periods. However, the use of the weighted average-to-weighted average comparison methodology does not allow the Investigating Authority to use different criteria to establish which sales will be considered within the POI in order to determine both the normal value and the export price. Accepting otherwise would mean compromising the fair comparison for the purposes of the margin of dumping calculation.

7.62. We now turn to consideration of the details of the export sales shipped on the Thorco Logic and the Suzie Q. Costa Rica has raised various arguments on when the material terms of the sale shipped on the Thorco Logic were set. In this regard, it argues that this sale was made "at the latest in December 2016"[94], i.e. well before the POI. Costa Rica also refers to the contract dated 1 November 2016[95] and to an invoice dated 13 December 2016[96] that concern the bars exported to the Dominican Republic. Costa Rica seeks to support the importance of considering these contracts by referring to footnote 8 of Article 2.4.1.[97] Costa Rica has indicated that the price of the feedstock, billets, was substantially lower at the end of 2016.[98] Costa Rica argues that, in cases where the cost of the feedstock is increasing and this cost has a significant effect on the price of the end 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. It is thought that 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.[99] For its part, the Dominican Republic disputes the content

[90] Dominican Republic's response to Panel question No. 73, para. 26.
[91] Dominican Republic's response to Panel question No. 73, paras. 27-28 (referring to Panel Report, *US — Stainless Steel (Korea)*, para. 6.121).
[92] Dominican Republic's response to Panel question No. 73, para. 27.
[93] Panel Report, *US — Stainless Steel (Korea)*, para. 6.121. (emphasis added)
[94] Costa Rica's second written submission, para. 32. Costa Rica refers to the contract dated 1 November 2016 (Exhibit CRI-14 (BCI)) and to invoice No. W37441 dated 13 December 2016 (Exhibit CRI-15 (BCI)), as mentioned in para. 7.37. above.
[95] Contract dated 1 November 2016 (Exhibit CRI-14 (BCI)).
[96] Invoice No. W37441 dated 13 December 2016 (Exhibit CRI-15 (BCI)).
[97] See para. 7.36. above.
[98] See para. 7.50. above.
[99] Costa Rica's second written submission, para. 40.

of these contracts[100], and also rejects Costa Rica's interpretation of the relevance of footnote 8[101], asking why it would be appropriate in this case to use the date of contract instead of the date of export or of invoice.[102]

7.63. In this regard, it is noted that, mindful of the responses of Costa Rica and the Dominican Republic that there is no information on the use of the contract date both for domestic sales in Costa Rica and for other export sales to the Dominican Republic, we are of the view that the parties' arguments concerning the date on which the material terms of sale were established are not a relevant element in the application of Article 2.4 in this dispute.

7.64. For the reasons set out above, we conclude 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.

7.3.4 Exercising judicial economy in respect of certain claims under Articles 2.1 and 2.4 of the Anti-Dumping Agreement

7.65. 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 at issue is inconsistent with any of the provisions of the covered agreement and if findings under the additional claims are not necessary to resolve the dispute.

7.66. In this dispute, Costa Rica has made multiple claims under Articles 2.1 and 2.4 to challenge the same measure, related to the CDC's decision to include in the determination of the export price the sales shipped the Thorco Logic and the Suzie Q, and the impact of their inclusion on the calculation of the margin of dumping. Costa Rica's claims argue that including information on those sales, which does not correspond to the POI, affects the comparability of export prices and domestic sales prices and, as a result, skews the determination of dumping.

7.67. Costa Rica has stated that should the Panel find that the CDC failed to comply with Article 2.4 because it did not use sales made as nearly as possible at the same time, the Panel could exercise judicial economy with respect to its argument that the comparison was not fair.[103] Costa Rica also confirmed that its claim on adjustments under the third sentence of Article 2.4 is presented as an alternative and that the Panel does not have to address these arguments should it find that the CDC failed to comply with Article 2.4 because it did not use sales made at as nearly as possible the same time.[104]

7.68. Costa Rica has also noted that in the event that the Panel determines that the CDC failed to comply with Article 2.4, judicial economy could be exercised with respect to its claim under Article 2.1.[105]

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[100] The Dominican Republic claims, for example, that the contract dated 1 November 2016 in Exhibit CRI-14 (BCI) relates to the transformation of billets into corrugated steel bars, and that it does not include an agreement on the export price. It also claims that the price of billets indicated in the invoice in Exhibit CRI-15 (BCI) was not part of the contract of 1 November 2016, and that it is not clear that the contract was necessarily made at arm's length. (Dominican Republic's first written submission, para. 118.)

[101] See para. 7.41. above.

[102] Dominican Republic's first written submission, para. 117 ("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 of invoice").

[103] Costa Rica is of the view that the second sentence of Article 2.4 refers to two parameters that must be the same for the comparison to be fair, and that if an authority fails to comply with the second sentence, it also fails to comply with the first sentence. Costa Rica holds that a comparison may not be fair owing to circumstances not expressly stipulated in the second sentence. However, in this case, Costa Rica confirms that its arguments under the first sentence of Article 2.4 relate solely to the dates of sale of the export sales and the domestic sales. (Costa Rica's response to Panel question No. 68, para. 7).

[104] Costa Rica's response to Panel question No. 68, para. 8.

[105] Costa Rica considers that, while Article 2.4 refers to a fair comparison and Article 2.1 refers more generally to "comparable" prices, if the prices used result in a comparison that is not fair, this would be the basis for considering that the prices are not comparable. However, Costa Rica asserts that the comparability referred to in Article 2.1 would be broader and could cover situations in which the price comparison does not necessarily lack fairness. (Costa Rica's response to Panel question No. 66, paras. 4-5).

7.69. In the light of the foregoing, we conclude that the Dominican Republic acted inconsistently with the second sentence of Article 2.4, and we therefore exercise judicial economy in respect of Costa Rica's other claims under Article 2.1, as well as under the first and third sentences of Article 2.4.

7.3.5 Conclusion

7.70. For the reasons set forth above, we conclude that the Dominican Republic has acted inconsistently with its obligations under Article 2.4 of the Anti-Dumping Agreement. In particular, we conclude that 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", as it considered sales made in different periods, one to determine the normal value and another to determine the export price. 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.

7.4 Costa Rica's claims under Article 2.2.1 of the Anti-Dumping Agreement: cost test

7.4.1 Introduction

7.71. Before determining the normal value, the CDC assessed whether the exporting company, ArcelorMittal, made sales of the like product in Costa Rica below cost for G60 S and W products of diameters 3, 4, 6, and 8. The CDC determined that the identified below-cost sales accounted for 54% of total sales, and therefore, eliminated those sales from the normal value calculation.[106]

7.72. Before the final determination, ArcelorMittal requested the CDC that it perform its analysis of the cost test on the basis of monthly per unit costs rather than the annual weighted average costs. In particular, ArcelorMittal explained that the costs and sales prices of the product under investigation in the Costa Rican market increased during the POI, and that the comparison between a weighted average cost that did not reflect the actual costs incurred and associated with production, and with sales on a transaction-by-transaction basis, skewed the analysis.[107] However, the CDC reaffirmed its initial decision that the per unit costs of production provided by ArcelorMittal, in annex F-4.1 of the exporter's questionnaire form, were appropriate for the purpose of conducting the cost test.[108]

7.73. Costa Rica claims that the CDC's analysis is deficient in multiple respects. Firstly, Costa Rica argues that Article 2.2.1 requires that the investigating authority, before excluding sales for not being in the ordinary course of trade by reason of price, determine that such sales are made: (a) within an extended period of time; (b) in substantial quantities; and (c) are at prices which do not provide for the recovery of all costs within a reasonable period of time. According to Costa Rica, there is no "indication"[109] in the final determination that the CDC concluded 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.

7.74. Secondly, Costa Rica claims that the CDC violated Article 2.2.1 because the CDC failed to properly consider whether prices were below per unit costs "at the time of sale" pursuant to the second sentence of Article 2.2.1. In this regard, Costa Rica notes that the CDC chose to use an annual weighted average cost in its comparison with prices by transaction, which resulted in the exclusion of certain sales at the beginning of the POI, even though these sales were made at

[106] Essential Facts Report (confidential version) (Exhibit DOM-2 (BCI)), paras. 172-173; and Final Technical Report (confidential version) (Exhibit DOM-3 (ICC)), paras. 207-208.
[107] ArcelorMittal's position on the Essential Facts Report (Exhibit DOM-7 (BCI)), pp. 12-13.
[108] Final Technical Report (confidential version) (Exhibit DOM-3 (BCI)), para. 193. See also the resolution on the appeal for reconsideration (Exhibit CRI-1), paras. 92-95.
[109] Costa Rica's second written submission, para. 57. In particular, Costa Rica argues that "the Final Technical Report does not show that two of the three conditions set out in Article 2.2.1 were met". (Costa Rica's second written submission, para. 65).

above-cost prices at the time of sale. Costa Rica adduces that the CDC had monthly costs that would have allowed it to determine whether the sales price was below per unit costs at the time of sale.[110]

7.75. The Dominican Republic responds that Costa Rica's claims are not supported by the facts on the record and have no legal basis. In particular, the Dominican Republic notes that the CDC properly determined that a significant number of the transactions available to it (54% of the total) were below cost throughout the POI, and that the CDC correctly determined that these sales did not provide for the recovery of the costs within a reasonable period of time on the basis of an average annual cost.[111] The Dominican Republic further argues that Article 2.2.1 does not require an investigating authority to explicitly reflect in its final determination each step of the below-cost sales test analysis.[112] Lastly, the Dominican Republic maintains that there is no legal basis in Article 2.2.1 to support Costa Rica's argument that the CDC was required to use monthly cost data rather than annual cost data.[113]

7.76. We now turn to Costa Rica's claims under Article 2.2.1 of the Anti-Dumping Agreement. First, we set out the applicable requirements of Article 2.2.1 (section 7.4.2). Second, we apply those requirements to the facts of this case to assess whether the CDC acted inconsistently with Article 2.2.1 in its use of an annual weighted average cost in the cost test (section 7.4.3.1). Third, we consider Costa Rica's claim as to whether the CDC effectively determined 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 (section 7.4.3.2).

7.4.2 Requirements applicable to Article 2.2.1 of the Anti-Dumping Agreement

7.77. Article 2.2.1 provides that:

> Sales of the like product in the domestic market of the exporting country or sales to a third country at prices below per unit (fixed and variable) costs of production plus administrative, selling and general costs may be treated as not being in the ordinary course of trade by reason of price and may be disregarded in determining normal value only if the authorities[3] determine that such sales are made within an extended period of time[4] in substantial quantities[5] and are at prices which do not provide for the recovery of all costs within a reasonable period of time. If prices which are below per unit costs at the time of sale are above weighted average per unit costs for the period of investigation, such prices shall be considered to provide for recovery of costs within a reasonable period of time.

[3] When in this Agreement the term "authorities" is used, it shall be interpreted as meaning authorities at an appropriate senior level.

[4] The extended period of time should normally be one year but shall in no case be less than six months.

[5] Sales below per unit costs are made in substantial quantities when the authorities establish that the weighted average selling price of the transactions under consideration for the determination of the normal value is below the weighted average per unit costs, or that the volume of sales below per unit costs represents not less than 20 per cent of the volume sold in transactions under consideration for the determination of the normal value.

7.78. Article 2.2.1 establishes a methodology for determining whether below-cost sales may be treated as not being made in the ordinary course of trade. As explained in the first sentence, an investigating authority is permitted to *determine* whether there are sales of the like product in the domestic market of the exporting country at prices below per unit (fixed and variable) costs of

[110] Costa Rica's first written submission, paras. 76-77.
[111] Dominican Republic's first written submission, paras. 168-175; and second written submission, para. 40.
[112] Dominican Republic's second written submission, para. 48.
[113] Dominican Republic's first written submission, paras. 186-187; and second written submission, paras. 42-43.

production plus administrative, selling, and general costs. Such below-cost sales may be treated as not being in the ordinary course of trade and may be disregarded in determining normal value. Before excluding these sales, the investigating authority must determine that such below-cost sales are made: (a) "within an extended period of time"; (b) "in substantial quantities"; and (c) "at prices which do not provide for the recovery of all costs within a reasonable period of time".

7.79. We consider that the three conditions set out in Article 2.2.1 are cumulative, so the investigating authority must make an affirmative determination on each condition.

7.80. In relation to the first condition (if below-cost sales are made "within an extended period of time"), the definition of "extended period of time" in footnote 4 of the Anti-Dumping Agreement is that it should "normally be one year but shall in no case be less than six months". The authority can therefore establish that below-cost sales are made "within an extended period of time" when considering whether there are below-cost sales during the POI. Furthermore, the specific definition in footnote 4 indicates that the authority does not need to determine the duration of the "extended period" *per se* under the circumstances of a given investigation.

7.81. In relation to the second condition (if the below-cost sales are made "in substantial quantities"), footnote 5 of the Anti-Dumping Agreement defines when below-cost sales are considered to have been made "in substantial quantities". This condition is met when the authority establishes that the "the weighted average selling price of the transactions under consideration for the determination of the normal value is below the weighted average per unit costs", or alternatively, the authority may establish that the volume of sales below per unit costs "represents not less than 20 per cent of the volume sold" in transactions under consideration for the determination of the normal value.

7.82. Lastly, in relation to the third condition, the authority must determine that sales were made "at prices which do not provide for the recovery of all costs within a reasonable period of time" before excluding sales not made in the ordinary course of trade from the determination of the normal value. The Agreement does not define the phrase "reasonable period of time". However, the second sentence of Article 2.2.1 defines the method for determining when it is appropriate to consider that prices do provide for recovery of costs within a reasonable period of time. In this regard, that provision states: "If prices which are below per unit costs at the time of sale are above weighted average per unit costs for the [POI], such prices shall be considered to provide for recovery of costs within a reasonable period of time". Therefore, if an authority determines that the circumstances described in the second sentence of Article 2.2.1 apply, the authority must not exclude such sales from the normal value determination.

7.4.3 Whether the Dominican Republic acted inconsistently with Article 2.2.1 of the Anti-Dumping Agreement

7.83. Costa Rica's claims under Article 2.2.1 relate to two main issues, namely: (a) whether the CDC's decision to conduct the cost test using an annual weighted average cost instead of using monthly average costs is consistent with Article 2.2.1; and (b) whether it is clear from its determination that the CDC "effectively" complied with the requirements of Article 2.2.1 that below-cost sales had been made "within an extended period of time" and "at prices which [did] not provide for the recovery of all costs within a reasonable period of time". We will address both of these issues below.

7.4.3.1 Use of an annual weighted average cost in the cost test

7.84. Costa Rica claims that the CDC failed to properly consider whether prices were below per unit costs "at the time of sale" pursuant to the second sentence of Article 2.2.1, as the CDC used an annual weighted average cost instead of using monthly average costs.

7.85. In particular, as ArcelorMittal did in the investigation, Costa Rica refers to the information in the file provided by ArcelorMittal, and refers to the information supplied by the applicant Gerdau Metaldom. In this regard, Costa Rica adduces that such information showed costs and, consequently, domestic prices trending upwards, during the POI, so the CDC methodology disregarded many transactions in the early part of the POI for reportedly being below the annual

average cost.[114] Costa Rica also states that excluding lower priced transactions resulted in a higher normal value than would have been obtained if monthly average costs had been used.[115] Moreover, in Costa Rica's view, centring the comparison exercise around an annualized unit cost, as the CDC did, does not reflect the costs actually incurred on a monthly basis with the sales prices in each transaction, and therefore such an exercise does not provide objective findings adjusted to the circumstances at the time of sale.[116] Above all, Costa Rica argues that the CDC had information on monthly average costs that would have allowed it to properly determine whether prices were below per unit costs *at the time of sale*.[117]

7.86. In short, for Costa Rica, the methodology used by the CDC disregarded a large number of sales in the early part of the period when prices were lower, which meant that the normal value was higher than it would have been had an analysis been performed using monthly per unit costs.

7.87. The Dominican Republic responds that Costa Rica's claim has no legal basis, emphasizing that Article 2.2.1 does not set out a specific methodology for determining whether a particular sale is made in the ordinary course of trade. The Dominican Republic also notes that, to the extent that the costs relate to the period during which the sales at issue were made, Article 2.2.1 does not require an authority to use daily, weekly, monthly or annual cost data. Therefore, according to the Dominican Republic, Article 2.2.1 leaves it to an authority's discretion to determine whether sales were made below cost, and in such circumstances, the Dominican Republic submits that the CDC's examination was sufficient, as the CDC assessed prices in the light of the weighted costs for the POI.[118]

7.88. During the investigation, ArcelorMittal first became aware of the outcome of the cost test in the Essential Facts Report. In its comments of 11 September 2019, ArcelorMittal requested the CDC that it revise its analysis of the cost test, basing the analysis not on the annual costs that ArcelorMittal submitted in annex F-4.1 of its response to the form, but on the monthly per unit costs. ArcelorMittal explained that both the costs and the sales prices of the like product in the Costa Rican market increased during the POI, with the result that the use of an annual weighted average cost could not reflect the actual production costs incurred, therefore skewing the analysis.[119] ArcelorMittal explained the issue in the following terms:

> [C]omparing a weighted average per unit cost, which does not reflect the actual costs incurred on a monthly basis, with transaction-by-transaction sales prices, undoubtedly creates a biased methodology, which will result in: (a) a higher volume of sales from the first months of the period being rejected, as this annualized per unit cost is higher than the actual cost incurred, and at the same time, the prices in those first months are lower, given the lower cost of billets; and (b) fewer sales from the last few months being rejected. However, the prices of the remaining sales are higher, because of the higher billet prices.
>
> Evidently, a comparison of an annualized per unit cost, with transaction-by-transaction prices, when both prices and costs are increasing, is consistent with a methodology that is neither objective nor unbiased.[120]

[114] Costa Rica's first written submission, para. 76 (referring to ArcelorMittal's position on the Essential Facts Report (Exhibit CRI-10), pp. 12-13 and 15; Final Technical Report (Exhibit CRI-3), table 5; and para. 351 (referring to the confidential version of the supplemental information form filed by the domestic industry on 11 September 2018, p. 2).

[115] Costa Rica's first written submission, para. 76 (referring to ArcelorMittal's position on the Essential Facts Report (Exhibit CRI-10), pp. 12-13 and 15).

[116] Costa Rica's first written submission, para. 76 (referring to ArcelorMittal's position on the Essential Facts Report (Exhibit CRI-10), pp. 12-13 and 15).

[117] Costa Rica's second written submission, para. 59 (referring to ArcelorMittal's position on the Essential Facts Report (Exhibit CRI-10), p. 15; and minutes of the verification visit (21 November 2018) (Exhibit CRI-11), p. 6).

[118] Dominican Republic's first written submission, paras. 148-149, 152 and 157-159; opening statement at the first meeting of the Panel, para. 21; second written submission, paras. 41, 42 and 49; and opening statement at the second meeting of the Panel, para. 21.

[119] ArcelorMittal's position on the Essential Facts Report (Exhibit DOM-7 (BCI)), pp. 12-13.

[120] ArcelorMittal's position on the Essential Facts Report (Exhibit DOM-7 (BCI)), p 13.

7.89. ArcelorMittal offered to verify the monthly costs for the CDC on the basis of the full general ledger already submitted. ArcelorMittal also provided, in annex 1 to its comments, the total monthly per unit costs for the POI for the rod diameters in question.[121]

7.90. The CDC, for its part, explained that the average costs previously submitted by ArcelorMittal in annex F-4.1 had been considered appropriate for the purpose of conducting the cost test. The CDC therefore rejected ArcelorMittal's request to revise the cost test analysis.[122]

7.91. The Dominican Republic submits that it was reasonable for the CDC to base its cost test analysis on the information that ArcelorMittal had provided regarding annual costs in annex F-4.1 of its form. The Dominican Republic notes that the information had been verified by the CDC. It also stated that the CDC explained why it was not "appropriate" to use the other EBITDA-COST data provided by ArcelorMittal to perform the cost test. In particular, the CDC indicated that the EBITDA-COST data were not necessarily comparable to a total accounting cost, which included all direct and indirect costs related to the manufactured product. Therefore, the CDC did not use the sales data contained in annex E-3 to ArcelorMittal's form.[123]

7.92. The Dominican Republic considers it relevant to point out that ArcelorMittal contested the CDC's methodology, and that ArcelorMittal only provided the CDC with data concerning monthly non-EBITDA costs after becoming aware of the Essential Facts Report, i.e. more than one year after the verification visit. The Dominican Republic maintains that it was not possible to carry out the verification visit again, especially in the light of the issues that had arisen between ArcelorMittal and a cost expert, which led to the cancellation of a second verification visit.[124]

7.93. The Dominican Republic also rejects the argument that there was anything in particular about the circumstances that would have invalidated the decision to examine the prices in the light of the weighted costs for the POI. The Dominican Republic considers that, in general, the use of an annualized average is "entirely acceptable and even the norm"[125], and if costs increase during the POI, it would not be surprising to see more below-cost sales in the early part of the period compared to the latter part. The relevant question regarding the use of an annual cost average is not whether there was a higher incidence of below-cost sales in the POI. Rather, the Dominican Republic considers that what might be relevant is whether the domestic sales transactions were predominantly made in a specific period rather than the entire POI. Only in that scenario might it be necessary to create different periods to examine below-cost sales. As such, according to the Dominican Republic, it is the distribution and concentration of sales in general, not whether an authority identifies more below-cost sales during a particular period of the POI.[126] However, the Dominican Republic argues that this was not the situation that the CDC faced because sales of the like product were not concentrated in a particular part of the period, rather the sales occurred throughout the POI and their volume was relatively constant. Therefore, the Dominican Republic considers that the use of an annual average was reasonable.[127]

7.94. Lastly, the Dominican Republic maintains that the billet cost data provided by ArcelorMittal in its comments of 11 November 2019 "also did not immediately reveal an obvious difference in costs that would have required the use of monthly cost data and comparisons".[128]

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[121] ArcelorMittal's position on the Essential Facts Report (Exhibit DOM-7 (ICC)), annex 1.

[122] Final Technical Report (confidential version) (Exhibit DOM-3 (BCI)), para. 193. In response to the application of definitive anti-dumping duties, ArcelorMittal filed an appeal for reconsideration, claiming that the CDC's determination of below-cost sales was inconsistent with Article 2.2.1 of the Anti-Dumping Agreement. In Resolution CDC-RD-AD-001-2020 of 17 March 2020, the CDC reaffirmed the decision that the average costs submitted by ArcelorMittal in annex F-4.1 were appropriate for the purpose of conducting the cost test. (Resolution on the appeal for reconsideration (Exhibit CRI-1), paras. 91-94).

[123] Dominican Republic's comments on Costa Rica's response to Panel question No. 76, para. 20.

[124] Dominican Republic's comments on Costa Rica's response to Panel question No. 76, para. 21.

[125] Dominican Republic's response to Panel question No. 77, para. 35.

[126] Dominican Republic's response to Panel question No. 77, paras. 35-36.

[127] Dominican Republic's response to Panel question No. 77, para. 38. See also Dominican Republic's opening statement at the first meeting of the Panel, para. 25; and second written submission, para. 51.

[128] Dominican Republic's response to Panel question No. 77, para. 42; and comments on Costa Rica's responses to Panel question No. 77, paras. 24 and 34

7.95. Neither the fact that ArcelorMittal initially provided information on annual costs in annex F-4.1 or the fact that it only expressed concern about the CDC's analysis upon receipt of the Essential Facts Report, are key to justifying the methodology used by the CDC. With regard to annex F-4.1, ArcelorMittal provided costs for the POI and for certain previous years, in accordance with the instructions for the anti-dumping form and the prescribed format for presenting the information in table F-4.1. Annex F-4.1 of the form sent to ArcelorMittal specifically indicated that exporters should provide their "total cost of production" for certain "financial years" and for the "POI".[129] The form also indicates that "[t]he headings of the items in the table may be adapted to match the nomenclature of your own cost accounting system; however, the same level of detail must be retained".[130] It was therefore not surprising that ArcelorMittal had submitted annual data.

7.96. With regard to the timing of ArcelorMittal's concerns, we consider that ArcelorMittal alerted the CDC to its concerns when it first became aware of the results of the cost test in the Essential Facts Report. At that time ArcelorMittal also provided the information on monthly costs and offered to verify it with the information submitted previously.

7.97. We disagree with the Dominican Republic that the discretion under Article 2.2.1 is such that it would have allowed the CDC to employ such a methodology.

7.98. The second sentence of Article 2.2.1 establishes that the authority must take two matters into account: firstly, the authority must consider the prices in respect of the costs at the "time" of the sale; and secondly, sequentially and if appropriate, the authority should compare the price with the weighted average cost of the POI. The latter comparison with the annual weighted average determines whether sales in the normal value calculation should be retained, even if the price of such sales was lower than the costs "at the time of sale". If the initial comparison of the price to costs at the time of sale shows that the price was above costs at the time of sale, the sale would not be considered below cost and there would be no need to compare the price against the annual weighted average price. This is consistent with the first sentence of Article 2.2.1, which allows the investigating authority to exclude from the normal value calculation sales that are at "prices below per unit costs", provided that such sales meet the conditions of Article 2.2.1. In fact, any determination of whether sales had been made at prices which did not provide for the recovery of all costs within a reasonable time would be meaningless if prices and costs were not initially compared at the time of sale.

7.99. Based on the foregoing, we consider 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. This is intended to avoid the risk of excluding sales from the margin of dumping determination that were not in fact below cost at the time of sale. We consider that the risk could be particularly high in circumstances when production costs increase significantly during the POI. However, the parties[131] (and some third parties[132] to this dispute) have acknowledged that, in certain circumstances, the use of an annual weighted average as a basis of comparison may be appropriate. In this regard, in situations where costs, as well as prices, are relatively stable, an approach comparing transaction prices to an average over the whole POI would not distort the analysis of whether transactions are below cost.

7.100. In the underlying investigation, we consider that the CDC was aware that production costs had increased significantly during the POI. In view of this, 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.

[129] CDC, Anti-dumping questionnaire for exporters (Exhibit DOM-4), p. 40

[130] CDC, Anti-dumping questionnaire for exporters (Exhibit DOM-4), pp. 25 and 40. (emphasis omitted)

[131] In this regard, the Dominican Republic noted that a particularly unusual change in costs could arise during part of the POI, which may exceptionally require the POI to be divided into two or more periods for the purposes of a below-cost sales test. (Dominican Republic's opening statement at the second meeting of the Panel, para. 22; and response to Panel question No. 77, paras. 37-40.)

[132] United States' third-party response to Panel question No. 5, para. 9; European Union's third-party submission, para. 25; and European Union's third-party response to Panel question No. 5, para. 7.

7.101. First, we note that ArcelorMittal informed the CDC that the prices of the main feedstock (i.e. billets) increased during the POI, and that consequently the sales prices of the product under investigation in the Costa Rican market also increased. While this was raised by the applicant in the context of the arguments on price suppression, the CDC already had information from the applicant (Gerdau Metaldom) regarding increasing international billet prices during the POI. As explained in the Final Technical Report, Gerdau Metaldom, on 11 September 2018 (i.e. before the completion of the verification visit and the publication of the Essential Facts Report), noted the following:

> The Applicant indicated that, given the increases in international billet prices during the [POI, and] it being the main feedstock for the production of rods, its domestic prices did not decrease but were suppressed considerably and that, as a result of Costa Rican imports at dumped prices, the domestic industry could not afford to increase its prices in line with the increase in its production cost.
>
> In addition, the Applicant argued that: "as of December 2017, there is evidence of a 13% increase in domestic industry's prices when compared to December 2016; however, a 31% increase in billet prices was noted throughout the same period. Similarly, the price of billets in April 2018 compared to April 2017 increased by 26%, however, the price of rods in the domestic industry's domestic market only increased by 4% during this same period."[133]

7.102. Therefore, at a stage prior to the end of the investigation, the CDC became aware of the increase in the international billet price and the product price during the POI, and not when ArcelorMittal expressed its concerns upon first learning of the results of the cost test in the Essential Facts Report.

7.103. Second, we consider that the CDC's own analysis also made evident the risk of distortion in the cost test as shown in Exhibit DOM-22, a confidential Excel file, which the Dominican Republic maintains is a contemporaneous working paper used by the CDC to carry out the cost test. Costa Rica, for its part, contends that the file has no corroborating indication that it was part of the record of the investigation and, independently, is an *ex post* explanation, which the Panel should disregard.[134] We consider that the fact that the file was not on the record does not presuppose that the Investigating Authority did not perform the analysis. As this document shows, the CDC revised the sales prices of all transactions included in the information submitted by ArcelorMittal in annex F-4.1. As corroborated by the Dominican Republic in response to questions from the Panel[135], a significant proportion of sales of all investigated products were found to be below cost (and therefore excluded from the normal value determination) in the early months of the POI as compared to later months.[136] As confirmed by the Dominican Republic's own analysis, the bulk of the sales volume of G60 was found to be below cost and excluded from the beginning of the POI: 91% was excluded in May 2007; 92% in June 2007; 82% in July 2007; and 91% in August 2007. The proportion of sales determined to be below cost began to decline over the course of the investigation to a point where the percentages that were excluded as below cost were: 35% of sales in January 2018; 34% in February 2018; 6% in March 2018; and 2% in April 2018. As also acknowledged by the Dominican Republic, while the monthly sales volume during the POI fluctuated to some extent, the sales volume was relatively constant and sales were not negligible in any month during the POI.[137]

7.104. We note that there is a correlation between the trend reflected in Exhibit DOM-22, as mentioned in the preceding paragraph regarding the decreasing percentage of below-cost sales, and the monthly per unit billet cost data during the POI provided by ArcelorMittal in its comments of 11 November.[138] As reflected in the data provided by ArcelorMittal, during the first six months of the

[133] Final Technical Report (confidential version) (Exhibit DOM-3 (BCI)), paras. 351-352 (citing the confidential version of the supplemental information form filed by the domestic industry on 11 September 2018, p. 2-3). (footnotes omitted)

[134] Costa Rica's second written submission, para. 70.

[135] Dominican Republic's response to Panel question No. 77, paras. 31 and 32.

[136] We note the Dominican Republic's comment that only sales of G60 of specific diameters were considered in the cost test analysis because the product exported to the Dominican Republic was G60 S steel bars or rods of diameters 3, 4, 6, and 8. (Essential Facts Report (Exhibit CRI-4), para. 116)

[137] Dominican Republic's response to Panel question No. 77, para. 38.

[138] ArcelorMittal's position on the Essential Facts Report (Exhibit DOM-7 (BCI)), p. 15.

POI (from May 2017 to October 2017), monthly billet costs for the different diameters were lower than the annualized cost reported in annex F-4.1.[139] The costs in the latter months were above the annualized cost. The information contained in Exhibit DOM-22 also confirms this trend. The fact that such high proportions of sales were excluded in the initial months of the POI at least indicates to an investigating authority that there may be possible bias in the below-cost sales analysis.

7.105. On the basis of the facts set out above, we conclude that the CDC had information on the increasing trend in the costs of the main feedstock and in the prices of the like product. Furthermore, the CDC's own analysis shows that the vast majority of sales in the first half of the POI were below cost. In these circumstances, the use of an annual average cost was not appropriate, as it resulted in the CDC's analysis, for the purpose of determining the normal value, failing to take into account a significant number of sales made in the first few months of the POI that were not in fact below cost. Such a result skewed the normal value estimate upwards. We therefore find that the CDC failed to act in an unbiased and objective manner when determining whether prices were below per unit costs at the time of sale, before concluding that the sales were not made in the ordinary course of trade by reason of price, in accordance with Article 2.2.1.

7.106. We therefore conclude that the Dominican Republic acted inconsistently with Article 2.2.1 of the Anti-Dumping Agreement when the CDC performed its cost test analysis using an annual weighted average cost. In particular, the CDC failed to properly consider whether prices were below unit costs "at the time of sale" pursuant to the second sentence of Article 2.2.1, before excluding those sales from the normal value determination. Nor do we consider that the CDC explained why it was appropriate, in the circumstances of the underlying investigation, to have performed its analysis using an annual weighted average cost.

7.4.3.2 Whether the CDC failed to determine that 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"

7.107. Costa Rica claims that the CDC's determination is inconsistent with Article 2.2.1 of the Anti-Dumping Agreement because there is no evidence demonstrating that the CDC actually "determine[d]" that below-cost sales were made "within an extended period" and "at prices which did not allow for the recovery of all costs within a reasonable period of time".[140] Costa Rica argues that the conditions set out in Article 2.2.1 are cumulative and must be met, the CDC should thus have made affirmative determinations on these elements before excluding domestic sales from the normal value calculation.[141] However, Costa Rica notes, that these determinations do not appear in the Final Technical Report, notably in section 5.5.1 on "Proof of Cost", nor in the final determination.[142]

7.108. The Dominican Republic considers that Costa Rica's claim is "purely procedural" and, in any event, invalid. In particular, the Dominican Republic argues that Article 2.2.1 does not require an investigating authority to explicitly reflect in its final determination every step of the below-cost sales test analysis, as long as it is clear that the authority took into consideration the conditions set out in Article 2.2.1.[143] The Dominican Republic nevertheless considers that the CDC took into consideration the conditions set out in Article 2.2.1, as evidenced, according to the Dominican Republic[144], in the Essential Facts Report[145] and the Final Technical Report.[146]

7.109. As 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 at

[139] ArcelorMittal, section F, production costs (Exhibit DOM-8 (BCI)).
[140] Costa Rica's second written submission, para. 57.
[141] Costa Rica's first written submission, paras. 70-71.
[142] Costa Rica's second written submission, para. 57.
[143] European Union's second written submission, para. 39 (referring to Panel Report, *EC — Salmon (Norway)*, paras. 7.236 and 7.277).
[144] Dominican Republic's first written submission, paras. 168-175.
[145] Essential Facts Report (confidential version) (Exhibit DOM-2) (BCI), paras. 170-172 and table 6).
[146] Final Technical Report (confidential version) (Exhibit DOM-3 (BCI)), paras. 191, 193 and 207, and tables 8 and 9.

issue is inconsistent with any of the provisions of the covered agreement and if findings under the additional claims are not necessary to resolve the dispute.

7.110. We have found above that the Dominican Republic failed to act consistently with Article 2.2.1 of the Anti-Dumping Agreement because of the manner in which the CDC performed its cost test analysis using an annual weighted average cost. To the extent that this vitiates the determination of the proportion of sales that were below cost, we do not consider that additional findings with regard to this same analysis would assist in resolving the dispute. We therefore exercise judicial economy with regard to the additional claims made by Costa Rica under the same article.

7.4.4 Conclusion

7.111. On the basis of the foregoing, we conclude that 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 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. We exercise judicial economy with regard to Costa Rica's other claims under Article 2.2.1, as we do not consider that additional findings are necessary.

7.5 Costa Rica's claims under Article 3 of the Anti-Dumping Agreement: determination of threat of injury and causal relationship

7.5.1 Introduction

7.112. Costa Rica claims that the data on the record demonstrate that the domestic industry indicators in the most recent part of the POI are generally positive and objectively substantiate an improvement in the performance of the domestic industry. In view of the positive trend in key indicators, Costa Rica claims that an objective and unbiased determination by the Investigating Authority would not have concluded that a change in circumstances which would create a situation in which the dumping would cause injury was clearly foreseen and imminent. Costa Rica therefore considers that there were no factual bases for determining, as the CDC did, the existence of a threat of material injury.

7.113. In the light of this, Costa Rica has submitted a number of claims under Articles 3.1, 3.2, 3.4, 3.5 and 3.7 of the Anti-Dumping Agreement. Below, in section 7.5.2 , we first address Costa Rica's claims under Articles 3.1 and 3.2 regarding the CDC's analysis of price undercutting, depression and suppression during the injury POI. Then, in section 7.5.3 , we address Costa Rica's claims under Articles 3.1 and 3.4 regarding the CDC's examination of the relevant economic factors and indices having a bearing on the state of the domestic industry, while in section 7.5.4 , we address Costa Rica's claims under Articles 3.1 and 3.7 of the Anti-Dumping Agreement with respect to the CDC's determination regarding the existence of a threat of material injury. Lastly, in section 7.5.5 , we address Costa Rica's claims under Articles 3.1 and 3.5 regarding the CDC's causation analysis and non-attribution analysis.

7.5.2 Costa Rica's claims under Articles 3.1 and 3.2 of the Anti-Dumping Agreement: consideration of the effect of dumped imports on prices

7.114. In its threat of injury analysis, the CDC examined "whether there was a significant price undercutting by the dumped imports compared with the domestic industry ex-factory price" and "whether those imports ha[d] served to depress or suppress the domestic industry price".[147] In this regard, the CDC determined that: (a) "Costa Rican imports ha[d] recorded high price undercutting margins since 2016"[148]; (b) "domestic industry prices fell by 6% during the period 2015-2017"[149]; and (c) "[r]egarding the domestic industry price suppression analysis, … the average [sale] price [of the product] had enabled the domestic industry to recover its production costs".[150]

[147] Final Technical Report (confidential version) (Exhibit DOM-3 (BCI)), para. 330.
[148] Final Technical Report (confidential version) (Exhibit DOM-3 (BCI)), para. 339.
[149] Final Technical Report (confidential version) (Exhibit DOM-3 (BCI)), para. 344.
[150] Final Technical Report (confidential version) (Exhibit DOM-3 (BCI)), para. 354.

7.115. Costa Rica claims that the CDC's analysis of the effects of imports from Costa Rica on domestic prices is inconsistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement because it was not based on an objective examination on the basis of positive evidence or an examination of all relevant evidence.[151]

7.116. The Dominican Republic responds that Costa Rica's claims are unfounded.[152] In addition, the Dominican Republic claims that several of the arguments put forward by Costa Rica in its first written submission do not relate to the claim presented in Costa Rica's panel request and are therefore outside the Panel's terms of reference.[153]

7.117. We begin our analysis by examining the Dominican Republic's claim, which we reject, that we do not have jurisdiction to examine certain arguments made by Costa Rica in its first written submission (section 7.5.2.1). We then set out the applicable requirements of Articles 3.1 and 3.2 (section 7.5.2.2), and, on the basis of these, we consider whether the CDC's examination of: (a) price undercutting (section 7.5.2.3); (b) price depression (section 7.5.2.4); and (c) price suppression (section 7.5.2.5) is inconsistent with the requirements of Articles 3.1 and 3.2.

7.5.2.1 Dominican Republic's claim under Article 6.2 of the DSU

7.118. The Dominican Republic contends that several of the arguments put forward by Costa Rica in its first written submission regarding Articles 3.1 and 3.2 do not relate to the claim made by Costa Rica in its panel request. Therefore, according to the Dominican Republic, the claim referred to in those arguments has not been submitted pursuant to Article 6.2 of the DSU and, as a result, that claim and the arguments supporting it are not within the Panel's terms of reference.[154]

7.119. We note that, in paragraph 8 of Costa Rica's panel request, it is stated that the challenged measures are inconsistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement because, *inter alia*:

> [T]he Investigating Authority's analysis of the effects of the imports under investigation on prices in the domestic market for like products was not based on an objective examination on the basis of positive evidence or an examination of all relevant evidence before the authorities.

7.120. The Dominican Republic states that Costa Rica sets forth arguments in its first written submission that concern a different claim to that presented in its panel request.[155] According to the Dominican Republic, the terms used by Costa Rica in its panel request indicate that its claim under Articles 3.1 and 3.2 was "limited" to the lack of "objectivity" in the CDC examination and to the "positive nature or relevance" of the evidence taken into account in the consideration of the price effects of the dumped imports.[156] However, the Dominican Republic indicates that, in its first written submission, rather than questioning the CDC's lack of "objectivity" or the "probative nature" of the evidence considered, Costa Rica refers to at least two arguments that address a different claim to that presented in the panel request, namely: (a) the "significant" nature of the price effects; and (b) that the CDC failed to determine that the effects were caused by the dumped imports.[157] According to the Dominican Republic, the claim referred to in these arguments does not form part of the Panel's terms of reference.[158]

7.121. For its part, Costa Rica considers that the Dominican Republic's argument is "flawed". In particular, Costa Rica adduces that, in its panel request, it questioned the consistency of the CDC's price undercutting analysis with Articles 3.1 and 3.2 of the Anti-Dumping Agreement. Furthermore, Costa Rica maintains that the use of the phrase "*inter alia*" in paragraph 8 of the request "makes it

[151] Costa Rica's first written submission, para. 79.
[152] Dominican Republic's first written submission, para. 229.
[153] Dominican Republic's first written submission, para. 197.
[154] Dominican Republic's first written submission, para. 197.
[155] Dominican Republic's first written submission, paras. 200 and 203.
[156] Dominican Republic's first written submission, paras. 200 and 202.
[157] Dominican Republic's first written submission, paras. 203-205.
[158] Dominican Republic's first written submission, para. 200.

clear that the reasons set out below are illustrative and are not intended to limit the scope of the complaint".[159]

7.122. We recall that Article 6.2 of the DSU provides, in relevant part, that:

> The request for the establishment of a panel shall be made in writing. It shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.

7.123. The requirements to "identify the specific measures" at issue and to "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly" are central to establishing a panel's jurisdiction.[160] In fact, the legal basis of the complaint, together with the identification of the measures at issue, forms the basis for a panel's terms of reference under Article 7.1 of the DSU.

7.124. To satisfy the requirement to "provide a brief summary of the legal basis of the complaint", the panel request must set out the claims so as to "present the problem clearly".[161] An assessment of whether a claim is sufficiently set out in a panel request requires an examination of the text of the request as a whole, and in certain cases, the statement of a claim may be inferred from such an examination.[162] As a minimum requirement, the panel request must "list the article(s) of the covered agreement(s) claimed to have been violated".[163] At the same time, it is the claims, and not the arguments, that must be clearly set out in the panel request.[164] Consequently, a complainant does not need to include in a panel request the arguments supporting a claim, as these may be set out, developed and/or progressively clarified in the submissions made over the course of the panel proceedings.[165] In any event, the question of whether a "brief summary" is "sufficient to present the problem clearly" is to be assessed on a case-by-case basis, taking into consideration the nature and scope of the provisions of the covered agreements alleged to have been violated.[166]

7.125. Having carefully considered the parties' arguments and the relevant language contained in Costa Rica's panel request, we consider that Costa Rica has provided a brief summary of the legal basis of the claim sufficient to meet the minimum requirements of Article 6.2 of the DSU with respect to the claims made about the analysis of price undercutting by the dumped imports. First, it is clear that Article 3.2 is explicitly cited in Costa Rica's panel request. Therefore, Costa Rica's allegations under Article 3.2 clearly fall within the Panel's terms of reference. It is also obvious that, in its request, Costa Rica provided a brief explanation in which it questioned the CDC's analysis of "the effects of the imports under investigation on prices in the domestic market for like products"[167],

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[159] Costa Rica's opening statement at the first meeting of the Panel, para. 16.

