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1 ARTICLE 15

1.1 Text of Article 15

Article 15

Determination of Injury⁴⁵

*(footnote original)*⁴⁵ Under this Agreement the term "injury" shall, unless otherwise specified, be taken to mean material injury to a domestic industry, threat of material injury to a domestic industry or material retardation of the establishment of such an industry and shall be interpreted in accordance with the provisions of this Article.

15.1 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

subsidized imports and the effect of the subsidized imports on prices in the domestic market for like products⁴⁶ and (b) the consequent impact of these imports on the domestic producers of such products.

*(footnote original)*⁴⁶ Throughout this Agreement the term "like product" ("produit similaire") shall be interpreted to mean a product which is identical, i.e. alike in all respects to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration.

15.2 With regard to the volume of the subsidized imports, the investigating authorities shall consider whether there has been a significant increase in subsidized imports, either in absolute terms or relative to production or consumption in the importing Member. With regard to the effect of the subsidized imports on prices, the investigating authorities shall consider whether there has been a significant price undercutting by the subsidized 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 to prevent price increases, which otherwise would have occurred, to a significant degree. No one or several of these factors can necessarily give decisive guidance.

15.3 Where imports of a product from more than one country are simultaneously subject to countervailing duty investigations, the investigating authorities may cumulatively assess the effects of such imports only if they determine that (a) the amount of subsidization established in relation to the imports from each country is more than de minimis as defined in paragraph 9 of Article 11 and the volume of imports from each country is not negligible and (b) a cumulative assessment of the effects of the imports is appropriate in light of the conditions of competition between the imported products and the conditions of competition between the imported products and the like domestic product.

15.4 The examination of the impact of the subsidized imports on the domestic industry 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 output, sales, market share, profits, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments and, in the case of agriculture, whether there has been an increased burden on government support programmes. This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance.

15.5 It must be demonstrated that the subsidized imports are, through the effects⁴⁷ of subsidies, causing injury within the meaning of this Agreement. The demonstration of a causal relationship between the subsidized 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 subsidized 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 subsidized imports. Factors which may be relevant in this respect include, inter alia, the volumes and prices of non-subsidized imports of the product in question, 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.

*(footnote original)*⁴⁷ As set forth in paragraphs 2 and 4.

15.6 The effect of the subsidized imports shall be assessed in relation to the domestic production of the like product when available data permit the separate identification of that production on the basis of such criteria as the production process, producers' sales and profits. If such separate identification of that production is not possible, the effects of the subsidized imports shall be assessed by the examination of the production of the narrowest group or range of products, which includes the like product, for which the necessary information can be provided.

15.7 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 subsidy would cause injury must be clearly foreseen and imminent. In making a determination regarding the existence of a threat of material injury, the investigating authorities should consider, inter alia, such factors as:

- (i) nature of the subsidy or subsidies in question and the trade effects likely to arise therefrom;
- (ii) a significant rate of increase of subsidized imports into the domestic market indicating the likelihood of substantially increased importation;
- (iii) sufficient freely disposable, or an imminent, substantial increase in, capacity of the exporter indicating the likelihood of substantially increased subsidized exports to the importing Member's market, taking into account the availability of other export markets to absorb any additional exports;
- (iv) 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
- (v) 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 subsidized exports are imminent and that, unless protective action is taken, material injury would occur.

15.8 With respect to cases where injury is threatened by subsidized imports, the application of countervailing measures shall be considered and decided with special care.

1.2 General

1.2.1 Anti-Dumping Agreement

1. As the text of Article 15 of the SCM Agreement largely parallels the text of Article 3 of the Anti-Dumping Agreement, see also the Section on that Article of the Anti-Dumping Agreement.

1.2.2 The provisions of Article 15 contemplate a logical progression of inquiry

2. The Appellate Body in *China – GOES* held that the provisions of Article 15 contemplate a logical progression of inquiry leading to an investigating authority's ultimate injury and causation determination:

"The paragraphs of Articles 3 [of the Anti-Dumping Agreement] and 15 [of the SCM Agreement] thus stipulate, in detail, an investigating authority's obligations in determining the injury to the domestic industry caused by subject imports. Together, these provisions provide an investigating authority with the relevant framework and disciplines for conducting an injury and causation analysis. These provisions contemplate a logical progression of inquiry leading to an investigating authority's ultimate injury and causation determination. This inquiry entails a consideration of the volume of subject imports and their price effects, and requires an examination of the impact of such imports on the domestic industry as revealed by a number of economic factors. These various elements are then linked through a causation analysis between subject imports and the injury to the domestic industry, taking into account all factors that are being considered and evaluated. Specifically, pursuant to Articles 3.5 and 15.5, it must be demonstrated that dumped or subsidized imports are causing injury 'through the effects of' dumping or subsidies '[a]s set forth in paragraphs 2 and 4'. Thus, the inquiry set forth in Articles 3.2 and 15.2, and the examination required in Articles 3.4 and 15.4, are necessary in order to answer the ultimate question in Articles 3.5 and 15.5 as to whether subject imports are causing injury to the domestic industry. The outcomes of these inquiries thus form the basis for the overall causation analysis contemplated in Articles 3.5 and 15.5. As further

explained below, the interpretation of Articles 3.2 and 15.2 should be consistent with the role these provisions play in the overall framework of an injury determination under Articles 3 and 15."¹

1.3 Article 15.1

1.3.1 General

3. The Appellate Body in *US – Carbon Steel (India)* observed that "Article 15.1 is an overarching provision setting forth Members' fundamental substantive obligations in the context of a determination of injury and informing the more detailed obligations in the subsequent paragraphs of Article 15 concerning the determination of injury by an investigating authority."²

1.3.2 Interpretation and application

4. The Panel in *US – Countervailing Duty Investigation on DRAMs* noted the Appellate Body's interpretations of the equivalent Anti-Dumping Agreement provision in previous cases, and said that, given the parties' agreement, it would use these Appellate Body statements in determining in this case whether the ITC's injury determination was consistent with SCM Agreement Articles 15.2, 15.4 and 15.5.³ In this context it was guided by the Appellate Body in *US – Hot-Rolled Steel*, which in paragraph 193 characterized "positive evidence" as evidence which is of an "affirmative, objective and verifiable character, and ... [is] credible" and which described an "objective examination" as requiring that the domestic industry and the effects of imports be investigated in an unbiased manner, without favouring the interests of any interested party, or group of interested parties, in the investigation:

"The term 'objective examination' aims at a different aspect of the investigating authorities' determination. While the term 'positive evidence' focuses on the facts underpinning and justifying the injury determination, the term 'objective examination' is concerned with the investigative process itself. The word 'examination' relates, in our view, to the way in which the evidence is gathered, inquired into and, subsequently, evaluated; that is, it relates to the conduct of the investigation generally. The word 'objective', which qualifies the word 'examination', indicates essentially that the 'examination' process must conform to the dictates of the basic principles of good faith and fundamental fairness.⁴ In short, an 'objective examination' requires that the domestic industry, and the effects of dumped imports, be investigated in an unbiased manner, without favouring the interests of any interested party, or group of interested parties, in the investigation. The duty of the investigating authorities to conduct an 'objective examination' recognizes that the determination will be influenced by the objectivity, or any lack thereof, of the investigative process."⁵⁶

5. Examining the nature of Article 15.1 of the SCM Agreement, the Panel in *EC – Countervailing Measures on DRAM Chips* noted that it is an overarching provision informing the other obligations contained in Article 15 of the SCM Agreement:

"Article 15.1 of the *SCM Agreement* is an overarching provision which informs the more detailed obligations set forth in the remainder of Article 15 of the *SCM Agreement*. This implies that we can only reach a conclusion that the authority acted in a manner that is consistent with the specific obligations of, *inter alia*,

¹ Appellate Body Report, *China – GOES*, para. 128.

² Appellate Body Report, *US – Carbon Steel (India)*, para. 4.580.

³ Panel Report, *US – Countervailing Duty Investigation on DRAMs*, para.7.218.

⁴ (footnote original) This provision is yet another expression of the general principle of good faith in the *Anti-Dumping Agreement*. See, *supra*, para. 101.

