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## **1 ARTICLE 11**

### **1.1 Text of Article 11**

#### **Article 11**

##### *Initiation and Subsequent Investigation*

11.1 Except as provided in paragraph 6, an investigation to determine the existence, degree and effect of any alleged subsidy shall be initiated upon a written application by or on behalf of the domestic industry.

11.2 An application under paragraph 1 shall include sufficient evidence of the existence of (a) a subsidy and, if possible, its amount, (b) injury within the meaning of Article VI of GATT 1994 as interpreted by this Agreement, and (c) a causal link between the subsidized imports and the alleged injury. Simple assertion, unsubstantiated by relevant evidence, cannot be considered sufficient to meet the requirements of this paragraph. The application shall contain such information as is reasonably available to the applicant on the following:

- (i) the identity of the applicant and a description of the volume and value of the domestic production of the like product by the applicant. Where a written application is made on behalf of the domestic industry, the application shall identify the industry on behalf of which the application is made by a list of all known domestic producers of the like product (or associations of domestic producers of the like product) and, to the extent possible, a description of the volume and value of domestic production of the like product accounted for by such producers;
- (ii) a complete description of the allegedly subsidized product, the names of the country or countries of origin or export in question, the identity of each known exporter or foreign producer and a list of known persons importing the product in question;
- (iii) evidence with regard to the existence, amount and nature of the subsidy in question;
- (iv) evidence that alleged injury to a domestic industry is caused by subsidized imports through the effects of the subsidies; this evidence includes information on the evolution of the volume of the allegedly subsidized imports, the effect of these imports on prices of the like product in the domestic market and the consequent impact of the imports on the domestic industry, as demonstrated by relevant factors and indices having a bearing on the state of the domestic industry, such as those listed in paragraphs 2 and 4 of Article 15.

11.3 The authorities shall review the accuracy and adequacy of the evidence provided in the application to determine whether the evidence is sufficient to justify the initiation of an investigation.

11.4 An investigation shall not be initiated pursuant to paragraph 1 unless the authorities have determined, on the basis of an examination of the degree of support for, or opposition to, the application expressed<sup>38</sup> by domestic producers of the like product, that the application has been made by or on behalf of the domestic industry.<sup>39</sup> The application shall be considered to have been made "by or on behalf of the domestic industry" if it is supported by those domestic producers whose collective output constitutes more than 50 per cent of the total production of the like product produced by that portion of the domestic industry expressing either support for or opposition to the application. However, no investigation shall be initiated when domestic producers expressly supporting the application account for less than 25 per cent of total production of the like product produced by the domestic industry.

*(footnote original)*<sup>38</sup> In the case of fragmented industries involving an exceptionally large number of producers, authorities may determine support and opposition by using statistically valid sampling techniques.

*(footnote original)*<sup>39</sup> Members are aware that in the territory of certain Members employees of domestic producers of the like product or representatives of those employees may make or support an application for an investigation under paragraph 1.

11.5 The authorities shall avoid, unless a decision has been made to initiate an investigation, any publicizing of the application for the initiation of an investigation.

11.6 If, in special circumstances, the authorities concerned decide to initiate an investigation without having received a written application by or on behalf of a domestic industry for the initiation of such investigation, they shall proceed only if they have sufficient evidence of the existence of a subsidy, injury and causal link, as described in paragraph 2, to justify the initiation of an investigation.

11.7 The evidence of both subsidy and injury shall be considered simultaneously (a) in the decision whether or not to initiate an investigation and (b) thereafter, during the

course of the investigation, starting on a date not later than the earliest date on which in accordance with the provisions of this Agreement provisional measures may be applied.

11.8 In cases where products are not imported directly from the country of origin but are exported to the importing Member from an intermediate country, the provisions of this Agreement shall be fully applicable and the transaction or transactions shall, for the purposes of this Agreement, be regarded as having taken place between the country of origin and the importing Member.

11.9 An 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 subsidization or of injury to justify proceeding with the case. There shall be immediate termination in cases where the amount of a subsidy is de minimis, or where the volume of subsidized imports, actual or potential, or the injury, is negligible. For the purpose of this paragraph, the amount of the subsidy shall be considered to be de minimis if the subsidy is less than 1 per cent ad valorem.

