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1 ARTICLE 3

1.1 Text of Article 3

Article 3

Determination of Injury[9]

(*footnote original*)[9] Under this Agreement the term "injury" shall, unless otherwise specified, be taken to mean material injury to a domestic industry, threat of material injury to a domestic industry or material retardation of the establishment of such an industry and shall be interpreted in accordance with the provisions of this Article.

3.1 A determination of injury for purposes of Article VI of GATT 1994 shall be based on positive evidence and involve an objective examination of both *(a)* the volume of the 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.

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

3.3 Where imports of a product from more than one country are simultaneously subject to anti-dumping investigations, the investigating authorities may cumulatively assess the effects of such imports only if they determine that *(a)* the margin of dumping established in relation to the imports from each country is more than *de minimis* as defined in paragraph 8 of Article 5 and the volume of imports from each country is not negligible and *(b)* a cumulative assessment of the effects of the imports is appropriate in light of the conditions of competition between the imported products and the conditions of competition between the imported products and the like domestic product.

3.4 The examination of the impact of the dumped imports on the domestic industry concerned shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry, including actual and potential decline in sales, profits, output, market share, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; the magnitude of the margin of dumping; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments. This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance.

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

3.6 The effect of the dumped imports shall be assessed in relation to the domestic production of the like product when available data permit the separate identification of that

production on the basis of such criteria as the production process, producers' sales and profits. If such separate identification of that production is not possible, the effects of the dumped imports shall be assessed by the examination of the production of the narrowest group or range of products, which includes the like product, for which the necessary information can be provided.

3.7 A determination of a threat of material injury shall be based on facts and not merely on allegation, conjecture or remote possibility. The change in circumstances which would create a situation in which the dumping would cause injury must be clearly foreseen and imminent.[10] In making a determination regarding the existence of a threat of material injury, the authorities should consider, *inter alia*, such factors as:

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

(i) a significant rate of increase of dumped imports into the domestic market indicating the likelihood of substantially increased importation;

(ii) sufficient freely disposable, or an imminent, substantial increase in, capacity of the exporter indicating the likelihood of substantially increased dumped exports to the importing Member's market, taking into account the availability of other export markets to absorb any additional exports;

(iii) whether imports are entering at prices that will have a significant depressing or suppressing effect on domestic prices, and would likely increase demand for further imports; and

(iv) inventories of the product being investigated.

No one of these factors by itself can necessarily give decisive guidance but the totality of the factors considered must lead to the conclusion that further dumped exports are imminent and that, unless protective action is taken, material injury would occur.

3.8 With respect to cases where injury is threatened by dumped imports, the application of anti-dumping measures shall be considered and decided with special care.

1.2 General

1.2.1 Agreement on Subsidies and Countervailing Measures (SCM Agreement)

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

1.2.2 Relationship between the paragraphs of Article 3

2. In *Thailand – H-Beams*, the Appellate Body explained the relationship between the paragraphs of Article 3:

> "Article 3 as a whole deals with obligations of Members with respect to the determination of injury. Article 3.1 is an overarching provision that sets forth a Member's fundamental, substantive obligation in this respect. Article 3.1 informs the more detailed obligations in succeeding paragraphs. These obligations concern the determination of the volume of dumped imports, and their effect on prices (Article 3.2), investigations of imports from more than one country (Article 3.3), the impact of dumped imports on the domestic industry (Article 3.4), causality between dumped imports and injury (Article 3.5), the assessment of the domestic production of the like product (Article 3.6), and the determination of the threat of material injury

(Articles 3.7 and 3.8). The focus of Article 3 is thus on *substantive* obligations that a Member must fulfil in making an injury determination."[1]

3. In *Egypt – Steel Rebar*, the Panel confirmed the role of Article 3.1 and explained the relationship between paragraph 5 and paragraphs 2 and 4:

> "It is clear that Article 3.1 provides overarching general guidance as to the nature of the injury investigation and analysis that must be conducted by an investigating authority. Article 3.5 makes clear, through its cross-references, that Articles 3.2 and 3.4 are the provisions containing the specific guidance of the *AD Agreement* on the examination of the volume and price effects of the dumped imports, and of the consequent impact of the imports on the domestic industry, respectively[.]"[2]

4. In *Morocco - Hot-Rolled Steel (Turkey),* the Panel reiterated the role of Article 3.1 and clarified that "Article 3.1 requires that an investigating authority also base, on objective examination and positive evidence, any of its findings that *form part of* that inquiry into the impact of dumped imports on domestic producers".[3]

5. The Panel in *Morocco - Hot-Rolled Steel (Turkey)* agreed with Türkiye's view that "Article 3.1 can be violated independently when an erroneous act or omission, such as an erroneous finding that the domestic industry in question is unestablished, taints the overall injury analysis. We thus evaluate in this dispute Türkiye's claim in question under Article 3.1 independently of any other provision in Article 3."[4]

6. In *Morocco – Definitive AD Measures on Exercise Books (Tunisia)*, the Panel explained how the obligation to conduct an objective examination under Article 3.1 applied to analyses of the volume of dumped imports under Article 3.2:

> "We note that Article 3.2 does indeed provide for three alternative examinations of the increase in imports (which can be assessed '*either* in absolute terms *or* relative to production *or* consumption in the importing Member') and does not require the authority to conduct more than one of these examinations. However, Article 3.1 requires that '[a] determination of injury ... be based on positive evidence and involve an objective examination of both (a) the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products, and (b) the consequent impact of these imports on domestic producers of such products'. On its face, the obligation in Article 3.1 applies to the analysis of the volume of dumped imports and does not distinguish between mandatory analyses and discretionary analyses that an authority may undertake under Article 3.2. On the basis of this text, we agree with Tunisia's argument that, if the authority chose to undertake an analysis of the evolution of the volume of imports not only in absolute terms but also in relative terms and to base its conclusions on that analysis, the analysis must comply with the requirements of Article 3.1 in its entirety."[5]

1.2.3 Period of investigation

1.2.3.1 General

7. In *Egypt – Steel Rebar*, Türkiye claimed that because the period of investigation for dumping ended on 31 December 1998, and most of the injury found by the investigating authorities occurred in the first quarter of 1999, the investigating authorities had failed to demonstrate that dumping and injury occurred at the same point in time and that there was a link

[1] Appellate Body Report, *Thailand – H-Beams*, para. 106.
[2] Panel Report, *Egypt – Steel Rebar*, para. 7.102.
[3] Panel Report, *Morocco – Hot-Rolled Steel (Turkey)*, para. 7.147.
[4] Panel Report, *Morocco - Hot-Rolled Steel (Turkey)*, para. 7.151.
[5] Panel Report, *Morocco – Definitive AD Measures on Exercise Books (Tunisia)*, para. 7.257.

between the imports that were specifically found to be dumped and the injury found, violating Articles 3.5 and 3.1.[6] The Panel disagreed:

> "[N]either of the articles cited in this claim [Articles 3.1 and 3.5], nor any other provision of the *AD Agreement*, contains any specific rule as to the time periods to be covered by the injury or dumping investigations, or any overlap of those time periods.[7]
>
> In fact, the only provisions that provide guidance as to how the price effects and effects on the domestic industry of the dumped imports are to be gauged are (as cross-referenced in Article 3.5), Articles 3.2 (volume and price effects of dumped imports), and Article 3.4 (impact of the dumped imports on the domestic industry). Neither of these provisions specifies particular time periods for these analyses[.]"[8]

8. The Panel in *Argentina – Poultry Anti-Dumping Duties* considered that "there is a *prima facie* case that an investigating authority fails to conduct an 'objective' examination if it examines different injury factors using different periods. Such a *prima facie* case may be rebutted if the investigating authority demonstrates that the use of different periods is justifiable on the basis of objective grounds (because, for example, data for more recent periods was not available for certain injury factors)."[9]

9. The Panel in *Argentina – Poultry Anti-Dumping Duties* rejected the argument that the periods of review used for the separate dumping and injury determination must end at the same time, and considered that "there is nothing in the *AD Agreement* to suggest that the periods of review for dumping and injury must necessarily end at the same point in time. Indeed, since there may be a time-lag between the entry of dumped imports and the injury caused by them, it may not be appropriate to use identical periods of review for the dumping and injury analyses in all cases."[10]

10. The Panel in *Russia – Commercial Vehicles* rejected the argument that Article 3.1 precludes investigating authorities from focusing on parts of the period of investigation to capture the developments during such parts:

> "Finally, nothing in Article 3.1 prohibits an investigating authority from focussing on a part of the period of investigation for a more detailed analysis of developments during that part of the period of investigation. In this instance, for each of the indicators analysed in the Investigation Report, the DIMD analysed a complete set of data for the period from 2008 to 2011 on an annual basis, and the data for the POI as compared with the corresponding periods of the respective previous years. The DIMD did not focus its analysis on the POI only, or on any part of the POI only. Furthermore, in focussing on the intervening trends over the POI, the DIMD applied the same approach consistently to each of the economic indicators it examined. The DIMD's more detailed analysis of the intervening trends during the POI revealed for some indicators, such as profits, negative trends either in the first half or the second half of the POI. However, that alone cannot lead to the conclusion that the DIMD did not conduct an objective examination. We further recall that an investigating authority is not precluded from considering the intervening trends during the period of consideration; in fact, it is generally <u>necessary</u> that it do so."[11]

11. The Panel in *Mexico – Steel Pipes and Tubes* noted that the selection of the period of investigation by an investigating authority was a critical element in the anti-dumping investigative process.[12] The Panel noted further that there were clear textual indications that anti-dumping

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[6] Panel Report, *Egypt – Steel Rebar*, para. 7.127.

[7] *(footnote original)* See Recommendation Concerning the Periods of Data Collection for Anti-Dumping Investigations, G/ADP/6, adopted 5 May 2000 by the Committee on Anti-Dumping Practices.

[8] Panel Report, *Egypt – Steel Rebar*, paras. 7.130-7.131.

[9] Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.283.

[10] Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.287.

[11] Panel Report, *Russia – Commercial Vehicles*, para. 7.41. See also Panel Report, *China – Broiler Products (Article 21.5 – US)*, paras. 7.153-7.155.

[12] Panel Report, *Mexico – Steel Pipes and Tubes*, para. 7.224.

measures could only be imposed to offset dumping currently causing injury.[13] The data on which such a determination was made could be based on a past period, although given that "historical" data was being used to draw conclusions about the current situation it was likely that more recent data would be "inherently more relevant and thus especially important to the investigation."[14] The Panel considered that "the investigating authority should rely upon information pertaining to a period approaching, as close as practicable, the date of initiation of the investigation."[15] In this case, the Panel needed to consider whether a gap of eight months between the end of the period of investigation and the initiation of the investigation, and another gap of just over two years between the end of the period of investigation and the imposition of the final anti-dumping duties raised doubts about the existence of a "sufficiently relevant nexus between the date relating to the period of investigation and current injury and causal link as to result in a violation of Article 3.1[.]"[16] While the Panel had concerns regarding the selection of the injury period of investigation and would have preferred the investigating authority in Mexico to have collected updated data, it did not consider Guatemala to have "established that the information used … did not reflect a sufficiently relevant nexus between the data relating to the period of investigation and current injury and causal link[.]"[17] The Panel explained its reasoning as follows:

> "We consider that it would have been appropriate and desirable for Economía to collect updated data, if not prior to initiation, then at least for the purposes of its substantive injury analysis. However, we observe that there are practical time constraints in respect of the production, gathering and analysis of data. Particularly in light of the time required for data of the type included in this anti-dumping application to be produced and published, and then collected and analysed by the applicant in order to rely upon it in its application, it was not unreasonable for the investigating authority to rely on a data set terminating eight months prior to the initiation of the investigation.
>
> … We do not consider that Guatemala has established that the information used by Economía did not reflect a sufficiently relevant nexus between the data relating to the period of investigation and *current* injury and causal link, and thus did not give reliable indications of current injury. Given that the *Anti-Dumping Agreement* does not contain any specific and express rules concerning the period to be used for injury data collection in an anti-dumping investigation, and on the basis of the facts and arguments before us, we do not consider that the period used in this case was remote.
>
> This is not to say that we are fully satisfied with Economía's selection of the injury POI, and we believe it is instructive to set out our remaining concerns in some detail. We note that Economía adopted the period of investigation proposed by the applicant. It is clear to us that acceptance of the POI proposed by the applicant may not necessarily constitute a violation of Article 3.1, but we are concerned that Economía adopted this period without giving any consideration to whether or not it was appropriate to use this period in the circumstances of this particular case. The record does not reflect that Economía gave any such specific consideration[.]"[18]

12. The Panel in *Mexico- Anti-Dumping Duties on Steel Pipes and Tubes* considered that the period of investigation was linked to an investigating authority's obligation under Article 3.1 to conduct an objective assessment of positive evidence, and that the investigating authority was bound to "satisfy its obligations in this respect whether or not it is raised by an interested party in the course of an investigation."[19] The Panel noted the Appellate Body's findings in *Mexico – Anti-Dumping Measures on Rice,* but distinguished its dispute on factual differences, namely that the temporal gaps in the latter dispute were far more "remote" than in the dispute it was considering.

[13] Panel Report, *Mexico – Steel Pipes and Tubes*, para. 7.227.
[14] Panel Report, *Mexico – Steel Pipes and Tubes*, para. 7.228.
[15] Panel Report, *Mexico – Steel Pipes and Tubes*, para. 7.230.
[16] Panel Report, *Mexico – Steel Pipes and Tubes*, para. 7.232.
[17] Panel Report, *Mexico – Steel Pipes and Tubes*, para. 7.235.
[18] Panel Report, *Mexico – Steel Pipes and Tubes*, paras. 7.234-7.236.
[19] Panel Report, *Mexico – Steel Pipes and Tubes*, para. 7.237.

The Panel was also mindful that the investigation in the dispute before it had occurred within the overall time constraints envisaged by the Agreement.[20]

13. The Panel in *Morocco - Hot-Rolled Steel (Turkey)* found error in the investigating authority's conclusion that a material injury analysis *requires* a review of historical data for at least three years:

> "At the outset, we consider that an unbiased and objective investigating authority would not have concluded that international practice did *require* that a determination of material injury be based on three years of data. Given the absence of any requirement in the WTO covered Agreements that a material injury analysis be based on a review of data for at least three years, international practice could not have set out that requirement and bound the MDCCE in that regard. We therefore consider that the MDCCE did not objectively conclude that a material injury analysis *requires* a review of historical data for at least three years."[21]

1.2.3.2 Recommendation by the Committee on Anti-Dumping Practices

14. With respect to the recommendation by the Committee on Anti-Dumping Practices on the period of data collection, see the explanations on the official decisions regarding the Anti-Dumping Agreement.

15. In *Mexico – Anti-Dumping Duties on Rice,* Mexico contested the Panel's reliance on the Recommendation made by the Committee on Anti-Dumping Practices. In this regard the Appellate Body in *Mexico – Anti-Dumping Measures on Rice* noted that the Panel's reference to the Recommendation was made by it simply in order to show that its findings were not inconsistent with the Recommendation. Furthermore, the Appellate Body said the Recommendation was not a "decisive factor" in the Panel's decision.[22]

16. The Panel in *Russia – Commercial Vehicles* identified three reasons militating against attaching undue prominence to the Recommendation by the Committee on Anti-Dumping Practices:

> "a. The text of the Recommendation does not evince any intention on the part of Members that it should be treated as anything other than a 'useful guide to the common understanding of Members'.[23] On its face, the Recommendation is a non-binding document that sets out a common understanding of WTO Members, not of their legal obligations, but of best practices under the Anti-Dumping Agreement.
>
> b. Nothing in the Recommendation suggests that it was meant to guide or influence the interpretation, by panels or the Appellate Body, of the legal obligations of Members under the Anti-Dumping Agreement.
>
> c. Members should feel confident that not every document produced by a WTO body will be interpreted as having legislative content or will have legal consequences for dispute settlement purposes. Giving undue weight to recommendations and exhortations by, or exchanges of ideas in, WTO bodies risks inhibiting the work of the political and policy organs of the WTO."[24]

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[20] Panel Report, *Mexico – Steel Pipes and Tubes*, para. 7.239.
[21] Panel Report, *Morocco - Hot-Rolled Steel (Turkey)*, para. 7.159.
[22] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 169.
[23] *(footnote original)* WTO, Committee on Anti-Dumping Practices, Minutes of the Meeting held on 29 April 1996, G/ADP/M/7 (2 October 1996), para. 40. The Recommendation states explicitly that "[t]he Committee also recognizes, however, that such guidelines do not preclude investigating authorities from taking account of the particular circumstances of a given investigation in setting the periods of data collection for both dumping and injury, to ensure that they are appropriate in each case." (WTO, Committee on Anti-Dumping Practices, Recommendation concerning the periods of data collection for Anti-Dumping investigations, G/ADP/6 (adopted 5 May, circulated 16 May 2000), (Exhibit EU-24)).
[24] Panel Report, *Russia – Commercial Vehicles*, para. 7.49.

1.3 Footnote 9

17. Referring to footnote 9 to Article 3 and to Article 4.1, the Panel in *Mexico – Corn Syrup* stated:

> "These two provisions inescapably require the conclusion that the domestic industry with respect to which injury is considered and determined must be the domestic industry defined in accordance with Article 4.1."[25]

18. In *Morocco - Hot-Rolled Steel (Turkey),* the Panel examined the relationship between footnote 9 and Article 3 of the Anti-Dumping Agreement, with respect to the requirements of Article 6.2 of the DSU:

> "Footnote 9 is substantively connected with Articles 3.1 and 3.4 because footnote 9 defines the term 'injury' used in those (and other) provisions. However, this does not mean that a statement of claims under Articles 3.1 and 3.4 necessarily implies a claim under footnote 9. Footnote 9 is attached to the heading of Article 3, rather than to Article 3.1 or 3.4 specifically. Footnote 9 therefore applies to all of the provisions of Article 3 – and, by its express terms, more generally to all instances where the term 'injury' is used '[u]nder this Agreement'. We do not consider that a statement of claim under any provision in the Anti-Dumping Agreement that includes the term 'injury', by the mere use of this term, necessarily directs to, and includes, a claim under footnote 9. Nor do we consider that the text of Article 3.1 or 3.4 suggests that claims under these provisions specifically imply a further claim under footnote 9."[26]

1.4 Article 3.1

1.4.1 General

19. In the investigation at issue in *EU – Biodiesel (Argentina)*, the EU producers had revised the capacity data more than once during the investigation. The revision of the data was significant, was not verified, and was made ten working days before the Commission's Definitive Disclosure.[27] The Panel found that the Commission had acted inconsistently with the "positive evidence" and "objective examination" obligations set forth in Article 3.1 by basing its determination on such data.[28]

1.4.2 Significance of paragraph 1 within the context of Article 3

20. In *Thailand – H-Beams*, the Appellate Body explained the legal status of paragraph 1 in the provisions of Article 3. See paragraph 2 above.[29] See also paragraph 3 above.

21. The Panel in *US – Softwood Lumber VI* considered that in the absence of independent argument supporting overarching claims under Article 3.1, the resolution of these claims was substantively dependent on the resolution of the specific claims under the other paragraphs of Article 3:

> "Thus, in the absence of any additional arguments supporting the allegations of violation of Articles 3.1 and 15.1, if we find that the facts give rise to a conclusion of no violation under one of Canada's specific claims, we will also consider that those facts give rise to the same conclusion, no violation, with respect to the overarching claims under Article 3.1 of the *AD Agreement* and Article 15.1 of the SCM Agreement. With respect to any aspect of the determination that is found to be inconsistent with any other provision of Articles 3 and 15 of the Agreements asserted by Canada, we can see no reason to conclude, in addition, that it also violates Article 3.1 of the *AD Agreement* and Article 15.1 of the SCM Agreement. In the absence of additional arguments in support of these claims, to say that a violation of a specific

[25] Panel Report, *Mexico – Corn Syrup*, para. 7.147.
[26] Panel Report, *Morocco - Hot-Rolled Steel (Turkey)*, para. 7.13.
[27] Panel Report, *EU – Biodiesel (Argentina)*, paras. 7.401 and 7.409-7.410.
[28] Panel Report, *EU – Biodiesel (Argentina)*, paras. 7.411-7.413.
[29] See also Appellate Body Report, *US – Hot-Rolled Steel*, para. 192.

> provision of the Agreements also violates the overarching obligations in Articles 3.1 and 15.1 does not clarify the obligation set out in Articles 3.1 of the *AD Agreement* and 15.1 of the SCM Agreement. Nor would it provide any guidance in the context of implementation of any recommendation of the DSB. Therefore, we will make no findings with respect to these claims."[30]

22. In *China – GOES*, the Appellate Body stressed the overarching nature of the obligations laid down in Article 3.1, as follows:

> "[W]hile we may agree with China that investigating authorities 'have discretion to frame their investigations and analyses in light of the information gathered by the authorities and the arguments presented to the authorities by the parties', authorities remain bound by their overarching obligation to conduct an objective examination on the basis of positive evidence, irrespective of how the issues were presented or argued during the investigation."[31]

23. In *Dominican Republic – AD on Steel Bars (Costa Rica)*, the Panel stated that the overarching nature of the obligations laid down in Article 3.1 also informs Article 3.7:

> "[W]e agree with previous panels that there is 'a close normative relationship' between the different subparagraphs of Article 3, which together establish the relevant legal framework and disciplines that must be followed when conducting an injury and causation analysis. It is our view that this normative relationship also includes the threat of injury analysis under Article 3.7. We also consider that Article 3.1 functions as an overarching provision that is directly linked with the more detailed obligations set forth in succeeding provisions (including Article 3.7), and the inquiries foreseen under these provisions 'serve as elements of a single, overall analysis' addressing the question of whether dumped imports are causing injury or, as in the case at hand, a threat of injury. In particular, we agree that the basic principles of 'positive evidence' and 'objective examination', on which an injury determination under Article 3.1 must be based, do not 'establish independent obligations which can be judged in the abstract, or in isolation and separately' from the obligations set out in the succeeding provisions but instead 'inform the application of all the provisions of Article 3'. In the context of this overall examination, we therefore do not rule out that a claim made under a more specific provision, such as Article 3.7, may not be resolved without assessing the consistency of the situation at issue with the requirements of the overarching provision, namely Article 3.1."[32]

1.4.3 Investigating authorities' obligation under Article 3.1

1.4.3.1 "positive evidence"

24. In *US – Hot-Rolled Steel*, the Appellate Body ruled that "the thrust of the investigating authorities' obligation, in Article 3.1, lies in the requirement that they base their determination on 'positive evidence' and conduct an 'objective examination'."[33]

25. In *China – X-Ray Equipment*, the Panel distinguished the obligation to base an injury determination on positive evidence from disclosure obligations under Articles 6 and 12 of the Anti-Dumping Agreement, and cautioned against blurring the lines between these two different sets of obligations:

> "We understand that the European Union's complaint is not that MOFCOM failed to disclose the data upon which it was relying, but rather that MOFCOM did not explain that it had modified the data supplied by Nuctech as a result of an on-site verification. In our view, this aspect of the European Union's argumentation appears to blur the lines between the requirement that an injury determination be based upon positive evidence and the requirements regarding disclosure of evidence and reasoning found

[30] Panel Report, *US – Softwood Lumber VI*, para. 7.26.
[31] Appellate Body Report, *China – GOES*, para. 201.
[32] Panel Report, *Dominican Republic – AD on Steel Bars (Costa Rica),* para. 7.243.
[33] Appellate Body Report, *US – Hot-Rolled Steel*, para. 192.

> elsewhere in the Anti-Dumping Agreement, such as in Articles 6 and 12. We would suggest that whether evidence is 'positive', in the sense of being affirmative, objective and verifiable, is unrelated to whether an investigating authority has explained or disclosed the way in which it derived the data. In other words, in the reference to 'positive evidence', Article 3.1 of the Anti-Dumping Agreement disciplines the substantive adequacy of the evidence relied upon by an investigating authority, rather than imposing procedural obligations in relation to the disclosure of the reasoning or method by which the investigating authority derived the evidence. …
>
> Therefore, in our view, the European Union's complaint that MOFCOM failed to inform interested parties that it had modified certain data supplied by Nuctech as a result of the on-site verification is an argument about the procedural obligations disciplining investigating authorities. It does not bear upon whether the evidence is 'positive'"[34]

1.4.3.1.1 Meaning of positive evidence

26. In *US – Hot-Rolled Steel,* the Appellate Body ruled that "the term 'positive evidence' relates, in our view, to the quality of the evidence that authorities may rely upon in making a determination." It further explained that "[t]he word 'positive' means, to us, that the evidence must be of an affirmative, objective and verifiable character, and that it must be credible."[35]

27. In *Egypt – Steel Rebar*, Türkiye had argued that for a price undercutting analysis to be based on positive evidence as required by Article 3.1, an investigating authority must justify its choice of the basis for the price comparison it makes. The Panel considered that it did not need to opine on the exact nature of the "positive evidence" requirement of Article 3.2 (see paragraph 146 below) and dismissed Türkiye's claim. The Panel found that Türkiye had not established that an objective and unbiased investigating authority could not have found price undercutting on the basis of the evidence of record.[36]

28. In *Mexico – Anti-Dumping Duties on Rice*, the Appellate Body observed that assumptions by an investigating authority should be based on positive evidence:

> "An investigating authority enjoys a certain discretion in adopting a methodology to guide its injury analysis. Within the bounds of this discretion, it may be expected that an investigating authority might have to rely on reasonable assumptions or draw inferences. In doing so, however, the investigating authority must ensure that its determinations are based on 'positive evidence'. Thus, when, in an investigating authority's methodology, a determination rests upon assumptions, these assumptions should be derived as reasonable inferences from a credible basis of facts, and should be sufficiently explained so that their objectivity and credibility can be verified."[37]

29. The Appellate Body in *Mexico – Anti-Dumping Duties on Rice* found that the assumptions on which Economía was relying in its methodology were not properly substantiated and explained:

> "An investigating authority that uses a methodology premised on unsubstantiated assumptions does not conduct an examination based on positive evidence. An assumption is not properly substantiated when the investigating authority does not explain why it would be appropriate to use it in the analysis. … In the Final Determination, Economía did not explain why [its] assumptions were appropriate and credible in the analysis of the volume and price effects of the dumped imports, or how they would contribute to providing an accurate picture of the volume and price effects of the dumped imports … We would expect an investigating authority to substantiate the reasonableness and credibility of particular assumptions."[38]

30. The Panel in *Morocco - Hot-Rolled Steel (Turkey)* stated that "the 'positive evidence' to be examined by the investigating authority must pertain to the particular substantive elements

[34] Panel Report, *China – X-Ray Equipment*, paras. 7.146-7.147.
[35] Appellate Body Report, *US – Hot-Rolled Steel*, para. 192.
[36] Panel Report, *Egypt – Steel Rebar*, paras. 7.70 and 7.75.
[37] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 204.
[38] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 205.

relevant to the determination made, and the 'objective examination' must relate to the consideration and evaluation of that evidence in the investigation at issue."[39] In evaluating the finding of the investigating authority that the domestic industry was unestablished, the Panel considered that "Article 3.1 does not prescribe a particular methodology that an investigating authority must follow" and confirmed that "when an investigating authority's determination rests upon assumptions, these assumptions should be derived as reasonable inferences from a credible basis of facts, and should be sufficiently explained so that their objectivity and credibility can be verified."[40]

1.4.3.1.2 Scope of positive evidence

31. In *Thailand – H-Beams*, the Appellate Body reversed the Panel's finding that an injury determination must be based only upon evidence disclosed to, or discernible by, the parties to the investigation, and concluded that "Article 3.1 … permits an investigating authority making an injury determination to base its determination on *all* relevant reasoning and facts before it."[41] The Appellate Body explained:

> "Even if we accept that the ordinary meaning of these terms is reflected in the dictionary definitions cited by the Panel, in our view, the ordinary meaning of these terms does not suggest that an investigating authority is required to base an injury determination only upon evidence disclosed to, or discernible by, the parties to the investigation. An anti-dumping investigation involves the commercial behaviour of firms, and, under the provisions of the *Anti-Dumping Agreement*, involves the collection and assessment of *both* confidential and non-confidential information. An injury determination conducted pursuant to the provisions of Article 3 of the *Anti-Dumping Agreement* must be based on the *totality* of that evidence. We see nothing in Article 3.1 which limits an investigating authority to base an injury determination only upon non-confidential information."[42]

32. In *Thailand – H-Beams*, the Appellate Body provided the following contextual support for its finding that a determination of injury pursuant to Article 3.1 need not be based exclusively on evidence which has been disclosed to the parties to the investigation:

> "Contextual support for this interpretation of Article 3.1 can be found in Article 3.7, which states that a threat of material injury must be 'based on facts and not merely on allegation, conjecture or remote possibility'. This choice of words shows that, as in Article 3.1, which overarches and informs it, it is the *nature* of the evidence that is being addressed in Article 3.7. A similar requirement for an investigating authority can be found in Article 5.2, which requires that an application for initiation of an anti-dumping investigation may not be based on '[s]imple assertion, unsubstantiated by relevant evidence'. Article 5.3 requires an investigating authority to 'examine the accuracy and adequacy' of the evidence provided in such an application.
>
> Further contextual support for this reading of Article 3.1 is provided by other provisions of the *Anti-Dumping Agreement*. Article 6 (entitled 'Evidence') establishes a framework of procedural and due process obligations which, amongst other matters, requires investigating authorities to disclose certain evidence, during the investigation, to the interested parties. Article 6.2 requires that parties to an investigation 'shall have a full opportunity for the defence of their interests'. Article 6.9 requires that, before a final determination is made, authorities shall 'inform all interested parties of the essential facts under consideration which form the basis for the decision'. There is no justification for reading these obligations, which appear in Article 6, into the substantive provisions of Article 3.1. We do *not*, however, imply that the injury determination by the Thai authorities in this case necessarily met the requirements of Article 6. As the Panel found that Poland's claim under Article 6 did not meet the requirements of Article 6.2 of the DSU, the issue was not considered by the Panel.