⁵ (footnote original) In this respect, we recall that panels are under a similar duty, under Article 11 of the DSU, to make an "objective assessment of the matter ... including an objective assessment of the facts". In our Report in *EC Measures Concerning Meat and Meat Products (Hormones)*, we indicated that the obligation to make an "objective assessment" includes an obligation to act in "good faith", respecting "fundamental fairness". (Appellate Body Report, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, 135, para. 133)

⁶ Appellate Body Report, *US – Hot-Rolled Steel*, para. 193.

Articles 15.2, 15.4 and 15.5 of the *SCM Agreement* if it based its determination of injury on positive evidence and conducted an objective examination of the various injury elements as required by these more specific provisions."⁷

1.3.3 Selection of the period of investigation

6. The Panel in *Mexico – Olive Oil* examined Article 15.1 in the context of claims regarding the investigating authority's definition of the period of investigation. The Panel made the following statements regarding this matter:

"In our view, the selection by an investigating authority of the period of investigation is a critical element in the countervailing duty investigative process. It determines the data that will form the basis for the assessment of subsidization, injury and the causal relationship between subsidized imports and the injury to the domestic industry. Although the *SCM Agreement* does not set forth an express requirement regarding the selection of the period of investigation for the purpose of conducting an injury analysis, this does not mean that an investigating authority's discretion in this respect is unlimited. In our view, the requirements in Article 15.1 to base a determination of injury on positive evidence and pursuant to an objective examination impose certain constraints on an investigating authority's discretion in selecting the period of investigation necessary to ensure the comprehensiveness and reliability of the data used as the basis for an injury determination."⁸

1.3.4 "subsidized imports"

7. The Appellate Body in *US – Carbon Steel (India)* clarified that the terms "these imports" contained in element (b) of Article 15.1 refer to the "subsidized imports" contained in element (a) of that provision. Hence, the injury analysis in the framework of Article 15 shall concern injury caused by "subsidized imports", rather than covering effects of imports in general. In particular, the Appellate Body explained:

"Article 15.1 of the *SCM Agreement* stipulates that a determination of injury shall be based on positive evidence and involve an objective examination of both the volume and effect of the subsidized imports on prices in the domestic market for like products, and of the consequent impact of these imports on the domestic producers of such products. We note, in particular, the references to 'subsidized imports' in the first part of the provision and to 'these imports' in the latter part of the provision. We understand the words 'these imports' to refer to the 'subsidized imports' in the first part of the provision. By referring to 'subsidized imports', rather than to 'imports' generally, Article 15.1 requires that the injury analysis in the framework of Article 15, including Article 15.3, be limited to consideration of injury caused by 'subsidized imports', rather than covering effects of imports in general."⁹

1.4 Footnote 46

1.4.1 "characteristics closely resembling"

8. In its "like product" analysis under footnote 46, the Panel in *Indonesia – Autos* emphasized the physical characteristics of the compared products and held that in its analysis, the Panel would also be guided by the "like product" analysis contained in the Appellate Body Report in *Korea – Alcoholic Beverages*:

"In our view, the analysis as to which cars have 'characteristics closely resembling' those of the Timor logically must include as an important element the physical characteristics of the cars in question. This is especially the case because many of the other possible criteria identified by the parties are closely related to the physical characteristics of the cars in question. Thus, factors such as brand loyalty, brand image/reputation, status and resale value reflect, at least in part, an assessment by

⁷ Panel Report, *EC – Countervailing Measures on DRAM Chips*, para. 7.276.

⁸ Panel Report, *Mexico – Olive Oil*, para. 7.267.

⁹ Appellate Body Report, *US – Carbon Steel (India)*, para. 4.581.

purchasers of the physical characteristics of the cars being purchased. Although it is possible that products that are physically very different can be put to the same uses, differences in uses generally arise out of, and assist in assessing the importance of, different physical characteristics of products. Similarly, the extent to which products are substitutable may also be determined in substantial part by their physical characteristics. Price differences also may (but will not necessarily) reflect physical differences in products. An analysis of tariff classification principles may be useful because it provides guidance as to which physical distinctions between products were considered significant by Customs experts. However, we do not see that the SCM Agreement precludes us from looking at criteria other than physical characteristics, where relevant to the like product analysis. The term 'characteristics closely resembling' in its ordinary meaning includes but is not limited to physical characteristics, and we see nothing in the context or object and purpose of the SCM Agreement that would dictate a different conclusion.

Although we are required in this dispute to interpret the term 'like product' in conformity with the specific definition provided in the SCM Agreement, we believe that useful guidance can nevertheless be derived from prior analysis of 'like product' issues under other provisions of the WTO Agreement. Thus, we note the statement of the Appellate Body in *Alcoholic Beverages* (1996) that, in this context as in any other, the issue of 'like product' must be considered on a case-by-case basis, that in applying relevant criteria panels can only use their best judgment regarding whether in fact products are like, and that this will always involve an unavoidable element of individual, discretionary judgement."¹⁰

9. Further in its "like products" analysis under footnote 46, the Panel in *Indonesia – Autos* rejected the argument that it "must consider all passenger cars to be 'like' because any effort to differentiate between passenger cars with a multitude of differing characteristics would inevitably result in arbitrary divisions"¹¹:

"We are aware that there are innumerable differences among passenger cars and that the identification of appropriate deciding lines between them may not be a simple task. However, this does not in our view justify limping all such products together where the differences among the products are so dramatic. ... We must endeavour to find some reasonable way to assess the relative importance of the various differences in the minds of consumers and to devise some sensible means to categorize passenger cars."¹²

10. The Panel in *Indonesia – Autos* decided that "[o]ne reasonable way ... to approach the 'like product' issue is to look at the manner in which the automotive industry itself has analysed market segmentation."¹³ The Panel opted for an analysis which "considered the physical characteristics of the cars in question when designing its segmentation"; it considered that "an approach, which segments the market based on a combination of size and price/market position, [is] a sensible one which is consistent with the criteria relevant to 'like product' analysis under the SCM Agreement."¹⁴

11. In *Indonesia – Autos*, Indonesia argued that the low price of its Timor car placed it in a "special market niche" and rendered it unlike other, more expensive, car models. The Panel noted that the complainants in the case before it were claiming that the Indonesian Timor was being sold at undercutting prices as a result of subsidization and rejected the argument by Indonesia:

"We do not preclude that price might be a relevant consideration in performing 'like product' analysis, particularly where differences in price represent one way to assess the relative importance of differing physical characteristics to consumers. In this case, however, the complainants allege that the Timor is being sold at undercutting prices as a result of subsidization. If we were to conclude that the low price of the Timor in

¹⁰ Panel Report, *Indonesia – Autos*, paras. 14.173-14.174.

¹¹ Panel Report, *Indonesia – Autos*, para. 14.176.

¹² Panel Report, *Indonesia – Autos*, para. 14.176.

¹³ Panel Report, *Indonesia – Autos*, para. 14.177.

¹⁴ Panel Report, *Indonesia – Autos*, para. 14.178.

the Indonesian market were to render the Timor 'unlike' other models which are similar in physical characteristics to the Timor but priced higher, the result would be that, in cases where the subsidization and resulting price undercutting were sufficiently high, price undercutting claims under Article 6 could never prevail. Thus, we do not consider that the Timor's lower price is a basis to conclude that it is unlike the models alleged by the complainants to be 'like' the Timor."¹⁵

12. Considering whether "the difference between a product assembled and unassembled is sufficiently important that the unassembled product does not 'closely resemble' the assembled product"¹⁶, the Panel in *Indonesia – Autos* stated:

"We do not consider that an unassembled product *ipso facto* is not a like product to that product assembled. Recalling the view of the Appellate Body that tariff classification may be a useful tool in like product analysis, we note that, under the General Rules for the Interpretation of the Harmonized System:

Any reference in a heading to an Article shall be taken to include a reference to that Article complete or unfinished, provided that, as presented, the incomplete or unassembled Article has the essential character of the complete or unfinished article.

