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DOMINICAN REPUBLIC - ANTI-DUMPING MEASURES ON CORRUGATED STEEL BARS

NOTIFICATION OF AN APPEAL BY THE DOMINICAN REPUBLIC UNDER ARTICLE 16.4 AND ARTICLE 17.1 OF THE UNDERSTANDING ON RULES AND PROCEDURES GOVERNING THE SETTLEMENT OF DISPUTES (DSU), AND UNDER RULE 20(1) OF THE WORKING PROCEDURES FOR APPELLATE REVIEW

The following communication, dated 18 September 2023, from the delegation of the Dominican Republic, is being circulated to Members.

1. Pursuant to Articles 16.4 and 17.1 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), the Dominican Republic hereby notifies the Dispute Settlement Body of its decision to appeal to the Appellate Body certain issues of law and legal interpretations in the report of the panel established to hear the case *Dominican Republic - Anti-dumping Measures on Corrugated Steel Bars* (WT/DS605/R). Pursuant to Rule 20(1) of the Working Procedures for Appellate Review, the Dominican Republic simultaneously files this Notice of Appeal with the Appellate Body Secretariat. The appeal is restricted to errors that the Dominican Republic considers to be serious errors of law or legal interpretation that need to be corrected. However, the fact that an issue in the Panel Report has not been appealed, does not mean that the Dominican Republic agrees with the Panel's specific decision or interpretation.

2. For reasons that will be set out in greater detail in its submissions to the Appellate Body, the Dominican Republic appeals and requests the Appellate Body to reverse, amend or declare moot and of no legal effect, the following findings, conclusions, rulings and recommendations of the Panel with respect to errors of law or legal interpretation contained in the Panel Report.¹

I. The Panel's conclusion regarding the violation of Article 2.4 of the Anti-Dumping Agreement is in error

3. The Dominican Republic appeals the findings in which the Panel states that the Dominican Republic violated Article 2.4 of the Anti-Dumping Agreement because it failed to exclude from the determination of export sales, two sales invoiced just prior to the start of the period of investigation, but which entered the country during the period of investigation, and which were included as such by the exporter in its response to the questionnaire for exporters. The Panel thus erred in law in its conclusion by stating 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 the 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".²

4. It is important to note that the Regulatory Commission on Unfair Trade Practices and Safeguard Measures of the Dominican Republic (CDC) used the same period of investigation for sales

¹ The paragraphs listed in the Notice of Appeal form an "indicative list" only of the relevant parts of the Panel Report, pursuant to Rule 20(2)(d)(iii) of the Working Procedures for Appellate Review. Errors in the issues of law may also be reflected in or have consequences for other parts of the Panel Report. The Dominican Republic appeals all analyses, findings and conclusions deriving from or based on appealed errors.

² Panel Report, *Dominican Republic - AD on Steel Bars (Costa Rica)* (WT/DS605/R) (henceforth "Panel Report"), para. 7.70.

in the Costa Rican market as for export sales. Moreover, the CDC used exactly the same data as the exporter included in its response to the questionnaire. The exporter submitted its data on domestic market sales during the period of investigation, taking into account the date of the sales invoice, while for export sales, it used the date of entry of the product into the Dominican Republic. The CDC accepted these data and criteria (such as the date of entry for export sales) used by the exporter. However, this difference in criteria, and in particular the use of the date of entry of the product into the Dominican Republic for export sales, is the only basis for the Panel's decision.

5. The Panel's finding of a violation of Article 2.4 of the Anti-Dumping Agreement is affected by a series of errors of law.

6. First, the Panel erroneously considers that Article 2.4 governs the investigating authority's determination of the export price (such as the matter of which export transactions must be included in that determination of the export price).³ However, Article 2.4 does not refer to the determination of the normal value and the export price, but only to the *comparison* between them once both values have been established.

7. In this connection, it is important to note that neither Costa Rica in this case, nor the Costa Rican exporter in the underlying investigation, argued that an *adjustment* was needed to reflect an alleged difference between the normal value and the export price in order to ensure a "fair comparison". Rather, both argued that certain export transactions *should have been excluded* from the analysis when determining the export price. Consequently, their arguments address the determination of the export price. The determination of the normal value and export price is governed by Articles 2.1, 2.2 and 2.3, not Article 2.4. Article 2.4 does not refer to the determination of the normal value or export price; instead, it refers only to the obligation to ensure a fair comparison between them once these two determinants have been established. On that basis alone, the Panel should have rejected Costa Rica's claim under Article 2.4 and, thus, its finding of a violation is an error of law.