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[39] Panel Report, *Morocco - Hot-Rolled Steel (Turkey)*, para. 7.154.
[40] Panel Report, *Morocco - Hot-Rolled Steel (Turkey)*, para. 7.155.
[41] Appellate Body Report, *Thailand – H-Beams*, para. 111.
[42] Appellate Body Report, *Thailand – H-Beams*, para. 107.

> Article 12 (entitled 'Public Notice and Explanation of Determinations') also provides contextual support for our interpretation of the meaning of 'positive evidence' and 'objective examination' in Article 3.1. In a similar manner to Article 6, Article 12 establishes a framework of procedural and due process obligations concerning, notably, the contents of a final determination. Article 12.2.2 requires, in particular, that a final determination contain 'all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures', and 'the reasons for the acceptance or rejection of relevant arguments or claims made by the exporters and importers'. Article 12, like Article 6, sets forth important procedural and due process obligations. However, as in the case of Article 6, there is no justification for reading these obligations into the substantive provisions of Article 3.1. We do *not*, however, imply that the injury determination of the Thai authorities in this case necessarily met the requirements of Article 12. This issue was not considered by the Panel, since Poland did not make a claim under this provision."[43]

33. Further, in *Thailand – H-Beams*, the Appellate Body rejected the Panel's reasoning that in reviewing the determination of injury by the investigating authority under Article 3, the Panel "is required, under Article 17.6(i), in assessing whether the *establishment of facts* is proper, to ascertain whether the 'factual basis' of the determination is 'discernible' from the documents that were available to the interested parties and/or their legal counsel in the course of the investigation and at the time of the final determination; and, in assessing whether the *evaluation of the facts* is unbiased and objective, to examine the 'analysis and reasoning' in only those documents 'to ascertain the connection between the disclosed factual basis and the findings.'"[44] The Panel had linked the obligation of national authorities under Article 3.1 to base the determination of injury on positive evidence, i.e. excluding confidential information not disclosed to the parties to the investigation, to the Panel's obligation under Articles 17.5 and 17.6, stating that "we as a panel should base our review on the reasoning and analysis reflected in the final determination and in communications and disclosures to which the Polish firms had access in the course of the investigation or at the time of the final determination". The Appellate Body had already found that under Article 3.1, contrary to the Panel's finding, the investigating authority was not precluded from basing its determination of injury on information not disclosed to the parties to the investigation. The Appellate Body then also disagreed with the link, established by the Panel, between Article 3.1 on the one hand and Articles 17.5 and 17.6 on the other:

> "[W]hile the obligations in Article 3.1 apply to *all* injury determinations undertaken by Members, those in Articles 17.5 and 17.6 apply only when an injury determination is examined by a WTO panel. The obligations in Articles 17.5 and 17.6 are distinct from those in Article 3.1."[45]

34. In *Thailand – H-Beams*, the Appellate Body then also reversed the Panel's findings that the Panel was precluded from examining facts not disclosed to interested parties in the national investigation:

> "Articles 17.5 and 17.6(i) require a panel to examine the facts made available to the investigating authority of the importing Member. These provisions do not prevent a panel from examining facts that were not disclosed to, or discernible by, the interested parties at the time of the final determination."[46]

35. The Appellate Body in *Mexico – Anti-Dumping Duties on Rice* upheld the Panel's finding that a prima facie case was established that the information used by Economía did not provide reliable indications of current injury and, therefore, did not meet the criterion of positive evidence in Article 3.1. Noting its agreement with Mexico that using a remote investigation period is not *per se* a violation of Article 3.1, the Appellate Body concluded that the Panel did not set out such a principle, because its findings related to the specific circumstances of the dispute and were based on several factors. Having agreed with the Panel that more recent data was likely to provide better indications about current injury, the Appellate Body stated:

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[43] Appellate Body Report, *Thailand – H-Beams*, paras. 108-110.
[44] Appellate Body Report, *Thailand – H-Beams*, para. 119.
[45] Appellate Body Report, *Thailand – H-Beams*, para. 114.
[46] Appellate Body Report, *Thailand – H-Beams*, para. 118.

> "[A] gap of 15 months between the end of the period of investigation and the initiation of the investigation, and another gap of almost three years between the end of the period of investigation and the imposition of the final anti-dumping duties, may raise real doubts about the existence of a sufficiently relevant nexus between the data relating to the period of investigation and current injury."[47]

36. In *Mexico – Anti-Dumping Duties on Rice*, Mexico argued that the Panel should have found that Mexico's interpretation concerning the "integration" of the data collection period was permissible under Article 17.6(ii) of the Anti-Dumping Agreement. Considering this argument, the Appellate Body noted that the issue before the Panel was the manner in which Economía conducted the injury analysis, not the interpretation of a specific provision of the Anti-Dumping Agreement. The Appellate Body supported the view expressed by the Panel that the data on the basis of which a determination of injury caused by dumping is made may relate to a past period, to the extent this information is relevant with regard to the current situation. It thus concluded that the Panel's view as such was compatible with Mexico's own reading of the Anti-Dumping Agreement, according to which using data relating to a past period does not, *per se*, entail a violation of that Agreement. Thus, Mexico's argument regarding Article 17.6(ii) was without merit.[48]

37. The Panel in *Mexico – Steel Pipes and Tubes* noted that while the Anti-Dumping Agreement did not set forth any express requirements regarding the choice of the period of investigation for the purpose of conducting an injury analysis, it considered that the Article 3.1 requirement to base a determination of injury on "positive evidence" and pursuant to an "objective examination" nevertheless imposed certain limitations on the discretion of an investigating authority. In this case the investigating authority had relied on temporal subsets within a period without providing sufficient explanation as to the reason why – something the Panel referred to as a "truncated temporal approach."[49] The Panel also focussed on the "non-comprehensiveness and unreliability of the factual basis"[50] used by the investigating authority. Finally, the Panel noted that simply because none of the interested parties questioned the selection of the period of investigation did not excuse the investigating authority from meeting its obligations under Article 3.1.[51] The Panel thus concluded that the investigating authority was not able to "make an objective examination of positive evidence in reaching its affirmative injury determination."[52]

38. See also the material on "objective examination" below.

39. In *Pakistan – BOPP Film (UAE)*, the Panel examined the text of Article 3.1 of the Anti-Dumping Agreement and relevant context to ascertain the legal requirements governing the temporal scope of evidence underlying an injury determination.[53] In the Panel's view, whether the evidence supporting an investigating authority's determination of injury relates to *current* injury will depend on two factors:

> "[F]irst … the temporal scope of the evidence relative to the dates of initiation and of final determination. The more recent the data, the more likely they are to be relevant to current injury. Second, it also depends on the relevant circumstances surrounding the authority's choice of the POI for injury."[54]

40. In considering whether evidence supporting such a determination of injury relates to *current* injury, the Panel also noted the reasoning of the panel and Appellate Body in *Mexico - Anti-Dumping Measures on Rice*[55] and considered that Article 3.1 requires the following:

> "To summarize, then, Article 3.1 requires a determination of injury to be based on positive evidence. This means, at a minimum, that the evidence must be relevant, and

[47] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 167.
[48] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 171.
[49] Panel Report, *Mexico – Steel Pipes and Tubes*, para. 7.252.
[50] Panel Report, *Mexico – Steel Pipes and Tubes*, para. 7.260.
[51] Panel Report, *Mexico – Steel Pipes and Tubes*, para. 7.259.
[52] Panel Report, *Mexico – Steel Pipes and Tubes*, para. 7.260.
[53] Panel Report, *Pakistan – BOPP Film (UAE)*, paras. 7.85-7.88.
[54] Panel Report, *Pakistan – BOPP Film (UAE)*, para. 7.89.
[55] Panel Report, *Pakistan – BOPP Film (UAE)*, para. 7.90.

> therefore it must pertain to current injury at the time the determination is made. Whether this requirement is complied with depends not only on the temporal scope of the evidence *vis-à-vis* the dates of initiation and final determination, but also on any other relevant circumstances surrounding the authorities' determination, such as, for example, whether the authority made any attempts to update remote evidence or whether it was possible to do so."[56]

41. The Panel then considered whether Pakistan had acted inconsistently with Article 3.1 by basing its determination of injury of 4 February 2013 on evidence ending in June 2010.[57]

42. With respect to the order by the Pakistani court directing the NTC to proceed with the complaint before it, the Panel considered that a WTO Member is responsible for the WTO-consistency of the acts of all its organs:

> "Pakistan asks the Panel to take into account that a domestic court order directed the NTC to proceed with the complaint before it, which, according to Pakistan, meant it could not change the temporal scope of the evidence. However, as we have already noted, a WTO Member is responsible for the WTO-consistency of the acts of all of its organs, including the judiciary, and therefore whether the NTC was abiding by the instructions of a Pakistani court or acting in its own discretion does not change our assessment under the Anti-Dumping Agreement. Moreover, the argument is even more difficult to follow when one considers that the court order now invoked by Pakistan referred to proceeding 'with the complaint before [the NTC]', whereas Pakistan invokes it to explain its use of the POI selected in a first, interrupted investigation, which was not identical to the period covered in the "complaint" in question."[58]

43. Second, the Panel disagreed with Pakistan's argument that maintaining the POI first selected in 2010 allowed the NTC to complete the investigation faster, in a little more than nine months, which also limited the ultimate temporal gap between the end of the POI and the final determination.[59] The Panel recalled its response to Pakistan's arguments with respect to Article 2.1[60], and noted the obligation in Article 3.1 for Members to base their determination of injury on "positive evidence":

> "Article 3.1 imposes an obligation on Members to base their determination of injury on 'positive evidence', and mere expediency – without, for example, an explanation as to why updating the evidence was not possible – cannot explain the choice to base a determination of injury on evidence that was already almost two years old at the time of initiation, and two years and seven months old at the time of the final determination."[61]

44. Third, the Panel took into account the factors noted by the UAE, which were similar to those indicated by the panel in *Mexico – Anti-Dumping Measures on Rice*:

> "(i) the selected POI was essentially what was proposed by the applicant; (ii) the NTC did not establish that practical problems necessitated this particular POI; (iii) the NTC never established that updating the information was not possible; (iv) the NTC made no attempt at updating the information although there was no lack of cooperation from interested parties; and (v) the NTC provided no reason why it was not seeking more recent information".[62]

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[56] Panel Report, *Pakistan – BOPP Film (UAE)*, para. 7.91.
[57] Panel Report, *Pakistan – BOPP Film (UAE)*, paras. 7.92-7.93.
[58] Panel Report, *Pakistan – BOPP Film (UAE)*, para. 7.69. See also ibid. paras. 7.68-7.76.
[59] Panel Report, *Pakistan – BOPP Film (UAE)*, paras. 7.70-7.71.
[60] Panel Report, *Pakistan – BOPP Film (UAE)*, para. 7.97.
[61] Panel Report, *Pakistan – BOPP Film (UAE)*, para. 7.97.
[62] Panel Report, *Pakistan – BOPP Film (UAE)*, para. 7.98.

45. The Panel noted that it had addressed these circumstances in the context of Article 2.1, and that the identical considerations were valid when assessing the consistency of the determination of injury with Article 3.1.[63]

46. Ultimately, the Panel found that Pakistan had failed to base its determination of injury on "positive evidence", contrary to Article 3.1 of the Anti-Dumping Agreement:

> "Summing up, the NTC based its determination of injury on evidence that ended almost two years before initiation, and two years and seven months before the final determination. The NTC made no attempt to update that evidence and, during the anti-dumping proceedings, it provided no discussion whatsoever of this choice. For these reasons, we find that Pakistan failed to base its determination of injury on 'positive evidence', thus acting inconsistently with Article 3.1 of the Anti-Dumping Agreement."[64]

1.4.3.2 "Objective examination"

1.4.3.2.1 Concept of objective examination

47. In *US – Hot-Rolled Steel,* the Appellate Body analysed the concept of "objective examination" as compared to "positive evidence", indicating that the former is concerned with the investigating process itself as opposed to the facts justifying the injury determination:

> "The term 'objective examination' aims at a different aspect of the investigating authorities' determination. While the term 'positive evidence' focuses on the facts underpinning and justifying the injury determination, the term 'objective examination' is concerned with the investigative process itself. The word 'examination' relates, in our view, to the way in which the evidence is gathered, inquired into and, subsequently, evaluated; that is, it relates to the conduct of the investigation generally. The word 'objective', which qualifies the word 'examination', indicates essentially that the 'examination' process must conform to the dictates of the basic principles of good faith and fundamental fairness.[65] In short, an 'objective examination' requires that the domestic industry, and the effects of dumped imports, be investigated in an unbiased manner, without favouring the interests of any interested party, or group of interested parties, in the investigation. The duty of the investigating authorities to conduct an 'objective examination' recognizes that the determination will be influenced by the objectivity, or any lack thereof, of the investigative process.[66]"[67]

1.4.3.2.2 Extent of the objective examination

48. In *US – Hot-Rolled Steel,* Japan had challenged Section 771(7)(C)(iv) of the United States Tariff Act of 1930, as amended, (the so-called "captive production provision") which provided that, in certain statutorily defined circumstances, the investigating authorities when conducting an injury determination "shall focus primarily " on a particular segment of the "domestic industry", when "determining market share and the factors affecting financial performance ". The Appellate Body examined whether the investigating authorities could make a sectoral examination of the domestic industry when conducting an injury determination under Article 3.1. As indicated in paragraph 200 below the Appellate Body concluded by reference to Article 3.4 that it may be highly pertinent to examine the domestic industry by part, sector or segment provided that such an examination is conducted in an "objective" manner as mandated by Article 3.1.

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[63] Panel Report, *Pakistan – BOPP Film (UAE)*, para. 7.98.

[64] Panel Report, *Pakistan – BOPP Film (UAE)*, para. 7.99. See also ibid. paras. 7.73-7.75.

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

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

[67] Appellate Body Report, *US – Hot-Rolled Steel*, para. 193.

49. The Appellate Body interpreted the obligation to make an "objective" assessment in this regard as meaning that "where investigating authorities undertake an examination of one part of a domestic industry, they should, in principle, examine, in like manner, all of the other parts that make up the industry, as well as examine the industry as a whole" or, "in the alternative," provide "a satisfactory explanation as to why it is not necessary to examine directly or specifically the other parts…". It therefore found that an examination of only certain parts of a domestic industry does not ensure a proper evaluation of the state of the domestic industry as a whole, and does not, therefore, satisfy the requirements of "objectiv[ity]" in Article 3.1 of the Anti-Dumping Agreement:

> "[I]t may be highly pertinent for investigating authorities to examine a domestic industry by part, sector or segment. However, as with all other aspects of the evaluation of the domestic industry, Article 3.1 of the *Anti-Dumping Agreement* requires that such a sectoral examination be conducted in an 'objective' manner. In our view, this requirement means that, where investigating authorities undertake an examination of one part of a domestic industry, they should, in principle, examine, in like manner, all of the other parts that make up the industry, as well as examine the industry as a whole. Or, in the alternative, the investigating authorities should provide a satisfactory explanation as to why it is not necessary to examine directly or specifically the other parts of the domestic industry. Different parts of an industry may exhibit quite different economic performance during any given period. Some parts may be performing well, while others are performing poorly. To examine only the poorly performing parts of an industry, even if coupled with an examination of the whole industry, may give a misleading impression of the data relating to the industry as a whole, and may overlook positive developments in other parts of the industry. Such an examination may result in highlighting the negative data in the poorly performing part, without drawing attention to the positive data in other parts of the industry. We note that the reverse may also be true – to examine only the parts of an industry which are performing well may lead to overlooking the significance of deteriorating performance in other parts of the industry.
>
> Moreover, by examining only one part of an industry, the investigating authorities may fail properly to appreciate the economic relationship between that part of the industry and the other parts of the industry, or between one or more of those parts and the whole industry. For instance, we can envisage that an industry, with two parts, may be overall in mild recession, where one part is performing very poorly and the other part is performing very well. It may be that the relationship between the two parts is such that the healthier part will lead the other part, and the industry as a whole, out of recession. Alternatively, the healthy part may follow the other part, and the industry as a whole, into recession.
>
> Accordingly, an examination of only certain parts of a domestic industry does not ensure a proper evaluation of the state of the domestic industry as a whole, and does not, therefore, satisfy the requirements of 'objectiv[ity]' in Article 3.1 of the *Anti-Dumping Agreement*."[68]

50. The Panel in *Morocco – Hot-Rolled Steel (Turkey)* found that the investigating authority had not satisfied the objective examination requirement of Article 3.1 of the Anti-Dumping Agreement by not assessing Maghreb Steel's total market share on the grounds that it consisted of captive transfers of hot-rolled steel.[69] The Panel applied the reasoning of the Appellate Body in *US - Hot-Rolled Steel*, that investigating authorities should in principle examine in like manner all parts of an industry, as well as the industry as a whole, or provide a satisfactory explanation why not.[70]

51. The Panel in *Morocco – Hot-Rolled Steel (Turkey)* found that the investigating authority had not satisfied the objective examination requirement of Article 3.1 of the Anti-Dumping Agreement by dismissing the merchant market share based on the reasoning that the company's sales were allegedly made at a loss:

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[68] Appellate Body Report, *US – Hot-Rolled* Steel, paras. 204-206.
[69] Panel Report, *Morocco - Hot-Rolled Steel (Turkey)*, paras. 7.172-7.175.
[70] Panel Report, *Morocco - Hot-Rolled Steel (Turkey)*, paras. 7.170-7.171.

> "In considering the issue of establishment in the context of the stability of an industry's presence, an objective and impartial investigating authority would be expected to consider whether an industry's ability to capture as much as 40% of the merchant market, even through selling at a loss, nevertheless indicates that the presence of that industry is sufficiently stabilized. In our view, once a certain share of the market is secured, the fact that sales are made at a loss does not necessarily preclude a determination that the presence of an industry is sufficiently stabilized for that industry to be established (in which case the sales at a loss would be considered in the context of an assessment of material injury)."[71]

52. Regarding the finding of instability in the establishment analysis, the Panel concluded that the investigating authority had not satisfied the objective examination requirement under Article 3.1 of the Anti-Dumping Agreement:

> "We accept that the question of stability of production has an important bearing on the broader question of whether or not the operations of an industry are sufficiently stabilized to consider that industry as being established. That said, the stability of production must be viewed in light of the industry at issue and the prevailing market conditions[72], for even a well-established industry of long standing will not be able to maintain stable production when the prevailing market conditions, or the cyclical nature of an industry, do not allow it. … An objective and impartial investigating authority would weigh any instability suggested by production fluctuations against variability in the prevailing market conditions, as evidenced on the record, and against the broader operational stability suggested by the increase in sales."[73]

53. The Panel in *Morocco – Hot-Rolled Steel (Turkey)* examined "whether the MDCCE did not properly assess the 'new industry' criterion in its establishment analysis". In so doing, the Panel did not consider *Ad Note* to Article XVIII of the GATT 1994 relevant for interpretation of the term "establishment":

> "We see no basis for interpreting the term 'establishment' under Article VI:6(a) of the GATT 1994 and footnote 9 to the Anti-Dumping Agreement in terms of the clarification in the Ad Note to Article XVIII of the GATT 1994 pertaining to 'the establishment of particular industries'. That clarification was developed, and would apply, in the specific context of 'the establishment of particular industries', with a view to securing economic development in certain limited types of economies. In contrast, Article VI:6(a) and footnote 9 to the Anti-Dumping Agreement, and any requirements therein regarding the determination of injury in the form of material retardation of the establishment of the domestic industry, apply equally to all Members."[74]

54. The Panel looked into whether introduction of a new product necessarily amounts to creation of a new industry:

> "If an existing industry chooses to introduce a new product unlike any other product currently being produced, the introduction of that new product will not necessarily result in the creation of a new industry. It may still be perceived as the introduction of a new product line into the existing industry, depending on the degree to which the overall infrastructure (including the productive, commercial, research, and administrative assets) of the existing industry is implicated. The greater the degree of overlap in the use of overall infrastructure, the less likely the perception that the introduction of the new product marks the establishment of a new industry. The fact that a domestic industry is defined by Article 4.1 of the Anti-Dumping Agreement by reference to like product, and that there are no pre-existing producers of that like product in the domestic market, does not preclude the possibility of that domestic industry utilizing existing infrastructure, such as customer contacts and distribution channels, in its introduction of that like product in the domestic market.

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[71] Panel Report, *Morocco - Hot-Rolled Steel (Turkey)*, para. 7.190.

[72] *(footnote original)* In respect of captive production, it may also be necessary to consider any variability in light of variability in upstream operations.

[73] Panel Report, *Morocco - Hot-Rolled Steel (Turkey)*, para. 7.202.

[74] Panel Report, *Morocco - Hot-Rolled Steel (Turkey)*, fn 313.

…

We agree with Turkey, however, that investments are required even where a company adds a new product line, and a company's investment to produce a different product line should not automatically lead to the conclusion that the company is creating 'a new industry'."[75]

55. The Panel in *Morocco - Hot-Rolled Steel (Turkey)* noted that the objectivity requirement of Article 3.1 calls for the examination of industry parts that perform poorly and of parts that perform well:

"An investigating authority, by focusing only on poorly performing parts to the exclusion of parts performing well, would raise the likelihood, as a result of the fact-finding or evaluation process, of determining that the domestic industry is injured.