We think that a comparable approach to the relation between assembled and unassembled products makes good sense in the context of this dispute."¹⁷

1.5 Article 15.2

1.5.1 "Significant" increase in subsidized imports

13. The Panel in *US – Countervailing Duty Investigation on DRAMs* explained that there are three ways in which an investigating authority may comply with the requirement to consider whether there has been a significant increase in subsidized imports:

"There are three ways in which an investigating authority may comply with the Article 15.2 requirement to 'consider whether there has been a significant increase in subsidized imports.' First, the investigating authority may consider whether there has been a significant increase in the volume of subsidized imports in absolute terms. Second, the investigating authority may consider whether there has been a significant increase in the volume of subsidized imports relative to domestic production. Third, the investigating authority may consider whether there has been a significant increase in the volume of subsidized imports relative to domestic consumption. Article 15.2 provides that '[n]o one or several of these factors can necessarily give decisive guidance'."¹⁸

14. In respect of the volume of subsidized imports relative to domestic consumption, the Panel in *US – Countervailing Duty Investigation on DRAMs*, having found that Korea failed to establish that "an increase in subject import market share of this magnitude could not properly be considered significant,"¹⁹ explained that:

"Article 15.2 does not require an investigating authority to demonstrate that all of the subject imports covered by the period of injury investigation are subsidized. ... It is not necessary that the period of review for subsidization must mirror the period of review for injury."²⁰

15. The Panel in *EC – Countervailing Measures on DRAM Chips* stated that: "the language of Article 15.2 confers considerable latitude on an investigating authority. Article 15.2 allows an

¹⁵ Panel Report, *Indonesia – Autos*, para. 14.192.

¹⁶ Panel Report, *Indonesia – Autos*, para. 14.196.

¹⁷ Panel Report, *Indonesia – Autos*, para. 14.197.

¹⁸ Panel Report, *US – Countervailing Duty Investigation on DRAMs*, para. 7.223.

¹⁹ Panel Report, *US – Countervailing Duty Investigation on DRAMs*, para. 7.243.

²⁰ Panel Report, *US – Countervailing Duty Investigation on DRAMs*, para. 7.245.

investigating authority to consider a significant increase, either in absolute terms or relative to production or consumption."²¹

16. In *US – Ripe Olives from Spain*, the Panel rejected the European Union's argument that the USITC's volume analysis had not complied with the requirement in Article 15.2 "to consider whether" there had been a significant increase in dumped or subsidised imports because it "only considered a significant *presence* of Spanish imports in the domestic industry".²² The Panel explained that "to consider whether" there had been a significant increase under Article 15.2 did not imply a requirement to arrive at a particular conclusion, i.e., that there had in fact been a growth in the volume of subsidised imports:

"In our view the European Union's argument that an investigating authority 'must show a growth in [dumped or] subsidized imports' to 'consider whether' there has been a significant increase in volume is based on an erroneous construction of the term 'consider whether' in Article 3.2 and Article 15.2. These provisions instruct an investigating authority to 'consider whether' there has been a significant increase in volume. As noted above, the ordinary meaning of 'consider' includes '[t]o view or contemplate attentively, to survey, examine' and '[t]o contemplate mentally, fix the mind upon; to think over, meditate or reflect on, bestow attentive thought upon, give heed to, take note of'. To 'consider' indicates a requirement that an investigating authority take something into account in reaching its decision, not a requirement to arrive at a particular conclusion. This understanding is supported by the contrast between the obligation to 'consider' that is contained in the first sentence of Article 3.2 and Article 15.2, and the use of the more definitive term 'demonstrate' in Article 3.5 of the Anti-Dumping Agreement and Article 15.5 of the SCM Agreement, which state '[i]t must be demonstrated that the [dumped or subsidized] imports are, through the effects of [dumping or subsidies] ... causing injury'. Moreover, the first sentence in Article 3.2 and Article 15.2 qualifies the instruction to 'consider' with the word 'whether'. Thus the ordinary meaning of 'consider', its contrast with more definitive language used in other provisions of Article 3 and Article 15, and the qualification 'whether', are incompatible with the European Union's interpretation that an investigating authority may only successfully 'consider whether' there has been a significant increase in volume in circumstances where the investigating authority can 'show a growth in [dumped or] subsidized imports'. Rather, the language of the first sentence of Article 3.2 and Article 15.2 makes clear that an investigating authority's consideration of whether there has been a 'significant increase' in volume may be evidenced by an examination of the change in volume, regardless of whether volumes in fact increased, decreased, or remained stable."²³

17. On the basis of this reasoning, the Panel assessed the USITC's volume analysis and concluded that it had not been shown to be inconsistent with Article 15.2:

"We agree with the view of the panel in *Thailand - H-Beams* that to establish compliance with the first sentence of Article 3.2 and Article 15.2, 'it must be apparent in the relevant documents in the record that the investigating authorities have given attention to and taken into account whether there has been a significant increase in dumped imports, in absolute or relative terms'. The USITC identified that the volume of ripe olives from Spain decreased from 35,037 tonnes to 32,782 tonnes during the period of investigation. The USITC then identified the changes in the market share of Spanish ripe olives during the period of investigation. The USITC also examined the change in market shares in the retail sector. The USITC concluded that the volume of ripe olives was significant on an absolute and relative basis, and found that the volume of subject ripe olives was significant relative to domestic production. The USITC's examination of the changes in volume and market share of Spanish ripe olives, coupled with the assessment of the significance of these imports, shows that the USITC considered whether there was a significant increase on an absolute and relative basis. We find that the European Union has thus not established that the USITC failed

²¹ Panel Report, *EC – Countervailing Measures on DRAM Chips*, para. 7.307.

²² Panel Report, *US – Ripe Olives from Spain*, para. 7.227.

²³ Panel Report, *US – Ripe Olives from Spain*, para. 7.229.

to consider whether there was a significant increase in the volume of Spanish ripe olives."²⁴

18. The Panel also rejected the European Union's argument that the USITC's volume analysis was inconsistent with Article 15.2 for failing to provide "explanatory force" for the occurrence of a significant volume increase:

"The European Union also maintains that the USITC's examination of volume could not form a 'meaningful basis' for causation and was thus inconsistent with Article 3.2 and Article 15.2. The European Union bases this argument on the proposition that an investigating authority's volume analysis 'must provide 'explanatory force' for the occurrence of a significant volume increase'. ... We note that, in relation to volume, an investigating authority is simply directed by Article 3.2 and Article 15.2 to 'consider whether there has been a significant increase in [dumped or subsidized] imports'. The investigating authority's inquiry regarding volume only concerns the identification of the change in the volume of imports and an assessment of its significance. There is no further requirement to use this data to consider some further phenomena such as an effect on prices. We therefore disagree with the European Union's assertion that an investigating authority's volume analysis must provide 'explanatory force' for the occurrence of a significant volume increase. Accordingly, we reject the European Union's argument made on that basis."²⁵

1.5.2 Treatment of imports from companies which merged

19. The Panel in *EC – Countervailing Measures on DRAM Chips* considered whether under Article 15.2 of the SCM Agreement, imports from the companies which merged are subject to any special rules. The Panel found that "Article 15.2 of the SCM Agreement sets forth no specific rules concerning the treatment of imports from companies which merged in the course of the period of investigation, thereby forming the company found to have been subsidized".²⁶

1.5.3 Price effect

20. The Panel in *US – Countervailing Duty Investigation on DRAMs* explained that, under Article 15.2, "competent authorities may choose whether to examine the price effects of subsidized imports on the basis of price underselling, price depression, or price suppression".²⁷ Because, in this case, the ITC considered both price underselling and price depression, the Panel examined these issues separately. In respect of price underselling, the Panel, rejecting Korea's arguments, noted that the "plain meaning" of Article 15.2 requires competent authorities only "to examine the price effects of subsidized imports," and not to examine the price effects of non-subsidized imports or pricing on a combined brand basis:

"Article 15.2 of the *SCM Agreement* requires the competent authority to analyse 'the effect of the subsidized imports on [domestic] prices.' In light of the plain meaning of this text, the competent authority is only required to examine the price effects of subsidized imports. It is not required to also examine the price effects of non-subsidized imports, or pricing on a combined brand basis. Such examinations would extend beyond the price effects of subsidized imports, and therefore are not required by Article 15.2. For this reason, Korea's arguments regarding the price effects of non-subsidized imports, or pricing on a combined brand basis, provide no basis for finding that the ITC could not properly have found that 'there is significant price underselling by subject imports'. "²⁸

21. On this basis, the Panel in *US – Countervailing Duty Investigation on DRAMs* rejected Korea's argument that price depression was due to the larger volume of non-subject imports, noting Korea's own acknowledgement that:

²⁴ Panel Report, *US – Ripe Olives from Spain*, para. 7.232.