[160] Appellate Body Report, *EC and certain member States - Large Civil Aircraft*, paras. 639-640 (referring to Appellate Body Reports, *Guatemala - Cement I*, paras. 72-73; *US - Carbon Steel*, para. 125; *US - Continued Zeroing*, para. 160; *US - Zeroing (Japan) (Article 21.5 - Japan)*, para. 107; *Australia - Apples*, para. 416; and *Brazil — Desiccated Coconut*, p. 22). See also Panel Reports, *US — Ripe Olives from Spain*, para. 7.190; and *Morocco — Hot-Rolled Steel (Turkey)*, para. 7.9.

[161] Panel Report, *US — Ripe Olives from Spain*, para. 7.191 (referring to Appellate Body Report, *EC - Selected Customs Matters*, para. 167).

[162] Appellate Body Report, *US — Countervailing and Anti-Dumping Measures (China)*, para. 4.33.

[163] Appellate Body Report, *US — Countervailing and Anti-Dumping Measures (China)*, para. 4.8 (referring to Appellate Body Reports, *Korea - Dairy*, paras. 123-124, in turn referring to Appellate Body Reports, *Brazil - Desiccated Coconut*, p. 22; *EC - Bananas III*, paras. 145 and 147; *India — Patents (US)*, paras. 89 and 92-93; and *US - Carbon Steel*, para. 130).

[164] We agree with the Appellate Body's statement in *Korea - Dairy* that a "claim" refers to a claim "that the respondent party has violated, or nullified or impaired the benefits arising from, an identified provision of a particular agreement"; and that "arguments", by contrast, are statements adduced by a complaining party "to demonstrate that the responding party's measure does indeed infringe upon the identified treaty provision". (Appellate Body Report, *Korea - Dairy*, para. 139).

[165] See Panel Report, *Thailand - H-Beams*, para. 7.44; and the final Panel Report issued to the parties in *Colombia — Frozen Fries*, para. 7.231. See also Appellate Body Report, *Korea - Pneumatic Valves (Japan)*, paras. 5.6 and 5.31.

[166] Appellate Body Report, *US — Countervailing Measures (China)*, para. 4.9.

[167] For its part, Costa Rica asserts that the challenged measures violate Articles 3.1 and 3.2 "because, *inter alia*, the investigating authority's analysis of the volume of the dumped imports was not based on an objective examination on the basis of positive evidence or an examination of all relevant evidence before the authorities". (Costa Rica's panel request, para. 7).

arguing that it was not based on an "objective examination" on the basis of "positive evidence" or an examination of all "relevant evidence".

7.126. In our view, the fact that the request refers generally to the text of Article 3.1 does not limit Costa Rica's claim regarding the "objective nature" of the CDC's examination or the "positive nature or relevance" of the evidence, as is argued by the Dominican Republic. As we see it, the assertions made by Costa Rica in its first written submission with regard to the effect of the dumped imports on prices constitute arguments in support of its claim of a violation of Article 3.2 and fall within the scope of its claim under that provision. These arguments include that: (a) the CDC failed to consider whether the undercutting was "significant"[168]; (b) the CDC did not consider whether the undercutting was the effect of the dumped imports[169]; (c) the CDC's price depression analysis does not comply with the requirement that an investigating authority must consider whether the effect of the imports is otherwise to depress prices to a significant degree[170]; and (d) in the price suppression analysis, the CDC did not take into account Costa Rica's imports.[171]

7.127. For the reasons set out above, we reject the Dominican Republic's contention that the claim referred to in these arguments has not been duly submitted to the Panel pursuant to Article 6.2 of the DSU.

7.5.2.2 Applicable requirements of Articles 3.1 and 3.2 of the Anti-Dumping Agreement

7.128. We begin our analysis by recalling the applicable requirements of Articles 3.1 and 3.2 of the Anti-Dumping Agreement. Article 3.1 is a general provision that provides as follows:

> A determination of injury for purposes of Article VI of GATT 1994 shall be based on positive evidence and involve an objective examination of both (a) the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products, and (b) the consequent impact of these imports on domestic producers of such products.

7.129. The second sentence of Article 3.2 provides that:

> With regard to the effect of the dumped imports on prices, the investigating authorities shall consider whether there has been a significant price undercutting by the dumped imports as compared with the price of a like product of the importing Member, or whether the effect of such imports is otherwise to depress prices to a significant degree or prevent price increases, which otherwise would have occurred, to a significant degree.

7.130. With respect to the obligation under Article 3.1 to perform an objective examination based on positive evidence, prior panels and the Appellate Body have found that the term "positive evidence" relates to the quality of the evidence that an investigating authority may rely upon to make a determination, and requires the evidence to be "affirmative, objective, verifiable, and credible".[172] They have also found that the term "objective examination" requires that an investigating authority's examination "conform to the dictates of the basic principles of good faith and fundamental fairness", and be conducted "in an unbiased manner, without favouring the interests of any interested party, or group of interested parties, in the investigation".[173] We agree with this interpretation and with the assertion that, in order to conduct an objective examination,

[168] Costa Rica's first written submission, para. 93.
[169] Costa Rica's first written submission, para. 94.
[170] Costa Rica's first written submission, paras. 98-99.
[171] Costa Rica's first written submission, para. 107.
[172] Appellate Body Report, *China - GOES*, para. 126 (referring to Appellate Body Report, *US — Hot-Rolled Steel*, para. 192).
[173] Appellate Body Reports, *US — Hot-Rolled Steel*, para. 193; *China - GOES*, para. 126; Panel Report, *US — Ripe Olives from Spain*, para. 7.209 ("[t]o be 'objective', an investigating authority's examination must be impartial and supported by reasoning that is coherent and internally consistent"). See also *Diccionario de la Real Academia Española*, definition of "*objetivo*" (objective) https://dle.rae.es/objetivo, meaning 2 ("*[d]esinteresado*, *desapasionado*" (disinterested, dispassionate)).

the authority must also take into account conflicting evidence and respond to competing plausible explanations of that evidence in reaching its conclusions.[174]

7.131. The second sentence of Article 3.2 imposes on an investigating authority the obligation to "consider" the effect of dumped imports on prices. We note that the ordinary meaning of the word "consider" includes "look at attentively … think over" and thus does not impose an obligation on an authority to make a definitive determination.[175]

7.132. Article 3.2 concerns three types of price effects that an investigating authority must consider: (a) price undercutting; (b) price depression; and (c) price suppression.

7.133. First, with regard to price undercutting, Article 3.2 requires authorities to "consider whether there has been a significant price undercutting by the dumped imports as compared with the price of a like product of the importing Member". Therefore, Article 3.2 requires a comparison between the prices of the dumped imports and those of the domestic like product.[176] We agree with the views expressed above that the price undercutting analysis requires consideration of price effects that continue over time, and are not limited to an isolated instance.[177]

7.134. Second, Article 3.2 requires investigating authorities to consider "whether the effect of such [dumped] imports is otherwise to depress prices to a significant degree or prevent price increases, which otherwise would have occurred, to a significant degree". With respect to price depression, in the context of Article 3.2, we consider that an authority must consider whether the prices of domestic like products are being pushed down by the dumped imports.[178] Regarding price suppression, an authority must also consider whether, in the absence of subject imports, prices "otherwise would have" increased.[179] Therefore, the consideration of price suppression is counterfactual in nature.

7.135. We note the Appellate Body's interpretation that, by asking "whether the effect of" the dumped imports is significant price depression or suppression, the second sentence of Article 3.2 explicitly requires the investigating authorities to consider whether certain price effects are the consequences of subject imports.[180] Article 3.2 thus links price depression and suppression to the dumped imports and contemplates consideration of the relationship between the prices and the imports.[181] We agree with the notion that, in an analysis under the second sentence of Article 3.2,

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[174] See also, for example, Appellate Body Reports, *US — Softwood Lumber VI (Article 21.5 - Canada)*, para. 97; *US — Hot-Rolled Steel*, para. 193.

[175] Appellate Body Report, *China - GOES*, para. 130; and Panel Report, *Pakistan - BOPP Film (UAE)*, appealed on 22 February 2021, para. 7.262 (quoting *Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 1, p. 496; and Oxford Dictionaries online, definition of "consider", https://www.oed.com/view/Entry/39593?redirectedFrom=consider#eid).

[176] Appellate Body Reports, *China - GOES*, para. 136; and *China — HP-SSST (Japan) / China — HP-SSST (EU)*, para. 5.158; and Panel Report, *Pakistan — BOPP Film (UAE)*, appealed on 22 February 2021, para. 7.293.

[177] See also Appellate Body Reports, *China — HP-SSST (Japan) / China — HP-SSST (EU)*, para. 5.159, reasoning that:

> [A] proper reading of "price undercutting" under Article 3.2 suggests that the inquiry requires 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 entire period of investigation (POI). An examination of such developments and trends includes assessing whether import and domestic prices are moving in the same or contrary directions, and whether there has been a sudden and substantial increase in the domestic prices.

[178] We agree with Panel Report, *Pakistan — BOPP Film (UAE)*, appealed on 22 February 2021, para. 7.295 that "[t]he ordinary meaning of 'depress' includes '[t]o press down … to lower', while the ordinary meaning of 'depression' includes '[t]he action of pressing down, or fact of being pressed down'" (fns omitted) (referring to Oxford Dictionaries online, definition of "depress", https://www.oed.com/view/Entry/50442?rskey=ThDTSn&result=2&isAdvanced=false#eid, v., meaning 2; and Oxford Dictionaries online, definition of "depression", https://www.oed.com/view/Entry/50451?redirectedFrom=depression#eid, n., meaning 1).

[179] Appellate Body Report, *China - GOES*, para. 141.

[180] Appellate Body Report, *China - GOES*, para. 136.

[181] See, for example, Appellate Body Report, *China - GOES*, para. 136, in which it is noted that "an investigating authority is required to consider whether a first variable — that is, subject imports — has explanatory force for the occurrence of significant depression or suppression of a second variable — that is, domestic prices". See also Appellate Body Reports, *China — HP-SSST (Japan) / China — HP-SSST (EU)*, para. 5.161.

it is not sufficient for an investigating authority to confine its consideration to what is happening to domestic prices for purposes of considering significant price depression or suppression.[182]

7.136. The investigating authority must consider whether the three types of price effects referred to in the second sentence of Article 3.2 are "significant". We note that Article 3.2 does not set out a minimum threshold for what qualifies as a "significant" increase; whether an increase is "significant" will depend on the specific circumstances of the case.[183]

7.5.2.3 Whether the CDC's examination of price undercutting was consistent with Articles 3.1 and 3.2

7.137. Costa Rica presents two arguments[184] in support of its assertion that the CDC's consideration of price undercutting was inconsistent with Articles 3.1 and 3.2. First, Costa Rica claims that "there is no record that the CDC considered whether the undercutting was 'significant'".[185] Second, Costa Rica argues that the CDC did not consider whether the price undercutting was "the effect of" dumped imports, given that the lowest level of undercutting coincided with an increase in imports from Costa Rica.[186] We will now consider these arguments.

7.5.2.3.1 Whether the price undercutting was "significant"

7.138. Costa Rica claims that the CDC did not consider whether the price undercutting was "significant", as required under Article 3.2.[187]

7.139. In response, the Dominican Republic states that the magnitude of the price undercutting observed by the CDC was [[***]].[188] The Dominican Republic contends that "[t]he CDC's reports clearly considered the significance of the price undercutting margins" by noting that "imports from Costa Rica have 'high … margins' of undercutting".[189] It argues that "[t]he CDC explicitly indicated the significant magnitude … of the price undercutting margins".[190] The Dominican Republic also considers that the margins were sufficient to support a finding of significance in the circumstances of this case, i.e. in the light of "the fierce competition between imported and domestic products on the market and their high degree of substitutability".[191]

7.140. Costa Rica claims that, although the CDC stated that the price undercutting margins were "high", beyond this assertion, it did not provide reasons why it considered the alleged undercutting to be "important", "notable" or "consequential" in the circumstances of the particular case.[192]

7.141. We recall that Article 3.2 does not provide a quantitative threshold for what qualifies as "significant" price depression. We note that, in addition to indicating in the overall conclusion of the Final Technical Report that "Costa Rican imports [had] recorded high price undercutting margins of

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[182] Appellate Body Report, *China - GOES*, para. 138.

[183] Appellate Body Reports, *China — HP-SSST (Japan) / China — HP-SSST (EU)*, para. 5.161; and Panel Report, *Pakistan — BOPP Film (UAE)*, appealed on 22 February 2021, paras. 7.263 and 7.296.

[184] In its first written submission, Costa Rica put forward an additional argument with respect to the information contained in table 22 of the public version of the Final Technical Report (Exhibit CRI-3 (BCI)), where the undercutting margins were presented as indices. We will not discuss this argument further in the light of Costa Rica's confirmation that the confidential version of the Final Technical Report (Exhibit DOM-3 (BCI)) "addresses the concerns expressed by Costa Rica in paragraphs 89-92 of [its] first written submission, without implying that Costa Rica's claim under Article 3.2 has been entirely resolved". (Costa Rica's response to Panel question No. 23, para. 49).

[185] Costa Rica's first written submission, para. 93.

[186] Costa Rica's first written submission, para. 95; opening statement at the first meeting of the Panel, para. 19; second written submission, para. 76; opening statement at the second meeting of the Panel, paras. 32-34; and response to Panel question No. 82, paras. 27-30.

[187] Costa Rica's first written submission, para. 93.

[188] Dominican Republic's first written submission, para. 231 (referring to Final Technical Report (Exhibit DOM-3 (BCI)), table 22 and paras. 339 and 517 (xii)).

[189] Dominican Republic's first written submission, para. 235 (referring to Final Technical Report (confidential version) (Exhibit DOM-3 (BCI)), para. 517 (xii)).

[190] Dominican Republic's first written submission, para. 237.

[191] Dominican Republic's first written submission, para. 240.

[192] Costa Rica's first written submission, para. 93.

up to [[***]]"[193], the CDC emphasized the competitive realities of the product under investigation in its price effects analysis, noting in particular that "in the case of little-differentiated products such as steel bars and rods, economic actors compete on the basis of prices".[194] Consideration of the magnitude of the undercutting margins, together with information on competition in the domestic market between imports and the domestic product, and on the nature of the product, is relevant in assessing whether price undercutting is "significant".[195]

7.142. There is no indication on the record that, in the underlying investigation, ArcelorMittal questioned the competitive dynamic or that Costa Rica questioned the existence of these conditions in relation to the product under investigation. In our view, under the circumstances, the acknowledgement that the undercutting margins were "high" (ranging from [[***]] in 2016 to [[***]] at the end of the POI) was sufficient to support a finding of significance in the circumstances of this case.

7.143. Therefore, in the light of the specific facts and circumstances of this case, we conclude that the price undercutting was significant. We therefore find that the CDC considered whether there had been "significant" price undercutting and thus did not act inconsistently with Article 3.2.

7.5.2.3.2 Whether the CDC considered whether price undercutting was "the effect of" imports from Costa Rica

7.144. Costa Rica claims that the CDC also failed to comply with the obligation under Article 3.2 to consider whether the alleged price undercutting was "the effect of" the dumped imports, which is considered to be an explicit requirement under the second sentence of Article 3.2.[196]

7.145. Costa Rica bases its argument on the fact that the prices of Costa Rican imports "increased steadily during the POI", while the undercutting margin "decrease[d] considerably during the same period".[197] This is reflected in the CDC's determination that the magnitude of the price undercutting that it observed was [[***]].[198] The CDC also noted that the decline in the undercutting margin "coincides with a downturn in the domestic industry's sales in the domestic market in 2017 and an increase in Costa Rican imports in the same year".[199]

7.146. Costa Rica considers that the fact that the lowest level of undercutting coincided with an increase in imports from Costa Rica "tend[ed] to disprove" rather than support the conclusion that the alleged undercutting was the effect of the imports.[200] Costa Rica contends, however, that the CDC did not consider this trend and therefore failed to explain the nature of the relationship between the allegedly dumped imports and the domestic industry's prices.[201]

7.147. Costa Rica also claims that the CDC "failed to properly consider" whether the price undercutting was the effect of imports from Costa Rica because it did not consider the prices of imports from China and other countries that were "significantly lower" than those of Costa Rican imports throughout the POI.[202] Costa Rica claims that, by failing to take this into account, the CDC

[193] Final Technical Report (confidential version) (Exhibit DOM-3 (BCI)), para. 517 (xii).
[194] Final Technical Report (confidential version) (Exhibit DOM-3 (BCI)), para. 334.
[195] In *EC — Salmon (Norway)*, the panel observed that "[t]he significance of any such undercutting would, in our view, be a question of the magnitude of such price difference, in light of other relevant information concerning competition in the domestic market between the imports and the domestic product, the nature of the product, and other factors". (Panel Report, *EC — Salmon (Norway)*, para. 7.638. See also Appellate Body Reports, *China — HP-SSST (Japan) / China — HP-SSST (EU)*, para. 5.161).
[196] Costa Rica's first written submission, para. 94.
[197] Costa Rica's opening statement at the first meeting of the Panel, para. 19.
[198] Dominican Republic's first written submission, para. 231.
[199] Final Technical Report (confidential version) (Exhibit DOM-3 (BCI)), para. 339.
[200] Costa Rica's first written submission, para. 95.
[201] Costa Rica's first written submission, para. 93; opening statement at the first meeting of the Panel, para. 19; and second written submission, para. 76.
[202] Costa Rica's second written submission, paras. 77-78. According to the Final Technical Report, in 2016, the price of imports from China was [[***]], while the price of imports from Costa Rica was [[***]]. The volume of imports from China (34,065.48 tonnes) was more than 2.5 times the volume imported from Costa Rica. Tables 41 and 42 of the Final Technical Report show that, in 2017, imports from Italy, Japan, Mexico, Spain, Chinese Taipei and the United States entered at prices lower than those of imports from

did not properly consider whether "it was Costa Rican imports that were having an effect on the domestic industry's prices".[203]

7.148. The Dominican Republic contends that Costa Rica's argument has no legal basis and that the undercutting analysis calls only for "an objective and factual examination of the prices of [the dumped imports] in relation to the prices of domestic products" and does not require consideration of whether the price undercutting was "the effect of" the dumped imports.[204] The Dominican Republic also contests that Article 3.2 requires a non-attribution analysis of other factors that may have had an impact on pricing.[205] Regardless of this, the Dominican Republic denies that an increase in import prices over the course of the POI, coupled with a declining undercutting margin, somehow contradicts the CDC's conclusions on price undercutting.[206] According to the Dominican Republic, what matters is that the established undercutting margins were "significant" throughout the POI.

7.149. We recall that Article 3.2 requires an investigating authority to consider price effects throughout the POI. Its assessment must be "a dynamic consideration" of two sets of prices, rather than "a static snapshot" of the relationship between two prices (or averages).[207] Moreover, the examination requires consideration of developments and trends, such as whether import and domestic prices are moving in the same or contrary directions.[208]

7.150. In our view, the CDC's assessment is based on the facts on the record and provides a reasoned and adequate explanation, in compliance with the obligations applicable to a price undercutting analysis. First, the record shows price undercutting by Costa Rica's imports in every year of the review period, with undercutting margins of between [[***]] and [[***]]. Moreover, we do not agree that the fact that Costa Rica's import prices "increased steadily during the POI" contradicts the observations of significant undercutting. The record also indicates increases in the international price of the main feedstock, billets, with implications for production costs and the prices of the final product, both for the domestic producer, Gerdau Metaldom, and for ArcelorMittal.[209] In fact, prices increased for both the domestic and the dumped product.[210] However, this does not negate the fact that prices of imports continued to undercut domestic prices.[211]

7.151. Moreover, we do not agree with Costa Rica that, in its examination of price undercutting, the CDC should have carried out an additional assessment of the prices of imports from China and other countries. Article 3.2 clearly highlights a link between the price of subject imports and that of like domestic products by requiring that a comparison be made between the two.[212] The consideration

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Costa Rica, and that the total volume of these imports exceeded that of Costa Rican imports. (Final Technical Report (confidential version) (Exhibit DOM-3 (BCI)), table 42).

[203] Costa Rica's second written submission, para. 81.

[204] Dominican Republic's second written submission, para. 72. See also Dominican Republic's first written submission, para. 241.

[205] Dominican Republic's opening statement at the second meeting of the Panel, para. 36.

[206] The Dominican Republic maintains that "[t]he fact that the undercutting was higher when the imports first entered the market is entirely consistent with an aggressive pricing strategy and the normal response of producers, which may lead to some reduction of the undercutting margin". (Dominican Republic's second written submission, para. 72).

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

[208] Appellate Body Reports, *China — HP-SSST (Japan) / China — HP SSST (EU)*, para. 5.159.

[209] Final Technical Report (confidential version) (Exhibit DOM-3 (BCI)), paras. 121-122, 347 and 351-352.

[210] The price of the domestic product increased in the period 2016-2017 ([[***]]) and in the period January-April 2018 ([[***]]). The prices of imports from Costa Rica increased in the period 2016-2017 ([[***]]) and in the period January-April 2018 ([[***]]). (Based on the information in Final Technical Report (confidential version) (Exhibit DOM-3 (BCI)), table 22).

[211] We note that the circumstances of the investigation before the CDC were quite different from those addressed by the Appellate Body in *China — HP-SSST (Japan) / China — HP-SSST (EU)*. In that investigation, the Appellate Body expressed concern that the Chinese investigating authority had failed to explain how significant underselling could be found to exist given that the price of the domestic like product had more than doubled during the course of a single year, while the price of imports had fallen. These circumstances were not present in the CDC investigation.

[212] By contrast, in *China – GOES*, the Appellate Body considered that, by assessing "whether the effect of" the subject imports is significant price depression or suppression, the second sentence of Article 3.2 specifically instructs an investigating authority to consider whether certain price effects are the consequences of subject imports. Thus, an examination of price depression, by definition, calls for more than a simple observation of a price decline, and also encompasses an analysis of what is pushing down the prices. In

of prices under Article 3.2 serves as a basis for the causation determination under Article 3.5. Article 3.5 requires an investigating authority to demonstrate that subject imports are causing injury "through the effects of dumping". Therefore, it is in the context of the non-attribution requirement of Article 3.5 that "an assessment must involve separating and distinguishing the injurious effects of the other factors from the injurious effects of the dumped imports".[213]

7.152. Therefore, taking into account the circumstances of this case, we conclude that the CDC considered that price undercutting was "the effect of" the dumped imports from Costa Rica, in accordance with Article 3.2.

7.5.2.3.3 Conclusion

7.153. In the light of the above considerations, we conclude that 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.

7.5.2.4 Whether the CDC's examination of price depression was inconsistent with Articles 3.1 and 3.2

7.154. Costa Rica claims that the CDC's consideration of price depression was inconsistent with Articles 3.1 and 3.2, first because there was no price depression, as the trend throughout the POI was for the domestic industry's prices to increase, including in the most recent period of the investigation[214]; and second because the CDC did not consider whether price depression was "the effect of" dumped imports, given that imports from China and other countries were entering at "lower" prices than Costa Rican imports throughout the entire POI and accounted for a "significantly larger volume" than those from Costa Rica.[215] We will now consider these arguments.

7.5.2.4.1 Whether the trend throughout the POI demonstrated price depression

7.155. Costa Rica argues that the CDC's claim that "the domestic industry's prices during the period 2015-2017 were depressed by 6%"[216] "does not reflect the trend for the period and, therefore, the CDC's analysis does not meet the requirements under Article 3.2", in conjunction with Article 3.1.[217]

7.156. Costa Rica observes that the applicant, Gerdau Metaldom, acknowledged that in "December 2017, there [was] 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]".[218] Costa Rica emphasizes that, owing to the increases during the period 2017-2018, the price in 2018 was almost back at the same level as in 2015.[219]

7.157. The Dominican Republic's response is that the CDC objectively and correctly concluded that prices were lower in 2017 than in 2015 because prices were down 11.62% in 2017 compared with 2015. The Dominican Republic claims that "[i]n 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".[220] According to the Dominican Republic, an end-point comparison is a relevant and objective consideration that reflects price developments over time.[221] The Dominican Republic also recognizes that it is important to examine trends. However, according to

addition, price suppression cannot be properly examined without a consideration of whether, in the absence of subject imports, prices "otherwise would have" increased. (See Appellate Body Report, *China - GOES*, paras. 136-138 and 141).

[213] See Appellate Body Report, *China - GOES*, para. 151.

[214] Costa Rica's first written submission, paras. 98 and 100-101; opening statement at the first meeting of the Panel, para. 21; second written submission, para. 98; and opening statement at the second meeting of the Panel, paras. 35-38.

[215] Costa Rica's second written submission, para. 90.

[216] Final Technical Report (confidential version) (Exhibit DOM-3 (BCI)), para. 344.

[217] Costa Rica's second written submission, para. 85.

[218] Final Technical Report (confidential version) (Exhibit DOM-3 (BCI)), para. 352.

[219] Costa Rica's second written submission, para. 88; and first written submission, para. 100 (referring to the Final Technical Report (confidential version) (Exhibit DOM-3 (BCI)), table 24).

[220] Dominican Republic's first written submission, para. 247.

[221] Dominican Republic's first written submission, para. 247.

the Dominican Republic, the CDC was objective in its analysis and recognized that prices increased in 2017 and 2018; it considered that this increase was consistent with the rise in the prices of the main feedstock in the production of corrugated steel rods.[222] The Dominican Republic states that this "is exactly what Article 3.2 requires when it stipulates that the authority should 'consider' certain factors".[223]

7.158. The Dominican Republic also indicates that "[i]t is important to note that the CDC used the term 'depression' and not 'to depress prices'", since, according to the Dominican Republic, the CDC "did not come to any conclusion as to whether the prices were depressed as a result of the dumped imports".[224] Lastly, the Dominican Republic claims that it is clear from section 6.3.3 of the Final Technical Report that the CDC's conclusion "was [in relation to] 'price suppression'".[225]

7.159. As we have indicated, Article 3.2 of the Anti-Dumping Agreement requires the investigating authority to consider whether the effect of the imports is "otherwise to depress prices to a significant degree". We have found that this analysis "requires 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".[226]

7.160. First, we observe that the CDC's analysis is contained in the section of the Final Technical Report entitled "Price depression".[227] In this section, the CDC indicates that "[p]rice depression occurs when the domestic industry's ex-factory selling price falls during the period of investigation", and that "the domestic industry's prices during the period 2015-2017 were depressed by 6%".[228] In view of the foregoing, and contrary to what the Dominican Republic adduces, we consider that the CDC did in fact determine the existence of price depression.[229]

7.161. As the Dominican Republic explained, the 6% depression mentioned by the CDC is an "average for all years [in the period 2015-2017]".[230] The depression was [[***]] when comparing the prices in 2015 and 2017 on an "end-point-to-end-point" basis.[231] We observe that, based on the information provided in table 24, the domestic industry's average ex-factory price fell 17.83% in 2016; rose by 7.02% in 2017; and subsequently increased by a further 11% when comparing the average 2017 price with the average price in the period January-April 2018.[232] In fact, the average price in the period January-April 2018, which stood at DOP [[***]]/MT, had almost returned to the 2015 price of DOP [[***]]/MT.[233]

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[222] The Dominican Republic indicates that, in the context of the price suppression analysis, the CDC observed that the domestic industry's ex-factory prices increased by [[***]] in the period January-April 2018, which can be "explained by the increase in international billet prices during the same period and, therefore, in the domestic industry's production costs". The Dominican Republic states that this observation is an integral part of the CDC's examination of price effects, and the decrease in prices must be viewed in the context of the CDC's findings as a whole. (Dominican Republic's first written submission, paras. 247-249 (referring to the Final Technical Report (confidential version) (Exhibit DOM-3 (BCI)), para. 347; and to the Essential Facts Report (Exhibit DOM-2 (BCI)), para. 259).

[223] Dominican Republic's opening statement at the second meeting of the Panel, para. 38.

[224] Dominican Republic's response to Panel question No. 24, para. 44.

[225] Dominican Republic's response to Panel question No. 24, para. 44.

[226] Appellate Body Reports, *China — HP-SSST (Japan) / China — HP SSST (EU)*, para. 5.160.

[227] Final Technical Report (confidential version) (Exhibit DOM-3 (BCI)), section 6.3.2.

[228] Final Technical Report (confidential version) (Exhibit DOM-3 (BCI)), para. 344.

[229] To clarify this point, we observe that the section of the Final Technical Report entitled "Findings on the threat of injury", the CDC indicated, *inter alia*, the following:

> While it is true that imports from other origins increased during the most recent period of the investigation (January-April 2018), it is the dumped imports from Costa Rica with a dumping margin of 15% *that have depressed selling prices in the domestic market* and, consequently, adversely affected the domestic industry's economic and financial indicators.
> (Final Technical Report (confidential version) (Exhibit DOM-3 (BCI)), para. 361 (viii) (emphasis added)).

[230] Dominican Republic's response to Panel question No. 24, para. 40.

[231] Dominican Republic's response to Panel question No. 24, para. 40.

[232] Table 24 in the Final Technical Report indicates that the domestic industry's average ex-factory price was DOP [[***]]/MT in 2015 and fell to DOP [[***]]/MT in 2016 before increasing to DOP [[***]]/MT in 2017 and DOP [[***]]/MT in the first four months of 2018. (Final Technical Report (confidential version) (Exhibit DOM-3 (BCI)), table 24).

[233] Final Technical Report (confidential version) (Exhibit DOM-3 (BCI)), table 24.

7.162. The CDC's analysis focuses on the difference in prices between 2015 and 2017. However, we do not agree with the Dominican Republic that the CDC adequately considered price developments throughout the entire POI. The Dominican Republic explains the methodology that it used to determine the 6% depression.[234] It also explains the [[***]] difference in the average prices in 2015 and 2017. However, these explanations are not reflected in the relevant CDC determination. The CDC mentioned only that the price of the rods in the domestic market rose [[***]] in the period January-April 2018 relative to the period January-April 2017 as a result of the increase in the international price of the main feedstock during the same period.[235] However, the CDC did not explain the price's upward trend throughout the period 2016-2018 or the fact that the average price at the end of the POI was almost the same as in 2015.

7.163. In order to conduct an objective examination, the Investigating Authority should have explained that there was a price decrease from 2015 to 2016 (of 17.83%); that prices increased in the period from 2016 to 2017 (by [[***]]); and that they increased by a further [[***]] in the period January-April 2018. In that respect, the domestic industry's price only fell during the period 2015-2016, as the price rose during the subsequent periods. The absence of such explanations, together with the fact that the CDC only considered the end-point-to-end-point price change (from 2015 to 2017) and, consequently, did not analyse the trend throughout the entire period, leads the Panel to conclude that the CDC's price depression analysis was not objective and, as such, is inconsistent with Articles 3.1 and 3.2.

7.5.2.4.2 Whether the CDC's price depression examination considered "the effect of" imports from Costa Rica

7.164. Costa Rica claims that the CDC's analysis is inconsistent with Articles 3.1 and 3.2 because the CDC failed to consider prices of imports from other sources. Costa Rica reiterates the argument set out above[236] that imports from China and other sources entered "at prices lower than imports from Costa Rica throughout the entire POI", and that, in addition, imports from China and other sources "accounted for a significantly larger volume than those from Costa Rica".[237]

7.165. Costa Rica argues that the CDC should have taken this information into account when considering whether the alleged price depression was the effect of imports from Costa Rica and that 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".[238]

7.166. We concluded above that the Dominican Republic acted inconsistently with Articles 3.1 and 3.2 for other reasons[239], and we therefore do not deem it necessary to examine this additional argument by Costa Rica.

7.5.2.4.3 Conclusion

7.167. Based on the foregoing, we conclude that the Dominican Republic acted inconsistently with Articles 3.1 and 3.2 of the Anti-Dumping Agreement, as the CDC failed to explain the upward price trend throughout the entire POI and, therefore, failed to conduct an objective examination.

7.5.2.5 Whether the CDC's price suppression examination is inconsistent with Articles 3.1 and 3.2

7.168. Costa Rica claims that the CDC's consideration of price suppression was inconsistent with Articles 3.1 and 3.2 because the CDC's assessment failed to demonstrate price suppression or to

[234] Dominican Republic's response to Panel question No. 24, paras. 40-43.
[235] Final Technical Report (confidential version) (Exhibit DOM-3 (BCI)), para. 352.
[236] See para. 7.147. above.
[237] Costa Rica's second written submission, para. 90.
[238] Costa Rica's second written submission, para. 90 (quoting the Final Technical Report (confidential version) (Exhibit DOM-3 (BCI)), para. 345).
[239] See para. 7.163. above.

consider whether the price suppression was "the effect of" dumped imports.[240] We will now consider these arguments.

7.5.2.5.1 Whether the CDC's analysis demonstrated price suppression that was "the effect of" dumped imports

7.169. Costa Rica claims that the CDC failed to properly consider whether there was price suppression and failed to establish that this alleged suppression was an effect of Costa Rica's imports. Costa Rica also observes that the relevant section of the CDC's final determination refers to the alleged profitability of the domestic industry, but the CDC does not state that the domestic industry's prices would have been higher if it were not for the imports from Costa Rica. In addition, Costa Rica underscores that the CDC's analysis does not refer to imports from Costa Rica or demonstrate a relationship between imports from Costa Rica and the domestic industry's alleged inability to increase the price. According to Costa Rica, the CDC's analysis is "incomplete"[241] and it is "clear and evident that there is no analysis or evidence to substantiate the CDC's findings".[242]

7.170. The Dominican Republic's response is that the Final Technical Report shows that the CDC considered the existence of price suppression based on positive evidence and linked the price suppression to the increase in imports from Costa Rica. The Dominican Republic maintains that the CDC concluded that prices were suppressed by the dumped imports, given that its analysis showed that the prices of like domestic products increased by less than costs and that the cost-price ratio worsened significantly, precisely at the time when the dumped imports increased.[243] In addition, the Dominican Republic maintains that the cost-price squeeze "coincided" with the increase in imports, including in the most recent period of the injury POI[244], "thus revealing the explanatory force of dumped imports [for] price suppression".[245]

7.171. The Dominican Republic claims that the CDC's approach was "very relevant and standard practice" for explaining the absence of a price increase.[246] Furthermore, the Dominican Republic is of the view that no investigating authority includes dumped imports in the analysis of domestic producer price developments. Consequently, according to the Dominican Republic, Costa Rica's argument that table 24 makes no reference to dumped imports from Costa Rica is "irrelevant".[247]

7.172. The consideration of price suppression is contained in the section of the Final Technical Report entitled "Price suppression".[248] In its analysis, the CDC stated that price suppression was the extent to which the increase in the cost of producing the investigated product could not be recovered through the selling prices.[249] As table 24 shows, the CDC compared the domestic industry's average ex-factory prices with the average total cost for the years 2015-2017 and for the period January-April 2018, and concluded that costs as a percentage of the selling price was [[***]]in 2015, [[***]] in 2016, [[***]] in 2017 and [[***]] in the most recent period of January-April 2018.[250] Based on this examination, the CDC concluded that it was clear that "the domestic industry ha[d] not been able to properly take advantage of the rise in the average price", given that " its profitability, in terms of the cost-price ratio, declined throughout the [POI]".[251] The CDC observed that "its average prices fell even though average costs increased".[252]

7.173. Thus, this section of the Final Technical Report does not contain any explanation as to how the CDC took into consideration that domestic price suppression and the decline in profitability

[240] Costa Rica's first written submission, paras. 105-107; opening statement at the first meeting of the Panel, para. 21; second written submission, paras. 98-101 and 103-104; and opening statement at the second meeting of the Panel, paras. 40-42.
[241] Costa Rica's first written submission, para. 107.
[242] Costa Rica's first written submission, para. 105.
[243] Dominican Republic's second written submission, paras. 80-81.
[244] Dominican Republic's first written submission, para. 257.
[245] Dominican Republic's opening statement at the second meeting of the Panel, paras. 39-40.
[246] Dominican Republic's second written submission, para. 82.
[247] Dominican Republic's first written submission, para. 257.
[248] Final Technical Report (confidential version) (Exhibit DOM-3 (BCI)), section 6.3.3.
[249] Final Technical Report (confidential version) (Exhibit DOM-3 (BCI)), para. 350.
[250] Final Technical Report (confidential version) (Exhibit DOM-3 (BCI)), table 24.
[251] Final Technical Report (confidential version) (Exhibit DOM-3 (BCI)), para. 355.
[252] Final Technical Report (confidential version) (Exhibit DOM-3 (BCI)), para. 355.

coincided with the significant increase in dumped imports from Costa Rica. The Dominican Republic does not refute this, but instead argues that the CDC's analysis should be viewed in the context of its analysis elsewhere in the report. In particular, the Dominican Republic makes reference to paragraphs 291, 292 and 297 of the section of the Final Technical Report entitled "Variation in the volume of dumped imports".[253] This section provides information on the volume of imports of the investigated product in the period 2015-April 2018, including information on imports from Costa Rica as a percentage of total imports.[254] In addition, the CDC observed that imports from Costa Rica had "increased considerably" as of 2016 and had risen by 156% in 2017.[255] It also observed that imports from Costa Rica "remain[ed] on an upward trend", with growth of 22% in the period January-December 2018 compared with 2017.[256] The Dominican Republic claims that it was "precisely in 2017 and the first four months of 2018" that prices did not keep up with costs, which adversely affected profitability "as might be expected under normal circumstances", and as such, "it is clear" that the CDC assessed the effects of dumped imports in its examination of price suppression.[257]

7.174. The Dominican Republic also refers to the section of the Final Technical Report in which the CDC responds to the arguments put forward by ArcelorMittal concerning the CDC's threat of injury analysis[258], in which the CDC stated the following:

> Regarding [the claim] made by ArcelorMittal, the CDC reiterates that, when comparing average prices to average total costs, it is observed that the domestic industry has not been able to properly take advantage of the increase in average prices, because its profitability declined throughout the period of investigation. *This coincided with the entry into the Dominican Republic of Costa Rican imports with a dumping margin of 15%, which is above what is considered to be* de minimis *(2% of the export price), and in volumes totalling 37,634.02 during the dumping period, which is more than 3% of the total volume of imports of steel bars and rods into the Dominican Republic*, pursuant to Article 5.8 of the Anti-Dumping Agreement.[259]

7.175. Costa Rica maintains that this paragraph mentions only a "coincidence" and does not sufficiently demonstrate that the declines are an effect of the imports in the course of the POI. In any case, Costa Rica contends that this reference 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.[260]

7.176. However, after examining the CDC's determination as a whole, we reject Costa Rica's argument that the CDC's assessment was insufficient. We note that Article 3.2 does not specify how the investigating authority should conduct the price suppression analysis. Furthermore, we recall that the investigating authority has a degree of discretion with regard to its analysis. That discretion is guided by the principle set out in Article 3.1 that the determination of injury, including the examination of price effects, must be based on an objective examination of positive evidence.[261]

7.177. The CDC's response to the concerns raised by ArcelorMittal in paragraph 439 of the Final Technical Report clearly forms part of the CDC's assessment of price suppression and identifies the link between the aforementioned analysis and the increase in imports from Costa Rica. Additionally, the observations in section 6.1.1 of the Final Technical Report regarding the injury analysis refer to the change in volumes of dumped imports. In our view, therefore, this section also provides a reasoned explanation based on positive evidence of the link between dumped imports and the price suppression analysis.

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[253] Final Technical Report (confidential version) (Exhibit DOM-3 (BCI)), section 6.1.1.
[254] See, for example, Final Technical Report (confidential version) (Exhibit DOM-3 (BCI)), tables 16 and 17, and para. 297 (vii).
[255] Final Technical Report (confidential version) (Exhibit DOM-3 (BCI)), para. 291.
[256] Final Technical Report (confidential version) (Exhibit DOM-3 (BCI)), para. 292.
[257] Dominican Republic's response to Panel question No. 85, para. 61.
[258] Dominican Republic's first written submission, para. 255.
[259] Final Technical Report (confidential version) (Exhibit DOM-3 (BCI)), para. 439. (emphasis added)
[260] Costa Rica's opening statement at the first meeting of the Panel, para. 23; and second written submission, para. 103.
[261] Our opinion is consistent with that expressed in Appellate Body Report, *China — GOES*, para. 152.

7.178. Consequently, we conclude that the CDC's examination is not inconsistent with Articles 3.1 and 3.2, as the CDC's price suppression determination provides a reasoned explanation based on positive evidence that explains how dumped imports relate to the price suppression analysis.

7.5.2.5.2 Conclusion

7.179. For the reasons outlined above, we conclude that the Dominican Republic did not act inconsistently with Articles 3.1 and 3.2 of the Anti-Dumping Agreement, as the CDC's price suppression analysis properly considered there to be price suppression and established that the suppression was a consequence of the effect of imports from Costa Rica.

7.5.3 Costa Rica's claims under Articles 3.1 and 3.4 of the Anti-Dumping Agreement

7.180. In this section, we address Costa Rica's arguments that the CDC acted inconsistently with Articles 3.1 and 3.4 of the Anti-Dumping Agreement in the manner in which it examined economic factors and indices, and in which it examined the impact of the imports on the domestic industry.[262]

7.181. Costa Rica acknowledges that the CDC examined the economic factors and indices listed in Article 3.4 during the investigation. Insofar as the CDC included this analysis in its injury determination, Costa Rica claims that this analysis should comply with the requirements of Articles 3.1 and 3.4 of the Anti-Dumping Agreement.[263]

7.182. The Dominican Republic responds that Costa Rica's claims are without merit and that they seek to have the Panel conduct a *de novo* review of the facts, which is contrary to the Panel's task under Article 17.6 of the Anti-Dumping Agreement.[264]

7.183. We begin our analysis by recalling the applicable requirements of Articles 3.1 and 3.4 of the Anti-Dumping Agreement (section 7.5.3.1), before addressing Costa Rica's arguments regarding the CDC's evaluation of the economic factors and indices mentioned in Article 3.4 and of the impact of the imports on the domestic industry (section 7.5.3.2).