11.10 An investigation shall not hinder the procedures of customs clearance.

11.11 Investigations shall, except in special circumstances, be concluded within one year, and in no case more than 18 months, after their initiation.

## **1.2 General**

### **1.2.1 Anti-Dumping Agreement**

1. As the text of Article 11 of the SCM Agreement largely parallels the text of Article 5 of the Anti-Dumping Agreement, see also the Section on that Article of the Anti-Dumping Agreement.

## **1.3 Article 11.2**

### **1.3.1 "caused by subsidized imports"**

2. In *Japan – DRAMs (Korea)*, the Appellate Body upheld the Panel's finding that it suffices for an investigating authority to find that subsidized imports are causing injury, without any additional requirement to trace the volume effects, the price effects, or the consequent impact of the subsidized imports back the subsidies. The Appellate Body, like the Panel, found contextual support for this conclusion in Article 11.2:

"Article 11.2 of the *SCM Agreement* provides contextual support for our reading of the first sentence of Article 15.5. Article 11.2 sets forth guidance as to what may constitute 'sufficient evidence' for purposes of an application for the initiation of a countervailing duty investigation and further describes the type of evidence that should be included in the application ...

We agree with the Panel that Article 11.2 thus indicates that information relating to the volume effects, the price effects, and the consequent impact of the subsidized imports on the domestic industry serves as evidence to demonstrate that injury is caused by the 'subsidized imports through the effects of subsidies'. By its terms, Article 11.2 does not require an applicant to provide specific evidence regarding the effects that the subsidies may have on import volumes and prices so as to cause injury.

If a demonstration of an additional causal link between the effect of the subsidy and injury is to be established as a prerequisite for an injury determination, as Korea contends, there is no reason why Article 11.2 would not have prescribed submission of evidence for that purpose."<sup>1</sup>

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<sup>1</sup> Appellate Body Report, *Japan – DRAMs (Korea)*, paras. 269-271.

### 1.3.2 "sufficient evidence"

3. The Panel in *China – GOES* rejected China's argument that a lower evidentiary standard applies to Article 11.2 of the SCM Agreement because that provision does not directly reference "specificity". Rather, the Panel held "the same standard of 'sufficient evidence' applies regardless of whether the evidence relates to the existence of a financial contribution, benefit or specificity." The Panel explained:

"In relation to whether evidence of specificity is required in an application, the Panel concurs with the parties that the reference to evidence of the 'nature of the subsidy' includes evidence regarding whether the subsidy is specific. Article 11 is found within Part V of the SCM Agreement. Further, Article 1.2 provides that a subsidy will be subject to Part V only if it is specific within the meaning of Article 2. Therefore, in our view, it is reasonable to conclude that evidence of the 'nature of the subsidy' includes evidence regarding whether the subsidy is specific. The alternative would be that the initiation of an investigation would be justified under Article 11.3, even though it may be clear at the time of initiation that the alleged subsidy is not subject to the disciplines of Part V of the SCM Agreement because it is broadly available in a given jurisdiction. This would not be effective in filtering those applications that are 'frivolous or unfounded'.

The Panel acknowledges that the term 'nature' is used in a number of sections of the SCM Agreement, and that it may not necessarily refer to 'specificity' in each instance. For example, the reference to 'nature' in Article 4.5 of the SCM Agreement appears to refer to whether or not a subsidy is prohibited. However, in the Panel's view, and as both parties agree, a consideration of the context in which a term is used can result in different meanings across different provisions. As outlined in the previous paragraph, the context in which Articles 11.2 and 11.3 are found supports the parties' view that the 'nature' of a subsidy under Article 11.2 (iii) includes evidence of whether or not an alleged subsidy is specific."<sup>2</sup>

- a. The Panel also found that Article 11.2(iii) "requires evidence of the 'nature', namely the specificity, 'of the subsidy in question' ... [which] requires evidence of the nature of each alleged subsidy program." It rejected China's argument that pervasive government support to an industry, discernible from application, constituted sufficient evidence of specificity. The Panel concluded that "[g]eneral information about government policy, with no direct connection to the program at issue, is not 'sufficient evidence' of specificity."<sup>3</sup>