²⁵ Panel Report, *US – Ripe Olives from Spain*, para. 7.247.

²⁶ Panel Report, *EC – Countervailing Measures on DRAM Chips*, para. 7.301.

²⁷ Panel Report, *US – Countervailing Duty Investigation on DRAMs*, para. 7.265.

²⁸ Panel Report, *US – Countervailing Duty Investigation on DRAMs*, para. 7.269.

"[T]here may be multiple causes of injury suffered by a domestic industry. Thus, the fact that non-subject imports may have had negative price effects does not preclude a finding that subject imports also had negative effects on prices. Even if Korea's arguments regarding the role of non-subject imports were correct, therefore, Korea's arguments do not necessarily mean that the ITC could not properly have found, nevertheless, that "the effect of [] subject imports [] depressed prices to a significant degree."²⁹

22. Discussing the argument advanced by Korea concerning the illogical nature of EC's conclusion that Hynix's imports had an effect on domestic prices when it was losing market share, the Panel in *EC – Countervailing Measures on DRAM Chips* noted that: "Article 15.2 of the SCM Agreement requires an investigating authority to consider whether there has been any significant price undercutting by the subsidized imports. Article 15.2 does not require an investigating authority to establish what caused the price undercutting."³⁰

23. The Panel in *EC – Countervailing Measures on DRAM Chips* considered that Article 15.2 of the SCM Agreement does not set forth any particular methodology for examining price undercutting, as long as the methodology chosen is reasonable and objective.³¹ The Panel stated that "[i]t appears to us that every methodology has its strengths and weaknesses, but that, in the absence of any prescribed methodology in the *SCM Agreement*, as long as the methodology used is not unreasonable, the Panel cannot find against it."³²

24. In *US – Ripe Olives from Spain*, the Panel disagreed with the European Union's argument that price undercutting was not, in and of itself, an effect on domestic prices:

"[W]e disagree with the central premise of the European Union's argument: the proposition that price undercutting is not, in and of itself, an effect on domestic prices. ... we find that the text of Articles 3.1 and 3.2 and Articles 15.1 and 15.2 does not support this interpretation. Rather, in our view, those provisions recognize that consideration of significant price undercutting under the second sentence of Article 3.2 and Article 15.2 on its own constitutes an 'examination of ... the effect of the dumped imports on prices in the domestic market for like products' under Article 3.1 and Article 15.1.

...

Article 3.2 and Article 15.2 instruct an investigating authority to consider whether the dumped or subsidized imports result in any of three phenomena, i.e. significant price undercutting, significant price depression, or significant price suppression. The use of the disjunctive 'or' between these three phenomena indicates that they are independent lines of inquiry. A view that only price depression and price suppression constitute price effects would read out of the text the option to consider price undercutting as an independent channel of inquiry. This would be inconsistent with the requirement that effect be given to all terms of a treaty. We thus interpret Article 3.2 and Article 15.2 to mean that a consideration of any of the three price effects can independently satisfy the requirement in Article 3.1 and Article 15.1 to examine the 'effect ... on prices in the domestic market for like products'. "³³

25. In coming to this conclusion, the Panel disagreed with the idea that price undercutting requires price depression and/or price suppression:

"The European Union argues that price undercutting cannot itself be an 'effect ... on prices' because it is only through price depression or suppression that 'the price curve of the domestic industry's prices' can be impacted. In the European Union's view, then, 'price undercutting requires, at least factually, the existence of price depression and/or price suppression'. However, we consider that such a narrow interpretation of

²⁹ Panel Report, *US – Countervailing Duty Investigation on DRAMs*, para. 7.271.

³⁰ Panel Report, *EC – Countervailing Measures on DRAM Chips*, para. 7.328.

³¹ Panel Report, *EC – Countervailing Measures on DRAM Chips*, para. 7.334.

³² Panel Report, *EC – Countervailing Measures on DRAM Chips*, para. 7.336.

³³ Panel Report, *US – Ripe Olives from Spain*, paras. 7.256 and 7.258.

'effect ... on prices' is neither required by the definition of 'effect' nor consistent with the structure of the provisions. The ordinary meaning of an 'effect' is, *inter alia*, '[s]omething accomplished, caused, or produced; a result, consequence'. This definition indicates that the examination of the 'effect' of subject imports on domestic prices required by Article 3.1 and Article 15.1 must entail an examination of whether there has been some result or consequence with respect to domestic prices that was caused by subject imports. We do not see any reason that such a result or consequence may only be in the form of a change in the price of the domestic like product. It is our view, rather, that such a result or consequence could be in the form of a change in the relative prices of domestic like product and the products with which it competes. Such changes could impact the competitiveness of the price of the domestic like product, even if there is no evidence during the period of investigation that the price of the domestic like product is significantly depressed or suppressed. We find this broader view to be consistent with the structure of the second sentence in Article 3.2 and Article 15.2, which as explained above, provides for three separate channels of inquiry. In contrast, the European Union's narrow interpretation would in practice read price undercutting out of Article 3.2 and Article 15.2 as an independent line of inquiry."³⁴

26. Discussing, in the context of Article 15.2, the requirement to examine factors that might be affecting domestic prices, the Panel in *EC – Countervailing Measures on DRAM Chips* concluded that: "Article 15.2 of the SCM Agreement does not, as such, require an investigating authority to establish a causal link between the subsidized imports and the domestic prices which would require it to examine all other factors affecting domestic prices at the same time".³⁵

27. The Panel in *China – Autos* noted that "neither Article 3.2 [of the Anti-Dumping Agreement] nor Article 15.2 [of the SCM Agreement] impose a specific methodology on an IA [Investigating Authority] in analysing the effects of subject imports on domestic industry prices. Panels and the Appellate Body have previously recognized the margin of discretion that an IA has in choosing a methodology for such an analysis. However, these reports underline that this discretion is not unlimited."³⁶ On this basis, the Panel explained that:

"Articles 3.2 and 15.2 are informed by the overarching obligation of Articles 3.1 and 15.1 that an IA undertake an 'objective examination' based on 'positive evidence'. Further, the Appellate Body stated, in *China – GOES*, that in addition to a 'consideration' of the existence of a type of price effect on domestic prices, an IA's price effects analysis requires an IA to determine whether subject imports have an 'explanatory force' for such price effect(s). This calls upon an IA to examine the relationship between subject imports and domestic prices, which cannot be done properly if the IA confines its analysis to what is happening to domestic prices, without consideration of subject imports and their prices. The Appellate Body observed that elements relevant to a consideration of price undercutting may differ from those relevant to a consideration of price depression or price suppression, such that subject imports may still have a price depressing effect, even if they do not significantly undercut domestic prices. In all cases, however, the IA may not disregard evidence that calls into question the explanatory force of subject imports on alleged price effects to domestic industry prices."³⁷

23. The Panel in *China – Broiler Products* interpreted the aforementioned ruling of the Appellate Body in *EC – Bed Linen (Article 21.5)* to mean that "the requirement to ensure price comparability does not depend on the respondents having raised the issue before the investigating authorities."³⁸

24. The Panel in *China – Broiler Products* observed that the above findings lead to the conclusion that "price comparability needs to be examined any time that a price comparison is performed in the context of a price undercutting analysis, yet also recognize that the need for adjustments

³⁴ Panel Report, *US – Ripe Olives from Spain*, para. 7.259.

³⁵ Panel Report, *EC – Countervailing Measures on DRAM Chips*, para. 7.338.