7.5.3.1 The applicable requirements of Articles 3.1 and 3.4 of the Anti-Dumping Agreement in relation to the threat of injury analysis

7.184. Costa Rica bases its violation claims on Articles 3.1 and 3.4. We have already examined the applicable requirements of Article 3.1 in section 7.5.2.2 above.[265]

7.185. Article 3.4 of the Anti-Dumping Agreement sets out the obligations related to the examination of the impact of the dumped imports on the domestic industry and provides as follows:

> The examination of the impact of the 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, including actual and potential decline in sales, profits, output, market share, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; the magnitude of the margin of dumping; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments. This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance.

7.186. We agree with previous panels that the text of the Anti-Dumping Agreement requires consideration of the factors listed in Article 3.4 in a threat of injury determination.[266] We note that

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[262] Costa Rica's first written submission, para. 109.
[263] Costa Rica's opening statement at the first meeting of the Panel, paras. 26-28.
[264] Dominican Republic's first written submission, para.262; and second written submission, para. 89.
[265] See in particular paras. 7.128. and 7.130. above.
[266] Panel Report, *Mexico — Corn Syrup,* para. 7.127 ("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"). See also Panel Report, *Mexico — Corn Syrup*, para. 7.131:

such consideration is vital "in order to establish a background against which the investigating authority can evaluate whether imminent further dumped imports will affect the industry's condition in such a manner that material injury would occur in the absence of protective action".[267] Thus, while Article 3.7 sets out additional factors that must be considered in a threat of injury evaluation, it "does not eliminate the obligation to consider the impact of dumped imports on the domestic industry in accordance with the requirements of Article 3.4".[268]

7.187. We agree with previous panels that "the obligation to 'evaluat[e]' under Article 3.4 [requires] 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'".[269] Moreover, 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".[270] The examination under Article 3.4 must also meet the requirements of Article 3.1.[271]

7.5.3.2 Whether the CDC's threat of injury determination complied with Articles 3.1 and 3.4 of the Anti-Dumping Agreement

7.5.3.2.1 The relevance of the Article 3.4 evaluation in a threat of injury determination

7.188. The Dominican Republic has raised the issue of whether there is a basis for considering Costa Rica's arguments relating to Articles 3.1 and 3.4 since the CDC's determination consisted of a determination of threat of injury.

7.189. The Dominican Republic acknowledges that an authority is required to consider the Article 3.4 injury factors to determine a threat of injury, and notes that the CDC did explain repeatedly that the Article 3.4 evaluation was part of its threat of injury determination under Article 3.7.[272] Nevertheless, the Dominican Republic argues that "it is not clear what exactly the CDC did to violate Article 3.4, since the CDC did not make any determination of injury under Article 3.4".[273] In this regard, the Dominican Republic takes the view that Costa Rica is confusing the different provisions of Articles 3.4 and 3.7.[274] The Dominican Republic considers that the analysis of the volume of the dumped imports, their effects on prices and their impact on the domestic industry relates to the past and not the future, and provides, at most, a context for assessing the likelihood of a further increase in imports at dumped prices.[275] For the Dominican Republic,

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Article 3.7 requires a determination whether material injury would occur, Article 3.1 requires that a determination of injury, including threat of injury, involve an examination of the impact of imports, and Article 3.4 sets out the factors that must be considered, among other relevant factors, in the examination of the impact of imports on the domestic industry. Thus, in our view, the text of the AD Agreement requires consideration of the Article 3.4 factors in a threat determination.

See also Panel Report, *US — Coated Paper (Indonesia)*, para. 7.262.

[267] Panel Reports, *Mexico — Corn Syrup*, para. 7.132; and *US — Coated Paper (Indonesia)*, para. 7.262.

[268] Panel Report, *Mexico — Corn Syrup*, para. 7.131. See also Panel Report, *Thailand — H-Beams*, para 7.249 ("[the] 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"); and Panel Report, *China — Cellulose Pulp*, para 7.129.

[269] Panel Report, *Pakistan — BOPP Film (UAE),* appealed on 22 February 2021, para. 7.351 (quoting Panel Report, *EC — Bed Linen (Article 21.5 – India)*, para. 6.162; and referring to Panel Report, *Egypt — Steel Rebar*, paras. 7.43-7.44).

[270] Panel Report, *Mexico - Corn Syrup*, para. 7.133.

[271] Panel Report, *Pakistan - BOPP Film (UAE)*, appealed on 22 February 2021, para. 7.366.

[272] Dominican Republic's first written submission, para. 264; and response to Panel question No. 91, paras. 75-76.

[273] Dominican Republic's first written submission, para. 264.

[274] The Dominican Republic notes, for instance, that Costa Rica's arguments that the CDC failed to provide explanations regarding the elements relating to Article 3.7 and that the CDC never referred to the Article 3.4 evaluation to find a threat of injury, are arguments that are not relevant to the assertion that the CDC acted inconsistently with Articles 3.1 and 3.4 and that these arguments should instead form part of Costa Rica's claim under Article 3.7 (Dominican Republic's first written submission, paras. 267-268).

[275] Dominican Republic's response to Panel question No. 91, para. 90.

Article 3.7 is determinative with regard to whether the investigating authority has established a threat of injury.[276]

7.190. We do not agree with the Dominican Republic's assertion that there is no basis at all to address Costa Rica's claim under Article 3.4 "given that the CDC did not make any determination of injury under [that provision]".[277] As we have noted[278], in a case concerning the existence of a threat of injury, the authority must consider the situation of the domestic industry in the light of the factors listed in Article 3.4, in order to establish a background against which the investigating authority can evaluate the impact of future dumped imports, as well as the specific threat factors.[279] Therefore, in our view, in the context of claims relating to a threat of injury determination, a panel must examine whether the investigating authority acted consistently with the provisions of Article 3.4.

7.191. Accordingly, we will now assess Costa Rica's arguments regarding the CDC's analysis of the economic factors and indices listed in Article 3.4. First, we will assess Costa Rica's arguments that the CDC's analysis of certain factors (profits, cash flow, employment, and the loss of market share allegedly attributable to Costa Rican imports) was not supported by an objective evaluation or based on positive evidence.[280] Second, we will assess Costa Rica's arguments that the CDC failed to assess the positive performance of several domestic industry indicators and limited itself to examining the economic factors and indices individually without considering "each one's role, relevance or relative importance" and without considering them in a broader context.[281]

7.5.3.2.2 The examination of profits

7.192. Costa Rica claims that the CDC's assertion that "[t]he contractions in profits coincide 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" is not supported by the information on the record.[282]

7.193. For its part, the Dominican Republic submits that, contrary to Costa Rica's assertion, there is a correlation between the negative trend in the domestic industry's profits and the decline in other factors, such as sales.[283] In particular, the Dominican Republic notes that the CDC determined that profits decreased in 2017 compared to 2016, while the volume and value of domestic sales declined over the same period.[284]

7.194. Section 7.2 of the Final Technical Report contains the CDC's profits analysis.[285] Paragraph 378 and table 27 in this section outline the trends in this factor. The CDC noted that: the domestic industry's profits "contracted" in 2016 compared to 2015; "suffered a contraction" in 2017 in relation to 2016; and "decreased" in the period January-April 2018.[286] The CDC concluded that "[t]he contractions in profits coincide[d] 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".[287]

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[276] Dominican Republic's response to Panel question No. 91, para. 87.
[277] Dominican Republic's first written submission, para. 264.
[278] See para. 7.186. above.
[279] Panel Reports, *Mexico — Corn Syrup*, para. 7.132; and *US — Coated Paper (Indonesia)*, para. 7.262.
[280] Costa Rica's first written submission, para. 118.
[281] Costa Rica's first written submission, paras. 117 and 129.
[282] Costa Rica's first written submission, para. 119 (quoting Final Technical Report (confidential version) (Exhibit DOM-3 (BCI)), para. 378).
[283] Dominican Republic's first written submission, para. 303.
[284] Dominican Republic's first written submission, para. 303.
[285] We note that the text of paragraph 378 in which the profits are analysed is devoted to the analysis of profits "prior to the deduction of taxes". However, table 27 identifies the first row as "Net profit" and the second as "Rate of change %". As we have noted, the figures on these rows do not coincide with those mentioned in the accompanying text. In a response to the Panel, the Dominican Republic confirmed that "the rates of change in the second row mistakenly refer to the rate of change in profits before interest and taxes". (Dominican Republic's response to Panel question No. 26, para. 48). Without confirmation of this error, however, it is impossible to infer what type of profits are being analysed by the Investigating Authority.
[286] Final Technical Report (Exhibit CRI-3), para. 378.
[287] Final Technical Report (Exhibit CRI-3), para. 378.

7.195. We note that, in its analysis, the CDC did not contrast the profit figures with domestic sales figures. The figures mentioned in the text of paragraph 378 of the Final Technical Report show a steady decline in profits.[288] In comparison, the figures in table 26 of the Final Technical Report in the section on domestic sales show a combination of various movements. At the beginning of the POI, the volume of sales increased while their value decreased. Subsequently, in 2017, there is a decline in both the volume and value of sales, followed by a sharp increase in the volume and value of sales in the first four months of 2018 compared to the same period in 2017.[289] We see no explanation as to how these movements in the volume and value of sales actually "coincide" with the profit contractions described by the CDC in section 7.2 of the Final Technical Report.

7.196. It is the task of a panel to assess whether the explanations provided by the investigating authority are "reasoned and adequate" by testing the relationship between the evidence on which the authority relied in drawing specific inferences, and the coherence of its reasoning.[290] We do not see how the CDC's reasoning in establishing that "[t]he contractions in profits *coincide* with the decline in sales"[291] is coherent in the light of the consistent trend in profits and the fluctuating trend in sales.

7.197. The CDC also refers to the decrease in the "domestic industry's profit margin".[292] Costa Rica maintains that the CDC did not provide figures on this alleged decrease[293], and submits that the relationship that the CDC established between the domestic industry's profits and the profit margin constitutes a "circular assertion", since the profits are the main element used to calculate the profit margin. Therefore, according to Costa Rica, the two concepts are directly related: in other words, if profits fall, the profit margin also decreases.[294]

7.198. The Dominican Republic disagrees, arguing that "[i]t 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". Moreover, according to the Dominican Republic, that "these two methods of examining the issue of profitability are closely linked does not mean that they are irrelevant".[295]

7.199. We recall that the panel's review must be based on the explanations given by the authority in its published report. The analysis of the "profit-cost" ratio to which the Dominican Republic refers is a review of the trends in price in relation to cost and is included in the Final Technical Report in the section on the CDC's review of price suppression. Moreover, the CDC's evaluation of profits makes no reference to this analysis. Rather, its examination of profits focuses on "the decrease in the ... profit margin", a phrase not mentioned elsewhere in the Final Technical Report. Therefore, the explanations provided by the Dominican Republic regarding the relevance of the analysis contained in paragraph 355 of the Final Technical Report concerning the evaluation of profits constitute an *ex post* explanation. Moreover, even if we consider the price trends in relation to cost in the context of profits, we note that the decline in the first indicator is slight in 2016 compared to 2015, and more drastic in 2017 compared to 2016, while the reduction in profits is more significant in the period 2015-2016 and less so in the period 2016-2017.

7.200. Furthermore, paragraph 355 of the Final Technical Report does not mention the dumped imports and does not contrast the decreases observed in the profit-cost ratio with any trend in imports from Costa Rica. Therefore, this paragraph provides no additional factual basis on which the CDC could base its conclusion that "the decrease in the domestic industry's profit margin [was]

[288] As such, the profits in 2016 and 2017 amounted to 77.64% and 69.42% of the level observed in 2015. In the first four months of 2018, they amounted to 83.12% of the level in the same period in 2017.
[289] As indicated in table 26 of the Final Technical Report, in 2016 the sales volume increased by 9.94% in relation to 2015, while the value of sales decreased by 14.22%. In 2017, the volume and value of sales decreased by 13.88% and 5.69%, respectively, in relation to 2016. During the most recent period of the POI, the volume and value of sales increased by 15.4% and 34.83%, respectively.
[290] Appellate Body Report, *US — Softwood Lumber VI (Article 21.5 - Canada)*, para. 97.
[291] Emphasis added.
[292] Final Technical Report (Exhibit CRI-3), para. 378.
[293] Costa Rica's first written submission, para. 119.
[294] Costa Rica's first written submission, para. 119.
[295] Dominican Republic's first written submission, para. 304.

owing to the entry into the country of Costa Rican imports at dumped prices".[296] On the basis of all of the above, we do not consider that the CDC's examination of the profits could constitute a reasoned and adequate explanation as to how the evidence on the record supported its examination of this aspect of the investigation.

7.5.3.2.3 The examination of cash flow

7.201. Costa Rica disagrees with the CDC's assertion that "[t]he cash flow performance is attributable to the fall in profits as a result of Costa Rica's dumping practices".[297] In particular, Costa Rica submits that "the CDC does not indicate the basis for that assertion" and that "the information on the record disproves that the contraction in profits has been a result of imports from Costa Rica".[298]

7.202. The Dominican Republic responds that "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".[299]

7.203. The cash flow analysis is set out in section 7.9 of the Final Technical Report. At the end of its analysis in paragraph 389, the CDC concluded that "[t]he cash flow performance [was] attributable to the fall in profits as a result of Costa Rica's dumping practices, adversely affecting the business value".[300]

7.204. However, we note that neither the text of paragraph 389 nor the Dominican Republic's arguments indicate that the CDC contrasted cash flow trends with any other indicator to reach this conclusion, or that the CDC had based its conclusion on positive evidence on the record.

7.205. The Dominican Republic notes that the CDC's conclusion is based "on the temporal correlation between the decrease in the cash flow and the profits of the domestic industry and the increase in dumped imports from Costa Rica", and that the record contains "[t]he relevant data for cash flow, profits, and volumes and prices of imports".[301] However, we note that a mere coincidence between alleged dumping and the decrease in the domestic industry's cash flow (and/or profits) does not in itself, or necessarily, prove that the decline in these economic factors was attributable to this dumping.

7.206. Lastly, we note that the CDC's entire cash flow analysis is set out in a single paragraph that consists of a description of the trend followed by the indicator during the POI and the conclusion reached. The CDC does not attempt to contrast the cash flow trend with any other index and/or factor, and, if anything, limits itself to attributing the trend in this factor to the fall in profits, without any type of substantiation. In our view, the CDC's consideration does not constitute a reasoned and adequate explanation as to how the evidence supports its conclusion regarding cash flow.

7.5.3.2.4 The examination of employment

7.207. Costa Rica submits that employment performance was "mixed or even stable, and not negative as suggested by the CDC".[302] Specifically, Costa Rica notes that the CDC focused "on the number of workers and not on total employment" and also highlights the fact that "the domestic industry's productivity significantly improve[d] (53.4%) in the last four months of the [POI]".[303] Costa Rica claims that the CDC was under the obligation to explain why the domestic industry was in a state of vulnerability rather than on a path towards greater efficiency.[304]

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[296] Final Technical Report (confidential version) (Exhibit DOM-3 (BCI)), para. 378. (emphasis added)
[297] Final Technical Report (Exhibit CRI-3), para. 389; and Costa Rica's first written submission, para. 121.
[298] Costa Rica's first written submission, para. 121.
[299] Dominican Republic's first written submission, para. 309.
[300] Final Technical Report (Exhibit CRI-3), para. 389.
[301] Dominican Republic's response to Panel question No. 95, para. 117.
[302] Costa Rica's first written submission, para. 122.
[303] Costa Rica's first written submission, para. 122.
[304] Costa Rica's first written submission, para. 122.

7.208. In addition, Costa Rica disagrees with the CDC's conclusion 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".[305] According to Costa Rica, this assertion is not "accurate" because the domestic industry did not reduce the total number of employees. Nor does Costa Rica consider that the CDC has provided any basis for characterizing labour costs (particularly for direct labour, which was allegedly of concern to the CDC) as fixed costs.[306] Lastly, Costa Rica considers that the fact that "the domestic industry has been forced to reduce its workforce owing to the entry of imports at dumped prices" runs counter to the CDC's finding that the number of workers employed in the production of the like product increased in 2016.[307]

7.209. The Dominican Republic responds that the CDC's conclusion "[wa]s based on the temporal correlation between the decrease in the data on employment, the increase in dumped imports from Costa Rica and production costs".[308] The Dominican Republic also explains that "[t]he reduction in sales, in revenue, in the ability to transfer costs to prices, in profits and in cash flow led the domestic industry to take measures to reduce production costs", and that this "entail[ed], amongst other measures, a cut in employment, which was recorded in 2017, in order to reduce fixed costs and, therefore, the average cost of production".[309] The Dominican Republic also notes that "[i]n view of the displacement of domestic production by dumped imports from Costa Rica, the domestic industry had to take measures to help reduce average costs".[310]

7.210. We note that table 34 of the Final Technical Report contains information on the change in the number of employees divided into four groups: direct labour; workers (direct labour and indirect labour); employees; and total employment (workers and employees).[311] The CDC analyses the change in the number of workers employed in the production of the like product and notes that this number increased in 2016 before decreasing in 2017 and the first four months of 2018.[312] The CDC noted the following:

> Overall, the total number of employees of the domestic industry, i.e. [the] total number of workers plus the total number of employees (including sales, management and general services employees) involved in the production and marketing of the like product, increased by 11% in 2016. Similarly, in 2017 and the period January-April 2018, the total number of employees fell by 7% and 11%, respectively. The foregoing relates to the reduction in the domestic industry's total investments.[313]

7.211. In addition to these comments, the CDC noted that, "[a]ccording to the information provided by the Applicant", "the domestic industry has 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".[314]

7.212. We note that the figures in table 34 of the Final Technical Report show a varying trend during the injury POI with respect to the different categories of employees. Furthermore, the reduction in the workforce does not concern all the categories. For instance, we note that, despite fluctuations, the number of "employees" in the period January-April 2018 exceeds the number of employees in 2015. Similarly, "total employment" in January 2018 is almost at the level of total employment for 2015.[315] The CDC also indicated that its analysis was conducted on the basis of the number of total employees, which reflects a decrease in 2017 and January-April 2018 in relation to the comparable period.[316]

[305] Costa Rica's first written submission, para. 123 (quoting Final Technical Report (confidential version) (Exhibit DOM-3 (BCI)), para. 397).
[306] Costa Rica's first written submission, para. 123.
[307] Costa Rica's first written submission, para. 123.
[308] Dominican Republic's response to Panel question No. 95, para. 119.
[309] Dominican Republic's response to Panel question No. 95, para. 120.
[310] Dominican Republic's response to Panel question No. 95, para. 120.
[311] Final Technical Report (Exhibit CRI-3), table 34.
[312] Final Technical Report (Exhibit CRI-3), para. 392.
[313] Final Technical Report (Exhibit CRI-3), para. 393.
[314] Final Technical Report (Exhibit CRI-3), paras. 394 and 397.
[315] Final Technical Report (Exhibit CRI-3), table 34.
[316] Final Technical Report (Exhibit CRI-3), para. 396.

7.213. However, we do not find any explanation in the CDC's examination that links the domestic industry's need to reduce its workforce "[with the objective of] reduc[ing] its fixed costs and thereby lower[ing] its average cost", which formed the basis for the CDC's conclusion that the reduction in employment had been caused by the entry of imports.[317] Apart from indicating that this conclusion was reached in "[a]ccord[ance with] the information provided by the Applicant", and citing information provided by the latter on 11 September 2018[318], the CDC failed to provide explanations or an analysis to substantiate its conclusion. As a result, we do not see how the CDC's determination provided a reasoned and adequate explanation as to how the evidence on the record supported its conclusion.[319]

7.5.3.2.5 The examination of the domestic industry's loss of market share

7.214. Costa Rica submits that the CDC's conclusion that the domestic industry's loss of market share was attributable to Costa Rican imports is unsupported by the record. Costa Rica notes that its imports' share of apparent domestic consumption in the Dominican Republic did not remain "unchanged" during the most recent period. Therefore, according to Costa Rica, if the period January-April 2018 is compared to the period January-April 2017, the decline in the domestic industry's share cannot be attributed to imports from Costa Rica, as the market share of those imports did not increase.[320]

7.215. The Dominican Republic explains that Costa Rica's argument is based on a comparison of different periods and is therefore incorrect. In particular, according to the Dominican Republic, if the periods are compared in the same manner as they were by the CDC, it is clear that imports from Costa Rica retained the same share of the domestic market.[321]

7.216. The CDC's analysis of the domestic industry's market share is set out in section 6.1.2 of the Final Technical Report. On the basis of the information in table 19, the CDC noted that the share of Costa Rican imports increased by 3% in 2016 and 10% in 2017, and remained unchanged at 6% during the most recent period in January-April 2018, in relation to the same period in 2017.[322] The CDC also noted that imports from other sources had increased their imported volume by 77% and their share of apparent domestic consumption (ADC) by 6 percentage points.[323] In the meantime, imports from Costa Rica increased by 38%, with their share remaining unchanged.[324] On this basis, the CDC concluded that the domestic industry "recorded a loss of market share attributable to Costa Rican imports" and, despite the domestic industry recovering slightly in the most recent period of the investigation, it did not attain the share levels it had recorded in 2016.[325]

7.217. Table 19 suggests that the domestic industry's share of ADC began decreasing in 2016. However, while the domestic industry's share fell in 2017 in the context of the growing share of imports from Costa Rica, in the first four months of 2018, the share of imports from Costa Rica appeared "unchanged", while the volume of imports from other sources increased by 77% and the ADC share of such imports rose by 6 percentage points, with a stable (compared to the same period in 2017) or decreasing (compared to the whole of 2017) share of imports from Costa Rica. In these circumstances, the loss of market share during the most recent period was, to a large extent, contextualized by imports from other sources. In any event, even though the authority took into account the increase in Costa Rican imports in 2017, 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. On the basis of the foregoing, we do not consider that the CDC's examination of the market

[317] Final Technical Report (Exhibit CRI-3), para. 397 ("the CDC considers that the domestic industry has 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".)
[318] Final Technical Report (Exhibit CRI-3), fn 134 (referring to the information provided by Gerdau Metaldom in the confidential version of the supplementary information form dated 11 September 2018, p. 12).
[319] Having made this finding, we express no view as to whether the CDC was under the obligation to contrast the trend in employment with productivity.
[320] Costa Rica's first written submission, para. 124.
[321] Dominican Republic's first written submission, para. 326.
[322] Final Technical Report (Exhibit CRI-3), para. 299.
[323] Final Technical Report (Exhibit CRI-3), para. 300.
[324] Final Technical Report (Exhibit CRI-3), para. 300.
[325] Final Technical Report (Exhibit CRI-3), para. 305.

share of the dumped imports could constitute a reasoned and adequate explanation as to how the evidence on the record supported that conclusion.

7.5.3.2.6 Whether the CDC properly considered the positive performance of certain indicators and evaluated the economic factors and indices as a whole

7.218. Costa Rica claims that the CDC failed to comply with the requirements of Article 3.4 because it did not assess the positive performance of certain domestic industry indicators and also limited itself to examining the economic factors and indices individually without considering "each one's role, relevance or relative importance".[326] Furthermore, Costa Rica argues that the CDC also 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".[327]

7.219. The Dominican Republic responds that the CDC duly examined all the injury factors relevant to the domestic industry in the light of the significant increase in dumped imports, 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 imports. Furthermore, the Dominican Republic notes that the CDC examined each of the factors and, in doing so, obtained "a complete picture" of the state of the industry that informed its determination in relation to dumped imports from Costa Rica.[328]

7.220. The Dominican Republic also submits that Costa Rica is wrong to selectively focus its argument on a certain period within the POI. In any case, the Dominican Republic notes that a disagreement over how the authority interpreted the facts does not constitute sufficient grounds for finding a violation of the Anti-Dumping Agreement.[329]

7.221. Lastly, the Dominican Republic emphasizes that the CDC's final determination was not one of material injury, but of threat of injury. According to its argument, the fact that certain factors continued to show a positive trend over a certain period of the POI, such as, for example, during the last four months of the POI, is not a valid reason for challenging the examination of the factors listed in Article 3.4.[330]

7.222. We begin by examining Costa Rica's first argument, namely that the CDC failed to assess the positive performance of several domestic industry indicators. Specifically, Costa Rica's argument focuses on positive movements in the following economic factors and indices: volume and value of the domestic industry's domestic sales; volume of production; productivity; utilization of productive capacity; return on investments; inventories; and ability to raise capital or investments. According to Costa Rica, these factors showed a positive trend "during the [POI] or at least in the first four months of 2018".[331]

7.223. In particular, Costa Rica adduces that when a number of 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 [POI]".[332] In the case at issue, Costa Rica notes that "the figures in the Final Technical Report objectively support a trend of improvement in the performance of the domestic industry during the POI" and, therefore, argues that it is not possible to "conclude in an unbiased

[326] Costa Rica's first written submission, paras. 117 and 129.
[327] Costa Rica's second written submission, para. 126. See also Costa Rica's first written submission, para. 131.
[328] In particular, the Dominican Republic notes that the CDC evaluated each of the injury factors required to objectively examine the trend and, in doing so, obtained a complete picture of the state of the industry, which, according to the Dominican Republic, is precisely what Article 3.4 requires of an investigating authority. Dominican Republic's first written submission, paras. 278 and 299; and second written submission, para. 103.
[329] Dominican Republic's first written submission, para. 292; and second written submission, para. 109.
[330] Dominican Republic's second written submission, para. 105.
[331] Costa Rica's first written submission, para. 115; and second written submission, para. 116.
[332] Costa Rica's second written submission, para. 113 (quoting Panel Report, *Thailand — H-Beams*, para. 7.249; and referring to Panel Report, *Mexico — Corn Syrup*, para. 7.133).

and objective manner that the situation under analysis would lead to a clear, expected and imminent occurrence of injury".[333]

7.224. The CDC considered the economic factors and indices listed in Article 3.4 in the section of the Final Technical Report entitled "Domestic Industry Indicators".[334] At the beginning of this section, the CDC summarized the applicant's arguments regarding the state of the domestic industry.[335] Among other comments, the applicant had noted that the domestic industry had "suffered a significant contraction in several of the company's economic and financial variables, with its consequent negative impact".[336] The CDC noted, in particular, the applicant's arguments with respect to the decline in the gross profit and the return on investments of the domestic industry. The CDC further observed that:

> [T]he domestic industry's economic and financial indicators have weakened, an effect that has persisted over time due to the increase in those imports; for example, during the period January-April 2018, [gross profit] and investments contracted by 3% and 28.2%, respectively, while the number of employees and workers fell by 7% and 6%.[337]

7.225. In the subsequent paragraphs, the CDC presented its analysis of the domestic industry's injury indicators for the POI.[338]

7.226. We note that there is no disagreement between the parties that Article 3.4 requires an evaluation of all relevant economic factors and indices.[339] At the same time, we recall that the evaluation of the economic factors and indices relating to the Article 3.4 examination requires that, rather than considering the trends relating to each of the economic factors and indices in isolation, the investigating authority assess the "relative weight"[340] of each factor in the investigation. The investigating authority also needs to take into account all relevant factors, including those that detract from an affirmative determination, and that evaluation must be reflected in the investigation record.

7.227. Apart from its consideration of the economic factors and indices in isolation, we find no indication that the CDC considered the factors in a holistic manner or assessed the relative weight of each factor. Due to this absence of consideration, we do not agree that the CDC conducted a proper evaluation of all the relevant economic factors and indices listed in Article 3.4 in order to have an appreciation of the state of the domestic industry.

7.228. The Dominican Republic refers to paragraph 305 of the Final Technical Report as evidence that the CDC duly evaluated the factors. This paragraph forms part of the CDC's analysis of apparent domestic consumption, but is limited to the observation that there was a trend in increased imports from Costa Rica at dumped prices, and that:

> [T]o this extent, the domestic industry's economic indicators, including profits, cash flow and employment, were adversely affected. Moreover, the domestic industry recorded a loss of market share attributable to Costa Rican imports and, despite recovering slightly during the most recent period of the investigation, did not attain the share levels it had recorded in 2016, a situation that coincides with the entry into the country of imports from Costa Rica at dumped prices.[341]

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[333] Costa Rica's opening statement at the first meeting of the Panel, para. 13 (referring to Final Technical Report (confidential version) (Exhibit DOM-3 (BCI)), table A-1). (footnote omitted)
[334] Final Technical Report (confidential version) (Exhibit DOM-3 (BCI)), section 7.
[335] Final Technical Report (confidential version) (Exhibit DOM-3 (BCI)), paras. 367-371.
[336] Final Technical Report (confidential version) (Exhibit DOM-3 (BCI)), para. 368.
[337] Final Technical Report (confidential version) (Exhibit DOM-3 (BCI)), para. 370.
[338] Final Technical Report (confidential version) (Exhibit DOM-3 (BCI)), paras. 373-407.
[339] Dominican Republic's second written submission, para. 105.
[340] Panel Report, *Pakistan — BOPP Film (UAE),* appealed on 22 February 2021, para. 7.351 (referring to Panel Reports, *EC — Bed Linen (Article 21.5 – India)*, para. 6.162; and *Egypt — Steel Rebar*, paras. 7.43-7.44).
[341] Final Technical Report (confidential version) (Exhibit DOM-3 (BCI)), para. 305.

7.229. The Dominican Republic also refers to paragraphs 163-167 of the final determination.[342] However, these paragraphs largely repeat the CDC's observation in paragraph 305 of the Final Technical Report, as set out above, which is not indicative of the CDC having conducted a proper evaluation of all the relevant economic factors and indices listed in Article 3.4. In the final determination, the CDC noted that "generally speaking, the economic and financial indicators of the domestic industry continued fluctuating".[343] In our view, however, the general characterization of the trends in all indices as "fluctuating" does not amount to an assessment of the role, relevance and relative weight of each factor.

7.230. On the basis of the foregoing, the investigation record does not show that the CDC has conducted a proper and objective analysis of the economic factors and indices that had a bearing on the state of the domestic industry as part of the examination provided for in Article 3.4. As a result, we do not consider that the CDC conducted an evaluation of all relevant economic factors and indices, as prescribed in Article 3.4.

7.5.3.3 Conclusion

7.231. In sum, for the reasons set out above, we conclude that the Dominican Republic acted inconsistently with its obligations under Articles 3.1 and 3.4 of the Anti-Dumping Agreement because, 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. At the same time, we recall that in a case concerning the existence of a threat of injury, the authority must consider the situation of the industry in the light of the factors listed in Article 3.4.[344] In this instance, we therefore conclude that the Dominican Republic also acted inconsistently with Articles 3.1 and 3.4 because 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.

7.5.4 Costa Rica's claims under Articles 3.1 and 3.7 of the Anti-Dumping Agreement

7.232. In this section, we address Costa Rica's arguments that the CDC's conclusions that allegedly support the CDC's determination of a threat of injury are not well founded and, as such, are inconsistent with Articles 3.1 and 3.7 of the Anti-Dumping Agreement.[345]

7.233. Costa Rica claims that the CDC's determination of a threat of injury is inconsistent with Articles 3.1 and 3.7 of the Anti-Dumping Agreement.[346] Essentially, Costa Rica claims that there are "serious shortcomings" in the CDC's analysis of the four factors set forth in Article 3.7.[347] Moreover, Costa Rica maintains that the CDC's arguments as a whole fail to provide an appropriate, or "robust", explanation that a change in circumstances which would create a situation in which the alleged dumping would cause injury is "clearly foreseen and imminent".[348]

7.234. The Dominican Republic responds that Costa Rica's claim has no legal basis.[349] The Dominican Republic also contends that Costa Rica has "erred" in not addressing the CDC's conclusions and in ignoring a large number of the factual findings that support those conclusions.[350] The Dominican Republic also asserts that Costa Rica's allegations under Article 3.1 regarding its claim under Article 3.7 are not within the scope of the Panel's terms of reference.[351]

7.235. We begin our analysis by examining the Dominican Republic's argument, which we reject, that the Panel does not have jurisdiction to examine the arguments under Article 3.1 that Costa Rica put forward in its first written submission and that relate to Costa Rica's claim under Article 3.7 (section 7.5.4.1). We go on to recall the applicable requirements of Articles 3.1 and 3.7 of the

[342] Final Determination (Exhibit CRI-2), paras. 163-167.
[343] Final Determination (Exhibit CRI-2), para. 163.
[344] See para. 7.186. above.
[345] Costa Rica's first written submission, paras. 139-165.
[346] Costa Rica's first written submission, paras. 139 and 172-173.
[347] Costa Rica's first written submission, para. 139.
[348] Costa Rica's first written submission, para. 172.
[349] Dominican Republic's first written submission, para. 481.
[350] Dominican Republic's first written submission, para. 482.
[351] Dominican Republic's first written submission, para. 418.

Anti-Dumping Agreement (section 7.5.4.2), and then, based on the specific facts and circumstances of this dispute, we examine Costa Rica's claims that the Dominican Republic acted inconsistently with Articles 3.1 and 3.7 in its analysis of the factors set forth in Article 3.7 (section 7.5.4.3).

7.5.4.1 Dominican Republic's claim under Article 6.2 of the DSU

7.236. The Dominican Republic argues that Costa Rica did not indicate in its request for the establishment of a panel that Article 3.1 was a legal basis for its claim concerning the CDC's determination of a threat of material injury and, as such, the Panel does not have jurisdiction to examine the arguments under Article 3.1 that Costa Rica put forward in its first written submission regarding the determination of a threat of material injury.[352]

7.237. We note that, in paragraph 11 of its panel request, Costa Rica stated that the challenged measures are inconsistent with Article 3.7 of the Anti-Dumping Agreement because, *inter alia*:

> [T]he investigating authority based the determination of a threat of material injury not on facts but merely on allegation, conjecture or remote possibility, and failed to properly determine that the change in circumstances which would create a situation in which the alleged dumping would cause injury was clearly foreseen and imminent. In addition, the investigating authority failed to properly consider:
>
> - whether there was a significant rate of increase of dumped imports into the domestic market indicating the likelihood of substantially increased importation;
>
> - whether there was sufficient freely disposable capacity indicating the likelihood of an imminent, substantial increase in dumped exports to the Dominican Republic, taking into account the availability of other export markets to absorb any additional exports;
>
> - whether imports were entering at prices that would have a significant depressing or suppressing effect on domestic prices, and would likely increase demand for further imports; and
>
> - whether the totality of the factors considered led to the conclusion that further dumped exports were imminent and that, unless protective action was taken, material injury would occur.

7.238. With respect to the claim regarding the determination of a threat of material injury, Costa Rica's panel request refers explicitly to Article 3.7 but does not mention Article 3.1.

7.239. As we have indicated, the Dominican Republic contends that, since Costa Rica did not mention in its panel request that Article 3.1 was a legal basis for its claim concerning the CDC's determination of a threat of material injury, the Panel does not have jurisdiction to examine the arguments under Article 3.1 that Costa Rica put forward in its first written submission. In particular, in the Dominican Republic's view, any argument advanced by Costa Rica that the CDC failed to conduct an "objective examination" based on "positive evidence" in its determination of a threat of material injury does not fall within the scope of the Panel's terms of reference.[353] To support its argument, the Dominican Republic also indicates that, in contrast to its claim under Article 3.7, Costa Rica did, in its panel request, identify Article 3.1 as a legal basis for other claims.[354]

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[352] Dominican Republic's first written submission, para. 418.

[353] Dominican Republic's first written submission, para. 418. The Dominican Republic emphasizes that it is important for a panel request to be precise in identifying the legal basis of the complaint, and that identifying the legal basis fulfils the function of protecting the respondent's due process rights. (Dominican Republic's first written submission, paras. 416-417 (referring to Appellate Body Reports, *Thailand — H-Beams*, para. 97; and *US — Oil Country Tubular Goods Sunset Reviews*, para. 162)).

[354] The Dominican Republic adds that regardless of whether the error was inadvertent or not, the consequences must be borne by Costa Rica, as it is obliged under Article 6.2 of the DSU to provide "a brief summary of the legal basis of the complaint sufficient to present the problem clearly". (Dominican Republic's first written submission, para. 414).

7.240. Costa Rica responds that the Dominican Republic's argument is "irrelevant", since "Article 3.1 is an 'overarching' provision and 'informs the more detailed obligations in succeeding paragraphs'".[355] In addition, Costa Rica indicates that, as the Dominican Republic acknowledges, "objectivity" is a central component of the assessment that the Panel must make in accordance with the standard of review set forth in Article 17.6 of the Anti-Dumping Agreement. As such, there is nothing to prevent the Panel from considering Costa Rica's argument of a lack of "objectivity" in the CDC's determination of a threat of material injury.[356]

7.241. Having examined the parties' arguments and the relevant language in Costa Rica's panel request, we consider that Costa Rica has provided a brief summary of the legal basis of the claim sufficient to meet the minimum requirements of Article 6.2 of the DSU with respect to the claims concerning the CDC's determination of a threat of material injury under Articles 3.1 and 3.7 of the Anti-Dumping Agreement.

7.242. We recall first of all that the assessment of whether a "brief summary" is "sufficient to present the problem clearly" must take into consideration the nature and scope of the provisions of the covered agreements alleged to have been violated.[357] We also recall that this assessment requires an examination of the text of the request as a whole, and in certain cases, the statement of a claim may be inferred therefrom.[358] It is therefore our view that the fact that a complainant does not explicitly refer to a claim does not necessarily undermine a panel's jurisdiction to examine such a claim.

7.243. As we have noted, Costa Rica's panel request refers explicitly to Article 3.7 and not to Article 3.1 in its claim concerning the determination of a threat of material injury. However, we agree with previous panels that there is "a close normative relationship" between the different subparagraphs of Article 3, which together establish the relevant legal framework and disciplines that must be followed when conducting an injury and causation analysis.[359] It is our view that this normative relationship also includes the threat of injury analysis under Article 3.7. We also consider that Article 3.1 functions as an overarching provision that is directly linked with the more detailed obligations set forth in succeeding provisions[360] (including Article 3.7), and the inquiries foreseen under these provisions "serve as elements of a single, overall analysis" addressing the question of whether dumped imports are causing injury[361] or, as in the case at hand, a threat of injury. In particular, we agree that the basic principles of "positive evidence" and "objective examination", on which an injury determination under Article 3.1 must be based, do not "establish independent obligations which can be judged in the abstract, or in isolation and separately" from the obligations set out in the succeeding provisions but instead "inform the application of all the provisions of Article 3".[362] In the context of this overall examination, we therefore do not rule out that a claim made under a more specific provision, such as Article 3.7, may not be resolved without assessing the consistency of the situation at issue with the requirements of the overarching provision, namely Article 3.1.[363]

[355] Costa Rica's opening statement at the first meeting of the Panel, para. 40 (referring to Appellate Body Report, *Thailand — H-Beams*, para. 106).

[356] Costa Rica's first written submission, paras. 40-41.

[357] See para. 7.124. above. See also Appellate Body Report, *US — Countervailing Measures (China)*, para. 4.9.

[358] See para. 7.124. above.

[359] Panel Report, *US — Ripe Olives from Spain*, para. 7.193. See also Panel Report, *China — Cellulose Pulp*, para. 7.10.

[360] Appellate Body Reports, *US — Carbon Steel (India)*, para. 4.580; and *Thailand — H Beams*, para. 106. See also Panel Reports, *US — Ripe Olives from Spain*, para. 7.193; and *China — Cellulose Pulp*, para. 7.13.

[361] Panel Report, *US — Ripe Olives from Spain*, para. 7.193. See also Appellate Body Reports, *China — HP-SSST (Japan) / China - HP-SSST (EU)*, para. 5.141; *Korea — Pneumatic Valves (Japan)*, para. 5.193; and *Russia — Commercial Vehicles*, para. 5.54.

[362] Panel Report, *China - Cellulose Pulp*, paras. 7.12-7.13. See also Panel Report, *US — Ripe Olives from Spain*, para. 7.193.

[363] By analogy, we observe that panels in prior disputes have stated that a claim of inconsistency with Article 3.1 will not normally be made or resolved independently of other provisions of Article 3. (Panel Report, *China - Cellulose Pulp*, para. 7.13). See also Panel Reports, *Korea — Pneumatic Valves (Japan)*, para. 7.33; and *US — Ripe Olives from Spain*, para. 7.193.

7.244. In this case, Costa Rica's request closely follows the text of Article 3.7, stating that "the investigating authority based the determination of a threat of material injury not on facts but merely on allegation, conjecture or remote possibility".[364] It is our view that, in the light of this brief summary, it could be reasonably understood that Costa Rica's panel request indicates that its claim under Article 3.7 encompasses matters pertaining to the principles of "objective examination" and "positive evidence" under Article 3.1, on which a determination of a threat of injury must be based.

7.245. For the foregoing reasons, concerning the claims made under Article 3.1 and 3.7 of the Anti-Dumping Agreement, we conclude that, by identifying Article 3.7 in its panel request, and considering the text of the request as a whole and the function of Article 3.1 (i.e. that of an informative, overarching provision that is directly linked to the more specific obligations in the succeeding provisions, including Article 3.7), Costa Rica provided a brief summary of the legal basis of the complaint that is sufficient to satisfy the minimum requirements of Article 6.2 of the DSU.

7.246. We therefore reject the Dominican Republic's argument that the fact that Costa Rica identified Article 3.1 as a legal basis for other claims in its panel request indicates that it failed to make reference to the provisions of Article 3.1 in its claim under Article 3.7.[365] In particular, for the foregoing reasons, this fact does not preclude Costa Rica's claim under Article 3.7 from encompassing matters pertaining to whether the CDC's threat of injury analysis constituted an objective examination and whether its determination was based on positive evidence.