… In our view, an unbiased and objective investigating authority, in analysing the state of the domestic industry, would not disregard a guaranteed market which held "good commercial prospects" for the domestic industry's performance, and which accounted for half of that industry's production, and would therefore have taken that captive market into consideration in its analysis."[76]

1.4.3.2.3 "Accurate and unbiased picture" including use of samples

56. The Appellate Body in *Mexico – Anti-Dumping Duties on Rice*, noting consistency with its own past statements of the view expressed by the Panel that, under Article 3.1, an injury analysis can be "objective" only "if it is based on data which provide an accurate and unbiased picture of what it is that one is examining, upheld the Panel's finding that in limiting the injury analysis to the March to August period of 1997, 1998, and 1999, Mexico failed to make a determination of injury that involves an "objective examination" as required by Article 3.1. The Appellate Body concluded that because the injury analysis was based on selective use of the information gathered for the purpose of the injury analysis, as well as on the period of investigation proposed by the petitioner, which allegedly represented the period of highest import penetration, "in the specific circumstances of this case, these two factors, considered together, were sufficient to make out a *prima facie* case that the data used by Economía did not provide an 'accurate and unbiased picture.'"[77]

57. The Appellate Body in *Mexico – Anti-Dumping Duties on Rice* rejected Mexico's argument that the period for the injury determination be set to match the period for the dumping determination so as to avoid "distortions", noting that "although injury and dumping must be linked by a causal relationship, these determinations are two separate operations relying on distinct data seeking to determine different things". Accordingly, the Appellate Body agreed with the Panel that "the explanation provided by Mexico with respect to Economía's choice of a limited period of investigation for purposes of the injury analysis was not a 'proper justification' sufficient to refute the *prima facie* case that the data used by Economía did not provide an 'accurate and unbiased picture' of the state of the domestic industry."[78]

1.4.3.2.4 Use of sampling in injury investigations

58. The Panel in *EC – Salmon (Norway)* rejected Norway's claim that the Anti-Dumping Agreement did not allow the use of sampling in injury determinations:

"In light of this absence of methodological guidance, and the aggregate nature of the injury determination, we are unsurprised that the specific question of sampling in this context is not addressed in the AD Agreement, and cannot conclude that this absence requires the conclusion that sampling in the context of injury determinations is prohibited. Such a conclusion would make it impossible for investigating authorities to make injury determinations in certain cases involving more than some relatively limited number of domestic producers. We therefore dismiss Norway's claim that the

[75] Panel Report, *Morocco – Hot-Rolled Steel (Turkey)*, paras. 7.211 and 7.216.
[76] Panel Report, *Morocco – Hot-Rolled Steel (Turkey)*, paras. 7.272-7.273.
[77] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 181.
[78] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 183.

use of sampling by the EC investigating authority was in violation of Articles 3.1, 3.4 and 3.5[.]"[79]

59. With regard to the principles governing the process of the selection of a sample for purposes of an injury determination, the Panel in *EC – Salmon (Norway)* stated:

> "We do consider that the AD Agreement establishes some general parameters for the use of sampling in the injury context. Thus, in our view, the obligation in Article 3.1 that a determination of injury be based on 'positive evidence' and involve an 'objective examination' of the volume, price effects, and impact of dumped imports, limits an investigating authority's discretion both in choosing a sample to be examined in the context of injury, and in collecting and evaluating information obtained from the sampled producers. The Appellate Body stated, in *US – Hot-Rolled Steel*, that 'an 'objective examination' [under Article 3.1] requires that the domestic industry, and the effects of dumped imports, be investigated in an unbiased manner, without favoring the interests of any interested party, or group of interested parties, in the investigation.' A sample that is not sufficiently representative of the domestic industry as a whole is not likely to allow for such an unbiased investigation, and therefore may well result in a determination on the question of injury that is not consistent with the requirements of Article 3.1 of the AD Agreement."[80]

60. The Panel in *EU – Footwear (China)* held that "[t]here is no minimum number of producers, nor a minimum percentage of volume of production, that must be reached before a sample can be considered sufficiently representative of the domestic industry as a whole."[81]

61. The Panel in *EU – Footwear (China)* rejected China's argument that Article 3.1 of the Anti-Dumping Agreement requires even-handed treatment in the collection of information for purposes of selecting a sample for an injury determination:

> "We reject China's view that the Article 3.1 requirement of 'objective examination' entails 'even-handed treatment' in the collection of information for purposes of selecting a sample for the injury determination. Objective examination presumes that information, or positive evidence, is available to be examined, but says nothing about the collection of that information. China's arguments suggest that, in order to be 'even-handed', sampling forms must be sent to every interested party, regardless of whether the investigating authority already possesses, with respect to certain parties, what it considers to be sufficient information for purposes of selecting a sample. We see no legal basis in the text of the AD Agreement which could establish that any particular methodology must be used by investigating authorities in this regard. In particular, we see no basis to impose a methodology which would require an investigating authority to undertake the redundant exercise of asking for information it already possesses. The time and resources spent by some parties in completing sampling forms, while other parties are not required to do so, does not affect our view in this regard. We fail to see why, for purposes of selecting the sample, the investigating authority should be required to seek and collect anew information already in its possession, simply to treat all parties even-handedly.[82] Moreover, even-handed treatment in the collection of information for purposes of selecting a sample is no guarantee that the determination of injury ultimately made will be based on an objective examination of positive evidence. Thus, the requirement China seeks to impose would not, in our view, necessarily further the objectives of Article 3.1, and we see no basis on which to impose it on investigating authorities."[83]

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[79] Panel Report, *EC – Salmon (Norway)*, para. 7.129.
[80] Panel Report, *EC – Salmon (Norway)*, para. 7.130.
[81] Panel Report, *EU – Footwear (China)*, para. 7.387.
[82] *(footnote original)* Indeed, such an exercise would seem to be a waste of the investigating authorities' time and resources. We recall that Article 5.10 establishes time limits on original investigations, and Article 11.4 similarly provides that reviews, including expiry reviews, shall be carried out "expeditiously", and normally concluded within 12 months of initiation.
[83] Panel Report, *EU – Footwear (China)*, para. 7.369.

62. The Panel in *EU – Footwear (China)* also rejected China's argument that the sample selection process in the investigation at issue was flawed because the complainant producers did not give their express consent to be included in the sample:

> "With respect to China's argument that the procedure to select the sample was flawed because the complainant EU producers did not give their express consent to be sampled by completing the sampling form, we see nothing in Article 3.1 of the AD Agreement that would require that consent must be given by each company considered in the selection of the sample. Even if such a requirement were to be implied, we can see no basis for concluding that such consent must be obtained through the use of sampling forms. In our view, the very act of participating as complainants in an anti-dumping investigation suggests a willingness to be considered for inclusion in a sample. In this case, the CEC, acting on behalf of all complainants, explicitly confirmed that all complainant EU producers were ready to cooperate and participate in the sampling exercise. Thus, to the extent any consent were considered necessary, it was given in this case."[84]

63. In *EC – Fasteners (China),* China claimed that the EU violated Article 3.1 by conducting its injury determination on fasteners on the basis of a sample of six producers, whose output accounted for approximately 65 per cent of the production of the 45 producers defined by the Commission as the domestic industry; the sample accounted for 17.5 per cent of total domestic production. The Appellate Body found that it is permissible to determine injury on the basis of a sample; while the sample must be representative of the domestic industry, the Anti-Dumping Agreement does not require use in all cases of a statistically valid sample:

> "[T]he *Anti-Dumping Agreement* is silent on the issue of whether sampling may be used for purposes of the injury determination. The Agreement thus does not prevent an authority from using samples to determine injury[.] …
>
> We note that, because the *Anti-Dumping Agreement* does not specify whether sampling is allowed for purposes of an injury determination, it also does not contain guidance on how sampling should be conducted. Thus, we see no basis for China's argument that a sample selected on the basis of the largest volume that can reasonably be investigated, rather than a statistically valid sample, necessarily means that an injury determination conducted on this basis is inconsistent with Article 3.1 of the *Anti-Dumping Agreement*. Although we do not disagree with the view that a sample must be properly representative of the domestic industry defined by the investigating authority, we disagree with China's contention that the only way to ensure representativeness is through a statistically valid sample. In our view, as long as the domestic industry is defined consistently with the *Anti-Dumping Agreement*, and that the sample selected is representative of the domestic industry, an investigating authority has discretion in deciding the method with which it selects a sample. A statistically valid sample is a proper way to ensure the representativeness of the sample. Yet, the *Anti-Dumping Agreement* imposes no obligation on an investigating authority always to resort to statistically valid samples."[85]

64. The Panel in *EC – Fasteners (China)* rejected China's claim that the fact that the investigating authority considered some injury factors on the basis of information for the domestic industry as defined, and considered the remaining factors on the basis of information for the sample of that industry, demonstrates that the determination was not an objective examination based on positive evidence. The Panel found:

> "[R]eliance on information for the sample for some factors, and on information for the entire domestic industry for others, does not mean that the investigating authority did not consider the injury factors in relation of an industry defined in a consistent manner – there is only one industry defined in this case, the 46 EU producers of fasteners. The sample is not a different 'definition' of the domestic industry. We agree with China to the extent that, once the domestic industry has been defined, it is clear that the examination, analysis, and determination of injury must be with respect to

[84] Panel Report, *EU – Footwear (China)*, para. 7.370.
[85] Appellate Body Report, *EC – Fasteners (China)*, paras. 435-436.

> that industry. However, this does not limit the right of the investigating authority to rely on information for a properly constituted sample of the domestic industry in that examination, analysis and determination."[86]

65. The Panel in *China – Broiler Products (Article 21.5 – US)* held that the Anti-Dumping Agreement generally does not preclude the use of sampling as an analytical tool provided that the sample used is representative of the relevant population as a whole:

> "The question of 'representativeness' arises in the context of 'sampling'. Sampling is an exercise in which observations about the whole of a population are based on data collected from a subset of that population. The methodology used to sample from a larger population depends on the type of analysis being performed, but may include simple random sampling or systematic sampling. Whatever the sampling methodology, in the context of the Anti-Dumping Agreement and the SCM Agreement, application of sampling as an analytical tool is valid where it can be demonstrated that the sample is sufficiently representative to allow for a reasoned conclusion about the population as a whole. In this instance, MOFCOM obtained additional data from four domestic producers on 'volume, value, and unit value on a product-specific basis' in the context of analysing 'pricing relationships across product types'. According to China, this was done 'to establish' such relationships, in respect of not only the four domestic producers subject to verification, but also the domestic industry as defined. Moreover, according to China, 'pricing evidence collected by MOFCOM through verification during the re-investigation process further established a pricing spectrum'.
>
> Nothing in Articles 3.2 and 15.2 – or, indeed, in Articles 3 and 15 as a whole – expressly prohibits or permits, or specifically regulates, sampling as an analytical methodology. Nonetheless, any sample that is used to 'establish' a conclusion about the population as a whole must be representative.[87] An unbiased and objective investigating authority cannot reasonably draw conclusions about a population as a whole based on data gathered from a subset that is not representative."[88]

66. Turning to the investigation at issue, the Panel in *China – Broiler Products (Article 21.5 – US)* found that the Chinese investigating authority had failed to show that the sample it had used in its injury determination was representative of the domestic industry:

> "The redetermination is silent as to the selection criteria, the selection process, and the representativeness of the sample. The explanations proffered by China in its submissions do not in any way address the question of representativeness of the sample, but rather contend that the choice of the four companies reverified was not arbitrary. Accordingly, even if MOFCOM's 'reverification' amounted to the type of 'control' required for a proper price comparison, MOFCOM did not explain in the redetermination in what way its sample was sufficiently representative that it could draw a reasoned conclusion about the population as a whole.
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> In this light, we find that China did not act consistently with Articles 3.2 of the Anti-Dumping Agreement and 15.2 of the SCM Agreement because in conducting its 'reverification', MOFCOM failed to explain in what way the companies chosen were

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[86] Panel Report, *EC – Fasteners (China)*, para. 7.390. See also ibid. para. 7.358 ("Article 3.1 of the Anti-Dumping Agreement does not specify how an investigating authority is to select a sample for purposes of an injury determination")..

[87] *(footnote original)* Sampling is generally concerned with gathering data from a sub-set of a population for the purpose of drawing conclusions about the population as a whole. In this instance, the investigating authority already had considerable data – not just of the sub-set, but of the population as a whole; indeed, China stresses that the reason why MOFCOM reverified the four companies was that it knew the sub-set sampled. We are sympathetic to MOFCOM's stated reason for the selection: given tight timelines, it is not unreasonable for an investigating authority to seek data from producers that have already been verified and that are familiar to it. At the same time, and especially given the lack of any explanation in the redetermination for the choice of these producers, this sequence of events might well give rise to an appearance of selecting among domestic producers based on their data to ensure a particular outcome, which would not be consistent with an objective analysis of the evidence. We need not and do not make any findings on this point, but only note that MOFCOM's approach was not without risk.

[88] Panel Report, *China – Broiler Products (Article 21.5 – US)*, paras. 7.109 and 7.111.

> 'representative' such that a consideration of price effects based on data for these companies could be generalised to the domestic industry."[89]

1.4.3.2.5 An objective examination based on positive evidence of "dumped imports"

67. The Panel in *EC – Bed Linen* rejected the argument advanced by India that the term "dumped imports" must be understood to refer only to imports which are the subject of transactions in which the export price was below normal value. Rather, the Panel endorsed the argument by the European Communities that once a determination has been made that a product in question from particular producers is being dumped, this conclusion will then apply to *all* imports of that product from that source:

> "[W]e consider that dumping is a determination made with reference to a *product* from a particular producer/exporter, and not with reference to individual transactions. That is, the determination of dumping is made on the basis of consideration of transactions involving a particular product from particular producers/exporters. If the result of that consideration is a conclusion that the product in question from particular producers/exporters is dumped, we are of the view that the conclusion applies to all imports of that product from such source(s), at least over the period for which dumping was considered. Thus, we consider that the investigating authority is entitled to consider all such imports in its analysis of 'dumped imports' under Articles 3.1, 3.4, and 3.5 of the *AD Agreement*."[90]

68. The Panel in *EC – Bed Linen* also indicated some practical reasons for why the phrase "dumped imports" could not refer only to those imports attributable to transactions in which export price was below normal value:

> "Our conclusion that investigating authorities may treat all imports from producers/exporters for which an affirmative determination of dumping is made as 'dumped imports" 'or purposes of injury analysis under Article 3 is bolstered by our view that the interpretation proposed by India, which entails the conclusion that the phrase 'dumped imports' refers *only* to those imports attributable to *transactions* in which export price is below normal value, would lead to an unworkable result in certain cases. One of the objects and purposes of the *AD Agreement* is to establish the conditions under which Members may impose anti-dumping duties in cases of injurious dumping. An interpretation which would, in many cases, make it impossible to assess one of the necessary elements, injury, is not consistent with that object and purpose.
>
> An assessment of the volume, price effects, and consequent impact, only of imports attributable to transactions for which a positive margin was calculated would be, in many cases, impossible, or at least impracticable. Attempting to segregate individual transactions as to whether they were 'dumped' or not, even assuming it could be done, would leave investigating authorities in a quandary in cases in which the dumping investigation is undertaken for a sample of companies or products. Such sampling is specifically provided for in the *AD Agreement*, yet it would not be possible, in such cases, accurately to determine the volume of imports attributable to 'dumped' transactions. Similarly, if dumping is determined on the basis of a comparison of weighted average normal value to weighted average export price, there would be no comparisons concerning individual transactions which could serve as the basis for segregating imports in 'dumped' and 'not-dumped' categories."[91]

69. In *EC – Bed Linen (Article 21.5 – India),* the Appellate Body reversed the finding by the Panel that in case of an investigation based on a sample, an investigating authority is entitled to consider the total volume of imports from non-examined producers and exporters as being dumped for the purposes of an Article 3 injury analysis, as long as a dumping margin had been

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[89] Panel Report, *China – Broiler Products (Article 21.5 – US)*, paras. 7.112 and 7.113.
[90] Panel Report, *EC – Bed Linen*, para. 6.136.
[91] Panel Report, *EC – Bed Linen*, paras. 6.139-140.

established for any of the examined producers or exporters.[92] Contrary to the Panel, the Appellate Body considered that Article 9.4 does not provide justification for considering *all* imports from *non*-examined producers as *dumped* for purposes of Article 3. According to the Appellate Body:

> "Article 9.4 provides no guidance for determining the volume of dumped imports from producers that *were not* individually examined on the basis of 'positive evidence' and an 'objective examination' under Article 3. The exception in Article 9.4, which authorizes the imposition of anti-dumping *duties* on imports from producers for which *no* individual dumping margin has been calculated, *cannot be assumed* to extend to Article 3, and, in particular, in this dispute, to paragraphs 1 and 2 of Article 3. For the same reasons, we do not see why the volume of imports that has been found to be dumped by non-examined producers, for purposes of determining *injury* under paragraphs 1 and 2 of Article 3, must be *congruent* with the volume of imports from those non-examined producers that is subject to the *imposition of anti-dumping duties* under Article 9.4, as contended by the European Communities and the Panel."[93]

70. In the view of the Appellate Body in *EC – Bed Linen (Article 21.5 – India)*, while paragraphs 1 and 2 of Article 3 do not set forth a specific methodology for examining the volume of dumped imports in case the investigating authority carries out its investigation on the basis of a sample, they do "require investigating authorities to make a determination of injury on the basis of 'positive evidence' and to ensure that the injury determination results from an 'objective examination' of the volume of dumped imports, the effects of the dumped imports on prices, and, ultimately, the state of the domestic industry. Thus, whatever methodology investigating authorities choose for determining the volume of dumped imports, if that methodology fails to ensure that a determination of injury is made on the basis of 'positive evidence' and involves an 'objective examination' of *dumped* imports—rather than imports that are found *not* to be dumped—it is not consistent with paragraphs 1 and 2 of Article 3."[94]

71. The Appellate Body in *EC – Bed Linen (Article 21.5 – India)* thus came to the conclusion that the European Communities' approach whereby it had considered all imports from non-examined exporters or producers as dumped because a number of exporters included in the sample were found to have been dumping was inconsistent with the obligation to conduct an "objective examination":

> "The examination was not 'objective' because its result is predetermined by the methodology itself. Under the approach used by the European Communities, whenever the investigating authorities decide to *limit* the examination to some, but not all, producers—as they are entitled to do under Article 6.10 — *all* imports from *all non*-examined producers will *necessarily always be included* in the volume of dumped imports under Article 3, as long as any of the producers examined individually were found to be dumping. This is so because Article 9.4 permits the imposition of the 'all others' duty rate on imports from *non*-examined producers, *regardless* of which alternative in the second sentence of Article 6.10 is applied. In other words, under the European Communities' approach, imports attributable to *non*-examined producers are simply *presumed*, in all circumstances, to be *dumped*, for purposes of Article 3, solely because they are subject to the imposition of anti-dumping duties under Article 9.4. This approach makes it 'more likely [that the investigating authorities] will determine that the domestic industry is injured', and, therefore, it cannot be 'objective'. Moreover, such an approach tends to favour methodologies where *small numbers* of producers are examined individually.

[92] The Panel had considered highly relevant that "Article 9.4 allows anti-dumping duties to be **collected** on imports from producers for which an individual determination of dumping, based on the calculation of a dumping margin under Article 2, was not made. It also establishes an upper limit for any such duties. In our view, the fact that an anti-dumping duty may properly be collected on imports from producers for which an individual calculation of dumping was not made, necessarily entails that such producers are properly considered to be dumping. Consequently, we consider inescapable the conclusion that the imports from those producers are properly considered as "dumped imports" for the purposes of Articles 3.1 and 3.2." Panel Report, *EC – Bed Linen (Article 21.5 – India)*, para. 6.137.

[93] Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 126.

[94] Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 113.

> This is because the *smaller* the number of individually-examined producers, the *larger* the amount of imports attributable to *non*-examined producers, and, therefore, the larger the amount of imports *presumed* to be *dumped*. Given that the *Anti-Dumping Agreement* generally requires examination of *all* producers, and only exceptionally permits examination of only *some* of them, it seems to us that the interpretation proposed by the European Communities cannot have been intended by the drafters of the Agreement.
>
> For these reasons, we conclude that the European Communities' determination that *all* imports attributable to *non*-examined producers were dumped—even though the evidence from *examined* producers showed that producers accounting for 53 per cent of imports attributed to examined producers were *not* dumping—did not lead to a result that was *unbiased*, *even-handed*, and *fair.* Therefore, the European Communities did not satisfy the requirements of paragraphs 1 and 2 of Article 3 to determine the volume of dumped imports on the basis of an examination that is '*objective*'."[95]

72. In *Korea – Certain Paper*, the Panel recognized the investigating authority's discretion regarding the conclusions it draws in respect of the results of price analysis as long as it adheres to the requirements of Article 3.1 of the Anti-Dumping Agreement:

> "[A]s long as the IA's analysis conforms to the requirements of Article 3.1 of the Agreement, that is, an objective examination based on positive evidence, changes in the relative levels of prices of dumped imports and the domestic industry during the POI do not necessarily preclude the IA from concluding that dumped imports had negative effects on prices."[96]

73. In *EC – Fasteners (China)*, the Panel considered a claim regarding inclusion of two Chinese producers for which zero margins were calculated in the volume of imports considered in the injury analysis; the EU argued that the impact of this inclusion was small. The Panel noted that "the text of the AD Agreement is perfectly clear in this regard … the consideration of 'dumped imports' for purposes of making an injury determination consistent with Articles 3.1, 3.2, 3.4 and 3.5 of the AD Agreement entails the consideration of only those imports for which a margin of dumping greater than *de minimis* is established in the course of the investigation."[97] The Panel further noted that the EU knew or should have known that the information it was considering in examining the volume of dumped imports included imports that were not dumped, and found that "it is not appropriate for us to conclude that the investigating authority could have made an affirmative determination of injury in the absence of consideration of the volume of imports properly treated as dumped. Such an analysis would effectively constitute a *de novo* review of the evidence, which we are not to undertake under the applicable standard of review."[98] The Panel concluded that the EU acted inconsistently with Articles 3.1 and 3.2 in considering the volume of dumped imports.[99]

74. In *EC – Fasteners (China)*, the Panel further considered the principle regarding non-consideration of injury caused by non-dumped imports, in relation to imports of producers/exporters not included in the sample used for the dumping determination and not separately granted individual examination. In the investigation at issue, the EU determined that all sampled producers were dumping and calculated a dumping margin for these non-sampled/unexamined producers on the basis of the dumping margins determined for the sampled producers. The two producers found not to be dumping were not included in the sample; because all producers in the sample were found to be dumping, the Panel considered that the EU authorities were entitled to rely on that evidence and treat all imports from non-sampled/unexamined producers as dumped for purposes of its injury determination; the Panel rejected China's claim under Articles 3.1 and 3.2.[100] The Panel found:

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[95] Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, paras. 132-133.
[96] Panel Report, *Korea – Certain Paper*, para. 7.243.
[97] Panel Report, *EC – Fasteners (China)*, para. 7.354.
[98] Panel Report, *EC – Fasteners (China)*, para. 7.359.
[99] Panel Report, *EC – Fasteners (China)*, para. 7.360.
[100] Panel Report, *EC – Fasteners (China)*, para. 7.370.

> "[T]he conclusion of the investigating authority with respect to the sampled producers, that they were dumping, is not undermined by the fact that two producers not included in the sample were found not to be dumping upon being individually examined. The purpose of sampling foreign producers/exporters in an anti-dumping investigation is to allow an investigating authority to extrapolate from the sample to draw conclusions about dumping for all non-sampled/unexamined foreign producers/exporters on the basis of a detailed examination of fewer than all of them. Article 9.4 of the AD Agreement makes clear that, if the sample for the dumping determination is selected consistently with the AD Agreement, a matter China has not challenged in this dispute, then the investigating authority may treat the findings of dumping made with respect to that sample of companies as establishing the existence of dumping by all non-sampled/unexamined companies for purposes of the imposition of anti-dumping duties.
>
> In our view, a similar result should follow with respect to the treatment of imports as dumped for purposes of the injury determination. That is, if the sample for the dumping determination is selected consistently with the AD Agreement, a matter China has not challenged in this dispute, then the investigating authority may treat the findings of dumping made with respect to that sample of companies as evidence that imports from the non-sampled/unexamined companies are dumped. To do otherwise would limit the utility of Article 6.10 of the AD Agreement, as it would require the investigating authority to gather and consider information for non-sampled/unexamined producers in order to be able to make individual judgments as to whether the imports from non-sampled/unexamined producers are dumped, despite the decision to proceed on the basis of a sample.
>
> … [I]t seems inconsistent and illogical to accept that conclusions about dumping for sampled producers can be the basis for the imposition of anti-dumping duties on non-sampled/unexamined producers, but not to accept that those same conclusions about dumping may serve as evidence that imports attributable to non-sampled/unexamined producers are dumped in the same investigation."[101]

1.4.3.3 Relationship with Article 3.4

75. In *US – Hot-Rolled Steel,* the Appellate Body explained that "an important aspect of the 'objective examination' required by Article 3.1 is further elaborated in Article 3.4 as an obligation to 'examin[e] the impact of the dumped imports on the domestic industry' through 'an evaluation of all relevant economic factors and indices having a bearing on the state of the industry'".[102] See also paragraphs 48 above and 200 below.

76. The Panel in *Argentina – Poultry Anti-Dumping Duties* considered that "to the extent that a Member failed to conduct a proper 'examination of the impact of dumped imports' for the purpose of Article 3.4, that Member also failed to conduct an 'objective examination of … the consequent impact of the [] imports' within the meaning of Article 3.1(b)."[103]

77. The Panel in *Pakistan – BOPP Film (UAE)* found that Pakistan's investigating authority (NTC) had acted inconsistently with Articles 3.1 and 3.4 in its finding of injury on account of market share.[104] In arriving at this finding, the Panel emphasized that, to perform an objective examination based on positive evidence, an investigating authority must, *inter alia*, take into account conflicting evidence and explain how the evidence supported its conclusions:

> "We recall that Articles 3.1 and 3.4 require a determination to 'be based on positive evidence' and 'involve an objective examination' of, among others, the impact of dumped imports on the state of the domestic industry, including market share. To perform an objective examination based on positive evidence, an investigating

[101] Panel Report, *EC – Fasteners (China)*, paras. 7.364-7.365.
[102] Appellate Body Report, *US – Hot-Rolled Steel*, para. 194.
[103] Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.325.
[104] Panel Report, *Pakistan – BOPP Film (UAE)*, para. 7.369.

> authority must, among other things, take into account conflicting evidence and explain how the evidence supported its conclusions."[105]

78. In examining the NTC's determination of injury, the Panel considered that the NTC had based its market share findings exclusively on the year during the POI in which the domestic industry's market share had declined without explaining how it had taken into account the conflicting evidence from the rest of the POI:

> "In the case before us, the NTC was faced with an increasing market share of the domestic industry during the first and last part of the POI, and a decrease in 2009; and vice versa for the market share of the dumped imports. The NTC chose to base its findings on market share exclusively on 2009, the only portion of the POI during which the domestic industry's market share decreased. We cannot find any explanation on the record of how the NTC took into account the conflicting data from the earlier and later parts of the POI. This is not consistent with the requirement to perform an objective examination pursuant to Articles 3.1 and 3.4."[106]

1.4.4 Volume and price effects

79. The Panel in *Mexico – Steel Pipes and Tubes* was mindful of the considerations outlined by the Appellate Body in *Mexico – Anti-Dumping Duties on Rice* when it analysed the use of samples and six-month time periods in considering whether Mexico had violated Articles 3.1 and 3.2 in: (i) estimating the volume of imports of the product under investigation from countries other than Guatemala by using a non-representative sample; and (ii) in evaluating the price effects of imports from Guatemala.[107] On the volume point, the Panel considered that the investigating authority could have done more to ensure it received a statistically robust response, and was not convinced by Mexico's arguments that it was not possible to do so:

> "It seems to us that if Economía had made a request at or near the outset of the investigation, it could have received a comprehensive, or at least statistically robust, response well within the time-frames of this investigation. We would have vastly preferred that Economía acquire a comprehensive official data set – or at least a statistically robust sample – from the competent Mexican government agency. We believe that such information would have been the best available source to calculate volumes of imports from sources other than Guatemala. However, we are aware that, for certain Members, considerable periods of time may be needed in order to acquire such information from the competent government agencies, and that, for the purposes of conducting a timely investigation as required by the Agreement, it may not always be possible to acquire such information from a government source. In any event, we do not consider that simply by not seeking information from official government sources, Economía's analysis would necessarily be flawed."[108]

80. The Panel in *Mexico – Steel Pipes and Tubes* found that the investigating authority had indeed acted inconsistently with Articles 3.1 and 3.2 regarding the methodology to establish the volume of imports from sources other than Guatemala "due to the limited magnitude and consistency of samples, together with the unsubstantiated price range assumptions on which Economia relied to estimate the volume of subject imports imported from countries other than Guatemala. An investigating authority that uses a methodology premised on a limited sample and unsubstantiated assumptions does not conduct an examination based on positive evidence."[109] However, in evaluating price effects of the imports from Guatemala, the Panel found that Guatemala had not established a prima facie case.[110]

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

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[105] Panel Report, *Pakistan – BOPP Film (UAE)*, para. 7.366.
[106] Panel Report, *Pakistan – BOPP Film (UAE)*, para. 7.367.
[107] Panel Report, *Mexico – Steel Pipes and Tubes*, para. 7.262.
[108] Panel Report, *Mexico –Steel Pipes and Tubes*, para. 7.282.
[109] Panel Report, *Mexico –Steel Pipes and Tubes*, para. 7.285.
[110] Panel Report, *Mexico –Steel Pipes and Tubes*, paras. 7.293-7.295.