³⁶ Panel Report, *China – Autos*, para. 7.255.

³⁷ Panel Report, *China – Autos*, para. 7.255.

³⁸ Panel Report, *China – Broiler Products*, para. 7.478.

necessarily depends on the factual circumstances of the case and the evidence before the authority."³⁹

25. The Panel in *China – Autos* ruled that an investigating authority must ensure that its findings of price differentials result from a type of price effects:

"In price comparisons between groups of subject imports and the like domestic goods further, an IA must ensure price comparability between the goods whose prices are compared. A failure to ensure price comparability is inconsistent with the requirement under Articles 3.1 and 15.1 that a determination of injury be based on positive evidence and involve an objective examination of, *inter alia*, the effect of subject imports on the prices of domestic like products. Thus, an IA must ensure that whatever price differentials arise from a comparison of domestic and imported goods in 'baskets' of products or sales transactions result from a type of price effects, and not merely from differences in the composition of the two baskets being compared, absent adjustments by the IA to control and adjust for relevant differences in product characteristics."⁴⁰

26. The Panel in *China – Autos* clarified that "an IA's obligation to ensure price comparability between subject imports and the domestic like product is not affected by the type of price effects being considered or found to affect domestic industry prices."⁴¹ According to the Panel:

"[T]he need to consider comparable prices in order to undertake an objective examination of positive evidence is not limited to cases in which a comparison of actual prices is undertaken, but applies to the consideration of price effects in general."⁴²

27. The Panel in *China – Broiler Products* noted that "several factors determine the sales price in a given transaction, and that, consequently, price comparability has to be ensured in terms of the various features of the products and transactions being compared."⁴³ The Panel explained:

"In particular, the sales price of a product reflects the commercial transactions and circumstances in which the product is traded. It is made of different pricing components that reflect the particular conditions or circumstances of the sale, starting with an amount that represents the cost of production and sale of the product, to which is added an amount for profit. Depending on the particular realities of the relevant market, additional pricing elements – generally an amount for additional costs and profit for each of the successive participant in the distribution chain – are added as the product gets traded further down the distribution chain, from producer to wholesaler, from wholesale to retailer, and from retailer to end-user."⁴⁴

28. The Panel in *China – Broiler Products* considered that, in the framework of price undercutting, "the concept of level of trade is relevant to the price comparison even though it is not specifically referred to in the various paragraphs of Article 3, in contrast to Article 2.4 of the Anti-Dumping Agreement."⁴⁵ The Panel stated that:

"[T]he level of trade at which a transaction takes place – whether the sale takes place between a producer and a wholesaler or between a wholesaler and a retailer for example – is an important characteristic of a transaction as it determines which pricing components are included in the sales price. In our view, for a price comparison to be informative of the level of price undercutting by subject imports, it must compare transactions that include the same pricing components (insofar as pricing components have an impact on the price). This means that it must compare transactions at the same level of trade. Alternatively, if the transactions are at

³⁹ Panel Report, *China – Broiler Products*, para. 7.479.

⁴⁰ Panel Report, *China – Autos*, para. 7.256.

⁴¹ Panel Report, *China – Autos*, para. 7.277.

⁴² Panel Report, *China – Autos*, para. 7.277.

⁴³ Panel Report, *China – Broiler Products*, para. 7.480.

⁴⁴ Panel Report, *China – Broiler Products*, para. 7.480.

⁴⁵ Panel Report, *China – Broiler Products*, para. 7.482.

different levels of trade, the authority must apply appropriate adjustments to render them comparable in terms of the pricing components that they include."⁴⁶

29. The Panel in *China – Broiler Products* held that, in the framework of price undercutting, the investigating authority must ensure that the "like products" compared are sufficiently similar:

"Another fundamental determining factor of the price is the physical characteristics of the product. Articles 3.1/15.1 and 3.2/15.2 mandate an analysis of the effects of prices on the domestic market of the 'like product'. Yet, in our view, ensuring that the products being compared are 'like products' will not always suffice to ensure price comparability. Where the products under investigation are not homogenous, and where various models command significantly different prices, the investigating authority must ensure that the product compared on both sides of the comparison are sufficiently similar such that the resulting price difference is informative of the 'price undercutting', if any, by the imported products. For this reason, for the price undercutting analysis to comply with Articles 3.1/15.1 and 3.2/15.2 may well require the investigating authority to perform its price comparison at the level of product models. In a situation in which it performs a price comparison on the basis of a 'basket' of products or sales transactions, the authority must ensure that the groups of products or transactions compared on both sides of the equation are sufficiently similar so that any price differential can reasonably be said to result from 'price undercutting' and not merely from differences in the composition of the two baskets being compared. Alternatively, the authority must make adjustments to control and adjust for relevant differences in the physical or other characteristics of the product."⁴⁷

1.5.4 Examination of the effect of both the prices and volume of subject imports on domestic prices

30. The Appellate Body in *China – GOES* found that in such a situation in which the investigating authority relies on both subject import prices and volume, a panel must still allow for the possibility that either prices or volumes were sufficient in themselves to sustain a finding of price suppression or price depression:

"We see no disagreement between the participants that MOFCOM's finding of significant price depression and suppression rested on an examination of the effect of both the prices and volume of subject imports on domestic prices. This approach is consistent with the requirements of Articles 3.2 and 15.2 whereby the effect of subject imports on domestic prices may be examined through the vector of subject import prices, subject import volumes, or both. However, in circumstances where an investigating authority relies on both subject import prices and volume, a panel must still allow for the possibility that either prices or volume was sufficient by itself to sustain a finding. We therefore do not consider that the focus of the Panel's inquiry should have been on whether the effects of either subject import volume or prices was the primary basis for MOFCOM's price effects finding."⁴⁸

31. The Appellate Body in *China – GOES* noted that MOFCOM had referred to both volume and price effects but had provided no explanation or reasoning as to whether or how the prices and volume of subject imports interacted to produce an effect on domestic prices. This being the case, the Appellate Body noted that the panel was itself unable to disentangle the relative contribution of these effects in MOFCOM's Final Determination without substituting its judgement for that of the authority. According to the Appellate Body:

"In this respect, we further recall the Panel's conclusion that '[t]here [was] nothing in MOFCOM's determination to suggest that MOFCOM itself found that the volume effects of subject imports alone were sufficient to conclude that price depression was an effect of subject imports.' Without further explanation or reasoning in MOFCOM's Final Determination regarding the manner in which the effects of the prices and

⁴⁶ Panel Report, *China – Broiler Products*, para. 7.481.

⁴⁷ Panel Report, *China – Broiler Products*, para. 7.483.

⁴⁸ Appellate Body Report, *China – GOES*, para. 216.

volume of subject imports operated either independently or together to depress domestic prices, we understand the Panel to have concluded that it was itself unable to disentangle the relative contribution of these effects in MOFCOM's Final Determination without substituting its judgement for that of the authority. The Panel therefore refrained from conducting an analysis that, in its view, MOFCOM itself had not conducted. To have done so would have put the Panel at risk of engaging in a de novo review, which would have been inconsistent with a panel's standard of review in assessing determinations of national authorities.

