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## **1 ARTICLE 11**

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

#### **Article 11**

##### *Duration and Review of Anti-Dumping Duties and Price Undertakings*

11.1 An anti-dumping duty shall remain in force only as long as and to the extent necessary to counteract dumping which is causing injury.

11.2 The authorities shall review the need for the continued imposition of the duty, where warranted, on their own initiative or, provided that a reasonable period of time has elapsed since the imposition of the definitive anti-dumping duty, upon request by any interested party which submits positive information substantiating the need for a review.<sup>21</sup> Interested parties shall have the right to request the authorities to examine whether the continued imposition of the duty is necessary to offset dumping, whether the injury would be likely to continue or recur if the duty were removed or varied, or both. If, as a result of the review under this paragraph, the authorities determine that the anti-dumping duty is no longer warranted, it shall be terminated immediately.

(footnote original)<sup>21</sup> A determination of final liability for payment of anti-dumping duties, as provided for in paragraph 3 of Article 9, does not by itself constitute a review within the meaning of this Article.

11.3 Notwithstanding the provisions of paragraphs 1 and 2, any definitive anti-dumping duty shall be terminated on a date not later than five years from its imposition (or from the date of the most recent review under paragraph 2 if that review has covered both dumping and injury, or under this paragraph), unless the authorities determine, in a review initiated before that date on their own initiative or upon a duly substantiated request made by or on behalf of the domestic industry within a reasonable period of time prior to that date, that the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury.<sup>22</sup> The duty may remain in force pending the outcome of such a review.

(footnote original)<sup>22</sup> When the amount of the anti-dumping duty is assessed on a retrospective basis, a finding in the most recent assessment proceeding under subparagraph 3.1 of Article 9 that no duty is to be levied shall not by itself require the authorities to terminate the definitive duty.

11.4 The provisions of Article 6 regarding evidence and procedure shall apply to any review carried out under this Article. Any such review shall be carried out expeditiously and shall normally be concluded within 12 months of the date of initiation of the review.

11.5 The provisions of this Article shall apply *mutatis mutandis* to price undertakings accepted under Article 8.

### **1.2 Article 11.1**

#### **1.2.1 Necessity**

1. The Panel in *US – DRAMS* described the requirement in Article 11.1 whereby anti-dumping duties "shall remain in force only as long as and to the extent necessary" to counteract injurious dumping, as "a general necessity requirement."<sup>1</sup>

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<sup>1</sup> Panel Report, *US – DRAMS*, para. 6.41.

2. In assessing the essential character of the necessity involved in Article 11.1, the Panel in *US – DRAMS* stated the following:

"We note that the necessity of the measure is a function of certain objective conditions being in place, *i.e.* whether circumstances require continued imposition of the anti-dumping duty. That being so, such continued imposition must, in our view, be essentially dependent on, and therefore assignable to, a foundation of positive evidence that circumstances demand it. In other words, the need for the continued imposition of the duty must be demonstrable on the basis of the evidence adduced."<sup>2</sup>

3. The Panel in *US – DRAMS* held that "the necessity of the continued imposition of the anti-dumping duty can only arise in a defined situation pursuant to Article 11.2: *viz* to offset dumping".<sup>3</sup> See paragraph 15 below.

4. With respect to the relationship between Article 11.1 and 11.2, see paragraph 7 below.

5. In *Pakistan – BOPP Film (UAE)*, the Panel considered, based on the ordinary meaning of the term "counteract", that Article 11.1 "provides that an anti-dumping duty may remain in force only 'as long as and to the extent' that it is necessary to act against, or neutralize the action or effect of, 'dumping which is causing injury'".<sup>4</sup>

6. The Panel also noted that Article 11.1 is the first paragraph of Article 11, which focuses on the "Duration and Review of Anti-Dumping Duties" and sets forth disciplines for so-called changed circumstances reviews and sunset reviews. Thus, the Panel considered that Article 11.1 establishes an overarching principle that duties may only continue to be imposed as long as they remain necessary:

"Thus, we agree with other panels which have taken the view that Article 11.1 establishes an overarching principle that duties may only continue to be imposed as long as they remain necessary, which is operationalized in the procedures for changed circumstances and sunset reviews set out in the remainder of Article 11."<sup>5</sup>

### **1.2.2 Relationship with other paragraphs of Article 11**

7. The Panel in *US – DRAMS* examined the relationship between Articles 11.1 and 11.2 by considering whether the terms of Article 11.2 preclude the continued imposition of anti-dumping duties on the basis that an authority fails to satisfy itself that recurrence of dumping is "not likely". Referring to the general necessity requirement in Article 11.1, the Panel further noted that "the application of the general rule in Article 11.1 is specified in Article 11.2".<sup>6</sup>

8. The Panel in *EC – Tube or Pipe Fittings* considered that "Article 11.1 does not set out an independent or additional obligation for Members"<sup>7</sup> but rather "furnishes the basis for the review procedures contained in Article 11.2 (and 11.3) by stating a general and overarching principle, the modalities of which are set forth in paragraph 2 (and 3) of that Article".<sup>8</sup>

## **1.3 Article 11.2**

### **1.3.1 Nature of the determination under Article 11.2**

9. The Panel in *US – Shrimp II (Viet Nam)* held that the nature of an investigating authority's determination in a review conducted pursuant to Article 11.2 is the same as in a sunset review conducted pursuant to Article 11.3:

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<sup>2</sup> Panel Report, *US – DRAMS*, para. 6.42.

<sup>3</sup> Panel Report, *US – DRAMS*, para. 6.43.

<sup>4</sup> Panel Report, *Pakistan – BOPP Film (UAE)*, para. 7.539.

<sup>5</sup> Panel Report, *Pakistan – BOPP Film (UAE)*, para. 7.540.

<sup>6</sup> Panel Report, *US – DRAMS*, para. 6.41.

<sup>7</sup> Panel Report, *EC – Tube or Pipe Fittings*, para. 7.113.

<sup>8</sup> Panel Report, *EC – Tube or Pipe Fittings*, para. 7.113.

"Turning to the nature and character of the obligation imposed on the investigating authority, we note that like Article 11.3, Article 11.2 does not prescribe any specific methodology for or criteria to be considered by the authority in determining whether there is a need for the 'continued imposition of the duty'. However, as noted above, the Appellate Body did indicate that Article 11.3 envisages a process combining both investigatory and adjudicatory aspects and assigns an active rather than a passive decision-making role to the authorities. The same considerations apply, in our view, to the review provided for in Article 11.2, and when the conditions set therein are met, Article 11.2 imposes an obligation on the authority to undertake a review of the need for the continued imposition of the duty and to make a determination in that respect."<sup>9</sup>

### **1.3.2 "whether the continued imposition of the duty is necessary to offset dumping"**

10. The Panel in *US – DRAMS* reasoned that in a review conducted under Article 11.2 an investigating authority's mandate is not limited to examine whether the duty is necessary to offset "present" dumping:

"First, we note that the second sentence of Article 11.2 refers to an examination of 'whether the continued imposition of the duty is necessary to offset dumping.' We note further that this sentence is expressed in the present tense. In addition, the second sentence of Article 11.2 does not explicitly include any reference to dumping being 'likely' to 'recur', as is the case with the injury review envisaged by that sentence.

However, the second sentence of Article 11.2 requires an investigating authority to examine whether the 'continued imposition' of the duty is necessary to offset dumping. The word 'continued' covers a temporal relationship between past and future. In our view, the word 'continued' would be redundant if the investigating authority were restricted to considering only whether the duty was necessary to offset *present* dumping. Thus, the inclusion of the word 'continued' signifies that the investigating authority is entitled to examine whether imposition of the duty may be applied henceforth to offset dumping.

Furthermore, with regard to injury, Article 11.2 provides for a review of 'whether the injury would be likely to continue or *recur* if the duty were removed or varied' (emphasis supplied). In conducting an Article 11.2 injury review, an investigating authority may examine the causal link between injury and dumped imports. If, in the context of a review of such a causal link, the only injury under examination is injury that may recur following revocation (*i.e.*, future rather than present injury), an investigating authority must necessarily be examining whether that future injury would be caused by dumping with a commensurately prospective timeframe. To do so, the investigating authority would first need to have established a status regarding the prospects of dumping. For these reasons, we do not agree that Article 11.2 precludes *a priori* the justification of continued imposition of anti-dumping duties when there is no present dumping."<sup>10</sup>

11. The Panel in *US – DRAMS* concluded its assessment by noting that "there is nothing in the text of Article 11.2 of the *AD Agreement* that explicitly limits a Member to a 'present' analysis, and forecloses a prospective analysis, when conducting an Article 11.2 review."<sup>11</sup>

12. The Panel in *US – DRAMS* considered Article 11.3 to be particularly relevant in giving support for, and reinforcing, its interpretation of Article 11.2 regarding the issue of whether Article 11.2 precludes an anti-dumping duty being deemed "necessary to offset dumping" where there is no present dumping to offset.<sup>12</sup> The Panel stated the following regarding Article 11.3:

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<sup>9</sup> Panel Report, *US – Shrimp II (Viet Nam)*, para. 7.375.

<sup>10</sup> Panel Report, *US – DRAMS*, paras. 6.26-6.28.

<sup>11</sup> Panel Report, *US – DRAMS*, para. 6.29.

<sup>12</sup> Panel Report, *US – DRAMS*, para. 6.30.

"We note that with regard to dumping, the 'sunset provision' in Article 11.3 of the AD Agreement envisages *inter alia* an examination of whether the expiry of an anti-dumping duty would be likely to lead to 'continuation or recurrence' of dumping. If, as argued ... an anti-dumping duty must be revoked as soon as present dumping is found to have ceased, the possibility (explicitly envisaged by Article 11.3) of the expiry of that duty causing dumping to *recur* could never arise. This is because the reference to 'expiry' in Article 11.3 assumes that the duty is still in force, and the reference to 'recurrence' of dumping assumes that dumping has ceased, but may 'recur' as a result of revocation. [This] textual interpretation of Article 11.2 would effectively exclude the possibility of an Article 11.3 review in circumstances where dumping has ceased but the duty remains in force. [This] interpretation therefore renders part of Article 11.3 ineffective. As stated by the Appellate Body in *Gasoline*, '[a]n interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility'. An interpretation of Article 11.2 which renders part of Article 11.3 meaningless is contrary to the customary or general rules of treaty interpretation, and thus should be rejected."<sup>13</sup>

13. The Panel in *US – DRAMS* also rejected the argument that Article 11.2 requires the immediate revocation of an anti-dumping duty in case of a finding of "no dumping". The Panel opined that such interpretation would render footnote 22 under Article 11.3 meaningless:

"Furthermore, [the] argument that Article 11.2 requires the immediate revocation of an anti-dumping duty in case of a finding of 'no dumping' (e.g., when a retrospective assessment finds that no duty is to be levied) is also inconsistent with note 22 of the AD Agreement. Note 22 states that, in cases where anti-dumping duties are levied on a retrospective basis, 'a finding in the most recent assessment proceeding ... that no duty is to be levied shall not by itself require the authorities to terminate the definitive duty'. If [this] interpretation of Article 11.2 were accurate, then an investigating authority would be obligated under Article 11.2 to terminate an anti-dumping duty upon making such a finding, and note 22 would be meaningless. In our view, this confirms a finding that the absence of present dumping does not in and of itself require the immediate termination of an anti-dumping duty pursuant to Article 11.2."<sup>14</sup>

14. As a result of its findings quoted in paragraphs 10-13 above, the Panel in *US – DRAMS* rejected the argument that "Article 11.2 of the AD Agreement requires revocation as soon as an exporter is found to have ceased dumping, and that the continuation of an anti-dumping duty is precluded *a priori* in any circumstances other than where there is present dumping."<sup>15</sup>

15. Referring to the general necessity requirement in Article 11, the Panel in *US – DRAMS* held that such necessity can only arise "in a defined situation pursuant to Article 11.2". While "the necessity involved in Article 11.2 is not to be construed in some absolute and abstract sense", it should nevertheless "be demonstrable on the basis of the evidence adduced":

"The necessity of the continued imposition of the anti-dumping duty can only arise in a defined situation pursuant to Article 11.2: *viz* to offset dumping. Absent the prescribed situation, there is no basis for continued imposition of the duty: the duty cannot be 'necessary' in the sense of being demonstrable on the basis of the evidence adduced because it has been deprived of its essential foundation. In this context, we recall our finding that Article 11.2 does not preclude *a priori* continued imposition of anti-dumping duties in the absence of present dumping. However, it is also clear from the plain meaning of the text of Article 11.2 that the continued imposition must still satisfy the 'necessity' standard, even where the need for the continued imposition of an anti-dumping duty is tied to the 'recurrence' of dumping. We recognize that the certainty inherent to such a prospective analysis could be conceivably somewhat less than that attached to purely retrospective analysis, reflecting the simple fact that analysis involving prediction can scarcely aspire to a standard of inevitability. This is, in our view, a discernible distinction in the degree of certainty, but not one which

<sup>13</sup> Panel Report, *US – DRAMS*, para. 6.31.

<sup>14</sup> Panel Report, *US – DRAMS*, para. 6.32.

<sup>15</sup> Panel Report, *US – DRAMS*, para. 6.34.

would be sufficient to preclude that the standard of necessity could be met. In our view, this reflects the fact that the necessity involved in Article 11.2 is not to be construed in some absolute and abstract sense, but as that appropriate to circumstances of practical reasoning intrinsic to a review process. Mathematical certainty is not required, but the conclusions should be demonstrable on the basis of the evidence adduced. This is as much applicable to a case relating to the prospect of recurrence of dumping as to one of present dumping."<sup>16</sup>

16. With respect to other findings of the Panel in *US – DRAMS* concerning "necessity" under Article 11, see paragraphs 1-2 above.

### 1.3.3 "injury"

17. In *US – DRAMS*, the Panel stated that "by virtue of note 9 of the AD Agreement, the term 'injury' in Article 11.2 'shall be interpreted in accordance with the provisions of' Article 3."<sup>17</sup> See further the excerpt quoted in paragraph 21 below.

### 1.3.4 "likely to lead to continuation or recurrence"

18. The Panel in *US – DRAMS* considered Korea's claim that the test applied by the United States' authorities was inconsistent with the "likely to lead to continuation or recurrence" language of Article 11.2. The Panel noted that under United States' law, the competent authority will not revoke anti-dumping duties unless it is "satisfied that future dumping is not likely."<sup>18</sup> Korea argued that this "not likely" test was inconsistent with Article 11.2, because Article 11.2 mentions a likelihood test only with respect to *injury*. Furthermore, Korea argued that, even if the "likely" standard, established under Article 11.2 only in the context of *injury*, applied also in the context of *dumping*, the United States' "not likely" test was in any case incompatible with the "likely" standard set forth in Article 11.2. The Panel found that the "'not likely'-standard is not in fact equivalent to, and falls decisively short of, establishing that dumping is 'likely to recur if the order is revoked'." <sup>19</sup> In reaching this finding, the Panel considered both the "clear conceptual difference between establishing something as a positive finding and failing to establish something as a negative finding"<sup>20</sup>, and the common usage of the relevant terms.<sup>21</sup> The Panel noted that situations could exist where the "not likely" standard would be satisfied, while the "likely" standard would not be and concluded by stating that the United States' "not likely" test did not provide a "demonstrable basis for consistently and reliably determining that the likelihood criterion is satisfied".<sup>22</sup>

19. After finding that the United States' test of "not likely" was inconsistent with the "likely" test mandated by the Anti-Dumping Agreement, the Panel in *US – DRAMS* decided not to address the issue whether the "likely" standard in the *dumping context* (as opposed to the *injury context*, where it is explicitly established) is consistent with the terms of Article 11.2 of the Agreement. The Panel then made the following observations, stating that a "likelihood" standard, applied in the context of *injury* under Article 11.2, could be applicable also in the anti-dumping context. More specifically, the Panel held, *inter alia*, that "there could be reason to support a view that authorities are entitled to apply the same test concerning the likelihood of recurrence or continuation of dumping for both Article 11.2 and 11.3 reviews":

"We note that Article 11.3 provides for termination of a definitive anti-dumping duty five years from its imposition. However, such termination is conditional. First, the terms of Article 11.3 itself lay down that this should occur unless the authorities determine that the expiry would be 'likely to lead to continuation or recurrence of dumping and injury.' Where there is a determination that both are likely, the duty may remain in force, and the five year clock is reset to start again from that point. Second, Article 11.3 provides also for another situation whereby this five year period

<sup>16</sup> Panel Report, *US – DRAMS*, para. 6.43.

<sup>17</sup> Panel Report, *US – DRAMS*, fn 501.

<sup>18</sup> Panel Report, *US – DRAMS*, para. 6.38.

<sup>19</sup> Panel Report, *US – DRAMS*, para. 6.48.

<sup>20</sup> Panel Report, *US – DRAMS*, para. 6.45.