8. Second, the Panel's finding that the CDC acted inconsistently with Article 2.4 of the Anti-Dumping Agreement because it failed to make the comparison between the normal value and the export price "in respect of sales made at as nearly as possible the same time" is wrong.⁴ It is based on an incorrect legal interpretation of Article 2.4, in the light of Article 2.1. Moreover, the Panel's application of the standard to the facts of this case is equally erroneous and constitutes an error of law.

9. Article 2.4 does not require the use of a period of investigation, and certainly does not set forth criteria for determining whether sales are made at "as nearly as possible the same time". Thus, the Panel's finding of a violation is not supported by the text of the Agreement, under which the determination of the period of investigation and the criteria used to determine whether an export sale was made during the period of investigation are left to the discretion of the investigating authority.

10. It is customary to use a period of investigation that is sufficiently recent and to compare the prices of domestic and export sales made during this period of investigation. This is what the CDC also did. Costa Rica has not disagreed with the CDC's selection of the period of investigation in this case. Moreover, nothing in Article 2.4 requires an investigating authority to use a specific criterion to identify relevant transactions that fall within this period of investigation, provided that these transactions correspond to a properly established period of investigation.

11. The Panel's finding that the CDC considered export sales and domestic sales "made in different periods"⁵ is incorrect, as the same period of investigation was used for both the normal value and for the export price.

12. The only reason for the Panel's finding of a violation is the fact that the criterion used to determine whether export sales were made during the period of investigation was their date of entry, while the criterion for including domestic sales was the date of invoice.⁶ There is no textual basis for

³ Panel Report, paras. 7.32 and 7.33.

⁴ Panel Report, paras. 7.45, 7.55, 7.61 and 7.64.

⁵ Panel Report, para. 7.70.

⁶ Panel Report, paras. 7.45, 7.55 and 7.64.

demanding complete parallelism in terms of the criteria to be used. In fact, given that, for obvious reasons, the "date of entry" in the country cannot be used as a criterion for determining which domestic sales are covered, the Panel effectively disregarded this criterion without an adequate legal basis.

13. Moreover, this finding is based on an incorrect legal interpretation of the term "dumping" in Article 2.1 and wrongly imposes an obligation, not reflected in Article 2.4, to use the date of invoice to determine the date of export sale. In any event, Article 2.1 defines the term "dumping" by making reference to sales that are "introduced into the commerce" at less than their normal value, thereby confirming that the use of the date of entry is a totally acceptable criterion for determining whether export sales were made during the period of investigation (as the CDC did). The date of entry is, in effect, the moment at which a product is "introduced" into the commerce and is thus a legitimate criterion for determining whether sales were made during the period of investigation. Under Article 17.6(ii) of the Anti-Dumping Agreement, the use of the date of entry for determining whether export sales were made during the period of investigation is one permissible interpretation of Articles 2.1 and 2.4; and, therefore, the Panel had no basis for overturning the use of this criterion.

14. Third, the Panel erroneously considered that this alleged lack of parallelism failed to ensure a "fair" comparison, which would "compromis[e] the fair comparison for the purposes of the margin of dumping calculation". However, the Panel neglected to examine whether this was the case in view of the facts in question. Nor did the Panel apply the Agreement correctly to the facts of this case, since it failed to establish that the mere fact that some export sales were invoiced just a few days prior to the start of the period of investigation meant that the authorities had not considered sales made at as nearly as possible the same time.