7.5.4.2 Applicable requirements of Articles 3.1 and 3.7 of the Anti-Dumping Agreement

7.247. Costa Rica bases its claims of violation on Articles 3.1 and 3.7 of the Anti-Dumping Agreement. We have already examined the applicable requirements of Article 3.1 in section 7.5.2.2 above.[366]

7.248. 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. The change in circumstances which would create a situation in which the dumping would cause injury must be clearly foreseen and imminent.[10] In making a determination regarding the existence of a threat of material injury, the authorities should consider, *inter alia*, such factors as:
>
> (i) a significant rate of increase of dumped imports into the domestic market indicating the likelihood of substantially increased importation;
>
> (ii) 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, taking into account the availability of other export markets to absorb any additional exports;
>
> (iii) whether imports are entering at prices that will have a significant depressing or suppressing effect on domestic prices, and would likely increase demand for further imports; and
>
> (iv) inventories of the product being investigated.
>
> No one of these factors by itself can necessarily give decisive guidance but 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.

[364] Costa Rica's panel request, para. 11.
[365] Dominican Republic's first written submission, para. 414.
[366] See in particular paras. 7.128. and 7.130. above.

> [10] One example, though not an exclusive one, is that there is convincing reason to believe that there will be, in the near future, substantially increased importation of the product at dumped prices.

7.249. Article 3.7 therefore requires that a determination of a threat of injury be based on "facts" and not merely on "allegation, conjecture or remote possibility". It also stipulates that the change in circumstances which would create a situation in which the dumping would cause injury "must be clearly foreseen and imminent". Article 3.7 also sets out four factors that the investigating authorities "should consider" when assessing whether a threat of injury exists.[367] Footnote 10 states that an "example" of "foreseen and imminent" circumstances is that there is convincing reason to believe that there will be, in the near future, substantially increased importation of the product at dumped prices.

7.250. The fact that the investigating authorities have "consider[ed]" the factors listed in Article 3.7 must be clear from the authority's respective determination, meaning that it must be apparent that "the investigating authorities have given attention to and taken into account those factors", and its consideration "must go beyond a mere recitation of the facts in question" and instead "put them into context".[368]

7.251. We also agree with previous panels and the Appellate Body that Article 3.7 combines positive requirements – a determination of threat of injury must "be based on facts" and show how a "clearly foreseen and imminent" change in circumstances would lead to further subject imports causing injury in the near future – with an express prohibition of a determination based "merely on allegation, conjecture or remote possibility".[369] As the panel in *US - Coated Paper (Indonesia)* observed:

> A threat of injury determination thus requires that the determination of the investigating authority clearly disclose its inferences and explanations in order to ensure that any projections or assumptions made by it regarding likely future occurrences, are adequately explained and supported by positive evidence on the record, and show a high degree of likelihood that projected occurrences will occur.[370]

7.252. We also agree that "[i]n determining the existence of a threat of material injury, the investigating authorities will also necessarily have to make projections relating to the 'occurrence of future events' since such future events 'can never be definitively proven by facts'".[371] However, "[n]otwithstanding this intrinsic uncertainty, a 'proper establishment' of facts in a determination of threat of material injury must be based on events that, although they have not yet occurred, must be 'clearly foreseen and imminent', in accordance with Article 3.7".[372] We also agree that "projections about future events need not necessarily reflect a continuation of trends that took place during the POI for a threat of injury determination to be based on facts as opposed to allegation, conjecture or remote possibility".[373]

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[367] However, we note that "consideration of each of the factors listed in Article[ ] 3.7 … is not mandatory" and, as such, "a failure to consider a factor at all, or a failure to adequately consider, a particular factor would not necessarily demonstrate a violation of the provisions". Rather, "[w]hether a violation existed would depend on the particular facts of the case, in light of the totality of the factors considered and the explanations given". (Panel Report, *US — Softwood Lumber VI*, para. 7.68).

[368] Panel Report, *US — Softwood Lumber VI*, para. 7.67 (referring to Panel Report, *Thailand — H-Beams*, paras. 7.161 and 7.170). (fn omitted)

[369] Panel Report, *US — Coated Paper (Indonesia)*, para. 7.261 (referring to Appellate Body Report, *US — Softwood Lumber VI (Article 21.5 - Canada)*, para. 96 (quoting Appellate Body Report, *US — Lamb*, para. 136)). See also Appellate Body Report, *Mexico - Corn Syrup (Article 21.5 — US)*, para. 85; and Panel Report, *Japan — DRAMs (Korea)*, para. 7.415.

[370] Panel Report, *US — Coated Paper (Indonesia)*, para. 7.261 (referring to Appellate Body Report, *US — Softwood Lumber VI (Article 21.5 - Canada)*, paras. 96 and 109). (fns omitted)

[371] Panel Report, *US — Coated Paper (Indonesia)*, para. 7.262.

[372] Panel Report, *US — Coated Paper (Indonesia)*, para. 7.262. Appellate Body Report, *Mexico — Corn Syrup (Article 21.5 - US)*, para. 85 (referring to Appellate Body Report, *US — Hot-Rolled Steel*, fn 59 and para. 56).

[373] Panel Report, *US — Coated Paper (Indonesia)*, para. 7.277.

7.5.4.3 Whether the Dominican Republic acted inconsistently with Articles 3.1 and 3.7

7.253. In the current case, it is not disputed that the CDC covered each of the factors listed in Article 3.7.[374] Therefore, in order to establish whether the CDC's determination of a threat of material injury is inconsistent with the requirements of Article 3.7, we will now separately examine each of the factors considered by the CDC, and the parties' arguments. However, in accordance with Article 3.7[375], our findings are based on our assessment of the CDC's determination as a whole, taking into account the facts under consideration and the analysis carried out.

7.5.4.3.1 Significant rate of increase of dumped imports

7.254. Costa Rica claims that the CDC's analysis merely considered two scenarios predicated on baseless assumptions.[376] Costa Rica also notes that the CDC did not "clearly" conclude that there was a likelihood of substantially increased imports, but simply assumed that imports would increase (directly or indirectly). As such, Costa Rica contends that the CDC failed to assess the likelihood of these scenarios occurring and what would happen in each of them.[377]

7.255. The Dominican Republic maintains that Costa Rica's argument is incorrect and irrelevant. In particular, the Dominican Republic indicates that the CDC's analysis of the first factor listed under Article 3.7 was based on an analysis of the volumes of dumped imports from Costa Rica during the POI.[378] The Dominican Republic maintains that the CDC's findings concerning the rate of increase of dumped imports "speak for themselves", since dumped imports increased by 156% between 2016 and 2017 and by a further 38% in the first quarter of 2018[379], and the figures show that Costa Rican imports continued to rise throughout 2018, increasing by 22% compared with the full-year figure for 2017.[380]

7.256. We observe that section 6 of the Final Technical Report contains the CDC's "[d]etermination of a threat of injury to the domestic industry".[381] In this section (in particular, subsection 6.1.1), the CDC analysed "the behaviour of imports of the investigated product during the period of investigation in both absolute and relative terms"[382], as well as "apparent domestic consumption" (ADC) (subsection 6.1.2). In particular, the CDC observed that "imports originating in Costa Rica increased considerably from 2016 onwards" and that in 2017 "these same imports grew significantly, with an increase of 156%". The CDC also noted that the investigated imports "follow[ed] an upward trend", increasing by 22% from January to December 2018 compared with 2017.[383] In terms of ADC, the CDC observed that "Costa Rican imports increased their share of ADC during the period under analysis. In 2016, the share of these imports was 3%[;] in 2017 it was 10% [; and] [d]uring the most recent period of the investigation [(January-April 2018)] it remained unchanged compared with the same period of the previous year, at 6%."[384] Based on this analysis, the CDC underscored the following facts: (a) "Costa Rican imports of the investigated product began to enter the Dominican Republic in November 2016" and "from then until December 2017, 48,522.95 MT were imported from that country"; (b) in the period 2016-2017, "the imports accounted for 26% of total imports and, during the most recent period of January-April 2018, they accounted for 28% of total imports"; and (c) in relative terms, "Costa Rican imports rose by 156% from 2016 to 2017 and, during the same period, their share of ADC increased by an average of 7%", and in the most recent period, "imports rose by 38% and their share of ADC increased by 6%".[385]

7.257. We recall that Article 3.7(i) requires the consideration of "a significant rate of increase of dumped imports into the domestic market *indicating* the likelihood of substantially increased

[374] See section 6.1 of the Final Technical Report (Exhibit DOM-3 (BCI)).
[375] We recall that no one factor listed under Article 3.7 can necessarily give decisive guidance, but the totality of the factors considered must lead to the conclusion regarding threat of material injury.
[376] Costa Rica's first written submission, para. 143.
[377] Costa Rica's first written submission, para. 144.
[378] Dominican Republic's first written submission, paras. 483-484.
[379] Dominican Republic's opening statement at the first meeting of the Panel, para. 46.
[380] Dominican Republic's opening statement at the first meeting of the Panel, para. 46.
[381] Final Technical Report (Exhibit CRI-3), section 6.
[382] Final Technical Report (Exhibit CRI-3), para. 289.
[383] Final Technical Report (Exhibit CRI-3), para. 292.
[384] Final Technical Report (Exhibit CRI-3), para. 299.
[385] Final Technical Report (Exhibit CRI-3), para. 361(i)-(iii).

importation".[386] In our view, the use of the term "*que indique*" ("indicating") (i.e. *que muestre algo con indicios*[387] (that demonstrates something with evidence)) implies that the rate of increase of imports must not be considered simply as a matter of fact. Rather, in the context of Article 3.7, this rate must actually indicate "the likelihood of substantially increased importation". In its aforementioned analysis of imports, the CDC provided a descriptive analysis of the rates of increase of imports from Costa Rica. However, we do not see how this analysis, which merely describes the previous import trend, can support a finding that imports would increase substantially.[388]

7.258. Costa Rica points out that the CDC's conclusion concerning the likely increase in Costa Rican imports can be found in section 17.6 of the CDC's Final Technical Report.[389] However, the Dominican Republic argues that this analysis "is far from the only factual basis for the CDC's conclusion".[390]

7.259. We note that in section 17.6 of the Final Technical Report, the CDC analysed "the likelihood of entry of further Costa Rican imports and the possible impact on the domestic industry".[391] In particular, the CDC "presents the projected change in demand for rods in the Dominican Republic for the period 2020-2022, for imports originating in Costa Rica" and in other countries, on the basis of three scenarios.[392]

7.260. For each of the three scenarios, the CDC makes projections about the change in the volume of imports up to the year 2022. In the "baseline" scenario, the CDC estimates that the volume of imports from Costa Rica will increase at a constant annual rate of 3%, reaching 39,769 MT in 2022.[393] In the "price adjustment" scenario, the CDC forecasts that the volume of imports from Costa Rica would stand at 45,038 MT in 2018 (an increase of 29% compared with 2017) and would continue to rise at the same rate as in the baseline scenario, reaching 50,024 MT in 2022.[394] In the "quantity adjustment" scenario, the CDC projected that the volume of imports from Costa Rica would rise to 65,805 MT in 2018 (an increase of 89% compared with 2017) and would continue to rise, reaching 134,621 MT in 2022.[395]

7.261. The CDC also explains how the different scenarios would affect the domestic industry.[396] Specifically, the CDC explains that "[i]n the event of a quantity adjustment, it is assumed that Costa Rican imports would increase by 90,000 MT over a three-year period".[397] The CDC also states that "in the event that ArcelorMittal used around half of its idle capacity, of 90,000 metric tonnes, over a three-year period, the impact on the value of the domestic industry would be significant".[398]

7.262. We note that the projected increases under the aforementioned scenarios were not part of the CDC's conclusions concerning the imminent entry into the Dominican Republic of further imports from Costa Rica at dumped prices in the short term.[399] In any event, we recall that any projection or assumption made by an investigating authority must be adequately explained and supported by positive evidence on the record.[400]

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[386] Emphasis added

[387] *Diccionario de la Real Academia Española*, definition of "*indicar*" ("indicate") https://dle.rae.es/indicar?m=form (accessed 14 April 2023), meaning 1. We note that the term "*que indique*" appears in the co-authentic English and French texts of the Anti-Dumping Agreement as "indicating" and "*qui dénote*", respectively.

[388] In this respect, we recall that an investigating authority's consideration of the factors set forth in Article 3.7 "must go beyond a mere recitation of the facts in question" and instead "put them into context". (See para. 7.250. above; and Panel Report, *US — Softwood Lumber VI*, para. 7.67).

[389] Costa Rica's first written submission, para. 141.

[390] Dominican Republic's first written submission, para. 483.

[391] Final Technical Report (Exhibit CRI-3), para. 408.

[392] Final Technical Report (Exhibit CRI-3), para. 409.

[393] Dominican Republic's response to Panel question No. 35, paras. 117-118.

[394] Dominican Republic's response to Panel question No. 35, para. 121.

[395] Dominican Republic's response to Panel question No. 35, para. 122.

[396] Final Technical Report (Exhibit CRI-3), para. 410.

[397] Final Technical Report (Exhibit CRI-3), para. 411.

[398] Final Technical Report (Exhibit CRI-3), para. 412.

[399] See Final Technical Report (Exhibit CRI-3), para. 362.

[400] See para. 7.251. above. See also Panel Report, *US - Coated Paper (Indonesia)*, para. 7.261 (referring to Appellate Body Report, *US — Softwood Lumber VI (Article 21.5 - Canada)*, para. 109).

7.263. The CDC's analysis, however, does not mention how it determined the rates of increase of imports used in each of the three scenarios to project the alleged progression in imports up to the year 2022.[401] At the same time, the projected increase in imports from Costa Rica in the "baseline" scenario (i.e. an annual increase of 3%) cannot, in our view, be considered a substantial increase in imports, and the CDC does not explain which of the scenarios is the most likely to occur.[402] In particular, it is not clear from the record in which of these scenarios the CDC considered there to be "a significant rate of increase of imports … indicating the likelihood of substantially increased importation".

7.264. Furthermore, we observe that the facts available on the record do not appear to support several of the assumptions on which the CDC based its projections. In particular, in the "price adjustment" scenario, the CDC's assumptions about the change in ADC "[are] based on … an annual growth rate of 3.0% generated by growth in [gross domestic product]".[403] However, we observe that the CDC itself states that "in 2016 and 2017, ADC [had] declined by 1.36% and 22%"[404] and, as a result, we do not see how the facts on the record support the assumption that the investigated product's ADC would increase at a constant annual rate of 3%. Furthermore, the CDC makes the assumptions that "[i]f the domestic industry reduced its price by [[***]], it can be assumed that growth in the domestic industry's sales of local rods could be maintained at its historical annual rate of [[***]]"[405] and that this would lead to an "increase in the total volume of rods".[406] However, we observe that, in 2016, the domestic industry's prices fell by 17.5%[407], its ADC declined by 1.36%[408] and its sales volumes increased by 9.94% compared with 2015.[409] Based on these facts, it is not clear to us that a [[***]] decline in the domestic industry's prices would result in an increase in domestic consumption and only a modest increase in the domestic industry's sales volumes, as the CDC estimated. Consequently, any projection of future imports made on the basis of these assumptions would not appear to be based on the facts on the record.

7.265. Similarly, in the "quantity adjustment" scenario, we observe that the CDC makes a series of assumptions about the volume of imports from Costa Rica that are not aligned with the facts available on the record. In particular, the CDC estimated that under this scenario imports from Costa Rica would stand at 65,805 MT in 2018.[410] However, the record shows that, for this period (January-December 2018), the CDC recorded a rise in Costa Rican imports to 42,462.32 MT (i.e. 1.5 times lower than the amount estimated by the CDC as the basis for its projections).[411]

[401] The Dominican Republic explains that this analysis was supported by an internal economic analysis and seeks to explain the methodology used in its responses to the Panel's questions (see Dominican Republic's responses to Panel questions No. 35 and No. 101). However, these explanations cannot be found in any part of the CDC's determination. We recall that "[a] threat of injury determination thus requires that the determination of the investigating authority clearly disclose its inferences and explanations in order to ensure that any projections or assumptions made by it regarding likely future occurrences, are adequately explained and supported by positive evidence on the record" (Appellate Body Report, *US — Softwood Lumber VI (Article 21.5 - Canada)*, para. 7.261).

[402] In its analysis of the "likelihood of entry of further Costa Rican imports and the possible impact on the domestic industry", in section 7.16 of the Final Technical Report, the CDC also explains that it conducted a Monte Carlo analysis, which "involves the simulation of 5,000 quantity variations that could be applied by ArcelorMittal over a three-year period, which may range from 60,000 MT (an annual increase of 20,000 MT) to 120,000 MT (an annual increase of 40,000 MT)". (Final Technical Report (Exhibit CRI-3), para. 413). We note that, based on this analysis, the CDC came to conclusions with respect to the likelihood of losses and loss of value that the domestic industry would suffer. As such, this analysis has nothing to do with the increase in the imports.

[403] Dominican Republic's response to Panel question No. 101, para. 165.

[404] Final Technical Report (Exhibit CRI-3), para. 296.

[405] Final Technical Report (confidential version) (Exhibit DOM-3 (BCI)), para. 346.

[406] Final Technical Report (Exhibit CRI-3), para. 346. See also Dominican Republic's response to Panel question No. 101, para. 165, in which the Dominican Republic explains that it assumes that "the 17% depression in the price of domestic industry rods … would lead to an increase of 5.8% in total demand for rods".

[407] Final Technical Report (Exhibit CRI-3), table 22.

[408] Final Technical Report (Exhibit CRI-3), table 18.

[409] Final Technical Report (Exhibit CRI-3), table 26.

[410] Final Technical Report (confidential version) (Exhibit DOM-3 (BCI)), table 40.

[411] Concerning the fact that the CDC took into account information on AlcelorMittal's contractual obligations with respect to new supplies when considering the scenarios alleged by the Dominican Republic, we note that the contract refers to sales in an amount of 3,000 MT/month (which implies an annual total of 36,000 TM) and a strategy to achieve a market share of 15%, with the market estimated to represent

Therefore, any projection of future imports drawn from this inaccurate volume of 65,805 MT is not, in our view, based on the facts on the record.

7.5.4.3.2 Sufficient disposable, or an imminent, substantial increase in, capacity

7.266. Costa Rica argues that the approaches relied upon by the CDC are not sufficient to demonstrate a likelihood of the exporting company's freely disposable capacity resulting in a substantial increase in exports, and therefore that the CDC's conclusion is not based on an objective assessment of positive evidence.[412] Moreover, Costa Rica states that the CDC does not adequately explain why other markets would not absorb any possible increase in the installed capacity use of the exporting company.[413]

7.267. The Dominican Republic refutes these arguments. First, the Dominican Republic states that none of Costa Rica's arguments objects to the CDC's conclusion that there was freely disposable capacity in Costa Rica.[414] Second, the Dominican Republic notes that Article 3.7 does not require a "clear" determination that exports will occur in the future[415]; rather, it requires an investigating authority to examine whether these exports are "likely" to occur.[416] Third, the Dominican Republic submits that Article 3.7 gives the investigating authority some discretion to draw reasonable inferences from the facts before it, including to make assumptions about the occurrence of future events.[417]

7.268. We note that the CDC determined that "according to the data provided by ArcelorMittal Costa Rica, the company ha[d] the capacity to produce about 350,000 metric tonnes of the product per year" and that, during the POI, it had not reported any changes in its installed capacity.[418] Moreover, after comparing this with the exporting company's actual capacity utilization, the CDC noted that the company "ha[d] a large freely disposable capacity of 55% in the most recent period, which would allow it to increase the volume of production and thus of exports of the product under investigation in the short term".[419] In this regard, the CDC further noted that "the existing contractual obligations between the exporting company and various Dominican importers [wa]s a clear indication" of "[the company's] intention to continue to export its products to the Dominican Republic in the short term".[420] With respect to export markets other than the Dominican Republic, the CDC also carried out an analysis of the export volumes of the exporting company to various markets, and analysed the conditions in some of these markets.[421] Thus, for Nicaragua and Honduras, the CDC observed a drop in imports of construction materials, and for the United States, it noted the imposition of additional tariffs of 25% on aluminium and steel.[422] The CDC also noted that "ArcelorMittal's strategy [wa]s to place its products in other countries on account of the limitations … in Costa Rica's market, in which [the company had] seen its sales replaced by imported products and ha[d] lost market share".[423] Furthermore, the CDC found that "since 2016,

320,000 MT per year (which implies a maximum volume of 48,000 MT). As such, this does not come close to the estimated volume of imports from Costa Rica provided by the CDC in its "quantity adjustment" scenario.

[412] Costa Rica's opening statement at the first meeting of the Panel, para. 52. Costa Rica explains that many companies are export-oriented, but that this in itself is insufficient to conclude that there is a likelihood of substantially increased exports by the company in question and that the increase would be directed to a specific market. (See Costa Rica's first written submission, para. 151).

[413] Costa Rica's first written submission, para. 152. Costa Rica adds that the CDC also ignored the behaviour of exports to the Dominican Republic from other countries and simply assumed that Costa Rica's exports would displace exports from other countries. (See Costa Rica's first written submission, para. 153).

[414] Dominican Republic's first written submission, para. 503.

[415] Dominican Republic's second written submission, para. 198.

[416] Dominican Republic's second written submission, para. 198; and Panel Report, *US — Coated Paper (Indonesia)*, paras. 7.261-7.262.

[417] Dominican Republic's second written submission, para. 198; and Appellate Body Report, *Mexico - Corn Syrup (Article 21.5 - US)*, para. 85.

[418] Final Technical Report (confidential version) (Exhibit DOM-3 (BCI)), para. 310.

[419] Final Technical Report (confidential version) (Exhibit DOM-3 (BCI)), para. 311.

[420] Final Technical Report (confidential version) (Exhibit DOM-3 (BCI)), para. 325.

[421] Final Technical Report (confidential version) (Exhibit DOM-3 (BCI)), paras. 319-320 and table 21.

[422] Final Technical Report (confidential version) (Exhibit DOM-3 (BCI)), para. 320.

[423] Final Technical Report (confidential version) (Exhibit DOM-3 (BCI)), para. 327. In this regard, the CDC noted that, "as a result of Costa Rica reducing the tariff on imports of steel rod from 14% to 5% in 2011, the market share of ArcelorMittal, the only company producing the product under investigation in Costa Rica, fell from 75% to around 50%". (Final Technical Report (confidential version) (Exhibit DOM-3 (BCI)), para. 313).

the Dominican Republic has been an attractive destination for ArcelorMittal exports and was the main market for its sales abroad during the period investigated".[424] On the basis of its analysis, the CDC concluded that "ArcelorMittal ha[d] significant productive capacity and, therefore, could continue to increase its exports to the Dominican Republic within a short period of time".[425]

7.269. Thus, it seems clear to us that the CDC considered the installed capacity of the exporting company, how much of it was used and how much was freely disposable, and took into account the situations in other historical export markets.

7.270. Furthermore, contrary to what Costa Rica asserts, we see nothing in Article 3.7 that requires an investigating authority to explain why it considers that a company's export strategy would necessarily lead it to export to a particular market, that requires it to analyse in detail the reasons why other markets would not absorb any increase in the use of spare capacity or that requires it to assess whether exports from other countries are likely to increase. Article 3.7 (ii) provides only that the "freely disposable … capacity of the exporter" must indicate "the likelihood" of substantially increased importation. In the case at hand, the CDC concluded that the exporting company "*ha[d] significant productive capacity* and, therefore, *could continue* to increase its exports to the Dominican Republic within a short period of time".[426]

7.5.4.3.3 Price depression and suppression

7.271. Costa Rica argues that the price effects analyses that the CDC conducted in its threat of injury analysis and its conclusions are retrospective and do not concern the "prospective effect" of imports on domestic prices, as required by Article 3.7 (iii). Moreover, Costa Rica claims that the CDC's analysis is deficient because the CDC failed to take into account other factors, such as the prices of imports from other sources and the fact that the domestic industry's price was on an upward trend.[427]

7.272. The Dominican Republic does not dispute Costa Rica's assertion that the CDC's conclusions on prices do not refer to their future effects, but it stresses that the CDC conducted several additional analyses estimating the likely effects of the volume and prices of the dumped imports from Costa Rica. According to the Dominican Republic, all the analyses carried out by the CDC on the price effects during the POI and on the effects of the estimated future prices were part of the CDC's threat of material injury determination.[428]

7.273. The Dominican Republic submits that, in any event, the third factor in Article 3.7 essentially refers to prices during the POI (i.e. whether imports "are entering" at prices that will have a depressing or suppressing effect on prices), and contends that undercutting is an important consideration in this regard.[429] In this respect, the Dominican Republic adduces that the CDC's analysis of the effect of reducing the prices of the dumped imports took into account data for 2017 but also indicated what would have to happen in terms of price decreases in order to maintain sales volumes. Thus, the Dominican Republic submits that the situation during the POI is a relevant basis from which future events can be inferred.[430] Accordingly, the Dominican Republic states that all the analyses carried out by the CDC on the price effects during the POI and on the effects of estimated future prices were part of the threat of material injury determination.[431]

7.274. We note that Article 3.2 requires the authorities to consider "whether there has been a significant price undercutting", or whether the effect of such imports is "to depress" prices or "prevent" price increases. Moreover, Article 3.7 (iii) provides that investigating authorities should consider "whether imports are entering at prices that will have a significant depressing or suppressing effect on domestic prices, and would likely increase demand for further imports".

[424] Final Technical Report (confidential version) (Exhibit DOM-3 (BCI)), para. 327.
[425] Final Technical Report (confidential version) (Exhibit DOM-3 (BCI)), para. 328.
[426] Final Technical Report (confidential version) (Exhibit DOM-3 (BCI)), para. 328. (emphasis added)
[427] Costa Rica's second written submission, paras. 162 and 173.
[428] Dominican Republic's first written submission, para. 528.
[429] Dominican Republic's first written submission, para. 523.
[430] Dominican Republic's first written submission, para. 527.
[431] Dominican Republic's first written submission, para. 528.

Therefore, in contrast to the analysis required by Article 3.2, the consideration required by Article 3.7 (iii) is essentially prospective.

7.275. In section 7.5.2 above, we examined the CDC's analysis of the effects of Costa Rica's imports on domestic prices during the POI and concluded that Costa Rica failed to establish that the CDC's examination of price undercutting and price suppression was inconsistent with Articles 3.1 and 3.2. We agree with previous panels that the factors set out in Article 3.2 may be relevant when considered in a "predictive" context in making a threat of material injury determination.[432]

7.276. In any event, we note the Dominican Republic's argument that the CDC did carry out additional analyses estimating the likely volume and price effects of the dumped imports. In this regard, the CDC noted the following:

> [F]or the domestic industry not to be displaced by Costa Rican dumped imports, it would have to reduce the price by approximately [[***]]. If the domestic industry reduced its price by [[***]], it can be assumed that growth in the domestic industry's sales of local rods could be maintained at its historical annual rate of [[***]], while ArcelorMittal would account for the rest of the increase in the total volume of rods. Failing that, the combination of the price reduction to maintain the sales volume would cause the domestic industry's sales value to fall by [[***]], while the value of the domestic industry would decline by [[***]].[433]

7.277. The Dominican Republic also refers to the "additional analyses" in paragraphs 408-415 and 518-519 of the Final Technical Report.[434] In paragraph 410, the CDC notes that "[i]n the price adjustment scenario, the decline in the price of rods would increase their consumption to almost [[***]] thousand MT in 2022, of which slightly more than [[***]] thousand would be supplied by the domestic industry and 121,000 by the various sources of imports".[435] Further on, in paragraph 412, the CDC concludes that "[i]f the domestic industry decided not to reduce prices, it would allow its domestic sales to be displaced".[436]

7.278. We understand that these conclusions of the CDC are based on the projections that we have already evaluated above and determined not to be based on facts.[437] We therefore do not believe that the references cited by the Dominican Republic serve to support its argument that the CDC did consider the factor in Article 3.7 (iii).

7.5.4.3.4 Inventories of the product being investigated

7.279. Costa Rica argues that the exporting company's inventory levels did not give cause to believe that there would be a substantial increase in imports of the product at dumped prices in the near future.[438] Costa Rica further maintains that, contrary to the Dominican Republic's contention, there is nothing in the CDC analysis to suggest that the inventory level was an indication of the threat of injury and that, in fact, the CDC dismissed the inventory levels as irrelevant and did not consider them to be indicative of such a threat.[439]

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[432] Panel Report, *US — Coated Paper (Indonesia)*, para. 7.313 ("nothing in Article 3.7 … require[s] an investigating authority to have found negative price effects during the POI as a prerequisite for concluding that negative price effects will occur in the imminent future"); and Panel Report, *US – Softwood Lumber VI*, para. 7.111 ("[w]ith respect to the factors set out in Article 3.2 of the AD Agreement … we see even less basis for concluding that they must be directly considered in a 'predictive' context in making a threat of material injury determination. Th[is] provision[] requires the investigating authorities to consider events in the past, during the period investigated, in making a determination regarding present material injury").

[433] Final Technical Report (confidential version) (Exhibit DOM-3 (BCI)), para. 346.

[434] Dominican Republic's first written submission, para. 522.

[435] Final Technical Report (confidential version) (Exhibit DOM-3 (BCI)), para. 410.

[436] Final Technical Report (confidential version) (Exhibit DOM-3 (BCI)), para. 412.

[437] See paras. 7.263. -7.265. above.

[438] Costa Rica's first written submission, paras. 167-169.

[439] Costa Rica's second written submission, paras. 186-187. Costa Rica adds that the Dominican Republic incorrectly confuses inventory (which, by definition, already existed, hence the use of the term "*existencias*" in Spanish) with the idle capacity. (Costa Rica's second written submission, para. 186).

7.280. The Dominican Republic submits that the CDC determined that the exporting company's inventory level was not a decisive factor in determining the threat of material injury, since the CDC found that the company did not keep a large stock. Rather, according to the Dominican Republic, the CDC determined that the company would start production once an order had been placed.[440] The Dominican Republic adds that the CDC determined that the exporter had a significant free production capacity of 55%, which clearly demonstrated that production and exports could significantly increase in the short term.[441]

7.281. We note that, in its analysis of inventories of the product being investigated, the CDC found that "the increase in ArcelorMittal's inventories [wa]s in line with the increase in its production of the product under investigation, accounting for approximately [[***]]% to [[***]]% of the total production of the product at the end of each financial year".[442] The CDC also noted that, notwithstanding the behaviour of ArcelorMittal's inventory levels, the company's idle production capacity, which stood at 55% during the most recent period, would enable it to increase production, and thus its exports, within a short period of time.[443] The CDC also emphasized that "ArcelorMittal manufacture[d] after price negotiations and the receipt of purchase orders, which would justify the inventory levels" of the company.[444]

7.282. Costa Rica's argument centres on the fact that, in its view, the inventory level did not give cause to believe that there would be a substantial increase in imports of the product at dumped prices in the near future.[445] However, we note that the CDC did not reach that conclusion. Rather, the CDC considered that the exporting company did not, in fact, keep a large inventory owing to the nature of its production (in other words, "ArcelorMittal manufacture[d] after price negotiations and the receipt of purchase orders"), but that this did not preclude reaching the conclusion that, on the basis of the company's freely disposable capacity, it could increase its production, and consequently its exports, within a short period of time.

7.283. In addition, we recall that no one of the factors set out in Article 3.7 "by itself can necessarily give decisive guidance but the totality of the factors considered must lead to the conclusion that further dumped exports are imminent". Consequently, the mere fact that the exporting company's inventory level was not, in itself, an indicator of a threat of injury does not, in our view, mean that, in combination with other factors, it could not serve as a basis for concluding that further dumped exports were imminent.

7.5.4.3.5 Whether the CDC's determination, based on the totality of the factors considered, is consistent with Article 3.7

7.284. We recall that Article 3.7 provides that the totality of the factors considered by an investigating authority must lead to the conclusion that "further dumped exports are imminent" and that, unless protective action is taken, "material injury would occur". Accordingly, investigating authorities should not only determine whether "further … imports are imminent" but also reach a conclusion on whether, unless protective action is taken, "material injury would occur".[446]

7.285. Regarding the first element of this examination, we note that, in its threat of injury determination, the CDC stated that there were "sufficient elements" to conclude that "the entry into the Dominican Republic of further imports from Costa Rica at dumped prices in the short term [was imminent]".[447] The CDC based its conclusion on the following considerations:

a. imports from Costa Rica accounted for 26-28% of total import volumes during the POI;

[440] Dominican Republic's first written submission, para. 421.
[441] Costa Rica's second written submission, para. 186.
[442] Final Technical Report (confidential version) (Exhibit DOM-3 (BCI)), para. 357.
[443] Final Technical Report (confidential version) (Exhibit DOM-3 (BCI)), para. 359.
[444] Final Technical Report (confidential version) (Exhibit DOM-3 (BCI)), para. 360.
[445] Costa Rica's first written submission, para. 167.
[446] Panel Report, *Mexico — Corn Syrup*, para. 7.125. (emphasis omitted)
[447] Final Technical Report (confidential version) (Exhibit DOM-3 (BCI)), para. 362.

b. in relative terms, these imports grew by 156% from 2016 to 2017, and by 38% in the most recent period;

c. ArcelorMittal has the capacity to produce about 350,000 MT of the product under investigation per year, and in 2015, it used only 26.7% of its productive capacity, while in 2016 and 2017, the utilization rate rose to 38.5% and 48.1%, respectively, as part of an upward trend in the utilization of its productive capacity;

d. ArcelorMittal had a freely disposable capacity of 55% in the most recent period;

e. ArcelorMittal has the capacity to replace all other exporters of rods to the Dominican Republic and to replace a significant share of domestic production;

f. the prices of imports from Costa Rica depress domestic sales prices, adversely affecting the economic and financial indicators of the domestic industry;

g. ArcelorMittal increased its utilization of production capacity at the same time as it began to export to the Dominican Republic, which is the main destination for the company's exports;

h. ArcelorMittal's loss of domestic market share;

i. in 2017, ArcelorMittal requested the initiation of a safeguard investigation concerning steel bars and rods on the grounds that it was suffering serious damage because of the product's increasing trend in the domestic market;

j. the drastic change in the destination of ArcelorMittal's sales from the domestic market to overseas;

k. even though, in 2018, ArcelorMittal increased its export sales to other markets, the Dominican Republic continued to be its main export market;

l. ArcelorMittal is contractually obliged to supply a minimum monthly average of 3,000 MT of products (including the product under investigation) and to increase its market share by [[***]] by the end of 2018;

m. notwithstanding the behaviour of ArcelorMittal's inventory levels, its idle production capacity would enable it to increase production, and thus its exports; and

n. owing to limitations in Costa Rica's domestic market, ArcelorMittal's strategy is to place its products in other countries.[448]

7.286. It is clear from the CDC's determination that the key bases for its threat of injury determination are the conclusions that the exporting company "ha[d] a freely disposable capacity of 55%" and that it had "increased its share of the Dominican market in recent years".[449] However, having examined the CDC's analysis of the rate of increase of imports, we do not see how the historical increase in imports can support its conclusion of a threat of injury. As discussed above, the CDC merely described the historical rates of increase in imports from Costa Rica, without explaining why they were indicative of a substantial increase in imports. Therefore, while the facts on which the CDC relied could support the conclusion that dumped imports would remain at the levels reached in the past, we do not see how this could be sufficient to indicate the likelihood of a substantial increase in imports and thus to support the conclusion of a threat of injury.[450] In addition,

[448] Final Technical Report (confidential version) (Exhibit DOM-3 (BCI)), para. 361.
[449] Final Technical Report (confidential version) (Exhibit DOM-3 (BCI)), para. 362.
[450] Moreover, while events that took place during the POI "do not limit the scope of projections that the authority may make concerning future events" (see Panel Report, *US — Coated Paper (Indonesia)*, para. 7.277), we recall our findings in paragraphs 7.262. -7.265. above that the CDC's projections about the change in the volume of imports up to the year 2022 were not part of the CDC's conclusions regarding a likelihood of substantially increased importations and that, in any event, some of the conclusions and/or elements on which the CDC based these projections were not supported by the facts on the record or pointed

we note that, although imports from Costa Rica increased significantly from 2016 onwards, particularly in 2017 (when they were 156% higher than the year before), import growth slowed in 2018 to 22%.[451]

7.287. As we have noted, the CDC also mentions the freely disposable capacity of the exporting company to support its determination of a threat of injury. Specifically, the CDC noted that ArcelorMittal had "a large freely disposable capacity of 55% in the most recent period, which would allow it to increase the volume of production and thus of exports of the product under investigation in the short term".[452] In this context, the CDC also noted that the increase in the utilization of the exporting company's productive capacity had coincided with when it began exporting to the Dominican Republic, which was the destination for between 32% and 40% of the company's exports during the POI.[453] However, we consider that the exporter's freely disposable capacity alone cannot support a conclusion that further exports are "imminent". While an existing production capacity may be indicative of potential to export, we do not see how this fact on its own can substantiate the "imminence" of further exports.

7.288. The CDC attempts to bolster this conclusion with an analysis of the competitive pressures experienced by ArcelorMittal in the Costa Rican domestic market. Thus, the CDC refers to a study by the Government of Costa Rica that estimates the effect of reducing the tariff on imports of steel rod in 2011 and the resulting loss of market share by ArcelorMittal in the Costa Rican market. According to the CDC, owing to these limitations in the domestic market, ArcelorMittal developed a strategy to place its products in other markets. The CDC also noted that ArcelorMittal requested the Costa Rican Government to initiate a safeguard investigation on rods.[454]

7.289. We do not see how these elements would support a conclusion of imminent further imports. The CDC does not explain why the effect of the 2011 tariff reduction is so long-lasting as to result in imminent further imports to the Dominican Republic in the future. Furthermore, the record reveals that, in absolute terms, ArcelorMittal's sales in Costa Rica's domestic market actually increased during the POI.[455] We also fail to see how the fact that a company requested a safeguard investigation would support the conclusion that further imports to the Dominican Republic were imminent. In other words, in our view, a possible safeguard measure would presumably alleviate the pressure exerted by imports on the domestic market and would enable domestic producers to increase their domestic sales. Therefore, the elements referred to by the CDC do not appear to support its conclusion that further imports are imminent.

7.290. The CDC also noted a number of elements that, in its view, supported its conclusion that further dumped exports were imminent. In particular, the CDC considered that the contractual obligations between ArcelorMittal and a Dominican importing company to supply a minimum monthly average of 3,000 MT of long steel products (including the product under investigation) and to increase its market share by [[***]]% by the end of 2018 was "a clear indication of the company's intention to continue to export its products to the Dominican Republic in the short term".[456] However, this alleged "intention" is not sufficient to support the conclusion that further exports are imminent. This contract also covered products other than the dumped product and related to an increase in imports over a period running up to 2018. Consequently, we fail to see how the contractual obligations cited by the CDC could support its conclusion that further exports are imminent in the future.

7.291. Regarding the second element to be addressed in a conclusion of a threat of injury, we note that "[a] determination that material injury would occur cannot … be made solely on the basis of

to growth that was not substantial. For these reasons, we further reject the Dominican Republic's argument that "the CDC attempted to conduct a quantitative analysis of what could occur in a baseline scenario of increased imports". (Dominican Republic's response to Panel question No. 91, paras. 91-92).

[451] Final Technical Report (Exhibit CRI-3), para. 292.
[452] Final Technical Report (confidential version) (Exhibit DOM-3 (BCI)), para. 361 (v).
[453] Final Technical Report (confidential version) (Exhibit DOM-3 (BCI)), para. 361 (ix).
[454] Final Technical Report (confidential version) (Exhibit DOM-3 (BCI)), paras. 314-315.
[455] Final Technical Report (confidential version) (Exhibit DOM-3 (BCI)), table 21.
[456] Final Technical Report (confidential version) (Exhibit DOM-3 (BCI)), paras. 325 and 361 (xiv).

consideration of the Article 3.7 factors".[457] Rather, an investigating authority must also "include consideration of the likely impact of further dumped imports on the domestic industry".[458]

7.292. Having examined the CDC's threat of injury determination, we note that the CDC calculated that "for the domestic industry not to be displaced by Costa Rican dumped imports, it would have to reduce the price by approximately 17%".[459] However, this determination does not contain any analysis of the future development of the domestic industry in the light of this hypothetical decrease. We also note that the CDC concluded that "[i]f the domestic industry decided not to reduce prices, it would allow its domestic sales to be displaced [and that] [f]or example, in the event that ArcelorMittal used around half of its idle capacity, 90,000 metric tonnes, over a three-year period, the impact on the value of the domestic industry would be significant ".[460] In other words, the company's market share would follow a downward trend over the three-year period, and the annual average domestic sales value would fall, as would the "value of the company".[461] We note that both conclusions are based on the CDC's projections about the change in the volume of imports up to the year 2022. However, as we have found above, some of the conclusions and/or elements on which the CDC based these projections were not supported by the facts on the record.[462]

7.293. The Dominican Republic notes the CDC's conclusion that:

> [G]iven the high elasticity of substitution between imported and domestically-produced rods due to the product's homogeneity, the domestic industry would have to reduce its prices significantly[, since, f]or example, in 2017, the average c.i.f. price of the rod exported by ArcelorMittal from Costa Rica was USD 536.8 per MT, which is [[***]] % lower than the average price of the rod manufactured and sold by the domestic industry.[463]

7.294. We fail to see how the mere fact that the price of the imported products is lower necessarily implies a significant decline in the domestic industry's prices, especially considering the upward trend in the prices of these imports noted by the CDC.[464] We recall that any projections or assumptions made by an investigating authority regarding likely future occurrences must be adequately explained and supported by positive evidence on the record and show a high degree of likelihood that projected occurrences will occur.[465] We do not see how the CDC's conclusion satisfies this requirement.

7.295. Lastly, on a general level, we note that the CDC's determination did not conclude that the situations described above would cause "material injury" to the domestic industry unless measures are imposed.

7.296. Consequently, bearing in mind the factors considered by the CDC and the explanations provided in its threat of injury determination, we conclude that the CDC's threat of injury determination is inconsistent with Articles 3.1 and 3.7 of the Anti-Dumping Agreement.