<sup>21</sup> Panel Report, *US – DRAMS*, para. 6.46.

<sup>22</sup> Panel Report, *US – DRAMS*, para. 6.47.

can be otherwise effectively extended, viz in a situation where a review under paragraph 2 covering both dumping and injury has taken place. If, for instance, such a review took place at the four year point, it could effectively extend the sunset review until 9 years from the original determination. In the first case, we note that the provisions of Article 11.3 explicitly condition the prolongation of the five year period on a finding that there is likelihood of dumping and injury continuing or recurring. In the second case, where there is reference to review under Article 11.2, there is no such explicit reference.

However, we note that both instances of review have the same practical effect of prolonging the application of anti-dumping duties beyond the five year point of an initial sunset review. This at the very least suggests, in our view, that there could be reason to support a view that authorities are entitled to apply the same test concerning the likelihood of recurrence or continuation of dumping for both Article 11.2 and 11.3 reviews. There certainly appears to be nothing that explicitly provides to the contrary. Nor do we see any reason why this conclusion would be materially affected by whether or not the dumping review occurred in conjunction with an injury review. There is nothing in the text of Article 11 which suggests there should be some fundamental bifurcation of the applicable standard for dumping review contingent on whether there is also an Article 11.2 injury review being undertaken.

We also note that 'likelihood' or 'likely' carries with it the ordinary meaning of 'probable'. That being so, it seems to us that a 'likely standard' amounts to the view that where recurrence of dumping is found to be probable as a consequence of revocation of an anti-dumping duty, this probability would constitute a proper basis for entitlement to maintain that anti-dumping duty in force. Without prejudice to the legal status of such a view in terms of its consistency with the terms of Article 11.2 – a matter on which we are not required to rule as noted in the text above – we feel obliged to at least take note that, at least as a practical matter, rejection of such a view would effectively amount to a systematic requirement that reviewing authorities are obliged to revoke anti-dumping duties precisely where doing so would render recurrence of dumping probable."<sup>23</sup>

### 1.3.5 "warranted"

20. The Panel considered whether "Article 11.2 necessarily requires an investigating authority, following three years and six months' findings of no dumping, to find an *ex officio* Article 11.2 review of 'whether the injury would be likely to continue or recur if the duty were removed or varied' is 'warranted'"<sup>24</sup>, it stated whether such "injury" review would be "warranted" would be entirely dependent upon a determination of whether dumping will recur:

"A review of 'whether the injury would be likely to continue or recur if the duty were removed or varied' could include a review of whether (1) injury that is (2) caused by dumped imports would be likely to continue or recur if the duty were removed or varied. With regard to injury, we believe that an absence of dumping during the preceding three years and six months is not in and of itself indicative of the likely state of the relevant domestic industry if the duty were removed or varied. With regard to causality, an absence of dumping during the preceding three years and six months is not in and of itself indicative of causal factors other than the absence of dumping. If the only causal factor under consideration is three years and six months' no dumping, the issue of causality becomes whether injury caused by dumped imports will recur. This necessarily requires a determination of whether dumping will recur. Thus, the 'injury' review that [is believed to be] 'warranted' on the basis of three years and six months' no dumping would be entirely dependent upon a determination of whether dumping will recur. ... The mere fact of three years and six months' findings of no dumping does not require the investigating authority to, in addition,

<sup>23</sup> Panel Report, *US – DRAMS*, para. 6.48, fn 494.

<sup>24</sup> Panel Report, *US – DRAMS*, para. 6.58.



self-initiate a review of 'whether the injury would be likely to continue or recur if the duty were removed or varied'."<sup>25</sup>

21. In a footnote to the statement quoted in paragraph 22 below, the Panel in *US – DRAMS* noted:

"[B]y virtue of note 9 of the AD Agreement, the term 'injury' in Article 11.2 'shall be interpreted in accordance with the provisions of' Article 3. Article 3.5 of the AD Agreement requires the establishment of a causal link between the dumped imports and the injury found to exist. Thus, we consider that the Article 11.2 examination of 'whether the injury would be likely to continue or recur if the duty were removed or varied' may also involve an examination of whether any injury that is found to be likely to continue or recur is caused by dumped imports. We can envisage circumstances, however, when an Article 11.2 injury review need not necessarily include an examination of causal link."<sup>26</sup>

22. The Panel in *EC – Tube or Pipe Fittings*, in interpreting the phrase "where warranted" stated:

"[T]he phrase 'where warranted' in Article 11.2 to denote circumstances furnishing good and sufficient grounds for, or justifying, the self-initiation of a review. Where an investigating authority determines such circumstances to exist, an investigating authority must self-initiate a review. Such a review, once initiated, will examine whether continued imposition of the duty is necessary to offset dumping, whether the dumping would be likely to continue or recur, or both. Article 11.2 therefore provides a review mechanism to ensure that Members comply with the rule contained in Article 11.1."<sup>27</sup>

23. As the Panel pointed out, "the determination of whether or not good and sufficient grounds exist for the self-initiation of a review necessarily depends upon the factual situation in a given case and will necessarily vary from case to case".<sup>28</sup>

### 1.3.6 "duty": company-specific or order-wide concept?

24. The Panel in *US – Shrimp II (Viet Nam)* held that "duty" could be interpreted as referring to the duty on an order-wide or company-specific basis. In so finding, the Panel also pointed out that "duty" within the meaning of Article 11.2 need not be understood in exactly the same way as in Article 11.3. According to the Panel, depending on who made the request, the investigating authority will decide whether to conduct a company-specific or order-wide determination. It added, however, that where the request for a review covers both dumping and injury, the authority will have to review the order as a whole:

"In our view the term 'duty' as it is used in Article 11.2 can be interpreted to mean either a company-specific duty or an order-wide duty. While the Appellate Body has interpreted the term 'duty', as it is used in Article 11.3, to refer to the duty as a whole, on an order-wide basis, the term 'duty' in Article 11.2 need not, in our view, be understood identically as it is in Article 11.3. The reasons for this are, as discussed in more detail below, first, the different purposes of the provisions; second, the reference to 'interested parties' in Article 11.2, the fact that Article 11.2 refers to the term 'dumping' on its own (independently of the concept of injury) and the three different kinds of examinations that may be requested by an interested party under the second sentence of Article 11.2; and third, the reference to price undertakings in Article 11.5 and in the title of Article 11.

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<sup>25</sup> Panel Report, *US – DRAMS*, para. 6.59.

<sup>26</sup> Panel Report, *US – DRAMS*, fn 501.

<sup>27</sup> Panel Report, *EC – Tube or Pipe Fittings*, para. 7.112.

<sup>28</sup> Panel Report, *EC – Tube or Pipe Fittings*, para. 7.115.



In light of our understanding of the term 'duty' in Article 11.2, we consider that an authority has some – but not unlimited – discretion in deciding whether to undertake a review on an order-wide or on a company-specific basis. This discretion is fettered by the right of an interested party to request an examination of certain matters pursuant to the second sentence of Article 11.2. The situation will be different in each case and will depend on both the specific request made by the interested party and the evidence submitted by that party substantiating the need for a review. For example, an investigating authority may decide, in response to a request to examine whether the continued imposition of the duty is necessary to offset dumping, that it only needs to undertake a review on a company-specific basis. Equally, the authority may decide to undertake a review of the duty on an order-wide basis. By contrast, if the request made by the interested party is for the examination of the need for the continued imposition of the duty with respect to both dumping and injury, then the authority in our view is required to undertake a review of the order as a whole, as the consideration of all dumped imports would be a necessary element of determining whether injury is likely to continue or recur if the duty were removed or varied. In any event, while Article 11.2 does not specify in what circumstances an authority should undertake a review on a company-specific basis and in what circumstances it should undertake a review on an order-wide basis, it does impose an obligation on the authority to undertake a review of the need for the continued imposition of the duty and to make a determination when an interested party submits a request meeting the requirements set therein."<sup>29</sup>

25. The Panel in *US – Shrimp II (Viet Nam)* faulted the USDOC for refusing to make company-specific determinations for companies that requested the review, in two reviews conducted pursuant to Article 11.2, solely because these companies were not individually examined in the reviews. In this regard, the Panel disagreed with the United States' argument that "the Article 6.10 'limited examination' exception applies in the context of Article 11.2 reviews, such that the USDOC was not obligated to conduct a review where it was requested to do so by a producer/exporter that was not being individually examined."<sup>30</sup> According to the Panel, Article 6.10 does not allow an investigating authority to refuse to conduct a company-specific determination in an Article 11.2 review for a company that so requests:

"Article 11.4 provides that the provisions of Article 6 regarding evidence and procedure apply to reviews conducted under Article 11.2. However, the Appellate Body has indicated (in the context of interpreting Article 11.3) that Article 11.4 does not import the requirements under Article 6 into Article 11 wholesale. As noted above, Article 11.2 provides little or no guidance for the authorities as to the methodology or criteria for the conduct of a review under that provision. We consider that, for the same reasons as led the Appellate Body to its conclusion regarding the interpretation of Article 11.3 in light of Article 11.4, nothing requires the authorities to calculate individual margins of dumping in the context of an Article 11.2 review. Moreover, in our view the reference in Article 11.4 to the 'limited examination' exception in Article 6.10 does not allow an authority to refuse to conduct a review under Article 11.2 when the conditions set forth in that provision are otherwise fulfilled, on the basis that the producer/exporter requesting revocation is not being individually examined or was not individually examined in prior reviews or proceedings.

Even assuming that Article 6.10 applies in Article 11.2 reviews in the same way as it does in original investigations, the USDOC's decision not to undertake the requested reviews in the proceedings at issue cannot be justified on the basis of that Article. There is no indication that the USDOC considered whether – or determined that – initiating the reviews sought by Vietnamese producers/exporters was impracticable; rather, it preconditioned the review on the requesting producer/exporter having been selected for individual examination in the corresponding administrative review. Moreover, by requiring that only companies selected for individual examination were eligible to obtain a company-specific revocation, the USDOC imposed an additional

<sup>29</sup> Panel Report, *US – Shrimp II (Viet Nam)*, paras. 7.369 and 7.376.

<sup>30</sup> Panel Report, *US – Shrimp II (Viet Nam)*, para. 7.386.

condition, not foreseen under Article 11.2, on the initiation of reviews under that provision."<sup>31</sup>

### **1.3.7 Relationship with other paragraphs of Article 11**

26. The *US – DRAMS* Panel touched on the relationship between Article 11.1 and Article 11.2. See paragraph 7 above.

27. The relationship between Article 11.2 and Article 11.3 was also discussed in *US – DRAMS*. See the excerpts quoted in paragraphs 10 and 19 above. The relationship between Article 11.2 and footnote 22 to Article 11.3 was addressed by the Panel in *US – DRAMS*. See paragraph 13 above.

## **1.4 Article 11.3**

### **1.4.1 General**

#### **1.4.1.1 Mandating rule / exception**

28. The Appellate Body in *US – Corrosion-Resistant Steel Sunset Review* considered that Article 11.3 lays down a mandatory rule with an exception and thus imposes a temporal limitation on the imposition of anti-dumping duties:

"Specifically, Members are required to terminate an anti-dumping duty within five years of its imposition 'unless' the following conditions are satisfied: first, that a review be initiated before the expiry of five years from the date of the imposition of the duty; second, that in the review the authorities determine that the expiry of the duty would be likely to lead to continuation or recurrence of *dumping*; and third, that in the review the authorities determine that the expiry of the duty would be likely to lead to continuation or recurrence of *injury*. If any one of these conditions is not satisfied, the duty must be terminated."<sup>32</sup>

29. The Appellate Body in *US – Oil Country Tubular Goods Sunset Reviews* also viewed the continuation of an anti-dumping duty as "an exception to the otherwise mandated expiry of the duty after five years".<sup>33</sup>

30. In addition to interpreting the text of Article 11.1 (as outlined above), the Panel in *Pakistan – BOPP Film (UAE)* set out its interpretation of Article 11.3. In the light of the ordinary meaning of the terms "determine", "review", and "likely", the Panel considered that a Member may not rely solely on assumption or speculation when conducting a likelihood analysis during a sunset proceeding:

"Together, these terms indicate that a Member may not rely solely on assumption or speculation when conducting a likelihood analysis during a sunset proceeding but must, instead, conduct its examination on the basis of positive evidence so as to arrive at a reasoned determination, resting on a sufficient factual basis, that dumping and injury are 'likely' – i.e. probable and not merely possible – to continue or recur."<sup>34</sup>

31. The Panel also noted the connections between Article 11.3, on the one hand, and Articles 2 and 3, on the other hand. For example, the Panel considered that if an investigating authority chooses to rely on dumping margins to determine the likelihood of continuation or recurrence of dumping, it must do so consistently with Article 2.<sup>35</sup> The Panel then considered that, if an investigating authority chooses to evaluate certain of the factors listed in Article 3 to determine the likelihood of the continuation or recurrence of injury, it must do so consistently with Article 3.<sup>36</sup>

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<sup>31</sup> Panel Report, *US – Shrimp II (Viet Nam)*, paras. 7.388-7.389.

<sup>32</sup> Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 104.

<sup>33</sup> Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 178.

<sup>34</sup> Panel Report, *Pakistan – BOPP Film (UAE)*, para. 7.543.

<sup>35</sup> Panel Report, *Pakistan – BOPP Film (UAE)*, para. 7.544.

<sup>36</sup> Panel Report, *Pakistan – BOPP Film (UAE)*, para. 7.545.

32. The Panel also noted that Article 11.3 requires an investigating authority to ascertain whether the expiry of a duty "would be likely to lead to" the continuation or recurrence of dumping and injury:

"Finally, Article 11.3 requires the authority to 'determine ... that the expiry of the duty *would be likely to lead to* continuation or recurrence of dumping and injury'. Thus, Article 11.3 requires the authority to ascertain whether there is a relationship (or 'nexus') between the expiry of a duty, on the one hand, and continuation or recurrence of dumping and injury, on the other, such that the former 'would be likely to lead to' the latter."<sup>37</sup>

33. In the light of its understanding of the applicable legal requirements in Article 11.3, the Panel turned to consider whether Pakistan's investigating authority's (NTC) determination that dumping was likely to continue or recur from the UAE was inconsistent with Article 11.3.<sup>38</sup>

34. First, the Panel found that the "likely dumping margins" calculated by the NTC were subject to Article 2:

"In sum, the calculations performed by the NTC, the provisions the NTC invoked and the wording it used in its determination, taken together, indicate that the NTC calculated margins of dumping and relied upon them in determining whether dumping was likely to continue or recur. Thus, the NTC first calculated normal values, and in order to do so, it turned to the questionnaire responses of the cooperating exporters and stated that it would construct normal value on the basis of the cost data submitted by those exporters. It then calculated an export price, and derived margins of dumping by comparing the normal values and export prices it had so established. In doing so, it cited provisions of domestic law concerning the definition and determination of dumping, normal value, and dumping margins. We note, in addition, that the NTC set out the results of this exercise in a table entitled 'Dumping Margins'. All of these elements taken together, which we have described in more detail above, indicate that the NTC calculated margins of dumping. Immediately after setting out its calculations of dumping margins, the NTC stated that '[o]n the basis of above information and analysis the [NTC] has reached the conclusion [that] there is likelihood of continuation or recurrence of dumping of the product under review if antidumping duties imposed on it are terminated': that is, it relied on those margins in determining that dumping was likely to continue or recur. While Article 11.3 does not require authorities to calculate (or otherwise rely upon) dumping margins in a sunset review, when an authority is in a position to rely on dumping margins and chooses to rely on dumping margins under Article 11.3, these must conform to the requirements of Article 2. Therefore, given that the NTC chose to calculate and rely upon dumping margins in determining whether dumping was likely to continue or recur, these dumping margins are subject to the requirements of Article 2."<sup>39</sup>

35. The Panel subsequently found that the NTC had constructed normal value without establishing that the conditions for doing so were met:

"We have found above that the NTC relied upon margins of dumping that are subject to the requirements of Article 2. However, the NTC constructed normal value without establishing the existence of any of the three situations in which an authority may construct normal value pursuant to Article 2.2. Therefore, the NTC constructed normal value inconsistently with Article 2.2. It was on the basis of this normal value that the NTC calculated the margin of dumping that it relied on to determine that dumping was likely to continue or recur. As a result, the NTC's determination that dumping was likely to continue or recur was inconsistent with Article 11.3."<sup>40</sup>

36. Further, the Panel found that the NTC had failed to provide any explanation of how its findings had supported the conclusion that dumping was likely to continue or recur:

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<sup>37</sup> Panel Report, *Pakistan – BOPP Film (UAE)*, para. 7.546.

<sup>38</sup> Panel Report, *Pakistan – BOPP Film (UAE)*, para. 7.547.

<sup>39</sup> Panel Report, *Pakistan – BOPP Film (UAE)*, para. 7.560.

<sup>40</sup> Panel Report, *Pakistan – BOPP Film (UAE)*, para. 7.566.