15. Given that the difference between the date of invoice and the start of the period of investigation of these sales was only one month for the first export sale and three days for the other export sale, it was incumbent upon Costa Rica to demonstrate that this difference affected the fairness of the comparison and upon the Panel to examine that. This was also not the case. In fact, and very importantly in terms of what constitutes a "fair" comparison, it was the exporter itself that included these two export sales in the response to the questionnaire and that used the criterion of "date of entry into the Dominican Republic" as a decisive criterion.⁷ Clearly, the exporter did not consider the comparison to be problematic or unfair when it responded to the questionnaire. It was only after the disclosure of the essential facts that the exporter requested the exclusion of these two export sales, without, however, providing a convincing explanation to support that request. Moreover, in order to find a violation of Article 2.4, it was incumbent upon the Panel to establish that the temporal difference had an impact on the comparability of the prices and that the CDC's decision to use the data provided by the exporter was not objective. The Panel failed to do so. The foregoing constitutes a failure to apply the standard to the facts of the case and is, therefore, an error of law.

16. Fourth, in making its finding of a violation of Article 2.4, the Panel failed to respect its terms of reference under Article 17.6 of the Anti-Dumping Agreement. Its task was to examine whether the Investigating Authority's establishment of the facts was proper and whether its evaluation of those facts was unbiased and objective. It is not for the panel to assume the role of the investigating authority and decide what it would have done or what the authority might have done in this position. The Panel failed to respect this standard in its review.

17. An objective assessment of the facts by the Panel would have reflected that certain observations made by the exporter under investigation were in response to the disclosure of the essential facts in November 2019,⁸ at the end of the investigation, and more than one year after the verification visit. This also meant that the CDC did not have time to examine the veracity of statements regarding the alleged increase in costs in the months prior to the start of the period of investigation. The Panel disregarded the clear warning contained in Article 6.14 of the Anti-Dumping Agreement that the procedures are not intended to prevent the authorities from proceeding expeditiously, and, pursuant to the obligation set forth in Article 5.10, from normally concluding the investigation within one year, and in no case more than 18 months, after its initiation.

⁷ Panel Report, para. 7.49.

⁸ Panel Report, para. 7.49.

18. Similarly, the Panel's apparent acceptance of the unsubstantiated assertion that costs increased in the months prior to the start of the period of investigation, is equally not consistent with the Panel's obligation to make an objective assessment of the facts as stipulated in Article 11 of the DSU.⁹ The Panel completely neglected to explain why it would have been biased and unobjective of the Investigating Authority to reject the incomplete table of costs provided by the exporter without supporting evidence and subsequent to the disclosure of the essential facts.

19. Equally, this table of costs did not provide any information for March 2017 and certainly did not support the assertion that costs had increased between February and March 2017, when the first of the contested export sales was invoiced, and in May 2017, when the period of investigation began. In fact, the table provided by the exporter at that late stage of the investigation, did not contain any information for March 2017 and the information corresponding to February 2017 showed that the costs of inputs remained exactly the same when compared with May 2017, the date the period of investigation began.

20. The Panel failed to respect the standard of review under Article 17.6(i) and Article 11 of the DSU, which is another clear error of law that undermines its finding of a violation of Article 2.4 of the Anti-Dumping Agreement.

21. Consequently, the Dominican Republic respectfully requests the Appellate Body to reverse the Panel's finding with respect to the violation of Article 2.4 of the Anti-Dumping Agreement, as set out in paragraph 8.1.a.i. of the Panel Report and in the aforementioned paragraphs.

II. The Panel's conclusion regarding the violation of Article 2.2.1 of the Anti-Dumping Agreement is in error

22. The Panel erred in law in its legal interpretation of Article 2.2.1 of the Anti-Dumping Agreement and also committed an error of law in its application of the provision to the facts in this case, by concluding that the CDC acted inconsistently with Article 2.2.1. The Dominican Republic appeals the Panel's finding that the CDC violated Article 2.2.1 by using the annual cost data provided by the exporter in the questionnaire response, to assess whether domestic sales were below cost.

23. In particular, first, the Panel's finding "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"¹⁰ is based on an incorrect interpretation of Article 2.2.1, since Article 2.2.1 is silent on whether daily, weekly, monthly or annual cost data should be used when examining whether sales were below per unit cost at the time of sale. Thus, to the extent that the costs relate to the period during which the sales at issue occurred, Article 2.2.1 does not require an authority to use daily, weekly, monthly or annual cost data and gives the investigating authority discretion over the cost data to be used for examining below-cost sales. The CDC correctly assessed prices in the light of the weighted costs for the period of investigation.