7.297. Costa Rica raises an additional argument that the threat of injury determination did not satisfy the applicable requirements of Article 3.7 because the CDC "failed to identify a clearly

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[457] Panel Report, *Mexico — Corn Syrup*, para. 7.125.

[458] Panel Report, *Mexico — Corn Syrup*, para. 7.125. We agree with the panel's statements in *Mexico — Corn Syrup* that:

> "[The Article 3.7 factors] are not … relevant to a decision concerning what the 'consequent impact' of continued dumped imports on the domestic industry is likely to be. However, it is precisely this latter question - whether the 'consequent impact' of continued dumped imports is likely to be material injury to the domestic industry - which must be answered in a threat of material injury analysis. Thus, we conclude that an analysis of the consequent impact of imports is required in a threat of material injury determination".
> (Panel Report, *Mexico — Corn Syrup*, para. 7.126).

[459] Final Technical Report (Exhibit CRI-3), para. 346.

[460] Final Technical Report (confidential version) (Exhibit DOM-3 (BCI)), para. 412.

[461] Final Technical Report (confidential version) (Exhibit DOM-3 (BCI)), para. 412.

[462] See paras. 7.264. -7.265. above.

[463] Dominican Republic's response to Panel question No. 93, para. 99 (quoting Final Technical Report, paras. 344-345; and Essential Facts Report (Exhibit DOM-2 (BCI)), para. 259).

[464] Final Technical Report (confidential version) (Exhibit DOM-3 (BCI)), table 22.

[465] See para. 7.251. above.

foreseen and imminent change in circumstances".[466] The parties disagree over whether Article 3.7 requires a specific analysis on this issue.[467] In our view, an assessment of whether the change in circumstances was "clearly foreseen and imminent" in a specific situation "in which the dumping would cause injury" is possible only when the situation in question is identified by the investigating authority. In this case, however, the investigating authority failed to properly evaluate the consequent impact of future dumped imports on the domestic industry or to identify a situation in which the dumping would cause injury. We therefore express no view on this argument by Costa Rica.

7.5.4.4 Conclusion

7.298. In sum, on the basis of all the foregoing considerations, we find that 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.

7.5.5 Costa Rica's claims under Articles 3.1 and 3.5 of the Anti-Dumping Agreement

7.299. Costa Rica claims that the CDC's causation analysis is neither adequate nor sufficient to establish that Costa Rica's imports had "the characteristics of a 'genuine and substantial' cause of threat of injury".[468] In particular, Costa Rica asserts that the CDC's examination was limited to assessing whether there were other factors causing injury to the domestic industry at the same time; in other words, a non-attribution analysis.[469] However, according to Costa Rica, although the non-attribution assessment is mandatory, it is in itself insufficient to meet the obligation under Article 3.5 of the Anti-Dumping Agreement.[470] With respect to this non-attribution analysis, Costa Rica claims that the CDC's conclusions on "other factors" that were causing injury to the domestic industry at the same time do not amount to an objective examination based on positive evidence.[471]

7.300. The Dominican Republic responds that the CDC established a causal link between the dumped imports and the performance of the domestic industry with respect to individual injury factors and the performance as a whole.[472] Moreover, the Dominican Republic states that this analysis is spread across several parts of the CDC's determination, since there is no obligation for an investigating authority to present all the facts and analyses in its determination under one heading.[473] Regarding the non-attribution obligation, the Dominican Republic maintains that Costa Rica's arguments are unfounded.[474] In particular, the Dominican Republic indicates that the CDC examined other known factors that could have injured the domestic industry at the same time as the dumped imports and found that no factor broke the established causal relationship.[475]

7.5.5.1 Applicable requirements of Articles 3.1 and 3.5 of the Anti-Dumping Agreement

7.301. Costa Rica bases its claims of violation on Articles 3.1 and 3.5 of the Anti-Dumping Agreement. We have already examined the applicable requirements of Article 3.1 in section 7.5.2.2 above.[476]

7.302. Article 3.5 of the Anti-Dumping Agreement provides:

[466] Costa Rica's second written submission, para. 135.
[467] Costa Rica's response to Panel question No. 108, para. 52; and Dominican Republic's response to Panel question No. 107, paras. 205-207.
[468] Costa Rica's first written submission, para. 181.
[469] Costa Rica's first written submission, para. 179.
[470] Costa Rica's first written submission, para. 180.
[471] Costa Rica's first written submission, para. 191.
[472] Costa Rica's first written submission, para. 191.
[473] Dominican Republic's first written submission, para. 373.
[474] Dominican Republic's first written submission, paras. 370 and 385.
[475] Dominican Republic's opening statement at the first meeting of the Panel, para. 58.
[476] See in particular paras. 7.128. and 7.130. above.

> It must be demonstrated that the dumped imports are, through the effects of dumping, as set forth in paragraphs 2 and 4, causing injury within the meaning of this Agreement. The demonstration of a causal relationship between the dumped imports and the injury to the domestic industry shall be based on an examination of all relevant evidence before the authorities. The authorities shall also examine any known factors other than the dumped imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the dumped imports. Factors which may be relevant in this respect include, *inter alia*, the volume and prices of imports not sold at dumping prices, contraction in demand or changes in the patterns of consumption, trade restrictive practices of and competition between the foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry.

7.303. Article 3.5 thus requires investigating authorities to ascertain whether the dumped imports are causing injury to the domestic industry ("causation") and, as part of that causation analysis, it also requires investigating authorities to ensure that they do not attribute to dumped imports the injury caused by known factors other than dumping ("non-attribution").[477]

7.304. The first sentence of Article 3.5 requires that an investigating authority demonstrate that the dumped imports are, "through the effects of dumping, as set forth in [Articles 3.2 and 3.4]", causing injury. This provision thus requires the authority to bring together the findings arrived at under Articles 3.2 and 3.4 to ascertain whether "the dumped imports are … causing injury".[478]

7.305. With respect to the demonstration of a causal relationship within the framework of a threat of injury determination, we recall the Appellate Body's statement that this positive requirement implies "that an investigating authority demonstrate that further dumped … imports would cause injury".[479] We also note that a panel should "examine whether the [investigating authority] identified and explained the positive evidence establishing a genuine and substantial relationship of cause and effect between imports and threat of injury".[480]

7.306. The second sentence of Article 3.5 requires the authority to demonstrate a causal relationship between the dumped imports and the injury "based on an examination of all relevant evidence before [it]".

7.307. The third sentence of Article 3.5 requires an investigating authority to examine "any known factors" that are causing injury at the same time as dumped imports, and ensure that it does not attribute the injury caused by those other factors to the dumped imports. The fourth sentence of Article 3.5 lists some of the factors other than dumped imports that "may be relevant", and makes it clear, by using the words "include, *inter alia*", that the list is not exhaustive.[481]

7.308. Article 3.5 requires an authority to examine injurious factors other than dumping only when the factors are "known" to it. For a factor to be "known", it must have "come within the scope of knowledge" of the authority, which is typically the case when interested parties have substantiated the existence of such a factor during the anti-dumping proceedings.[482] In addition, we note that a factor cannot be known "in one stage of the investigation [such as in the dumping and injury analyses] and unknown in a subsequent stage [such as the causation analysis]".[483]

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[477] Panel Report, *Pakistan — BOPP Film (UAE)*, para. 7.429.

[478] See also e.g. Panel Report, *Pakistan — BOPP Film (UAE)*, para. 7.430 and Appellate Body Report, *China — GOES*, para. 128.

[479] Appellate Body Report, *US — Softwood Lumber VI (Article 21.5 — Canada)*, para. 132.

[480] Appellate Body Report, *US — Softwood Lumber VI (Article 21.5 - Canada)*, para. 132 (referring to Appellate Body Report, *US — Wheat Gluten*, para. 69) (fn omitted). See also Appellate Body Report, *US – Steel Safeguards*, para. 485.

[481] Panel Report, *Pakistan — BOPP Film (UAE)*, para. 7.432.

[482] Panel Report, *Pakistan — BOPP Film (UAE)*, para. 7.432 (quoting Oxford Dictionaries online, definition of "known", https://www.oed.com/search?searchType=dictionary&q=known&_searchBtn=Search (accessed 27 October 2020), adj., meaning A1b). See also, *e contrario*, Panel Reports, *China — X-Ray Equipment*, para. 7.267; *China — Autos (US)*, paras. 7.322-7.323; *Thailand — H-Beams*, para. 7.273; and *EU — Footwear (China)*, para. 7.484.

[483] Appellate Body Report, *EC — Tube or Pipe Fittings*, para. 178.

7.309. Once the other factors are "known" to it, the investigating authority must "examine" them and "not … attribute[] to the dumped imports" "the injuries caused by these other factors".[484] This requires the authority to identify, and "separat[e] and distinguish[,] the injurious effects of the other factors from the injurious effects of the dumped imports"[485], because otherwise, the authority will not have a rational basis to ensure that it does not attribute those injuries to the dumped imports.[486]

7.310. In the specific case of a threat of injury finding, a previous panel understood the obligation laid down in the third sentence of Article 3.5 to "encompass non-attribution of injury by other known factors *threatening to cause* injury to the domestic industry".[487]

7.311. Article 3.5 does not set out a specific methodology for investigating authorities to follow in their examinations. However, the methods applied by an investigating authority must comport with the overarching obligation in Article 3.1 to undertake an objective examination based on positive evidence.[488]

7.312. As can be seen from the considerations relating to the applicable legal framework, Article 3.5 establishes two separate but complementary obligations. Costa Rica has raised its claims on this understanding, and the Dominican Republic does not dispute this characterization of the obligations. We will therefore start by examining Costa Rica's claim regarding the establishment of a causal relationship, before turning to Costa Rica's claim concerning the non-attribution obligation.

7.5.5.2 Whether the CDC carried out a proper causation analysis

7.313. Costa Rica claims that the CDC failed to carry out a proper causation analysis.[489] In particular, Costa Rica asserts that the CDC's determination was limited to assessing "whether there were … factors other than the dumped imports which at the same time were injuring the domestic industry; in other words, a non-attribution analysis"[490], hence the causal relationship was assumed to exist on account of the alleged absence of other factors.[491] Costa Rica further states that, despite being required to do so, the CDC failed to assess the arguments put forward by the exporting company that there was no coincidence in time between the movements in the imports and the movements in injury factors, and that the domestic industry indicators showed a significant recovery in 2018, even though imports from Costa Rica remained stable.[492]

7.314. The Dominican Republic refutes this claim. In particular, the Dominican Republic contends that Costa Rica's argument is purely "formalistic and incorrect", since an authority cannot be considered to have violated Article 3.5 simply because its conclusion on causation is not repeated in a specific section of the report, when it is obvious that the authority established a causal link between the dumped imports and the threat of injury.[493] The Dominican Republic further argues that the CDC concluded that there was a strong coincidence in time between the negative performance and the significant increase in the volume of dumped imports[494], and that, accordingly, the CDC determined that a negative trend in several injury factors coincided with the presence of significant volumes of dumped imports.[495]

7.315. We begin our analysis by recalling that, in order to demonstrate causation in the context of a threat of injury, an investigating authority must find that further dumped imports would cause material injury.[496]

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[484] Article 3.5 of the Anti-Dumping Agreement.
[485] Appellate Body Report, *US — Hot-Rolled Steel*, para. 223.
[486] See also e.g. Appellate Body Report, *US — Hot-Rolled Steel*, paras. 223 and 226.
[487] Panel Report, *US — Coated Paper (Indonesia)*, para. 7.206. (emphasis original)
[488] Panel Report, *Pakistan — BOPP Film (UAE)*, para. 7.435. See also Appellate Body Reports, *China — HP-SSST (Japan) / China — HP-SSST (EU)*, para. 5.141.
[489] Costa Rica's first written submission, section XI.B.
[490] Costa Rica's first written submission, para. 179.
[491] Costa Rica's first written submission, para. 183.
[492] Costa Rica's first written submission, para. 185.
[493] Dominican Republic's opening statement at the first meeting of the Panel, para. 57.
[494] Dominican Republic's first written submission, para. 376.
[495] Dominican Republic's first written submission, para. 382.
[496] See para. 7.305. above.

7.316. The parties disagree as to whether the CDC did indeed conduct a causation analysis. As we have noted, Costa Rica argues that the CDC limited itself to a non-attribution analysis. However, the Dominican Republic considers that the causation analysis need not be contained in a single section of the report[497] and identifies various parts of the CDC's determination in which the CDC allegedly carried out a causation assessment.[498] In particular, the Dominican Republic refers to numerous paragraphs of the Final Technical Report in which the CDC noted that there was a temporal correlation during the POI between a negative trend in the domestic industry and a movement in imports from Costa Rica. The Dominican Republic notes that the correlation in time was clearly part of the CDC's analysis and that it confirmed the findings.[499] The Dominican Republic also explained the following:

> [T]o the extent that there is a correlation between the dumped imports and trends in specific injury factors, this provides a relevant factual basis for making reasonable assumptions about the future impact of further dumped imports. This was the case with the underlying investigation, in which the CDC found a temporal correlation between the state of the domestic industry and the dumped imports from Costa Rica, which provides a factual basis for making reasoned assumptions about the future likelihood of a threat of injury.

7.317. We have examined sections 7 and 8 of the Final Technical Report, section 9 of the Essential Facts Report and section D of the final determination, cited by the Dominican Republic.[500] We note that in none of these sections, whether in the public or the confidential versions, does the CDC refer to the issue of whether future injury could be caused by dumped imports. Moreover, we see nothing in the evidence on the record (nor has the Dominican Republic told us where in the record to look) that shows that the CDC relied on the past correlation between the state of the domestic industry and dumped imports "to make reasonable assumptions" that any future injury would be caused by future dumped imports.

7.318. The Dominican Republic argues that, in section 7.16 of the Final Technical Report, the CDC carried out an analysis "to determine the imminence of entry of further imports and their impact on the domestic industry".[501] However, in our discussion above on the CDC's threat of injury determination, we examined the CDC analysis contained in that section and found that it was not based on facts and that the CDC's conclusion that the domestic industry was actually likely to suffer material injury on account of further dumped imports was not substantiated. In such circumstances, we fail to see how the CDC could conclude that such material injury would be *caused* by further dumped imports.

7.319. We further note that, in its Final Technical Report, the CDC, referring to the causes of the threat of injury, observed that "it ha[d] not identified 'factors other' than increased imports from Costa Rica at dumped prices that [would] explain the threat of injury to the domestic industry".[502] Furthermore, in its final determination, the CDC reached the following conclusion:

> No factors other than Costa Rican imports of steel bars or rods at dumped prices have been identified as possible causes of the threat of injury to the domestic industry. The Plenary Session of the Commissioners therefore concludes that the causal relationship between the increase in *dumped* imports and the threat of injury to the domestic industry is clearly demonstrated.[503]

7.320. We therefore fail to see how the CDC's conclusion on the causal relationship amounts to a demonstration that *further* dumped imports *would cause* material injury.

7.321. In conclusion, we consider that the CDC acted inconsistently with Article 3.5 of the Anti-Dumping Agreement by failing to conduct a proper analysis of the existence of a causal relationship between further dumped imports and the threat of material injury. Given the

[497] Dominican Republic's first written submission, para. 373.
[498] Dominican Republic's first written submission, paras. 373 and 375-377.
[499] Dominican Republic's first written submission, para. 373.
[500] Dominican Republic's first written submission, para. 374.
[501] Final Technical Report (confidential version) (Exhibit DOM-3 (BCI)), para. 408.
[502] Final Technical Report (confidential version) (Exhibit DOM-3 (BCI)), paras. 514 and 520.
[503] Final determination (Exhibit CRI-2), para. 177. (emphasis original)

circumstances, we will not examine whether the CDC also acted inconsistently with Article 3.5 by failing to adequately address the arguments put forward by the exporting company with respect to whether there was a correlation between the dumped imports and the evolution of the domestic industry during the POI.

7.5.5.3 Whether the CDC's non-attribution analysis was inconsistent with Articles 3.1 and 3.5

7.322. Costa Rica claims that the CDC's non-attribution analysis was inconsistent with the requirements of Articles 3.1 and 3.5 of the Anti-Dumping Agreement. According to Costa Rica, the CDC's conclusions do not amount to an objective examination based on positive evidence, as the CDC failed to carry out a proper non-attribution assessment of the following factors: (a) the volume and prices of non-dumped imports; (b) the decline in the domestic industry's exports; and (c) developments in technology.[504]

7.323. The Dominican Republic does not agree with Costa Rica's claim and requests that it be rejected.[505]

7.324. We note that Costa Rica's arguments in the course of these proceedings focus on the CDC's analysis of the following factors: (a) the volume and prices of non-dumped imports; (b) the decline in the domestic industry's exports; and (c) developments in technology. Thus, in essence, Costa Rica's arguments are limited to the alleged inadequacy of the CDC's analysis of these factors during the POI, i.e. *in the past*. At the same time, we note that, in its panel request, Costa Rica makes its claim under Article 3.5 as follows:

> [The Dominican Republic's measures are inconsistent with] Articles 3.1 and 3.5 of the Anti-Dumping Agreement because, *inter alia*, the investigating authority … failed to ensure that injury *caused* by other factors was not attributed to the allegedly dumped imports. Most notably, but not exclusively, the investigating authority failed to adequately examine the volume and prices of imports not sold at dumping prices, developments in technology, and the export performance of the domestic industry.[506]

7.325. As we have noted, in order to demonstrate causation in the context of a threat of injury, an investigating authority must find that *further dumped imports would cause material injury*.[507] Similarly, we note that an investigating authority's obligation to conduct a non-attribution analysis in the context of a threat of injury must focus on an assessment of whether factors other than dumped imports would cause *future* injury.[508]

7.326. However, Costa Rica's claim and arguments do not focus on whether, in its non-attribution analysis, the CDC addressed whether "other factors" could have caused injury *in the future*. We therefore find no basis on which to make findings with respect to Costa Rica's claims concerning the CDC's non-attribution analysis.

7.5.5.4 Conclusion

7.327. For the reasons set out above, we conclude that 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.

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[504] Costa Rica's first written submission, para. 191.
[505] Dominican Republic's first written submission, para. 385.
[506] Costa Rica's panel request, para. 10. (emphasis added)
[507] See paragraphs 7.305. and 7.315. above.
[508] Panel Report, *US — Coated Paper (Indonesia)*, para. 7.211.

7.6 Costa Rica's claim under Article 5.3 of the Anti-Dumping Agreement: the initiation of the investigation

7.6.1 Introduction

7.328. On 7 May 2018, the company, Gerdau Metaldom, submitted an application to the CDC to initiate an anti-dumping investigation on imports of "corrugated or deformed steel rods and bars for concrete reinforcement", identified under tariff subheadings "7213.10.00, 7213.20.90, 7214.10.00, 7214.20.00, 7214.30.00, 7214.91.00 and 7214.99.00", coming from Costa Rica.[509] As evidence of the normal value, Gerdau Metaldom submitted four purchase invoices from two marketing companies in Costa Rica (Materiales Villa SRL and Construplaza), which were issued on 2 June and 17 July 2017.[510]

7.329. Costa Rica argues that the Dominican Republic acted inconsistently with its obligations under Article 5.3 because the CDC failed to examine properly the "accuracy" and "adequacy" of the evidence submitted by the applicant to determine whether there was "sufficient" evidence of dumping to justify the initiation of the investigation.[511] In particular, Costa Rica argues that the invoices submitted as evidence of the normal value were not "representative", as they referred to only one 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.[512]

7.330. The Dominican Republic responds that Costa Rica's claim is without merit because it is based on an incomplete and incorrect presentation of the facts, and on an erroneous approach to the evidence required under Article 5.3 to justify the initiation of an investigation.[513]

7.331. We begin our examination by recalling the applicable requirements of Article 5.3 (section 7.6.2). We will then examine whether, in view of the specific facts and circumstances of this dispute, the Dominican Republic acted inconsistently with Article 5.3 (section 7.6.3).

7.6.2 Requirements applicable to Article 5.3 of the Anti-Dumping Agreement

7.332. We note that Article 5.3 of the Anti-Dumping Agreement provides that:

> The authorities shall 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.

7.333. Article 5.3 thus requires investigating authorities to determine whether there is "sufficient" evidence to justify the initiation of an investigation and, in doing so, to "examine" the "accuracy" and "adequacy" of the evidence provided in "the application".[514] The ordinary meaning of the Spanish terms "*exactitud*" ("accuracy") and "*pertinencia*" ("adequacy") includes the definitions "*exacto*" ("exact") and "*pertinente*" ("relevant"), respectively.[515] In turn, the following definitions form part of the ordinary meaning of "*exacto*" ("exact"): "*perfectamente adecuada; rigurosamente cierto o correcto*" ("perfectly adequate; strictly accurate or correct")[516]; and for "*pertinente*" ("relevant"):

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[509] Application for initiation of the investigation (7 May 2018) (Exhibit DOM-11 (BCI)), sections II.1 and V.

[510] Application for initiation of the investigation (7 May 2018) (Exhibit DOM-11 (BCI)), point 50 and annex 4b; and sales invoices in Costa Rica (Exhibit DOM-21 (BCI)). See also Initial Technical Report (Exhibit CRI-6), paras. 59 and 62.

[511] Costa Rica's first written submission, para. 225; and second written submission, para. 256.

[512] Costa Rica's first written submission, para. 232; and opening statement at the first meeting of the Panel, para. 90.

[513] Dominican Republic's first written submission, paras. 541 and 577; and second written submission, para. 220.

[514] The subject under examination pursuant to Article 5.3 is therefore the "evidence" provided in the "application".

[515] *Diccionario de la Real Academia Española*, definitions of "*exactitud*" ("accuracy") and "*pertinencia*" ("adequacy") https://dle.rae.es/exactitud and https://dle.rae.es/pertinencia%20?m=form, respectively (accessed 10 October 2022), meaning 1.

[516] *Diccionario de la Real Academia Española*, definition of "*exacto*" ("exact") https://dle.rae.es/exacto?m=form (accessed 10 October 2022), meanings 2 and 4.

"*oportuno para una situación determinada*" ("appropriate to a specific situation").[517] An investigating authority must therefore examine whether the evidence is adequate, accurate, correct and appropriate.[518]

7.334. Lastly, we note that Article 5.3 requires the authorities to determine whether there is "sufficient" evidence to justify the initiation.[519] The ordinary meaning of the term "*suficiente*" ("sufficient") includes the meaning "*bastante para lo que se necesita*" ("enough for what is needed").[520] The investigating authority must therefore determine whether it has before it the evidence necessary to initiate an investigation, i.e. whether an investigation appears to be justified, but also whether it has the necessary information to enable it to initiate its investigation.[521]

7.335. We further note that, as other panels have stated, Article 5.3 does not indicate how this examination is to be carried out or require an investigating authority to explain how that examination was carried out.[522] We therefore take the view that "the absolute threshold of sufficiency will depend upon the circumstances of a given case"[523], according to the circumstances of the case in question.[524]

7.336. In the light of the foregoing, the standard of review that we will apply to examine Costa Rica's claim under Article 5.3 is whether an unbiased and objective investigating authority could have determined that the application submitted by Gerdau Metaldom to the CDC contained sufficient evidence to justify the initiation of an anti-dumping investigation on imports from Costa Rica of corrugated or deformed steel bars or rods for the reinforcement of concrete.[525]

7.6.3 Whether the Dominican Republic acted inconsistently with Article 5.3 of the Anti-Dumping Agreement

7.337. We begin our analysis by noting that Costa Rica's claim concerning the sufficiency of the evidence of alleged dumping is limited to the evidence submitted by the applicant pertaining to normal value. In this connection, we recall that, as part of its application to initiate an investigations, the applicant submitted four sales invoices from two Costa Rican marketing companies (Materiales Villa SRL and Construplaza S.A.).[526] We also note that it is not disputed that these invoices refer to bars produced by ArcelorMittal (the only exporter identified by the CDC[527]), and that they constitute a product similar to the product under investigation.

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[517] *Diccionario Reverso*, definition of "*pertinente*" ("relevant") https://diccionario.reverso.net/espanol-definiciones/pertinente (accessed 11 October 2022), meaning 1.

[518] In this context, we note the panel's statement in *Morocco — Definitive AD Measures on Exercise Books (Tunisia)* that "the examination of the accuracy and adequacy of the evidence [within the meaning of Article 5.3 does not] require the investigating authority to ensure that the information provided is 'representative' of the whole period and of all types of the product under investigation". (Panel Report, *Morocco — Definitive AD Measures on Exercise Books (Tunisia)*, para. 7.378 (emphasis omitted)).

[519] In this regard, we agree with the panel's statement in *Guatemala — Cement II* that "[i]t is however the sufficiency of the evidence, and not its adequacy and accuracy *per se*, which represents the legal standard to be applied in the case of a determination whether to initiate an investigation". (Panel Report, *Guatemala - Cement II*, para. 8.31).

[520] *Diccionario de la Real Academia Española*, definition of "*suficiente*" ("sufficient") https://dle.rae.es/suficiente (accessed 6 December 2022), meaning 1.

[521] *Morocco - Definitive AD Measures on Exercise Books (Tunisia)*, para. 7.358.

[522] Panel Report, *EC - Bed Linen*, para. 6.198.

[523] Panel Report, *Mexico - Steel Pipes and Tubes*, para. 7.24.

[524] In this regard, recognizing that the initiation stage of an investigation is different from the investigation process itself, we consider "the quantity" and "the quality" of the evidence necessary to initiate an investigation to be generally lower than that required to impose anti-dumping measures. (See, for example, Panel Reports, *Guatemala — Cement II*, para. 8.35; *Mexico — Steel Pipes and Tubes*, para. 7.22; and *Argentina - Poultry Anti-Dumping Duties*, para. 7.67.)

[525] In this regard, we agree with other panels that have adopted this standard of review for claims under Article 5.3. (See, for example, Panel Reports, *Argentina — Poultry Anti-Dumping Duties*, para. 7.60; *Mexico — Steel Pipes and Tubes*, para. 7.26; and *Morocco — Definitive AD Measures on Exercise Books (Tunisia)*, para. 7.358.)

[526] Application for initiation of the investigation (7 May 2018) (Exhibit DOM-11 (BCI)), annex 4b; and sales invoices in Costa Rica (Exhibit DOM-21 (BCI)).

[527] Initial Technical Report (Exhibit CRI-6), paras. 16-17 and table 1. See also Costa Rica's first written submission, para. 251.

7.338. Costa Rica makes several arguments in support of its claim that an "objective" and "unbiased" investigating authority would not have determined that the invoices provided by the applicant were "sufficient" evidence to justify initiation.[528] In essence, Costa Rica argues that the invoices were not "representative" because, first, they referred only to one type of rod; second, they covered a very low volume; and third, they were issued at around the same time, and almost a year before the submission of the application.[529]

7.339. For its part, the Dominican Republic responds that Costa Rica ignores the "obvious" difference in the "quality" and "quantity" of the evidence necessary for initiation, compared to the evidence required to adopt provisional or final determinations.[530] In addition, according to the Dominican Republic, it is not necessary for the evidence to cover the entire time period and all product types, provided that it covers some of the product types.[531] In particular, the Dominican Republic argues that Article 5.3 does not require normal value evidence ("which is notoriously difficult to obtain") to be "representative" of each product type and the overall period of investigation, as imposing such a standard would make it impossible to initiate an investigation.[532] Moreover, for the Dominican Republic, the invoices referred to a period of the POI and, therefore, Costa Rica's assertion that the invoices were too old to provide information about current dumping is incorrect.[533]

7.340. As a preliminary point, we note that Costa Rica's argument refers repeatedly to the alleged lack of "representativeness" of the invoices in question.[534] However, the concept of "representativeness" does not feature in Article 5.3 of the Anti-Dumping Agreement. This provision only refers to the evidence being "sufficient".

7.341. As regards Costa Rica's first argument, i.e. that the invoices were not "representative" because they referred to a single product type of the five under investigation identified by the applicant in its application[535], we note that, effectively, the invoices provided by the applicant as evidence of the normal value did not cover all types of the product under investigation.[536] Costa Rica makes somewhat contradictory statements regarding the assertions made before the Panel's with respect to this aspect of its claim. On the one hand, Costa Rica submits that the invoices provided were not "representative" because they referred to a single type of bar when the imported product identified by the applicant included five different types. On the other hand, however, Costa Rica claims that it is not arguing that the evidence must be "representative" of the product as a

[528] Costa Rica's first written submission, para. 230; and second written submission, para. 261.
[529] Costa Rica's first written submission, paras. 232 and 236. See also Costa Rica's second written submission, para. 263; and opening statement at the first meeting of the Panel, para. 90.
[530] Dominican Republic's opening statement at the first meeting of the Panel, para. 65; and opening statement at the second meeting of the Panel, para. 87.
[531] Dominican Republic's first written submission, para. 589. See also Dominican Republic's second written submission, para. 223.
[532] Dominican Republic's second written submission, paras. 223 and 233. See also Dominican Republic's opening statement at the first meeting of the Panel, para. 66. The Dominican Republic adds that Costa Rica develops theoretical arguments about what might have been better evidence at the time of initiation, but has not provided evidence that demonstrates that the evidence relied on by the CDC, in accordance with the facts before it, was not sufficiently reliable and accurate to justify the initiation of the investigation. (Dominican Republic's opening statement at the first meeting of the Panel, para. 70; response to Panel question No. 38, para. 133; and opening statement at the second meeting of the Panel, para. 88.)
[533] Dominican Republic's first written submission, para. 588.
[534] See, for example, Costa Rica's first written submission, para. 232; and second written submission, para. 263.
[535] Costa Rica's second written submission, para. 263. For this reason, Costa Rica claims that the invoices were not "relevant" to the possible existence of dumping for the other four types of rod identified by the applicant itself. (Costa Rica's response to Panel question No. 39, para. 65).
[536] In fact, the record shows that the *sales prices in the invoices* only concerned "deformed rod No. 3 3/8" of "[grade] 40", under tariff subheading 7214.20.00 (two of the invoices also indicate that the rods referred to therein were 6 metres in length), while the dumped product identified by the applicant covered "[c]orrugated or deformed steel bars or rods for concrete reinforcement" of different lengths (from 6 metres or 20 feet to 18 metres or 60 feet) and thicknesses (3/8", 1/2", 5.8", ¾", 1", 1 1/8", 1 1/2" and 2"), classified under tariff subheadings 7213.10.00, 7214.20.00, 7214.30.00, 7214.91.00 and 7214.99.00. The record also shows that the dumped product included products that could be of quality grades 40/60. (Sales invoices in Costa Rica (Exhibit DOM-21 (BCI)); and application for initiation of the investigation (7 May 2018) (Exhibit DOM-11 (BCI)), annex 4b, section II.1 and pp. 10-11).

"whole".[537] We therefore understand that Costa Rica is arguing, in essence, that invoices relating to *a single type* of imported product do not constitute sufficient evidence within the meaning of Article 5.3. However, in our view, Costa Rica's claim has no textual basis.

7.342. We recall that Article 5.3 of the Anti-Dumping Agreement requires that, in initiating an investigation, there is sufficient evidence of dumping for an investigating authority to be able to determine that there was "sufficient" evidence to justify the initiation of the investigation. As regards the normal value, we recall that the evidence required is "information on the prices at which the product is sold from the country or countries of origin or export". However, we note that Article 5.3 does not establish quantitative thresholds for determining what is considered "sufficient" evidence[538], and as such, we do not see anything in Article 5.3 that would make the sufficiency of the evidence of dumping dependent on the existence of evidence of a certain number of types of the imported product under investigation. We therefore do not see how, under the terms of Article 5.3, from the mere fact that the four purchase invoices allegedly referred to only one type of all of the types of products identified in the application that comprised the product under investigation, it could be established that the evidence was not sufficient to justify the initiation of the investigation.[539] Moreover, in our opinion, whether evidence is "sufficient" will depend on the specific circumstances of each case.[540] In the case at hand, we note that the products for which information on the normal value was submitted, which include grade 40, 6 metre-long deformed rods No. 3 3/8 classified under tariff subheading 7214.20.00, were specifically identified by the applicant as among the main types of the product under investigation.[541] We therefore disagree with Costa Rica's argument that the invoices submitted by the applicant as proof of the normal value could not be considered sufficient evidence because they concerned a single type of the imported product under investigation.

7.343. Costa Rica also claims that the invoices were not "representative" because they covered a "very low" volume.[542] In particular, according to Costa Rica, the low volume of sales covered by the invoices is another factor that casts doubt on not only the representativeness of the invoices, but also their capacity to substantiate the claims accurately and precisely. In other words, the volume described on the invoices was only 0.01% of the total volume of imports from Costa Rica in 2017 and, as a result, that volume could "hardly" serve as a basis for making "generalizations" about the normal value.[543]

7.344. We note that, as Costa Rica indicates, the quantities listed in each invoice were less than 1 tonne (i.e. 994.56 kg).[544] However, as we set out above, Article 5.3 does not establish quantitative thresholds for determining the sufficiency of evidence, and as such, we see nothing in Article 5.3 requiring that evidence of dumping must relate to particular sales volumes of the product in question. On the other hand, we recall that Article 5.3 only requires evidence to be "sufficient", i.e. that it is "sufficient" to justify the initiation of an investigation, and contrary to what Costa Rica appears to suggest, this provision does not refer to the concept of "generalization" or to evidence having to

[537] Costa Rica's second written submission, para. 271.

[538] Indeed, in previous disputes, panels have shared this view and found that "there is no requirement [under Article 5.3] that evidence of dumping of all categories or sub-sets of the imported product is necessary to justify a decision to initiate". (Panel Report, *US — Softwood Lumber V*, para. 7.101) See also Panel Reports, *Morocco — Definitive AD Measures on Exercise Books (Tunisia)*, paras. 7.378 and 7.380; and *Mexico — Steel Pipes and Tubes*, para. 7.40.

[539] At the same time, we recall that the "quantity and the "quality" of the evidence needed to initiate an investigation are lesser than required to impose anti-dumping measures. See fn 524 above. See also Panel Reports, *Guatemala - Cement II*, para. 8.35; *Mexico - Steel Pipes and Tubes*, paras. 7.22 and 7.27.

[540] In this regard, see para. 7.335. above. In fact, Costa Rica asserts that "sufficiency" must be determined on a case-by-case basis, depending on the particular circumstances of each situation. (Costa Rica's response to Panel question No. 36(b), para. 58).

[541] In particular, the applicant indicated that the "dumped product" was "entering into the Dominican Republic at lengths of between 20' (6 metres) and 40' (12 metres), specifically at lengths of 20, 25, 30, 35 and 40 feet", and that it was being imported at thicknesses of "3/8, ½, ¼ and 1 inch". The applicant also indicated that the main types of imported products under alleged conditions of dumping were the products under tariff subheadings 7214.10.00 and 7214.20.00. (Application for initiation of the investigation (Exhibit DOM-11 (BCI)), section II.2 and point 51.)

[542] Costa Rica's first written submission, para. 232; opening statement at the first meeting of the Panel, para. 90; and second written submission, para. 263.

[543] Costa Rica's response to Panel question No. 41, paras. 66-67.

[544] Application for initiation of the investigation (7 May 2018) (Exhibit DOM-11 (BCI)), annex 4b; and sales invoices in Costa Rica (Exhibit DOM-21 (BCI)).

"serve as a basis for making generalizations". We therefore find no basis in the text of Article 5.3 to support the position that the invoices were not sufficient evidence because the volume of sales covered by those invoices was "very low", and could not be used as a basis to make "generalizations" with respect to the normal value. At the same time, we are not convinced that the volume of sales covered by the evidence is a relevant factor as Costa Rica asserts. So, for example, in situations where the evidence of dumping refers to all types of the product under investigation and the entire POI (or vice versa), we do not see how the volume of sales covered by the evidence could affect the sufficiency of the evidence.

7.345. We now turn to Costa Rica's last argument, which concerns the dates of the evidence. Costa Rica claims that the four invoices were not "representative" because they were issued at around the same time, almost a year before the submission of the application.[545] We note that Costa Rica does not argue that the evidence must be "representative" of the whole POI.[546] Indeed, Costa Rica asserts that the problem in this case is the temporal dysfunction of the evidence, and not that the evidence did not cover "the whole period of time".[547] Therefore, in our view, Costa Rica's argument concerning the temporal scope of the information contained in the invoices is limited to the fact that this information corresponds to sales allegedly made almost a year before the submission of the application, which, according to Costa Rica, undermines the "adequacy" and "accuracy" of the evidence by failing to point to current dumping.[548]

7.346. We note that, as indicated above, the applicant submitted two invoices dated 2 June and two invoices dated 17 July 2017 (all within the POI designated by the applicant, namely April-October 2017).[549] We also note that the investigation was initiated on 30 July 2018[550], that is, a little over 12 months after the date of issue of the invoices in question.

7.347. In this regard, we note that the CDC acknowledged and addressed the time lag between the dates of the invoices and the initiation of the investigation. In particular, the CDC noted that "these invoices [corresponded] to two dates (2 June and 17 July 2017) within the period of *dumping*", and "[i]n this sense", requested that the applicant "provide evidence from other months within the period investigated, for the purpose of obtaining samples more representative of the normal value".[551]

7.348. Moreover, as the Dominican Republic indicates, we note that the CDC did not limit itself to asking the applicant questions about the invoices, but it also examined the additional evidence to corroborate the "accuracy" and "adequacy" of the information provided.[552] In particular, we note that the CDC "verif[ied] the market behaviour of the allegedly dumped imports subsequent to the dumping period provided in the application to initiate [an investigation]", and did so in order to "find

[545] Costa Rica's first written submission, para. 232; and opening statement at the first meeting of the Panel, para. 90. See also Costa Rica's first written submission, para. 236.
[546] Costa Rica's second written submission, para. 271.
[547] Costa Rica's response to Panel question No. 39, para. 64.
[548] Costa Rica's first written submission, para. 233; and second written submission, para. 262. We note that Costa Rica's argument refers to the temporal relationship between the information and the date of submission of the application. (See, for example, Costa Rica's first written submission, para. 233; second written submission, para. 262; and response to Panel question No. 39, para. 64.) However, we note that the obligations set forth in Article 5.3 of the Anti-Dumping Agreement concern the initiation of the investigation, and thus, "whether and to what extent the data are remote for purposes of Article 5.3 should be assessed with reference to the date of initiation". (Panel Report, *Pakistan - BOPP Film (UAE)*, appealed on 22 February 2021, para. 7.26 (emphasis omitted)).
[549] The applicant required that the period from April to October 2017 be considered the dumping analysis period, as this period was the "most recent" for which it had "available and verifiable" information. (Application for initiation of the investigation (7 May 2018), (Exhibit DOM-11 (BCI)), point 50.) Costa Rica does not object to either the period covered by the evidence in question, or the time lag (if any) between this and the initiation of the investigation.
[550] Resolution initiating the investigation (Exhibit CRI-5).
[551] Letter from the CDC to Gerdau Metaldom (4 June 2018) (Exhibit DOM-14 (BCI)), para. 13. (emphasis added)
[552] Dominican Republic's response to Panel question No. 38, paras. 130-132. See also Dominican Republic's first written submission, para. 580; opening statement at the first meeting of the Panel, para. 71; and second written submission, para. 228.

whether there [wa]s any correlation between the information ... on the record" and "[the information] verified by the [CDC] when preparing its [initial technical] report".[553]

7.349. Specifically, the CDC "used price information published [on 14 June 2018] on the website of the company, Construplaza, S.A. (previously identified as an ArcelorMittal distributor)" to "determine a price in the Costa Rican domestic market".[554] Meanwhile, the CDC used "Costa Rican import data for the month of April 2018 to obtain an export price".[555] The CDC determined an adjusted normal value of USD 801.78 and an adjusted export price of USD 680.24, thereby obtaining "an estimated margin of dumping of 22%".[556] As a result of the "research conducted", the CDC found "that for more recent dates there would be or would continue to be a pricing trend or behaviour that provide[d] evidence of a dumping trend".[557]

7.350. Costa Rica asserts that the CDC's analysis is flawed, and thus argues that the price that the CDC "found" does not resolve the inconsistency with Article 5.3, and that the alleged additional information gathered by the CDC does not demonstrate alleged dumping on dates closer to the application. In particular, Costa Rica notes that the CDC's analysis: (a) does not "identify" the type of rod used for the purposes of the normal value or export price; (b) does not "present information" on the adjustments made (does not "identify" the adjustments or their amounts, or "how they were applied" to the normal value obtained); and (c) does not "explain why" it compares transactions made in different months (14 June 2018 for the normal value and April for the export price), or "spell out why" it did not use importations made on dates closer to the date on which the price used for the normal value was obtained.[558]

7.351. In our view, the fact that the CDC did not explicitly set out the type of rod used, the adjustments made, and its decision to compare transactions from different months, does not affect the examination it carried out to corroborate the relevance of the evidence by finding that dumping occurred on dates closer to the time of initiation. In other words, Costa Rica has not provided the Panel with any evidence to indicate that the additional evidence collected by the CDC could not demonstrate alleged dumping on dates closer to the start of the investigation. Furthermore, we recall that while Article 5.3 requires the accuracy and adequacy of the information to be examined in order to determine whether there is sufficient evidence to justify the initiation of an investigation, there is nothing in that provision governing such an examination, or requiring the authorities to conduct a particular type of analysis or to provide an explanation of how it carried out this examination.[559] We therefore see no basis in Article 5.3 that requires an investigating authority to "explain" or "spell out" (or "provide information" on) how it carried out the examination of the evidence in accordance with that provision.

7.352. On the basis of the foregoing, we find that the information contained in the invoices corresponded to the POI, in the absence of any legal impediment to them being considered evidence

[553] Initial Technical Report (Exhibit CRI-6), para. 83. We note that the CDC's analysis was based on "information provided by the DGA, [the] applicant, [the CDC's] own estimates and data gathered from the website of the company, Construplaza, S.A." (*Ibid*., table 15).

[554] Initial Technical Report (Exhibit CRI-6), para. 84 and fn 39.

[555] In particular, the CDC identified six ArcelorMittal transactions dated 5 and 11 April 2018. However, the CDC excluded from its assessment the importation of 11 April 2018 as it had "a f.o.b. value of USD 0.74 that could distort the results". (Initial Technical Report (Exhibit CRI-6), table 15).