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

…

Article 3.2 and Article 15.2 instruct an investigating authority to consider whether the dumped or subsidized imports result in any of three phenomena, i.e. significant price undercutting, significant price depression, or significant price suppression. The use of the disjunctive 'or' between these three phenomena indicates that they are independent lines of inquiry. A view that only price depression and price suppression constitute price effects would read out of the text the option to consider price undercutting as an independent channel of inquiry. This would be inconsistent with the requirement that effect be given to all terms of a treaty. We thus interpret Article 3.2 and Article 15.2 to mean that a consideration of any of the three price effects can independently satisfy the requirement in Article 3.1 and Article 15.1 to examine the 'effect … on prices in the domestic market for like products'."[111]

82. The Panel went on to note that:

"The European Union argues that price undercutting cannot itself be an 'effect … on prices' because it is only through price depression or suppression that 'the price curve of the domestic industry's prices' can be impacted. In the European Union's view, then, 'price undercutting requires, at least factually, the existence of price depression and/or price suppression'. However, we consider that such a narrow interpretation of 'effect … on prices' is neither required by the definition of 'effect' nor consistent with the structure of the provisions. The ordinary meaning of an 'effect' is, inter alia, '[s]omething accomplished, caused, or produced; a result, consequence'. This definition indicates that the examination of the 'effect' of subject imports on domestic prices required by Article 3.1 and Article 15.1 must entail an examination of whether there has been some result or consequence with respect to domestic prices that was caused by subject imports. We do not see any reason that such a result or consequence may only be in the form of a change in the price of the domestic like product. It is our view, rather, that such a result or consequence could be in the form of a change in the relative prices of domestic like product and the products with which it competes. Such changes could impact the competitiveness of the price of the domestic like product, even if there is no evidence during the period of investigation that the price of the domestic like product is significantly depressed or suppressed. We find this broader view to be consistent with the structure of the second sentence in Article 3.2 and Article 15.2, which as explained above, provides for three separate channels of inquiry. In contrast, the European Union's narrow interpretation would in practice read price undercutting out of Article 3.2 and Article 15.2 as an independent line of inquiry."[112]

83. The Panel in *EC – Salmon (Norway)* considered the Appellate Body's finding in *EC – Bed Linen* on the treatment of imports attributable to unexamined producers, finding the decision troubling. In the case before it the Panel found that the European Communities had erred in concluding that all examined producers were dumping:

"The Appellate Body noted that there was no specified methodology for determining the volume of dumped imports, but stated that any such methodology must be based on positive evidence and an objective examination of relevant evidence. The Appellate Body concluded that the fact that producers accounting for 47 per cent of total imports attributable to examined producers were found to be dumping was not a

[111] Panel Report, *US – Ripe Olives from Spain*, paras. 7.256 and 7.258.
[112] Panel Report, *US – Ripe Olives from Spain*, para. 7.259.

sufficient basis to justify treating imports from unexamined producers/exporters as dumped for purposes of the injury analysis. The Appellate Body determined that an objective examination of that evidence alone could not lead to the conclusion that imports from unexamined producers were dumped,[113] and concluded that there must be other evidence to justify treating imports from unexamined producers as dumped for purposes of the injury investigation.[114] While a calculation of dumping margins for each individual producer/exporter was clearly not required, as Article 6.10 permitted limited examination, the Appellate Body considered that other evidence could be relied upon in determining whether imports from unexamined producers were dumped imports.'

We are troubled by the Appellate Body's decision in this regard. The Appellate Body's report indicates that an investigating authority may consider 'different and additional evidence' to evaluate whether imports from unexamined producers are dumped for purposes of injury analysis. In this regard, the Appellate Body's Report refers to evidence 'such as witness testimony and different types of documentary evidence about critical aspects of the market, conditions of competition, production characteristics, and statistical data relating to the volume, prices, and effects of imports' as evidence that may form part of the evidence an investigating authority may take into account 'when determining, on the basis of an 'objective examination' whether or not imports from non-examined producers are being dumped.' However, Article 2.1 of the AD Agreement makes clear that 'a product is to be considered as being dumped' only if the export price is less than the normal value, and establishes detailed rules for that calculation. The Appellate Body has, in the context of sunset reviews, found that a determination of likelihood of dumping based on a dumping margin calculated using a methodology inconsistent with Article 2 of the AD Agreement is unacceptable. Thus, it is unclear to us how such 'other evidence' can provide a legally sound basis for a conclusion that imports attributable to unexamined producers are dumped. In our view, the fact that imports from unexamined producers are, under the AD Agreement, recognized as dumped for purposes of the imposition of anti-dumping duties, and that those duties may be collected in amounts limited by calculations made pursuant to Article 2 of the AD Agreement, does establish a legally sound basis for the treatment of those imports as dumped for purposes of the injury analysis.'

… In our view, a finding that all imports attributable to examined producers are dumped may be treated as evidence that all imports attributable to unexamined producers are dumped for purposes of the injury analysis without a further examination of the nature of the operations of examined and unexamined producers.[115] Of course, in this case, the EC erred in concluding that all examined producers were dumping, as we have found above that the EC erred in treating imports from Nordlaks as 'dumped imports'. We have also found that the EC erred in the determination of the companies to be included in the group examined. Thus, not all examined sampled producers were found to be dumping, and to the extent that the EC extrapolated to all imports on the basis of a conclusion that all imports attributable to the examined producers were dumped, it erred."[116]

84. In conclusion, the Panel in *EC – Salmon (Norway)* found that the European Communities had acted inconsistently with Articles 3.1 and 3.2 in considering the volume of dumped imports.

"Therefore, we conclude that that the EC erred in treating imports attributable to a company for which a *de minimis* margin was calculated as dumped, and further erred in treating all imports from unexamined producers and exporters as dumped, in the

[113] Appellate Body Report, *EC-Bed-Linen (Article 21.5-India)*, para. 132.

[114] Appellate Body Report, *EC-Bed-Linen (Article 21.5-India)*, para. 124. In that case, the EC had proffered no evidence, other than the determination with respect to the sampled producers, with respect to the question of dumping by unexamined exporters, and thus the Appellate Body did not go on to consider the whether there was a sufficient basis for the treatment of imports from unexamined producers as dumped.

[115] (*footnote original*) Moreover, a finding that all sampled producer/exporters were dumping is persuasive evidence of dumping by unexamined non-producing exporters, who are presumably exporting the products produced by the sampled companies found to be dumping.

[116] Panel Report, *EC – Salmon (Norway)*, paras. 7.632-7.634.

> context of its injury determination. As a result, the EC acted inconsistently with Articles 3.1 and 3.2 in considering the volume of dumped imports."[117]

85. See also under Article 3.2 below.

1.4.5 Injury

86. The Panel in *Mexico – Steel Pipes and Tubes* considered a claim by Guatemala that the Mexican investigating authority's injury analysis was based on "selective and inconsistent use of information pertaining to the domestic industry."[118] The Panel recalled that the investigating authority had defined the domestic industry as being constituted of four firms: Hylsa, Tuberias Procarsa, Tuberia Nacional and Compania Mexicana de Tubos. However, for the purpose of the injury analysis the investigating authority relied upon information on the economic indicators of three firms constituting 88 per cent of the domestic industry.[119] For financial information only 53 per cent of the domestic industry was used.[120] The Panel found that examining only a part of the industry as defined by the investigating authority was not an objective examination of positive evidence. While the data in respect of examining economic injury factors, in the circumstances of this case, might have been acceptable, the data regarding financial factors was not:

> "We are of the view that once an investigating authority defines which entities comprise the domestic industry that will form the basis for its injury analysis, it should seek and use a consistent data-set reflecting the performance of those entities. We understand that, in practice, an investigating authority could have partial information to start an investigation, which might then be supplemented as the investigation proceeds. An investigating authority may also be confronted with problematic incomplete data furnished by one or more domestic producers. In such a case, it should request supplementary information, or, if that is not practicable, resort to a reasonable estimation methodology which will yield results that are reflective of the state of the domestic industry. This is because the requirement is to determine whether the domestic industry, as defined, is injured by dumped imports or not.
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> …
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> We are of the view that the Article 3.1 requirement to base a determination of injury on positive evidence and pursuant to an objective examination imposes certain obligations on an investigating authority with regard to the consistency of the data collected and relied upon as the basis for its determination. In brief, examining only a part of the industry as defined by the investigating authority is not an objective examination of positive evidence since it is not representative of the overall state of the domestic industry. The use of a consistent and representative data set will best reflect the state of the domestic industry for the purposes of an injury analysis. We thus disagree with Mexico's view that an IA may opt to limit its collection and evaluation of data in respect of certain injury factors to only a certain part of the domestic industry as defined by it for the purposes of its injury analysis.
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> …
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> Thus, in respect of the economic injury factors, Economía sought information from four companies and received and analysed information from three companies constituting 88 per cent of the domestic industry. We are of the view that, under these circumstances, the use of such data might have been reflective of the state of the domestic industry in respect of those factors. However, in respect of the financial indicators, we emphasize that Economía *did not even attempt* to seek information from other firms constituting the domestic industry as Economía had defined it. We consider that Economía acted inconsistently with its injury analysis obligations under Article 3 in treating the partial financial data that it sought, acquired and

[117] Panel Report, *EC – Salmon (Norway)*, para. 7.636. See also Panel Report, *Canada – Welded Pipe*, paras. 7.89 and 7.217.
[118] Panel Report, *Mexico –Steel Pipes and Tubes*, para. 7.296.
[119] Panel Report, *Mexico –Steel Pipes and Tubes*, para. 7.314.
[120] Panel Report, *Mexico –Steel Pipes and Tubes*, para. 7.314.

> analysed as a sufficient basis for its determination in respect of such factors, and as a component of its overall injury analysis. Among other things, there was no assessment as to how, or the extent to which, Hylsa's financial performance was reflective of, or better or worse than, the financial state of the rest of the domestic industry, as this had been defined by Economía. Furthermore, Mexico has failed to provide any acceptable justification regarding these gaps in the information sought and received and then analysed in its injury investigation. We note that there were only four firms comprising the domestic industry as defined by Economía for the purposes of its injury analysis; in our view it would not have been impracticable for Economía to have acquired financial injury data from the remaining firms constituting the domestic industry as defined by Economía."[121]

87. In *Pakistan – BOPP Film (UAE)*, the Panel assessed, *inter alia*, whether Pakistan's investigating authority (NTC) had acted inconsistently with Articles 3.1 and 3.4 by finding that the trends in profits were indicative of injury, despite *slight* declines in profits.[122] The Panel noted that the materiality of the injury to be assessed by an investigating authority concerns the overall state of the domestic industry, and not the individual factors:

> "We note that Article 3.4 does not necessarily preclude an investigating authority from finding the existence of material injury where it observes minor negative trends with regard to some of the individual factors. We understand the *materiality* of injury to attach to the overall state of the domestic industry, and not the individual factors. Therefore, the United Arab Emirates has not established that the NTC acted inconsistently with Article 3.4 by relying on slight declines in profits in support of its finding of injury."[123]

1.4.6 Causation / Non-attribution

88. The Panel in *Mexico – Steel Pipes and Tubes* considered whether an unbiased and objective investigating authority could have treated cost trends and a decrease in exports in the manner that the Mexican investigating authority did when analysing injury and causality.[124] Regarding the argument on costs, the Panel considered Guatemala had failed to make a prima facie case. On exports, the Panel did not think the investigating authority made any attempt in the Final Determination to "distinguish the relative impacts on the industry of the respective declines in the volumes of domestic sales and exports."[125] As such, the Panel found the investigating authority in Mexico to have acted inconsistently with Mexico's obligations under Articles 3.1, 3.2, 3.4, and 3.5 in its treatment of the decrease in exports in its causation analysis:

> "To the contrary, the only explanation given by Economía for dismissing the decline in exports as a determinative factor was exports' small share of domestic production. This statistic is irrelevant, however, given that the 'yardstick' used in Economía's entire analysis in this section of the Determination was the <u>absolute</u> decline in volume, by which yardstick the decline in exports over the period analysed by Economía was considerably larger than that in domestic sales. In short, we do not consider that Economía's non-attribution analysis in respect of the impact of the decline in exports on the domestic industry was sufficient."[126]

1.4.7 "the effect of dumped imports"

89. In *Guatemala – Cement II*, Mexico claimed that Guatemala's investigating authority had violated Articles 3.1 and 3.2 by not considering at all, in its investigation, certain other cement imports. The Panel understood the Mexican claim to be that the Guatemalan authorities considered the type of cement under the not scrutinized imports as being "unlike" the cement under the imports subject to investigation, an assessment which Mexico considered erroneous. Mexico further claimed that the erroneous exclusion of certain imports from the investigation resulted in

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[121] Panel Report, *Mexico –Steel Pipes and Tubes*, paras. 7.326, 7.328 and 7.332.
[122] Panel Report, *Pakistan – BOPP Film (UAE)*, para. 7.376.
[123] Panel Report, *Pakistan – BOPP Film (UAE)*, para. 7.377. See also ibid. paras. 7.384-7.393.
[124] Panel Report, *Mexico –Steel Pipes and Tubes*, para. 7.351.
[125] Panel Report, *Mexico –Steel Pipes and Tubes*, para. 7.372.
[126] Panel Report, *Mexico –Steel Pipes and Tubes*, para. 7.372.

the following consequences: (i) the resulting volume of total imports of the product under investigation was lower; (ii) the share of allegedly dumped imports in total imports of the product under investigation was artificially inflated; (iii) the consideration of a faulty and incomplete figure for total imports of the product under investigation yielded a distorted figure for apparent domestic consumption; and (iv) because of this incorrect figure for apparent domestic consumption, the relationship between the increase in dumped imports and consumption was ultimately incorrect.[127] The Panel considered that consequences (i) through (iv), if proven, would constitute a violation of Articles 3.1 and 3.2, in that an exclusion of the imports at issue from the figures for domestic consumption of the like product affected the comparison that was made with the figures for volume of dumped imports for purposes of determining that there had been a significant increase in dumped imports relative to domestic consumption in the importing Member.[128] After reviewing the evidence submitted by Mexico and inconsistencies in Guatemala's replies in this regard, the Panel ultimately found that Mexico had established a prima facie case of inconsistency with respect to Articles 3.1 and 3.2.[129]

1.4.8 Relationship with other paragraphs of Article 3

90. In *Thailand – H-Beams*, the Appellate Body referred to Article 3.7 as well as Articles 5.2, 5.3, 6 and 12 in interpreting Article 3.1. See paragraph 32 above.

1.5 Article 3.2

1.5.1 Choice of analytical methodology

1.5.1.1 General

91. With respect to Article 3.2, the Panel in *Thailand – H-Beams* stated that "it is for the investigating authorities in the first instance to determine the analytical methodologies that will be applied in the course of an investigation, as Article 3 contains no requirements concerning the methodology to be used."[130]

92. In *Egypt – Steel Rebar*, the Panel did not find on the plain text of Article 3.2 any requirement that the price undercutting analysis must be conducted at any particular level of trade. See paragraph 146 below.

93. In *China – GOES*, the Appellate Body held that the existence of a pricing policy by importers to undercut the prices of domestic producers could be taken into consideration by an investigating authority as evidence of price undercutting, price depression or price suppression:

> "We consider that the existence of a pricing policy by importers to undercut the prices of domestic producers could, when successful, lead to actual price undercutting. Even in the absence of price undercutting, however, a policy that aims to undercut a competitor's prices may still be relevant to an examination of its price depressive or suppressive effects. Indeed, a policy aimed at price undercutting may very well depress and suppress domestic prices in instances where, as China asserts, 'domestic producers were reacting to subject import competition and were lowering domestic prices so as to compete more effectively and minimize any further loss of market share.' In this respect, if an importer pursues a policy of undercutting a competitor, but that competitor anticipates or responds to that policy by lowering its price to win the sale, this may still reveal that subject imports have the effect of depressing, or preventing the increase of, domestic prices.
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> The Panel considered that the existence of a pricing policy was 'undermine[d]' by the fact that there was no price undercutting during the first quarter of 2009. Having

[127] Panel Report, *Guatemala – Cement II*, paras. 8.268-8.272. The Panel also found a violation of Article 3.5 with respect to the failure by Guatemala's authority to take into account certain non-dumped imports. See para. I.A.1(a)(i)107 below.

[128] Panel Report, *Guatemala – Cement II*, para. 8.269.

[129] Panel Report, *Guatemala – Cement II*, para. 8.272.

[130] Panel Report, *Thailand – H-Beams*, para. 7.159. See also Panel Report, *EU – Biodiesel (Indonesia)*, para. 7.137.

> examined only the question as to whether the existence of a pricing policy resulted in price undercutting by subject import prices, the Panel did not also examine whether that policy could, even in the absence of price undercutting, support a finding of significant price depression and suppression. The Panel did not address the proper question before it and therefore failed to consider the explanatory force that a policy aimed at price undercutting could have for the depression or suppression of domestic prices. That prices were higher for subject imports than domestic like products in the first quarter of 2009 does not necessarily negate the significance of a policy aimed at price undercutting for findings of price depression and suppression, and we therefore do not consider that it was appropriate for the Panel to have rejected MOFCOM's reliance on the pricing policy on the grounds that it did."[131]

94. In *China – GOES*, the Appellate Body reasoned that parallel price trends may support a price depression or suppression analysis:

> "We can conceive of ways in which an observation of parallel price trends might support a price depression or suppression analysis. For instance, the fact that prices of subject imports and domestic products move in tandem might indicate the nature of competition between the products, and may explain the extent to which factors relating to the pricing behaviour of importers have an effect on domestic prices."[132]

95. The Panel in *China – Cellulose Pulp* held that while parallel pricing may be taken into account in a finding of price depression, it "does not necessarily mean that the domestic prices were pushed down by the declining prices of the dumped imports."[133] Turning to the investigation at issue, the Panel concluded that the Chinese investigating authority had failed to explain how the decline in the domestic prices was an effect of dumped imports:

> "Without such explanation, the identification of parallel price trends does no more than recognize that two variables, domestic and dumped import prices, move together. Given that the product in question in this dispute is a commodity, and both dumped imports and the domestic like product are sold in similar quantities, at the same level of trade, with few if any discernible differences in quality or other relevant competitive factors, and are in the same market and therefore influenced by the same market pressures and factors, this is hardly surprising. It may be that one of the factors affecting domestic prices is competition with dumped imports, but the mere identification of such a parallel trend cannot alone suffice to show that the decline in the price of the domestic like product is an effect of the dumped imports.
>
> We therefore conclude that while MOFCOM reasonably found that there were parallel trends between dumped import and domestic like product prices, it failed to explain the role of those parallel price trends in the decline of domestic like product prices and how changes in the prices and volume of the dumped imports affected the domestic like product prices."[134]

96. In *China – GOES*, the Appellate Body held that the effect of dumped imports on domestic prices may be examined from the point of view of the volume or prices of dumped imports:

> "We see no disagreement between the participants that MOFCOM's finding of significant price depression and suppression rested on an examination of the effect of both the prices and volume of subject imports on domestic prices. This approach is consistent with the requirements of Articles 3.2 and 15.2 whereby the effect of subject imports on domestic prices may be examined through the vector of subject import prices, subject import volumes, or both. However, in circumstances where an investigating authority relies on both subject import prices and volume, a panel must still allow for the possibility that either prices or volume was sufficient by itself to

[131] Appellate Body Report, *China – GOES*, paras. 206-207.
[132] Appellate Body Report, *China-GOES*, para. 210.
[133] Panel Report, *China – Cellulose Pulp*, para. 7.77.
[134] Panel Report, *China – Cellulose Pulp*, paras. 7.80-7.81.

sustain a finding.[135] We therefore do not consider that the focus of the Panel's inquiry should have been on whether the effects of either subject import volume or prices was the primary basis for MOFCOM's price effects finding."[136]

1.5.1.2 Frequency of analysis

97. The Panel in *Thailand – H-Beams* considered that a quarterly analysis of the trend in import volume is not required under Article 3.2, and went on to state that:

> "Given that on an annual basis over a multi-year period, imports from Poland increased in every period examined, we do not believe that quarter-to-quarter fluctuation in import volumes during one of the twelve-month periods examined invalidates the Thai authorities' finding that the import volume of the subject imports 'increased continuously'."[137]

1.5.1.3 Length of period of investigation

98. In *Guatemala – Cement II*, the Panel did not agree with Mexico's argument that Guatemala's authority had acted inconsistently with Article 3.2 by examining import data only for the one-year period of investigation. The Panel explained:

> "A recent recommendation of the Committee on Anti-Dumping Practices calls on Members to use a data collection period of at least three years. This recommendation reflects the common practice of Members.[138] That said, there is no provision in the Agreement which specifies the precise duration of the period of data collection. Thus, it cannot be said *a priori* that the use of a one-year period of data collection would not be consistent with the requirement of Article 3.2 to consider whether there has been a significant increase in the volume of dumped imports in the circumstances of a particular case. In this case, Guatemala argues that the reason for the short period of data collection was that exports by Cruz Azul did not become significant until 1995. The record of the investigation supports this conclusion."[139]

99. In *Morocco – Definitive AD Measures on Exercise Books (Tunisia)*, the Panel held that basing a price undercutting analysis on a period which is different from the period of investigation used for the injury determination is inconsistent with Article 3.2:

> "We note that the title of Article 3 'Determination of *Injury*' and the wording of Article 3.5 ('[i]t must be demonstrated that the dumped imports are, *through the effects of dumping, as set forth in paragraphs 2 and 4,* causing injury within the meaning of this Agreement') confirm that consideration of price effects is one of the steps in the determination of injury. As Tunisia recalls, this inquiry is part of a 'logical progression ... leading to an investigating authority's ultimate injury and causation determination'. Therefore, in order to determine whether imports cause, through the

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[135] *(footnote original)* As a logical matter, the fact that an investigating authority relies more heavily on one of two potential factors does not support the inference that the lesser factor was by itself necessarily insufficient to sustain that finding, or that both factors together were insufficient to sustain it. In any event, we recognize that, given the inter-relationship of product volumes and prices, it is not clear that an investigating authority may in practice easily separate and assess the relative contribution of the volumes versus the prices of subject imports on domestic prices.

[136] Appellate Body Report, *China-GOES*, para. 216.

[137] Panel Report, Thailand – *H-Beams*, para. 7.168.

[138] *(footnote original)* The recommendation provides that:

"(c) the period of data collection for injury investigations normally should be at least three years, unless a party from whom data is being gathered has existed for a lesser period, and should include the entirety of the period of data collection for the dumping investigation; " (Recommendation Concerning the Periods of Data Collection for Anti-Dumping Investigations, adopted by the ADP Committee on 5 May 2000, G/ADP/6)."

We note that this recommendation is a relevant, but non-binding, indication of the understanding of Members as to appropriate implementation practice regarding the period of data collection for an anti-dumping investigation.

[139] Panel Report, *Guatemala – Cement II*, para. 8.266.

> effects of dumping (including price effects) injury, the effects analysed must, in principle, relate to the period selected for the examination of the economic situation of the domestic industry."[140]

100. The Panel found that Morocco's investigating authority acted inconsistently with Article 3.2 basing its price undercutting analysis on a period different from the period of data collection for its injury analysis, without showing good cause for doing so:

> "The record shows that MIICEN indicated that the period from 1 January 2013 to 30 April 2017 was the period of data collection for the purposes of the injury assessment; however, it made the price comparison for the purposes of the price undercutting analysis only on the basis of the last 12 months of that period. For the reasons outlined above, we consider that MIICEN failed to conduct an objective examination, as it selected a different period of price undercutting analysis from the one used for the rest of the injury analysis and did not show good cause in its report for selecting a different period."[141]

101. The Panel also rejected Morocco's argument that "when the price effects analysis period is the same as the dumping analysis period, there is a presumption of conformity with the requirements of Article 3.1."[142] According to the Panel, "[n]othing in the text of the Anti-Dumping Agreement requires the period of undercutting and the period of dumping analysis to coincide. Moreover, the Anti-Dumping Agreement does not establish a presumption of conformity should the two periods overlap."[143]

102. Finally, the Panel also rejected Morocco's argument that its investigating authority had followed domestic law in selecting a different period for the price undercutting analysis.[144] Based on the foregoing reasoning, the Panel concluded that the Moroccan investigating authority's analysis failed to reflect an objective examination of price undercutting under Articles 3.1 and 3.2 of the Anti-Dumping Agreement.[145]

1.5.2 Comparability of product types

103. In *China – Broiler Products (Article 21.5 – US)*, the Panel clarified an investigating authority's obligation in determining the effect of dumped prices on the prices of the domestic industry in investigations where comparisons are made between baskets of product types, as follows:

> "As a matter of law, we continue to be of the view that:
>
> a. a simple comparison of prices in respect of baskets with different compositions does not indicate the effect of one set of prices (of the subject import basket) on the other set of prices (the domestic basket, comprising a larger number of product models); and
>
> b. where AUVs are based on baskets whose product mixes are not comparable, an investigating authority is required to seek to 'control for differences in physical characteristics affecting price comparability or making necessary adjustments'."[146]

104. The Panel in *China – Broiler Products (Article 21.5 – US)* found an inconsistency with Article 3.2 in the Chinese investigating authority's analysis of price effects on the ground that the authority had failed to take into account the differences in the composition of the two baskets:

> "First, in considering the price effects of dumped imports, MOFCOM undertook a price comparison between two baskets of dissimilar compositions and considered the effects

[140] Panel Report, *Morocco – Definitive AD Measures on Exercise Books (Tunisia)*, para. 7.216.
[141] Panel Report, *Morocco – Definitive AD Measures on Exercise Books (Tunisia)*, para. 7.217.
[142] Panel Report, *Morocco – Definitive AD Measures on Exercise Books (Tunisia)*, para. 7.218.
[143] Panel Report, *Morocco – Definitive AD Measures on Exercise Books (Tunisia)*, para. 7.219.
[144] Panel Report, *Morocco – Definitive AD Measures on Exercise Books (Tunisia)*, para. 7.221.
[145] Panel Report, *Morocco – Definitive AD Measures on Exercise Books (Tunisia)*, para. 7.222.
[146] Panel Report, *China – Broiler Products (Article 21.5 – US)*, para. 7.104.