24. There is no textual legal basis for the Panel's finding that Article 2.2.1 does not establish discretion to use annual cost data¹¹ and that it would be "reasonable to use a methodology that takes into account the costs at the time of sale determined on a basis other than the annual weighted average per unit cost".¹² Therefore, nor is there any legal basis in Article 2.2.1 for the Panel's finding that the use of annual cost data by the CDC violated Article 2.2.1.¹³ The use of annual cost data is clearly a permissible interpretation of Article 2.2.1, and the Panel's finding to the contrary constitutes an error of law. The Panel acted inconsistently with its terms of reference under Article 17.6(ii) of the Anti-Dumping Agreement.

25. Second, the Panel erred in law when it developed certain criteria for the mandatory use of monthly cost data, as there is no legal basis for any such criteria in the Anti-Dumping Agreement. The Panel's finding that the use of annual cost data may be permissible in a situation where prices and costs are "relatively stable" compared to a situation where costs "increase significantly" during

⁹ Panel Report, paras. 7.54-7.55.

¹⁰ Panel Report, para. 7.106.

¹¹ Panel Report, para. 7.97.

¹² Panel Report, para. 7.99.

¹³ Panel Report, para. 7.105.

the period of investigation¹⁴, is in no way based on any provision of the text of the Anti-Dumping Agreement and remains completely vague and undefined. On the basis of these newly invented criteria, the Panel reached its conclusion that the CDC was in violation of Article 2.2.1 of the Anti-Dumping Agreement.¹⁵ This finding is therefore based on a clear error of law, as there is no legal basis requiring an authority to examine those criteria in accordance with Article 2.2.1.

26. Third, the Panel failed to respect its terms of reference under Article 17.6(i) of the Anti-Dumping Agreement and Article 11 of the DSU. The Panel based its finding of violation on assertions regarding the increase in costs and prices of billets during the period of investigation that were not supported by any evidence, as they were, in addition, submitted too late in the investigation for consideration by the CDC.

27. In particular, the Panel referred to arguments that the cost of the main feedstock (billets) increased during the period of investigation and that this would have had a direct effect on the outcome of the examination of below-cost sales.¹⁶

28. However, these assertions were never made, let alone substantiated by means of factual data during the investigation, until after the disclosure of the essential facts. The Panel once again disregards the important temporal progression of an investigation, contrary to the provisions of Articles 5.10 and 6.14 of the Anti-Dumping Agreement. The exporter did not provide monthly cost data until after the disclosure of the essential facts and did not provide any data or information supporting the "mandatory" use of such monthly data.

29. It should be noted that the information was provided very late in the investigation, including many months after the verification visit. And when it was, it was checked taking into account that there was no clear difference regarding costs, which would have required an objective investigating authority to change the parameters of its below-cost examination, despite there being no legal obligation for such a requirement. Thus, since the Anti-Dumping Agreement does not set out any obligation to use monthly costs, it was a reasonable decision for the CDC to not change, at that late stage, its determinations on the basis of information that the exporter could have provided before the verification visit. The Panel's conclusion that the CDC "fail[ed] 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*"¹⁷ is entirely without merit, and is not based on the facts on the record, since these monthly costs were never verified. This "*de novo*" conclusion of the Panel demonstrates that the Panel violated its terms of reference under Article 17.6 of the Anti-Dumping Agreement since it is not an "objective" assessment as required by Article 11 of the DSU.

30. The Dominican Republic notes that the Panel also asserts that the CDC should have been aware of the alleged increasing costs even before the communication submitted by the exporter at the end of the investigation, because this fact was raised by the applicant in September 2018.¹⁸ However, the Panel's conclusion fails to establish that this isolated comment was made by the applicant in an entirely different context, that of comments regarding injury, without providing any supporting evidence. Furthermore, the information did not indicate any increase in costs so exceptional and large as to require the CDC not to use an annual average. The Panel completely fails to establish that this comment was such that the use of annual cost data (provided by the exporter itself in its questionnaire response) could not be "objective" or unbiased. Once again, the Panel appears to be acting in disregard of the terms of reference of Article 17.6(i), which make it very clear that it is possible to overturn an authority's evaluation simply because the Panel in its position would have done things differently.