## 1.4 Article 11.3

### 1.4.1 Standard of review

4. The Panel in *China – GOES* found that the appropriate standard of review applicable under Article 11.3 is the same as that of the analogous provision under the Anti-Dumping Agreement, as adopted by the panel in *US – Softwood Lumber V*:

"A panel should determine 'whether an unbiased and objective investigating authority would have found that the application contained sufficient information to justify initiation of the investigation'. The Panel agrees with the parties that its role is not to conduct a *de novo* review of the accuracy and adequacy of the evidence to arrive at its own conclusion regarding whether the evidence in the application was sufficient to justify initiation."<sup>4</sup>

5. Moreover, the Panel in *China – GOES* clarified that, as implied by the language of Article 11.3, part of the investigating authority's determination of whether there is "sufficient evidence" to justify initiation of an investigation must entail an "assessment of the accuracy and adequacy of the evidence furnished." In its view, "when evidence not in the application but relevant to the

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<sup>2</sup> Panel Report, *China – GOES*, paras. 7.60-7.61.

<sup>3</sup> Panel Report, *China – GOES*, para. 7.66.

<sup>4</sup> Panel Report, *China – GOES*, para. 7.51.

decision to initiate is submitted to an investigating authority ... an unbiased and objective investigating authority would weigh this evidence in its assessment."<sup>5</sup>

6. In *US – Countervailing Measures (China)*, the Panel undertook a fact-intensive analysis to determine whether an unbiased, objective investigating authority would have found information provided in industry petitions to be "adequate evidence tending to prove or indicate" that the Government of China provides a financial contribution by directing a private body to carry out the function of providing goods to domestic producers". The Panel did not find "any information" in the petitions that demonstrated how the Government of China "gives responsibility to" or "exercises authority over" a private body in China insofar as "the government exercises its authority over a private body in order to effectuate a financial contribution." As such, the Panel found that the investigating authority's initiation of two countervailing duty investigations was inconsistent with Article 11.3.<sup>6</sup>

#### 1.4.2 "sufficient evidence"

7. As noted in paragraph 4 above, the Panel in *China – GOES* confirmed that the same standard of "sufficient evidence" applies to Article 11.3 as it does to Article 11.2.<sup>7</sup>

8. In *China – GOES*, the Panel rejected China's argument that "direct evidence of de facto specificity is typically not reasonably available to applicants" and, as such, the investigating authority, in that dispute, was justified in initiating an investigation under Article 11.3. The Panel stated that "the fact that an applicant must provide such information as is reasonably available to it does not suggest that an investigating authority is justified in initiating an investigation under Article 11.3 of the *SCM Agreement* even though there is no evidence of specificity before it."<sup>8</sup>

#### 1.4.3 Relationship between Articles 11.2 and 11.3

9. The Panel in *China – GOES* addressed the relationship between Articles 11.2 and 11.3 of the SCM Agreement. According to the Panel, Article 11.2 sets "the evidence that must be included in an application for initiation submitted to an investigating authority by or on behalf of a domestic industry" and Article 11.3 requires an investigating authority to review the accuracy and adequacy of the evidence in order to determine whether it is 'sufficient' to justify initiation of an investigation."<sup>9</sup> The Panel continued:

"[T]he obligation upon Members in relation to the sufficiency of evidence in an application finds expression in Article 11.3 of the SCM Agreement, which provides that an investigating authority must assess the accuracy and adequacy of the evidence in an application to determine whether it is sufficient to justify initiation. The obligation in Article 11.3 must be read together with Article 11.2 of the SCM Agreement, which sets forth the requirements for 'sufficient evidence'. If an investigating authority were to initiate an investigation without 'sufficient evidence' before it, this would be inconsistent with Article 11.3."<sup>10</sup>

10. Granted the above approach, the Panel in *China – GOES* did "not consider it necessary to reach separate conclusions" under Article 11.2. Rather, the Panel "consider[ed] it appropriate to make findings under Article 11.3" with respect to the measures at issue.<sup>11</sup>

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<sup>5</sup> Panel Report, *China – GOES*, para. 7.52.