> of the AUV of a smaller import basket on the AUV of a larger domestic basket. In the original case MOFCOM had found that the 'like product' for the purposes of the investigation was a broiler and not specific product models, and that many of the product models at issue were substitutable in the Chinese market. MOFCOM was thus aware of potential price effects as a result of competition among product models within each basket. Given substitutability of the product models within the larger domestic basket, there was some risk that price effects were the effects of competition from product models within the domestic basket that were not in the dumped import basket.
>
> Second, we note the observation by the United States that, 'MOFCOM found that chilled chicken cuts accounted for 40 to 47 percent of subject imports and chicken feet accounted for 29 to 39 percent of subject imports, depending on the year'. We recall the model-specific prices that MOFCOM found in the course of the reverification. Given the range of prices among the various product models and the change in the composition of the domestic basket from year to year, it is not a given that any observed price effects are 'not merely from differences in the composition of the two baskets being compared'. An unbiased and objective investigating authority would be expected to seek to control for these variations in considering the effect of the prices of subject imports on the prices of the domestic like product."[147]

105. In *Korea – Pneumatic Valves (Japan)*, the Panel found that the investigating authority acted inconsistently with Articles 3.1 and 3.5 of the Anti-Dumping Agreement by failing to ensure price comparability in the comparison of individual transaction prices of certain models of dumped imports with the average prices of corresponding models of the domestic like product. At the outset of its analysis, the Panel explained the need to ensure price comparability:

> "We recall that there is no specific guidance in the Anti-Dumping Agreement as to how an investigating authority is to consider the price effects of dumped imports. However, whatever methodology or approach it uses, it must respect the overarching principle of Article 3.1 that the determination of injury must involve an 'objective examination' based on 'positive evidence'. This means, *inter alia*, that when an investigating authority compares the prices of the dumped imports and those of the domestic like product, it must ensure that the prices being compared are, in fact, properly comparable. 'As soon as price comparisons are made, price comparability necessarily arises as an issue.' Therefore, an investigating authority must ensure price comparability whenever price comparisons are made, not just in a price undercutting analysis. Of course, the most direct instance of price comparison is in the context of considering price undercutting. However, an investigating authority's consideration of price depression or price suppression may also involve comparison of prices, and to the extent it does, the investigating authority must ensure that the prices being compared are properly comparable."[148]

1.5.3 "a significant increase in dumped imports"

106. In *Thailand – H-Beams*, the Panel considered that Article 3.2 does not require that the term "significant" be used to characterize a subject increase in imports in the determination of an investigating authority. The Panel explained:

> "We note that the text of Article 3.2 requires that the investigating authorities 'consider whether there has been a significant increase in dumped imports'. The *Concise Oxford Dictionary* defines 'consider' as, *inter alia*: 'contemplate mentally, especially in order to reach a conclusion'; 'give attention to'; and 'reckon with; take into account'. We therefore do not read the textual term 'consider' in Article 3.2 to require an explicit 'finding' or 'determination' by the investigating authorities as to whether the increase in dumped imports is 'significant'. While it would certainly be preferable for a Member explicitly to characterize whether any increase in imports as 'significant', and to give a reasoned explanation of that characterization, we believe that the word 'significant' does not necessarily need to appear in the text of the

[147] Panel Report, *China – Broiler Products (Article 21.5 – US)*, paras. 7.102-7.103.
[148] Panel Report, *Korea – Pneumatic Valves (Japan)*, para. 7.266.

> relevant document in order for the requirements of this provision to be fulfilled. Nevertheless, we consider that it must be apparent in the relevant documents in the record that the investigating authorities have given attention to and taken into account whether there has been a significant increase in dumped imports, in absolute or relative terms."[149]

107. In *Guatemala – Cement II*, the Panel agreed with Mexico that Guatemala's authority had acted inconsistently with Articles 3.1 and 3.2 by not taking into account imports other than those from the supplier under investigation. See paragraph 89 above.

108. The Panel in *China – Cellulose Pulp* pointed out that the three methods provided for under Article 3.2 for the assessment of the volume of dumped imports are not mutually exclusive, but rejected the argument that an investigating authority may be required to consider the significance of any increase in dumped imports in relative terms, in addition to considering the significance of an absolute increase:

> "The three methods for considering the volume of imports set out in Article 3.2 are not mutually exclusive, and the investigating authority may rely on one, two or all of them in the course of its consideration of the significance of any increase in the volume of dumped imports, as well as in its analysis and determination with regard to injury and causation at later stages. However, in our view, there is no basis in the text of Article 3.2, in light of the disjunctive 'either … or', for Canada's view that investigating authorities can, on the facts of a particular case, be required to consider the significance of any increase in the volume of dumped imports in relative terms, in addition to considering the significance of any absolute increase."[150]

109. The Panel in *China – Cellulose Pulp* disagreed that an investigating authority is required under Article 3.2 to analyse the correlation between an increase in the volume of dumped imports and other factors such as sales of the domestic industry and non-dumped imports:

> "Canada's specific argument in this regard is that MOFCOM failed to provide a reasoned and adequate explanation of how MOFCOM's reference to the share of the dumped imports in total imports supported its conclusion that the volume of the dumped imports increased in absolute terms. In addition, Canada argues that MOFCOM did not take into account the expansion of the market and the increased sales of the domestic like product and non-dumped imports. Based on our views above, consideration of how any increase in the dumped imports correlates with other factors, including sales of the domestic like product and non-dumped imports, is not a required element of the consideration of whether there was a significant increase in the volume of dumped imports in absolute terms under Article 3.2. Moreover, we recall that the obligation is to consider – and not to determine – whether there was a significant increase in dumped imports in absolute terms. In the absence of a requirement to make any determination in this regard, we cannot conclude that there is an obligation to provide a reasoned and adequate explanation under Article 3.2. Whether any increase in dumped imports supports a demonstration that dumped imports cause material injury under Article 3.5 will require explanation in order to be consistent with the requirements of that Article and Article 3.1."[151]

110. The Panel in *China – Cellulose Pulp* also found that "the consideration of whether there has been a significant increase in the volume of dumped imports under Article 3.2 does not require a duplicative analysis of causal linkages and other factors."[152] This is because:

> "Article 3.2 does not provide any guidance as to what circumstances might be relevant to consideration of the 'significance' of any increase in imports. Recalling that there is no requirement under Article 3.2 for an investigating authority to *determine* that an observed increase in imports, whether absolute or relative, is significant, and an investigating authority may ultimately find injury caused by dumped imports even in

[149] Panel Report, *Thailand – H-Beams*, para. 7.161.
[150] Panel Report, *China – Cellulose Pulp*, para. 7.39.
[151] Panel Report, *China – Cellulose Pulp*, para. 7.55.
[152] Panel Report, *China – Cellulose Pulp*, para. 7.43.

> the absence of a significant increase in such imports, it would be inappropriate, in our view, to impose requirements for the analysis of the significance of any increase in imports that are duplicative of elements of the analysis of causation relevant to determining whether the dumped imports, whatever their volume, and whether or not it increased significantly in absolute or relative terms, are causing injury to the domestic industry."[153]

111. The Panel in *US - Ripe Olives from Spain* rejected the European Union's argument that an investigating authority's volume analysis must provide explanatory force for the occurrence of a significant volume increase:

> "The European Union also maintains that the USITC's examination of volume could not form a 'meaningful basis' for causation and was thus inconsistent with Article 3.2 and Article 15.2. The European Union bases this argument on the proposition that an investigating authority's volume analysis 'must provide 'explanatory force' for the occurrence of a significant volume increase'. In making this argument, the European Union notes the observation by the Appellate Body in *China – GOES* that, when examining price suppression or depression under Article 3.2 and Article 15.2, 'an investigating authority is required to consider the relationship between subject imports and prices of like domestic products, so as to understand whether subject imports provide explanatory force for the occurrence of significant depression or suppression of domestic prices'. The European Union argues that 'there is no reason' why this obligation is not equally applicable to an investigating authority's consideration of whether there was a significant increase in the volume of dumped or subsidized imports. We note that, in relation to volume, an investigating authority is simply directed by Article 3.2 and Article 15.2 to 'consider whether there has been a significant increase in [dumped or subsidized] imports'. The investigating authority's inquiry regarding volume only concerns the identification of the change in the volume of imports and an assessment of its significance. There is no further requirement to use this data to consider some further phenomena such as an effect on prices. We therefore disagree with the European Union's assertion that an investigating authority's volume analysis must provide 'explanatory force for the occurrence of a significant volume increase."[154]

112. In *Korea – Pneumatic Valves (Japan)*, Japan alleged that certain flaws in the investigating authority's analysis of the volume of dumped imports undermined its causation determination, giving rise to a violation of Article 3.5. In this regard, Japan referred to the fact that the volume of dumped imports decreased in two years of the three-year period of trend analysis. The Panel responded that:

> "There is no basis in either the text of the Anti-Dumping Agreement or in logic for the view that an investigating authority can only make a determination of causation if it finds a significant increase in dumped imports for the period of trend analysis as a whole, or for each year of the period of trend analysis. The fact that the dumped imports decreased during the earlier part of the period of trend analysis does not, in itself, preclude the investigating authority from finding a causal link, particularly when, as in this case, the volume of the dumped imports increased sharply during the last year of the period of trend analysis, when dumping was found."[155]

113. In *Korea – Pneumatic Valves (Japan)*, Japan alleged, in the context of its claims relating to causation under Article 3.5, that the investigating authority's causation determination was also undermined by the fact that, on an end-point to end-point basis, there was no *significant* increase in dumped imports. The Panel observed that "an increase in imports in relative terms is not required for a proper finding of causation, let alone an increase on an end-point to end-point basis", and stated that "a decrease in dumped import market share on an end-point to end-point basis would not necessarily undermine, much less disprove, a causation determination, particularly

[153] Panel Report, *China – Cellulose Pulp*, para. 7.44.
[154] Panel Report, *US – Ripe Olives from Spain*, para. 7.247.
[155] Panel Report, *Korea – Pneumatic Valves (Japan)*, para. 7.254.

when, as in this case, the market share of imports increased in the last year of the period of trend analysis, albeit to a level lower than at the beginning of the period".[156] The Panel noted that:

> "The first sentence of Article 3.2 sets out three parameters for the consideration of the volumes of the dumped import: in absolute terms, or relative to production, or relative to consumption in the importing country. The use of the disjunctive 'either … or' in the first sentence of Article 3.2 suggests that an investigating authority need only to consider whether there is a significant increase either in absolute terms or in relative terms under the first sentence of Article 3.2. The results of the investigation authority's consideration from any of these perspectives can *independently* serve as a basis for its consideration of the ultimate causation question under Article 3.5."[157]

114. In *Pakistan – BOPP Film (UAE)*, the Panel reviewed whether the Pakistani investigating authority's (NTC) consideration of the volume of dumped imports was inconsistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement. The Panel began by examining the text of Article 3.1 and Article 3.2, first sentence, and by outlining the applicable requirements of those provisions.

115. With respect to the phrase "based on positive evidence" in Article 3.1, the Panel considered that this provision "requires that a determination of injury be 'based on', i.e. have as its foundation, 'evidence' that is affirmative, definite, and capable of supporting such a determination".[158] Regarding the phrase "involve an objective examination" in Article 3.1, the Panel noted the importance of the impartiality of the determination:

> "[T]he enquiry and analysis leading to a determination of injury must be one that is impartial, i.e. not influenced by personal feelings and not favouring any interested party. For example, to perform an objective examination the authority must also take into account the evidence that appears to conflict with its own hypotheses, and explain how it has reconciled conflicting evidence in reaching its conclusions."[159]

116. The Panel stated that the first sentence of Article 3.2 requires an investigating authority to assess whether there has been an increase in the volume of dumped imports, and to take those findings into account. The Panel further specified what an investigating authority must consider in an increase in the volume of dumped imports:

> "What the investigating authority must consider is whether there has been an increase in the volume of dumped imports that is 'significant', i.e. 'noteworthy; consequential, influential'. Article 3.2 does not set out a minimum threshold for what qualifies as a 'significant' increase; whether an increase is 'significant' will depend on the specific circumstances of the case.
>
> Article 3.2 sets forth three perspectives from which an increase may be assessed: 'either in absolute terms or relative to production or consumption in the importing Member'. The use of the disjunctives 'either … or … or' makes it clear that these are alternative, i.e. an investigating authority may rely on one, two, or all three in its consideration of the volume of dumped imports."[160]

117. In reviewing the NTC's consideration of the volume of dumped imports, the Panel noted that investigating authorities, in attaching more weight to certain record data, must not ignore other relevant data:

> "Thus, although the NTC described the evolution of imports including the fact that they had decreased during the first and last part of the POI, it then based its finding on the single year in which they had increased, i.e. 2009, and it dismissed the decreases simply stating that the increase in 2009 had been at a 'higher rate' than the decrease in the first half of 2010.

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[156] Panel Report, *Korea – Pneumatic Valves (Japan)*, para. 7.257.
[157] Panel Report, *Korea – Pneumatic Valves (Japan)*, fn 358.
[158] Panel Report, *Pakistan – BOPP Film (UAE)*, para. 7.257.
[159] Panel Report, *Pakistan – BOPP Film (UAE)*, para. 7.258.
[160] Panel Report, *Pakistan – BOPP Film (UAE)*, paras. 7.262-7.264.

> We note that Article 3 does not preclude an investigating authority from attaching more weight to certain data on its record. However, even in doing so, an investigating authority must not ignore other relevant data, and must explain how it took into account evidence that conflicted with its conclusions."[161]

118. Pakistan also argued that Article 3.2 only requires authorities to "consider", and not to "determine or conclude", whether a significant increase in dumped imports has occurred. The Panel noted the importance of the requirement to make an "objective examination":

> "We note however that this does not exempt authorities from the requirement to make an 'objective examination' when considering whether there has been a significant increase in dumped imports, which is what was lacking in this case."[162]

119. Accordingly, the Panel found that the NTC had acted inconsistently with Articles 3.1 and 3.2 of the Anti-Dumping Agreement:

> "Therefore, we find that the NTC failed to make an objective examination in considering whether there had been a significant increase in dumped imports in absolute terms, because it focused selectively on the only year in which imports increased and did not explain how it took into account the conflicting evidence pertaining to the rest of the POI, including the most recent period. By so doing, the NTC acted inconsistently with Articles 3.1 and 3.2."[163]

120. The Panel also addressed the UAE's argument that, given the "contradictory trends" on the investigative record, the NTC was required to consider also whether there had been a significant increase in the volume of dumped imports relative to domestic consumption. The UAE considered this necessary for the NTC to have performed an objective examination under Articles 3.1 and 3.2. In response, the Panel did not consider that the NTC was required, under these provisions, to examine the evolution of the volume of imports, not only in absolute terms and relative to domestic production, but also relative to domestic consumption. In examining the text of Article 3.2, the Panel noted the following:

> "We recall that Article 3.2 uses the disjunctives 'either … or … or' when listing the different manners in which an authority may consider whether dumped imports have increased significantly, making it clear that these are alternative and not cumulative. Therefore, we reject the United Arab Emirates' argument that the NTC was required to examine the evolution of the volume of imports relative to domestic consumption, in addition to examining the evolution of the volume of imports in absolute terms and relative to domestic production."[164]

1.5.4 "the effect of the dumped imports on prices"

1.5.4.1 General

121. In *Guatemala – Cement II*, disagreeing with Mexico's claim that in violation of Article 3.2, Guatemala's authority had not properly examined the effect of dumped imports on the price of domestic sales, the Panel stated that "[b]ased on the evidence of declining prices and inability to achieve established price levels, coinciding with imports at lower prices we find that an objective and unbiased investigating authority could have properly concluded that the dumped imports were having a negative effect on the prices of the domestic industry."[165]

122. In *Guatemala – Cement II*, the Panel also rejected Mexico's argument that Guatemala's authority conducted the examination of the price effect of dumped imports at the regional level only and not also at the national level and therefore acted inconsistently with Article 3.2. Rather, the Panel found that Guatemala had not limited its analysis to a particular region. The Panel also added that there was only one cement producer in Guatemala, and thus, even if the negative

[161] Panel Report, *Pakistan – BOPP Film (UAE)*, paras. 7.270-7.271.
[162] Panel Report, *Pakistan – BOPP Film (UAE)*, para. 7.274.
[163] Panel Report, *Pakistan – BOPP Film (UAE)*, para. 7.275.
[164] Panel Report, *Pakistan – BOPP Film (UAE)*, para. 7.286.
[165] Panel Report, *Guatemala – Cement II*, para. 8.276.

effect of the dumped imports on the prices of the domestic like product was only evidenced in one particular region (where that producer was located), this could still be viewed as causing injury to that producer.[166]

123. The Panel in *Korea – Certain Paper* considering the issue of assessment of price effects under Article 3.2, noted that while Article 3.2 stipulates that the investigating authority has to consider whether dumped imports have had one of the three possible effects on the prices of the domestic industry: (a) significant price undercutting, (b) significant price depression or (c) significant price suppression, "it does not, however, require that a determination be made in this regard".

124. The Panel in *Korea – Certain Paper* stated that it does not read Article 3.2 as requiring that the word "significant" appear in the text of the investigating authority's determination, explaining that:

> "Article 3.2 does not generally require the IA to make a determination about the 'significance' of price effects or indeed as to whether there were price effects as such. All it requires is that the IA consider whether there has been significant price undercutting, price depression or price suppression. In our view, therefore, the requirements of that article will be satisfied if the determination demonstrates that the IA properly considered whether or not prices of dumped imports had one of the three price effects set out under Article 3.2."[167]

125. In *China – GOES*, the Appellate Body pointed out that the various provisions of Article 3 of the Anti-Dumping Agreement form part of a logical progression leading to the investigating authority's ultimate determination of injury and causation, and that the inquiry under Article 3.2 is part of that overall determination:

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

[166] Panel Report, *Guatemala – Cement II*, para. 8.277.
[167] Panel Report, *Korea – Certain Paper*, para. 7.253

> 15.4, are necessary in order to answer the ultimate question in Articles 3.5 and 15.5 as to whether subject imports are causing injury to the domestic industry. The outcomes of these inquiries thus form the basis for the overall causation analysis contemplated in Articles 3.5 and 15.5."[168]

126. In *China – GOES*, the Appellate Body agreed with the Panel's finding that "it is *not* sufficient for an authority to confine its consideration to what is happening to domestic prices alone for purposes of the inquiry stipulated in Article[] 3.2."[169] The Appellate Body interpreted the word "determine" in Article 3.2 to mean that an investigating authority is not required to make a definitive determination on the volume of subject imports and their effect on domestic prices, but underlined that the authority is required to consider such effects, taking into account the overarching principles laid down in Article 3.1 of the Anti-Dumping Agreement:

> "By the use of the word 'consider', Articles 3.2 and 15.2 do not impose an obligation on an investigating authority to make *a definitive determination* on the volume of subject imports and the effect of such imports on domestic prices. Nonetheless, an authority's *consideration* of the volume of subject imports and their price effects pursuant to Articles 3.2 and 15.2 is also subject to the overarching principles, under Articles 3.1 and 15.1, that it be based on positive evidence and involve an objective examination. In other words, the fact that no definitive determination is required does not diminish the rigour that is required of the inquiry under Articles 3.2 and 15.2.
>
> Furthermore, while the *consideration* of a matter is to be distinguished from the definitive determination of that matter, this does not diminish the scope of *what* the investigating authority is required to consider. The fact that the authority is only required to *consider*, rather than to *make a final determination*, does not change the subject matter that requires consideration under Articles 3.2 and 15.2, which includes 'whether the effect of' the subject imports is to depress prices or prevent price increases to a significant degree. We further discuss below what this requirement entails. Finally, an investigating authority's *consideration* under Articles 3.2 and 15.2 must be reflected in relevant documentation, such as an authority's final determination, so as to allow an interested party to verify whether the authority indeed *considered* such factors."[170]

127. In *China – GOES*, the Appellate Body clarified that Article 3.2 requires an investigating authority to go beyond identifying the relevant trends in prices and examine whether subject imports have explanatory force for the occurrence of such trends:

> "Given that Articles 3.2 and 15.2 contemplate an inquiry into the relationship between subject imports and domestic prices, it is *not* sufficient for an investigating authority to confine its consideration to what is happening to domestic prices for purposes of considering significant price depression or suppression. Thus, for example, it would not be sufficient to identify a downward trend in the price of like domestic products over the period of investigation when considering significant price depression, or to note that prices have not risen, even though they would normally be expected to have risen, when analyzing significant price suppression. Rather, an investigating authority is required to examine domestic prices in conjunction with subject imports in order to understand whether subject imports have explanatory force for the occurrence of significant depression or suppression of domestic prices. Moreover, the reference to 'the effect of *such* [*dumped or subsidized*] *imports*' in Articles 3.2 and 15.2 indicates that the effect stems from the relevant aspects of such imports, including the price and/or the volume of such imports."[171]

128. The Appellate Body in *China – GOES* also considered that its interpretation was reinforced by the concepts of price depression and price suppression:

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[168] Appellate Body Report, *China – GOES*, paras. 128 and 143.
[169] Appellate Body Report, *China – GOES*, para. 159.
[170] Appellate Body Report, *China – GOES*, paras. 130-131. See also Panel Report, *China – X-Ray Equipment*, paras. 7.45-7.46.
[171] Appellate Body Report, *China – GOES*, para. 138.

> "Our interpretation is reinforced by the very concepts of price depression and price suppression. Price depression refers to a situation in which prices are pushed down, or reduced, *by something*. An examination of price depression, by definition, calls for more than a simple observation of a price *decline*, and also encompasses an analysis of *what* is pushing down the prices. With regard to price suppression, Articles 3.2 and 15.2 require the investigating authority to consider 'whether the effect of' subject imports is '[to] prevent price increases, *which otherwise would have occurred*, to a significant degree'. By the terms of these provisions, price suppression cannot be properly examined without a consideration of whether, in the absence of subject imports, prices 'otherwise would have' increased. The concepts of price depression and price suppression thus both implicate an analysis concerning the question of what brings about such price phenomena.
>
> Therefore, a consideration of significant price depression or suppression under Articles 3.2 and 15.2 encompasses by definition an analysis of whether the domestic prices are depressed or suppressed by subject imports. As a corollary of this understanding, Articles 3.2 and 15.2 would appear to make a unitary analysis of the effect of subject imports on domestic prices more appropriate, rather than a two-step analysis that first seeks to identify the market phenomena and then, as a second step, examines whether such phenomena are an effect of subject imports."[172]

129. In *China – GOES*, the Appellate Body disagreed with the argument that interpreting Article 3.2 as requiring a consideration of the relationship between subject imports and domestic prices would duplicate the causation analysis under Article 3.5:

> "Interpreting Articles 3.2 and 15.2 as requiring a consideration of the relationship between subject imports and domestic prices does not result in duplicating the causation analysis under Articles 3.5 and 15.5. Rather, Articles 3.5 and 15.5, on the one hand, and Articles 3.2 and 15.2, on the other hand, posit different inquiries. The analysis pursuant to Articles 3.5 and 15.5 concerns the causal relationship between *subject imports* and *injury* to the domestic industry. In contrast, the analysis under Articles 3.2 and 15.2 concerns the relationship between subject imports and a different variable, that is, *domestic prices*."[173]

130. In so finding, the Appellate Body in *China – GOES* drew a parallel between the examination under Article 3.2 and Article 3.4 of the Anti-Dumping Agreement:

> "Consequently, Articles 3.4 and 15.4 are concerned with the relationship between subject imports and the state of the domestic industry, and this relationship is analytically akin to the type of link contemplated by the term 'the effect of' under Articles 3.2 and 15.2. In other words, Articles 3.4 and 15.4 require an examination of the explanatory force of subject imports for the state of the domestic industry. In our view, such an interpretation does not duplicate the relevant obligations in Articles 3.5 and 15.5. As noted, the inquiry set forth in Articles 3.2 and 15.2, and the examination required under Articles 3.4 and 15.4, are necessary in order to answer the ultimate question in Articles 3.5 and 15.5 as to whether subject imports are causing injury to the domestic industry. The outcomes of these inquiries form the basis for the overall causation analysis contemplated in Articles 3.5 and 15.5. Thus, similar to the consideration under Articles 3.2 and 15.2, the examination under Articles 3.4 and 15.4 *contributes to*, rather than duplicates, the overall determination required under Articles 3.5 and 15.5.
>
> Moreover, an investigating authority is required to *examine* the impact of subject imports on the domestic industry pursuant to Articles 3.4 and 15.4, but is *not* required to *demonstrate* that subject imports are causing injury to the domestic industry. Rather, the latter analysis is specifically mandated by Articles 3.5 and 15.5. The demonstration of the causal relationship under Articles 3.5 and 15.5 requires an investigating authority to examine 'all relevant evidence' before it, and thus covers a broader scope than the examination under Articles 3.4 and 15.4. As discussed below,

[172] Appellate Body Report, *China – GOES*, paras. 141-142.
[173] Appellate Body Report, *China – GOES*, para. 147.