31. Lastly, it appears that the Panel considered that the fact that the majority of below-cost sales are concentrated in the first months of the investigation period "indicates to an investigating authority that there may be possible bias in the below-cost sales analysis".¹⁹ However, there is no legal basis for this assumption. It would be a different scenario if costs had increased during the period of investigation and almost all sales had been concentrated at the beginning of the

¹⁴ Panel Report, paras. 7.99 and 7.100.

¹⁵ Panel Report, para. 7.105.

¹⁶ Panel Report, paras. 7.92 and 7.100-7.104.

¹⁷ Panel Report, para. 7.105.

¹⁸ Panel Report, para. 7.101.

¹⁹ Panel Report, para. 7.104.

investigation; in such a scenario, there may be a risk of bias. But here, this was not the case. As reflected in the Panel Report, "the sales volume was relatively constant and sales were not negligible in any month during the POI".²⁰

32. For all these reasons, the Dominican Republic respectfully requests the Appellate Body to reverse the Panel's finding concerning the violation of Article 2.2.1, as set out in paragraph 8.1.a.iii of the Panel Report and in the aforementioned paragraphs.

III. The Panel's conclusion that the CDC acted inconsistently with Articles 3.1 and 3.2 of the Anti-Dumping Agreement in relation to price depression is in error

33. The Panel erred in law by finding that the CDC acted inconsistently with Articles 3.1 and 3.2 of the Anti-Dumping Agreement with respect to the price depression analysis. Contrary to the Panel's conclusion, the CDC complied with the obligation set out in Articles 3.1 and 3.2 to "examine" objectively and on the basis of positive evidence, the effect of the dumped imports on prices, including whether the effect of these imports was to depress prices to a significant degree. The CDC obtained a series of correct intermediate results that reflected proper consideration of the price effects, recognizing also that prices increased during the most recent period of the period of investigation, as clearly shown in table 24 of the CDC's Final Technical Report and as expressed also in the price suppression analysis.

34. The Panel's finding that "[i]n order to conduct an objective examination, the Investigating Authority should have explained that there was a price decrease from 2015 to 2016" and that "the price rose during the subsequent periods"²¹ and that "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"²², establishes an obligation with respect to Article 3.2 that does not exist in that Article. The Panel's finding that "[t]he absence of such explanations" leads the Panel to conclude that the price depression analysis was not objective is in error.²³ The Panel confuses the substantive obligation to objectively examine the price effects with the non-existent obligation to make a "determination" regarding price depression and to provide a detailed explanation of this in the authorities' report. Article 3.2 does not require a "determination", let alone that such a determination be accompanied by a descriptive and written explanation.

35. Furthermore, the Panel's conclusions fail to confirm the lack of "objective" assessment by the CDC. The Panel's assertion that the CDC's failure to explain that prices actually increased from 2016 contradicts its own finding that the CDC properly considered there to be price suppression²⁴, which inherently reflects a recognition that prices increased, but not to the extent anticipated. The Panel denies that the CDC's examination of price trends clearly and expressly included a table 24 showing that prices in fact increased in 2016-2017, but less than costs, and that the increase did not offset the fall in prices in the first period. The price analysis was objective and unbiased. It is an error of law for the Panel to conclude otherwise solely on the basis that this explanation has not been repeated in a part of the CDC's Final Technical Report.

36. The Dominican Republic therefore respectfully requests the Appellate Body to reverse the Panel's finding with respect to the violation of Articles 3.1 and 3.2, as set out in paragraph 8.1.b.iii of the Panel Report and in the aforementioned paragraphs.

IV. The Panel's conclusion regarding the violation of Articles 3.1 and 3.4 of the Anti-Dumping Agreement is in error

37. The Panel erred in law by finding that the CDC acted inconsistently with Articles 3.1 and 3.4 of the Anti-Dumping Agreement in relation to certain aspects of the analysis of the impact of the injury factors that supported its threat of injury determination.

²⁰ Panel Report, para. 7.103.

²¹ Panel Report, para. 7.163.

²² Panel Report, para. 7.162.

²³ Panel Report, paras. 7.163 and 7.167.

²⁴ Panel Report, paras. 7.178 and 7.179.