"Second, we have found that the NTC failed to provide any explanation of how its finding that major export destinations of the investigated countries remained the same or similar related to its conclusion that dumping was likely to continue or recur. Third, we have found that the NTC's finding of exportable surplus was not based on positive evidence, and also that the NTC failed to explain how the export data it relied upon supported its conclusion that dumping was likely to continue or recur."<sup>41</sup>

37. The Panel considered that, while a determination made under Article 11.3 must be based on positive evidence and not on assumption, the NTC's finding that the termination of anti-dumping duties would likely result in an increase in imports was essentially conclusory in nature:

"We recall that, under Article 11.3, an authority must determine that the continuation or recurrence of injury is likely, and not merely possible, and that this determination must be based on positive evidence and not on assumption.

We note that the NTC reasoned that, since after the imposition of anti-dumping duties imports had declined and domestic production had increased, it was likely that the opposite would happen if the duties were removed. While the fact that imports declined significantly and domestic production increased significantly after the imposition of the anti-dumping duties suggests that it is *possible* that the opposite could happen upon removal of the duties, the NTC did not explain *why* it considered these developments to be *likely* to occur (and not just possible). Given the absence of any further explanation in this regard, we are of the view that the NTC's finding that 'termination of antidumping duties will likely result in an increase in imports of the product under review which will affect adversely ... the productions of the domestic like product' was essentially conclusory in nature. We therefore find that the NTC failed to provide a reasoned and adequate explanation to support its finding that imports of BOPP film would likely increase in the event anti-dumping duties on these imports were to be removed."<sup>42</sup>

38. Subsequently, the Panel also found that the NTC's finding concerning the likely effects of the expiry of the anti-dumping duties on market share was the result of an assumption and was not supported by a reasoned and adequate explanation:

"The NTC found that after the imposition of anti-dumping duties, the market share of the domestic industry had increased, the market share of the dumped imports had decreased significantly, and the market share of imports from other sources had remained stable. On that basis, the NTC concluded that expiry of the anti-dumping duties would likely lead to an increase in imports of the product under review and therefore in the market share of the dumped imports, and 'therefore' would 'likely affect adversely' the domestic industry's market share.

...

We further note that similar to its findings on imports and domestic production, the NTC appears to have assumed that, because dumped imports had decreased and the market share of the domestic industry had increased following the introduction of the anti-dumping duties, the opposite would happen upon removal of the duties. We therefore find that the NTC did not provide a reasoned and adequate explanation of why these developments were likely to occur, and not just possible."<sup>43</sup>

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<sup>41</sup> Panel Report, *Pakistan – BOPP Film (UAE)*, para. 7.594.

<sup>42</sup> Panel Report, *Pakistan – BOPP Film (UAE)*, paras. 7.602-7.603. See also *ibid.* para. 7.615.

<sup>43</sup> Panel Report, *Pakistan – BOPP Film (UAE)*, paras. 7.605 and 7.608. The Panel also made similar findings with respect to the NTC's findings that the removal of the anti-dumping duties would likely lead to the continuation or recurrence of price undercutting and price depression. (See *ibid.* paras. 7.610 and 7.614-7.619.)

### 1.4.1.2 Difference between original investigation and sunset reviews

39. With respect to the determination of a likelihood of recurrence or continuation of dumping and injury, the Appellate Body in *US – Corrosion-Resistant Steel Sunset Review* noted that, as this likelihood determination is a prospective determination: "the authorities must undertake a forward-looking analysis and seek to resolve the issue of what would be likely to occur if the duty were terminated".<sup>44</sup> In this respect, the Appellate Body pointed to the important difference between original investigations and sunset reviews:

"In an original anti-dumping investigation, investigating authorities must determine whether *dumping exists* during the period of investigation. In contrast, in a sunset review of an anti-dumping duty, investigating authorities must determine whether the expiry of the duty that was imposed at the conclusion of an original investigation would be *likely to lead to continuation or recurrence of dumping*."<sup>45</sup>

40. The Panel in *Ukraine – Ammonium Nitrate* made a distinction between making an injury determination in the context of a sunset review and considering the state of the domestic industry following the imposition of original duties, and held that "just because an investigating authority considers the existing state of the domestic industry, based, *inter alia*, on various factors and indices showing the performance of that industry, does not mean that it was seeking to establish that the domestic industry was suffering material injury during the period of review".<sup>46</sup>

41. The Panel in *EU – Cost Adjustment Methodologies II (Russia)* addressed claims by Russia that the European Commission's analysis and determination concerning the likelihood of recurrence of injury were inconsistent with Articles 3 and 11.3 of the Anti-Dumping Agreement. The European Union countered that, for these claims, only Article 11.3 applied.<sup>47</sup>

42. In determining which legal standard was relevant for its examination of Russia's claims relating to a determination of the likelihood of recurrence of injury, the Panel recalled the Appellate Body's statements in *US – Corrosion-Resistant Steel Sunset Review* (reproduced in part in paragraph 39 above).<sup>48</sup> The Panel noted that the Appellate Body had distinguished the analysis to be undertaken in an expiry review (pursuant to Article 11.3) from that in an original investigation (pursuant to Article 3):

"The likelihood determination is a prospective determination. In other words, the authorities must undertake a forward-looking analysis and seek to resolve the issue of what would be likely to occur if the duty were terminated. In considering the nature of a likelihood determination in a sunset review under Article 11.3, we recall our statement in *US – Carbon Steel*, in the context of the SCM Agreement, that:

... original investigations and sunset reviews are distinct processes with different purposes. The nature of the determination to be made in a sunset review differs in certain essential respects from the nature of the determination to be made in an original investigation.

This observation applies also to original investigations and sunset reviews under the Anti-Dumping Agreement. In an original anti-dumping investigation, investigating authorities must determine whether *dumping exists* during the period of investigation. In contrast, in a sunset review of an anti-dumping duty, investigating authorities must determine whether the expiry of the duty that was imposed at the conclusion of an original investigation would be *likely to lead to continuation or recurrence of dumping*."<sup>49</sup>

43. The Panel in *EU – Cost Adjustment Methodologies II (Russia)* also recalled the conclusion drawn by the panel in *EU – Footwear* that, in an expiry review, "an anti-dumping measure has

<sup>44</sup> Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 105.

<sup>45</sup> Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 107.

<sup>46</sup> Panel Report, *Ukraine – Ammonium Nitrate*, para. 7.183.

<sup>47</sup> Panel Report, *EU – Cost Adjustment Methodologies II (Russia)*, paras. 7.359, 7.361.b, and 7.377.

<sup>48</sup> Panel Report, *EU – Cost Adjustment Methodologies II (Russia)*, para. 7.378.

<sup>49</sup> Panel Report, *EU – Cost Adjustment Methodologies II (Russia)*, para. 7.378.

been in place for some time". In that panel's view, this would require a "fresh analysis" to "determine whether the expiry of that measure would be likely to lead to continuation or recurrence of injury":

"In original anti-dumping investigations, investigating authorities must determine whether the domestic industry of a Member is materially injured by dumped imports. At this stage, the focus is on the existence of 'material injury' at the time of the determination. That determination is made under Article 3, based on information concerning the necessary and relevant factors for some previous period. In contrast, in an expiry review, an anti-dumping measure has been in place for some time, and investigating authorities must, based on a fresh analysis, determine whether the expiry of that measure would be likely to lead to continuation or recurrence of injury."<sup>50</sup>

44. The Panel thus considered that, if the requirements of Article 3 of the Anti-Dumping Agreement apply to the determination of injury in the context of an original investigation, they do not apply directly in the context of an expiry review. The Panel also noted that the Appellate Body stated clearly in *US – Oil Country Tubular Goods Sunset Review* that "investigating authorities are not *mandated* to follow the provisions of Article 3 when making a likelihood-of-injury determination".<sup>51</sup>

45. While the Panel agreed with these past panel and Appellate Body rulings on this issue, it was also mindful that the provisions of Article 3 of the Anti-Dumping Agreement, although not directly applicable, could be relevant to its interpretation of the obligations contained in Article 11.3.<sup>52</sup>

46. On this point, the Panel took into consideration the statements of the Appellate Body in *US – Oil Country Tubular Goods Sunset Review* (reproduced in part in paragraph 67) that the requirements in Article 3.1 would be equally relevant to likelihood determinations under Article 11.3, but that the necessity of conducting such an analysis would arise from Article 11.3, not Article 3.1:

"This is not to say, however, that in a sunset review determination, an investigating authority is never required to examine any of the factors listed in the paragraphs of Article 3. Certain of the analyses mandated by Article 3 and necessarily relevant in an original investigation may prove to be probative, or possibly even required, in order for an investigating authority in a sunset review to arrive at a 'reasoned conclusion'. In this respect, we are of the view that the fundamental requirement of Article 3.1 that an injury determination be based on 'positive evidence' and an 'objective examination' would be equally relevant to likelihood determinations under Article 11.3. It seems to us that factors such as the volume, price effects, and the impact on the domestic industry of dumped imports, taking into account the conditions of competition, may be relevant to varying degrees in a given likelihood-of-injury determination. An investigating authority may also, in its own judgement, consider other factors contained in Article 3 when making a likelihood-of-injury determination. But the necessity of conducting such an analysis in a given case results from the requirement imposed by Article 11.3 -not Article 3- that a likelihood-of-injury determination rest on a 'sufficient factual basis' that allows the agency to draw 'reasoned and adequate conclusions'."<sup>53</sup>

47. The Panel also recalled the statement of the panel in *EU – Footwear (China)* that a determination of injury under Article 3 is not required under Article 11.3:

"In our view, a failure to examine relevant factors set out in the substantive provisions of Article 3 in the determination of likelihood of continuation or recurrence of injury could preclude an investigating authority from reaching a 'reasoned conclusion', which would result in a violation of Article 11.3 of the AD Agreement. However, we recall

<sup>50</sup> Panel Report, *EU – Cost Adjustment Methodologies II (Russia)*, para. 7.379.

<sup>51</sup> Panel Report, *EU – Cost Adjustment Methodologies II (Russia)*, para. 7.380.

<sup>52</sup> Panel Report, *EU – Cost Adjustment Methodologies II (Russia)*, para. 7.381.

<sup>53</sup> Panel Report, *EU – Cost Adjustment Methodologies II (Russia)*, para. 7.381.

that a determination of injury under Article 3 is not required under Article 11.3. Thus, we do not consider that all factors relevant to an injury determination under Article 3 are necessarily relevant to a determination of likelihood of continuation or recurrence of injury under Article 11.3."<sup>54</sup>

48. Thus, in the light of the above-referenced interpretations of Article 11.3, the Panel concluded that the requirements of Article 3 are equally relevant to likelihood determinations under Article 11.3, but that an investigating authority is not required to comply with these requirements in making a likelihood-of-injury determination. The Panel thus rejected Russia's claim concerning the inconsistency of the European Union's determination of the likelihood of recurrence of injury under Article 3. The Panel referred to Article 3 as context in examining any alleged inconsistencies under Article 11.3:

"Therefore, while the fundamental requirement of Article 3.1 that an injury determination be based on 'positive evidence' and an 'objective examination' are equally relevant to likelihood determinations under Article 11.3, we take the view that an investigating authority is not obliged to comply with the provisions of Article 3 in making a likelihood-of-injury determination, unless that determination is based on a finding of material injury. As a consequence, we reject Russia's claim related to the consistency of the European Union's likelihood of recurrence of injury determination with Article 3 of the Anti-Dumping Agreement. Instead, we will examine the determinations made by the European Commission in light of the obligations contained in Article 11.3 of the Anti-Dumping Agreement. In doing so, we will refer to the provisions of Article 3 as context, as necessary and depending upon the nature of the determinations made by the European Commission, for interpreting the obligations contained in Article 11.3."<sup>55</sup>

#### 1.4.1.3 Active role of investigating authorities

49. Based on an analysis of the various terms used in Article 11.3, the Appellate Body in *US – Corrosion-Resistant Steel Sunset Review*, then reached the following general conclusions:

"This language in Article 11.3 makes clear that it envisages a process combining *both* investigatory and adjudicatory aspects. In other words, Article 11.3 assigns an active rather than a passive decision-making role to the authorities. The words 'review' and 'determine' in Article 11.3 suggest that authorities conducting a sunset review must act with an appropriate degree of diligence and arrive at a reasoned conclusion on the basis of information gathered as part of a process of reconsideration and examination. In view of the use of the word 'likely' in Article 11.3, an affirmative likelihood determination may be made only if the evidence demonstrates that dumping would be probable if the duty were terminated—and not simply if the evidence suggests that such a result might be possible or plausible."<sup>56</sup>

50. The Panel in *EU – Footwear (China)* held that the principles set out by the Appellate Body in *US – Corrosion-Resistant Steel Sunset Review* with regard to likelihood or continuation of dumping determinations also applied in connection with the likelihood of continuation or recurrence of injury determinations in expiry reviews.<sup>57</sup> In the Panel's view, the same logic applies to the causation analysis, including the assessment of factors other than dumped imports causing injury to the domestic industry.<sup>58</sup> The Panel also found:

"In our view, a failure to examine relevant factors set out in the substantive provisions of Article 3 in the determination of likelihood of continuation or recurrence of injury could preclude an investigating authority from reaching a 'reasoned conclusion', which would result in a violation of Article 11.3 of the AD Agreement. However, we recall that a determination of injury under Article 3 is not required under Article 11.3. Thus,

<sup>54</sup> Panel Report, *EU – Cost Adjustment Methodologies II (Russia)*, para. 7.382.

<sup>55</sup> Panel Report, *EU – Cost Adjustment Methodologies II (Russia)*, para. 7.383.

<sup>56</sup> Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 111. See also Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 179.

<sup>57</sup> Panel Report, *EU – Footwear (China)*, para. 7.331.

<sup>58</sup> Panel Report, *EU – Footwear (China)*, para. 7.495.



we do not consider that all factors relevant to an injury determination under Article 3 are necessarily relevant to a determination of likelihood of continuation or recurrence of injury under Article 11.3."<sup>59</sup>

51. The Panel in *US – Corrosion-Resistant Steel Sunset Review* underlined the importance of the need for sufficient positive evidence on which to base the likelihood determination:

"The requirement to make a 'determination' concerning likelihood therefore precludes an investigating authority from simply assuming that likelihood exists. In order to continue the imposition of the measure after the expiry of the five-year application period, it is clear that the investigating authority has to determine, on the basis of positive evidence, that termination of the duty is likely to lead to continuation or recurrence of dumping and injury. An investigating authority must have a sufficient factual basis to allow it to draw reasoned and adequate conclusions concerning the likelihood of such continuation or recurrence."<sup>60</sup>

52. The Panel in *EU – Cost Adjustment Methodologies II (Russia)* addressed Russia's claim that the European Union had failed to perform proper undercutting calculations to ensure that a likelihood of injury determination rested on a "sufficient factual basis" to allow the investigating authority to arrive at a reasoned conclusion under Article 11.3. The Panel began by recalling the Appellate Body's statements in paragraph 51 above, noting the requirements for making a "determination" concerning likelihood.<sup>61</sup>

53. The Panel then considered it relevant for its analysis that the requirements of "positive evidence" and "objective examination" contained in Article 3.1 of the Anti-Dumping Agreement relate to two essential elements of an injury analysis:

"a. the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products; and

b. the consequent impact of these imports on domestic producers of such products."<sup>62</sup>

54. The Panel noted that these elements, as compulsory aspects of an "objective examination" of injury, could be relevant in the context of an "objective examination" of the likelihood of recurrence of injury in an expiry review. These two elements would include reference to multiple factors set forth in Article 3 that an investigating authority could take into account when making a likelihood of injury determination:

"Thus, 'factors such as the volume, price effects, and the impact on the domestic industry of dumped imports, taking into account the conditions of competition, may be relevant to varying degrees in a given likelihood-of-injury determination. [But] [a]n investigating authority may also, in its own judgement, consider other factors contained in Article 3 when making a likelihood-of-injury determination'".<sup>63</sup>

55. The Panel was particularly mindful that, in an expiry review, an anti-dumping measure would already be in place for some time. In the Panel's view, investigating authorities must conduct a fresh analysis to determine whether the expiry of such an anti-dumping measure would be likely to lead to the continuation or the recurrence of injury.<sup>64</sup> For this reason, the Panel disagreed with Russia that a price undercutting analysis, based on a comparison of the price of Russian exports of ammonium nitrate (AN) to the Union market with the price of domestic producers, would have provided a more objective basis for assessing the likelihood of recurrence of injury.<sup>65</sup>

<sup>59</sup> Panel Report, *EU – Footwear (China)*, para. 7.333.

<sup>60</sup> Panel Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 7.271. The Appellate Body agreed with this view. Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 114.

<sup>61</sup> Panel Report, *EU – Cost Adjustment Methodologies II (Russia)*, para. 7.406.

<sup>62</sup> Panel Report, *EU – Cost Adjustment Methodologies II (Russia)*, para. 7.407.