<sup>6</sup> Panel Report, *US – Countervailing Measures (China)*, paras. 7.401-7.404.

<sup>7</sup> Panel Report, *China – GOES*, para. 7.61.

<sup>8</sup> Panel Report, *China – GOES*, para. 7.67.

<sup>9</sup> Panel Report, *China – GOES*, para. 7.49.

<sup>10</sup> Panel Report, *China – GOES*, para. 7.50.

<sup>11</sup> Panel Report, *China – GOES*, para. 7.50. See also Panel Report, *US – Countervailing Measures (China)*, para. 7.380, where China had advanced claims regarding the initiation of CVD investigations under both Articles 11.2 and 11.3, but the Panel made findings only under Article 11.3.

## 1.5 Article 11.4

### 1.5.1 "by or on behalf of the domestic industry"

#### 1.5.1.1 Requirement to make a determination

11. In *US – Offset Act (Byrd Amendment)*, the Appellate Body recalled that Article 11.4 of the SCM Agreement requires investigating authorities to "determine" whether an application for the initiation of an investigation has been "made by or on behalf of the domestic industry". If a sufficient number of domestic producers have "expressed support" and the thresholds set out in Article 11.4 of the *SCM Agreement* have therefore been met, the "application shall be considered to have been made by or on behalf of the domestic industry". In such circumstances, an investigation may be initiated. By contrast, there is no requirement that an investigating authority examine the motives of domestic producers that elect to support an investigation. Thus, an "examination" of the "degree" of support, and not the "nature" of support, is required. In other words, it is the "quantity", rather than the "quality", of support that is the issue.<sup>12</sup> The Appellate Body ruled:

"A textual examination of Article 5.4 of the *Anti-Dumping Agreement* and Article 11.4 of the *SCM Agreement* reveals that those provisions contain no requirement that an investigating authority examine the motives of domestic producers that elect to support an investigation.<sup>13</sup> Nor do they contain any explicit requirement that support be based on certain motives, rather than on others. The use of the terms 'expressing support' and 'expressly supporting' clarify that Articles 5.4 and 11.4 require only that authorities 'determine' that support has been 'expressed' by a sufficient number of domestic producers. Thus, in our view, an 'examination' of the 'degree' of support, and not the 'nature' of support is required. In other words, it is the 'quantity', rather than the 'quality', of support that is the issue."<sup>14</sup>

#### 1.5.1.2 Exclusive reliance on information in the application

12. The Panel in *Mexico – Olive Oil* addressed the European Communities' argument that investigating authorities are precluded from basing their standing determinations pursuant to Article 11.4 solely on the information provided in the application. The Panel rejected this argument in the following terms:

"[W]e see no language in Article 11.4, or in the *SCM Agreement* generally, prohibiting an investigating authority from basing its determination that an application has been made 'by or on behalf of the domestic industry' solely on evidence provided by the applicant. In fact, there is no reference at all in Article 11.4, or elsewhere in the *SCM Agreement*, to particular sources of information that must or must not be used as the basis for this determination. The only stipulations concerning the quality of the evidence provided in an application are the general requirements in Articles 11.2 and 11.3 of the *SCM Agreement* (neither of which the European Communities has cited in its claims), that 'simple assertions, unsubstantiated by relevant evidence, cannot be considered sufficient' for purposes of an application, and that the authority must 'review the accuracy and adequacy of the evidence provided in the application'. The focus of these provisions is on the quality and credibility of the evidence, rather than on its exact source."<sup>15</sup>

#### 1.5.2 Relationship with Article 5.4 of the Anti-Dumping Agreement

13. In *US – Offset Act (Byrd Amendment)*, the Appellate Body noted that Article 5.4 of the Anti-Dumping Agreement and Article 11.4 of the SCM Agreement are "identical" provisions, and analysed them together. See the Section on Article 5.4 of the Anti-Dumping Agreement.