[556] The Dominican Republic points out that the following adjustments were made to the prices obtained from the Construplaza website to reach the adjusted normal value: sales adjustment (13%); marketing margin (6%); and transport adjustment (USD 10 per metric tonne). As regards the export price, the Dominican Republic indicates that two adjustments were made: a port transportation adjustment (USD 9) and a loading, unloading, wharfage, cargo movement, and stevedoring adjustment (USD 13.50). (Dominican Republic's second written submission, para. 231). We note, however, that these explanations are not reflected in the record of the investigation.

[557] Initial Technical Report (Exhibit CRI-6), paras. 83-85 and fn 40. We note that the margin of dumping alleged by the applicant was lower (that is, 17.3%) than the margin of dumping calculated by the CDC (that is, 22%). (Application for initiation of the investigation (Exhibit DOM-11 (BCI)), point 55; and Initial Technical Report (Exhibit CRI-6), para. 74).

[558] Costa Rica's first written submission, para. 241; and second written submission, para. 273. See also Costa Rica's opening statement at the first meeting of the Panel, para. 91.

[559] See para. 7.335. above. In this regard, we concur with the panel's statement in *EC — Bed Linen* that Article 5.3 says nothing "regarding the nature of the examination to be carried out. Nor does it say anything requiring an explanation of how that examination was carried out". (Panel Report, *EC - Bed Linen*, para. 6.198).

of the normal value. In such circumstances, we disagree with Costa Rica's argument that the invoices could not be considered sufficient evidence because they concerned sales made almost a year before the application to initiate an investigation.

7.6.4 Conclusion

7.353. For the reasons stated above, we conclude that the Dominican Republic did not act inconsistently with its obligations under Article 5.3. In particular, we conclude that 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.

7.7 Costa Rica's claim under Article 5.8 of the Anti-Dumping Agreement

7.354. Costa Rica claims that, as the CDC did not have sufficient information on the existence of dumping, it should have rejected the application and promptly terminated the investigation. Accordingly, Costa Rica argues that the CDC's decision to initiate the investigation is inconsistent with Article 5.8 of the Anti-Dumping Agreement.[560]

7.355. The Dominican Republic responds that Costa Rica's argument is not supported by the text of Article 5.8. In particular, the Dominican Republic claims that Article 5.8 applies once the investigating authority concludes that there is not sufficient evidence to justify initiation, and, given that the CDC determined that there was sufficient evidence, Article 5.8 does not apply. According to the Dominican Republic, this applies even in the event that a panel were to consider that the CDC's conclusion was reached in a manner inconsistent with the Anti-Dumping Agreement.[561]

7.356. Before addressing the substance of this claim, we note that there have been changes and contradictions throughout this dispute in the way Costa Rica has made its claim under Article 5.8. Initially, in its first written submission, Costa Rica made its claim under Article 5.8 consequential to its claim under Article 5.3.[562] Subsequently, in its response to the Panel's questions prior to the first substantive meeting, Costa Rica indicated that its claim under Article 5.3 and that under Article 5.8 are related, since both are based on a premise of insufficient evidence.[563] Then, in its second written submission, Costa Rica again put forward its claim under Article 5.8 as consequential to its claim under Article 5.3.[564]

7.357. In any event, and despite these contradictions, we note that the text of Article 5.8 of the Anti-Dumping Agreement provides that "[a]n application under paragraph 1 shall be rejected and an investigation shall be terminated promptly as soon as the authorities concerned are satisfied that there is not sufficient evidence of either dumping or of injury to justify proceeding with the case". Accordingly, we note that Article 5.8 does not require an investigating authority to reject an application or promptly terminate an investigation if it is satisfied that there is sufficient evidence to justify initiating an investigation.[565] In this connection, as we have found that the CDC did not err when it determined that there was sufficient evidence to justify initiating the investigation, and, in

[560] Costa Rica's first written submission, paras. 243-244; and second written submission, paras. 275-276.

[561] Dominican Republic's first written submission, paras. 591-593 (quoting Panel Report, *Morocco — Definitive AD Measures on Exercise Books (Tunisia)*, para. 7.360). See also Dominican Republic's second written submission, para. 225.

[562] See, for example, Costa Rica's first written submission, para. 244.

[563] Costa Rica's response to Panel question No. 42, para. 69

[564] Costa Rica's second written submission, para. 276. We also note that Costa Rica did not contest the Dominican Republic's characterization of this claim as "entirely consequential". (Costa Rica's second written submission, para. 277).

[565] In this regard, we agree with the panel in *Morocco — Definitive AD Measures on Exercise Books (Tunisia)*, para. 7.359, that "[o]ther panels have taken the view that Article 5.8 does not require an additional examination in relation to Article 5.3" and "Article 5.8 regulates the situation in which an authority, following the examination required under Article 5.3, determines that there is not sufficient evidence to initiate an investigation".

the light of the foregoing, we conclude that there was no violation of Article 5.8 of the Anti-Dumping Agreement.

7.8 Costa Rica's claim under Article 6.1.3 of the Anti-Dumping Agreement: provision of the "full text of the written application" received

7.8.1 Introduction

7.358. On 7 May 2018, the applicant – Gerdau Metaldom – submitted its written application for initiation of an investigation to the CDC, together with confidential and non-confidential versions of the application form and the annexes thereto.[566] In its letter dated 4 June 2018, the CDC noted that there were "certain aspects that need to be clarified and/expanded on" by the applicant[567] and therefore asked it to provide the "additional information needed to examine the application".[568] In response, the applicant provided the additional information required by the CDC on 7 and 11 June 2018.[569] The CDC accepted the application and, on 30 July 2018, decided to initiate "an anti-dumping investigation into imports of corrugated or deformed steel bars or rods for the reinforcement of concrete" originating in Costa Rica.[570] On the same date, the CDC "notified initiation of the investigation to the known producing/exporting company of the dumped product"[571] (namely, ArcelorMittal[572]) and, together with this notification, "sent copies of Resolution No. CDC-RD-AD-001-2018 providing for the initiation of the investigation, the public notice of its initiation and the non-confidential version of the written application for initiation filed by the applicant".[573]

7.359. Costa Rica claims that the Dominican Republic violated Article 6.1.3 because the CDC (a) failed to provide the text of the application to the known exporter "as soon" as the investigation was initiated; and (b) failed to provide the known exporter with the "full text" of the written application.[574] In particular, Costa Rica submits that the CDC only provided an eight-page document, rather than the application filed by the applicant in its "entirety", and that it was not until four months after initiation, following a request from the exporting company, that the CDC provided it with the required information.[575] In addition to this delay, Costa Rica argues that the CDC never provided the "full" text of the written application to the known exporter, as the CDC failed to provide the information submitted by the applicant in follow-up to the application, which, according to Costa Rica, "corrected" or "supplemented" the application.[576] In view of the foregoing, Costa Rica adds that the CDC failed to comply with basic rules that ensure due process in an investigation, creating imbalances in the process and hampering the exporting company's defence.[577]

7.360. The Dominican Republic states that Costa Rica's arguments are without merit and requests the Panel to reject these claims.[578] In the Dominican Republic's view, Article 6.1.3 refers only to the "full text of the application", and nothing in this provision indicates that elements other than the

[566] Application for initiation of the investigation (7 May 2018) (Exhibit DOM-11 (BCI)). See also Letter from the CDC to Gerdau Metaldom (24 May 2018) (Exhibit DOM-12), p. 1.
[567] Letter from the CDC to Gerdau Metaldom (4 June 2018) (Exhibit DOM-14 (BCI)), p. 3.
[568] Initial Technical Report (Exhibit CRI-6), para. 9.
[569] Letter from Gerdau Metaldom to the CDC (7 June 2018) (Exhibit DOM-15 (BCI)); and letter from Gerdau Metaldom to the CDC (11 June 2018) (Exhibit DOM-16 (BCI)).
[570] Resolution No. CDC-RD-AD-001-2018 (Exhibit DOM-1), p. 1. (emphasis omitted)
[571] Final Technical Report (confidential version) (Exhibit DOM-3 (BCI)), para. 18. (emphasis omitted)
[572] It is an undisputed fact that ArcelorMittal was the only exporter identified by the CDC. (See, for example, Costa Rica's first written submission, para. 251).
[573] Final Technical Report (confidential version) (Exhibit DOM-3 (BCI)), para. 19.
[574] Costa Rica's first written submission, paras. 245 and 252. See also Costa Rica's second written submission, para. 231; and opening statement at the second meeting of the Panel, para. 109.
[575] Costa Rica's response to Panel question No. 43, para. 75; and first written submission, para. 253. Costa Rica indicates that the "vast difference" between what the applicant submitted and the inventory that the CDC conducted based on the information it received, on the one hand, and what the CDC provided to the exporter when the investigation was initiated, on the other hand, demonstrates that the CDC failed to provide the known exporter with the "full text of the application". (Costa Rica's second written submission, para. 240).
[576] Costa Rica's first written submission, para. 256; and second written submission, para. 248.
[577] Costa Rica's first written submission, paras. 250, 253 and 258.
[578] Dominican Republic's first written submission, paras. 598 and 627; second written submission, para. 265.

"text" of the application, such as "annexes" and "updates", should be provided immediately.[579] Consequently, in the investigation in question, the Dominican Republic argues that the CDC complied with Article 6.1.3 of the Anti-Dumping Agreement by providing the non-confidential version of the text of the application "immediately" after initiating the investigation.[580] Furthermore, the Dominican Republic indicates that ArcelorMittal acknowledged receipt of the application and made comments thereon, so its rights of defence were safeguarded in the investigation.[581] Lastly, the Dominican Republic indicates that the CDC subsequently provided ArcelorMittal with the annexes to the application with non-confidential information (the "application form") and granted it sufficient time to make comments thereon, which means that its rights of defence were safeguarded under Articles 6.2 and 6.4 of the Anti-Dumping Agreement.[582]

7.361. Our examination is structured as follows: first, we recall the applicable requirements under Article 6.1.3 of the Anti-Dumping Agreement (section 7.8.2); and, second, we apply those requirements to the specific facts and circumstances of this dispute in order to evaluate whether the Dominican Republic acted inconsistently with Article 6.1.3 of the Anti-Dumping Agreement (section 7.8.3).

7.8.2 Applicable requirements of Article 6.1.3 of the Anti-Dumping Agreement

7.362. The text of Article 6.1.3 of the Anti-Dumping Agreement establishes that:

> As soon as an investigation has been initiated, the authorities shall provide the full text of the written application received under paragraph 1 of Article 5 to the known exporters[16] and to the authorities of the exporting Member and shall make it available, upon request, to other interested parties involved. Due regard shall be paid to the requirement for the protection of confidential information, as provided for in paragraph 5.

> [16] It being understood that, where the number of exporters involved is particularly high, the full text of the written application should instead be provided only to the authorities of the exporting Member or to the relevant trade association.

7.363. Therefore, Article 6.1.3 expressly indicates that the investigating authority must provide the "full text of the written application" received "under Article [5.1 of the Anti-Dumping Agreement]". Article 5.1 of the Anti-Dumping Agreement establishes that an anti-dumping investigation may be initiated upon submission of a "written application" by (or on behalf of) the domestic industry. Consequently, in accordance with Article 6.1.3, the application to be provided is the "written application" by (or on behalf of) the domestic industry.

7.364. Moreover, we note that Article 6.1.3 requires the investigating authorities to "provide" this application to the known exporters and to the authorities of the exporting Member. The ordinary meaning of the term "*facilitar*" ("provide") includes "*entregar*" ("deliver").[583] Accordingly, in our view, the obligation under Article 6.1.3 to "provide" the written application requires effective action by an investigating authority, namely, action to "deliver" this application to the known exporters and to the authorities of the exporting Member in question.

[579] Dominican Republic's opening statement at the first meeting of the Panel, para. 77; second written submission, para. 245; and response to Panel question No. 44(a), para. 141. See also Dominican Republic's first written submission, para. 617.
[580] Dominican Republic's opening statement at the first meeting of the Panel, para. 77; and first written submission, paras. 612-613 and 616.
[581] Dominican Republic's opening statement at the first meeting of the Panel, para. 77; and second written submission, para. 259.
[582] Dominican Republic's opening statement at the first meeting of the Panel, para. 77; and second written submission, para. 245.
[583] *Diccionario de la Real Academia Española*, definition of "*facilitar*" https://www.rae.es/drae2001/facilitar (accessed 29 March 2023), meaning 2.

7.365. Lastly, with regard to when this obligation applies, we note that Article 6.1.3 clearly establishes that the "full text of the written application" must be provided as "*pronto*" ("soon") (in other words, "*con celeridad*" ("rapidly")[584]) as the investigation has been initiated.

7.8.3 Whether the Dominican Republic acted inconsistently with Article 6.1.3

7.366. There are two points of contention between the parties under Article 6.1.3 that we examine below: first, whether the CDC provided the "full text of the written application" received "as soon" as the investigation was initiated; and, second, whether the information provided by the applicant after the submission of the application formed part of the "full text of the written application", and, accordingly, whether it was information that needed to be provided under Article 6.1.3. We will examine these two issues in turn.

7.367. With regard to the first issue, we note that, as has been indicated, the applicant submitted its "written application for initiation of an investigation" (written application) to the CDC, together with the "form for applicant producers" (application form) and the annexes thereto.[585] Moreover, we recall that, on the same day the investigation was initiated, the CDC sent the known company – ArcelorMittal – a copy of the non-confidential version of the written application submitted to the CDC by the applicant.[586]

7.368. Costa Rica argues that the CDC violated Article 6.1.3 because it failed to provide the text of the application to the known exporting company "as soon" as the investigation was initiated.[587] In essence, as we understand it, Costa Rica's claim is based on its opinion that the document provided by the CDC to the known exporter on the same day that the investigation was initiated did not constitute the application submitted by the applicant in its "entirety". In other words, according to Costa Rica, it was not until 22 November 2018 (four months after the investigation was initiated) that the CDC sent the required information, namely, the application form and the annexes thereto, to the exporting company.[588]

7.369. In the light of the foregoing, in order to resolve Costa Rica's claim regarding the "promptness" of the provision of the application, we shall first examine whether the document provided by the CDC to the known exporter, namely the written application without the application form and the annexes thereto, constituted the "full text of the written application" under Article 6.1.3 of the Anti-Dumping Agreement.

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[584] *Diccionario de la Real Academia Española*, definition of "*pronto*" https://dle.rae.es/pronto?m=form (accessed 18 April 2023), meaning 8. We also agree with the panel's assertions in *Guatemala - Cement II* that the term "as soon as" conveys a sense of "substantial urgency", and, in fact, the terms "'immediately' and 'as soon as' are considered to be interchangeable". (Panel Report, *Guatemala - Cement II*, para. 8.101)

[585] Application for initiation of the investigation (7 May 2018) (Exhibit DOM-11 (BCI)); and letter from the CDC to Gerdau Metaldom (24 May 2018) (Exhibit DOM-12), p. 1. We take note of the Dominican Republic's indication that distinction is made in the Dominican Republic between the written application and the application form. The former summarizes (a) who is submitting the application and their credentials; (b) the description of the product and the practice being reported (namely, identification, description, uses and origin of the dumped product; the behaviour of the imports under investigation; dumping analysis and description of the situation; and identification of producers and/or exporters of the reported good); (c) the description of the injury to domestic production; and (d) the causal relationship. The latter, the application form, is an annex to the written application. It contains responses to detailed questions on: (i) the identity of the applicant producer; (ii) the characteristics of the imported products under investigation and the like domestic product; (iii) the domestic industry; (iv) the importers and exporters of the products under investigation; (v) the total sales of the applicant and of the domestic market; (vi) the material injury to the domestic industry and the causal link; (vii) the dumping practices; and (viii) the international market. The application form is also accompanied by annexes, which include information on dumping; the applicant's economic and financial indicators; and imports. (Dominican Republic's response to Panel question No. 45(a), paras. 149-150; and second written submission, paras. 250-251). See also Application for initiation of the investigation (7 May 2018) (Exhibit DOM-11 (BCI)).

[586] Final Technical Report (confidential version) (Exhibit DOM-3), paras. 18-19. The Dominican Republic indicates that, when notifying the initiation of the investigation, the CDC shares the written application and informs the parties that the application form completed by the domestic producer is "available" from the CDC. (See, for example, Dominican Republic's response to Panel question No. 45(b), para. 152).

[587] Costa Rica's first written submission, para. 252.

[588] See, for example, Costa Rica's first written submission, para. 253; and response to Panel question No. 43, para. 75.

7.370. The response to this question raises the issue of the meaning of the expression "full text of the written application" in Article 6.1.3. The parties disagree on the meaning, and particularly on the scope, of this expression. Costa Rica argues, *inter alia*, that the use of the adjective "full" in Article 6.1.3 suggests the intention to give a "broad" and "exhaustive" meaning to the obligation contained in this provision.[589] Therefore, according to Costa Rica, the term "full text of the application" refers to the application in its "entirety", including annexes and any material submitted by the applicant to supplement its application prior to the initiation of the investigation.[590] However, according to the Dominican Republic, the fact that Article 6.1.3 does not refer simply to the full "application", but to the "full text" of the application, "intentionally limits" the obligation contained in Article 6.1.3 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".[591]

7.371. Broadly speaking, the European Union agrees with Costa Rica and argues that the expression "full text of the written application" includes the application and any other written submission provided by the applicant and on the basis of which the investigating authority assessed whether the initiation of the investigation was warranted in accordance with Article 5.3 of the Anti-Dumping Agreement.[592]

7.372. Mexico also concurs with Costa Rica's view and asserts that "the application" within the meaning of Article 6.1.3 comprises the set of elements contained in the application, as well as all the pieces of evidence, inferences and lines of reasoning that support this application, including the elements listed in Article 5.2 of the Anti-Dumping Agreement.[593] Similarly, the United States argues that the "written application" that is to be provided under Article 6.1.3 constitutes the written application filed by (or on behalf of) the domestic industry, including any supplemental aspects of the written application.[594]

7.373. We recall that the relevant part of the text of Article 6.1.3 of the Anti-Dumping Agreement establishes the following:

> [T]he authorities shall provide the full text of the written application received under paragraph 1 of Article 5 to the known exporters and to the authorities of the exporting Member [...]. Due regard shall be paid to the requirement for the protection of confidential information, as provided for in paragraph 5.[595]

7.374. The essence of the Dominican Republic's argument is that the term "text" in Article 6.1.3 should be understood in the sense that this provision does not require elements other than the "text" of the application, such as all the information that could have been provided in an annex or forms, to be provided.[596] However, in our view, the Dominican Republic's argument is based on an erroneous interpretation of the term "text" in Article 6.1.3 of the Anti-Dumping Agreement. In particular, we note that the ordinary meaning of the term "*texto*" ("text") includes "*conjunto coherente de enunciados escritos*" ("coherent set of written submissions").[597] Moreover, as part of its application, we note than an applicant may submit, or be required to submit, non-written evidence or information.[598] Therefore, when placed in context, it is our view that the term "text" refers to the written aspect of the application and, accordingly, its use emphasizes that what needs to be provided under Article 6.1.3 is limited to the written content of the application submitted, thereby excluding

[589] See, for example, Costa Rica's second written submission, paras. 237 and 246.
[590] Costa Rica's second written submission, para. 235. See also Costa Rica's response to Panel question No. 43, para. 70; and opening statement at the first meeting of the Panel, para. 106.
[591] Dominican Republic's first written submission, para. 617. See also Dominican Republic's second written submission, para. 257; and response to Panel question No. 44(a), para. 141.
[592] European Union's third-party response to Panel question No. 10, para. 17.
[593] Mexico's third-party response to Panel question No. 10(a), p. 4.
[594] United States' third-party response to Panel question No. 10(a), para. 24.
[595] Fn omitted.
[596] See, for example, Dominican Republic's first written submission, para. 617.
[597] *Diccionario de la Real Academia Española*, definition of "*texto*" https://dle.rae.es/texto (accessed 2 November 2022), meaning 1.
[598] For example, in the investigation at issue, we note that, in its application, the applicant provided "physical samples of the product under investigation, imported from the country [of origin]" and "samples of the domestically manufactured product". (Application for initiation of the investigation (7 May 2018) (Exhibit DOM-11 (BCI)), p. 1).

the non-written elements.[599] Consequently, we do not agree with the limited and exclusionary meaning that the Dominican Republic attributes to the use of the term "text" in Article 6.1.3, or with the indicative importance that the Dominican Republic gives to this term for the purposes of interpreting the expression "full text of the written application".[600] Rather, an examination of the text and of the context of Article 6.1.3 indicates that the scope of the expression "full text of the written application" is not limited as the Dominican Republic suggests.

7.375. As we discuss above, based on the terms set out in Article 6.1.3, the application to be provided is the "full text of the written application" submitted in accordance with Article 5.1 of the Anti-Dumping Agreement: in other words, the "written application" for initiation of an investigation submitted by (or on behalf of) the domestic industry. At the same time, we note that, except in cases related to confidential information, there is nothing in Article 6.1.3 that limits or circumscribes the provision of this application to, for example, certain documents or document types only, or that limits the nature of the written information contained in the documents submitted. On the contrary, we note that Article 6.1.3 clearly requires the "full" text of the written application received to be provided. The ordinary meaning of the term "*completo*" ("full") includes "*[q]ue tiene todos los elementos o partes que normalmente lo componen*"[601] ("having all the elements or parts that usually comprise it") and "*que tiene todos los elementos necesarios*" ("having all the necessary elements").[602] Therefore, the use of the adjective "full" in the context of Article 6.1.3 indicates that the written application that must be provided in accordance with this provision includes all of the written documents or submissions that form part of the application or that are necessary for the purposes of applying for the initiation of an investigation.[603] Under such circumstances, we do not see any textual basis in the provision in question for excluding information or evidence that an applicant has supplied as part of their application in annexes, forms or other written documents.

7.376. The Dominican Republic asserts that the reference to the "full" text in Article 6.1.3 "means that it is not the authority's responsibility to prepare a summary of the application".[604] However, the Dominican Republic's assertion is inconsistent with the meaning of the term "full". Furthermore, we note that Article 6.1.3 refers only to an investigating authority's obligation to "provide" the "full text of the written application" received and there is nothing in this provision that refers to an investigating authority's capacity to "prepare" something in relation to this application.

7.377. As context relevant to the interpretation of the expression "full text of the written application", we also note that Article 5.2 of the Anti-Dumping Agreement lays down the content to be included in the "application under [Article 5.1]", that is, the application also referred to in Article 6.1.3. In particular, in our view, the reference in Article 6.1.3 to the application received in accordance with Article 5.1 and the requirements in Article 5.2, which specify the evidence and information to be included in this application, clearly establish an explicit link between these three provisions. We therefore reject the Dominican Republic's argument that the fact that Article 6.1.3 refers only to Article 5.1, and not to Article 5.2 in which reference is made to the evidence to be submitted together "with" the application, means that the evidence contained in the annexes does not need to be provided under Article 6.1.3.[605]

7.378. Article 5.2 indicates that the application referred to in Article 6.1.3 must include "evidence" of dumping, injury and a causal link, in the form of certain elements of "information" to be submitted insofar as it is "reasonably" available to the applicant. Accordingly, in our view, it is clear that the information and evidence that an applicant submits under Article 5.2 forms part of its written application and, as a result, this information and evidence needs to be provided under Article 6.1.3.

[599] In fact, we note that Article 6.1.3 itself refers to the "text" of the "written" application.

[600] In this regard, we note Costa Rica's argument that understanding the term "text" as a limiting factor would run counter to the broad meaning reflected by the use of the term "full" in Article 6.1.3. (See, for example, Costa Rica's second written submission, para. 246).

[601] *TheFreeDictionary*, definition of "*completo*" https://es.thefreedictionary.com/completo (accessed 30 March 2023), adj., meaning 1.

[602] *Diccionario general de español*, definition of "*completo*" https://www.definiciones-de.com/Definicion/de/completo.php#definicion_snip (accessed 30 March 2023), adj., meaning 1.

[603] Pursuant to the Anti-Dumping Agreement, we note that the purpose of an application is to initiate an anti-dumping investigation in order to "determine the existence, degree and effect of any alleged dumping". (Article 5.1 of the Anti-Dumping Agreement).

[604] See, for example, Dominican Republic's second written communication, para. 263.

[605] Dominican Republic's response to Panel question No. 44 (a)-(b), paras. 141-142; and second written submission, paras. 257-258.

However, we note that we agree with the European Union's assertion that it is not only the content detailed in Article 5.2 that falls under the obligation established under Article 6.1.3 of the Anti-Dumping Agreement.[606] As has been indicated above, we note that Article 6.1.3 requires the "full" text of the written application submitted by (or on behalf of) the domestic industry to be provided, and that Article 5.2 only indicates the evidence and information that this application must "include".

7.379. The Dominican Republic claims that the fact that Article 6.1.3 refers expressly to the need to protect confidential information, which, in all "likelihood" is included in most of the evidence submitted together with the text of the application, confirms that the drafters' intention "was to oblige the authorities to provide the text of the application, rather than the evidence together with the text".[607] However, we note that the Dominican Republic's argument on "likelihood" contradicts the "explicit" requirement in Article 5.2 for the application to be supported by evidence of dumping, injury and a causal link.

7.380. Consequently, in the light of all the previous considerations, we do not agree with the Dominican Republic's interpretation that the expression "full text of the written application" excludes the information or evidence provided by an applicant in an annex or other forms related to the application. Accepting the Dominican Republic's interpretation would distort the purpose of Article 6.1.3 as it could undermine the principle of transparency and due process rights laid down in Article 6.1.3.[608]

7.381. The Dominican Republic maintains that its interpretation of the "full text" of the application does not "undermine" the "transparency" requirement, as Articles 6.2 and 6.4 of the Anti-Dumping Agreement "[would] continue" to enable interested parties to have the opportunity to examine all the relevant non-confidential information that the authorities use in the investigation.[609] However, in our view, the obligations laid down in these provisions and, as a result, the rights of the interested parties covered by them, are, by their nature, different from the obligations and rights under Article 6.1.3. Specifically, we recall that Article 6.1.3 establishes the obligation for the investigating authority to "provide", "as soon" as the investigation has been initiated, "the full text of the written application" received.

7.382. Moreover, we note that Article 6.2 does not lay down any obligations concerning the disclosure of, or access to, information.[610] Similarly, although Article 6.4 allows for "interested parties to see all information that is relevant to the presentation of their cases, that is not confidential"[611], we note that the obligation in Article 6.4, which applies throughout the investigation, concerns information that is "used" by the authorities in the investigation and does not require this information to be actively disclosed.[612] Accordingly, in our view, while the information and evidence submitted as part of an application could be provided over the course of an investigation (assuming that it is information and evidence used by the authorities), we do not see how providing this

[606] European Union's third-party response to Panel question No. 10, para. 16.

[607] See, for example, Dominican Republic's second written communication, para. 262.

[608] Panel Report, *Guatemala - Cement II*, paras. 8.102 and 8.111 ("a key function of the transparency requirements of the AD Agreement is to ensure that interested parties … are able to take whatever steps they deem appropriate to defend their interests" and, to that end, "[a]ccess to the text of the application is crucial for the exporter to prepare its defence").

[609] Dominican Republic's second written submission, para. 256.

[610] As previous panels have highlighted, the only specific requirement in Article 6.1.3 is for "investigating authorities to, on request, provide opportunities for parties to meet other parties with adverse interests", and, therefore, "nothing in the text of Article 6.2 … require[s] investigating authorities to actively disclose information to interested parties" as, in fact, "there is nothing specific in the text of Article 6.2 that relates to 'information' at all". (Panel Report, *EU - Footwear (China)*, para. 7.604. See also Panel Report, *EC — Fasteners (China)*, para. 7.481).

[611] Article 6.4 of the Anti-Dumping Agreement provides the following:

> The authorities shall whenever practicable provide timely opportunities for all interested parties to see all information that is relevant to the presentation of their cases, that is not confidential as defined in paragraph 5, and that is used by the authorities in an anti-dumping investigation, and to prepare presentations on the basis of this information.

[612] We agree with the panel's comments in *EC - Fasteners (China)* that the obligation laid down in Article 6.4 to provide "timely" opportunities to see information, which applies "throughout the course of an anti-dumping investigation", "does not obligate the investigating authorities to actively disclose information to interested parties". (Panel Report, *EC - Fasteners (China)*, paras. 7.480 and 7.507).

information and evidence could constitute an alternative way of guaranteeing the inherent procedural rights of transparency and due process enjoyed by the parties under Article 6.1.3.[613] In other words, access – through its "provision" by the authorities – to the "full text of the written application" received "as soon" as the investigation has been initiated. We therefore reject the Dominican Republic's argument that its interpretation that the "full text" of the application alone would not undermine the "transparency" requirement, since Articles 6.2 and 6.4 would continue to enable the interested parties to see the information.

7.383. On the basis of the foregoing, we find that the written application provided by the CDC to the known exporter on the same day as the investigation was initiated – which also, as the Dominican Republic itself recognizes, only "summarizes" the applicant's claims[614] – could not constitute the "full text of the written application" within the meaning of Article 6.1.3. In particular, the text and the context of Article 6.1.3 clearly indicate that the written application under this provision includes all the elements and parts that comprise it, including the evidence or information contained in the annexes, forms or other document types provided by an applicant. As has been previously mentioned, Article 6.1.3 clearly imposes the obligation to provide the "full text of the written application" as "soon" (in other words, rapidly) as the investigation has been initiated.[615] In the present case, the record shows that the application form and the annexes thereto were provided to the exporting company on 22 November 2018, that is, slightly less than four months after initiation.[616] Under such circumstances or, in other words, given that there was a delay of exactly 116 days, we find that the CDC failed to comply with the requirement to provide the "full text of the written application" submitted by the applicant "as soon" as the investigation was initiated.[617]

7.384. The Dominican Republic argues that, following the initiation of the investigation, the CDC provided ArcelorMittal with the information contained in the initiation form and the annexes thereto and granted it sufficient time (30 working days) to make comments on them, therefore its rights of defence were safeguarded.[618] In our view, however, the fact that the CDC granted the known exporter 30 working days to make comments on the information in question almost four months after the initiation of the investigation, does not imply, let alone mean, that the rights of defence of the known exporter were safeguarded "as soon" as the investigation was initiated. Indeed, the record shows that, prior to receiving the initiation form and the annexes thereto, the known exporter had already stated that its rights of defence had been violated by the absence of this information.[619]

7.385. conclusion, for the reasons set out above, we find that by providing the known exporter with the initiation form and the annexes thereto almost four months after initiating the investigation, the Dominican Republic acted inconsistently with its obligation under Article 6.1.3 to provide the "full text of the written application" received "as soon" as the investigation was initiated.

7.386. With regard to the second matter, namely, whether the information provided by the applicant in follow-up to the application formed part of the "full text of the written application" and, consequently, was information that needed to be provided under Article 6.1.3, Costa Rica claims that this "additional information" was related to the initiation application and therefore formed part

[613] Indeed, as demonstrated by the facts of the investigation at issue (see para. 7.384. above), in contrast to what is claimed by the Dominican Republic, the known exporter's rights of defence under Article 6.1.3 were not safeguarded in an alternative manner later during the investigation.

[614] Dominican Republic's second written submission, para. 250.

[615] See para. 7.365. above.

[616] Letter from the CDC (22 November 2018) (Exhibit CRI-17).

[617] In this context, we note the finding of the panel in *Guatemala - Cement II* that the "sending of the application even 8 days after the initiation of investigation is not adequate to fulfil the requirement that it be done 'as soon as an investigation has been initiated'". (Panel Report, *Guatemala - Cement II*, para. 8.104)

[618] In particular, the Dominican Republic maintains that the reason why the text of the application must be submitted immediately under Article 6.1.3 is directly related to the need "for exporters to prepare the arguments in defence of their interests before the investigating authorities" and given that "in this case, an additional 30 working days were granted in order to make comments on the form, it is clear that this due process-related obligation was respected, even assuming that the initiation form [wa]s part of the full text of the written application (*quod non*)". (Dominican Republic's first written submission, para. 626).

[619] Specifically, in its comments made on the written application provided on 30 July 2018 (in other words, on the day that the investigation was initiated), the known exporter stated that the "missing, untimely and incomplete information" in this application, "constitute[d] a violation of due process" and "le[ft] it clearly defenceless". (ArcelorMittal's comments (30 October 2018) (Exhibit DOM-17), p. 1).

of it.[620] In its defence, the Dominican Republic makes the same arguments as those raised with regard to the applicant's initiation form and the annexes thereto[621], which we have rejected. Having determined that, in our view, 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 are necessary to resolve this dispute.

7.8.4 Conclusion

7.387. Based on the foregoing, we conclude that 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.

7.9 Costa Rica's claim under Article 6.4 of the Anti-Dumping Agreement: opportunities to see certain information

7.9.1 Introduction

7.388. From 22 to 25 October 2018, the CDC conducted a verification visit at the production facility and administrative offices of the applicant company (Gerdau Metaldom).[622] The purpose of this visit was to confirm the accounting, economic and financial figures provided by the company, and to observe, on the spot, the production process for the product under investigation.[623] The CDC took minutes of the verification visit, which were included in the public and confidential record of the investigation. The CDC also prepared reports on "the findings and information resulting from the verification visit", which were incorporated into the confidential record of the investigation.[624]

7.389. Costa Rica claims that the Dominican Republic violated Article 6.4 of the Anti-Dumping Agreement because the CDC failed to provide the exporting company (ArcelorMittal) with timely opportunities to see all information relevant to the presentation of its case and to prepare presentations on the basis of this information.[625] In particular, Costa Rica asserts that the CDC failed to provide the exporting company with opportunities to see: (a) the reports on the findings and information resulting from the verification visit; and (b) the documents that the CDC received during this visit.[626] According to Costa Rica, the information in question was relevant, was not declared confidential by the CDC under Article 6.5 of the Anti-Dumping Agreement, and was used by the CDC in the anti-dumping investigation at issue.[627] In the light of the above, Costa Rica adds that the CDC failed to comply with the rules of due process and left the exporting company defenceless.[628]

7.390. The Dominican Republic responds that Costa Rica's assertions are erroneous[629] for five reasons: (a) the text of the Anti-Dumping Agreement (Article 6.7) contradicts Costa Rica's argument that the verification results should be shared with a party other than the verified

[620] See, for example, Costa Rica's first written submission, para. 256. See also para. 7.359. above.
[621] See para. 7.360. above.
[622] Despite the CDC having scheduled the verification visit for the week of 22-26 October 2018, the CDC "complete[d] the verification of all the information on 25 October 2018". (Minutes of the verification visit (Exhibit CRI-7), p. 3)
[623] Final Technical Report (Exhibit CRI-3), para. 53; Essential Facts Report (Exhibit CRI-4), para. 33; and final determination (Exhibit CRI-2), para. 17. See also minutes of the verification visit (Exhibit CRI-7), pp. 1-3.
[624] Final Technical Report (Exhibit CRI-3), para. 54. See also minutes of the verification visit (Exhibit CRI-7), p. 2.
[625] Costa Rica's second written submission, para. 278. See also Costa Rica's first written submission, para. 259.
[626] Costa Rica's first written submission, paras. 263-264; and second written submission, paras. 281-282. See also Costa Rica's opening statement at the first meeting of the Panel, para. 111; and response to Panel question No. 49, paras. 82-83.
[627] Costa Rica's second written submission, paras. 283-286; and first written submission, paras. 265-267. See also Costa Rica's opening statement at the second meeting of the Panel, para. 110.
[628] Costa Rica's first written submission, para. 262. See also Costa Rica's first written submission, paras. 265 and 267.
[629] Dominican Republic's first written submission, para. 629.

company[630]; (b) the documents received during the verification visit, as well as the CDC's conclusions pertaining to those documents, fall within the definition of confidential information in Article 6.5[631]; (c) Costa Rica has failed to prove that the alleged "information" meets the legal standard of being "used" by the authorities within the meaning of Article 6.4[632]; (d) the obligation under Article 6.4 does not require active disclosure by the investigating authority, but rather is limited to providing timely opportunities for all interested parties to see information; and (e) in this case, there is no evidence suggesting that ArcelorMittal - despite having been aware of what happened during the verification visit and of the documents gathered - has requested opportunities to see the information in question and that it has been denied such opportunities.[633]

7.391. Our examination is structured as follows: first, we recall the applicable requirements under Article 6.4 of the Anti-Dumping Agreement (section 7.9.2); and, second, we apply these requirements to the specific facts and circumstances of this dispute in order to evaluate whether the Dominican Republic acted inconsistently with Article 6.4 of the Anti-Dumping Agreement (section 7.9.3).

7.9.2 Applicable requirements of Article 6.4 of the Anti-Dumping Agreement

7.392. The text of Article 6.4 of the Anti-Dumping Agreement provides as follows:

> The authorities shall whenever practicable provide timely opportunities for all interested parties to see all information that is relevant to the presentation of their cases, that is not confidential as defined in paragraph 5, and that is used by the authorities in an anti-dumping investigation, and to prepare presentations on the basis of this information.

7.393. Article 6.4 thus requires investigating authorities, "whenever practicable", to provide timely opportunities for interested parties in the investigation to see all "information" that is: (a) relevant to the presentation of their cases; (b) not confidential as defined in Article 6.5; and (c) used by the authorities in the investigation. Therefore, the information concerned must meet these three cumulative criteria as a precondition for a finding of an Article 6.4 violation.[634]

7.394. Regarding the relevance of the information, the information is considered "relevant" within the meaning of Article 6.4 when the interested party itself determines that the information is relevant to the presentation of its case in the investigation.[635] However, under the terms of Article 6.4, any information that has been accorded "confidential" treatment in accordance with Article 6.5 is excluded from the scope of this provision.[636]

7.395. Lastly, we agree with panels in previous disputes that Article 6.4 does not obligate the authorities to actively disclose information to interested parties.[637]

7.9.3 Whether the Dominican Republic acted inconsistently with Article 6.4

7.396. Costa Rica raises its claim under Article 6.4 regarding opportunities to see certain items of information and to prepare presentations on the basis of such information. In particular, Costa Rica's claim is limited to two categories of information: (a) the documents that the CDC received from the

[630] Dominican Republic's first written submission, para. 647; second written submission, paras. 267 and 273-274; opening statement at the first meeting of the Panel, paras. 78-79; and response to Panel question No. 112, paras. 220-221.
[631] Dominican Republic's first written submission, paras. 648-649; and second written submission, para. 268.
[632] Dominican Republic's first written submission, para. 650; and second written submission, para. 271.
[633] Dominican Republic's first written submission, para. 651 (referring to, *inter alia*, Panel Report, *Korea — Certain Paper (Article 21.5 - Indonesia)*, para. 6.87); and second written submission, paras. 269-270.
[634] See, for example, Appellate Body Report, *EC — Fasteners (China) (Article 21.5 - China)*, para. 5.122; and Panel Report, *China - Broiler Products (Article 21.5 - US)*, para. 7.279.
[635] Appellate Body Reports, *EC - Tube or Pipe Fittings*, para. 145; *EC - Fasteners (China)*, para. 479; and *EC — Fasteners (China) (Article 21.5 - China)*, para. 5.111.
[636] Appellate Body Report, *EC - Fasteners (China) (Article 21.5 - China)*, para. 5.101.
[637] Panel Reports, *EC - Fasteners (China)*, para. 7.480; *Korea - Certain Paper (Article 21.5 - Indonesia)*, para. 6.87; and *EU - Footwear (China)*, paras. 7.646 and 7.648.

applicant during the verification visit; and (b) the CDC's reports on the findings and information resulting from this verification visit. We address each of these aspects below.

7.9.3.1 Documents received by the CDC from the applicant during the verification visit

7.397. Costa Rica submits that the documents received by the CDC during the verification visit were "relevant" information within the meaning of Article 6.4, since this information would have enabled the exporting company to have a fuller understanding of the domestic industry's situation for the purpose of preparing its arguments concerning the alleged existence of injury and the alleged causal link.[638] Costa Rica also asserts that this information was in fact "used" by the CDC and that it was not "declared" confidential during the investigation.[639]

7.398. The Dominican Republic responds that Article 6.4 does not require the "active disclosure" of all the documents obtained or produced by the authorities in an investigation.[640] Therefore, according to the Dominican Republic, if the interested party considers the alleged information to be "relevant to the presentation of [its case]", it could and should have requested an opportunity to see that information. In this instance, the Dominican Republic notes that ArcelorMittal, however, despite knowing "exactly" what had happened during the verification visit and which documents had been gathered[641], did not request to see the alleged "information" from the visit, and therefore Costa Rica's claim is without merit.[642] In addition, the Dominican Republic submits that the documents provided during the verification (a) are not the type of "information" to be provided on the basis of Article 6.4[643] and (b) fall within the definition of confidential information in Article 6.5[644], and that (c) Costa Rica has failed to demonstrate that the information at issue has been "used" by the authorities within the meaning of Article 6.4.[645]

7.399. The first question we must address is whether the documents that the CDC received from the applicant during the verification visit constitute "information" within the meaning of Article 6.4. The minutes of the verification visit (verification minutes) state that, during this visit, the CDC received the following documents: (a) nine invoices for raw material purchased by the applicant (Gerdau Metaldom); (b) 40 invoices for sales of the like product for the POI; (c) sales report; (d) reports on sales costs and details thereof; (e) report on sales of round and square bars; (f) list of prices of rods and rods in coils for the export market; (g) employee payroll lists (February, July and November 2015; April, August and December 2016; January, June and October 2017; and March 2018); (h) Social Security Treasury payment receipt (February, July and November 2015; April, August and December 2016; January, June and October 2017; and March 2018); (i) list of permanent staff submitted to the Ministry of Labour (2015-2017 and January-April 2018); and (j) audited financial statements (2017).[646] It is this Panel's understanding that the information gathered at the time of the verification visit confirmed the veracity and accuracy of the information provided by the applicant.[647] That information had been used to initiate the investigation and had

[638] In other words, according to Costa Rica, this would have enabled the exporting company to prepare its presentations with a more "clear and comprehensive" understanding. (Costa Rica's first written submission, para. 265; and second written submission, para. 283).
[639] Costa Rica's first written submission, paras. 266-267; and second written submission, para. 284.
[640] The Dominican Republic argues that the fact that Article 6.4 does not impose an active disclosure obligation means that the burden of proof lies with Costa Rica, i.e. it is for Costa Rica to demonstrate that the authorities did not provide opportunities to see the relevant and non-confidential information at issue. (Dominican Republic's second written submission, para. 280).
[641] In particular, the Dominican Republic notes that, through the verification minutes, which formed part of the public record, ArcelorMittal "was aware of the preparation of a 'verification report' and also knew exactly what additional evidence was gathered during verification". (See, for example, Dominican Republic's second written submission, para. 281).
[642] Dominican Republic's response to Panel question No. 55, paras. 164-166. See also, for example, Dominican Republic's first written submission, paras. 646 and 651; second written submission paras. 269-270; and opening statement at the first meeting of the Panel, para. 83.
[643] Dominican Republic's response to Panel question No. 55, para. 167. See also Dominican Republic's first written submission, para. 652; and responses to Panel questions Nos. 59 and 111, paras. 179 and 213, respectively.
[644] See, for example, Dominican Republic's first written submission, para. 648; and second written submission, para. 268.
[645] Dominican Republic's first written submission, para. 650; and second written submission, para. 271.
[646] Minutes of the verification visit (Exhibit CRI-7), pp. 3-4.
[647] See, for example, para. 7.388. above.

therefore been included in the investigation's Initial Technical Report.[648] ArcelorMittal was therefore aware of this information, and of that contained in the record.