38. First, the Panel erred by considering that the CDC was violating Article 3.4²⁵, since the CDC did not make a determination of injury under Article 3.4. While the Dominican Republic recognizes that a threat of injury analysis under Article 3.7 is based on an analysis of the injury factors listed in Article 3.4, any claim of violation may only be made under Article 3.7 when no finding of material injury is made under Article 3.4, as was the case here.

39. Second, the Panel erred in considering that the CDC did not objectively assess certain injury factors, such as profits, cash flow, employment and loss of market share, and failed to adequately explain the positive development of other injury factors.²⁶ The Panel imposes a requirement for a detailed explanation of the impact of dumped imports on each individual factor and at each point during the investigation period, which is not provided for in Articles 3.1 and 3.4. Pursuant to Article 17.6(i) of the Anti-Dumping Agreement, the Panel's task was to examine whether the evaluation of these factors was biased or unobjective, and not to examine whether the explanation provided was sufficiently detailed. The Panel failed to do so and imposed a detailed explanation standard with respect to the evolution of each of the factors that is not found in the text of Article 3.4.

40. Third, the Panel's finding that Article 3.4 requires an evaluation of the effects of the dumped imports on the domestic industry is based on an incorrect interpretation of Article 3.4. The Panel requires an investigating authority not only to evaluate the state of the domestic industry, but also to provide a reasoned and proper analysis of the causal link between these developments and the dumped imports, on the one hand, and between the trends in each factor, on the other, in order to determine the "relative weight" of each factor. This interpretation of what Article 3.4 requires is in error and is not based on the text of Article 3.4.²⁷ The Panel failed to identify any improper evaluation of the facts or any biased evaluation of those facts by the CDC, and its conclusion that Article 3.4 has been violated is therefore erroneous.

41. The Dominican Republic therefore respectfully requests the Appellate Body to reverse the Panel's findings in paragraph 8.1.b.v. of the Panel Report and in the aforementioned paragraphs.

V. The Panel's conclusion regarding the violation of Articles 3.1 and 3.7 of the Anti-Dumping Agreement is in error

42. The Panel erred in law by finding that the CDC acted inconsistently with Articles 3.1 and 3.7 of the Anti-Dumping Agreement in relation to the finding of a threat of injury to the domestic industry.

43. First, Article 3.7 requires an investigating authority to consider four factors. It is undisputed that the CDC examined these four factors in their entirety. In particular, Article 3.7 requires authorities to consider whether there has been a significant increase in dumped imports, as this would indicate the likelihood of substantially increased importation in the future. However, the Panel interprets this as two obligations: to examine whether there has been a significant rate of increase *and* to explain why there would be a likelihood of substantially increased importation in the future.²⁸ This is incorrect. The existence of a significant rate of increase of dumped imports is the indication of the likelihood of substantially increased importation. In this connection, as there is no doubt that imports increased significantly during the period of investigation, even in the last four months, the Panel had no grounds for finding that the CDC had failed to properly consider this factor.²⁹

44. Similarly, in Article 3.7(iii), when considering 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, the focus is on the current situation rather than the future. However, again, the Panel imposes an obligation to conduct a "prospective" analysis³⁰, which is not supported

²⁵ Panel Report, para. 7.231.

²⁶ Panel Report, para. 7.231.

²⁷ See, for example, Panel Report, paras. 7.195, 7.199, 7.200, 7.204, 7.206, 7.213, 7.217, 7.227, 7.229, 7.230 and 7.231.

²⁸ Panel Report, paras. 7.257 and 7.286.

²⁹ Panel Report, paras. 7.257 and 7.298.

³⁰ Panel Report, para. 7.274.

by the text of Article 3.7. Its related finding of a violation of Article 3.7, because the projections made by the CDC lacked a factual basis, is therefore equally erroneous.³¹

45. Second, the Panel erred in considering that the totality of the factors considered, all of which supported a conclusion that dumped imports would increase in the future and cause additional price or volume effects, was not sufficient, and that the CDC was further obligated to explain the market dynamics that would lead to future dumped imports and prices.³² There is no such obligation in the text of Article 3.7 of the Anti-Dumping Agreement.