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<sup>12</sup> Appellate Body Report, *US – Offset Act (Byrd Amendment)*, paras. 281-282.

<sup>13</sup> (footnote original) We note that the parties' submissions do not suggest otherwise.

<sup>14</sup> Appellate Body Report, *US – Offset Act (Byrd Amendment)*, para. 283.

<sup>15</sup> Panel Report, *Mexico – Olive Oil*, para. 7.225.

## 1.6 Article 11.6

### 1.6.1 Non-application of self-initiation standard to sunset reviews under Article 21.3

14. The Appellate Body in *US – Carbon Steel* confirmed the Panel's finding in relation to the self-initiation of sunset reviews that "nothing in the text of Article 11.6 provides for its evidentiary standards to be implied in Article 21.3" in relation.<sup>16</sup> The Appellate Body in *US – Carbon Steel* commented:

"Before leaving our analysis of the text of Article 21.3 of the *SCM Agreement*, we, lastly note that the provision contains no explicit cross-reference to evidentiary rules relating to initiation, such as those contained in Article 11.6. We believe the absence of any such cross-reference to be of some consequence given that, as we have seen, the drafters of the *SCM Agreement* have made active use of cross-references, *inter alia*, to apply obligations relating to *investigations* to review proceedings. In our view, the omission of any express cross-reference thus serves as a further indication that the negotiators of the *SCM Agreement* did not intend the evidentiary standards applicable to the self-initiation of *investigations* under Article 11 to apply to the self-initiation of *reviews* under Article 21.3."<sup>17</sup>

## 1.7 Article 11.9

### 1.7.1 Non-application of the *de minimis* standard to sunset reviews under Article 21.3

15. The Appellate Body in *US – Carbon Steel* reversed the Panel's finding that the 1 per cent *de minimis* standard contained in Article 11.9 of the *SCM Agreement* (which applies to countervailing duty investigations) could be "implied" in Article 21.3 of the *SCM Agreement* on sunset reviews of countervailing duty determinations. In doing so, the Appellate Body observed that all the paragraphs of Article 11 relate to the authorities' initiation and conduct of a countervailing duty investigation, and in particular reflect rules that are "mainly procedural and evidentiary nature."<sup>18</sup> The Appellate Body considered:

"Although the terms of Article 11.9 are detailed as regards the obligations imposed on authorities thereunder, none of the words in Article 11.9 suggests that the *de minimis* standard that it contains is applicable *beyond* the investigation phase of a countervailing duty proceeding. In particular, Article 11.9 does *not* refer to Article 21.3, nor to reviews that may follow the imposition of a countervailing duty."<sup>19</sup>

16. The Appellate Body in *US – Carbon Steel* criticized on several grounds the Panel's approach to the *de minimis* standard in Article 21.3 and observed that it "centred" on the premise that the Article 11.9 *de minimis* standard represents a threshold below which subsidization is always non-injurious. While the Appellate Body recognized that it would be "unlikely" that very low levels of subsidization could be shown to cause "material" injury, it considered that the *SCM Agreement* does not per se preclude such a possibility.<sup>20</sup> In this regard, the Appellate Body noted:

"[T]here is nothing in Article 11.9 to suggest that its *de minimis* standard was intended to create a special category of '*non-injurious*' subsidization, or that it reflects a concept that subsidization at less than a *de minimis* threshold *can never* cause injury. For us, the *de minimis* standard in Article 11.9 does no more than lay down an agreed rule that if *de minimis* subsidization is found to exist in an original investigation, authorities are obliged to terminate their investigation, with the result that no countervailing duty can be imposed in such cases."<sup>21</sup>

17. The Appellate Body in *US – Carbon Steel* then examined Article 11.9 and other paragraphs of Article 11 and found that most of these provisions set forth rules of "a mainly procedural and

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<sup>16</sup> Panel Report, *US – Carbon Steel*, para. 8.19.

<sup>17</sup> Appellate Body Report, *US – Carbon Steel*, para. 105.

<sup>18</sup> Appellate Body Report, *US – Carbon Steel*, paras. 66-67.

<sup>19</sup> Appellate Body Report, *US – Carbon Steel*, para. 68.