> Articles 3.5 and 15.5 further impose a requirement to conduct a non-attribution analysis regarding all factors causing injury to the domestic industry. Given these intrinsic differences between Articles 3.4 and 15.4, on the one hand, and Articles 3.5 and 15.5, on the other hand, we do not consider that our interpretation leads to a 'duplicative analysis of causation', as China suggests."[174]

131. In *China – GOES*, the Appellate Body distinguished the requirement to examine the explanatory force of subject imports on domestic prices from the non-attribution analysis required under Article 3.5 of the Anti-Dumping Agreement:

> "Articles 3.5 and 15.5 require an investigating authority to 'examine any known factors other than the [dumped or subsidized] imports which at the same time are injuring the domestic industry', and to ensure that 'the injuries caused by these other factors [are not] attributed to the [dumped or subsidized] imports'. As the Appellate Body has found, the non-attribution language of Articles 3.5 and 15.5 requires that 'an assessment must involve separating and distinguishing the injurious effects of the other factors from the injurious effects of the dumped imports'. In contrast, Articles 3.2 and 15.2 require an investigating authority to consider the relationship between subject imports and *domestic prices*, so as to understand whether the former may have explanatory force for the occurrence of significant depression or suppression of the latter. For this purpose, the authority is not required to conduct a fully fledged and exhaustive analysis of all known factors that may cause *injury* to the domestic industry, or to separate and distinguish the *injury* caused by such factors.
>
> This does not mean that an investigating authority may disregard evidence that calls into question the explanatory force of subject imports for significant depression or suppression of domestic prices. Rather, where an authority is faced with elements other than subject imports that may explain the significant depression or suppression of domestic prices, it must consider relevant evidence pertaining to such elements for purposes of understanding whether subject imports indeed have a depressive or suppressive effect on domestic prices. This understanding is also reinforced by the very concept of price suppression under Articles 3.2 and 15.2, which concerns prevention of price increases 'which otherwise would have occurred'. Moreover, by taking into account evidence pertaining to such elements, an authority also ensures that its consideration of significant price depression and suppression under Articles 3.2 and 15.2 is properly based on positive evidence and involves an objective examination, as required by Articles 3.1 and 15.1."[175]

132. The Panel in *Dominican Republic – AD on Steel Bars (Costa Rica)* rejected the argument that, in the context of a price undercutting analysis, Article 3.2 required the investigating authority to conduct an additional assessment of the prices of imports from third countries:

> "Moreover, we do not agree with Costa Rica that, in its examination of price undercutting, the CDC should have carried out an additional assessment of the prices of imports from China and other countries. Article 3.2 clearly highlights a link between the price of subject imports and that of like domestic products by requiring that a comparison be made between the two. The consideration of prices under Article 3.2 serves as a basis for the causation determination under Article 3.5. Article 3.5 requires an investigating authority to demonstrate that subject imports are causing injury 'through the effects of dumping'. Therefore, it is in the context of the non-attribution requirement of Article 3.5 that 'an assessment must involve separating and distinguishing the injurious effects of the other factors from the injurious effects of the dumped imports'."[176]

133. In *China – X-Ray Equipment*, the Panel held that in order to make an objective examination based on positive evidence, an investigating authority had to ensure price comparability before proceeding to a price effects analysis under Article 3.2. The Panel also found

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[174] Appellate Body Report, *China – GOES*, paras. 149-150.
[175] Appellate Body Report, *China – GOES*, paras. 151-152.
[176] Panel Report, *Dominican Republic – AD on Steel Bars (Costa Rica)*, para. 7.151.

that in the investigation at issue the Chinese investigating authority had failed to observe this obligation and therefore acted inconsistently with Articles 3.1 and 3.2 of the Anti-Dumping Agreement:

> "In the Panel's view, price comparability needs to be considered in all price effects analyses to ensure that the injury determination involves an objective examination based on positive evidence. However, in addition, in the circumstances of this case, there was a significant volume of evidence on the record to put MOFCOM on notice that price comparability was an issue and would need to be accounted for before undertaking price comparisons under Article 3.2 of the Anti-Dumping Agreement. This evidence is outlined in the sections below. In summary, based upon its review of the evidence before MOFCOM, the Panel concludes that it was clear that the dumped imports consisted only of 'low-energy scanners', while there was no such limit on the energy levels of the domestic like product. Further, even accepting the existence of a 'continuum' of scanners, there was evidence on the record to indicate that there were significant differences between the dumped imports and some of Nuctech's scanners, in terms of uses, physical characteristics and prices, for example. Further, MOFCOM's own findings indicated that 'high-energy' and 'low-energy' scanners have different uses and are perceived differently by consumers. In the light of this evidence, the Panel is of the view that MOFCOM clearly failed to conduct an objective examination of positive evidence by proceeding with its price effects analysis without even considering, let alone taking into account, these differences in the products being compared…
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> …
>
> With such differences in the physical characteristics and uses of the scanners exported by Smiths to China and some of the large scanners produced by Nuctech, it seems clear to us that MOFCOM was on notice of a need at least to consider comparability before conducting its price comparisons for the purposes of its undercutting analysis, and consequently its price suppression analysis, under Article 3.2 of the Anti-Dumping Agreement … The Panel notes that the methodology used by MOFCOM, namely collecting total sales value and dividing it by quantity sold, without examining uses or prices of the imports or the domestic products, makes it clear that MOFCOM did not account for the differences in the products being compared. Rather, MOFCOM simply included all sales in its average unit value calculations. In the Panel's view, this is not consistent with an objective examination of positive evidence for the purposes of the price undercutting and price suppression analyses under Articles 3.1 and 3.2 of the Anti-Dumping Agreement."[177]

134. The Panel in *China – Broiler Products* pointed out that in a price effect analysis under Article 3.2, an investigating authority was required to compare prices at the same level of trade.[178] The Panel stated that the fact that products were considered to be "like" would not necessarily suffice to ensure price comparability for purposes of Article 3.2:

> "Where the products under investigation are not homogenous, and where various models command significantly different prices, the investigating authority must ensure that the product compared on both sides of the comparison are sufficiently similar such that the resulting price difference is informative of the 'price undercutting', if any, by the imported products. For this reason, for the price undercutting analysis to comply with Articles 3.1/15.1 and 3.2/15.2 may well require the investigating authority to perform its price comparison at the level of product models. In a situation in which it performs a price comparison on the basis of a 'basket' of products or sales transactions, the authority must ensure that the groups of products or transactions compared on both sides of the equation are sufficiently similar so that any price differential can reasonably be said to result from 'price undercutting' and not merely from differences in the composition of the two baskets being compared. Alternatively,

[177] Panel Report, *China – X-Ray Equipment*, paras. 7.68 and 7.85. See also ibid. paras. 7.51, 7.61-7.63.
[178] Panel Report, *China – Broiler Products*, para. 7.481.

> the authority must make adjustments to control and adjust for relevant differences in the physical or other characteristics of the product."[179]

135. In *China – Cellulose Pulp*, the Panel held that the word "effects" in the second sentence of Article 3.2 indicates the need for a contextual analysis regarding price effects of dumped imports, and that therefore an investigating authority has to analyse the extent to which the observed price trends are caused by dumped imports. However, the Panel added that it would be appropriate for an authority to make that assessment in the context of its ultimate causality analysis in the investigation:

> "The need for a contextual analysis in respect of prices derives from the requirement to consider the *effects* of dumped imports on prices in the second sentence of Article 3.2. Simply to observe the trends in prices does not suffice, as those trends may be the effect of different factors other than dumped imports, as well as of the dumped imports. However, it is difficult to undertake a consideration of the effects of dumped imports on prices from the effects of other factors which may be affecting those prices in isolation from the ultimate question whether the dumped imports are causing injury to the domestic industry. This is because Article 3.5 specifically provides that the demonstration that dumped imports are causing injury is, in part, dependent on the effects of dumped imports on prices. In our view, it would be entirely appropriate for an investigating authority to observe the levels and trends of dumped import and domestic prices in the first instance without addressing the effect of dumped imports on those levels and trends. But, of course, the investigating authority cannot stop there. The investigating authority must examine these levels and trends in the context of the domestic market and connect them to the effects of the dumped imports – that is, assess the explanatory force of dumped imports for the observed levels and trends in domestic prices – in reaching its ultimate determination regarding whether dumped imports are causing material injury through their effects on prices."[180]

136. The Panel in *China – Broiler Products (Article 21.5 – US)* pointed to the dynamic nature of the price determination to be made pursuant to Article 3.2:

> "The price comparison required in Articles 3.2 and 15.2 is an important analytical step in an investigating authority's injury and causation analysis under Article 3.5 of the Anti-Dumping Agreement and Article 15.5 of the SCM Agreement. It requires an investigating authority to consider whether any observed significant price undercutting is '<u>the effect of</u> the dumped imports'. A price comparison under Articles 3.2 and 15.2 is thus not a static snapshot of the relationship between two prices (or averages). It requires, rather, a dynamic consideration of two sets of prices in a specific market context and within a given time-frame. The consideration must address whether observed movements in domestic prices are the <u>effect</u> of the prices of the dumped imports."[181]

137. The Panel in *China — AD on Stainless Steel (Japan)* rejected China's argument that since MOFCOM, China's investigating authority, had resorted to facts available in its determination of price effects and Japan had not brought a claim to challenge resort, Japan's claims under Articles 3.1 and 3.2 of the AD Agreement regarding the authority's determination of price effects of dumped imports should be dismissed. According to the Panel, the fact that an authority uses facts available with regard to a particular aspect of the investigation does not shield that aspect from the application of other relevant provisions of the AD Agreement:

> "We note that nothing in Article 6.8 of the Anti-Dumping Agreement indicates that an investigating authority's resort to best information available with respect to a given aspect of its determination causes other provisions of the Agreement to become inapplicable to that aspect of the determination. Therefore, the fact that MOFCOM resorted to best information available for its consideration of price effects does not

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[179] Panel Report, *China – Broiler Products*, para. 7.483. See also Panel Report, *China – Autos (US)*, para. 7.278.

[180] Panel Report, *Cellulose Pulp*, para. 7.65.

[181] Panel Report, *China – Broiler Products (Article 21.5 – US)*, para. 7.98.

> imply that its findings on price effects cannot be challenged, as a matter of law, under Articles 3.1 and 3.2 of the Anti-Dumping Agreement. In the absence of a claim under Article 6.8 and Annex II of the Anti-Dumping Agreement, we cannot review whether MOFCOM's decision to resort to facts available was justified, or whether MOFCOM should have chosen a different set of data than the set it chose as the best information available for relevant aspects of its consideration of price effects. However, the Anti-Dumping Agreement does not preclude us from reviewing whether MOFCOM objectively examined the information that it did choose as the best information available with respect to the relevant aspects of its consideration of price effects and whether it reasonably and adequately explained its findings. We review below Japan's claims under Articles 3.1 and 3.2 of the Anti-Dumping Agreement bearing this approach in mind."[182]

138. The Panel in *China — AD on Stainless Steel (Japan)* rejected China's assertion that there has to be significant price differences between investigated product categories for the obligation to ensure price comparability to kick in:

> "We share Japan's view that the adjective 'significant' in Article 3.2 of the Anti-Dumping Agreement qualifies the concepts of price undercutting, price depression or price suppression. These three price effects are possible *outcomes* of a price effects analysis and are therefore conceptually distinct from *price comparability*. Thus, contrary to China's contention, the term 'significant' in the text of Article 3.2 does not appear to establish that a minimum price difference between product categories covered in the investigation is required to trigger the obligation to take appropriate steps to ensure price comparability.
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> The logical implication of China's submission is that no issue of price comparability will arise when different product categories are sold at equivalent prices or prices that are not significantly different. Yet, the notion of price comparability under Articles 3.1 and 3.2 is not about the extent to which two prices may *differ*, but rather, whether two prices are *comparable* for the purpose of objectively examining whether the effect of dumped imports on prices of domestic like products is significant price undercutting, price depression, or price suppression. The *comparability* of two prices for this purpose is not informed by their relative levels. It will instead depend upon the characteristics of the transactions to which the prices pertain, and the extent to which the product categories at issue compete with each other. We share Japan's view that the differences that are relevant for the purposes of ensuring price comparability include not only price differences, but also non-price differences (such as those in physical characteristics and uses) that could affect substitutability and the competitive relationship between the subject imports and the domestic like products.
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> In this regard, we recall that the obligation to ensure price comparability arises from the requirement in Article 3.1 of the Anti-Dumping Agreement for an authority to objectively examine *the effect* of dumped imports on prices in the domestic market for like products. Article 3.2 also requires investigating authorities to consider whether there has been an 'effect of dumped imports on prices' in the form of one or more of the three price effects identified in the provision. Normally, for one product to have an *effect* on the *prices* of another product, the two products would be expected to compete with each other. Thus, contrary to China's view, we do not consider that price differences must exist between product categories in order for there to be a problem of price comparability – and, therefore, a need to make adjustments."[183]

139. The Panel in *China — AD on Stainless Steel (Japan)* rejected China's argument that the differences in characteristics of product categories other than prices are relevant to price comparability only if such non-price differences give rise to a difference in the prices of the product categories. According to the Panel:

> "[P]ursuant to Articles 3.1 and 3.2 the question is whether the price of subject imports and the domestic like product are comparable. Prices of two products do not become

[182] Panel Report, *China — AD on Stainless Steel (Japan)*, para. 7.108.
[183] Panel Report, *China — AD on Stainless Steel (Japan)*, paras. 7.115-7.117.

> comparable simply because the products are sold at the same or similar price. For example, if an apple is sold at the same price as an orange, this does not mean that the prices of apples and oranges are comparable for the purpose of a price analysis under Articles 3.1 and 3.2. Whether prices are comparable will instead depend upon the characteristics of the transactions to which the prices pertain, and the extent to which the product categories at issue compete with each other. Competition between the product categories may depend upon differences in the physical or other characteristics of the products. We therefore share Japan's view that non-price differences (such as those in physical characteristics and uses) that could affect substitutability and the competitive relationship between the product categories at issue are relevant for the purposes of ensuring price comparability, regardless of whether such difference cause the relative prices of product categories to differ."[184]

140. The Panel in *China — AD on Stainless Steel (Japan)* rejected China's argument that the obligation to address price comparability arises only if there are significant differences in the product mix of domestic and imported products being compared. According to the Panel:

> "We agree with Japan that even when the baskets of subject imports and domestic like products comprise the same product categories in the same proportion in a year, any changes in the average prices of the baskets from one year to the other could be a reflection of a change in the proportion of the product categories within two baskets relative to the previous year. Thus, a similarity in the product mix of domestic and imported products being compared does not mean that an issue of price comparability cannot arise. Therefore, we do not agree with China's view that the obligation to ensure price comparability is triggered only if the baskets of the imported and the domestic like product being compared are not *sufficiently similar* in their product mix[.]"[185]

141. The Panel in *China — AD on Stainless Steel (Japan)* summarized the legal standard regarding investigating authorities' obligation to ensure price comparability in their determinations on the effect of dumped imports on prices:

> "To sum up our findings concerning the applicable legal standard, we recall that the parties agree that an investigating authority needs to ensure that price comparisons undertaken for the purposes of Article 3.2 of the Anti-Dumping Agreement involve comparable prices. Price comparability for this purpose is not about the extent to which prices of the products at issue differ in a relative sense. Whether any two prices are the same or different does not speak to whether those prices are comparable. Rather, price comparability depends upon the characteristics of the transactions to which the prices pertain and the competitive relationship between the product categories at issue. In this regard, differences in relative prices of the product categories at issue, as well as non-price differences between them (such as those in terms of physical characteristics or end-uses), that affect the competitive relationship between the product categories will be pertinent to an authority's consideration of price effects. Bearing the foregoing in mind, we will review whether MOFCOM undertook an objective examination of the relevant evidence before it in determining whether the prices of various product categories were comparable and whether MOFCOM supported its findings with reasoned and adequate explanations."[186]

142. The Panel in *China — AD on Stainless Steel (Japan)* distinguished an investigating authority's findings on product scope from its findings on price comparability:

> "We do not consider that such findings concerning *product scope*, in the absence of any additional explanation, could alone support a conclusion that the *prices* of the separate product categories falling within the product under consideration are *all comparable* for the purpose of Article 3.2 of the Anti-Dumping Agreement. In this regard, we note that the definition of product scope and the examination of price comparability for the purpose of considering price effects are two substantively

[184] Panel Report, *China — AD on Stainless Steel (Japan)*, para. 7.122.
[185] Panel Report, *China — AD on Stainless Steel (Japan)*, para. 7.125.
[186] Panel Report, *China — AD on Stainless Steel (Japan)*, para. 7.126.

> different aspects of an investigating authority's determination. The fact that an authority may consider that certain price and non-price differences between product categories are 'reasonable' when deciding whether to include the different product categories into the product scope does not, in and of itself, imply that an investigating authority may, without explanation, appropriately rely upon the same considerations to conclude that such price and non-price differences *do not* give rise to price comparability issues."[187]

143. In the investigation at issue in *China — AD on Stainless Steel (Japan)*, MOFCOM had, as part of its determination on price comparability, taken into consideration non-price differences. The Panel found that MOFCOM had failed to provide a reasoned and adequate explanation supporting its determination:

> "For the reasons discussed above, we consider that MOFCOM did not properly engage with record evidence concerning differences in the physical characteristics, usages, and customer groups of the three product categories, which were relevant to the competitive relationship between the product categories, and thus to the comparability of their prices. Accordingly, we consider that MOFCOM failed to provide a reasoned and adequate explanation supporting its determination that the prices of the product categories were comparable for the purpose of its price effects analysis."[188]

144. The Panel in *China — AD on Stainless Steel (Japan)* stated that "price comparability must be established regardless of whether an investigating authority compares 'price trends' or 'actual prices'".[189]

145. In *Dominican Republic – AD on Steel Bars (Costa Rica)*, the Panel disagreed with the complainant's argument that "the fact that the lowest level of undercutting coincided with an increase in imports from Costa Rica 'tend[ed] to disprove' rather than support the conclusion that the alleged undercutting was the effect of the imports".[190] In its reasoning, the Panel pointed to the fact that the investigating authority had found price undercutting, and that the prices of the subject product had increased, in every year of the review period:

> "In our view, the CDC's assessment is based on the facts on the record and provides a reasoned and adequate explanation, in compliance with the obligations applicable to a price undercutting analysis. First, the record shows price undercutting by Costa Rica's imports in every year of the review period, with undercutting margins of between [[***]] and [[***]]. Moreover, we do not agree that the fact that Costa Rica's import prices 'increased steadily during the POI' contradicts the observations of significant undercutting. The record also indicates increases in the international price of the main feedstock, billets, with implications for production costs and the prices of the final product, both for the domestic producer, Gerdau Metaldom, and for ArcelorMittal. In fact, prices increased for both the domestic and the dumped product. However, this does not negate the fact that prices of imports continued to undercut domestic prices."[191]

1.5.4.2 Price undercutting

146. In *Egypt – Steel Rebar*, Türkiye had argued that, to satisfy the requirements of Article 3.2, a price undercutting analysis must be made on a delivered-to-the-customer basis, as, in its view, it is only at that level that any such undercutting can influence customers' purchasing decisions. The Panel did not find on the basis of the plain text of Article 3.2 any requirement that the price undercutting analysis must be conducted in any particular way, that is, at any particular level of trade.[192]

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[187] Panel Report, *China — AD on Stainless Steel (Japan)*, para. 7.132.
[188] Panel Report, *China — AD on Stainless Steel (Japan)*, para. 7.163.
[189] Panel Report, *China — AD on Stainless Steel (Japan)*, para. 7.167.
[190] Panel Report, *Dominican Republic – AD on Steel Bars (Costa Rica)*, para. 7.146.
[191] Panel Report, *Dominican Republic – AD on Steel Bars (Costa Rica)*, para. 7.150.
[192] Panel Report, *Egypt – Steel Rebar*, paras. 7.70 and 7.73.

147. The Panel in *EC – Tube or Pipe Fittings* similarly stated that "unlike Article 2 (in particular Article 2.4.2) of the *Anti-Dumping Agreement*, which contains specific requirements relating to the calculation of the dumping margin, Article 3.2 requires the investigating authorities to consider whether price undercutting is 'significant' but does not set out any specific requirement relating to the calculation of a margin of undercutting, or provide a particular methodology to be followed in this consideration."[193] The Panel reasoned as follows:

> "The text of Article 3.2 refers to domestic 'prices' (in the plural rather than singular). This textual element supports our view that there is no requirement under Article 3.2 to establish one single margin of undercutting on the basis of an examination of every transaction involving the product concerned and the like product. In addition, the text of Article 3.2 refers to the 'dumped imports', that is, the imports of the product concerned from an exporting producer that has been determined to be dumping. Thus, investigating authorities may treat any imports from producers/exporters for which an affirmative determination of dumping is made as 'dumped imports' for purposes of injury analysis under Article 3. There is, however, no requirement to take each and every transaction involving the 'dumped imports' into account, nor that the 'dumped imports' examined under Article 3.2 are limited to those precise transactions subject to the dumping determination. This view is supported by the absence of a specific provision concerning time periods in the Agreement; an importing Member may investigate price effects of imports in an injury investigation period which may be different than the IP for dumping. These considerations do not, of course, diminish the obligation of an investigating authority to conduct an unbiased and even-handed price undercutting analysis.
>
> We take note of the shared view of the parties that 'the Panel should accord a considerable discretion to the investigating authorities to choose a methodology which produces a meaningful result while avoiding unfairness'. One purpose of a price undercutting analysis is to assist an investigating authority in determining whether dumped imports have, through the effects of dumping, caused material injury to a domestic industry. In this part of an anti-dumping investigation, an investigating authority is trying to discern whether the prices of dumped imports have had an impact on the domestic industry. The interaction of two variables would essentially determine the extent of impact of price undercutting on the domestic industry: the quantity of sales at undercutting prices; and the margin of undercutting of such sales. Sales at undercutting prices could have an impact on the domestic industry (for example, in terms of lost sales) irrespective of whether other sales might be made at prices above those charged by the domestic industry. The fact that certain sales may have occurred at 'non-underselling prices' does not eradicate the effects in the importing market of sales that *were* made at underselling prices. Thus, a requirement that an investigating authority must base its price undercutting analysis on a methodology that offset undercutting prices with 'overcutting' prices would have the result of requiring the investigating authority to conclude that no price undercutting existed when, in fact, there might be a considerable number of sales at undercutting prices which might have had an adverse effect on the domestic industry."[194]

148. The Panel in *EC – Salmon (Norway)* considered that to reach a conclusion of *significant* price undercutting, where the investigating authority had found that the domestic product benefited from a price premium over imports, that price premium would have to be considered. The European Communities argued that the existence of a price premium was irrelevant to the analysis of price undercutting and could only be taken into account when considering the injury margin.[195] The Panel found the EC argument unconvincing:

> "Merely that the price premium *[sic]* was taken into account in calculating the injury margin does not demonstrate that it was considered and deemed irrelevant to the evaluation of price undercutting. Having identified the existence of a price premium for the domestic product over the imports, we consider that an unbiased and objective investigating authority could not conclude, without explanation, that such price

[193] Panel Report, *EC – Tube or Pipe Fittings*, para. 7.281.
[194] Panel Report, *EC – Tube or Pipe Fittings*, paras. 7.276-7.277.
[195] Panel Report, *EC – Salmon (Norway)*, para. 7.639.

> premium had no bearing on the issue of whether there was significant price undercutting. Thus, the investigating authority's finding of significant price undercutting is not consistent with the requirements of Articles 3.1 and 3.2."[196]

149. In *EC – Fasteners (China)*, the Panel rejected a claim that the investigating authority's price undercutting determination was required to adjust for differences that affected price comparability. The Panel found:

> "It is clear that the text of Article 3.2 provides no methodological guidance as to how an investigating authority is to 'consider' whether there has been significant price undercutting. In our view, price undercutting may be demonstrated by comparing the prices of the like product of the domestic industry with the prices of the dumped imports, as the European Union did in this case. However, there is no equivalent requirement under Article 3.2 to that of Article 2.4 of the AD Agreement with respect to 'due allowance' for differences affecting price comparability. In our view, while it is clear that the general requirements of objective examination and positive evidence of Article 3.1 limit an investigating authority's discretion in the conduct of a price undercutting analysis, this does not mean that the requirements of Article 2.4 with respect to due allowance for differences affecting price comparability are applicable."[197]

150. In *Morocco – Definitive AD Measures on Exercise Books (Tunisia)*, the Panel held that using constructed prices in a price undercutting analysis does not satisfy the requirements of Article 3.2:

> "[A]lthough Article 3.2 does not refer to 'actual' prices, the context of this article provides useful guidance as to the nature of the prices to be used for the undercutting examination. First, Article 3.1 of the Anti-Dumping Agreement provides that a determination of injury shall be based on an objective examination of 'the effect of the dumped imports on *prices in the domestic market* for like products'. As price undercutting is one of these effects, this provision indicates that, in its Article 3.2 analysis, the investigating authority must examine prices that are related to the *domestic market* conditions of the importing Member, i.e. the actual prices charged and not hypothetical prices. Second, with regard to the prevention of price increases, the investigating authority must consider whether the effect of the dumped imports is 'otherwise to prevent *price increases, which otherwise would have occurred,* to a significant degree'. The use of the conditional in this passage (in italics) suggests that the authority may have recourse to a counterfactual analysis of the domestic prices that would have been charged in the absence of dumped imports. Therefore, the possibility of recourse to a counterfactual analysis is *expressly* provided for in the text of the Agreement. But, as noted by Canada, such terms are not used in relation to the undercutting examination, and thus the wording of Article 3.2 regarding the price undercutting analysis does not permit the construction of a target price for the domestic product.
>
> Lastly, we recall that Articles 3.1 and 3.2 require the investigating authority to examine the 'effects' of imports on the price of the domestic product in order to be able to subsequently determine whether such imports are causing injury to the domestic industry by means of these effects. In the light of this objective, we agree with Tunisia's argument that 'if the investigating authority constructs the price of the domestic product, it will no longer be possible to identify the 'effect' that imports actually [*sic*] have on the price of the domestic product using the resulting ratio'. This confirms the interpretation that the investigating authority must examine the prices of the domestic product that are actually charged in the market and not hypothetical prices."[198]

151. In coming to this conclusion, that Panel rejected Morocco's argument that Article 2.2.1 lent support to the view that constructed prices could be used in a price undercutting analysis:

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[196] Panel Report, *EC – Salmon (Norway)*, para. 7.640.
[197] Panel Report, *EC – Fasteners (China)*, para. 7.328.
[198] Panel Report, *Morocco – Definitive AD Measures on Exercise Books (Tunisia)*, paras. 7.208-7.209.

> "In our view, even if Article 2.2.1 allows the investigating authority to exclude sales not being made in the ordinary course of trade from the construction of normal value because of their price, this provision applies to the determination of dumping and not to the determination of injury. As Tunisia points out, the price comparison in the price undercutting analysis is different from the price comparison in the margin of dumping calculation. Furthermore, Article 2.2.1 sets out strict conditions for disregarding unprofitable sales in determining normal value: these sales 'may be disregarded in determining normal value only if the authorities determine that such sales are made within an extended period of time in substantial quantities and are at prices which do not provide for the recovery of all costs within a reasonable period of time'. As the possibility of disregarding certain sales, because of their prices, is explicitly and conditionally established in the very specific context of constructing normal value, we do not think that such discretion may be presumed in the context of the price undercutting examination."[199]

152. On this basis, the Panel found that the Moroccan investigating authority had not examined price undercutting in a manner consistent with Article 3.2 of the Anti-Dumping Agreement.[200] The Panel in *China – X-Ray Equipment* rejected the argument that an investigating authority's finding that imported goods are like domestic goods satisfied the requirement to ensure that prices are comparable in the context of a price effects analysis under Article 3.2:

> "China submits that MOFCOM examined the arguments raised by Smiths regarding the alleged differences between the 'low-energy' and 'high-energy' scanners when considering the product scope of the investigation. In considering the product scope, MOFCOM concluded that the domestic products were 'like' the subject imports. Therefore, China argues that in its price effects analysis MOFCOM compared the prices of 'like' products, which was sufficient to ensure price comparability. The Panel is not convinced by this argument. The consequence of defining the product under consideration very broadly, is that the 'like' domestic product will also be very broad. However, a number of panels have clarified that where a broad basket of goods under consideration and a broad basket of domestic goods have been found by an investigating authority to be 'like', this does not mean that each of the goods included in the basket of domestic goods is 'like' each of the goods included within the scope of the product under consideration. In the circumstances of this case, the fact that the domestic product was found under Article 2.6 of the Anti-Dumping Agreement to be 'like' the product under consideration, does not necessarily mean that a Smiths product used for scanning hand baggage at airports is necessarily 'like' a Nuctech product used for scanning rail carriages, trucks or marine cargo containers, for example.
>
> Consequently, in the Panel's view, MOFCOM's conclusion in the context of considering the scope of the investigation, namely that the domestic product was 'like' the product under consideration, does not mean that MOFCOM fulfilled its obligation to ensure price comparability when conducting its price effects analysis under Article 3.2 of the Anti-Dumping Agreement."[201]

153. In *China – HP-SSST (Japan) / China – HP-SSST (EU)*, the Appellate Body stated that a price undercutting analysis under Article 3.2 concerns pricing conduct that continues over time and that an isolated instance of dumped imports being sold at lower prices than domestic like products does not justify a conclusion that there is price undercutting:

> "Rather, a proper reading of 'price undercutting' under Article 3.2 suggests that the inquiry requires a dynamic assessment of price developments and trends in the relationship between the prices of the dumped imports and those of domestic like products over the entire period of investigation (POI). An examination of such developments and trends includes assessing whether import and domestic prices are

[199] Panel Report, *Morocco – Definitive AD Measures on Exercise Books (Tunisia)*, para. 7.207.
[200] Panel Report, *Morocco – Definitive AD Measures on Exercise Books (Tunisia)*, para. 7.214.
[201] Panel Report, *China – X-Ray Equipment*, paras. 7.65-7.66. See also Panel Report, *EU – Biodiesel (Indonesia)*, para. 7.156.