We therefore agree with the Panel that it was 'not possible to conclude that MOFCOM's finding that price depression was an effect of subject imports might be upheld purely on the basis of MOFCOM's findings regarding the effect of the increase in the volume of subject imports'.⁴⁹

32. In *US – Ripe Olives from Spain*, the Panel disagreed with the European Union's argument that the USITC had failed to conduct a proper assessment of the volume and price effects of subsidized imports on the state of the domestic industry because such assessment focused only on one sector of the domestic industry, i.e., the retail sector:

"We understand the European Union to contend that the USITC's finding that underselling resulted in a loss of market share by the domestic industry in the retail sector concerns only one sector of the market as a whole, and thus not the domestic industry as a whole. This argument relates to the requirement identified in prior Appellate Body reports, with which we agree, that an investigating authority must assess the impact of subject imports on the domestic industry as a whole. We disagree, however, with the European Union's contention that in the absence of volume and price effects 'at the level of the domestic industry as a whole' there could be no impact. We do not see any reason why findings concerning volume and price effects that relate to one sector cannot have consequent impacts on the industry as a whole. A deterioration in one sector could clearly impact the domestic industry as a whole. In our view, there is no need for every sector to be negatively impacted for the domestic industry's economic and financial indicia to deteriorate, although the degree of any such deterioration will be determined by the combined influence of developments in all sectors. We therefore reject the European Union's argument that the USITC's lack of findings concerning volume and price effects 'at the level of the domestic industry as a whole' could not result in any consequent impact."⁵⁰

1.5.5 Period of data collection

33. The Panel in *EC – Countervailing Measures on DRAM Chips* noted that Article 15.2 does not contain any express obligations on the period of data collection, and concluded:

"In our view, there simply is no basis for reading such a requirement into the text of Articles 15.1 or 15.2 of the *SCM Agreement*. While an argument could certainly be made that the data on which the injury analysis is based should be sufficiently recent in order for this data to be relevant and probative such as to constitute positive evidence of injury caused by subsidized imports, we do not consider that it was unreasonable or not objective of the EC to refuse to extend the period of investigation for injury purposes beyond the period used to establish subsidization in this case."⁵¹

1.6 Article 15.3

33. The Appellate Body in *US – Carbon Steel (India)* highlighted that "[t]he text is clear in stipulating that being subject to countervailing duty investigations is a prerequisite for the cumulative assessment of the effects of imports under Article 15.3."⁵² According to the Appellate Body:

⁴⁹ Appellate Body Report, *China – GOES*, paras. 200-201.

⁵⁰ Panel Report, *US Ripe Olives from Spain*, para. 7.287.

⁵¹ Panel Report, *EC – Countervailing Measures on DRAM Chips*, para. 7.341.

⁵² Appellate Body Report, *US – Carbon Steel (India)*, para. 4.579.

"The central element of Article 15.3 is the provision that 'investigating authorities may cumulatively assess' the effects of 'such imports'. The term 'such imports' refers to the first clause of Article 15.3, which describes a situation '[w]here imports of a product from more than one country are simultaneously subject to countervailing duty investigations'. The last clause of Article 15.3 stipulates the conditions that must be fulfilled in order for such cumulative assessment to be permitted. In particular, investigating authorities may engage in such cumulative assessment only if: '(a) the amount of subsidization established in relation to the imports from each country is more than *de minimis* and the volume of imports from each country is not negligible'; and '(b) a cumulative assessment of the effects of the imports is appropriate in the light of the conditions of competition between the imported products and the like domestic product.'

Article 15.3 refers to imports 'simultaneously subject to countervailing duty investigations'. The provision that investigating authorities may, if the conditions set out in the last clause of Article 15.3 are fulfilled, cumulatively assess the effects of 'such' imports thus requires that the imports be 'subject to countervailing duty investigations'. Conversely, the effects of imports other than such subsidized imports must not be incorporated in a cumulative assessment pursuant to Article 15.3. The text is clear in stipulating that being subject to countervailing duty investigations is a prerequisite for the cumulative assessment of the effects of imports under Article 15.3."⁵³

1.7 Article 15.4

1.7.1 Consideration of all relevant economic factors

34. The Panel in *US – Countervailing Duty Investigation on DRAMs* concluded that Korea's evidence in respect of particular companies that may have had access to capital markets was insufficient to overturn the ITC's determination, recalling that the last sentence of Article 15.4 makes it clear that no single economic factor necessarily gives decisive guidance:

"[W]e do not consider that the fact that two domestic producers may have had continued access to capital markets is sufficient to overturn the ITC's determination, based on a multitude of factors, that the domestic industry was suffering material injury. This is especially so as the last sentence of Article 15.4 makes it clear that no single economic factor having a bearing on the state of the domestic industry necessarily gives decisive guidance, and Korea has not established why domestic producers' access to capital should be considered decisive. Accordingly, we are not persuaded that an objective and impartial investigating authority could not properly have found material injury in these circumstances."⁵⁴

35. The Panel in *EC – Countervailing Measures on DRAM Chips* noted that Article 15.4 requires an objective examination and evaluation of all relevant factors having a bearing on the state of the industry, based on positive evidence.⁵⁵

36. Concerning economic downturn/business cycle and export performance, neither of which is a factor expressly listed in Article 15.4, the Panel in *EC – Countervailing Measures on DRAM Chips* concluded that the relevance of an economic factor depends, *inter alia*, on the nature of the industry being investigated:

"Whether an economic factor is relevant depends, *inter alia*, on the nature of the industry being investigated. In our view, and different from the situation addressed earlier in which a factor expressly listed in Article 15.4 is not evaluated, it will be for the complaining party to demonstrate two things: (1) that a certain factor which was relevant in assessing the impact of the subsidized imports on the state of the

⁵³ Appellate Body Report, *US – Carbon Steel (India)*, paras. 4.578-4.579.

⁵⁴ Panel Report, *US – Countervailing Duty Investigation on DRAMs*, para. 7. 301.

⁵⁵ Panel Report, *EC – Countervailing Measures on DRAM Chips*, para. 7.356.

domestic industry was not examined; and (2) that the question of evaluation was raised during the investigation."⁵⁶

1.7.2 Relationship with Article 15.2

37. The Appellate Body in *China – GOES* rejected China's argument that "if Articles 3.2 and 15.2 are interpreted as requiring a consideration of the relationship between subject imports and domestic prices, Articles 3.4 and 15.4 must also be interpreted as requiring an examination of the link between subject imports, on the one hand, and each of the economic factors listed in Articles 3.4 and 15.4, on the other hand."⁵⁷ Since, according to the Appellate Body, "such a result would lead to a duplicative analysis of causation at each step of an investigating authority's examination under Articles 3 and 15, and grafts onto Articles 3.2 and 15.2, as well as Articles 3.4 and 15.4, an obligation that exists under Articles 3.5 and 15.5."⁵⁸ The Appellate Body explained that:

"[A]rticles 3.4 and 15.4 require an investigating authority to examine the impact of subject imports on the domestic industry on the basis of "all relevant economic factors and indices having a bearing on the state of the industry". Articles 3.4 and 15.4 thus do not merely require an examination of the state of the domestic industry, but contemplate that an investigating authority must derive an understanding of the impact of subject imports on the basis of such an examination. Consequently, Articles 3.4 and 15.4 are concerned with the relationship between subject imports and the state of the domestic industry, and this relationship is analytically akin to the type of link contemplated by the term 'the effect of' under Articles 3.2 and 15.2. In other words, Articles 3.4 and 15.4 require an examination of the explanatory force of subject imports for the state of the domestic industry. In our view, such an interpretation does not duplicate the relevant obligations in Articles 3.5 and 15.5. As noted, the inquiry set forth in Articles 3.2 and 15.2, and the examination required under Articles 3.4 and 15.4, are necessary in order to answer the ultimate question in Articles 3.5 and 15.5 as to whether subject imports are causing injury to the domestic industry. The outcomes of these inquiries form the basis for the overall causation analysis contemplated in Articles 3.5 and 15.5. Thus, similar to the consideration under Articles 3.2 and 15.2, the examination under Articles 3.4 and 15.4 contributes to, rather than duplicates, the overall determination required under Articles 3.5 and 15.5."⁵⁹

1.7.3 Relationship with Article 15.5

38. The Appellate Body in *China – GOES* addressed the relationship between Articles 15.4 and 15.5 of the SCM Agreement:

"Moreover, an investigating authority is required to examine the impact of subject imports on the domestic industry pursuant to Articles 3.4 and 15.4, but is not required to demonstrate that subject imports are causing injury to the domestic industry. Rather, the latter analysis is specifically mandated by Articles 3.5 and 15.5. The demonstration of the causal relationship under Articles 3.5 and 15.5 requires an investigating authority to examine 'all relevant evidence' before it, and thus covers a broader scope than the examination under Articles 3.4 and 15.4. As discussed below, Article 3.5 and 15.5 further impose a requirement to conduct a non-attribution analysis regarding all factors causing injury to the domestic industry."⁶⁰

1.7.4 Relationship with Article 16

39. Addressing Korea's argument that the ITC defined the subject imports and domestic industry inconsistently, the Panel said that:

⁵⁶ Panel Report, *EC – Countervailing Measures on DRAM Chips*, para. 7.363.