<sup>63</sup> Panel Report, *EU – Cost Adjustment Methodologies II (Russia)*, para. 7.408.

<sup>64</sup> Panel Report, *EU – Cost Adjustment Methodologies II (Russia)*, para. 7.409.

<sup>65</sup> Panel Report, *EU – Cost Adjustment Methodologies II (Russia)*, para. 7.409.

56. The Panel added that Russian import prices could not be used for the purpose of assessing the likelihood of recurrence of injury in the present dispute, as the anti-dumping measures in place necessarily had an impact on the volume and price of Russian AN imports in the Union market:

"As the European Commission recognized, Russian import prices could not be used for this purpose as they were subject to a price undertaking or in any case affected by the anti-dumping duties. In this regard, we find that the reasons set out by the European Commission for disregarding the export price of Russian exporters which had committed to a price undertaking to be reasoned and adequate. We are of the view that the anti-dumping measures in place necessarily have an impact on the volume and price of Russian AN imports in the Union market. As such, the price of those imports cannot be considered as a reliable indicator of the future behaviour of Russian producers/exporters, should the measures lapse. Further, we agree with the European Union that investigating authorities 'are not restricted in the choice of methodology they will follow, as long as they arrive at reasoned conclusions on the basis of positive evidence.'"<sup>66</sup>

57. The Panel noted the variety of factors used in the European Commission's determination, including the export price of Russian exports to third countries, the spare capacity in Russia, and the attractiveness of the Union market and the other third markets. The Panel noted that the European Commission had relied on the export price of the sampled Russian producers/exporters to third countries for purposes of estimating future export prices that would no longer be subject to a price undertaking. As noted by the Panel, the European Commission had considered that the future export prices would enter the Union market at an average price level below the import prices from the third countries, and that the current cost of production and resulting non-injurious price were unlikely to decrease:

"In the present case, we note that the European Commission's determination is based on a variety of factors, including the export price of Russian exports to third countries, the spare capacity in Russia and the attractiveness of the Union market and other third markets. On this last point, the European Commission found that it was 'unclear how [Russian exporters subject to a price undertaking] would set their prices if the undertakings lapse together with the anti-dumping duties'. It thus relied on the export price of the sampled Russian producers/exporters to third countries in order to estimate 'at what prices those additional exports from companies not subject to a price undertaking [were] likely to take place'. In particular, the authority noted: 'it is likely that Russian exports from companies not subject to a price undertaking, in the absence of anti-dumping measures, would enter the Union market at an average price level below that of the import prices from third countries and also below that of imports from Russia under the undertaking, which are at the higher end of the non-injurious target price of the Union industry.' In addition, the investigating authority found that 'the current cost of production, and therefore the current non-injurious price is unlikely to decrease in the short term, given the trend of increased cost of production during the period considered'."<sup>67</sup>

58. The Panel ultimately concluded that, in the context of the forward-looking analysis that the European Commission conducted, the investigating authority was not obliged to consider whether dumped imports during the review investigation period (i.e. in the past) had "explanatory force" for the significant depression or suppression of domestic prices. The Panel noted that the European Commission had examined the likely impact on domestic prices of future imports of Russian AN, should the measures lapse.<sup>68</sup>

59. The Panel therefore rejected Russia's claim that the European Union breached Article 11.3 of the Anti-Dumping Agreement by failing to consider whether there had been a significant price undercutting by the dumped imports, as compared with the prices of the EU domestic industry.<sup>69</sup>

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<sup>66</sup> Panel Report, *EU – Cost Adjustment Methodologies II (Russia)*, para. 7.409.

<sup>67</sup> Panel Report, *EU – Cost Adjustment Methodologies II (Russia)*, para. 7.410.

<sup>68</sup> Panel Report, *EU – Cost Adjustment Methodologies II (Russia)*, para. 7.411.

<sup>69</sup> Panel Report, *EU – Cost Adjustment Methodologies II (Russia)*, para. 7.412.

#### 1.4.1.4 Positive evidence

60. The Panel in *US – Corrosion-Resistant Steel Sunset Review* expressed its view on the use of historical data as a basis for the inherently prospective likelihood determination of Article 11.3:

"Future 'facts' do not exist. The only type of facts that exist and that may be established with certainty and precision relate to the past and, to the extent they may be accurately recorded and evaluated, to the present. We recall that one of the fundamental goals of the Anti-Dumping Agreement as a whole is to ensure that objective determinations are made, based, to the extent possible, on facts. Thus, to the extent that it will rest upon a factual foundation, the prospective likelihood determination will inevitably rest on a factual foundation relating to the past and present. The investigating authority must evaluate this factual foundation and come to a reasoned conclusion about likely future developments."<sup>70</sup>

61. The Appellate Body in *US – Oil Country Tubular Goods Sunset Reviews* adopted a similar approach to the need to base a prospective likelihood determination on "positive evidence":

"The requirements of 'positive evidence' must, however, be seen in the context that the determinations to be made under Article 11.3 are prospective in nature and that they involve a 'forward-looking analysis'. Such an analysis may inevitably entail assumptions about or projections into the future. Unavoidably, therefore, the inferences drawn from the evidence in the record will be, to a certain extent, speculative. In our view, that some of the inferences drawn from the evidence on record are projections into the future does not necessarily suggest that such inferences are not based on 'positive evidence'."<sup>71</sup>

62. The Panel in *EU – Cost Adjustment Methodologies II (Russia)* addressed Russia's challenges of certain determinations made by the European Union's investigating authority in the context of a third expiry review on ammonium nitrate (AN) from Russia.<sup>72</sup> Russia had relied on the position of the panel in *US – Corrosion-Resistant Steel Sunset Review*, summarized in part above in paragraph 60, to argue that dumping determinations subject to Article 2 are relevant factors in a likelihood of recurrence of dumping determination:

"In the present case, Russia relies on the panel's position in *US – Corrosion-Resistant Steel Sunset Review* that a 'prospective likelihood determination will inevitably rest on a factual foundation relating to the past and present' to argue that dumping determinations subject to Article 2 are relevant factors in a likelihood of recurrence of dumping determination. Russia further submits that 'should investigating authorities choose to rely upon dumping margins in making their likelihood determination, the calculation of these margins must conform to the disciplines of Article 2.4.' Further, '[i]f these margins were legally flawed because they were calculated in a manner inconsistent with Article 2.4, this could give rise to an inconsistency not only with Article 2.4, but also with Article 11.3 of the Anti-Dumping Agreement.' In such circumstances, 'the likelihood[-of-dumping] determination could not constitute a proper foundation for the continuation of anti-dumping duties under Article 11.3'."<sup>73</sup>

63. The Panel agreed with Russia that any dumping margins used by an investigating authority to examine the likelihood of recurrence of dumping in an expiry review should be established in a manner consistent with Article 2 of the Anti-Dumping Agreement. Nevertheless, the Panel considered that Article 11.3 does not require investigating authorities to calculate or rely on dumping margins to determining the likelihood of recurrence of dumping. The Panel elaborated on its reasoning in the following manner:

"The Panel agrees with Russia's basic assumption that, should an authority rely on dumping margins to examine the likelihood of recurrence of dumping in an expiry review, these dumping margins should be established in a manner consistent with the

<sup>70</sup> Panel Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 7.279.

<sup>71</sup> Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 341.

<sup>72</sup> Panel Report, *EU – Cost Adjustment Methodologies II (Russia)*, para. 7.505.

<sup>73</sup> Panel Report, *EU – Cost Adjustment Methodologies II (Russia)*, para. 7.513.

provisions of Article 2 of the Anti-Dumping Agreement. Otherwise, they could not support an objective examination of the likelihood of recurrence of dumping. However, Russia fails to put the Appellate Body's finding in context: in its clearest statement on the distinction between dumping determinations and likelihood of recurrence determinations, the Appellate Body set out plainly that 'we see no obligation under Article 11.3 for investigating authorities to calculate or rely on dumping margins in determining the likelihood of ... recurrence of dumping.' The Appellate Body then continued, as Russia quotes, '[h]owever, should investigating authorities choose to rely upon dumping margins in making their likelihood determination'. In the present case, as we will discuss below, we do not consider that the European Commission in fact relied upon dumping margins, either previously established or calculated afresh, in determining the likelihood of recurrence of dumping."<sup>74</sup>

#### 1.4.2 No specific methodology

64. The Panel in *US – Corrosion-Resistant Steel Sunset Review* considered that Article 11.3 does not expressly prescribe any specific methodology for investigating authorities to use in making a likelihood determination in a sunset review:

"Similarly, we observe that Article 11.3 is silent as to how an authority should or must establish that dumping is likely to continue or recur in a sunset review. That provision itself prescribes no parameters as to any methodological requirements that must be fulfilled by a Member's investigating authority in making such a "likelihood" determination."<sup>75</sup>

65. This view was confirmed by the Appellate Body in *US – Corrosion-Resistant Steel Sunset Review*. It thus considered that "no obligation is imposed on investigating authorities to calculate or rely on dumping margins in a sunset review."<sup>76</sup> According to the Appellate Body, "in a sunset review, dumping margins may well be relevant to, but they will not necessarily be conclusive of, whether the expiry of the duty would be likely to lead to continuation or recurrence of dumping."<sup>77</sup>

66. However, the Appellate Body in *US – Corrosion-Resistant Steel Sunset Review* added, should investigating authorities choose to rely upon dumping margins in making their likelihood determination, the calculation of these margins must conform to the disciplines of Article 2 in general and Article 2.4 in particular: "If these margins were legally flawed because they were calculated in a manner inconsistent with Article 2.4, this could give rise to an inconsistency not only with Article 2.4, but also with Article 11.3 of the Anti-Dumping Agreement."<sup>78</sup> In such circumstances, "the likelihood[-of-dumping] determination could not constitute a proper foundation for the continuation of anti-dumping duties under Article 11.3."<sup>79</sup>

67. The Panel in *US – Oil Country Tubular Goods Sunset Reviews* came to a similar conclusion with respect to the likelihood of injury determination. According to the Panel, obligations contained in the various paragraphs of Article 3 do not "normally" apply to sunset reviews:

"Just as the Appellate Body stated that an investigating authority is not required to make a dumping determination in a sunset review, we consider that an investigating authority is not required to make an injury determination in a sunset review. It follows, then, that the obligations set out in Article 3 do not normally apply to sunset reviews."<sup>80</sup>

68. However, the Panel was of the view that, to the extent that an investigating authority relies on a determination of injury when conducting a sunset review, the obligations of Article 3 would apply to that determination:

<sup>74</sup> Panel Report, *EU – Cost Adjustment Methodologies II (Russia)*, para. 7.513.

<sup>75</sup> Panel Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 7.166.

<sup>76</sup> Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 123.

<sup>77</sup> Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 124.

<sup>78</sup> Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 127.

<sup>79</sup> Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 130.

<sup>80</sup> Panel Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 7.273.

"If, however, an investigating authority decides to conduct an injury determination in a sunset review, or if it uses a past injury determination as part of its sunset determination, it is under the obligation to make sure that its injury determination or the past injury determination it is using conforms to the relevant provisions of Article 3. For instance, Article 11.3 does not mention whether an investigating authority is required to calculate the price effect of future dumped imports on the prices of the domestic industry. In our view, this means that an investigating authority is not necessarily required to carry out that calculation in a sunset review. However, if the investigating authority decides to do such a calculation, then it would be bound by the relevant provisions of Article 3 of the Agreement. Similarly, if, in its sunset injury determinations, an investigating authority uses a price effect calculation made in the original investigation or in the intervening reviews, it has to assure the consistency of that calculation with the existing provisions of Article 3."<sup>81</sup>

69. The Appellate Body in *US – Oil Country Tubular Goods Sunset Reviews* agreed with this approach by the Panel. The Appellate Body considered that "when Article 11.3 requires a determination as to the likelihood of continuation or recurrence of 'injury', the investigating authority must consider the continuation or recurrence of 'injury' as defined in footnote 9."<sup>82</sup> According to the Appellate Body, "it does not follow, however, from this single definition of 'injury', that all of the provisions of Article 3 are applicable in their entirety to sunset review determinations under Article 11.3".<sup>83</sup> The Appellate Body went on to conclude:

"In our view, however, the Anti-Dumping Agreement distinguishes between 'determination[s] of injury', addressed in Article 3, and determinations of likelihood of 'continuation or recurrence ... of injury', addressed in Article 11.3. In addition, Article 11.3 does not contain any cross-reference to Article 3 to the effect that, in making the likelihood-of-injury determination, all the provisions of Article 3 – or any particular provisions of Article 3 – *must* be followed by investigating authorities. Nor does any provision of Article 3 indicate that, wherever the term 'injury' appears in the Anti-Dumping Agreement, a determination of injury must be made following the provisions of Article 3."<sup>84</sup>

70. The Appellate Body in *US – Oil Country Tubular Goods Sunset Reviews* concluded that "investigating authorities are not *mandated* to follow the provisions of Article 3 when making a likelihood-of-injury determination".<sup>85</sup> However, the Appellate Body added, this does not imply that in a sunset review determination, an investigating authority is never required to examine any of the factors listed in the paragraphs of Article 3:

"Certain of the analyses mandated by Article 3 and necessarily relevant in an original investigation may prove to be probative, or possibly even required, in order for an investigating authority in a sunset review to arrive at a 'reasoned conclusion'. In this respect, we are of the view that the fundamental requirement of Article 3.1 that an injury determination be based on 'positive evidence' and an 'objective examination' would be equally relevant to likelihood determinations under Article 11.3. It seems to us that factors such as the volume, price effects, and the impact on the domestic industry of dumped imports, taking into account the conditions of competition, may be relevant to varying degrees in a given likelihood-of-injury determination. An investigating authority may also, in its own judgement, consider other factors contained in Article 3 when making a likelihood-of-injury determination. But the necessity of conducting such an analysis in a given case results from the requirement imposed by *Article 11.3* – not Article 3 – that a likelihood-of-injury determination rest on a 'sufficient factual basis' that allows the agency to draw 'reasoned and adequate conclusions'."<sup>86</sup>

<sup>81</sup> Panel Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 7.274. See also Panel Report, *EU – Footwear (China)*, para. 7.337.

<sup>82</sup> Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 276.

<sup>83</sup> Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 277.

<sup>84</sup> Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 278.

<sup>85</sup> Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 281.

<sup>86</sup> Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 284.

71. The Panel in *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)* articulated further the freedom of an investigating authority to choose its own methodology to determine the likelihood of continuation or recurrence of dumping, cautioning that the investigating authority would nevertheless need to act with an appropriate degree of diligence:

"Article 11.3 requires investigating authorities to terminate an anti-dumping duty not later than five years from its imposition unless they determine in a review initiated before then that dumping and injury are likely to continue or recur should the duty be revoked. Article 11.3 does not, however, set out a specific methodology for making such determinations. In principle, therefore, investigating authorities are not restricted in the choice of methodology they will follow in making their sunset determinations. In their choice of methodology, however, the investigating authorities should have regard to both 'investigatory and adjudicatory aspects' of sunset reviews and make forward-looking determinations on the basis of evidence relating to the past. They must arrive at reasoned conclusions on the basis of positive evidence. In so doing, the investigating authorities may not remain passive. Rather, the authorities have to act with an 'appropriate degree of diligence'."<sup>87</sup>

72. In *US – Zeroing (Japan)*, the Panel determined that in making two sunset review determinations at issue, the US Department of Commerce relied on margins of dumping established in prior proceedings when making its likelihood-of-dumping calculations; the Appellate Body held that because zeroing in periodic reviews is inconsistent as such with Articles 2.4 and 9.3, the likelihood-of-dumping determinations were inconsistent with Article 11.3 because they relied on margins calculated inconsistently with the Agreement.<sup>88</sup>

73. The Panel in *US – Continued Zeroing* found that to the extent that a sunset review determination is based on previous margins obtained through a methodology that is inconsistent with the covered agreements, the resulting sunset review determinations would also be inconsistent with the covered agreements; it found that eight sunset review determinations were inconsistent with Article 11.3 because they relied on margins obtained through model zeroing in prior investigations.<sup>89</sup> The Appellate Body upheld this finding, and concluded that:

"[T]he application and continued application of anti-dumping duties is inconsistent with Article 11.3 of the Anti-Dumping Agreement to the extent that reliance is placed upon a margin of dumping calculated through the use of the zeroing methodology in making sunset review determinations."<sup>90</sup>

74. The Panel in *US – Shrimp II (Viet Nam)* found that the United States had acted inconsistently with Article 11.3 by using in a sunset review past dumping margins that had been calculated inconsistently with the Anti-Dumping Agreement<sup>91</sup>. However, the Panel agreed with the United States' argument that reliance on WTO-inconsistent factors may not always render a likelihood determination inconsistent with Article 11.3, but found that such reliance did lead to a violation of Article 11.3 in the sunset review at issue:

"We agree with the United States that an investigating authority's reliance on WTO-inconsistent factors may not always be fatal to the consistency of a likelihood-of-dumping determination with Article 11.3. This may be the case, for instance, if there are separate independent bases for a determination, at least one of which is not inconsistent with WTO obligations, and a reviewing panel can conclude that the challenged determination rested on each of those multiple independent bases. Here, however, the determination contains no indication that the USDOC considered that the rate applied to two uncooperative companies and the declining import volumes constituted an independent basis or bases for the USDOC's likelihood-of-dumping determination or that the determination rested on such basis or bases. To be sure, there is language (albeit qualified) in the USDOC's likelihood-of-dumping determination suggesting that, in general, the USDOC would reach an affirmative

<sup>87</sup> Panel Report, *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*, para. 7.34.