> moving in the same or contrary directions, and whether there has been a sudden and substantial increase in the domestic prices."[202]

154. In *China – HP-SSST (Japan) / China – HP-SSST (EU)*, the Appellate Body found that the Panel had erred by describing an investigating authority's obligation as a simple factual determination as to whether dumped imports sold at lower prices compared to domestic like products:

> "As we see it, the Panel appears to have assumed that price undercutting, under Article 3.2, is merely concerned with the question of whether there is a mathematical difference, at any point in time during the POI, between the prices of the dumped imports and the comparable domestic products. We disagree. As discussed above, while price undercutting involves situations where imports are being sold at prices *lower than* the domestic like products, an inquiry into price undercutting under Article 3.2 is not satisfied by a static examination of whether there is a mathematical difference at any point in time during the POI without any assessment of whether or how these prices interact over time. Rather, as noted above, Article 3.2 requires a dynamic assessment of price developments and trends in the relationship between the prices of the dumped imports and those of domestic like products over the duration of the POI."[203]

155. In *China – HP-SSST (Japan) / China – HP-SSST (EU)*, the Appellate Body observed that the Panel had focused only on the term "price undercutting" in Article 3.2, and had not accorded any importance to the word "significant" or its implications under that provision.[204] In this regard, the Appellate Body held that whether the observed price undercutting is significant will depend on the circumstances of each case:

> "The *significance* of the price undercutting found on the basis of that dynamic assessment is a question of the magnitude of the price undercutting. What amounts to *significant* price undercutting – that is, whether the undercutting is important, notable, or consequential – will therefore necessarily depend on the circumstances of each case. In order to assess whether the observed price undercutting is significant, an investigating authority may, depending on the case, rely on all positive evidence relating to the nature of the product or product types at issue, how long the price undercutting has been taking place and to what extent, and, as appropriate, the relative market shares of the product types with respect to which the authority has made a finding of price undercutting. In all cases, an investigating authority must, pursuant to Article 3.1, objectively examine all positive evidence, and may not disregard relevant evidence suggesting that prices of dumped imports have no, or only a limited, effect on domestic prices."[205]

156. In *China – HP-SSST (Japan) / China – HP-SSST (EU)*, the Appellate Body held that Article 3.2 does not require an investigating authority to analyse the existence of price undercutting for all product types under investigating. However, the Appellate Body disagreed with the Panel's view that in the investigation at issue the investigating authority did not have to assess the significance of price undercutting in relation to the part of domestic production for which no price undercutting was found:

> "We agree with the Panel that an investigating authority is not required, under Article 3.2 of the Anti-Dumping Agreement, to establish the existence of price undercutting for each of the product types under investigation, or with respect to the entire range of goods making up the domestic like product. That said, an investigating authority is under an obligation to examine objectively the effect of the dumped imports on domestic prices. As discussed above, with respect to its consideration of whether there has been a significant price undercutting, an investigating authority must undertake a dynamic assessment of price developments and trends in the relationship between the prices of the dumped imports and those of the domestic like

[202] Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.159.
[203] Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.160.
[204] Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.163.
[205] Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.161.

> product over the duration of the POI, taking into account all relevant evidence including, where appropriate, the relative market share of each product type. Importantly, and as discussed above, an investigating authority's consideration of price effects under Article 3.2 must provide a meaningful basis for subsequently determining whether the dumped imports are causing injury to the domestic industry within the meaning of Article 3.5 of the Anti-Dumping Agreement. We therefore disagree with the Panel that MOFCOM was not required to assess the significance of price undercutting by the dumped imports in relation to 'the proportion of domestic production for which no price undercutting was found'."[206]

157. In the investigation at issue in *China – HP-SSST (Japan) / China – HP-SSST (EU)*, the investigated product consisted of three types, with varying prices and market shares. The Appellate Body held that in its price undercutting determination the investigating authority should have taken into account such price and market share differences among the three product types:

> "In its investigation, MOFCOM observed that, during the POI, the dumped imports and domestic sales were concentrated in different segments of the HP-SSST market. On the one hand, the majority of Chinese domestic HP-SSST production related to Grade A. As such, the majority of domestic sales was of Grade A. The market share held by Grade A dumped imports in 2008 was only 1.45%. There were no Grade A dumped imports thereafter. On the other hand, during the POI, the dumped imports of Grades B and C each held a market share of around 90% of its respective market segment. We further recall that Japan argued before the Panel, and China did not dispute, that Grade B is approximately double the price of Grade A, and Grade C is approximately triple the price of Grade A. In the case before us, we consider that an objective examination by MOFCOM of whether there had been a significant price undercutting by the dumped imports as compared with the prices of the domestic like product (encompassing all three product types) should have taken into account the relevant market shares of the respective product types. Likewise, a proper analysis of price effects ought to have taken into account the fact that there were significant differences in the prices of these product types. As discussed above, an investigating authority may not disregard evidence suggesting that the dumped imports have no, or only a limited, effect on domestic prices."[207]

158. The Panel in *Pakistan – BOPP Film (UAE)* examined the Pakistani investigating authority's (NTC) consideration of the effect of dumped imports on the domestic industry's prices in accordance with Articles 3.1 and 3.2 of the Anti-Dumping Agreement. The UAE argued that the NTC had compared the aggregate price of dumped imports with the aggregate price of domestic BOPP film without distinguishing between metallic and non-metallic BOPP film, which had "significant differences in import volumes and prices".[208] Reviewing the text of Article 3.2, the Panel considered that investigating authorities are required to ensure that prices are comparable, even if investigated exporters do not raise such concerns during the investigation:

> "We note that the existence of two types of the product that differed in price and quantities raised concerns of comparability. We recall that the text of Article 3.2 stipulates that a price undercutting analysis is a price comparison. Whether the prices under comparison are comparable is core to the objectivity of the analysis. Therefore, investigating authorities are required to ensure that prices are comparable, whether or not investigated exporters raise such concerns during the investigation. Failure to do so falls short of an objective examination of price undercutting.
>
> Therefore, we find that by simply calculating an average price for the dumped imports and an average price for the like domestic product, without addressing the concerns for comparability that were posed by the existence of two different product types, the NTC failed to undertake an objective examination in considering price undercutting. It thus acted inconsistently with Articles 3.1 and 3.2."[209]

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[206] Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.180.
[207] Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.181.
[208] Panel Report, *Pakistan – BOPP Film (UAE)*, para. 7.306.
[209] Panel Report, *Pakistan – BOPP Film (UAE)*, paras. 7.309-7.310.

159. The UAE also argued that the NTC had based its affirmative finding of price undercutting during the POI on the single year in which the prices of dumped imports were lower than the prices of the domestic like product (2009) without taking into account the conflicting evidence from the rest of the POI.[210] The Panel noted that the NTC did not explain how it had taken this conflicting evidence into account, other than by making a cursory statement that was not supported by the data:

> "[T]he data before the NTC showed undercutting in 2009 by a margin of 4.35%, whereas during the rest of the POI, including the most recent period of the POI, the import prices exceeded those of the domestic like product by similar margins. Yet, the NTC did not explain how it took this conflicting evidence into account, other than to state that although the domestic price was lower than the price of imports in January to June 2010, the magnitude of price undercutting in 2009 was 'overwhelming'. We also note that this cursory statement does not appear to be supported by the data, because the magnitude of the undercutting in 2009 was in fact similar to the magnitude of the overselling in January to June 2010."[211]

160. The Panel noted that, in making an objective examination, an investigating authority must not disregard relevant evidence that may conflict with its findings and must explain how it took such conflicting evidence into account:

> "We recall that to make an objective examination as required by Article 3.1, the investigating authority must not disregard relevant evidence that may conflict with its findings, and must instead explain how it has taken this evidence into account. We further recall that the requirement to consider 'whether there *has been* a significant price *undercutting*' is not satisfied 'by a static examination' at a single point in time. By basing its conclusion of price undercutting solely on 2009, without explaining how it had taken into account conflicting evidence, including from the most recent period of the POI, the NTC acted inconsistently with Articles 3.1 and 3.2."[212]

1.5.4.2.1 Significance of price undercutting

161. The Panel in *Dominican Republic – AD on Steel Bars (Costa Rica)* rejected the complainant's allegation that in the underlying investigation the investigating authority had failed to determine that the level of price undercutting calculated was "significant" as required under Article 3.2. In so finding, the Panel took note of the fact that the investigating authority had found that the levels of price undercutting were "high" and that it had also analysed the competitive conditions in the market:

> "We recall that Article 3.2 does not provide a quantitative threshold for what qualifies as 'significant' price depression. We note that, in addition to indicating in the overall conclusion of the Final Technical Report that 'Costa Rican imports [had] recorded high price undercutting margins of up to [[***]]', the CDC emphasized the competitive realities of the product under investigation in its price effects analysis, noting in particular that 'in the case of little-differentiated products such as steel bars and rods, economic actors compete on the basis of prices'. Consideration of the magnitude of the undercutting margins, together with information on competition in the domestic market between imports and the domestic product, and on the nature of the product, is relevant in assessing whether price undercutting is 'significant'.
>
> There is no indication on the record that, in the underlying investigation, ArcelorMittal questioned the competitive dynamic or that Costa Rica questioned the existence of these conditions in relation to the product under investigation. In our view, under the circumstances, the acknowledgement that the undercutting margins were 'high' (ranging from [[***]] in 2016 to [[***]] at the end of the POI) was sufficient to support a finding of significance in the circumstances of this case."[213]

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[210] Panel Report, *Pakistan – BOPP Film (UAE)*, para. 7.311.
[211] Panel Report, *Pakistan – BOPP Film (UAE)*, para. 7.314.
[212] Panel Report, *Pakistan – BOPP Film (UAE)*, para. 7.315. See also ibid. paras. 7.324-7.329.
[213] Panel Report, *Dominican Republic – AD on Steel Bars (Costa Rica)*, paras. 7.141-7.142.

1.5.4.3 Price depression

162. The Panel in *China – GOES (Article 21.5 – US)* pointed out that an investigating authority cannot simply assume that increases in the volume of dumped imports will necessarily suppress or depress the domestic industry's prices, and that such a link has to be established by the investigating authority, by also taking into account factors other than dumped imports that might explain the observed price suppression or depression:

> "Before examining MOFCOM's conclusions, we recall that Articles 3.2 and 15.2 require investigating authorities to consider two lines of enquiry. With regard to the volume of dumped or subsidized imports, investigating authorities are required to consider whether there has been a significant increase in dumped or subsidized imports, in absolute terms, or relative to production or consumption in the importing Member. With regard to the effect of the dumped imports on prices, investigating authorities are required to consider 'whether there has been a significant price undercutting by the dumped imports as compared with the price of a like product of the importing Member, or whether the effect of such imports is otherwise to depress prices to a significant degree or prevent price increases, which otherwise would have occurred, to a significant degree'. In our view, it is clear that these two lines of enquiry are separate, and that increases in subject import volume and/or market share may, or may not, have consequences for domestic prices. In order to decide which the case in any given investigation is, the investigating authority must specifically consider the question of price effects, guided by the requirements of Articles 3.2 and 15.2. It is clear to us that it cannot simply be assumed that an increase in subject import volume and market share will have a price suppressing or depressing effect on domestic prices. If investigating authorities could simply assume that an increase in subject imports' volume and market share suppresses and/or depresses domestic like product prices, without specifically explaining whether the effect of such dumped or subsidized imports was to suppress or depress prices, the second prong of Articles 3.2 and 15.2 would be rendered redundant.
>
> Therefore, in our view an investigating authority may conclude that increases in the volume of subject imports and consequential market share gains have a price suppressing and depressing effect on the domestic like product only if it establishes a linkage between the subject import's increased volume and market share on the one hand and the price suppression or depression observed on the other. Furthermore, where an authority is faced with elements other than subject imports that may explain the price depression or suppression, it must consider the evidence relevant to such elements for purposes of understanding whether subject imports indeed have a depressive or suppressive effect on domestic prices. By taking into account such elements, an investigating authority ensures that its consideration of significant price depression and suppression under Articles 3.2 and 15.2 is properly based on positive evidence and involves an objective examination, as required by Articles 3.1 and 15.1."[214]

163. The Panel in *China – GOES (Article 21.5 – US)* faulted the Chinese investigating authority, MOFCOM, for concluding that the domestic industry reacted to increased dumped imports by competing on price, without analysing the trends in the prices of dumped imports, imports from third countries and the domestic industry:

> "Second, in our view, a reasonable and unbiased investigating authority could not have concluded that the domestic industry reacted to increased volumes of subject imports by competing on price without considering the relative prices of subject imports and the domestic like product. We recall that there was information before MOFCOM on the prices of the subject imports, non-subject imports, and the domestic like product. While we draw no conclusions as to the probative value of that information, we do question MOFCOM's failure to consider it at all in the Redetermination. Such a consideration is, in our view, important to understand the relationship between subject import and domestic like product prices. For example, if there is a significant variation between the price levels of subject imports and the

[214] Panel Report, *China – GOES (Article 21.5 – US)*, paras. 7.50-7.51.

> domestic like product, it may be questioned whether domestic industry prices were, in fact, precluded from increasing by the increases in the volume of subject imports in the market, or whether other factors were responsible for such price suppression. It is undisputed that MOFCOM did not make price comparisons. In our view, MOFCOM could not have reached a reasoned and adequate conclusion that the domestic industry's prices were suppressed by the volume of subject imports, having failed to consider the relative prices of subject imports and the domestic like product at all.
>
> …
>
> Even if price comparisons are not required in order to make a determination regarding the price effects of imports as a matter of law, a failure to at least consider evidence of price divergences where such evidence is before the investigating authority is difficult to understand."[215]

164. The Panel in *China – GOES (Article 21.5 – US)* found that, although price competition is an important analytical tool in determining whether dumped imports affect domestic prices, it does not follow from the existence of price competition that dumped imports affect domestic prices:

> "The concern that remains, having considered MOFCOM's Redetermination in light of the evidence and arguments presented to it and to us, is that it does not explain how MOFCOM's findings on price competition support its conclusions regarding the suppressive and depressive effect on domestic like product prices of the volume and market share of subject imports. We consider price competition to be an important analytical tool that goes to the question of whether subject imports have the potential to affect domestic prices – if subject imports and the domestic like product do not compete on price, it is unlikely that subject imports will affect domestic like product prices. However, it does not necessarily follow, in our view, that just because subject imports and the domestic like product compete on price, increases in subject import volumes and market share will necessarily have a suppressive or depressive effect on the domestic like product prices. Therefore, we consider that it is incumbent on an investigating authority to demonstrate how its factual findings concerning price competition support its conclusions regarding the price effects of subject imports on the domestic like product. MOFCOM failed to draw any such analytical linkage in this case."[216]

165. The Panel in *EC – Bed Linen (Article 21.5 – India)* pointed out that price depression or suppression may occur even if there is no increase in the market share of dumped imports:

> "We note that India's argument suggests that if the level of, or the increase in, the market share of dumped imports is relatively small, those imports cannot be considered a cause of injury. That suggestion is incorrect. We find nothing in the text of Article 3 to support such a suggestion, and indeed, India has not specifically argued otherwise. We note that Article 3.2 of the AD Agreement requires the investigating authorities to consider not only the volume of imports, but also the effect of the dumped imports on prices. Clearly, the existence of price depression and price suppression may support a finding of injury, yet neither of these would necessarily require an increase in dumped import volume or market share at the same time. Indeed, there could be price depression or price suppression in a situation where there is no increase, or even in some circumstances a decrease, in the volume or market share of dumped imports."[217]

166. The Panel in *Pakistan – BOPP Film (UAE)* examined the UAE's argument that Pakistan's investigating authority (NTC) had failed to consider whether the price depression was the effect of dumped imports because the price decrease in 2009 tracked closely the decrease in costs. As noted by the Panel, the NTC had merely stated that the "price depression was partly due to

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[215] Panel Report, China – *GOES (Article 21.5 – US)*, paras. 7.58 and 7.65. See also ibid. para. 7.63.
[216] Panel Report, *China – GOES (Article 21.5 – US)*, para. 7.111.
[217] Panel Report, *EC – Bed Linen (Article 21.5 – India)*, para. 6.230. See also Panel Report, *China – Cellulose Pulp*, para. 7.96.

decrease in cost and partly due to dumping".[218] In its analysis, the Panel emphasized that, to understand whether dumped imports have indeed depressed domestic prices, an investigating authority must consider any evidence that other elements may explain the price depression:

> "We recall that Article 3.2 requires an investigating authority to consider 'whether *the effect of* [the dumped] imports is … to depress prices'. We agree with Pakistan that price depression need not be exclusively the effect of dumping. However, where there is evidence that other elements may explain the price depression, an objective investigating authority would need to consider such evidence to understand whether the dumped imports have indeed depressed the domestic prices.
>
> In this case, prices of the domestic like product tracked costs closely both in percentage and absolute terms, and Taghleef had pointed out these facts during the investigation. In our view, in these circumstances, it was not sufficient merely to assert that the price depression was the effect of dumped imports and other factors. The NTC's statements that 'the reduction in prices was more than reduction in cost' and that therefore 'price depression was partly due to decrease in cost and partly due to dumping', are conclusory and fall short of a reasoned an adequate explanation. In our view, to perform an objective examination, the NTC was required to explain why, in light of the facts on its record, it considered that the price depression was 'the effect of' the dumped imports."[219]

167. The Panel therefore found that the NTC had acted inconsistently with Articles 3.1 and 3.2 because it did not explain why it considered that the price depression was the effect of the dumped imports in light of the fact that the decline in prices tracked extremely closely the decrease in the domestic industry's costs.[220]

168. The Panel in *Dominican Republic – AD on Steel Bars (Costa Rica)* found the investigating authority's price depression analysis to be inconsistent with Articles 3.1 and 3.2 because that analysis entailed an end-point-to-end-point comparison of prices, and ignored the trends throughout the period of review:

> "In order to conduct an objective examination, the Investigating Authority should have explained that there was a price decrease from 2015 to 2016 (of 17.83%); that prices increased in the period from 2016 to 2017 (by [[***]]); and that they increased by a further [[***]] in the period January-April 2018. In that respect, the domestic industry's price only fell during the period 2015-2016, as the price rose during the subsequent periods. The absence of such explanations, together with the fact that the CDC only considered the end-point-to-end-point price change (from 2015 to 2017) and, consequently, did not analyse the trend throughout the entire period, leads the Panel to conclude that the CDC's price depression analysis was not objective and, as such, is inconsistent with Articles 3.1 and 3.2."[221]

1.5.4.4 Price suppression

169. In *Russia – Commercial Vehicles*, the Appellate Body addressed a number of issues relating to the Panel's findings with respect to the investigating authority's determination of price suppression under Article 3.2.[222] In the course of its analysis, the Appellate Body offered the following general observations on the investigating authority's margin of discretion with respect to the methodology adopted to guide its price suppression analysis:

> "Although an investigating authority enjoys a certain degree of discretion in adopting a methodology to guide its price suppression analysis, the authority must nonetheless comply with the requirements of Articles 3.1 and 3.2 of the Anti-Dumping Agreement. Accordingly, when an investigating authority's determination rests upon assumptions, these assumptions should be derived as reasonable inferences from a credible basis of

[218] Panel Report, *Pakistan – BOPP Film (UAE)*, para. 7.339.
[219] Panel Report, *Pakistan – BOPP Film (UAE)*, paras. 7.341-7.342.
[220] Panel Report, *Pakistan – BOPP Film (UAE)*, para. 7.343.
[221] Panel Report, *Dominican Republic – AD on Steel Bars (Costa Rica),* para. 163.
[222] Appellate Body Report, *Russia – Commercial Vehicles*, paras. 5.42-5.114.

> facts, and should be sufficiently explained so that their objectivity and credibility can be verified. Moreover, an investigating authority is required, under the second sentence of Article 3.2, to consider whether dumped imports are preventing domestic price increases 'which otherwise would have occurred' to a significant degree. Therefore, an authority must ensure that its methodology assesses price increases 'which otherwise would have occurred' in the absence of dumped imports. Were an investigating authority to rely on a methodology that concerned price increases that would *not* have occurred in the absence of dumped imports, it would not be able to consider objectively, pursuant to Article 3.2, whether the effect of dumped imports was to suppress significantly domestic prices.
>
> In addition, by asking the question 'whether the effect of' the dumped imports is significant price suppression, the second sentence of Article 3.2 of the Anti-Dumping Agreement specifically instructs an investigating authority to consider whether certain price effects are the consequences of dumped imports. As explained earlier, an investigating authority is thus required to consider whether dumped imports have 'explanatory force' for the occurrence of significant suppression of domestic prices. In this respect, an investigating authority may not disregard evidence regarding elements that call into question the explanatory force of dumped imports for significant price suppression. Where there is evidence on the investigating authority's record concerning elements other than dumped imports that may explain the significant suppression of domestic prices, the investigating authority must consider relevant evidence pertaining to such elements for purposes of understanding whether dumped imports indeed have a suppressive effect on domestic prices."[223]

170. The Panel in *China – Broiler Products (Article 21.5 – US)* found a violation of Article 3.2 in MOFCOM's price suppression determination because it was based on a flawed price undercutting determination.[224]

171. In *Dominican Republic – AD on Steel Bars (Costa Rica)*, the Panel rejected the complainant's argument that the investigating authority's price suppression analysis was inconsistent with Articles 3.1 and 3.2. In so finding, the Panel underlined the importance of assessing the investigating authority's determination as a whole:

> "[A]fter examining the CDC's determination as a whole, we reject Costa Rica's argument that the CDC's assessment was insufficient. We note that Article 3.2 does not specify how the investigating authority should conduct the price suppression analysis. Furthermore, we recall that the investigating authority has a degree of discretion with regard to its analysis. That discretion is guided by the principle set out in Article 3.1 that the determination of injury, including the examination of price effects, must be based on an objective examination of positive evidence.
>
> The CDC's response to the concerns raised by ArcelorMittal in paragraph 439 of the Final Technical Report clearly forms part of the CDC's assessment of price suppression and identifies the link between the aforementioned analysis and the increase in imports from Costa Rica. Additionally, the observations in section 6.1.1 of the Final Technical Report regarding the injury analysis refer to the change in volumes of dumped imports. In our view, therefore, this section also provides a reasoned explanation based on positive evidence of the link between dumped imports and the price suppression analysis."[225]

1.5.4.5 Relationship between price undercutting, price depression and price suppression

172. It is well established that price undercutting, price depression, and price suppression may be independent of each other in an investigating authority's consideration of price effects of the

[223] Appellate Body Report, *Russia – Commercial Vehicles*, paras. 5.94-5.95.
[224] Panel Report, *China – Broiler Products (Article 21.5 – US)*, paras. 7.115-7.116.
[225] Panel Report, *Dominican Republic – AD on Steel Bars (Costa Rica),* paras. 7.176-7.177.

dumped imports.[226] In *China – GOES*, the Appellate Body confirmed that "even if prices of subject imports do not significantly undercut those of like domestic products, subject imports could still have a price-depressing or price-suppressing effect on domestic prices".[227]

173. The Panel in *China – Autos (US)* found that the Chinese investigating authority had failed to conduct an objective examination of the evidence on the record by not explaining how it found price depression despite the existence of overselling by dumped imports:

> "In our view, MOFCOM's final determination fails to reflect an objective examination of the evidence of overselling by the subject imports in finding price depression. Moreover, it entirely fails to explain how MOFCOM considered that evidence, and what, if any, impact it had on MOFCOM's reasoning. Subject imports oversold the domestic product during most of the POI. The margin of overselling was not insignificant at any time during the POI, and in interim 2009 it was greater than 30%. In our view, these facts do not, on their face, support a conclusion that the effect of subject imports was price depression, and as a general matter, would tend to undermine such a finding. We do not preclude the possibility that price depression may be found to exist in a case where there is overselling by subject imports. However, absent analysis and explanation by the IA, it is difficult to understand how a conclusion of price depression was reached in a situation where prices of imports were, for the most part, significantly higher than those of the domestic like product whose prices were purportedly being depressed during the POI."[228]

174. The Panel in *Russia – Commercial Vehicles* held that the fact that dumped prices are priced higher than domestic prices does not preclude a finding of price suppression:

> "As the European Union acknowledges, the fact that dumped import prices were higher than domestic prices is not in itself evidence that dumped imports do not have 'explanatory force' for the effect of significant suppression of domestic prices. In certain situations, higher dumped import prices can have a suppressing effect on domestic prices. This is most commonly observed in situations where imports command a price premium over the domestically produced product. In these situations, when dumped import prices decline, prices for the domestic product may well follow suit, or increase at a slower pace, or to a lesser extent, to maintain the price differential necessary for the domestic industry to make sales. Accordingly, the absence of price undercutting, or the presence of a 'price gap' in the European Union's term, does not necessarily preclude or call into question the 'explanatory force' of the dumped imports for the alleged price suppression."[229]

175. In *Korea – Pneumatic Valves (Japan)*, the Panel found, in the context of examining the adequacy of the investigating authority's causation analysis under Article 3.5, that the investigating authority had failed to adequately explain their consideration of the price suppressing and depressing effects of dumped imports in their determination of causation, "in light of the undisputed fact that the prices of the dumped imports were higher than those of the domestic like product throughout the period of trend analysis on the basis of both the average price of the product as a whole and the average prices of representative models".[230] At the outset of its analysis of this issue, the Panel explained that:

> "The existence of price undercutting is frequently relied on as an element suggesting that the effect of dumped imports is price depression or price suppression. However, depending on the facts, an investigating authority may properly consider that the effect of dumped imports is price depression or price suppression notwithstanding the fact that the prices of those imports are higher than those of the domestic like product. In such a situation, an objective examination of positive evidence, in the

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[226] Appellate Body Report, *China – GOES*, para. 137; Panel Reports, *China – Autos (US)*, para. 7.272; *China – Cellulose Pulp*, para. 7.63; and *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 7.129.

[227] Appellate Body Report, *China – GOES*, para. 137.

[228] Panel Report, *China – Autos (US)*, para. 7.272. See also Panel Report, *China – Cellulose Pulp*, para. 7.86.