46. Third, the Panel recalled the CDC's numerous findings supporting the threat of injury analysis, including a forward-looking set of projections based on the facts on the record. These projections may not have been perfect and involved some element of unavoidable speculation, but they did confirm the conclusions drawn on the basis of the facts. Despite the absence of evidence contradicting these findings, the Panel criticized the CDC for allegedly not having provided further explanations and evidence to support its projections.³³ In so doing, the Panel was again in breach of its narrower terms of reference under Article 17.6(i) of the Anti-Dumping Agreement. It was not for the Panel to decide what it would have done if it had been the investigating authority, rather its role is to examine whether what the CDC did was unbiased and objective. However, the Panel did not do so. It is not because further explanations could have been offered that an evaluation is biased. The Panel's subsequent finding that the CDC's conclusion "could not form the basis for its threat of injury determination"³⁴ is also erroneous.

47. For all these reasons, the Dominican Republic respectfully requests the Appellate Body to reverse the Panel's findings in paragraph 8.1.b.vii. of the Panel Report and the aforementioned paragraphs.

VI. The Panel's conclusion regarding the violation of Articles 3.1 and 3.5 of the Anti-Dumping Agreement is in error

48. The Panel erred in law in its legal interpretation of Articles 3.1 and 3.5 of the Anti-Dumping Agreement and thus committed an error in law when applying this legal standard to the facts of this case, by concluding that the CDC acted inconsistently with Articles 3.1 and 3.5 in relation to the determination of causation.

49. The Panel's legal interpretation of Articles 3.1 and 3.5 in the context of a determination of a threat of injury, which requires a demonstration of "future" causation by future imports, is based on a clear error of law and is not supported by the text of these provisions. The Panel faulted the CDC for not making reference to how *future injury* would be caused by *further and future dumped imports*.³⁵ However, this interpretation is not consistent with the text of the relevant provisions, and thus constitutes an error of law. The obligation under Article 3.5 is to demonstrate that the dumped imports *are causing* injury, not that they *will cause* injury. Article 3.5 does not set a different test for threat of injury situations and does not require an analysis of how further, future dumped imports would cause injury in the future.

50. The term "injury" used in Article 3.5 includes "threat of injury" in accordance with footnote 9. Therefore, the proper test under Article 3.5 is whether current dumped imports are a cause of threat of injury at the time of the investigation. The Panel's contrary interpretation is erroneous, and so is its conclusion on the facts of this case based on this erroneous legal interpretation.

51. Therefore, the Dominican Republic respectfully requests the Appellate Body to reverse the Panel's findings in paragraph 8.1.b.viii. of the Panel Report and in the aforementioned paragraphs.

VII. Conclusion

52. For all of the foregoing reasons, the Dominican Republic respectfully requests the Appellate Body to reverse the interpretations and findings of the Panel identified in this Notification

³¹ Panel Report, para. 7.278.

³² Panel Report, paras. 7.289 and 7.294.

³³ Panel Report, paras. 7.286-7.296.

³⁴ Panel Report, para. 7.298.

³⁵ Panel Report, paras. 7.317, 7.320, 7.321 and 7.327.

of Appeal. The aforementioned grounds for appeal are without prejudice to the more detailed arguments to be set forth in the Dominican Republic's appellate submission during the appeal.

53. In the event of a cross-appeal by Costa Rica, the Dominican Republic reserves the right, in addressing any such cross-appeal, to disagree with any statement by or finding of the Panel made in the context of a matter on which the Dominican Republic prevailed.

54. In initiating this appeal, pursuant to Article 16.4 of the DSU and Rule 20(1) of the Working Procedures for Appellate Review, the Dominican Republic is aware that, as a matter of fact, the Appellate Body is, temporarily, unable to function, given that there are currently no Appellate Body Members to constitute a division to hear the Dominican Republic's appeal.

55. In these exceptional circumstances, and in the interests of fairness and orderly procedure in the conduct of the appeal, in accordance with Rules 16(1) and 16(2) of the Working Procedures for Appellate Review, the Dominican Republic will await further instructions from the division, when it may eventually be composed, or the Appellate Body, regarding any further steps to be taken by the Dominican Republic in this appeal. The Dominican Republic thus reserves the right to submit an appellant submission when it will be so instructed.³⁶

³⁶ In the absence of such instructions, this notification is deemed also to be the Dominican Republic's appellant submission.