<sup>88</sup> Appellate Body Report, *US – Zeroing (Japan)*, para. 185.

<sup>89</sup> Panel Report, *US – Continued Zeroing*, paras. 7.195-7.196.

<sup>90</sup> Appellate Body Report, *US – Continued Zeroing*, paras. 394 and 395(v).

<sup>91</sup> Panel Report, *US – Shrimp II (Viet Nam)*, para. 7.312.

likelihood-of-dumping determination where any dumping continues after the imposition of the order, which suggests that the first two factors referred to by the United States in this regard could form the basis for an affirmative determination. It is, however, clear from the determination itself that the USDOC's consideration of the existence of dumping in this instance rests upon all the different margins of dumping – margins for mandatory respondents, separate rate and Viet Nam-wide entity rate that – it had calculated in each of the reviews. The USDOC discusses these various dumping margins together, and does not consider the two margins for the uncooperative respondents separately, other than when rebutting an argument of Vietnamese interested parties. Hence, we are unable to conclude in the present instance that the USDOC's determination rested upon WTO-consistent bases that were separate and independent from the WTO-inconsistent margins and rates upon which it relied."<sup>92</sup>

75. The Panel in *EU – Footwear (China)* held that while Articles 2 and 3 of the Anti-Dumping Agreement are not relevant to a likelihood determination made under Article 11.3, even if the investigating authority chooses to make a determination of dumping or injury in the context of an expiry review, such provisions are nevertheless relevant to a panel's consideration of whether there has been a violation of Article 11.3 in a given expiry review:

"Thus, it is clear to us that Articles 2 and 3 of the AD Agreement are not directly applicable to a determination under Article 11.3, and thus to a panel's consideration of an alleged violation of Article 11.3. Moreover, our view in this regard is not changed by the fact that an investigating authority chooses to make a determination of dumping or injury in the context of a particular expiry review. ...

However, this does not mean that the substantive provisions of Articles 2 and 3 of the AD Agreement are not relevant to our consideration of whether there has been a violation of Article 11.3. We recall that a determination under Article 11.3 must be based on positive evidence, have a sufficient factual basis, involve a rigorous examination, and be supported by reasoned and adequate conclusions. In our view, the substantive provisions of Articles 2 and 3 may well be relevant to an analysis under Article 11.3, in order for an investigating authority to be able to make 'reasoned conclusions' regarding of likelihood of continuation or recurrence of dumping and injury. We will address this question further in the context of our consideration of China's claims concerning the dumping and injury aspects of the expiry review."<sup>93</sup>

#### 1.4.3 Use of presumptions in a likelihood determination

76. The Appellate Body in *US – Corrosion-Resistant Steel Sunset Review* clearly stated that the use of presumptions may be inconsistent with an obligation to make a particular determination in each case using positive evidence. It considered "that a firm evidentiary foundation is required in each case for a proper determination under Article 11.3 of the likelihood of continuation or recurrence of dumping. Such a determination cannot be based solely on the mechanistic application of presumptions."<sup>94</sup>

77. The Appellate Body in *US – Corrosion-Resistant Steel Sunset Review* saw no problem in investigating authorities being instructed to examine, in every sunset review, dumping margin and import volumes.<sup>95</sup> However, it noted that the significance and probative value of the two factors for a likelihood determination in a sunset review will necessarily vary from case to case. It stated that it "would have difficulty accepting that dumping margins and import volumes are always 'highly probative' in a sunset review by the United States Department of Commerce if this means that either or both of these factors are presumed, by themselves, to constitute sufficient evidence that the expiry of the duty would be likely to lead to continuation or recurrence of dumping."<sup>96</sup> The Appellate Body thus concluded that the consistency of the provisions of a measure with Article 11.3 hinges upon whether those provisions instruct the investigating authority to treat

<sup>92</sup> Panel Report, *US – Shrimp II (Viet Nam)*, para. 7.317.

<sup>93</sup> Panel Report, *EU – Footwear (China)*, paras. 7.157-7.158.

<sup>94</sup> Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 178.

<sup>95</sup> Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 208.

<sup>96</sup> Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 177.



"dumping margins and/or import volumes as determinative or conclusive, on the one hand, or merely indicative or probative, on the other hand, of the likelihood of future dumping."<sup>97</sup>

78. The Panel in *US – Oil Country Tubular Goods Sunset Reviews* considered that a scheme that attributes a "determinative" / "conclusive" value to certain factors in sunset determinations – as opposed to only an indicative value – is likely to violate Article 11.3 of the Anti-Dumping Agreement.<sup>98</sup> On appeal, the Appellate Body considered that the Panel had correctly articulated the standard for determining whether a measure was inconsistent, as such, with Article 11.3 of the Anti-Dumping Agreement.<sup>99</sup>

79. The Panel in *US – Oil Country Tubular Goods Sunset Reviews* considered that both the so-called deemed waiver and affirmative waiver provisions of United States law were inconsistent with Article 11.3 because they required an authority to make an affirmative determination of likelihood of continuation or recurrence of dumping, without taking into consideration the facts submitted by the exporter filing an incomplete submission, or without any further inquiry in the event where the exporter filed no submission or declared its intention not to participate in the review.<sup>100</sup> On appeal, the Appellate Body agreed with the Panel's analysis:

"Because the waiver provisions require the USDOC to arrive at affirmative company-specific determinations without regard to any evidence on record, these determinations are merely *assumptions* made by the agency, rather than findings supported by evidence. The United States contends that respondents waiving the right to participate in a sunset review do so 'intentionally', with full knowledge that, as a result of their failure to submit evidence, the evidence placed on the record by the domestic industry is likely to result in an unfavourable determination on an order-wide basis. In these circumstances, we see no fault in making an unfavourable order-wide determination by taking into account evidence provided by the domestic industry in support thereof. However, the USDOC also takes into account, in such circumstances, statutorily-mandated *assumptions*. Thus, even assuming that the USDOC takes into account the totality of record evidence in making its order-wide determination, it is clear that, as a result of the operation of the waiver provisions, certain *order-wide* likelihood determinations made by the USDOC will be based, at least in part, on statutorily-mandated *assumptions* about a company's likelihood of dumping. In our view, this result is inconsistent with the obligation of an investigating authority under Article 11.3 to 'arrive at a reasoned conclusion' on the basis of 'positive evidence'."<sup>101</sup>

#### 1.4.4 Determination regarding likelihood or continuation or recurrence of dumping

80. In *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*, the section 129 determination (i.e. the sunset review determination by the USDOC) was based on two findings: (1) likely past dumping, and (2) the United States Department of Commerce's volume analysis from the original sunset review.<sup>102</sup> In relation to the first claim, Argentina argued that reliance on past dumping was inconsistent with Article 11.3. In relation to the volume analysis, Argentina claimed that: (a) it was part of the US Department of Commerce's measure taken to comply; and (b) that Argentine exporters had tried to explain that the decline in volume was due to other factors, which were not addressed by the USDOC.

##### 1.4.4.1 Likely past dumping

81. The Panel in *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*, quickly dismissed Argentina's first claim, citing an insufficient factual basis by the USDOC in its analysis of likely past dumping. This was based on the United States Department of Commerce's failure to seek information about home market prices:

<sup>97</sup> Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 178.

<sup>98</sup> Panel Report, *US – Oil Country Tubular Goods Sunset Reviews*, paras. 7.142-7.143.

<sup>99</sup> Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 197.

<sup>100</sup> Panel Report, *US – Oil Country Tubular Goods Sunset Reviews*, paras. 7.93-7.99.

<sup>101</sup> Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 234.

<sup>102</sup> Panel Report, *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*, para. 7.63.

"The parties' arguments raise two important issues. The first issue is whether the USDOC's finding of likely past dumping was a *determination of dumping*. The second issue is whether the USDOC's reliance upon a finding of *likely* past dumping as one of the bases of its determination of the likelihood of continuation or recurrence of dumping was consistent with Article 11.3 of the Agreement. In our view, however, a definitive resolution of these questions regarding the USDOC's Section 129 Determination is not necessary to our assessment of Argentina's claim. This flows from our view that even if this was *not* a *determination of dumping* as the United States asserts, and even if relying on *likely* past dumping was appropriate – issues which we do not here address – the USDOC's analysis of *likely past dumping* lacked a sufficient factual basis.

...

[T]he concept of dumping is, in the first instance, a comparison of home market and export prices. Only in the circumstances set forth in Article 2.2 may an investigating authority look to alternative bases to home market prices, such as costs, when determining normal value.

In the sunset review at issue, the USDOC did not *even ask* Acindar to provide information regarding its normal value and export price. Rather, it restricted itself to asking for certain cost information and, when that cost information was not provided, compared Acindar's export prices to the United States, obtained from the US customs authorities, with the prevailing prices in the US market. The failure to seek information about Acindar's home market prices means that the USDOC made a finding of likely dumping without making any effort to obtain information that is essential to the core principle of dumping as a price-to-price comparison. We do not see how a finding of *likely past dumping* could have a sufficient factual basis if it did not take into account at a bare minimum these elementary aspects of the concept of *dumping* as that term is used in the Anti-Dumping Agreement."<sup>103</sup>

#### 1.4.4.2 Volume analysis

82. The Panel in *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*, found that the volume analysis from the original sunset review was part of the "measure taken to comply", as claimed by Argentina:

"According to the United States, since the volume analysis was incorporated by reference, without any change, and the original panel made no findings with respect to this analysis, it is not part of the measure taken to comply. We recall that the function of a compliance panel under Article 21.5 of the DSU is to assess the existence or WTO-consistency of measures taken by a Member to comply with the DSB recommendations and rulings. Thus, as a compliance panel, we base our assessment on the measure taken to comply with the DSB recommendations and rulings. The United States describes the measure taken to comply with the recommendations and rulings of the DSB in a certain manner. We do not consider, however, that we are bound by such description. In compliance proceedings under Article 21.5 of the DSU, it is for the Panel, and not the parties to the dispute, to determine what constitutes the measure taken to comply. As the United States itself acknowledges, the text of the Section 129 Determination at issue makes it clear that one of the two main underpinnings of the USDOC's order-wide likelihood determination was the volume analysis carried over from the original sunset review. The USDOC based its order-wide determination on its finding regarding likely past dumping as well as the volume analysis from the original sunset review. As such, we consider the volume analysis from the original sunset review to have become an integral part of the Section 129 Determination. In our view, therefore, the volume analysis from the original sunset

<sup>103</sup> Panel Report, *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*, paras. 7.74 and 7.76-7.77.

review is part of the measure taken to comply by the United States and hence is properly before us in these proceedings."<sup>104</sup>

83. In support of its defence that the volume analysis was not part of the "measure taken to comply", the United States argued before the Panel in *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*, that the Appellate Body decision in *EC – Bed Linen (Article 21.5 – India)* supported its position. The Panel found the facts of *EC – Bed Linen (Article 21.5 – India)* to be sufficiently "distinguishable from the case before us" and confirmed, given its previous findings, that the volume analysis did form part of the measure taken to comply.<sup>105</sup>

84. The Panel in *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)* next considered whether the USDOC's analysis was consistent with Article 11.3 of the Anti-Dumping Agreement given Argentina's claim that other factors having an impact on the volume of imports had not been taken into account. In the Panel's view, the USDOC's finding regarding the decline in the volume of imports "was not based on a thorough evaluation of the possible causes of such decline"<sup>106</sup>:

"In our view, the USDOC's finding regarding the decline in the volume of imports was not based on a thorough evaluation of the possible causes of such decline. The decline could have resulted from a variety of other factors, which could theoretically indicate no likelihood of continuation or recurrence of dumping. In other words, it is possible that despite a decline in the volume of imports, there may not be likelihood of continuation or recurrence of dumping. In fact, Siderca, in its response to the USDOC's questionnaire, attempted to explain why the decline in the volume of Siderca's exports to the United States following the imposition of the measure at issue did not necessarily mean that Siderca could not export with the measure in place. The United States contends that Siderca's comments were weakly supported and did not explain why Siderca stopped shipping to the United States. The United States may or may not be correct in its proposition. We are by no means suggesting that Siderca's arguments should have been accepted by the USDOC. The fact remains, however, that the Section 129 Determination fails to examine potential reasons, other than a likelihood of continuation or recurrence of dumping, that could have triggered the decline in the volume of imports. This is not, in our view, the kind of determination that would be made by an unbiased and objective investigating authority. The USDOC's determination regarding the decline in the volume of imports lacks a sufficient factual basis."<sup>107</sup>

85. The Panel in *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)* concluded that the USDOC's order-wide determination to be inconsistent with Article 11.3 of the Anti-Dumping Agreement. This finding was appealed by the United States.

86. The Appellate Body in *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)* upheld the Panel's finding that the USDOC's finding on import volumes was part of the "measure taken to comply". Accordingly, the Panel's findings regarding the decline in the volume of imports was also upheld:

"The USDOC's reasoning in the Section 129 Determination indicates that the two factual premises operated together to support the determination of likelihood of dumping. The affirmative determination of likelihood of dumping follows consideration of both the finding of likely dumping during the time the anti-dumping duty order was in place and the finding that the volume of imports declined after the imposition of the order. Because the likelihood-of-dumping determination in the Section 129 Determination is premised on both bases, which together support the affirmative likelihood determination, we consider that the USDOC's finding that the volume of imports declined after imposition of the anti-dumping duty order is an integral part of the 'measure taken to comply' in this case. ...

<sup>104</sup> Panel Report, *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*, para. 7.91.

<sup>105</sup> Panel Report, *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*, para. 7.96.

<sup>107</sup> Panel Report, *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*, para. 7.101.

We further note that the Appellate Body considered in *US – Softwood Lumber IV (Article 21.5 – Canada)* that '[s]ome measures with a particularly close relationship to the declared 'measure taken to comply', and to the recommendations and rulings of the DSB, may also be susceptible to review by a panel acting under Article 21.5.' The Appellate Body noted that this 'requires an Article 21.5 panel to examine the factual and legal background against which a declared 'measure taken to comply' is adopted' because '[o]nly then is a panel in a position to take a view as to whether there are sufficiently close links for it to characterize such an other measure as one 'taken to comply' and, consequently, to assess its consistency with the covered agreements in an Article 21.5 proceeding.' If a measure that is formally separate from, but closely linked to, a declared 'measure taken to comply' can fall within the scope of an Article 21.5 proceeding, this would suggest *a fortiori* that, when both factual bases are relied upon for a likelihood-of-dumping determination, they can be considered by an Article 21.5 panel when assessing the consistency of that determination with Article 11.3.

...

Furthermore, we recall that the aim of Article 21.5 of the DSU is to promote the prompt compliance with DSB recommendations and rulings and the consistency of 'measures taken to comply' with the covered agreements by making it unnecessary for a complainant to begin new proceedings and by making efficient use of the original panelists and their relevant experience. These considerations support the Panel's finding that the volume analysis was properly before it. Requiring Argentina to initiate new WTO proceedings against the United States in order to challenge the USDOC's finding on import volumes would entail a significant delay. Moreover, it would be difficult to reconcile this with the objective that Article 21.5 panels 'examine fully the 'consistency with a covered agreement of the measures taken to comply', as required by [that provision]'. Finally, it seems difficult to conceive how the two factual bases could each be examined by separate panels (one of which is operating pursuant to Article 21.5), considering that both factual premises together support the USDOC's likelihood-of-dumping determination."<sup>108</sup>

#### 1.4.5 Order-wide basis of a likelihood determination

87. In its report on *US – Corrosion-Resistant Steel Sunset Review*, the Appellate Body addressed the question whether authorities must make a separate determination, for each individual exporter or producer, on whether the expiry of the duty would be likely to lead to continuation or recurrence of dumping by that exporter or producer or whether it would be possible to make a single order-wide determination on whether revocation of a particular anti-dumping duty order would be likely to lead to continuation or recurrence of dumping. The Appellate Body considered that, on its face, Article 11.3 does not oblige investigating authorities in a sunset review to make "company-specific" likelihood determinations:

"We reiterate that Article 11.3 does not prescribe any particular methodology to be used by investigating authorities in making a likelihood determination in a sunset review. In particular, Article 11.3 does not expressly state that investigating authorities must determine that the expiry of the duty would be likely to lead to dumping *by each known exporter or producer concerned*. In fact, Article 11.3 contains no express reference to individual exporters, producers, or interested parties. This contrasts with Article 11.2, which does refer to 'any interested party' and '[i]nterested parties'. We also note that Article 11.3 does not contain the word 'margins', which might implicitly refer to individual exporters or producers. On its face, Article 11.3 therefore does not oblige investigating authorities in a sunset review to make 'company-specific' likelihood determinations in the manner suggested by Japan."<sup>109</sup>

<sup>108</sup> Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*, paras. 146-147, and 151.