7.400. The Dominican Republic argues that these documents are not "information" within the meaning of Article 6.4, but rather constitute "documentary evidence" supporting the information already provided by the applicant in its questionnaire response.[649] Costa Rica disagrees with this assertion, noting that the term "information" in Article 6.4 has a broad meaning. In particular, Costa Rica indicates that: (a) this provision refers to "all" information; (b) the ordinary meaning of the term "information" includes evidence and includes material that supports information already provided; and (c) this term has been interpreted broadly.[650]

7.401. We recall that the "information" that an investigating authority will provide timely opportunities to see is "all" information that is "relevant" and "not confidential" that is "used" by the investigating authorities. In our view, this clearly indicates that the term "information" within the meaning of Article 6.4 does not in any way limit the type or nature of information that an interested party is entitled to see under that provision. Accordingly, "all" information that is relevant and used by the investigating authority, with the exception of confidential information, may be seen by interested parties in the investigation.

7.402. We now turn to consider whether the information contained in the documents under review meets the three conditions set out in Article 6.4. The Dominican Republic submits that the information gathered during the verification visit does not constitute "relevant" information, as it is merely "documentary evidence" supporting the information provided in the questionnaire response from the domestic industry. According to the Dominican Republic, the latter is the relevant "information" under Article 6.4, and this was made available to ArcelorMittal, giving it an opportunity to comment.

7.403. However, it is our understanding that the information subject to verification was relevant. In particular, we recall that information is "relevant" within the meaning of Article 6.4 when the interested party itself determines that the information is relevant to the presentation of its case in the investigation.[651] At the same time, we note Costa Rica's argument that the information gathered during the verification visit, and the documents received by the CDC during that same visit, were "relevant" information, as this information would have enabled the exporting company to have fuller understanding of the domestic industry's situation for the purpose of preparing its arguments concerning the alleged existence of injury and the alleged causal link.[652]

7.404. As we have said, the Dominican Republic also submits that since ArcelorMittal did not request any information, Costa Rica's claim is without merit. That is to say that, in the Dominican Republic's view, if the interested party considers that the alleged information was "relevant to the presentation of [its] case[]", it could and should have requested an opportunity to see that information.[653] In our view, however, the mere fact that an interested party has not requested an opportunity to see certain information does not in itself demonstrate that the information is not relevant within the meaning of Article 6.4.

7.405. With regard to whether the information gathered at the time of the verification was used by the CDC, we note that, as we have pointed out, this information made it possible to confirm the veracity and accuracy of the information previously provided by the applicant. Thus, given that the information submitted by the applicant was considered relevant information and was verified by the CDC, it is understood that the information gathered during the verification is of the same nature, recalling that the purpose of the verification was to confirm the veracity and accuracy of the information previously provided, as mentioned above.

[648] See, for example, Initial Technical Report (Exhibit CRI-6).
[649] Dominican Republic's first written submission, para. 652.
[650] Costa Rica's response to Panel question No. 111, para. 55 (referring to Appellate Body Report, *EC — Fasteners (China)*, para. 495; and Panel Report, *China - Broiler Products*, para. 7.310). See also definition of "*información*" (Exhibit CRI-25).
[651] See para. 7.394. above.
[652] Costa Rica's first written submission, para. 265.
[653] Dominican Republic's response to Panel question No. 55, paras. 164 and 166.

7.406. We now turn to the last condition imposed on the range of information subject to the requirements of Article 6.4, namely the non-confidentiality of the information. Costa Rica argues that the information contained in the documents at issue was not "declared" confidential.[654] In particular, Costa Rica notes that this information is not covered by the resolutions under which the CDC accorded confidential treatment to some of the applicant's information, and that the verification minutes do not indicate that the CDC accepted the applicant's request for this information to be treated as confidential.[655]

7.407. The Dominican Republic submits, however, that the documents received during the verification fall within the definition of confidential information of Article 6.5.[656] Furthermore, the Dominican Republic adduces that there is no legal basis for claiming that information must be "declared confidential" by an investigating authority in order to be excluded from the scope of Article 6.4.[657] In particular, according to the Dominican Republic, the documents need not be "declared confidential" as long as they are consistent with the definition in Article 6.5 (i.e. that they are by nature confidential or provided on a confidential basis, and treated as such), as was the case with the documents at issue in the investigation.[658]

7.408. We note that, with respect to the documents provided during the verification visit, it was requested that they be treated as confidential "under Article 52 of the Regulations" implementing Law No. 1-02.[659] Furthermore, we note that there is no disagreement between the parties that the information contained therein was not disclosed in any way to the interested parties during the investigation, and we therefore infer that the CDC accorded confidential treatment to that information.[660] Costa Rica's central argument specifically addresses this issue, and is essentially based on the assumption that the confidential treatment afforded to information must be "declared" by an investigating authority. However, as we discuss later in our report[661], Article 6.5 does not establish how an investigating authority should or must indicate in the investigation record its determination regarding confidential treatment granted. Moreover, insofar as Costa Rica responds that the CDC erroneously treated the information as confidential, we note that this would fall within the scope of a claim under Article 6.5, which Costa Rica has not made with regard to the information at issue.[662]

7.9.3.2 The CDC's reports on the findings and information resulting from the verification visit

7.409. Costa Rica relies largely on the same arguments it made regarding the documents that the CDC received during the verification visit, noting that the report on the findings and information resulting from this visit was relevant information[663] that was used by the CDC in the investigation[664], and was not "declared" confidential under Article 6.5 of the Anti-Dumping Agreement.[665] Costa Rica also submits that, as a factual matter, the Dominican Republic has not demonstrated that this information constituted analysis, conclusions or methodologies of the CDC.[666]

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[654] See, for example, Costa Rica's first written submission, para. 267.
[655] Costa Rica's first written submission, paras. 268-270 and 285.
[656] Dominican Republic's first written submission, para. 648; and second written submission, para. 268.
[657] Dominican Republic's first written submission, para. 648.
[658] Dominican Republic's first written submission, para. 649. See also Dominican Republic's opening statement at the first meeting of the Panel, para. 82; and response to question No. 56, para. 168.
[659] Minutes of the verification visit (Exhibit CRI-7), p. 4.
[660] Furthermore, we note that in its Resolutions Nos. 003 and 005, the CDC explicitly afforded confidential treatment to information of the same type and nature as that contained in the documents at issue. (See, for example, paras. 7.430. and 7.431. below).
[661] See specifically paras. 7.433. and 7.439. .
[662] Costa Rica claims that the obligation in Article 6.4 is "independent and does not depend on there being a violation of Article 6.5". (Costa Rica's response to Panel question No. 114, para. 63). However, in this instance, where the information at issue was treated as confidential, we fail to see how Costa Rica intends to demonstrate, if not by means of a claim under Article 6.5, that this information was not confidential in accordance with this provision and was therefore subject to the obligation laid down in Article 6.4.
[663] Costa Rica's first written submission, para. 265; and second written submission, para. 283.
[664] Costa Rica's first written submission, para. 266; and second written submission, para. 284.
[665] See, for example, Costa Rica's first written submission, para. 267.
[666] Costa Rica's comments on the Dominican Republic's response to Panel question No. 112, paras. 86-88.

7.410. For its part, the Dominican Republic reiterates that Article 6.4 does not require the "active disclosure" of all the documents obtained or produced by the authorities in an investigation, but rather the obligation contained in that provision applies when a request is received to "consult" certain information. Thus, according to the Dominican Republic, if the interested party considers the alleged information to be "relevant", it could and should have requested an opportunity to see that information, which ArcelorMittal did not, despite being aware of what had taken place during the verification.[667] Furthermore, the Dominican Republic submits that the internal reports prepared by the authorities (a) are not the type of "information" to be provided on the basis of Article 6.4[668] and (b) fall within the definition of confidential information in Article 6.5[669], and that (c) Costa Rica has failed to demonstrate that the information at issue complies with the "legal standard" of being "used" by the authorities within the meaning of Article 6.4.[670]

7.411. We recall that following the verification visit, the CDC prepared a report on "the findings and information resulting from the verification visit".[671] The Dominican Republic adduces that this report contains "the CDC's statements", which do not constitute "information", but rather "thoughts and 'findings' on the information" and are therefore not covered by Article 6.4.[672]

7.412. In our view, the thoughts and findings of an authority regarding the information verified in the context of a verification visit do not constitute, as such, information within the meaning of Article 6.4.[673] However, the report in question does not form part of the record of this dispute and we therefore have no way of knowing what that report contains. In particular, we have no basis to find that the report contains only findings by the CDC. The Dominican Republic states that paragraph 17 of the CDC's final determination "reflects what is in the 'report', that is, the CDC's statements".[674] In relevant part, however, this paragraph merely states that "reports were prepared on the findings and information resulting from the verification visits, and are included in the confidential record of the investigation".[675] We therefore see nothing in that paragraph suggesting that the report in question only "reflected" the "CDC's statements".

7.413. We now turn to consider whether this report is subject to the obligation in Article 6.4. We recall that Article 6.4 only requires that timely opportunities be provided to see information that is "relevant" to the presentation of the cases of the interested parties, "used" by the authorities in an investigation, and "not confidential" as defined in Article 6.5. In the present case, we note that the report in question was incorporated into the confidential record of the investigation[676], and that the information contained therein was not disclosed in any way to the interested parties during the investigation[677], and we therefore infer that the CDC accorded confidential treatment to that information. Costa Rica recognizes that Article 6.4 excludes confidential information from its scope of application, but submits that the information regarding the "findings and information resulting from the verification visit" was not "declared" as such in the investigation.[678] However, Costa Rica bases its argument on the premise that the confidential treatment accorded to information must be

[667] Dominican Republic's response to Panel question No. 55, paras. 164-166. See also, for example, Dominican Republic's first written submission, paras. 646 and 651; second written submission, paras. 269-270; and opening statement at the first meeting of the Panel, para. 83.

[668] See, for example, Dominican Republic's response to Panel question No. 111, paras. 213-214.

[669] Dominican Republic's first written submission, para. 648; and second written submission, para. 268.

[670] Dominican Republic's first written submission, para. 650; and second written submission, para. 271.

[671] Letter of notice of the visit to Gerdau Metaldom (15 October 2018) (Exhibit DOM-25), p. 3; minutes of the verification visit (Exhibit CRI-7), p. 2; Final Technical Report (Exhibit CRI-3), para. 54; and Essential Facts Report (Exhibit CRI-4), p. 15.

[672] Dominican Republic's response to Panel question No. 111, para. 218. See also Dominican Republic's response to Panel question No. 50, para. 158.

[673] Specifically, we share the Appellate Body's statements that Article 6.4 does not refer to an investigating authority's "reasoning or internal deliberation", or to "an authority's detailed analysis of the information". (Appellate Body Report, *EC - Fasteners (China)*, para. 480).

[674] Dominican Republic's response to Panel question No. 111, paras. 216-218.

[675] Final determination (Exhibit CRI-2), p. 4.

[676] Final Technical Report (Exhibit CRI-3), para. 54. See also minutes of the verification visit (Exhibit CRI-7), p. 2.

[677] The Dominican Republic confirmed that non-confidential versions were not drawn up for any of the verification reports prepared by the CDC, and that the fact that none of the interested parties requested to see these reports explains why no non-public versions were prepared. (Dominican Republic's response to Panel question No. 52, para. 160. See also Dominican Republic's response to Panel question No. 53, para. 162).

[678] See, for example, Costa Rica's first written submission, para. 267.

"declared" by an investigating authority, which we have rejected.[679] Moreover, insofar as Costa Rica challenges the confidential treatment accorded by the CDC to the information contained in the report on the findings and information from the verification visit, we note that this would require a claim under Article 6.5, which Costa Rica has not made with regard to this information.[680]

7.9.3.3 Conclusion

7.414. In view of the foregoing, we conclude that the Dominican Republic did not violate Article 6.4 because the CDC did not provide timely opportunities for the exporting company to see the information contained in the CDC's report on the findings and information from the verification visit and in the documents provided during that verification. In these circumstances, we do not consider it necessary to address the other arguments raised by the Dominican Republic[681] in support of its claims under Article 6.4 of the Anti-Dumping Agreement.

7.10 Costa Rica's claims under Article 6.5 of the Anti-Dumping Agreement: confidential treatment granted to certain information

7.10.1 Introduction

7.415. In the investigation, the applicant (Gerdau Metaldom) requested confidential treatment for some of the information and documents submitted to the CDC. Through Resolution No. 003 and Resolution No. 005, the CDC granted confidential treatment to said information and documents.[682]

7.416. Costa Rica argues that the Dominican Republic violated Article 6.5 of the Anti-Dumping Agreement because the CDC granted, without "good cause" being shown, confidential treatment to the information submitted by the domestic industry.[683] In particular, Costa Rica submits that pursuant to Article 6.5, the CDC was required to: (a) assess the reasons provided by the domestic industry to justify the confidential treatment of certain information; and (b) determine "objectively" whether the domestic industry had shown "good cause" for the confidential treatment of its information.[684] However, Costa Rica maintains that Resolution No. 003 and Resolution No. 005 do not demonstrate that the CDC "assessed" the reasons given, or that the CDC had "objectively" determined whether the applicant had shown "good cause" for the confidential treatment of its information.[685] As such, Costa Rica submits that the record does not reflect that the CDC had conducted an "objective assessment" of the reasons given by the domestic industry to justify the confidential treatment requested and, consequently, the CDC acted inconsistently with Article 6.5.[686]

7.417. The Dominican Republic rejects Costa Rica's claim on the grounds that it is incorrect and is without merit.[687] In general terms, the Dominican Republic submits that Costa Rica's position erroneously asserts that a "reasoned explanation" by the investigating authority is required with respect to the "good cause shown" for the protection of "each piece of confidential information".[688] However, according to the Dominican Republic, it is sufficient that it can be "discern[ed] from [the] published report" that the investigating authority has assessed whether good cause has been shown, and no "further express explanation" is required.[689] Moreover, the Dominican Republic notes that Costa Rica fails to demonstrate that the information to which confidential treatment was granted did

[679] See para. 7.407. above.
[680] Regarding Costa Rica's argument that the obligation under Article 6.4 is "independent and does not depend on there being a violation of Article 6.5", see fn 662 above in which we address this statement.
[681] See para. 7.390. above.
[682] Resolution No. CDC RD AD-003-2018 (Exhibit CRI-8); and Resolution No. CDC RD AD-005-2019 (Exhibit CRI-9).
[683] Costa Rica's first written submission, paras. 272 and 293.
[684] Costa Rica's second written submission, para. 295. (referring to Appellate Body Report, *EC — Fasteners (China) (Article 21.5 — China)*, para. 5.68); opening statements at the first and second meetings of the Panel, paras. 117 and 115, respectively.
[685] Costa Rica's first written submission, para. 276; and second written submission, para. 296.
[686] Costa Rica's second written submission, para. 299; and opening statement at the second meeting of the Panel, para. 116. See also Costa Rica's first written submission, para. 279.
[687] Dominican Republic's first written submission, para. 655. See also Dominican Republic's closing statement at the first meeting of the Panel, para. 7.
[688] Dominican Republic's first written submission, para. 677; and second written submission, para. 285.
[689] Dominican Republic's second written submission, para. 285.

not warrant such treatment, and nor does it demonstrate that the granting of confidential treatment was "unreasonable".[690]

7.418. We begin our analysis by recalling the applicable requirements under Article 6.5 of the Anti-Dumping Agreement (section 7.10.2). We then turn to consider whether, in the light of the specific facts and circumstances of this dispute, the Dominican Republic acted inconsistently with Article 6.5 of the Anti-Dumping Agreement (section 7.10.3).

7.10.2 Requirements applicable of Article 6.5 of the Anti-Dumping Agreement

7.419. Article 6.5 of the Anti-Dumping Agreement provides, in relevant part, the following:

> Any information which is by nature confidential (for example, because its disclosure would be of significant competitive advantage to a competitor or because its disclosure would have a significantly adverse effect upon a person supplying the information or upon a person from whom that person acquired the information), or which is provided on a confidential basis by parties to an anti-dumping investigation shall, upon good cause shown, be treated as such by the authorities. Such information shall not be disclosed without specific permission of the party submitting it.[17]

[17] Members are aware that in the territory of certain Members disclosure pursuant to a narrowly-drawn protective order may be required.

7.420. Article 6.5 refers to the confidential treatment of information provided as such by interested parties to an investigation. "Confidential information" is defined as information that is: (a) "by nature confidential"; or (b) "provided by parties to an investigation on a confidential basis". These two categories may, in practice, overlap.[691] In addition, Article 6.5 requires that "upon good cause shown", an investigating authority shall: (a) treat such information as confidential; and (b) not disclose it without specific permission of the party submitting it.

7.421. Thus, "good cause" is "a condition precedent for according confidential treatment to information submitted to an authority"[692], which applies to all information for which confidential treatment is sought, including information that is "by nature" confidential or information which is provided "on a confidential basis".[693] While Article 6.5 does not define what constitutes "good cause", we consider that the "good cause"[694] must constitute "a reason sufficient to justify the withholding of information from both the public and from the other parties interested in the investigation", so this justification "must demonstrate the risk of a potential consequence, the avoidance of which is important enough to warrant the non-disclosure of the information".[695]

[690] Dominican Republic's first written submission, para. 677; and second written submission, para. 285.
[691] Appellate Body Report, *EC — Fasteners (China)*, para. 536.
[692] Appellate Body Report, *EC — Fasteners (China) (Article 21.5 — China)*, para. 5.38. See also Panel Reports, *EU — Cost Adjustment Methodologies II (Russia)*, appealed on 28 August 2020, para. 7.635; *Russia — Commercial Vehicles*, para. 7.241; and *Korea — Pneumatic Valves (Japan)*, para. 7.423.
[693] See, for example, Appellate Body Report, *EC — Fasteners (China)*, para. 537; and Panel Report, *Guatemala — Cement II*, para. 8.219.
[694] Instead, Article 6.5 provides illustrative examples of information which "by nature" is considered confidential, including information that is sensitive "because its disclosure would be of significant competitive advantage to a competitor or because its disclosure would have a significantly adverse effect upon a person supplying the information or upon a person from whom that person acquired the information". We concur with the Appellate Body that these examples "are helpful in interpreting 'good cause' generally, because they illustrate the type of harm that might result from the disclosure of sensitive information, and the protectable interests involved". In particular, these illustrative examples "suggest that a 'good cause' which could justify the non-disclosure of confidential information might include an advantage being bestowed on a competitor, or the experience of an adverse effect on the submitting party or the party from which it was acquired". (Appellate Body Report, *EC — Fasteners (China)*, para. 538).
[695] Appellate Body Report, *EC — Fasteners (China)*, para. 537. See also Panel Reports, *China – HP-SSST (Japan)/China — HP-SSST (EU)*, para. 7.291; *Russia — Commercial Vehicles*, para. 7.241; *Korea — Pneumatic Valves (Japan)*, para. 7.423; and *EU — Cost Adjustment Methodologies II (Russia)*, appealed on 28 August 2020, para. 7.636.

7.422. Article 6.5 does not stipulate how "good cause" must be demonstrated[696], nor does it set forth how an investigating authority must assess and determine whether "good cause" has been shown.[697] However, we agree with the Appellate Body and previous dispute panels that the type of evidence and the extent of substantiation to prove "good cause" has been shown will depend on the nature of the information at issue and the particular good cause alleged.[698] In this regard, we further note that the confidentiality of information that is "by nature" confidential will often be readily "apparent"[699], and that this is a relevant factor when examining a showing of "good cause".[700]

7.423. With regard to our jurisdiction, we recall that it is not for us to conduct a *de novo* review of the record of the investigation, nor to determine whether the existence of "good cause" has been sufficiently substantiated by the submitting party.

7.10.3 Whether the Dominican Republic acted inconsistently with Article 6.5 of the Anti-Dumping Agreement

7.424. In the light of the parties' arguments, we consider that, in order to resolve Costa Rica's claim under Article 6.5, we need to consider two main issues: first, whether the CDC assessed the "reasons" given by the applicant to justify the confidential treatment requested; and second, whether the CDC "objectively" determined that the applicant had shown good cause for the confidential treatment of its information. We will examine these issues in turn.

7.425. With respect to the first issue, Costa Rica claims that none of the resolutions through which the CDC granted confidential treatment to specific information from the domestic industry, namely Resolution No. 003 and Resolution No. 005 of the CDC, demonstrate that the CDC assessed the "reasons" given by the domestic industry for the confidential treatment of its information.[701] The Dominican Republic, however, submits that the applicant requested confidential treatment based on the Dominican Republic's domestic legislation, which grants protection to specific types of information.[702]

7.426. Before resolving the merits of this issue, we will examine the circumstances surrounding the confidential treatment granted by the CDC, and then summarize the relevant facts in this regard, which are undisputed by the parties. We recall that Costa Rica's claim regarding this aspect of the investigation is limited to information and documents submitted by the domestic industry (that is to say, the applicant Gerdau Metaldom[703]), and referred to in Resolutions Nos. 003 and 005 of the CDC.

7.427. First, the initiation form, under the "general instructions" section, explains the "treatment of confidential information" by the CDC and indicates to the applicant the relevant domestic legislation in order to "understand the type of information to which the CDC will accept to afford confidential

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[696] See, for example, Panel Report, *EU — Footwear (China)*, para. 7.684. See also Appellate Body Report, *Korea — Pneumatic Valves (Japan)*, para. 5.399.

[697] Panel report, *EU — Footwear (China)*, para. 7.728. See also Appellate Body Report, *Korea — Pneumatic Valves (Japan)*, para. 5.399.

[698] Appellate Body Report, *EC — Fasteners (China)*, para. 539. See also Panel Reports, *Mexico — Steel Pipes and Tubes*, para. 7.378; and *Korea — Certain Paper*, para. 7.335.

[699] Appellate Body Report, *EC — Fasteners (China)*, para. 536. We also note that "[o]ne type of such information is commercially sensitive information not typically disclosed in the normal course of business, and which would likely be regularly treated as confidential in anti-dumping investigations", and that "[t]his could be the case, for example, for certain profit or cost data or proprietary customer information" (*Ibid*., para. 536 and fn 775) or "information on sales prices". (Panel Report, *EC — Footwear (China)*, para. 7.744) We also agree that a showing of "good cause" for information that is "by nature confidential" may consist of "establishing that the information fits into the Article 6.5 (*chapeau*) description of such information: 'for example, because its disclosure would be of significant competitive advantage to a competitor or because its disclosure would have a significantly adverse effect upon a person supplying the information or upon a person from whom that person acquired the information'". (Panel Report, *Mexico — Steel Pipes and Tubes*, para. 7.378; see also Panel Report, *Korea — Stainless Steel Bars*, para. 7.200).

[700] Appellate Body Report, *EC — Fasteners (China)*, para. 536. See also final report of the panel as issued to the parties in *Colombia — Frozen Fries*, para. 7.118.

[701] See, for example, Costa Rica's first written submission, paras. 276-277; and second written submission, para. 296.

[702] Dominican Republic's response to Panel question No. 114, paras. 223 and 225.

[703] We note in this regard that, in the underlying investigation, Gerdau Metaldom was the only company producing the product under investigation in the Dominican Republic. (See, for example, Initial Technical Report (Exhibit CRI-6), para. 2; and the Dominican Republic's first written submission, para. 66.).

treatment". Namely, Resolution No. CDC RD-ADM-014-2009 of 30 July 2009, "approving the criteria and procedure for declaring information submitted by interested parties in trade defence investigations confidential".[704]

7.428. Second, under the relevant Dominican legislation (Article 52 of the implementing regulations of Law No. 1-02), the following information is considered confidential: (a) business or trade secrets concerning the nature of a product; (b) production processes or operations for the product involved, and production equipment or machinery; (c) production costs and specification of components; (d) distribution costs; (e) terms and conditions of sale, except those offered to the public; (f) expansion and marketing plans; (g) selling prices by transaction and by product, except components of prices such as dates of sales and distribution of the product, and transport if by public routes; (h) identification of clients, distributors or suppliers; (i) the exact amount of the margin of price discrimination in individual sales; (j) t the amounts of adjustments for terms and conditions of sale, volume or quantities, variable costs and tax charges; (k) levels of inventories and sales; (l) information concerning the financial condition of a company that is not public, including amount or source of any profit, losses, or expenses relating to the production or sale of a specific product; and (m) any other specific information about the enterprise concerned whose disclosure or dissemination to the public may cause injury to its competitive position.[705] The legislation also provides that confidential information shall be deemed to be such information "the disclosure of which 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".[706] The legislation also establishes a "limitation on and exceptions to the obligation to inform" regarding information that the administration has received and "whose disclosure may result in economic damage".[707]

7.429. Third, under Dominican law, the CDC must issue confidentiality resolutions through which it communicates to the parties the information that has been granted the requested confidential treatment.[708]

7.430. Fourth, in Resolution No. 003, the CDC considered the request for confidential treatment of "information classified as such" by the applicant in the following submissions: (a) the initiation form; (b) the initiation request; (c) the letter of 11 June 2018; (d) the supplemental information questionnaire of 11 September 2018; and (e) the letter of 28 September 2018.[709] In particular, pursuant to Article 6.5 of the Anti-Dumping Agreement, as well as domestic legislation pertaining to the protection of confidential information[710], the CDC "analysed whether or not to grant confidential treatment" to information "classified" as confidential by the applicant.[711] The CDC granted confidential treatment to some of this information, and in particular the information described below:

[704] Application for initiation of the investigation (7 May 2018) (Exhibit DOM-11 (BCI)), p. 4. See also the exhibits related to the fact that the CDC notified the parties of relevant laws and regulations on confidential treatment (Exhibit DOM-30), p. 4.

[705] Resolution No. CDC-RD-AD-003-2018 (Exhibit CRI-8), pp. 2-3.

[706] Resolution No. CDC RD AD-005-2019 (Exhibit CRI-9), p. 6 (quoting Article 51 of the implementing regulations of Law No. 1-02).

[707] Resolution No. CDC RD AD-003-2018 (Exhibit CRI-8), p. 2 (quoting Article 17 i) of Law No. 200-04 on Free Access to Public Information).

[708] Resolution No. CDC RD AD-003-2018 (Exhibit CRI-8), p. 3 (quoting Article 54(II) of the implementing regulations of Law No. 1-02).

[709] Resolution No. CDC-RD-AD-003-2018 (Exhibit CRI-8), pp. 5-8.

[710] Specifically, Article 17 i) of Law No. 200-04 on Free Access to Public Information; and Articles 52 and 54 of the implementing regulations of Law No. 1-02. (Resolution No. CDC-RD-AD-003-2018 (Exhibit CRI-8), pp. 2-3).

[711] Resolution No. CDC-RD-AD-003-2018 (Exhibit CRI-8), p. 5.

Resolution No. 003 of the CDC	
Information	*Description*
Initiation form: points 26, 28, 35, 40, 44, and 47-48; and annexes C4-C8, 2, and 3A-3B	Information about Gerdau Metaldom regarding: (a) the production of the product at issue; (b) sales; (c) the financial statements for 2015-2016 and interim statements for 2017; (d) the prices for 2016-2017; (e) the name of and information related to the customers contained in the sample commercial invoices supporting the terms of sale; (f) the list of main customers; (g) the margin of price discrimination and company-related information in the determination of apparent domestic consumption; (h) economic and financial indicators; (i) financial information regarding the product under investigation and Gerdau Metaldom in general; (j) the ratio of imports to Gerdau Metaldom's sales, and the economic and financial variables affected by dumping; (k) the share of imports relative to Gerdau Metaldom's production; and (l) the name and information of the sellers and customers on the sales invoices of the product under investigation in Costa Rica.
Letter from Gerdau Metaldom of 11 June 2018: points 1,7,9, and 10	Information about Gerdau Metaldom regarding: (a) the economic and financial variables affected by dumping; (b) the production of the product at issue in 2015-2017; (c) the price list in 2017; and (d) the list of main customers in 2015.
Letter from Gerdau Metaldom of 11 September 2018 (supplemental information questionnaire): point 5; tables 1-2; annex 2B; tables 4-8 and 10-11; and section V	Information about Gerdau Metaldom regarding: (a) the ratio of Costa Rican imports to the domestic industry's sales; (b) the monthly productive capacity of the three national mills available to the domestic industry and Gerdau Metaldom's total production; (c) the interim financial statements (April 2018); (d) costs; (e) the average price (2015-April 2018) of the raw material used in the production of the like product and the monthly and average annual purchase price for the POI; (g) profits; (h) investments and their performance; (i) cash flow; (j) sales volume and value by type of channel; (k) domestic market sales and the terms of sale thereof; (l) apparent domestic consumption and the share of the feedstock in Gerdau Metaldom's total production costs
Letter from Gerdau Metaldom of 28 September 2018: points 1-2 and 4-6	Information about Gerdau Metaldom regarding: (a) sales prices (January-April 2018); (b) updated economic and financial information (January-April 2018); (c) the list of main customers (January-April 2018); (d) apparent domestic consumption and Gerdau Metaldom's market share; and (e) technological processes for the production of the product under investigation.

7.431. Fifth, in Resolution No. 005, the CDC assessed the requests for confidential treatment with regard to specific information that the applicant had classified as confidential in its letters dated: (a) 7 November 2018; (b) 28 December 2018; (c) 8 February 2019; (d) 19 March 2019; (e) 10 April 2019; (f) 16 May 2019; (g) 20 May 2019; (h) 8 July 2019; (i) 8 August 2019; and (j) 13 September 2019.[712] In the applicant's "view", this information was "by nature confidential", and the applicant requested that they be granted confidential treatment "pursuant to Article 6.5 of the Anti-Dumping Agreement" and "Article 51 *et seq.* of the implementing regulations of Law No. 1-02".[713] The CDC granted confidential treatment to all such information, as described below:

Resolution No. 005 of the CDC	
Information	*Description*
Information submitted on 7 November 2018	Information about Gerdau Metaldom (and/or information) regarding: (a) the name of the consulting firm used as the source to calculate the normal value; (b) the names of the sender and recipient of the email used as a basis to calculate the port services; and (c) information on technological advances in the production of the product under investigation.
Information submitted on 28 December 2018: table 7	Information on the performance of Gerdau Metaldom's investments.
Information submitted on 8 February 2019: annex 5	Independent expert opinion of an auditing firm on best accounting practices.
Information submitted on 19 March 2019	Information about Gerdau Metaldom regarding: (a) the value and volume of domestic production of the product under investigation (2015-April 2018); (b) the prices of monthly purchases of billets

[712] Resolution No. CDC-RD-AD-005-2019 (Exhibit CRI-9), pp. 3-5.
[713] Resolution No. CDC-RD-AD-005-2019 (Exhibit CRI-9), pp. 3 and 6.

Resolution No. 005 of the CDC	
	(2015-April 2018); and (c) the monthly cost of electricity for the production of the product under investigation (2015-April 2018).
Information submitted on 10 April 2019	Monthly information on the volume (in tonnes) and the value of domestic and export sales (in US dollars) (2015-April 2018) of Gerdau Metaldom.
Information submitted on 16 May 2019	Monthly information about the volumes (in metric tonnes) and value (in US dollars) of domestic and export sales (2015) of Gerdau Metaldom.
Information submitted on 20 May 2019	Information on Gerdau Metaldom's financial variables affected in the POI.
Information submitted on 8 July 2019: charts 1-2; tables 1-3; and annexes 2-3 and 7	Additional information on the margin of dumping, in particular: (a) the costs of grade 60 and 40 steel bars to the foundries of Gerdau Metaldom Costa Rica; (b) the average costs of grade 40 and 60 corrugated steel bars to foundries; (c) tables Nos. 2-3 of the memorandum containing additional arguments on the margin of dumping; (d) the sales of Gerdau Metaldom Costa Rica (January 2015-March 2019); (e) the summary of the monthly prices of Gerdau Metaldom Costa Rica; and (f) the calculation of the margin of dumping under different scenarios.
Information submitted on 5 August 2019	Information on the purpose of the acquisitions and implementation of technological changes affecting the production and sale of the product under investigation.
Information provided orally on 13 September 2019	Information on Gerdau Metaldom indicators showing the injury to the domestic industry.
Information submitted on 13 September 2019: tables 2-3	Information about: (a) Gerdau Metaldom's sales prices in the Costa Rican market; (b) Gerdau Metaldom's sales prices in the Costa Rican market on a freight adjusted basis; and (c) comparative analysis between the gross margin of the domestic industry and imports in metric tonnes originating in Costa Rica.

7.432. Based on the foregoing facts, it is clear that the CDC granted confidential treatment to specific information submitted by the applicant before and during the investigation, so that interested parties in the investigation had access only to the public versions of the documents containing that information. We also understand that, in accordance with the resolutions at issue, the CDC granted this confidential treatment. As the record before the Panel demonstrates, the CDC assessed the request for confidentiality based on its "classification" as such. It also follows that the applicant classified such information as confidential based on the relevant Dominican legislation and WTO law.[714]

7.433. As we have noted, Costa Rica submits that none of the resolutions through which the CDC granted confidential treatment demonstrates that the CDC has assessed the "reasons" given by the applicant to justify the confidential treatment requested. We note that implicit in Costa Rica's argument is the premise that, under Article 6.5, an applicant requesting confidential treatment is required to provide the "reasons" that justify the confidential treatment requested. However, we find no textual basis in Article 6.5 to support this assertion. In particular, we recall that Article 6.5 is limited to providing that "[a]ny information … provided on a confidential basis … shall, upon good cause shown, be treated as such by the authorities". Thus, as we discuss above, there is nothing in Article 6.5 that stipulates how "good cause" is to be shown.[715] In particular, we agree with the statements in *EU — Footwear (China)* that Article 6.5 "contains no guidance as to what might constitute good cause, or how it should be established" and nothing in Article 6.5 requires "any particular form or means of showing good cause, or any particular type or degree of supporting evidence which must be provided".[716]

7.434. As such, we do not consider that the implicit indication of good cause through the submission of information "classified" as confidential is *a priori* inconsistent with the requirements of Article 6.5. Rather, as we have stated above, the type of evidence and the extent of substantiation to prove the

[714] For example, the record reveals that the applicant "classified the information contained in [the application form] as confidential" "in accordance with and pursuant to" the relevant domestic legislation, "issued by the [CDC]". (Application for initiation of the investigation (7 May 2018) (Exhibit DOM-11 (BCI)), p. 1 of the application questionnaire). Regarding the confidential information referred to in Resolution No. 005, the applicant stated that it was requesting confidential treatment be granted to such information "pursuant to Article 6.5 of the Anti-Dumping Agreement" and "Article 51 *et seq.* of the implementing regulations of Law No. 1-02". (Resolution No. CDC-RD-AD-005-2019 (Exhibit CRI-9), p. 6).

[715] See para. 7.422. above.

[716] Panel Report, *EU — Footwear (China)*, para. 7.684. See also Panel Report, *Korea — Stainless Steel Bars*, para. 7.206.

existence of "good cause" will depend upon the nature of the information at issue.[717] We therefore do not preclude that in certain circumstances — for example, when a Member's legislation defines the categories of information to which it will grant confidential treatment, and it is clear that the information falls within one of those categories and that its disclosure would cause commercial harm — an "implicit assertion" might be sufficient. Specifically, we agree with the panel in *Korea — Stainless Steel Bars*, which, in response to an argument similar to Costa Rica's, observed that "[f]or some types of information, it may be self-evident that the information falls within one of the categories [of the domestic regulation at issue] and that its disclosure would cause commercial harm", and for such information "'implicit assertion' could well suffice".[718]

7.435. Costa Rica does not contest that the implicit indication of good cause is necessarily inconsistent with Article 6.5 of the Anti-Dumping Agreement. Rather, for Costa Rica, "the mere act of redacting certain information will normally not be sufficient to convey the category for which confidential treatment is being sought and whether protection is warranted".[719] Moreover, according to Costa Rica, "not *all* the information that was classified as confidential in Resolution No. 005 corresponds to the categories defined in Article 52 of the Dominican law".[720] However, we note that Costa Rica's claims in this dispute do not refer to the supposed failure to show good cause for *all* the information to which confidential treatment was granted. Rather, Costa Rica's claims refer to *specific* elements of information to which the CDC granted confidential treatment through Resolution No. 005 and Resolution No. 003. This is an important point because, in our view, the question of whether an implicit indication of good cause meets the requirements of Article 6.5 can only be determined on a case-by-case basis, i.e. on the basis of an assessment of each specific element of information at issue.[721]

7.436. In this case, however, Costa Rica failed to demonstrate, with respect to each element of information challenged, that its classification as confidential was not sufficient under Article 6.5. In particular, Costa Rica has not explained, nor demonstrated, why in its opinion, the information on, for example, the costs of production, prices, sales, and the economic and financial statements of the applicant, could not be considered confidential information or did not constitute confidential information under Dominican law. Costa Rica only refers, in an "illustrative manner", to some of the information to which the CDC granted confidential treatment through Resolution No. 005, arguing that it does not "appear" to fall within the categories of confidential information as referred to in Article 52.[722] First, however, the basis for the confidential treatment granted by the CDC in Resolutions Nos. 003 and 005 was not limited to Dominican domestic law, but included Article 6.5 of the Anti-Dumping Agreement. Second, the "examples" of information provided by Costa Rica refer only to some of the information to which the CDC granted confidential treatment through Resolution No. 005. Third, with respect to these examples, Costa Rica has not explained why, in its view, this information could not fall within the categories of confidential information listed in Article 52 of the implementing regulations of Law No. 1-02. Fourth, these examples were raised by Costa Rica in response to the Dominican Republic's rebuttal, as opposed to forming the basis of its original claim and being set out in its first written submission to this Panel.[723] Rather, as we have noted, Costa Rica has based its claim on the premise that Article 6.5 requires the applicant requesting confidential treatment of certain information to provide reasons to justify such treatment, which we have rejected.[724] In view of the foregoing, we find that Costa Rica has failed to establish that the CDC

[717] See para. 7.422. above. See also the Panel Reports, *Mexico — Steel Pipes and Tubes*, para. 7.378; *Korea — Certain Paper*, para. 7.335; *EU — Footwear (China)*, para. 7.728; and *Korea — Stainless Steel Bars*, para. 7.206.

[718] Panel Report, *Korea — Stainless Steel Bars*, para. 7.206. See also Panel Report, *Korea — Pneumatic Valves (Japan)*, para. 7.438.

[719] Costa Rica's response to Panel question No. 62, para. 90

[720] Costa Rica's opening statement at the second meeting of the Panel, para. 119 (emphasis added). We note that Costa Rica does not challenge the consistency with the Anti-Dumping Agreement of Article 52 of the implementing regulations of Law No. 1-02, and of other provisions to which the CDC referred in its confidential treatment determinations.

[721] See Panel Report, *Korea — Stainless Steel Bars*, para. 7.208.

[722] Costa Rica's opening statement at the second meeting of the Panel, para. 119.

[723] Working Procedures of the Panel, clause. 3.1. See also Appellate Body Report, *Argentina — Textiles and Apparel*, para. 79; and Panel Report, *Korea — Stainless Steel Bars*, fn 637.

[724] As stated by the panel in *Korea — Stainless Steel Bars*, "the text of Article 6.5 is not so prescriptive that it excludes the possibility of a showing of 'good cause' through an 'implicit assertion' by the submission of a redacted document … depending of course on the particular information at issue". (Panel Report, *Korea — Stainless Steel Bars*, para. 7.208).

acted inconsistently with Article 6.5 by granting confidential treatment to the information provided by the applicant.[725]

7.437. We now turn to the second issue, namely whether the CDC "objectively" determined that the applicant had shown good cause for the confidential treatment of its information. In essence, Costa Rica claims that there is no "substantiated" "reason" or "explanation" in Resolutions Nos. 003 and 005 demonstrating that the CDC "objectively" assessed the reasons given by the applicant.[726] The Dominican Republic refutes this assertion, noting that confidential treatment was granted because the CDC was able to verify that the applications complied with the requirements of domestic and WTO law, and when the CDC granted confidential treatment, it was because those rules required the CDC to do so.[727] Moreover, the Dominican Republic maintains that, contrary to Costa Rica's assertion, Article 6.5 does not require any particular detail in the submission of the reasoning of an investigating authority in support of its decision to treat information as confidential.[728] According to the Dominican Republic, it is sufficient that it can be "discerned from the published report" that the investigating authority has conducted an "objective assessment" as to whether "good cause" was shown, and no "further express explanation" is required.[729]

7.438. Our task of reviewing the CDC's assessment with respect to a showing of "good cause" must be based on the published documents from the competent investigating authority, the nature of the information at issue, and the justification provided by the applicant for confidential treatment. We also recall that Article 6.5 does not prescribe how an investigating authority must assess and determine whether "good cause" has been shown.[730] In particular, as we have stated above, we note that Article 6.5 does not set forth "how an investigating authority should or must evaluate a request for confidential treatment", nor does it set forth "how the investigating authority should or must indicate (explicitly or otherwise in the record of the investigation) how, and the extent to which, it assessed an applicant's assertion to conclude that 'good cause' existed for the information to be treated as confidential".[731]

7.439. Bearing these considerations in mind, we now turn to the facts on which Costa Rica bases its claim. In this case, as we have indicated, the CDC granted confidential treatment to some of the information provided by the applicant on a confidential basis as shown in Resolution No. 003 and Resolution No. 005. With respect to Resolution No. 003, we note that the CDC "analysed whether or not to grant confidential treatment" to information "classified" as confidential by the applicant, under Article 6.5 of the Anti-Dumping Agreement, as well as domestic legislation pertaining to the protection of confidential information.[732] To that end, the CDC began its assessment by describing the instances for which the applicant had requested confidential treatment and setting out the specific information classified by the applicant as confidential in each of these instances.[733] Then, before its confidential treatment determination, in the "Citations" section of the resolution, the CDC listed the domestic and WTO law and documentation it had reviewed as part of its assessment.[734]

[725] In reaching this conclusion, we express no views as to whether the "classification" as confidential of each element of information that was granted confidential treatment through Resolutions Nos. 003 and 005 constituted, in fact, a sufficient showing of good cause for the purposes of Article 6.5.