<sup>20</sup> Appellate Body Report, *US – Carbon Steel*, paras. 77-82.

<sup>21</sup> Appellate Body Report, *US – Carbon Steel*, para. 83.



evidentiary nature" and that "none of the words in Article 11.9 suggests that the de minimis standard that it contains is applicable beyond the investigation phase of a countervailing duty proceeding. In particular, Article 11.9 does not refer to Article 21.3, nor to reviews that may follow the imposition of a countervailing duty."<sup>22</sup>

18. The Appellate Body in *US – Carbon Steel* noted in particular the absence of textual cross-referencing between Article 21.3 and Article 11.9 and observed that:

"[T]he technique of cross-referencing is frequently used in the *SCM Agreement*... In the light of the many express cross-references made in the *SCM Agreement*, we attach significance to the absence of any textual link between Article 21.3 reviews and the *de minimis* standard set forth in Article 11.9. We consider this to be noteworthy, having regard to the fact that both the adoption of a *de minimis* standard for investigations, and the introduction of a 'sunset' provision, were regarded as important additions to the Tokyo Round Subsidies Code for improving GATT disciplines on subsidies and countervailing duties."<sup>23</sup>

19. The Appellate Body in *US – Carbon Steel* drew attention to the reference to Article 12 in Article 21.4 and noted the lack of reference to Article 11, "as an indication that the drafters intended that the obligations in Article 12, but not those in Article 11, would apply to reviews carried out under Article 21.3."<sup>24</sup>

20. The Appellate Body in *US – Carbon Steel* further considered that the Panel's decision to "imply" the de minimis standard in Article 21.3 was based on the fact that the Article 11.9 de minimis standard draws a threshold below which subsidization is non-injurious. The Appellate Body considered the Panel's approach to be wrong and indicated, inter alia, that the Panel had not explained why it thought it appropriate to rely on a 1987 Note prepared by the Secretariat for the Uruguay Round Negotiating Group on Subsidies and Countervailing Measures.<sup>25</sup>

"We observe, first, that in taking this approach, the Panel did not explain why it thought that it was appropriate to rely on the 1987 Note, but simply stated that 'it is useful to consider the rationale for the application of a de minimis standard to investigations, as reflected in a Note by the Secretariat prepared in April 1987'. In any event, it seems to us that the 1987 Note does not support the Panel's conclusion that the 'rationale' for the *de minimis* standard in Article 11.9 is that a *de minimis* subsidy is considered to be non-injurious. As the Panel itself recognized, the 1987 Note sets forth *two* rationales for *de minimis* standards, but does not suggest which of them is more compelling or preferable. Nor was any evidence adduced before the Panel suggesting that the negotiators of the *SCM Agreement* considered these or other rationales and expressed a preference for any of them. The Panel chose to base its interpretation of Article 11.9 on only one of these rationales. Even if it were appropriate to rely on the 1987 Note in interpreting the *SCM Agreement* in accordance with the rules of interpretation set forth in the *Vienna Convention*, selective reliance on such a document does not provide a proper basis for the conclusion reached by the Panel in this regard."<sup>26</sup>

21. Moreover, the Appellate Body in *US – Carbon Steel* considered that:

"Article 15 of the *SCM Agreement*, which deals with injury and how it is to be determined, refers, in its paragraph 3, to the *de minimis* standard in Article 11.9 only for the purpose of cumulation of imports. Moreover, footnote 45 to Article 15 indicates that, in the *SCM Agreement*, the term 'injury' is, 'unless otherwise specified', to:

... be taken to mean material injury to a domestic industry, threat of material injury to a domestic industry or material retardation of the

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<sup>22</sup> Appellate Body Report, *US – Carbon Steel*, paras. 67-68.

<sup>23</sup> Appellate Body Report, *US – Carbon Steel*, para. 69.

<sup>24</sup> Appellate Body Report, *US – Carbon Steel*, para. 72.

<sup>25</sup> Appellate Body Report, *US – Carbon Steel*, para. 77.

<sup>26</sup> Appellate Body Report, *US – Carbon Steel*, paras. 77-78.



establishment of such an industry and shall be interpreted in accordance with the provisions of [Article 15].