<sup>109</sup> Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 149. See also *ibid.* para.155.

88. In the compliance proceeding, the Panel in *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)* noted that following the regulatory amendments in the United States, the waiver provisions only required the USDOC to find likelihood of continuation or recurrence of dumping with respect to exporters who *affirmatively* waived their right to participate. However, the US law also required the USDOC to make its sunset determinations on an order-wide basis. Therefore, the question for the Panel was what impact, if any, a company-specific determination of likelihood might have on the USDOC's order-wide determination.<sup>110</sup> The Panel addressed this question as follows:

"We find it difficult to understand how the USDOC would find no likelihood of continuation or recurrence of dumping on an order-wide basis in a sunset review where it may have made an affirmative likelihood determination for some exporters pursuant to Section 751(c)(4)(B) of the Tariff Act. Given that Section 751(c)(4)(B) requires the USDOC to make an affirmative likelihood determination for individual exporters who waive their right to participate, it seems to us that such company-specific determinations would necessarily have a significant impact on, or even determine, the outcome of the USDOC's order-wide determination. Hence, we can reasonably conclude that in every sunset review involving multiple exporters the USDOC will have to find likelihood on an order-wide basis if one exporter waives its right to participate, because otherwise the USDOC would have found no likelihood with respect to the exporters who waive their right to participate.

Making an affirmative finding of likelihood of continuation or recurrence of dumping from a country without considering the information that may have been submitted by exporters who do not waive their right to participate in the sunset review would not, in our view, be a reasoned determination premised on an adequate factual basis. As we noted above, the investigating authorities are expected to be sufficiently active in sunset reviews in developing the necessary factual premise for their determinations. The provisions of Section 751(c)(4)(B) of the Tariff Act, however, would preclude the USDOC from taking into consideration evidence submitted by cooperating exporters or evidence otherwise collected by the USDOC in sunset reviews where there is at least one other exporter who waives its right to participate. In such cases, the USDOC's order-wide determination would be based on the assumption that because one exporter waived its right to participate and acknowledged to be likely to continue or resume dumping, other exporters are also likely to continue or resume dumping. The USDOC would thus be ignoring the information which is relevant to its sunset determination and which is readily available to it and would fail to observe the obligation of the investigating authorities to make reasoned determinations of likelihood of continuation or recurrence of dumping based on a sufficient factual premise in accordance with Article 11.3 of the Agreement."<sup>111</sup>

89. The Panel in *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)* found Section 751(c)(4)(B) of the Tariff Act, operating in conjunction with Section 751(c)(4)(A) of the Tariff Act and Section 351.218(d)(2) of the Regulations to be inconsistent with Article 11.3 of the Anti-Dumping Agreement. On appeal, the Appellate Body faulted the Panel for not giving sufficient weight to the United States' explanations on the ground that such explanations were not reflected in a written legal instrument under US law:

"First, the Panel did not fully appreciate the consequences that flow from the fact that, under the amended waiver provisions, the company-specific findings are now based on positive evidence taking the form of an admission. Secondly ... Argentina did not set out to demonstrate that the company-specific findings determine the outcome of the order-wide determination. Rather, Argentina sought to prove that 'the order-wide determination will be based, at least in part, on statutorily-mandated findings', which Argentina claims is sufficient to establish a violation of Article 11.3 of the *Anti-Dumping Agreement*.

<sup>110</sup> Panel Report, *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*, paras. 7.37–7.38.

<sup>111</sup> Panel Report, *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*, paras. 7.39–7.40.

In addition, we note that the Panel concluded that the amended waiver provisions 'would preclude the USDOC from taking into consideration evidence submitted by cooperating exporters or evidence otherwise collected by the USDOC in sunset reviews where there is at least one other exporter who waives its right to participate'. The Panel also concluded that 'company-specific determinations would necessarily have a significant impact on, or even determine, the outcome of the USDOC's order-wide determination.' However, the United States emphasized before the Panel that, '[i]n making its order-wide determination, [the USDOC] *must* consider all information and argument on the record of the sunset proceeding.' Furthermore, the United States pointed out that 'the relevance of ... a company-specific finding to the ultimate likelihood determination always would depend on the facts on the administrative record in that sunset review.'

We observe that a respondent's explanation of the basis on which its investigating authority will make a determination will have more weight if it is confirmed by the text of the applicable laws or regulations. But the United States' statements that the USDOC must consider all information and arguments on the record, and that the relevance of a company-specific finding to the order-wide likelihood determination would always depend on the facts of each case, cannot be rejected merely because there is no legal instrument that expressly requires the USDOC to act in this way. This is insufficient to support properly a finding of inconsistency as such. Thus, the Panel's reasoning seems speculative, and this is reflected in the language used in the Panel Report."<sup>112</sup>

#### 1.4.6 No prescribed time-frame for likelihood of continuation or recurrence of injury

90. The Panel in *US – Oil Country Tubular Goods Sunset Reviews* noted that Article 11.3 of the Anti-Dumping Agreement does not prescribe any time-frame for likelihood of continuation or recurrence of injury; nor does it require investigating authorities to specify the time-frame on which their likelihood determination is based:

"As we already stated, Article 11.3 does not impose a particular time-frame on which the investigating authority has to base its likelihood determination. Further, in our view, the investigating authority does not have to base its likelihood determination on a uniform time-frame with respect to each injury factor that it takes into consideration. The time-frame regarding different injury factors may be different from one another depending on the circumstances of each sunset review. For instance, in a case where the exporters have excessive inventories, the investigating authority's evaluation of likely volume of dumped imports can be based on a relatively short time-frame. On the other hand, an analysis regarding the cash flows or productivity of the domestic industry may necessarily have to be based on a longer time-frame."<sup>113</sup>

91. The Appellate Body in *US – Oil Country Tubular Goods Sunset Reviews* agreed with the Panel that "an assessment regarding whether injury is likely to recur that focuses "too far in the future would be highly speculative", and that it might be very difficult to justify such an assessment. However, like the Panel, we have no reason to believe that the standard of a "reasonably foreseeable time" set out in the United States statute is inconsistent with the requirements of Article 11.3."<sup>114</sup> The Appellate Body rejected the argument that the requirement set out in Article 3.7 that the threat of material injury be "imminent" is to be imported into Article 11.3 in the form of a temporal limitation on the time-frame within which "injury" must be determined to continue or recur. The Appellate Body considered that "sunset reviews are not subject to the detailed disciplines of Article 3, which include the specific requirement of Article 3.7".<sup>115</sup>

<sup>112</sup> Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews* (Article 21.5 – Argentina), paras. 118-120.

<sup>113</sup> Panel Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 7.187.

<sup>114</sup> Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 360.

<sup>115</sup> Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 358.



92. In addition, the Appellate Body in *US – Oil Country Tubular Goods Sunset Reviews* rejected the argument that an authority would be required to specify the relevant time-frame for injury to continue or recur for the authority's determination to be a "properly reasoned and supported determination":

"As we have noted above, the text of Article 11.3 does not establish any requirement for the investigating authority to specify the timeframe on which it bases its determination regarding injury. Thus, the mere fact that the timeframe of the injury analysis is not presented in a sunset review determination is not sufficient to undermine that determination. Article 11.3 requires that a determination of likelihood of continuation or recurrence of injury rest on a sufficient factual basis to allow the investigating authority to draw reasoned and adequate conclusions. A determination of injury can be properly reasoned and rest on a sufficient factual basis even though the timeframe for the injury determination is not explicitly mentioned."<sup>116</sup>

#### 1.4.7 Applicability of procedural obligations

##### 1.4.7.1 Evidentiary standards for initiation

93. The Panel in *US – Corrosion-Resistant Steel Sunset Review* rejected the argument that the same evidentiary standards that apply to the self-initiation of original investigations under Article 5.6 also apply to the self-initiation of sunset reviews under Article 11.3. The Panel based itself on the text of Article 11.3:

"As Japan concedes, Article 11.3, on its face, does not mention, either explicitly or by way of reference, any evidentiary standard that should or must apply to the self-initiation of sunset reviews. Article 11.3 contemplates initiation of a sunset review in two alternative ways, as is evident through the use of the word 'or'. Either the authorities make their determination in a review initiated 'on their own initiative', or they make their determination in a review initiated 'upon a duly substantiated request made by or on behalf of the domestic industry'. Although Article 11.3 provides for a certain qualification regarding initiations based on complaints lodged by the domestic industry – that such requests be 'duly substantiated' – the text clearly indicates that this qualification is germane only to that specific situation and does not apply to self-initiations. Consequently, since the drafters did not set forth any evidentiary requirements for the self-initiation of sunset reviews in the text of Article 11.3 itself, at first blush, it seems to us that they intended not to impose any evidentiary standards in respect of the self-initiation of a sunset review."<sup>117</sup>

94. The Panel in *US – Corrosion-Resistant Steel Sunset Review* found further support for its conclusion in the absence of any cross-referencing in Article 11 to the evidentiary standards concerning original investigations in Article 5.6:

"Although paragraphs 4 and 5 of Article 11 contain several cross-references to other articles in the *Anti-Dumping Agreement*, no such cross-reference has been made in the text of Article 11 to Article 5.6. These cross-references (as well as other cross-references in the *Anti-Dumping Agreement*, such as, for example, in Article 12.3) indicate that, when the drafters intended to make a particular provision also applicable in a different context, they did so explicitly. Therefore, their failure to include a cross-reference in the text of Article 11.3, or, for that matter, in any other paragraph of Article 11, to Article 5.6 (or *vice versa*) demonstrates that they did not intend to make the evidentiary standards of Article 5.6 applicable to sunset reviews."<sup>118</sup>

95. The Panel in *EU – Cost Adjustment Methodologies II (Russia)* examined the applicable legal standard for a request for an expiry review to be "duly substantiated" as stated in Article 11.3 of the Anti-Dumping Agreement.<sup>119</sup> The Panel referred to the Appellate Body report in *US – Carbon Steel* and noted that the provision in the SCM Agreement corresponding to Article 11.3 does not

<sup>116</sup> Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 364.

<sup>117</sup> Panel Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 7.26.

<sup>118</sup> Panel Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 7.27.

<sup>119</sup> Panel Report, *EU – Cost Adjustment Methodologies II (Russia)*, para. 7.325.



contain a cross-reference to the provision governing the initiation of original countervailing duty investigations. The Panel considered that the same arrangement applies in the Anti-Dumping Agreement:

"In *US – Carbon Steel* the Appellate Body noted that Article 21.3 of the SCM Agreement (the provision corresponding to Article 11.3 of the Anti-Dumping Agreement) does not contain a cross-reference to Article 11 of the SCM Agreement (which governs the initiation of original countervailing duty investigations). We note that the same is true for the Anti-Dumping Agreement: Article 11.3 does not cross-reference Article 5, which is thus only applicable to the initiation of original investigations. As the panel in *US – Corrosion-Resistant Steel Sunset Review* explained:

[C]ross-references [in the Anti-Dumping Agreement] indicate that, when the drafters intended to make a particular provision also applicable in a different context, they did so explicitly. Therefore, their failure to include a cross-reference in the text of Article 11.3, or, for that matter, in any other paragraph of Article 11, to Article 5.6 (or *vice versa*) demonstrates that they did not intend to make the evidentiary standards of Article 5.6 applicable to sunset reviews."<sup>120</sup>

96. The Panel agreed with the Appellate Body's line of reasoning, noting that the absence of any such cross-reference in the Anti-Dumping Agreement means that the standard for the initiation of an expiry review is different from the standard required for the initiation of an original investigation:

"The absence of any cross-reference in Article 11.3 to Article 5.3 must be understood to imply that the standard for the initiation of an expiry review is different from the standard required for the initiation of an original investigation, and that the standard in Article 5.3 of the Anti-Dumping Agreement does not apply to an expiry review. We also agree that it follows from a plain reading of the text that the appropriate standard against which to determine whether an expiry review has been properly initiated under Article 11.3 of the Anti-Dumping Agreement is whether the complainant has provided sufficient evidence that dumping and injury are likely to recur in the absence of anti-dumping measures to warrant initiation. The request is not required to demonstrate, as a certainty, that if the measures were to lapse, dumping and injury would be likely to recur or continue."<sup>121</sup>

97. The Panel also examined Russia's claim that the request for the initiation of the expiry review was not duly substantiated because it was based on allegations of likelihood of continuation of dumping, which relied on a margin of dumping that was determined in a manner inconsistent with Article 2 of the Anti-Dumping Agreement. Russia maintained in particular that the alleged margin of dumping was based on (i) a constructed normal value calculated using a cost for gas which was not the cost of production "in the country of origin", and (ii) a comparison of the constructed normal value with the export price of the Russian ammonium nitrate (AN) when sold for export to Brazil, not to the European Union.<sup>122</sup>

98. The Panel noted that, in assessing whether a petition is duly substantiated, the investigating authority "must ensure that the evidence put forward by the petitioners is consistent with the information available to them at the time the petition is filed".<sup>123</sup> The Panel further added that an authority may also take into account assumptions made by the applicant but must explain why such assumptions substantiate the initiation of an expiry review, which the European Commission had failed to do:

"[T]his may include assumptions or reliance on estimates and proxies, which would not be considered as a reasonable basis for a final determination consistent with Article 11.3 of the Anti-Dumping Agreement. We also take the view that, if the

<sup>120</sup> Panel Report, *EU – Cost Adjustment Methodologies II (Russia)*, para. 7.325.

<sup>121</sup> Panel Report, *EU – Cost Adjustment Methodologies II (Russia)*, para. 7.333.

<sup>122</sup> Panel Report, *EU – Cost Adjustment Methodologies II (Russia)*, para. 7.344.

<sup>123</sup> Panel Report, *EU – Cost Adjustment Methodologies II (Russia)*, para. 7.348.

authority chooses to rely on assumptions made by the applicant, it must explain why such assumptions substantiate the initiation of an expiry review. In the third expiry review on ammonium nitrate, we consider that the notice of initiation fell short of providing such an explanation by failing to indicate that the normal value constructed by the applicant and 'verified' by the European Commission, was based on the cost of production in the country of origin."<sup>124</sup>

99. The Panel thus found that the European Union had failed to verify whether the constructed normal value included in the request was based on the cost of production in the country of origin, and, as a consequence, failed to ensure that the review request was duly substantiated, in violation of Article 11.3 of the Anti-Dumping Agreement.<sup>125</sup>

100. The Panel further found to be relevant the statements made by the Appellate Body in *US – Oil Country Tubular Goods Sunset Review* (reproduced in paragraph 70 above) and the panel in *EU – Footwear (China)* (reproduced in paragraph 50 above). In the light of these references, the Panel considered that an investigating authority is not obliged to comply with the provisions of Article 3 in making a likelihood of injury determination, unless that determination is based on a finding of material injury:

"Therefore, while the fundamental requirement of Article 3.1 that an injury determination be based on 'positive evidence' and an 'objective examination' are equally relevant to likelihood determinations under Article 11.3, we take the view that an investigating authority is not obliged to comply with the provisions of Article 3 in making a likelihood-of-injury determination, unless that determination is based on a finding of material injury. As a consequence, we reject Russia's claim related to the consistency of the European Union's likelihood of recurrence of injury determination with Article 3 of the Anti-Dumping Agreement. Instead, we will examine the determinations made by the European Commission in light of the obligations contained in Article 11.3 of the Anti-Dumping Agreement. In doing so, we will refer to the provisions of Article 3 as context, as necessary and depending upon the nature of the determinations made by the European Commission, for interpreting the obligations contained in Article 11.3."<sup>126</sup>

#### 1.4.7.2 New factual basis

101. The Panel in *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*, rejected Argentina's claim that the US Department of Commerce acted inconsistently with Articles 11.3 and 11.4 by developing a new factual basis pertaining to the original review period for the purposes of a sunset review. The Panel drew on *Mexico – Corn Syrup*, *Australia – Salmon*, and *Japan – Apples* for support in concluding that "WTO Members may need to collect new information supplementary to that on the record of their original determinations in making subsequent determinations in the context of implementing the DSB recommendations and rulings."<sup>127</sup> Argentina appealed this finding, but was unsuccessful.

102. In the appeal on *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*, Argentina made an argument that rested on a distinction between clarifying or explaining the original sunset determination, which would, in Argentina's view, be possible; and developing a new evidentiary basis for a re-determination because an investigating authority had not "developed an adequate evidentiary foundation for its original sunset determination", which Argentina submitted would not be possible under Articles 11.3 and 11.4.<sup>128</sup> Argentina also argued that allowing an investigating authority to develop a new evidentiary basis would "reduce to inutility the temporal limitations set out in Articles 11.3 and 11.4". The Appellate Body was not convinced by Argentina's arguments:

<sup>124</sup> Panel Report, *EU – Cost Adjustment Methodologies II (Russia)*, para. 7.348.