[726] Costa Rica's first written submission, paras. 277-278; and second written submission, paras. 297-298.

[727] See, for example, Dominican Republic's first written submission, paras. 676 and 678-680; and second written submission paras. 292-295 and 302-304.

[728] Dominican Republic's second written submission, para. 285.

[729] See, for example, Dominican Republic's second written communication, para. 285 (referring to Appellate Body Report, *Korea — Pneumatic Valves (Japan)*, para. 5.402). The Dominican Republic argues that, in contrast, Costa Rica claims that a " substantiated explanation" is necessary as if it were a determination of dumping, injury or causation. (Dominican Republic's first written submission, para. 688).

[730] See para. 7.422 above.

[731] Panel Report, *Mexico — Steel Pipes and Tubes*, para. 7.393. In this context, we also note the panel report on *Korea — Stainless Steel Bars*, which specifies that there is "nothing in the text of Article 6.5 to support the proposition that it requires an authority, in all cases, to provide a report or other written evidence indicating the authority's assessment of good cause". (Panel Report, *Korea — Stainless Steel Bars*, para. 7.212).

[732] Specifically, Article 17 i) of Law No. 200-04 on Free Access to Public Information; and Articles 52 and 54 of the implementing regulations of Law No. 1-02. (Resolution No. CDC-RD-AD-003-2018 (Exhibit CRI-8), pp. 1-3 and 5).

[733] Resolution No. CDC-RD-AD-003-2018 (Exhibit CRI-8), pp. 5-8.

[734] Specifically, the Dominican Constitution; the Anti-Dumping Agreement; Law No. 1-02 on Unfair Trade Practices and Safeguard Measures; Law No. 200-04 on Free Access to Public Information; Law

Unlike Costa Rica, we do not consider that the numbered items in the "Citations" section of Resolution No. 003 "merely present a list of legal instruments and a general reference to the record of the investigation".[735] In our view, in the absence of a convincing explanation to the contrary, the "citations" instead show the documents that the CDC examined as part of its assessment. On the basis of its assessment, the CDC declared as confidential some of the information classified by the applicant as confidential, in considering that it "concern[ed] information that [could] compromise the company".[736] At the same time, the CDC denied the request for confidential treatment with respect to certain information[737], and required the applicant to justify the confidential nature of certain information provided as such.[738]

7.440. As we have noted, Costa Rica submits that Resolution No. 003 does not contain a "substantiated explanation" demonstrating that the CDC conducted an assessment. In particular, Costa Rica claims that the CDC found, without any sort "explanation" or "rationale", that confidentiality was granted "because it concerned information that [could] compromise the company".[739] In other words, for Costa Rica, apart from this concluding statement, Resolution No. 003 does not provide any justification for granting confidential treatment.[740]

7.441. The arguments put forward by Costa Rica are essentially based on the assumption that Article 6.5 requires an investigating authority to explain and base its determination on a showing of good cause for the confidential treatment granted. However, as we note above, Article 6.5 of the Anti-Dumping Agreement simply provides that "[a]ny information … provided on a confidential basis … shall, upon good cause shown, be treated as such by the authorities". Article 6.5 does not set forth how an investigating authority must assess and determine whether good cause has been shown or how an investigating authority must indicate or explain its assessment and determination of a showing of such cause.[741] We therefore see no legal basis under Article 6.5 to support Costa Rica's argument that the CDC was required to provide a "substantiated explanation" of its assessment of a showing of good cause for the confidential treatment granted.[742]

7.442. Our review of Resolution No. 003 reveals that Costa Rica's arguments are also factually unfounded. In particular, the statements published by the CDC reveal that the CDC based its determination of confidential treatment on the following factors: (a) the fact that the information at issue had been provided on a confidential basis by the applicant; (b) the confidential status of this information under Dominican and WTO law[743]; and (c) the fact that the disclosure of this information could "compromise the [applicant] company". Thus, in our view, contrary to Costa Rica's assertion, the facts on the record show that the CDC did in fact explain and substantiate the basis for its determination regarding the confidential treatment granted. Based on the foregoing, we cannot find

No. 107-13 on the Rights of Individuals in their Interactions with the Administration and Administrative Procedures; the implementing regulations of Law No. 1-02 on Unfair Trade Practices and Safeguard Measures; and Record No. CDC-RD/AD/2018-001 relating to the investigation at issue.
(Resolution No. CDC-RD-AD-003-2018 (Exhibit CRI-8), pp. 8-9).

[735] See, for example, Costa Rica's first written submission, para. 277.

[736] Resolution No. CDC-RD-AD-003-2018 (Exhibit CRI-8), p. 9.

[737] In particular, the CDC denied confidential treatment of the information submitted by the applicant with regard to the consulting firm used as a source for the determination of adjustments to the normal value; of certain information contained in the original application; and information relating to domestic industry workers, because such information was already on the record on a non-confidential basis.
(Resolution No. CDC-RD-AD-003-2018 (Exhibit CRI-8), pp. 9-10).

[738] The CDC requested justification for the confidential treatment requested with respect to the sender and recipient of the email used by the applicant as a source for determining adjustments to port services of stevedoring, transport and storage. (Resolution No. CDC-RD-AD-003-2018 (Exhibit CRI-8), p. 10).

[739] Costa Rica's first written submission, para. 277; and second written submission, para. 297 (quoting Resolution No. CDC-RD-AD-003-2018 (Exhibit CRI-8), p. 9).

[740] In particular, Costa Rica asserts that this conclusion does not demonstrate that the CDC conducted an objective analysis of whether the applicant had shown good cause. (Costa Rica's opening statement at the first meeting of the Panel, para. 118).

[741] See para. 7.422 above.

[742] Costa Rica's opening statement at the second meeting of the Panel, para. 118.

[743] In this regard, we recall that, through Resolution No. 003, "under the provisions of the regulations in this field" (i.e. Article 6.5 of the Anti-Dumping Agreement; Article 17 i) of Law No. 200-04 on Free Access to Public Information; and Articles 52 and 54 of the implementing regulations of Law No. 1-02), the CDC "analysed whether or not to grant confidential treatment" to information "classified" as confidential by the applicant. (Resolution No. CDC-RD-AD-003-2018 (Exhibit CRI-8), pp. 1-3 and 5).

that the CDC's assessment of the confidential treatment granted by Resolution No. 003 was deficient for the purposes of Article 6.5 of the Anti-Dumping Agreement.

7.443. We now turn to consider Resolution No. 005, bearing in mind that, in this resolution, the CDC examined requests for confidential treatment with respect to certain information which, "in the view" of the applicant, was "by nature confidential".[744] First, the CDC detailed the instances in which the applicant had requested such treatment and described the specific information classified as confidential in each of these instances.[745] Next, the CDC noted that the applicant had requested confidentiality "pursuant to Article 6.5 of the Anti-Dumping Agreement" and "Article 51 *et seq.* of the implementing regulations of Law No. 1-02".[746] After conducting a "detailed analysis" of the information at issue, as well as a "verification" of both Dominican and WTO law[747], the CDC determined to grant confidential treatment to the documentation submitted by the applicant and classified as confidential. In particular, in its assessment, the CDC "was able to verify the … nature of the information submitted" and determined that it "[fell] within the parameters established by Article 51 *et seq.* of the implementing regulations of Law 1-02 and Article 6.5 of the Anti-Dumping Agreement".[748] The CDC therefore determined that "it [wa]s appropriate to accept the requests for confidentiality …, since … disclosure [of that information] could cause material injury, could be of significant competitive advantage to a competitor and, in addition, in the cases in which they have received information from third parties, could have an adverse effect in accordance with the criteria established in the Anti-Dumping Agreement".[749] Based on the foregoing, the CDC determined to grant confidential treatment to the information provided by the applicant "because it is information that [could] compromise the company".[750]

7.444. Costa Rica presents a series of arguments that, in its view, undermine the objectivity of the CDC's review in Resolution No. 005, including: (a) that there is no "substantiated explanation" in that resolution that demonstrates that the CDC "objectively" assessed the reasons given by the applicant company[751]; (b) that the determination contains concluding statements that also refer to "all" of the information declared as confidential by the applicant[752]; and (c) that the CDC's reasoning contains certain contradictions and inconsistencies that demonstrate that the CDC did not conduct an objective assessment of the reasons provided by the applicant.[753]

7.445. Beginning with Costa Rica's first argument, we note that Costa Rica's criticism of the CDC's review focuses on the alleged view that an investigating authority's assessment of good cause must provide a "substantiated explanation" demonstrating such an assessment.[754] We have addressed this argument in discussing Costa Rica's arguments with respect to Resolution No. 003 in paragraph 7.441 above, and the same considerations are valid here. In particular, we reiterate that Article 6.5 does not prescribe how an investigating authority must evaluate and determine whether "good cause" has been shown, nor how an investigating authority must indicate or explain its assessment and determination in this regard. Moreover, in our view, Costa Rica's position is even more difficult to follow when Resolution No. 005 itself makes it clear that the CDC did indeed explain and substantiate its assessment of the reasons given by the applicant for the confidential treatment requested.

[744] Resolution No. CDC-RD-AD-005-2019 (Exhibit CRI-9), pp. 3-5.
[745] Resolution No. CDC-RD-AD-005-2019 (Exhibit CRI-9), pp. 3-5.
[746] Resolution No. CDC-RD-AD-005-2019 (Exhibit CRI-9), p. 6.
[747] Namely, Article 6.5 of the Anti-Dumping Agreement; Articles 51-52 and 54 of the implementing regulations of Law No. 1-02; and Articles 51-52 and 54 of Law No. 1-02. (Resolution No. CDC-RD-AD-005-2019 (Exhibit CRI-9), pp. 6-7).
[748] Resolution No. CDC-RD-AD-005-2019 (Exhibit CRI-9), p. 7.
[749] Resolution No. CDC-RD-AD-005-2019 (Exhibit CRI-9), p. 7.
[750] Resolution No. CDC-RD-AD-005-2019 (Exhibit CRI-9), p. 8. See paragraph 7.431 above, referring to the elements of information to which the CDC granted confidential treatment.
[751] Costa Rica's first written submission, para. 278; and second written submission, para. 298.
[752] Costa Rica's opening statement at the first meeting of the Panel, para. 119.
[753] See, for example, Costa Rica's first written submission, para. 278; second written submission, para. 298; and opening statement at the second meeting of the Panel, para. 120.
[754] In particular, Costa Rica argues that beyond the statements that the CDC conducted a "detailed analysis of the information submitted by [the applicant company]" and that it "was able to verify the confidential nature of the information submitted", there is no "substantiated explanation" in this determination that demonstrates that the CDC "objectively" assessed the reasons given by the applicant. (Costa Rica's first written submission, para. 278; and second written submission, para. 298).

7.446. In particular, based on the foregoing facts, we recall that the CDC: (a) took into consideration that the applicant had classified the information as confidential based on its confidential nature and its compliance with relevant domestic and WTO law[755]; (b) conducted a "detailed" analysis of the information, as well as a "verification" of the relevant regulations; (c) "ascertain[ed] the nature" of the information and determined that it "[fell] within the parameters established" by Article 6.5 and Article 51 *et seq*. of the implementing regulations of Law No. 1-02; and (d) found that it concerned information that "[could] compromise the [applicant] company", as its disclosure "could cause [the company] material injury", and "could be of significant competitive advantage to a competitor", while in the case of information submitted by third parties, "could have an adverse effect in accordance with the criteria established in the Anti-Dumping Agreement".[756] Therefore, in our view, these facts demonstrate that, contrary to Costa Rica's allegation, the CDC did indeed provide a "substantiated explanation" for its assessment.

7.447. We now turn to Costa Rica's second argument, namely, that the CDC's assertions that disclosure of the information could result in material injury to the applicant, and in cases where it has received information from third parties, could have an adverse effect on the applicant, are concluding statements that also relate to "all" of the information. In particular, according to Costa Rica, there is no discussion of the different categories of information submitted by the applicant, nor of the particular reasons that justified the confidential treatment of each category.[757] However, we recall that Article 6.5 does not set forth how an investigating authority must indicate or explain its assessment of a showing of "good cause". Therefore, we see nothing in Article 6.5 that requires or prohibits an assessment by category, and as such, we see no basis for requiring an investigating authority to specify, for each category of information granted confidential treatment, the reasons justifying the confidential treatment granted. Moreover, in our view, it is possible that for a set of information categories, the reasons justifying their confidentiality could be the same, and as such, the specification of these reasons for each category would be unnecessarily formalistic. In the present case, we further note that Costa Rica has not argued that the disclosure of the information at issue could not result in the injury identified by the CDC, and rather focuses its arguments on the alleged need for an assessment by category.

7.448. Lastly, as noted above, Costa Rica has also identified alleged contradictions and inconsistencies in the CDC's analysis which, in its view, demonstrate that the CDC failed to conduct an "objective" assessment of the reasons provided by the applicant. First, Costa Rica argues that the CDC's reasoning is not consistent, as the CDC stated that it conducted a "detailed analysis of the information" when it had admitted that it would consider all the information "as a whole".[758] As Costa Rica argues, we note that because of "all the information submitted by [the applicant]", for which the applicant "requested … confidential treatment", the CDC, "applying judicial economy", decided that it would "evaluate [the information] as a whole in order to make its finding" of confidential treatment.[759] However, we do not understand, and Costa Rica has not explained, how this context is sufficient to demonstrate that the CDC failed to conduct an "objective" assessment of the reasons given by the applicant. In other words, in our view, the mere fact that the CDC had stated that it would evaluate all the confidentiality requests referred to in Resolution No. 005 "as a whole" does not exclude, nor does it demonstrate, that the CDC could not or did not in fact conduct a "detailed analysis of the different information" as it indicated in its resolution. Therefore, in the absence of evidence to the contrary, we do not share the interpretation of the facts suggested by Costa Rica, whereby they point to an inconsistency, and therefore a lack of objectivity, in the CDC's analysis.

7.449. Similarly, we do not consider that the alleged contradictions identified by Costa Rica demonstrate a lack of "objectivity" in the CDC's assessment. Costa Rica argues that the confidential treatment of certain information in Resolution No. 003 and Resolution No. 005 is contradictory, and that this demonstrates that the CDC did not conduct an "objective" assessment. In particular, Costa Rica refers to the treatment of the following information: (a) the name of the consulting firm

[755] Resolution No. CDC-RD-AD-005-2019 (Exhibit CRI-9), pp. 3 and 6.
[756] Resolution No. CDC-RD-AD-005-2019 (Exhibit CRI-9), p. 7.
[757] Costa Rica's opening statement at the first meeting of the Panel, para. 119.
[758] Costa Rica's second written submission, para. 298. See also Costa Rica's first written submission, para. 278; and opening statement at the first meeting of the Panel, para. 119.
[759] Resolution No. CDC-RD-AD-005-2019 (Exhibit CRI-9), p. 5.

used as a source for the normal value calculation; and (b) the names of the sender and recipient of the email used as a basis for the port services calculation.[760]

7.450. With respect to the first element of information indicated by Costa Rica, i.e., the name of the consulting firm used as a source for the normal value calculation, we recall that the CDC, in Resolution No. 003, denied the requested confidential treatment of that information, since it had been submitted by the applicant in annex 4B of its initiation form "on a non-confidential basis".[761] At the same time, the CDC granted the applicant time to submit "any rectification or argument" with respect to the information denied confidential treatment.[762] We also note that, subsequently, within the time period granted for that purpose, the applicant reiterated the request for confidential treatment with respect to that information by reintroducing it on a confidential basis[763], and that based on that request, the CDC then granted the requested confidential treatment in Resolution No. 005.[764] In our view, the mere fact that the confidential treatment of that information was denied in the first instance, and subsequently granted, is not necessarily proof of a contradiction, and therefore a lack of objectivity, in the confidential treatment granted by the CDC. Rather, in our view, the foregoing facts only demonstrate the evolution of the assessment that the CDC actually conducted with respect to the requests for confidential treatment of that information.

7.451. However, we note that Costa Rica does not argue, nor does it demonstrate, that the information at issue had been disclosed in the investigation, and therefore could not be treated as confidential. At the same time, we note that the facts on the record appear to indicate that the disclosure of that information did not, in fact, have any effect on the present investigation. In particular, we note that this information was submitted on a non-confidential basis in the applicant's initiation form and that this form was provided to the known exporter in the investigation only after the information at issue had been reintroduced on a confidential basis (i.e. on 22 November 2018).[765] Moreover, in the absence of evidence to the contrary, we do not consider that the fact that the "investigation forms" were available on the CDC website before the information was reintroduced on a confidential basis[766], necessarily demonstrates that interested parties in the investigation had, in fact, accessed such information.

7.452. With respect to the second item of information indicated by Costa Rica, namely the names of the sender and recipient of the email used as a basis for the port services calculation, Costa Rica notes that, while in Resolution No. 003 the CDC required the applicant to justify the need for confidential treatment of that information, in Resolution No. 005, the CDC determined that this information was confidential without any "justification".[767] However, as discussed above, in the process of an investigating authority's assessment of a request for confidential treatment, the mere fact that confidential treatment of an element of information was first denied, and subsequently granted, does not necessarily imply "inconsistent treatment" of the information, nor consequently a lack of "objectivity" in the confidential treatment granted.

7.453. In the present case, the record shows that, in Resolution No. 003, the CDC required the applicant to "justify the confidential nature" of the information in question[768], and granted the applicant time to submit "any rectifications or arguments" in this regard.[769] We also note that subsequently, within the time period granted for that purpose[770], the applicant again requested confidential treatment of that information.[771] As noted above, on the basis of this new application, the CDC granted confidential treatment to that information, considering the following factors: (a) the fact that the applicant had submitted documents which, "in its view", were by "nature confidential"

[760] Costa Rica's opening statement at the second meeting of the Panel, para. 120.
[761] See fn 737 above. See also Resolution CDC-RD-AD-003-2018, (Exhibit CRI-8), pp. 6 and 10.
[762] Resolution No. CDC-RD-AD-003-2018 (Exhibit CRI-8), p. 10.
[763] Resolution No. CDC-RD-AD-005-2019 (Exhibit CRI-9), pp. 2-3.
[764] Resolution No. CDC-RD-AD-005-2019 (Exhibit CRI-9), pp. 3 and 8.
[765] See Resolution No. CDC RD AD-005-2019 (Exhibit CRI-9), p. 8; and letter from the CDC (22 November 2018) (Exhibit CRI-17).
[766] See, for example, Resolution No. CDC-RD-AD-001-2018 (Exhibit DOM-1), p. 4.
[767] Costa Rica's opening statement at the second meeting of the Panel, para. 120.
[768] See fn 738 above. See also Resolution No. CDC RD AD-003-2018 (Exhibit CRI-8), p. 10.
[769] Resolution No. CDC-RD-AD-003-2018 (Exhibit CRI-8), pp. 10-11.
[770] Namely, within the time period granted "for [the applicant] to make any comments with respect to the information declared non-confidential" in Resolution No. 003. (Resolution No. CDC-RD-AD-005-2019 (Exhibit CRI-9), p. 3).
[771] Resolution No. CDC-RD-AD-003-2018 (Exhibit CRI-8), pp. 2-3.

and which it requested be granted confidential treatment "pursuant to Article 6.5 of the Anti-Dumping Agreement" and to the relevant laws of the Dominican Republic; (b) the fact that the CDC had "[been] able to verify the … nature" of the information and determine that it "[fell] within the parameters established" by Article 6.5 of the Anti-Dumping Agreement and the relevant domestic legislation; and (c) that in cases where the applicant had received information from third parties, disclosure of that information could have an "adverse effect in accordance with the criteria set out in the Anti-Dumping Agreement".[772] Therefore, based on our reading of Resolution No. 003 and Resolution No. 005, we find that, contrary to Costa Rica's allegation, the facts on the record do not demonstrate a contradiction, and therefore a lack of objectivity, in the treatment that the CDC granted the requests for the confidentiality of the names of the sender and recipient of the email used as a basis for the port services calculation. Rather, these facts, in our view, indicate the development of the CDC's assessment of the requests for the confidential treatment of such information.

7.454. For these reasons, we also reject Costa Rica's argument that the alleged "contradictory treatment" by the CDC "undermines the argument that the reference to domestic law [wa]s sufficient to justify the confidential treatment granted in Resolution No. 005 to the same type of information".[773] In particular, Costa Rica supports its argument on the premise that there is a contradiction in the treatment of the information at issue, which we have rejected. In addition, we note that the basis for the confidential treatment granted by the CDC was not limited to the domestic law of the Dominican Republic, but included Article 6.5 of the Anti-Dumping Agreement and other factors.[774]

7.455. In conclusion, based on the foregoing, we cannot find that the CDC's assessment of the confidential treatment granted by Resolution No. 005 was deficient for the purposes of Article 6.5 of the Anti-Dumping Agreement.

7.10.4 Conclusion

7.456. On the basis of the foregoing, we conclude that Costa Rica has failed to demonstrate, with respect to the confidential treatment granted by Resolution No. 003 and Resolution No. 005: (a) that the CDC failed to assess the "reasons" provided by the applicant to justify the confidential treatment requested; and (b) that the CDC failed to "objectively" determine that the applicant had shown good cause for the confidential treatment of its information. Consequently, we find that the Dominican Republic did not act inconsistently with Article 6.5 of the Anti-Dumping Agreement with respect to the information that was granted confidential treatment in Resolutions Nos. 003 and 005.

7.11 Costa Rica's claim under Article 6.7 of the Anti-Dumping Agreement and Annex I thereto: information to be verified and any further information which needs to be provided

7.11.1 Introduction

7.457. On 19-21 November 2018, the CDC conducted a verification visit at the production facility and administrative offices of the exporting company, ArcelorMittal.[775] The purpose of this visit was to "confirm the accounting, economic and financial figures" provided by the company, and to "observe, on the spot, the production process for the product under investigation".[776] Before the verification visit took place, the CDC notified the exporting company of the "general verification programme" (including the matters to be verified) and the "items relating to the review period" that the company would have to submit at the start of the verification visit.[777]

7.458. Costa Rica claims that the Dominican Republic breached its obligations under Article 6.7 of the Anti-Dumping Agreement and Annex I thereto, as the CDC failed, prior to the visit, to advise

[772] Resolution No. CDC-RD-AD-005-2019 (Exhibit CRI-9), pp. 3 and 6-7.
[773] Costa Rica's opening statement at the second meeting of the Panel, para. 120.
[774] Specifically, see para. 7.443 above.
[775] Minutes of the verification visit to ArcelorMittal (Exhibit CRI-11) p. 2; and Final Technical Report (Exhibit CRI-3), para. 52.
[776] Final Technical Report (Exhibit CRI-3), para. 53.
[777] Letter from the CDC No. 697 to ArcelorMittal regarding the verification visit (2 November 2018) (Exhibit DOM-18), pp. 2-3.

ArcelorMittal of the "general nature" of the information that it sought to verify and of any further information that the company needed to provide. In particular, Costa Rica indicates that the CDC failed to inform the exporting company that it had to provide information on sales made prior to the POI.[778]

7.459. The Dominican Republic responds that this claim is not within the scope of the Panel's terms of reference because Costa Rica did not present the problem clearly in its panel request, in accordance with Article 6.2 of the DSU.[779] However, should the Panel deem this claim to be within the scope of its terms of reference, the Dominican Republic contends that Costa Rica's claim has no legal basis and that Costa Rica's presentation of the facts is also incorrect.[780]

7.460. The parties' arguments raise two issues that we will examine below: (a) whether the Panel has jurisdiction to examine Costa Rica's claim (section 7.11.2); and, if so, (b) whether, based on the specific facts and circumstances of this dispute, Costa Rica has established that the Dominican Republic acted inconsistently with Article 6.7 of the Anti-Dumping Agreement and Annex I thereto (section 7.11.3). We will address each of these issues below.

7.11.2 The Panel's terms of reference

7.461. We will first address the Dominican Republic's argument that Costa Rica's panel request did not present the problem clearly, in accordance with Article 6.2 of the DSU. The Dominican Republic claims, first, that Costa Rica did not specify which of the many obligations under Annex I its claim referred to; and second, that no "meaningful" narrative was provided alongside the claim in the panel request to enable the Dominican Republic to understand the case it had to answer.[781]

7.462. Costa Rica responds that its panel request makes reference to Article 6.7 and Annex I, and also contains a description sufficient to satisfy the requirement to provide "a brief summary of the legal basis of the complaint sufficient to present the problem clearly".[782]

7.463. As we discuss above[783], Article 6.2 of the DSU stipulates that "a brief summary of the legal basis of the complaint sufficient to present the problem clearly" must be provided in a request for the establishment of a panel as a fundamental requirement for determining a panel's jurisdiction. Furthermore, the matter of whether a "brief summary" is "sufficient to present the problem clearly" is to be assessed on a case-by-case basis, taking into consideration the nature and scope of the provisions of the covered agreements alleged to have been violated. At the same time, this assessment requires an examination of the text of the request in its entirety, and in certain cases, the panel may infer the statement of a claim therefrom.

7.464. In paragraph 18 of the panel request, Costa Rica claims that the challenged measures are inconsistent with Article 6.7 of the Anti-Dumping Agreement and Annex I thereto because, *inter alia*:

> [T]he investigating authority failed, prior to the visit, to advise the firms concerned of the general nature of the information to be verified and of any further information which needed to be provided.

7.465. Costa Rica's statement of a claim therefore expressly cites Article 6.7 and Annex I and uses practically the same language as that used in paragraph 7 of Annex I. It is thus clear that the "problem" that Costa Rica presents in its claim relates to paragraph 7 of Annex I. As such, we reject the Dominican Republic's argument that paragraph 18 of the request for the establishment of a panel was not "sufficient to present the problem clearly".

7.466. The Dominican Republic also contends that no "meaningful" narrative was provided alongside the claim in the panel request to enable the Dominican Republic to understand the case it was

[778] Costa Rica's first written submission, paras. 280 and 285; second written submission, para. 307; and opening statement at the first meeting of the Panel, para. 122.
[779] Dominican Republic's first written submission, para. 694.
[780] Dominican Republic's first written submission, para. 693.
[781] Dominican Republic's first written submission, paras. 694 and 696-697.
[782] Costa Rica's opening statement at the first meeting of the Panel, para. 120.
[783] See para. 7.122, ff. above.

required to respond to. The Dominican Republic also argues that the claim presented by Costa Rica in its first written submission is not the same as that presented in the panel request, as the claim in Costa Rica's first written submission "focuses on the fact that the CDC considered that ArcelorMittal should have provided evidence to enable the CDC to carry out the comparative analysis that ArcelorMittal deemed necessary or to support ArcelorMittal's argument that certain sales should be excluded from the examination based on the POI".[784] The Dominican Republic maintains that this argument has nothing to do with verification or with the procedural aspects set out in Annex I.[785]

7.467. Article 6.2 of the DSU stipulates that panel requests need only provide a "brief summary" of the claims.[786] It is therefore not necessary for the request to include the arguments supporting the claims. A complainant may progressively set out, develop and/or clarify its arguments in its submissions over the course of the panel proceedings.[787]

7.468. In our view, it is therefore clear that the assertions made by Costa Rica in its first written submission do not constitute separate claims but rather they are arguments to support its claim of a breach of Article 6.7 of the Anti-Dumping Agreement and Annex I thereto. This is clear to us because the submission mentions that the CDC should have requested, prior to the verification visit, information on domestic sales made before the POI.[788]

7.469. In the light of the above, we also reject the Dominican Republic's argument that Costa Rica's claim, as set out in its first written submission, is not within the scope of the Panel's terms of reference.

7.11.3 Whether the Dominican Republic acted inconsistently with Article 6.7 and Annex I

7.470. Costa Rica claims that the Dominican Republic violated Article 6.7 of the Anti-Dumping Agreement and Annex I thereto because the CDC failed, prior to the verification visit, to advise the exporting company of the "general nature" of the information that it sought to verify and of any further information that the company needed to provide. In particular, Costa Rica contends that the CDC failed to notify the exporting company, ArcelorMittal, that it had to provide information on sales made before the POI.[789]

7.471. The Dominican Republic responds that Costa Rica's claim has no legal basis and that its presentation of the facts is also incorrect.[790] The Dominican Republic provides three reasons to support its allegations. First, the Dominican Republic contends that 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, which is what the CDC did in the investigation.[791] Second, it is the Dominican Republic's view that Costa Rica presents a "confused" argument that is "unconnected" to Article 6.7 or the procedural aspects of on-the-spot verifications set forth in Annex I.[792] Third, the Dominican Republic points out that, at the time of the verification visit, the CDC did not know that ArcelorMittal would later oppose the inclusion of the

[784] Dominican Republic's first written submission, para. 698.
[785] Dominican Republic's first written submission, paras. 694 and 696-697.
[786] This means, as the Appellate Body has stated, that the brief summary of claims required under Article 6.2 "aims to explain succinctly how or why the measure at issue is considered by the complaining Member to be violating the WTO obligation in question". (Appellate Body Report, *EC - Selected Customs Matters*, para. 130).
[787] Panel Report, *Thailand - H-Beams*, para. 7.44; and the final panel report issued to the parties in *Colombia - Frozen Fries*, para. 7.231. See also Appellate Body Report, *Korea - Pneumatic Valves (Japan)*, paras. 5.6 and 5.31.
[788] See, for example, Costa Rica's first written submission, paras. 288-289.
[789] See, for example, Costa Rica's first written submission, para. 280.
[790] See, for example, Dominican Republic's first written submission, para. 693.
[791] Dominican Republic's first written submission, paras. 715-716.
[792] Namely, according to the Dominican Republic, the purpose of verification is to obtain documentary evidence to support the information already provided; yet Costa Rica's claim relates to evidence that should have been provided to support the claim that certain sales should have been excluded when determining the export price. (Dominican Republic's second written submission, paras. 308 and 310; and opening statement at the first meeting of the Panel, para. 88. See also Dominican Republic's first written submission, paras. 717-723).

export sales transactions shipped on the vessels, the Thorco Logic and the Suzie Q, which ArcelorMittal itself had included in its questionnaire response.[793]

7.472. The parties do not dispute that the CDC did not, prior to or during the verification visit, request the exporting company to verify sales made before the POI. Instead, the disagreement between the parties is centred on whether, under Article 6.7 and paragraph 7 of Annex I, the CDC was required to advise the exporting company that it needed to provide such information.

7.473. We observe that Article 6.7 of the Anti-Dumping Agreement provides, in relevant part, that:

> In order to verify information provided or to obtain further details, the authorities may carry out investigations in the territory of other Members as required, provided they obtain the agreement of the firms concerned and notify the representatives of the government of the Member in question, and unless that Member objects to the investigation. The procedures described in Annex I shall apply to investigations carried out in the territory of other Members.

7.474. Paragraph 7 of Annex I to the Anti-Dumping Agreement provides that:

> As the main purpose of the on-the-spot investigation is to verify information provided or to obtain further details, it should be carried out after the response to the questionnaire has been received unless the firm agrees to the contrary and the government of the exporting Member is informed by the investigating authorities of the anticipated visit and does not object to it; further, it should be standard practice prior to the visit to advise the firms concerned of the general nature of the information to be verified and of any further information which needs to be provided, though this should not preclude requests to be made on the spot for further details to be provided in the light of information obtained.

7.475. Pursuant to Article 6.7, on-the-spot verifications in the territory of other Members are not mandatory but rather are permitted during an anti-dumping investigation.[794] However, if an investigating authority decides to conduct a verification visit, Article 6.7 clearly establishes that the specific parameters that must be applied to the verification visit are found in Annex I to the Anti-Dumping Agreement.[795] Below we will analyse these provisions together.

7.476. We also observe that paragraph 7 of Annex I stipulates that it "should" be standard practice, prior to the visit, to advise the firms of the "general nature of the information to be verified and of any further information which needs to be provided". This paragraph does not stipulate that firms "shall be advised". However, we find it relevant that Article 6.7 expressly stipulates that the procedures described in Annex I "shall apply".[796] In our view, paragraph 7 of Annex I should therefore be interpreted in the mandatory sense, as not doing so would be inconsistent with Article 6.7.[797] For these reasons, we reject the Dominican Republic's argument that the use of the term "should" in paragraph 7 of Annex I "does not impose obligations on Members".[798]

7.477. As we have noted, Costa Rica claims that the CDC was "obliged" to advise ArcelorMittal, prior to the verification visit, that it had to supply information on sales made in Costa Rica's domestic market before the POI.[799] However, in the circumstances of this case, we do not deem there to be such an obligation.

7.478. First, paragraph 7 of Annex I instructs the authority to "advise the firms concerned of the general nature of the information to be verified and of any further information which needs to be provided". In the present case, we consider that this is what the CDC did, as confirmed in letter

[793] See, for example, Dominican Republic's response to Panel question No. 64, paras. 192-194.
[794] Panel Reports, *Egypt - Steel Rebar*, para. 7.326; and *EC - Tube or Pipe Fittings*, para. 7.191.
[795] Panel Report, *Egypt - Steel Rebar*, para. 7.325.
[796] We also observe that Annex I is entitled "Procedures for on-the-spot investigations pursuant to paragraph 7 of Article 6".
[797] See, by analogy, Panel Report, *Guatemala - Cement II*, fn 854.
[798] Dominican Republic's first written submission, para. 705; and second written submission, para. 316.
[799] Costa Rica's first written submission, para. 387.

No. 697 from the CDC to ArcelorMittal regarding the verification visit.[800] In particular, the letter makes reference to the verification of "[a]ll documents concerning sales in the domestic market".[801] It also explains that "it is expected that you will be able to account for every figure provided in your responses".[802] Annex I, however, does not specify any obligation to advise the exporter in advance of the specific transactions to be verified.

7.479. Second, we note that Costa Rica's argument is based on the fact that the CDC rejected the arguments – concerning the lack of a fair comparison between the normal value and the export price[803] – that the exporting company put forward in its observations about the essential facts of the investigation because, *inter alia*, "ArcelorMittal [had] failed to provide the evidence needed to make a fair comparison with the normal value for dates prior to the [POI]".[804] We recall that Costa Rica based the claim made under Articles 2.1 and 2.4 of the Anti-Dumping Agreement on these same facts, and we found that the CDC acted inconsistently with Article 2.4, as it failed to make a comparison between the export price and normal value "in respect of sales made at as nearly as possible the same time".[805]

7.480. In our view, in this instance, Costa Rica's argument under Article 6.7 and Annex I is based on the fact that, according to Costa Rica, the verification visit was the "ideal opportunity" for the CDC to express and meet its need to obtain certain information, with a view to ensuring a fair comparison.[806] However, we consider that verification visits – which are not even mandatory – are not the only time or way for an investigating authority to satisfy itself as to the accuracy of the information supplied by interested parties or to request further information as part of the investigation.[807] We therefore do not see how the verification visit was the "ideal opportunity" for the CDC to request information on domestic sales made before the POI, nor do we see how the CDC could be required to advise the exporter that it needed to supply this information.[808]

7.11.4 Conclusion

7.481. For the foregoing reasons, we therefore conclude that 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.

7.12 Costa Rica claims under Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994

7.482. Costa Rica claims that, because the Panel has found that the CDC failed to calculate the margin of dumping in accordance with Articles 2.4 and 2.2.1 of the Anti-Dumping Agreement, the

[800] Letter from the CDC No. 697 to ArcelorMittal regarding the verification visit (2 November 2018) (Exhibit DOM-18).
[801] Letter from the CDC No. 697 to ArcelorMittal regarding the verification visit (2 November 2018) (Exhibit DOM-18), p. 3.
[802] Letter from the CDC No. 697 to ArcelorMittal regarding the verification visit (2 November 2018) (Exhibit DOM-18), p. 3.
[803] Final Technical Report (confidential version) (Exhibit DOM-3 (BCI)), pp. 40-41.
[804] Final Technical Report (confidential version) (Exhibit DOM-3 (BCI)), para. 129. See also Costa Rica's first written submission, para. 288; and response to Panel question No. 117, para. 69.
[805] See section 7.3.3.2 above.
[806] Costa Rica's response to Panel question No. 63, para. 91. Costa Rica also contends that if "the CDC considered it necessary for the exporter to supply [information on invoices for domestic sales made prior to the POI], and given that the CDC decided to carry out a verification visit, the CDC should have used that visit to obtain further details on the domestic sales from the exporter". (Costa Rica's response to Panel question No. 117, para. 69).
[807] As the panel stated in *EU - Footwear (China)*, "[w]hile on-site verification is certainly one method by which an investigating authority may satisfy itself as to the accuracy of information [in accordance with Article 6.6 of the Anti-Dumping Agreement], it is by no means the only method of doing so, and ... is not required in any case". (Panel Report, *EU - Footwear (China)*, para. 7.428. See also Panel Report, *Egypt - Steel Rebar*, para. 7.327).
[808] In this respect, we take note of the Dominican Republic's assertion that "the purpose of verification [is not to] request new evidence to support [a claim] that had not even been made at that time". (Dominican Republic's second written submission, para. 317).

Panel should also determine that the Dominican Republic's anti-dumping measures were inconsistent with Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994.

7.483. The *chapeau* of Article 9.3 provides that "[t]he amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2". Article VI:2 of the GATT 1994 likewise provides that "[i]n order to offset or prevent dumping, a contracting party may levy on any dumped product an anti-dumping duty not greater in amount than the margin of dumping in respect of such product".

7.484. In the final determination, the CDC calculated a margin of dumping of 15% and applied definitive anti-dumping duties of 15% *ad valorem* at the ex-factory level.[809]

7.485. Costa Rica's claim is based on the argument that it has demonstrated that the Dominican Republic imposed anti-dumping duties in excess of the margin of dumping that should have been established under Article 2 of the Anti-Dumping Agreement. To substantiate this, Costa Rica recalls that, during the investigation, ArcelorMittal had submitted to the CDC an alternative margin of dumping calculation that excluded the shipments transported the Thorco Logic and the Suzie Q.[810] Costa Rica states that the alternative calculation demonstrated the absence of dumping and that the CDC rejected the calculation on the grounds that ArcelorMittal did not expressly request the exclusion of those shipments, nor did it provide evidence of prices associated with the normal value for purposes of comparison with the export prices of the two shipments.[811] Costa Rica rejects the validity of these arguments and also indicates that the CDC did not identify any errors in the alternative calculation. Costa Rica therefore considers that the margin of dumping calculation produced by ArcelorMittal is sufficient to demonstrate that the amount of the anti-dumping duty in this case exceeds the margin of dumping that would have been established if the CDC had complied with Article 2.[812]

7.486. The Dominican Republic considers Costa Rica's claim to be without merit because it is "purely consequential" to Costa Rica's other arguments that the CDC failed to calculate the margin of dumping in accordance with Article 2 of the Anti-Dumping Agreement.[813] The Dominican Republic also refutes Costa Rica's argument that "the CDC did not identify errors in the calculation produced by the exporting company", indicating that "[t]he CDC never examined the accuracy of the calculations because [they] excluded sales that entered the country during the POI and that should therefore have been included in the calculation".[814]

7.487. In its written submissions to the Panel, Costa Rica made reference to the approach taken in the cases *EU - Biodiesel (Argentina)*[815] and *EU - Biodiesel (Indonesia)*[816], in which the panels found that the investigating authority had acted inconsistently with Article 9.3 and Article VI:2, as it had calculated the margin of dumping in a manner inconsistent with Article 2 of the Anti-Dumping Agreement. In both cases, the panels determined that the anti-dumping duty imposed exceeded what the margin of dumping would have been had the investigating authority complied with Article 2. To reach that finding, the panels considered it appropriate to compare the margin of dumping calculated in the final determination with the margin of dumping calculated in the provisional determination. In both cases, the authorities had calculated the margin of dumping in the provisional

[809] Final determination (Exhibit CRI-2), third operative paragraph.
[810] Costa Rica's first written submission, para. 296 (referring to the resolution on the appeal for reconsideration (Exhibit CRI-1), paras. 82-83); and second written submission, para. 314 (referring to ArcelorMittal's arguments dated 8 February 2019 (Exhibit CRI-18) and Excel sheet with the "MD" calculation (Exhibit CRI-23 (BCI))).
[811] Costa Rica's first written submission, para. 296 (referring to the resolution on the appeal for reconsideration (Exhibit CRI-1), paras. 81-86); and second written submission, para. 314 (referring to ArcelorMittal's arguments dated 8 February 2019 (Exhibit CRI-18) and Excel sheet with the "MD" calculation (Exhibit CRI-23 (BCI))).
[812] Costa Rica's first written submission, para. 296; and second written submission, para. 314.
[813] Dominican Republic's first written submission, paras. 730-731; and second written submission, paras. 330 and 333.
[814] Dominican Republic's first written submission, para. 733 (referring to Costa Rica's first written submission, para. 296).
[815] Panel Report, *EU - Biodiesel (Argentina)*, paras. 7.365-7.366.
[816] Panel Report, *EU - Biodiesel (Indonesia)*, paras. 7.172-7.173.

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.