In defining the concept of injury, footnote 45 does not make any reference to the amount of subsidy involved."<sup>27</sup>

22. The Appellate Body in *US – Carbon Steel* also highlighted that:

"Article 1 of the SCM Agreement sets out a definition of 'subsidy' that applies to the whole of that Agreement. This definition includes all such subsidies, regardless of their amount. None of the provisions in the *SCM Agreement* that uses the term 'subsidization' confines the meaning of 'subsidization' to subsidization at a rate equal to or in excess of 1 percent *ad valorem*, or to any other *de minimis* threshold. 28 It is also worth noting that, under Part II of the SCM Agreement, prohibited subsidies are prohibited regardless of the amount of the subsidy.

[I]n our view, the terms 'subsidization' and 'injury' each have an independent meaning in the *SCM Agreement* which is not derived by reference to the other. It is unlikely that very low levels of subsidization could be demonstrated to cause 'material' injury. Yet such a possibility is not, per se, precluded by the Agreement itself, as injury is not defined in the SCM Agreement in relation to any specific level of subsidization."<sup>29</sup>

23. The Appellate Body in *US – Carbon Steel* then considered the negotiating history of the SCM Agreement and confirmed its view on the meaning of Article 21.3:

"[R]ecourse to the negotiating history of the *SCM Agreement* tends to confirm our view as to the meaning of Article 21.3. We note that the two issues, namely the application of a specific *de minimis* standard in investigations, and the introduction of a time-bound limitation on the maintenance of countervailing duties, were considered to be highly important and were the subject of protracted negotiations. ... The final texts of Article 11.9 and of Article 21.3 were the result of a carefully negotiated compromise that drew from a number of different proposals, reflecting divergent interests and views. We further note in this respect that none of the participants in this appeal pointed to any document indicating that the inclusion of a *de minimis* threshold was ever considered in the negotiations on sunset review provisions leading to the text of Article 21.3."<sup>30</sup>

#### **1.7.2 Exclusion of exporters from subsequent administrative and changed circumstances reviews**

24. The Appellate Body in *Mexico – Anti-Dumping Measures on Rice*, having found that the investigating authority must exclude from the anti-dumping measure any exporter found to have a zero or *de minimis* dumping margin, further agreed with the Panel that as a consequence:

"[S]uch exporters cannot be subject to administrative and changed circumstances reviews, because such reviews examine, respectively, the 'duty paid'<sup>31</sup> and 'the need for the *continued imposition* of the duty.'<sup>32</sup> Were an investigating authority to undertake a review of exporters that were excluded from the anti-dumping measure by virtue of their *de minimis* margins, those exporters effectively would be made subject to the anti-dumping measure, inconsistent with Article 5.8. The same may be said with respect to Article 11.9 of the *SCM Agreement*."<sup>33</sup>

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<sup>27</sup> Appellate Body Report, *US – Carbon Steel*, para. 78.

<sup>28</sup> (footnote original) The term "subsidization" is used in the following Articles of the *SCM Agreement*: 6.1(a); 8.3; 11.9; 12.10; 15.3; 17.2; 18.2; 18.4; 19.4; 21.1; 21.2; 21.3; as well as in Annex IV.

<sup>29</sup> Appellate Body Report, *US – Carbon Steel*, paras. 80-81.

<sup>30</sup> Appellate Body Report, *US – Carbon Steel*, para. 90.

<sup>31</sup> (footnote original) Article 9.3.2 of the *Anti-Dumping Agreement*.

<sup>32</sup> (footnote original) Article 11.2 of the *Anti-Dumping Agreement*; Article 21.2 of the *SCM Agreement*.

<sup>33</sup> Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 305.