<sup>125</sup> Panel Report, *EU – Cost Adjustment Methodologies II (Russia)*, para. 7.349.

<sup>126</sup> Panel Report, *EU – Cost Adjustment Methodologies II (Russia)*, para. 7.383.

<sup>127</sup> Panel Report, *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*, para. 7.60.

<sup>128</sup> Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*, para. 163.

"Articles 11.3 and 11.4 [do not] provide a basis for drawing a distinction between allowing an investigating authority to clarify information, or provide further explanations, on the one hand, and to develop a new factual basis, on the other hand. At the oral hearing, Argentina itself recognized that an investigating authority clarifying information, or providing further explanations, would be allowed to gather additional information and develop some new facts relating to the original sunset review period. This illustrates the difficulty of drawing the distinction relied upon by Argentina, where collection of some facts is allowed to clarify information or provide further explanations, but not to develop a new factual basis.

Article 11.3 of the Anti-Dumping Agreement does not refer to the steps that an investigating authority may take to implement DSB recommendations and rulings or to the collection of evidence at that stage. Article 11.4 states that the provisions of Article 6 of the Anti-Dumping Agreement regarding evidence and procedure are applicable to sunset reviews. Article 6 contains several provisions relating to the collection of evidence, including several time periods. However, like Articles 11.3 and 11.4, Article 6 does not specifically refer to the collection of evidence for purposes of implementing DSB recommendations and rulings. Therefore, we do not consider that Articles 11.3 and 11.4 address the specific question of whether an investigating authority can develop a new evidentiary basis when implementing DSB recommendations and rulings.

...

Argentina argues, furthermore, that allowing an investigating authority to develop a new evidentiary basis would reduce to inutility the temporal limitations set out in Articles 11.3 and 11.4 of the Anti-Dumping Agreement. We do not share this view. As explained above, Argentina's claim that the USDOC was precluded from developing a new evidentiary basis is premised on the qualitative shortcomings of the fact-finding in the original review. It does not implicate the temporal requirements of Article 11.3, which remain valid even if an investigating authority is allowed to collect additional facts relating to the original review period when making a re-determination of the likelihood of dumping for the purpose of implementing recommendations and rulings of the DSB. Moreover, an investigating authority seeking to comply with an adverse WTO ruling by conducting a sunset re-determination would have to comply with all of the substantive obligations set out in Articles 11.3 and 11.4. This means that any additional factual information relating to the initial review period that is collected for purposes of the re-determination would have to be 'sufficient', and the conclusion reached on the basis of those facts would have to be 'reasoned'. It also means that the anti-dumping duties could not remain in place unless the investigating authority concluded in the re-determination that dumping and injury were likely to continue or recur. Furthermore, the due process and evidentiary obligations established in Article 11.4, by virtue of its reference to Article 6, would apply also to the process leading to the re-determination."<sup>129</sup>

#### 1.4.7.3 De minimis standard in sunset reviews

103. The Panel in *US – Corrosion-Resistant Steel Sunset Review* rejected the argument that the Anti-Dumping Agreement requires that the same *de minimis* standard that applies to investigating authorities under Article 5.8 also applies to sunset reviews under Article 11.3:

"On its face, Article 11.3 does not provide, either explicitly or by way of reference, for any *de minimis* standard in making the likelihood of continuation or recurrence of dumping determinations in sunset reviews. Therefore, Article 11.3 itself is silent as to whether the *de minimis* standard of Article 5.8 (or any other *de minimis* standard) is applicable to sunset reviews. However, '[s]uch silence does not exclude the possibility that the requirement was intended to be included by implication.'

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<sup>129</sup> Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*, paras. 167-168, and 171.

We therefore look to the context of Article 11.3. The immediate context of Article 11.3 does not, however, yield a different result. Article 11.1 sets out the general rule that an anti-dumping duty can remain in force only as long as and to the extent necessary to counteract injurious dumping. Articles 11.2 and 11.3 reflect the application of that general rule under different circumstances. Article 11.4 contains a cross-reference to Article 6, which sets forth rules relating to evidence and procedure applicable to investigations. Given that, similar to Article 6, Article 5 also contains rules applicable to original investigations, we consider the absence in Article 11.4 of a similar cross-reference to Article 5 to indicate that the drafters did not intend to have the obligations in Article 5 apply also to sunset reviews."<sup>130</sup>

104. In the view of the Panel in *US – Corrosion-Resistant Steel Sunset Review*, it was clear that Article 5.8 did not suggest that the *de minimis* standard set out for investigations also applied to sunset reviews:

"In particular, the text of paragraph 8 of Article 5 refers expressly to the termination of an *investigation* in the event of *de minimis* dumping margins. There is, therefore, no textual indication in Article 5.8 that would suggest or require that the obligation in Article 5.8 also applies to sunset reviews. Nor is there any such suggestion or requirement in the other provisions of Article 5."<sup>131</sup>

105. On the basis of this textual analysis of the relevant provisions of the Anti-Dumping Agreement, the Panel in *US – Corrosion-Resistant Steel Sunset Review* concluded that the 2 per cent *de minimis* standard of Article 5.8 does not apply in the context of sunset reviews.<sup>132</sup>

#### 1.4.7.4 Cumulation

##### 1.4.7.4.1 Whether cumulation is permissible in sunset reviews

106. The Appellate Body in *US – Oil Country Tubular Goods Sunset Reviews* examined the question whether cumulation is permissible in sunset reviews. It found that, while Articles 3.3 and 11.3 are silent on this issue, this silence "cannot be understood to imply that cumulation is prohibited in sunset reviews".<sup>133</sup> The Appellate Body, recalling the apparent rationale behind the practice of cumulation in injury investigations as discussed by the Appellate Body in *EC – Tube or Pipe Fittings*<sup>134</sup> considered that this rationale is equally applicable to likelihood of injury determinations in sunset reviews. The Appellate Body thus concluded that cumulation in sunset reviews is permissible:

"Therefore, notwithstanding the differences between original investigations and sunset reviews, cumulation remains a useful tool for investigating authorities in both inquiries to ensure that all sources of injury and their cumulative impact on the domestic industry are taken into account in an investigating authority's determination as to whether to impose – or continue to impose – anti-dumping duties on products from those sources. Given the rationale for cumulation—a rationale that we consider applies to original investigations as well as to sunset reviews—we are of the view that it would be anomalous for Members to have limited authorization for cumulation in the Anti-Dumping Agreement to original investigations."<sup>135</sup>

##### 1.4.7.4.2 Non-application of negligibility standards

107. The Panel in *US – Corrosion-Resistant Steel Sunset Review* considered that the negligibility standards under Article 5.8 for the purposes of a cumulative injury assessment under Article 3.3 in original investigations, do not apply to sunset reviews under Article 11.3:

<sup>130</sup> Panel Report, *US – Corrosion-Resistant Steel Sunset Review*, paras. 7.67-7.68.

<sup>131</sup> Panel Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 7.70.

<sup>132</sup> Panel Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 7.85.

<sup>133</sup> Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 294.

<sup>134</sup> Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 116.

<sup>135</sup> Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 297.

"Article 11.3 speaks of a review to determine, *inter alia*, the likelihood of continuation or recurrence of injury. On its face, Article 11.3 does not mention, either explicitly or by way of reference, any negligibility standard that applies to the likelihood of continuation or recurrence of injury determinations in sunset reviews. Nor does the immediate context of Article 11.3 yield a different result. Article 11.1 sets out the general rule that an anti-dumping duty can remain in force only as long as and to the extent necessary to counteract injurious dumping. Article 11.2 and 11.3 reflect the application of that general rule under different circumstances. Although paragraphs 4 and 5 of Article 11 contain several cross-references to other articles of the Anti-Dumping Agreement, no such cross-reference has been made to Articles 3.3 or 5.8."<sup>136</sup>

108. The Panel in *US – Corrosion-Resistant Steel Sunset Review* considered that "Article 3.3, by its own terms, is limited in application to investigations and does not apply to sunset reviews. It follows that the cross-reference in Article 3.3 to the negligibility standard in Article 5.8 does not apply to sunset reviews"<sup>137</sup>

109. The Panel in *US – Oil Country Tubular Goods Sunset Reviews* similarly found that cumulation, when used in sunset reviews, does not need to satisfy the conditions of Article 3.3 because "by its own terms Article 3.3 limits its scope of application to investigations".<sup>138</sup> The Appellate Body agreed with the Panel "that the conditions of Article 3.3 do not apply to likelihood-of-injury determinations in sunset reviews".<sup>139</sup>

#### 1.4.8 "likely"

110. The *US – DRAMS* Panel interpreted the term "likely" in Article 11.2 with reference to Article 11.3. See paragraph 19 above.

111. The Appellate Body in *US – Oil Country Tubular Goods Sunset Reviews* considered "that the 'likely' standard of Article 11.3 applies to the overall determinations regarding dumping and injury; it need not necessarily apply to each factor considered in rendering the overall determinations on dumping and injury".<sup>140</sup>

#### 1.4.9 Relationship with other paragraphs of Article 11

112. The relationship between Article 11.3 and Article 11.2 was addressed in *US – DRAMS*. See paragraphs 10 and 19 above.

113. The Panel in *US – DRAMS* also referred to footnote 22 to Article 11.3 in interpreting Article 11.2. See paragraph 13 above.

#### 1.4.10 Relationship with the standard of review in Article 11 of the DSU

114. The Appellate Body in *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)* rejected Argentina's claim that the Panel had not made an objective assessment of the matter before it, as required by Article 11 of the DSU:

"We note that Argentina considers that the Panel failed to fulfil properly its duties under Article 11 of the DSU by 'subordinat[ing] the actual treaty text of Articles 11.3 and 11.4, and the disposition of Argentina's claims under these provisions, to broader, 'systemic' considerations of the WTO dispute settlement system'. We have found that Articles 11.3 and 11.4 do not address specifically whether an investigating authority may collect additional facts relating to the initial review period when making a re-determination of likelihood of dumping. Therefore, the Panel did not subordinate the text of these provisions to broader systemic considerations of the WTO dispute

<sup>136</sup> Panel Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 7.95.

<sup>137</sup> Panel Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 7.102.

<sup>138</sup> Panel Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 7.336.

<sup>139</sup> Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 302.

<sup>140</sup> Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 323.

settlement system when it found that the USDOC could develop a new evidentiary basis."<sup>141</sup>

#### 1.4.11 Existence of a causation requirement in sunset reviews

115. In *US – Anti-Dumping Measures on Oil Country Tubular Goods*, Mexico challenged the Panel's interpretation of Article 11.3 and "its failure to address the 'inherent' causation requirements under that Article."<sup>142</sup> In particular, Mexico contested the Panel's finding that the obligations set out in Article 3 are not directly applicable in sunset reviews. The Appellate Body in *US – Anti-Dumping Measures on Oil Country Tubular Goods* considered that:

"On its face, Article 11.3 does not require investigating authorities to establish the existence of a 'causal link' between likely dumping and likely injury. Instead, by its terms, Article 11.3 requires investigating authorities to determine whether the *expiry of the duty* would be likely to lead to *continuation or recurrence of dumping and injury*. Thus, in order to continue the duty, there must be a nexus between the 'expiry of the duty', on the one hand, and 'continuation or recurrence of dumping and injury', on the other hand, such that the former 'would be likely to lead to' the latter. This nexus must be clearly demonstrated.<sup>143</sup> In this respect, we further note that, under Article 11.3 of the *Anti-Dumping Agreement*, the termination of the anti-dumping duty at the end of five years is the rule and its continuation beyond that period is the 'exception'. "<sup>144</sup>

116. The Appellate Body in *US – Anti-Dumping Measures on Oil Country Tubular Goods* observed that while Article 11.3 is "silent" on the issue of a "causal link," there could be a requirement to establish a causal link between likely dumping and likely injury in a sunset review under Article 11.3 flowing from other provisions of the Anti-Dumping Agreement and Article VI of GATT 1994.<sup>145</sup> The Appellate Body then opined:

"It is clear from Article VI of the GATT 1994 and the above-mentioned provisions of the *Anti-Dumping Agreement*, and indeed from the design and structure of that Agreement as a whole, that the *Anti-Dumping Agreement* deals with counteracting injurious dumping and that an antidumping duty can be imposed and maintained *only* if the dumping (as properly established) causes injury to the domestic industry. Absent injury to the domestic industry, the rationale for either imposing the duty in the first place, or maintaining it at any time after its imposition, does not exist.<sup>146</sup> A causal link between dumping and injury to the domestic industry is thus fundamental to the imposition and maintenance of an anti-dumping duty under the *Anti-Dumping Agreement*.

... However, this does not mean that a causal link between dumping and injury is required to be established anew in a 'review' conducted under Article 11.3 of the *Anti-Dumping Agreement*. This is because the 'review' contemplated in Article 11.3 is a 'distinct' process with a 'different' purpose from the original investigation."<sup>147</sup>

117. The Appellate Body in *US – Anti-Dumping Measures on Oil Country Tubular Goods* observed that for an affirmative determination under Article 11.3 what is essential is "proof of likelihood of continuation or recurrence of dumping and injury, if the duty expires"<sup>148</sup>:

<sup>141</sup> Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*, para. 172.

<sup>142</sup> Appellate Body Report, *US – Anti-Dumping Measures on Oil Country Tubular Goods*, para. 105.

<sup>143</sup> (footnote original) The use of the word "likely" in Article 11.3 shows that "an affirmative likelihood determination may be made only if the evidence demonstrates that dumping [and injury] would be probable if the duty were terminated—and not simply if the evidence suggests that such a result might be possible or plausible." (Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 111)

<sup>144</sup> Appellate Body Report, *US – Anti-Dumping Measures on Oil Country Tubular Goods*, para. 108.

<sup>145</sup> Appellate Body Report, *US – Anti-Dumping Measures on Oil Country Tubular Goods*, para. 109.

<sup>146</sup> (footnote original) We recognize that, in a sunset review determination under Article 11.3, it could be properly determined that there may be a likelihood of recurrence of injury if the duty expires.

<sup>147</sup> Appellate Body Report, *US – Anti-Dumping Measures on Oil Country Tubular Goods*, paras. 117-118.

<sup>148</sup> Appellate Body Report, *US – Anti-Dumping Measures on Oil Country Tubular Goods*, para. 123.



"[W]hen a 'review' takes place under Article 11.3, and it is determined that the 'expiry of the duty' would 'likely ... lead to continuation or recurrence of dumping and injury', it is reasonable to assume that, where dumping and injury continues or recurs, the causal link between dumping and injury, established in the original investigation, would exist and need not be established anew.

...

The nexus to be demonstrated is between 'the expiry of the duty' on the one hand, and the likelihood of 'continuation or recurrence of dumping and injury' on the other hand."<sup>149</sup>

118. The Appellate Body in *US – Anti-Dumping Measures on Oil Country Tubular Goods* said that its conclusion that the establishment of a causal link between likely dumping and likely injury is not required in a sunset review determination does not imply that the causal link between dumping and injury envisaged by Article VI of the GATT 1994 and the Anti-Dumping Agreement is severed in a sunset review and that "it only means that re-establishing such a link is not required, as a matter of legal obligation, in a sunset review."<sup>150</sup>

119. The Appellate Body in *US – Anti-Dumping Measures on Oil Country Tubular Goods* stated that where the likelihood-of-dumping determination is flawed, "it does not follow that the likelihood-of-injury determination is *ipso facto* flawed as well." However, it added that "if a likelihood-of-injury determination rests upon a likelihood-of-dumping determination that is later found to be flawed, the former determination may also be found to be WTO-inconsistent, after a proper examination of the facts of that determination."<sup>151</sup>

120. The Appellate Body in *US – Anti-Dumping Measures on Oil Country Tubular Goods* rejected Mexico's argument that the text of Article 11.3 does not establish a requirement for an investigating authority to specify the time-frame within which the 'simultaneous presence' of subject imports and the corresponding likely injury would occur. The Appellate Body noted that "as long as a likelihood-of injury determination rests on a sufficient factual basis, the mere fact that an investigating authority does not specify the time-frame within which the 'simultaneous presence' of subject imports and the corresponding injury would be likely to occur, does not, in our view, undermine that determination."<sup>152</sup>

#### 1.4.12 Cumulation in sunset reviews

121. In *US – Anti-Dumping Duties on Oil Country Tubular Goods*, Mexico argued that the ITC was under a separate obligation to "ensure that cumulation was appropriate in light of the conditions of competition," and to do so it was "required" to make "a threshold finding that the subject imports would be simultaneously present in the U.S. market." The Appellate Body in *US – Anti-Dumping Duties on Oil Country Tubular Goods* said there was no textual basis in Article 11.3 for requiring such a finding, noting that:

"[I]n order to arrive at a reasoned and adequate conclusion, an examination of whether imports are in the market together and competing against each other may, in certain cases, be needed in a likelihood-of-injury determination where an investigating authority chooses to cumulate the imports from several countries. But the need for such an examination flows from the particular facts and circumstances of a given case and not from a legal requirement under Article 11.3."<sup>153</sup>

122. The Appellate Body in *US – Anti-Dumping Measures on Oil Country Tubular Goods*, rejecting Mexico's argument, noted that an investigating authority is *not* required, under Article 11.3 of the Anti-Dumping Agreement, to make a separate threshold finding regarding simultaneous presence of imports. Furthermore, it disagreed with Mexico that the ITC's approach

<sup>149</sup> Appellate Body Report, *US – Anti-Dumping Measures on Oil Country Tubular Goods*, paras. 121 and 123.