⁵⁷ Appellate Body Report, *China – GOES*, para. 148.

⁵⁸ Appellate Body Report, *China – GOES*, para. 148.

⁵⁹ Appellate Body Report, *China – GOES*, para. 149.

⁶⁰ Appellate Body Report, *China – GOES*, para. 150.

"Korea would have to challenge the ITC's definition of the domestic industry, and its treatment of assembly/casing as a domestic production operation, by filing a claim under Article 16 of the *SCM Agreement*. However, Korea has not done so. There is therefore no basis for us to consider that the ITC's definition of the domestic industry is inconsistent with that provision." ⁶¹

1.8 Article 15.5

1.8.1 "through the effects of subsidies" / footnote 47

40. In *Japan – DRAMs (Korea)*, the Panel considered whether an assessment of causation of injury should relate to injury caused by "subsidization", or to injury caused by "subsidized imports". Korea, the complainant in that case, argued that the term "through the effects of subsidies" in Article 15.5 read in conjunction with the accompanying footnote requires a demonstration that the volume and price effects of the subsidized imports (as set forth in Article 15.2) and the consequent impact on these imports on the domestic industry (as set forth in Article 15.4), are "the effects of subsidies". Thus, Korea argued that it must be demonstrated that the *subsidies* have caused the increased volume and/or price effects of the subsidized imports (Article 15.2) that have in turn had an impact on the domestic industry. In other words, Korea contended that it must be demonstrated that the *subsidies* are causing injury *through the effects of subsidized imports*. The Panel rejected Korea's argument on the basis that "the ordinary meaning of the first sentence of Article 15.5 and its accompanying footnote is to define the phrase "through the effects of subsidies" to mean the effects of subsidized imports ("[a]s set forth in Articles 15.2 and 15.4")."⁶² The Panel concluded that Article 15.5 could not be read in the manner proposed by Korea, "as paragraphs 2 and 4 of Article 15 drive the reader towards a consideration of the effects of the subsidized imports, and not the effect of the subsidy."⁶³

41. The Panel's interpretation was upheld by the Appellate Body in the following terms:

"It is clear from the architecture of Articles 15.2, 15.4, and 15.5 that, for determining whether the 'subsidized imports are, through the effects of subsidies, causing injury' to the domestic industry, what is required is the examination of the effects of the subsidized imports as set forth in Articles 15.2 and 15.4. These paragraphs neither envisage nor require the two distinct types of examinations suggested by Korea, namely, an examination of the effects of the subsidized imports as per Articles 15.2 and 15.4; and, a second examination of the effects of the subsidies as distinguished from the effects of the subsidized imports on a case-by-case basis.

Korea's argument that the effects of subsidies must be distinguished from the effects of the subsidized imports is based on the premise that the increase in the volume of subsidized imports or the price at which they are sold on the importing Member's market may not have been caused by the subsidies received by the exporting company. To illustrate its point, Korea has suggested that the increased volumes of sales of the product may be due to better quality, design, innovation, or customer preference, rather than the subsidy.

We are not persuaded by these arguments of Korea. In our view, they would imply additional inquiry by an investigating authority into two matters: first, the use to which the subsidies were put by the exporting company; and, secondly, whether, absent the subsidies, the product would have been exported in the same volumes or at the same prices. Such additional examinations are not contemplated by Articles 15.2 and 15.4.

Furthermore, the 'non-attribution' provisions contained in the third sentence of Article 15.5 already address adequately the concern that the injurious effects of any known factors *other than subsidized imports* are not attributed to the subsidized imports. This ensures that injuries that may have been caused by other known

⁶¹ Panel Report, *US – Countervailing Duty Investigation on DRAMs*, para. 7. 385.

⁶² Panel Report, *Japan – DRAMs (Korea)*, para. 7.411.

⁶³ Panel Report, *Japan – DRAMs (Korea)*, para. 7.411.

factors are not attributed to the subsidized imports. The third sentence of Article 15.5 does not envisage the kind of additional enquiry implied in Korea's arguments.

We are therefore of the view that, if an investigating authority carries out the examination required under Articles 15.2, 15.4, and 15.5, such examination suffices to demonstrate that 'subsidized imports are, through the effects of subsidies, causing injury' within the meaning of the *SCM Agreement*.⁶⁴

1.8.2 Non-attribution of injury caused by other factors

42. Noting that the non-attribution requirement had been addressed by the Appellate Body in several recent cases in the context of Article 3.5 of the Anti-Dumping Agreement, the Panel in *US – Countervailing Duty Investigation on DRAMs* considered that, while the requirement had not been considered in cases involving the SCM Agreement, the identical wording of the relevant provisions called for the same approach:⁶⁵

"The non-attribution requirement in anti-dumping investigations has been addressed by the Appellate Body in several recent cases. Although it has not been specifically considered in a countervailing duty case, given that the relevant provisions in the two Agreements are identical, and in light of the 'need for the consistent resolution of disputes arising from anti-dumping and countervailing duty measures,' [set out in the *Ministerial Declaration on Dispute Settlement Pursuant to the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 or Part V of the Agreement on Subsidies and Countervailing Measures*] it is clear to us that the requirement is the same in the context of both anti-dumping and countervailing duty investigations."⁶⁶

43. Therefore the Panel in *US – Countervailing Duty Investigation on DRAMs*, citing the Appellate Body's statement on the non-attribution requirement in paragraphs 188-189 of *EC – Pipe Fittings*, determined whether the ITC complied with Article 15.5 by examining whether the ITC properly separated and distinguished the injurious effects of other known factors from those of the alleged subsidized imports:

"Neither party has suggested that we should not be guided by the Appellate Body's interpretation of the non-attribution requirement set forth in Article 3.5 of the *AD Agreement*. We shall therefore determine whether the ITC's *Final Injury Determination* complied with the requirements of Article 15.5 of the *SCM Agreement* by examining whether the ITC properly separated and distinguished the injurious effects of other known factors from those of the alleged subsidized imports. We note that the Appellate Body has clarified that the ITC was 'free to choose the methodology it [would] use' to separate and distinguish the injurious effects of other factors from those of the alleged subsidized imports. We also note that Korea has acknowledged that the ITC was not required to quantify the injury caused by other factors in order to separate and distinguish it from the injurious effects of the alleged subsidized imports."⁶⁷

44. In considering Korea's claim that under SCM Agreement Article 15.5, an investigating authority must "separate" and "distinguish" the injurious effects of factors other than subsidized imports to ensure that they are not attributed to the subsidized imports, the Panel in *EC – Countervailing Measures on DRAM Chips* referred to the jurisprudence under the parallel obligation contained in Article 3.5 of the Anti-Dumping Agreement. In light of the identical wording and role of the non-attribution requirement in the SCM Agreement, the Panel opined that Article 15.5 contains a similar requirement to separate and distinguish the injury caused by factors other than subsidized imports:

"The second part of Korea's claim is whether the EC's causation analysis satisfies (1) the non-attribution requirement set forth in Article 15.5 the *SCM Agreement* and (2)

⁶⁴ Appellate Body Report, *Japan – DRAMs (Korea)*, paras. 264-268.

⁶⁵ A similar approach was taken by the Panel in *Mexico – Olive Oil* (para. 7.298).

⁶⁶ Panel Report, *US – Countervailing Duty Investigation on DRAMs*, para. 7. 351.