25. Applying this reasoning, the Appellate Body in *Mexico – Anti-Dumping Measures on Rice* concluded that by requiring the investigating authority to conduct a review for exporters with zero margins and de minimis margins, Article 68 of Mexico's Foreign Trade Act was inconsistent with Article 5.8 of the *Anti-Dumping Agreement* and *SCM Agreement* Article 11.9.<sup>34</sup>

## **1.8 Article 11.11**

### **1.8.1 "in no case more than 18 months"**

26. The Panel in *Mexico – Olive Oil* found that the requirement set out in Article 11.1 is "clear and unequivocal".<sup>35</sup> The Panel saw "no basis in this provision (nor authority in any other part of the *SCM Agreement*) to prolong an investigation beyond 18 months for any reason, including requests from interested parties".<sup>36</sup> Since Mexico's investigation exceeded 18 months, the Panel concluded that Mexico had acted inconsistently with Article 11.1.

## **1.9 Relationship with provisions of the SCM Agreement**

### **1.9.1 Article 21**

27. The Appellate Body in *US – Carbon Steel (India)* addressed the applicability of, inter alia, Article 11 to administrative reviews conducted pursuant to Article 21.2 of the *SCM Agreement*. The Appellate Body distinguished Article 11, which provides the manner to initiate "original investigation[s]", from Article 21, "a general rule", which, after the imposition of a countervailing duty, subjects continued application of that duty to certain disciplines by setting out requirements for periodic review. The Appellate Body observed additional differences between an investigating authority's mandate in conducting an original investigation pursuant to Article 11 and an administrative review under Article 21.2. Further, it recalled its discussion in *US – Carbon Steel*, where it had underscored that original investigations and sunset reviews pursuant to Article 21 are "distinct processes with different purposes." The Appellate Body also noted that the language of Article 21 does not import the requirements of Article 11, supporting its conclusion that the requirements of Article 11 do not apply to administrative reviews conducted pursuant to Article 21.2:

"Additionally, while Article 21.4 imposes the evidentiary rules in Article 12 of the *SCM Agreement* to reviews conducted pursuant to Article 21, nothing in the language of Articles 11 and 21 expressly imports the requirements of Article 11 to the conduct of administrative reviews under Article 21."<sup>37</sup>

...

Both [Article 21.2 and 21.3] ... bear a similar prospective focus. To the extent that the prospective focus of a review under Article 21.2 is similar to that under Article 21.3, this would suggest that the requirements set out in Article 11 of the *SCM Agreement* would not apply to administrative reviews conducted pursuant to Article 21.2 of the *SCM Agreement*."<sup>38</sup>

28. The Appellate Body in *US – Carbon Steel (India)* then addressed India's view that Article 11 is the "sole provision in the *SCM Agreement* that deals with the examination of the 'existence, degree and effect of any alleged subsidy'." It disagreed:

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<sup>34</sup> Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 307.

<sup>35</sup> Panel Report, *Mexico – Olive Oil*, para. 7.121.

<sup>36</sup> Panel Report, *Mexico – Olive Oil*, para. 7.121.

<sup>37</sup> (footnote original) In *US – Carbon Steel*, the Appellate Body noted the following regarding the applicability of Article 11 requirements to sunset reviews conducted pursuant to Article 21.3:

Given that the requirements of Articles 11 and 12 are placed consecutively in the Agreement, and the fact that both Articles expressly set out obligations in relation to investigations, we read the express reference in Article 21.4 to Article 12, but not to Article 11, as an indication that the drafters intended that the obligations in Article 12, but not those in Article 11, would apply to reviews carried out under Article 21.3.

(Appellate Body Report, *US – Carbon Steel*, para. 72 (emphasis original) See also para. 116)

<sup>38</sup> Appellate Body Report, *US – Carbon Steel (India)*, paras. 5.427 and 5.430.

"In an original investigation carried out under Article 11 of the SCM Agreement, the investigating authority must establish that all conditions set out in the SCM Agreement for the imposition of countervailing duties are fulfilled. In an administrative review, however, the investigating authority must address only those issues that have been raised before it by the interested parties or, in the case of an investigation conducted on its own initiative, those issues that warranted the examination. We are not persuaded that the examination of new subsidies in an administrative review alters these fundamentally different scopes of inquiry under Articles 11 and 21 of the SCM Agreement."<sup>39</sup>

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<sup>39</sup> Appellate Body Report, *US – Carbon Steel (India)*, para. 4.550.