<sup>150</sup> Appellate Body Report, *US – Anti-Dumping Measures on Oil Country Tubular Goods*, para. 124.

<sup>151</sup> Appellate Body Report, *US – Anti-Dumping Measures on Oil Country Tubular Goods*, para. 127.

<sup>152</sup> Appellate Body Report, *US – Anti-Dumping Measures on Oil Country Tubular Goods*, para. 166.

<sup>153</sup> Appellate Body Report, *US – Anti-Dumping Measures on Oil Country Tubular Goods*, para. 153.



did not reflect a prospective analysis, based on positive evidence, of whether imports from the five cumulated countries were likely to be simultaneously present in the market in the event of termination of the anti-dumping duty order, noting in particular that the information collected by the ITC related to *current* market conditions "is relevant as a basis to draw reasoned conclusions regarding likely *future* market conditions".<sup>154</sup>

123. The Appellate Body in *US – Anti-Dumping Measures on Oil Country Tubular Goods* recalled its holding in *US – Oil Country Tubular Goods Sunset Reviews* that:

"the 'likely' standard of Article 11.3 applies to the overall determinations regarding dumping and injury' ... 'it need not necessarily apply to each factor considered in rendering the overall determinations on dumping and injury.' Even assuming, *arguendo*, that it might apply to the USITC's 'assessment of likelihood of simultaneity,' we do not agree with Mexico that the USITC used a standard that is inconsistent with Article 11.3 '[b]y requiring a demonstration that the imports 'would not' be simultaneously in the market.' Although the USITC made reference to the fact that nothing in the Panel record indicates that the products would not be simultaneously present, it cited other reasons as well."<sup>155</sup>

124. In *US – Anti-Dumping Measures on Oil Country Tubular Goods*, Mexico argued that, having decided to cumulate Mexican imports with imports from the other four countries that were cumulated in the original investigation, the ITC was required to do so consistently with the requirements of Article 3.3, regardless of whether that provision applies directly to sunset reviews. The Appellate Body again recalled its findings in *US – Anti-Dumping Measures on Oil Country Tubular Goods* that:

"[T]he 'text of Article 3.3 plainly limits its applicability to original investigations' and ... 'the conditions of Article 3.3 do not apply to likelihood-of-injury determinations in sunset reviews.' The fact that an investigating authority has not undertaken all the analyses detailed in Article 3.3 is not, by itself, sufficient to undermine a determination under Article 11.3."<sup>156</sup>

125. The Appellate Body in *US – Anti-Dumping Measures on Oil Country Tubular Goods* emphasized:

"We do not, however, suggest, that when an authority chooses to cumulate imports in a likelihood-of-injury determination under Article 11.3, it is never necessary for it to determine whether such a cumulative assessment is appropriate in the light of the conditions of competition in the market place. In particular cases, a cumulative assessment of the effects of the imports may be found to be inappropriate and, therefore, inconsistent with the fundamental requirement that a determination rest on a sufficient factual basis and reasoned and adequate conclusions."<sup>157</sup>

#### 1.4.13 Qualitative assessment of determinations under Article 11.3

126. The Appellate Body in *US – Anti-Dumping Measures on Oil Country Tubular Goods* reversed the Panel's finding that Section II.A.3 of the Sunset Policy Bulletin (SPB), as such, was inconsistent with Article 11.3. because it found that in assessing the consistency of the SPB, as such, with Article 11.3, the Panel failed to make an objective assessment of the matter, including an objective assessment of the facts of the case, as required by Article 11 of the DSU.<sup>158</sup> Criticizing the Panel's "qualitative assessment" of the DOC determinations, the Appellate Body concluded that:

"[T]he Panel's analysis does not reveal that the affirmative determinations, in the 21 specific cases reviewed by it, were based *exclusively on the scenarios to the disregard of other factors*. Nor does the Panel's review of these cases reveal that the USDOC's affirmative determinations were based solely on the SPB scenarios, when the

<sup>154</sup> Appellate Body Report, *US – Anti-Dumping Measures on Oil Country Tubular Goods*, para. 159.

<sup>155</sup> Appellate Body Report, *US – Anti-Dumping Measures on Oil Country Tubular Goods*, para. 163.

<sup>156</sup> Appellate Body Report, *US – Anti-Dumping Measures on Oil Country Tubular Goods*, para. 172.

<sup>157</sup> Appellate Body Report, *US – Anti-Dumping Measures on Oil Country Tubular Goods*, para. 171.

<sup>158</sup> Appellate Body Report, *US – Anti-Dumping Measures on Oil Country Tubular Goods*, para. 210.

probative value of other factors might have outweighed that of the identified scenarios. Accordingly we conclude that the Panel did not conduct a 'qualitative assessment' of the USDOC's determination such that the Panel could properly conclude that the SPB requires the USDOC to treat the factual scenarios of Section II.A.3 of the SPB as determinative or conclusive."<sup>159</sup>

127. In relation to the "qualitative assessment" of individual determinations to be carried out by a panel, the Appellate Body in *US – Anti-Dumping Measures on Oil Country Tubular Goods* noted that the relevance and probative value of other factors is crucial.<sup>160</sup>

128. The Appellate Body in *US – Anti-Dumping Measures on Oil Country Tubular Goods* noted that the responding parties have a responsibility to submit information and evidence in their favour, particularly about their pricing behaviour, import volumes, and dumping margins, while the investigating authority "has a duty to seek out information on relevant factors and evaluate their probative value in order to ensure that its determination is based not on presumptions, but on a sufficient factual basis."<sup>161</sup>

#### 1.4.14 Treatment of other injury factors in a likelihood-of-injury analysis

129. In *Korea – Stainless Steel Bars*, the Panel addressed the complainant's claim that the respondent's investigating authority had erred in finding that the expiry of the anti-dumping duties would likely lead to a recurrence of injury without referring to three other factors that could have explained the likely recurrence of injury. These three factors were the impact of the large volume of low-priced imports from third countries, the cost of raw materials, and the weak demand in the domestic and export markets.<sup>162</sup>

130. With respect to the investigating authority's (KIA) failure to take into account the second and third factors, the Panel did not consider that the complainant had established a *prima facie* case of inconsistency with Article 11.3. The Panel noted that the complainant did not explain how those specific injury factors would sever or diminish the link between lifting the anti-dumping duties and the likelihood that this would lead to a recurrence of injury as part of the forward-looking analysis of a sunset review. The Panel also emphasized that the second and third factors had not been raised or substantiated by the Japanese exporters during the sunset review as matters that could sever or diminish the link between lifting the anti-dumping duties and the likelihood-of-injury. Specifically, the Panel stated the following:

"With respect to the other two factors, we do not consider that Japan has established a *prima facie* case of inconsistency with Article 11.3 of the Anti-Dumping Agreement. Japan's case is limited to pointing out that these were recognized by the KIA as injury factors affecting the Korean domestic industry during the POR, without attempting to explain *how* those specific injury factors would sever or diminish the link between lifting the anti-dumping duties and the likelihood that this would lead to a recurrence of injury as part of the forward-looking analysis of a sunset review. We also consider it noteworthy that, as Japan concedes, neither of these factors was raised or substantiated by the Japanese exporters during the sunset review as matters that could sever or diminish the link between lifting the anti-dumping duties and the likelihood-of-injury. Indeed, in the absence of any explanation or evidence to the contrary, one might expect the cost of raw materials and weak demand to affect the Japanese imports and domestic like products in similar ways in the Korean market. It is thus not obvious to us why the KIA should have treated these factors as potentially severing or diminishing the link between lifting the anti-dumping duties and the likelihood-of-injury, and Japan has not demonstrated otherwise.<sup>163</sup> Specifically, Japan has not attempted to explain *how* those factors would sever or diminish that link."<sup>164</sup>

<sup>159</sup> Appellate Body Report, *US – Anti-Dumping Measures on Oil Country Tubular Goods*, para. 209.

<sup>160</sup> Appellate Body Report, *US – Anti-Dumping Measures on Oil Country Tubular Goods*, para. 196.

<sup>161</sup> Appellate Body Report, *US – Anti-Dumping Measures on Oil Country Tubular Goods*, para. 201.

<sup>162</sup> Panel Report, *Korea – Stainless Steel Bars*, para. 7.121.

<sup>163</sup> (footnote original) We note that Korea contends that these factors "only confirmed that the domestic industry remained in a vulnerable position, further supporting the finding of a likelihood of recurrence of injury if the duties expired". (Korea's first written submission, para. 305). In view of our conclusion in this section, we

131. The Panel found, therefore, that the complainant had failed to demonstrate that the respondent's investigating authority had acted inconsistently with Article 11.3 regarding the cost of raw materials and the weak demand in the domestic and export markets. The Panel considered that it did not need to address the precise circumstances and the manner in which an investigating authority may be required to examine other known injury factors under Article 11.3:

"We therefore find that Japan has failed to demonstrate that the KIA acted inconsistently with Article 11.3 of the Anti-Dumping Agreement regarding the cost of raw materials and the weak demand in the domestic and export markets. Having reached this finding, we need not address the parties' arguments and rebuttals on the precise circumstances and manner in which an authority may be required to examine other known injury factors under Article 11.3, including whether there is a difference between recurrence and continuation determinations in that regard."<sup>165</sup>

### 1.5 Article 11.4

132. The Panel and Appellate Body in *US – Oil Country Tubular Goods Sunset Reviews – Article 21.5 (Argentina)* rejected Argentina's claim that the US Department of Commerce acted inconsistently with Articles 11.3 and 11.4 by developing a new factual basis pertaining to the original review period for the purposes of a sunset review. See paragraphs 100-101-102 above.

133. The Panel in *Pakistan – BOPP Film (UAE)* addressed the UAE's argument that the Pakistani investigating authority (NTC) had acted inconsistently with Article 11.4, second sentence, because it took more than 12 months to conclude its sunset review. In the UAE's view, the NTC did so in the absence of abnormal circumstances that justified doing so, and without providing a reasoned and adequate explanation of the abnormal circumstances warranting the delay. For the same reasons, the UAE argued that the NTC had acted inconsistently with the requirement in Article 11.4, second sentence, to carry out reviews "expeditiously".<sup>166</sup>

134. Outlining the applicable legal requirements in Article 11.4, the Panel considered that the first clause of the second sentence of Article 11.4 "provides that investigating authorities must carry out reviews under Article 11 'in an expeditious manner', 'speedily'."<sup>167</sup> The Panel also considered that the second clause of the second sentence of Article 11.4 indicates that only certain conditions would allow for the 12-month deadline to be exceeded:

"Therefore, the use of the term 'normally' in the second sentence of Article 11.4 indicates that there are certain conditions under which the 12-month deadline may be exceeded; such conditions are those that are not 'normal', i.e. not conforming to a standard, not regular, usual, typical, or ordinary.

The Appellate Body and panels in past disputes have similarly construed the use of the term 'normally', as it appears in other provisions of the Anti-Dumping Agreement and other WTO instruments, to indicate that a rule qualified by this term admits of derogation under circumstances that are not 'normal or ordinary'.<sup>168</sup>

135. The Panel also noted that the fact that provisions other than Article 11.4 set forth an outer limit of 18 months does not address which circumstances would be "abnormal":

"Pakistan points out that other provisions in the Anti-Dumping Agreement lay down a time-limit that applies as a rule, while providing for some flexibility. Article 5.10 provides that original investigations 'shall, except in special circumstances, be concluded within one year, and in no case more than 18 months'. Articles 9.3.1 and 9.3.2 provide for the determination of final liability for payment of anti-dumping

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need not reach a finding on that contention. We would agree, however, with the panel in *Ukraine – Ammonium Nitrate* that a likelihood-of-injury analysis can entail a consideration of the current state of the domestic industry. (Panel Report, *Ukraine – Ammonium Nitrate*, paras. 7.181-7.182).

<sup>164</sup> Panel Report, *Korea – Stainless Steel Bars*, para. 7.124.

<sup>165</sup> Panel Report, *Korea – Stainless Steel Bars*, para. 7.125.

<sup>166</sup> Panel Report, *Pakistan – BOPP Film (UAE)*, para. 7.630.

<sup>167</sup> Panel Report, *Pakistan – BOPP Film (UAE)*, para. 7.635.

<sup>168</sup> Panel Report, *Pakistan – BOPP Film (UAE)*, paras. 7.637-7.638.

duties, and refunds, to take place 'normally within 12 months, and in no case more than 18 months, after ... a request', with an express exception in the event of judicial review proceedings. Pakistan also points out that each of these provisions sets out, in addition to a normal or non-exceptional 12-month time-limit, 'a firm and unconditional outer limit of 18 months', while Article 11.4 does not. We agree with this observation. In our view, however, the fact that provisions other than Article 11.4 set forth an outer limit of 18 months does not address the question that is decisive in this case, namely what circumstances are abnormal and would therefore justify exceeding the 12-month time-limit set out in Article 11.4."<sup>169</sup>

136. Turning to the facts, the Panel considered whether the circumstances of the present case fell within the scope of the qualifier "normally" in Article 11.4.<sup>170</sup> For the Panel, what is considered "abnormal" in a proceeding for the purposes of Article 11.4 will vary from case to case:

"We agree with Pakistan that the text of Article 11.4 does not establish an outer time-limit in which an investigating authority must conclude a sunset review. We also agree that the text of Article 11.4 does not, as a general matter, provide definitive guidance regarding the nature of the facts or circumstances that may be considered to be sufficiently 'abnormal' to permit an administering authority to take longer than the 'normal' 12-months period to conclude a sunset review. Given this, we are of the view that what may be considered 'abnormal' in a proceeding for the purposes of Article 11.4 will depend on the unique set of facts and circumstances that are associated with the proceeding, and that those facts will necessarily vary from case to case."<sup>171</sup>

137. In response to an argument by Pakistan, the Panel did not consider that a reading of Article 13 and footnote 20 would support an interpretation in which judicial review proceedings would constitute "abnormal" circumstances:

"We agree with Pakistan that Article 13 shows that the Anti-Dumping Agreement envisages judicial (or equivalent) review proceedings as separate from the investigations and reviews conducted by the investigating authorities. However, Article 13 does not automatically render the acts of the judiciary 'extraneous' or 'outside the control of' a Member, in a way that always turns those acts into abnormal or extraordinary events within the meaning of Article 11.4.

As for footnote 20, this is an instance in which Members have expressly agreed that certain time-limits can be exceeded in case of judicial review proceedings. In the case of the reviews regulated by Article 11, Members have not included a provision equivalent to footnote 20."<sup>172</sup>

138. The Panel considered, therefore, that the judgment of the high court of Pakistan would not qualify as a circumstance that is not "normal" for purposes of Article 11.4, which would have allowed for the 12-month time-frame to be exceeded:

"We therefore find that, because of the particular constellation of facts before us in this case, the judgment of the Lahore High Court, which Pakistan invokes as an abnormal circumstance under which it could not conclude the sunset review within 12 months, does not qualify as a circumstance that is not 'normal' for purposes of Article 11.4, and that Pakistan acted inconsistently with Article 11.4 by concluding the sunset review in more than the 12-month limit that 'normally' applies under Article 11.4."<sup>173</sup>

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<sup>169</sup> Panel Report, *Pakistan – BOPP Film (UAE)*, para. 7.639.

<sup>170</sup> Panel Report, *Pakistan – BOPP Film (UAE)*, para. 7.640.

<sup>171</sup> Panel Report, *Pakistan – BOPP Film (UAE)*, para. 7.646.

<sup>172</sup> Panel Report, *Pakistan – BOPP Film (UAE)*, paras. 7.649-7.650.

<sup>173</sup> Panel Report, *Pakistan – BOPP Film (UAE)*, para. 7.651.

## **1.6 Relationship with other provisions of the Anti-Dumping Agreement**

### **1.6.1 Article 3**

139. The Panel in *US – DRAMS* discussed the relationship between footnote 9 to Article 3 and Article 11.2. See paragraph 21 above.

140. The Panel in *US – DRAMS* also discussed the relationship between Articles 3.5 and 11.2. See paragraph 21 above.

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