⁶⁷ Panel Report, *US – Countervailing Duty Investigation on DRAMs*, para. 7.353.

the overarching principle set forth in Article 15.1, *i.e.*, that a determination under Article 15 must be based on an objective evaluation of positive evidence. We recall that Article 15.5 of the *SCM Agreement* requires an investigating authority to ensure that injury caused by any known factors, other than the subsidized imports, which at the same time are injuring the domestic industry, must not be attributed to the subsidized imports. We note that a parallel obligation in the *AD Agreement* has been interpreted by panels and the Appellate Body to require an investigating authority to separate and distinguish the injury caused by such other known factors.²⁸¹ In light of the identical wording and role of the non-attribution requirement in the *SCM Agreement*, we are of the view that Article 15.5 contains a similar requirement to separate and distinguish the injury caused by factors other than subsidized imports. We note that the parties are in agreement with respect to the legal standard that applies, but differ in view as to the question whether the EC complied with this standard in its DRAMs investigation.

In our view, an investigating authority must make a better effort to quantify the impact of other known factors, relative to subsidized imports, preferably using elementary economic constructs or models. At the very least, the non-attribution language of Article 15.5 requires from an investigating authority a satisfactory explanation of the nature and extent of the injurious effects of the other factors, as distinguished from the injurious effects of the subsidized imports."⁶⁸

45. In respect of non-subject imports, on *US – Countervailing Duty Investigation* the ITC had performed a separate pricing analysis of the two groups of imports and demonstrated that alleged subsidized imports had injurious price effects independent of those of the larger volume of non-subject imports, the Panel concluded that "given that there is no obligation under Article 15.5 to quantify the amount of injury caused by alleged subsidized and non-subject imports respectively, the ITC has done all that it was required to do."⁶⁹

46. The Panel in *US – Countervailing Duty Investigation on DRAMs* concluded that the ITC's recognized the negative impact of slowing demand, but that it had failed to explain how it ensured that the injury caused by such decline in demand was not attributed to alleged subsidized imports. Therefore, the Panel found a violation of SCM Agreement Article 15.5:

"[I]n the absence of any meaningful explanation of the nature and extent of the injurious effects of the slowing in demand, it is not apparent from the face of the [final determination] whether, or how, the ITC separated and distinguished the injury caused by such slowing in the growth in demand from (a) the injury caused by the decline in demand inherent in the business cycle and, more importantly, (b) the injury caused by subject imports."⁷⁰

47. The Panel in *Mexico – Olive Oil* also addressed the non-attribution requirement set forth in Article 15.5. After reviewing the rulings of prior panel and Appellate Body reports regarding Article 3.5 of the Anti-Dumping Agreement, the Panel explained the nature of the Article 15.5 non-attribution obligation in the following terms:

"We find that the obligation in the third sentence of Article 15.5 in the SCM Agreement can be synthesized into two basic components. First, Economía was required to consider other factors known to it either as a result of its own investigation or because they were raised by the interested parties. Second, Economía was required to analyze each of these factors separately and to explain the nature and extent of the injurious effects of these other factors, separating and distinguishing them from the injurious effects of the subsidized imports. If the facts of the case so warranted, Economía might also have needed to consider the collective impact of the 'other known factors.'"⁷¹

⁶⁸ Panel Report, *EC – Countervailing Measures on DRAM Chips*, paras. 7.404-7.405

⁶⁹ Panel Report, *US – Countervailing Duty Investigation on DRAMs*, para. 7. 360.

⁷⁰ Panel Report, *US – Countervailing Duty Investigation on DRAMs*, para. 7. 368.

⁷¹ Panel Report, *Mexico – Olive Oil*, para. 7.305.

48. The Panel in *EU-PET (Pakistan)* concluded that 'although there may be circumstances in which a collective assessment is warranted, the simple existence of other known factors that are found to have contributed to the injury to the domestic industry at the same time as subject imports does not on its own amount to such circumstances.'⁷²

49. The Appellate Body in *EU – PET (Pakistan)* recognized that there are different approaches to assessing causation while accounting for the injurious effects of other known factors, such as a two-step analysis or a single step analysis. A single step analysis would first examine the existence and extent of a causal link between the subsidized imports and the injury suffered by the domestic industry through an assessment of the "effects" of the subsidized imports, and then conduct an assessment of the injurious effects of other known factors. In a single-step "counterfactual" causation analysis, the investigating authority would assess whether and to what extent the state of the domestic industry would have been better off in the absence of the effects of the subsidized imports while the effects of other known factors remain. This "unitary" analysis directly evaluates the significance of the impact of the subsidized imports alone and, thus, there is no need for a separate non-attribution analysis.⁷³

50. The Appellate Body in *EU – PET (Pakistan)* noted that in any event the core question in reviewing the appropriateness of an investigating authority's causation analysis is whether the authority has objectively determined that the subsidized imports qualify as a "genuine and substantial cause of the injury suffered by the domestic industry having taken into consideration the injurious effects of other known factors" and that this question must be answered on a case-specific basis.⁷⁴ The Appellate Body noted that it is permissible to carry out the causation analysis using a two-step approach, wherein the investigating authority first examines the causal link between the subsidized imports and the injury and then examines the injurious effects of other known factors. The Appellate Body agreed with "the Panel's interpretation of Article 15.5 of the SCM Agreement that an investigating authority's initial consideration of a causal link before completing its non-attribution analysis is compatible with the requirements of this provision."⁷⁵ In sum, the Appellate Body stated that:

"While Article 15.5 requires an investigating authority to complete the non-attribution analysis before it reaches an overall conclusion as to the existence of a 'causal relationship' within the meaning of this provision, the mere fact that an investigating authority has considered a 'causal link' to exist based only on the first step of its analysis does not amount to a violation of Article 15.5. On the contrary, provided that such consideration is made only on a preliminary basis and its validity is verified against the significance of the injurious effects of the other known factors before an overall conclusion on causation is reached, such an approach is consistent with the requirements of Article 15.5."⁷⁶

1.9 Article 15.8

49. The Panel in *US – Softwood Lumber VI* examined the meaning of the requirement under Article 3.8 of the Anti-Dumping Agreement and Article 15.8 of the SCM Agreement to consider and decide the application of anti-dumping and countervailing duties in a threat of injury case with "special care". Based on dictionary definitions of "special" and "care", the Panel opined that "a degree of attention over and above that required of investigating authorities in all anti-dumping and countervailing duty injury cases is required in the context of cases involving threat of material injury."⁷⁷

"The Panel in *US – Softwood Lumber VI* further considered that, in spite of the fact that Article 3.8 and Article 15.8 provides that the application of a measure has to be considered with special care, the 'special care' obligation applies 'during the process of investigation and determination of threat of material injury, that is, in the establishment of whether the prerequisites for application of a measure exist, and not

⁷² Panel Report, *EU – PET (Pakistan)*, para. 7.142.

⁷³ Appellate Body Report, *EU – PET (Pakistan)*, para. 5.173.

⁷⁴ Appellate Body Report, *EU – PET (Pakistan)*, para. 5.178.

⁷⁵ Appellate Body Report, *EU – PET (Pakistan)*, paras. 5.178 and 5.180.

⁷⁶ Appellate Body Report, *EU – PET (Pakistan)*, para. 5.180.

⁷⁷ Panel Report, *US – Softwood Lumber VI*, para. 7.33.

merely afterward when final decisions whether to apply a measure are taken'.⁷⁸ Faced with the question of what is entailed by this obligation to act with an enhanced degree of attention, so as to demonstrate compliance with the 'special care' obligation, the Panel made the following finding: 'The Agreements require, as noted above, an objective evaluation based on positive evidence in making any injury determination, including one based on threat of material injury. Canada has not asserted any specific legal requirements with respect to special care – it has made no arguments as to what it considers might constitute the special care required by the Agreements in threat cases. It is not clear to us what the parameters of such 'special care' in the context of an objective evaluation based on positive evidence would be. In these circumstances, we consider it appropriate to consider alleged violations of Articles 3.8 and 15.8 only after consideration of the alleged violations of specific provisions. While we do not consider that a violation of the special care obligation could not be demonstrated in the absence of a violation of the more specific provision of the Agreements governing injury determinations, we believe such a demonstration would require additional or independent arguments concerning the asserted violation of the special care requirement beyond the arguments in support of the specific violations.'⁷⁹

Current as of: December 2023

⁷⁸ Panel Report, *US – Softwood Lumber VI*, para. 7.33

⁷⁹ Panel Report, *US – Softwood Lumber VI*, para. 7.34.