[229] Panel Report, *Russia – Commercial Vehicles*, para. 7.77.

[230] Panel Report, *Korea – Pneumatic Valves (Japan)*, para. 7.322.

> context of price suppression or depression and the ultimate determination under Article 3.5 requires that an investigating authority faced with evidence of consistent average price overselling, or relevant arguments of interested parties, take this into account in its consideration and explanations."[231]

1.5.5 Relationship with other paragraphs of Article 3

176. With respect to the relationship of paragraph 2 with paragraphs 1, 3, 4 and 5 of Article 3, see paragraphs 2-3 above 131-132 above.

1.6 Article 3.3

1.6.1 Relationship with other paragraphs of Article 3

177. With respect to the relationship of paragraph 3 with paragraphs 1, 2, 4 and 5 of Article 3, see paragraph 2 above.

178. In its report on *EC – Tube or Pipe Fittings*, the Appellate Body stated that in case of a cumulated injury analysis, there is no indication in the text of Article 3.2 that the analyses of volume and prices must be performed on a country-by-country basis where an investigation involves imports from several countries.[232] The Appellate Body thus confirmed the Panel's position in this case that it is possible for the analyses of volume and prices envisaged under Article 3.2 to be done on a cumulative basis, as opposed to an individual country basis, when dumped imports originate from more than one country.[233]

1.6.2 Conditions for cumulation – general

179. The Panel in *EC – Tube or Pipe Fittings* came to the conclusion, on the basis of the text in Article 3.3, and citing contextual support in Articles 3.4 and 3.5, that the conditions identified in Article 3.3 are the *sole* conditions that must be satisfied by an investigating authority in order to undertake a cumulative assessment of the effects of dumped imports.[234] In particular, the Panel rejected Brazil's allegation that an investigating authority must first consider whether country-specific import volumes have significantly increased before cumulating them.[235] The Appellate Body agreed with the Panel and reached the following conclusion:

> "The text of Article 3.3 expressly identifies three conditions that must be satisfied before an investigating authority is permitted under the *Anti-Dumping Agreement* to assess cumulatively the effects of imports from several countries. These conditions are:
>
> (a) the dumping margin from each individual country must be more than *de minimis*;
>
> (b) the volume of imports from each individual country must not be negligible; and
>
> (c) cumulation must be appropriate in the light of the conditions of competition
>
> (i) between the imported products; and
>
> (ii) between the imported products and the like domestic product.

[231] Panel Report, *Korea – Pneumatic Valves (Japan)*, para. 7.299.
[232] Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 111.
[233] Panel Report, *EC – Tube or Pipe Fittings*, para. 7.231.
[234] Panel Report, *EC – Tube or Pipe Fittings*, paras. 7.234-7.235.
[235] Panel Report, *EC – Tube or Pipe Fittings*, para. 7.234.

> By the terms of Article 3.3, it is 'only if' the above conditions are established that an investigating authority 'may' make a cumulative assessment of the effects of dumped imports from several countries.
>
> We find no basis in the text of Article 3.3 for Brazil's assertion that a country-specific analysis of the potential negative effects of volumes and prices of dumped imports is a pre-condition for a cumulative assessment of the effects of all dumped imports. Article 3.3 sets out expressly the conditions that must be fulfilled before the investigating authorities may cumulatively assess the effects of dumped imports from more than one country. There is no reference to the country-by-country volume and price analyses that Brazil contends are pre-conditions to cumulation. In fact, Article 3.3 expressly requires an investigating authority to examine country-specific volumes, not in the manner suggested by Brazil, but for purposes of determining whether the 'volume of imports from each country is not negligible'."[236]

180. In support of its finding, the Appellate Body in *EC – Tube or Pipe Fittings* further elaborated on the rationale behind the practice of cumulation:

> "The apparent rationale behind the practice of cumulation confirms our interpretation that both volume and prices qualify as 'effects' that may be cumulatively assessed under Article 3.3. A cumulative analysis logically is premised on a recognition that the domestic industry faces the impact of the 'dumped imports' as a whole and that it may be injured by the total impact of the dumped imports, even though those imports originate from various countries. If, for example, the dumped imports from some countries are low in volume or are declining, an exclusively country-specific analysis may not identify the causal relationship between the dumped imports from those countries and the injury suffered by the domestic industry. The outcome may then be that, because imports from such countries could not *individually* be identified as causing injury, the dumped imports from these countries would not be subject to anti-dumping duties, even though they are in fact causing injury. In our view, therefore, by expressly providing for cumulation in Article 3.3 of the *Anti-Dumping Agreement*, the negotiators appear to have recognized that a domestic industry confronted with dumped imports originating from several countries may be injured by the cumulated effects of those imports, and that those effects may not be adequately taken into account in a country-specific analysis of the injurious effects of dumped imports. Consistent with the rationale behind cumulation, we consider that changes in import volumes from individual countries, and the effect of those country-specific volumes on prices in the importing country's market, are of little significance in determining whether injury is being caused to the domestic industry by the dumped imports as a whole.[237]"[238]

181. The Panel in *Canada – Welded Pipe* pointed out that "Article 3.3 marks a departure from the general rule that the term 'margin of dumping' refers to the individual margin of dumping of an exporter or producer."[239]

1.6.3 Conditions for cumulation – appropriate in light of the "conditions of competition"

182. The Panel in *EC – Tube or Pipe Fittings* examined the nature and scope of the requirement in Article 3.3(b) that a cumulative assessment of the effects of the imports is appropriate in light

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[236] Appellate Body Report, *EC – Tube or* Pipe *Fittings*, paras. 109-110.

[237] (*footnote original*) We do not suggest that trends in country-specific volumes are always irrelevant for an investigating authority's consideration. For example, such trends may be relevant in the context of an investigating authority's evaluation of the conditions of competition between imported products, and between imported products and the domestic like product, as provided for in Article 3.3(b). Brazil raised the relationship between import volumes and conditions of competition as the basis for a claim under that provision before the Panel. (Panel Report, para. 7.252) The Panel found that the divergences in volume trends between Brazilian imports and those of other countries did not compel a finding by the European Commission that the effects of Brazilian imports could not be appropriately assessed on a cumulated basis with the effects of imports from other countries. (*Ibid*., paras. 7.253-7.256) Brazil has not appealed the Panel's finding in this respect.

[238] Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 116.

[239] Panel Report, *Canada – Welded Pipe*, para. 7.26.

of the conditions of competition between the imported products and the conditions of competition between the imported products and the like domestic product. It considered that, "in light of the general wording of the provision and the nature of the term "appropriate", an investigating authority enjoys a certain degree of discretion in making that determination on the basis of the record before it. However, it is clear to us that cumulation must be suitable or fitting in the particular circumstances of a given case in light of the particular conditions of competition extant in the marketplace."[240]

183. The Panel in *EC – Tube or Pipe Fittings* understood the phrase "conditions of competition" to refer to the dynamic relationship between products in the marketplace and added that this phrase is not accompanied by any sort of qualifier such as "identical" or "similar". It concluded that Article 3.3 contains no express indicators by which to assess the "conditions of competition", much less any fixed rules dictating precisely the relative percentages or levels of such indicators that must be present:

> "While we note that a broadly parallel evolution and a broadly similar volume and price trend might well indicate that imports may appropriately be cumulated, we find no basis in the text of the Agreement for Brazil's assertion that 'only a comparable evolution and a similarity of the significantly increased import volumes and/or the significant price effects … would indicate that these imports might have a joint impact on the situation of the domestic industry and may be assessed cumulatively'. Moreover, the provision contains no express indicators by which to assess the 'conditions of competition', much less any fixed rules dictating precisely and exhaustively the relative percentages or levels of such indicators that must be present. Unlike the lists of factors that guide an authority's examination under, for example, Articles 3.2, 3.4 and 3.5, Article 3.3 does not provide even an indicative list of factors that might be relevant in the assessment called for under that provision, in particular, the assessment of 'conditions of competition'.[241] We note that Article 3.2 explicitly concentrates on volume and price trends, and that Article 3.3 is neither specific nor limited in this way. Thus, while price and volume considerations may well be relevant in this context, we find no explicit reference thereto in Article 3.3(b)."[242]

184. The Panel in *EU – Footwear (China)* rejected the complainant's argument that for an investigating authority to use cumulation it has to be shown "that imports from different countries have similar volume and market share trends, or that the conditions of competition in the different exporting countries were 'similar' or 'normal', in order to conclude that a cumulative assessment is appropriate in light of the 'conditions of competition'."[243] According to the Panel, "Article 3.3 contains no specific mandatory or indicative factors that should be considered in assessing whether cumulative analysis is appropriate in light of the 'conditions of competition'."[244]

185. The Panel in *China — AD on Stainless Steel (Japan)* stated that "[i]f an investigated source of exports increases in volume during the course of the POI (as was the case with Indonesia, whose exports of billets (slabs) and coils increased in 2017) that may well be a sign that exports from that source are effectively competing with imports from all other sources, which would make it appropriate for an investigating authority to cumulatively assess the imports from all such sources."[245]

186. The Panel in *China — AD on Stainless Steel (Japan)* rejected Japan's argument regarding the importance of price trends from different exporting countries in assessing conditions of

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[240] Panel Report, *EC – Tube or Pipe Fittings*, para. 7.241.

[241] (*footnote original*) In this regard, we take note of Exhibits EC-8 through 11 containing submissions made by certain Members as part of discussions in the Ad Hoc Group on Implementation within the ADP Committee, which we observe reflect somewhat divergent practices of Members. These discussions show, at a minimum, that price and volume are not accepted by all Members as appropriate indicators of the "conditions of competition" (as they arguably reflect the outcome of competition and not whether competition is occurring). It appears, therefore, that Members themselves have not yet arrived at a common understanding of the content of these terms. Indeed, we note that this is a topic which has been proposed for negotiations and it is not our task to presuppose the outcome of those negotiations.

[242] Panel Report, *EC – Tube or Pipe Fittings*, para. 7.242.

[243] Panel Report, *EU – Footwear (China)*, para. 7.404.

[244] Panel Report, *EU – Footwear (China)*, para. 7.404.

[245] Panel Report, *China — AD on Stainless Steel (Japan)*, para. 7.91.

competition in the context of a cumulation analysis. In so doing, the Panel underlined that the relevant inquiry under Article 3.3 is not whether subject imports are causing injury to the domestic industry:

> "While we are of the view that a consideration of price trends may be relevant in assessing the conditions of competition between subject imports, or between subject imports and the domestic like product, we do not consider that Japan has shown that MOFCOM's analysis of the conditions of competition was flawed in the light of the price trends Japan maintains demonstrate a lack of competition. Japan focuses on the higher prices from Japan and the European Union relative to prices from Korea and Indonesia. Japan relies on such price differences to advance its view that only part of the subject imports – specifically those from Indonesia or Korea – might have been causing injury to the domestic industry, and that Japanese subject imports could not have had any negative impact on the prices of domestic like products. However, we note that the relevant enquiry under Article 3.3, either when assessing the conditions of competition between subject imports and the domestic like product, or between subject imports, is not whether subject imports could have been *causing injury* to the domestic industry, but rather whether a cumulative assessment of the subject imports is appropriate in light of the conditions of competition."[246]

1.7 Article 3.4

1.7.1 General

187. The Panel in *EU – Footwear (China)* held that neither Article 3.1 nor Article 3.4 of the Anti-Dumping Agreement contains any limitation on the sources from which an investigating authority may obtain information pertaining to its injury determination:

> "[W]e recall that there is nothing in Article 3.1 of the AD Agreement that prescribes a methodology for the determination of injury. In our view, there is certainly nothing in that provision, or in Article 3.4 of the AD Agreement, that prescribes how the investigating authority is to obtain information for the purposes of its injury determination, and still less is there any limitation, express or implied, on the sources from which information in that regard may be obtained. Clearly, the investigating authority must 'evaluate' all relevant economic factors, and to do so, it must have information pertaining to those factors. However, we cannot see in this obligation anything that would limit the investigating authority's actions in seeking necessary information."[247]

188. With regard to the quality of the information used in an injury determination, the Panel in *EU – Footwear (China)* found:

> "Moreover, we recall our view that nothing in Article 3.4, or any other provision of the AD Agreement, precludes consideration of and reliance on less than perfect or unverified data, so long as the investigating authority is satisfied as to the accuracy of the information."[248]

189. The Panel in *Russia – Commercial Vehicles* stated that discrepancy in the injury data used by an investigating authority does not necessarily vitiate the injury determination. To demonstrate a lack of objective determination, the complainant has to show more than the existence of discrepancy:

> "To demonstrate that a discrepancy in data vitiates the cogency of the evidence or the objectivity of the analysis, a complainant must demonstrate more than the mere existence of a discrepancy. It must demonstrate that the discrepancy had consequences in terms of the analysis and conclusions: for example, that different data from that considered and relied upon was not only better, but that the

[246] Panel Report, *China — AD on Stainless Steel (Japan)*, para. 7.97.
[247] Panel Report, *EU – Footwear (China)*, para. 7.427.
[248] Panel Report, *EU – Footwear (China)*, para. 7.437.

> discrepancy was so meaningful as to bring into question the reasonableness or objectivity of the evaluation required under Article 3.4."[249]

190. On this basis, the Panel in *Russia – Commercial Vehicles* rejected the European Union's contention that the discrepancy in the data used by the Russian authorities in the challenged investigation led to a determination inconsistent with Articles 3.1 and 3.4 of the Anti-Dumping Agreement:

> "On the facts of this case, the European Union has identified discrepancies between the data supplied by Sollers in its Questionnaire response, and the data relied on by the DIMD in its Investigation Report. However, the European Union has not demonstrated in what way any identified discrepancy brings into question the probative value of the evidence actually relied upon by the DIMD, or the reasonableness and objectivity of the determination based on that evidence. We note that the Questionnaire response of Sollers was submitted to the DIMD on 30 March 2012, and was updated and corrected on at least two occasions during the investigation, upon request from the DIMD. Therefore, discrepancies between the data in these documents and that in the Investigation Report are not surprising and are not in themselves sufficient to prove that the DIMD failed to base its evaluation of profit/profitability on positive evidence. We stress that, other than referring to the discrepancies, the European Union does not even attempt to call into question the relevance, pertinence or quality of the aggregated profit/profitability data that the DIMD actually relied upon or the reasonableness and objectivity of the evaluation of that data."[250]

191. The Panel in *China – Broiler Products (Article 21.5 – US)*, in addressing the United States' argument that the increases MOFCOM had found in inventories were not "significant", noted that Article 3.4 does not require that investigating authorities examine the significance of the negative effects on inventories.[251]

192. The Panel in *China – Broiler Products (Article 21.5 – US)* rejected China's argument that Article 3.4 allows investigating authorities to rely, among others, on "potential declines" in the injury factors listed therein, and stressed that such a consideration is relevant to a determination of threat of material injury, but not present material injury:

> "Articles 3.4 and 15.4 are concerned with the impact of imports during a recent past period on the present state of the domestic industry, and not the impact of future imports on the future state of the industry. The latter is specifically addressed in Articles 3.7 and 15.7, which establish additional criteria for consideration in the context of determining 'threat of material injury'. A 'potential decline' in the sense of Articles 3.4 and 15.4 could not, in our view, be found to support the view that material injury is 'possible' as a result of future imports, or that future imports could cause injury in the future. Rather, 'potential decline' as a relevant factor in the examination of the impact of subject imports on the present state of the domestic industry would have to be a consequence of the dumped or subsidized imports during the period examined. 'Potential decline' exists where, despite the absence of an actual decline (in either absolute or relative terms) during the period examined, imports during the period examined have an impact on the domestic industry such that there is a latent or potential decline with respect to a particular factor which has not yet become manifest.
>
> As part of its examination of the impact of subject imports, MOFCOM apparently considered the prospective impact of future imports on the state of the industry as a relevant factor. This is not an appropriate consideration in the context of an examination of the impact of dumped and subsidized imports on the domestic industry as part of a determination of present material injury caused by those imports. In our view, MOFCOM's understanding of the relevance of future imports in the context of evaluation of a 'potential decline' was not consistent with a proper reading of Articles

[249] Panel Report, *Russia – Commercial Vehicles*, para. 7.115.
[250] Panel Report, *Russia – Commercial Vehicles*, para. 7.116.
[251] Panel Report, *China – Broiler Products (Article 21.5 – US)*, paras. 7.146-7.149.

> 3.4 and 15.4. In itself, this might suggest that the 'potential decline' portions of MOFCOM's analysis are irrelevant, and nothing in the Agreements prohibits an investigating authority from examining or evaluating irrelevant factors if this does not otherwise have an impact on the investigating authority's overall examination and ultimate determination. In this case, however, China itself argues that MOFCOM relied on this irrelevant factor. In this context, we cannot conclude that MOFCOM's examination of the impact of subject imports was consistent with Article 3.4 of the Anti-Dumping Agreement and Article 15.4 of the SCM Agreement, as we cannot know what MOFCOM's conclusion would have been had it not relied on this irrelevant factor."[252]

193. In *Pakistan – BOPP Film (UAE)*, the Panel addressed the UAE's argument that Pakistan's investigating authority (NTC) had failed to make a holistic assessment of the state of the domestic industry. In the UAE's view, the NTC had not explained why the facts taken together supported its finding of material injury despite conflicting evidence.[253] The Panel noted, at the outset, that the NTC had found that the domestic industry was not suffering injury on account of six of the factors it examined. In the Panel's view, the NTC did not appear to take these positive factors into account in finding, ultimately, that the domestic industry was suffering material injury:

> "To assess the question before us, we turn to the NTC's determination. As both parties point out, the NTC found that the domestic industry was not suffering injury on account of six of the factors it examined. In subsequently concluding that the domestic industry had suffered material injury, the NTC either did not refer to these factors at all (in the public version of its Report on final determination) or listed them as factors on account of which the domestic industry had not suffered material injury (in the confidential version of its report). However, there is no indication whatsoever of how the NTC took into account these positive factors in reaching its overall conclusion."[254]

194. The Panel further noted, in framing the applicable legal standard under Article 3.4, that an investigating authority must explain how it took conflicting evidence into account in reaching its conclusions:

> "Article 3.4 expressly provides that no particular factor 'can … necessarily give decisive guidance': there is no requirement for all factors, or a defined number of factors, to display negative trends. However, faced with evidence that contradicts its conclusions, an investigating authority must at least explain how it took that evidence into account in reaching its conclusions."[255]

195. Applying the legal standard to the facts, the Panel considered that the NTC had failed to explain how it took into account evidence that conflicted with its ultimate conclusions. The Panel thus found that the NTC had acted inconsistently with Articles 3.1 and 3.4 of the Anti-Dumping Agreement:

> "In this case, the NTC failed to provide *any* explanation. Pakistan argues that the factors displaying negative trends were those that play a particularly important role in an injury analysis, but this argument finds no reflection in the NTC's reasoning. Pakistan also argues that the NTC's conclusions were strengthened by its consideration of the volume and price effects pursuant to Article 3.2, but this does not excuse an authority from explaining how it has taken into account evidence that conflicts with its ultimate conclusions, here in the form of a number of injury factors displaying positive trends.
>
> We therefore find that by failing to provide any explanation – or even indication – of how it took into account the factors displaying positive trends in reaching its conclusion that the domestic industry had suffered material injury, the NTC failed to perform an objective examination based on positive evidence of the impact of the

[252] Panel Report, *China – Broiler Products (Article 21.5 – US)*, paras. 7.160-7.161.
[253] Panel Report, *Pakistan – BOPP Film (UAE)*, para. 7.417.
[254] Panel Report, *Pakistan – BOPP Film (UAE)*, para. 7.419.
[255] Panel Report, *Pakistan – BOPP Film (UAE)*, para. 7.420.

> dumped imports on the domestic industry, and therefore acted inconsistently with Articles 3.1 and 3.4."[256]

1.7.2 "dumped imports"

196. In *EC – Bed Linen*, the Panel rejected the argument that "dumped imports" must be understood to refer only to imports which are the subject of transactions in which the export price was below normal value. See the material at paragraph 67 and following.

197. The Panel in *EC – Salmon (Norway)* noted that, if there was a finding of *de minimis* dumping margins it was "inescapable" that imports attributable to such producer or exporter would not be able to be treated as "dumped" imports for any aspect of that investigation.[257] The Panel continued:

> "In our view, it would be illogical to treat such imports as 'dumped' imports for purposes of the injury determination, when they cannot be considered as 'dumped' for purposes of imposition of anti-dumping duties as a result of the investigation."[258]

198. In the investigation at issue in *Colombia – Frozen Fries*, the investigating authority based its injury determination on all investigated imports, including those from exporters for which *de minimis* or negative dumping margins had been calculated.[259] The complainant, the European Union, argued that doing so violated Articles 3.1, 3.2, 3.4 and 3.5 of the Anti-Dumping Agreement. The respondent, Colombia, contended that the term "dumped imports" in the cited four provisions covers *de minimis* margin imports. Colombia claimed that while negative-margin imports do not constitute "dumped imports", "the treatment of a 'small volume' of negative margin imports as 'dumped imports' by MINCIT does not undermine its injury and causation determinations."[260] The Panel started its assessment by noting that the term "dumped imports" carries the same meaning across these four provisions.[261] In coming to this conclusion, the Panel found contextual support in Article 5.8 of the Agreement. It also rejected Colombia's argument that Articles 9.4 and 3.3 demonstrate that there is no link between Articles 5.8 and 3 of the Agreement.[262] According to the Panel:

> "[O]nce a producer or exporter has been assigned a *de minimis* margin of dumping, the continued treatment of any imports from that producer or exporter as 'dumped imports', in any subsequent injury and causation analyses under Article 3, would render ineffective the requirement, under Article 5.8, to 'immediate[ly] terminate' the investigation."[263]

199. The Panel in in *Colombia – Frozen Fries* stated that imports from exporters for which negative overall dumping margins have been calculated cannot be considered as "dumped imports" for purposes of Article 3:

> "[W]e cannot see how an unbiased and objective investigating authority could have included imports from exporters with negative overall margins in its assessment of the injury caused by 'dumped imports'."[264]

1.7.3 "domestic industry"

1.7.3.1 Sectoral analysis

200. The Appellate Body in *US – Hot-Rolled Steel* ruled that investigating authorities can undertake "an evaluation of particular parts, sectors or segments within a domestic industry",

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[256] Panel Report, *Pakistan – BOPP Film (UAE)*, paras. 7.421-7.422.
[257] Panel Report, *EC – Salmon (Norway)*, para. 7.625.
[258] Panel Report, *EC – Salmon (Norway)*, para. 7.625.
[259] Panel Report, *Colombia – Frozen Fries*, para. 7.282.
[260] Panel Report, *Colombia – Frozen Fries*, para. 7.283.
[261] Panel Report, *Colombia – Frozen Fries*, para. 7.288.
[262] Panel Report, *Colombia – Frozen Fries*, paras. 7.294 and 7.298.
[263] Panel Report, *Colombia – Frozen Fries*, para. 7.302.
[264] Panel Report, *Colombia – Frozen Fries*, para. 7.304.

provided they respect the fundamental obligation in Article 3.1 to conduct an "objective assessment":

> "[I]t seems to us perfectly compatible with Article 3.4 for investigating authorities to undertake, or for a Member to require its investigating authorities to undertake, an evaluation of particular parts, sectors or segments within a domestic industry. Such a sectoral analysis may be highly pertinent, from an economic perspective, in assessing the state of an industry as a whole.
>
> However, the investigating authorities' evaluation of the relevant factors must respect the fundamental obligation, in Article 3.1, of those authorities to conduct an 'objective examination'. If an examination is to be "objective", the identification, investigation and evaluation of the relevant factors must be even-handed. Thus, investigating authorities are not entitled to conduct their investigation in such a way that it becomes more likely that, as a result of the fact-finding or evaluation process, they will determine that the domestic industry is injured.
>
> Instead, Articles 3.1 and 3.4 indicate that the investigating authorities must determine, objectively, and on the basis of positive evidence, the importance to be attached to *each* potentially relevant factor and the weight to be attached to it. In every investigation, this determination turns on the 'bearing' that the relevant factors have 'on the state of the [domestic] industry'."[265]

201. In *US - Ripe Olives from Spain*, the Panel disagreed with the European Union's argument that the USITC had failed to conduct a proper analysis of the impact of volume and price effects on the domestic industry as a whole, because such analysis focussed only on one sector of the market, i.e., the retail sector:

> "We understand the European Union to contend that the USITC's finding that underselling resulted in a loss of market share by the domestic industry in the retail sector concerns only one sector of the market as a whole, and thus not the domestic industry as a whole. This argument relates to the requirement identified in prior Appellate Body reports, with which we agree, that an investigating authority must assess the impact of subject imports on the domestic industry as a whole. We disagree, however, with the European Union's contention that in the absence of volume and price effects 'at the level of the domestic industry as a whole' there could be no impact. We do not see any reason why findings concerning volume and price effects that relate to one sector cannot have consequent impacts on the industry as a whole. A deterioration in one sector could clearly impact the domestic industry as a whole. In our view, there is no need for every sector to be negatively impacted for the domestic industry's economic and financial indicia to deteriorate, although the degree of any such deterioration will be determined by the combined influence of developments in all sectors. We therefore reject the European Union's argument that the USITC's lack of findings concerning volume and price effects 'at the level of the domestic industry as a whole' could not result in any consequent impact."[266]

202. The Panel in *EU – Footwear* held that an investigating authority was not required to analyse the situation of individual producers within the definition of domestic industry, in making its injury determination:

> "As discussed above, the determination of injury must be made with respect to the domestic industry as a whole. Article 3.4 of the AD Agreement does not require that each and every injury factor, considered individually, must be indicative of injury. We see no basis in Article 3.1 or 3.4 for the view that the situation of individual companies in the domestic industry must be examined to determine whether they, individually, show signs of injury. China asserts that the fact that a large portion of the sampled companies do not show any signs of injury constitutes 'positive evidence' that the investigating authority must examine in considering the impact of imports on domestic producers within the meaning of Article 3.1. However, this presupposes that

[265] Appellate Body Report, *US – Hot-Rolled Steel*, paras. 195-197.
[266] Panel Report, *US – Ripe Olives from Spain*, para. 7.287.

> the situation of individual companies must be evaluated in the first place, a proposition for which China has stated no legal basis. We note in this regard that this is not a case involving a regional industry as provided for in Article 4.1(ii) of the AD Agreement, where it is specifically required that, in order to conclude that injury exists, it must be found that 'the dumped imports are causing injury to the producers of all or almost all of the production within such market.' In our view, were any similar requirement applicable as a general rule, it would not have been necessary to include this specific provision in Article 4.1(ii). We thus conclude that the Commission was not required to consider the situation of individual companies to determine if, individually, they showed signs of injury. As a consequence, we consider that, *a fortiori*, the Commission did not act inconsistently with either Article 3.1 or Article 3.4 by not taking into account whether individual producers were suffering injury. We therefore reject this aspect of China's claim."[267]

1.7.3.2 Domestic producers outside the "sample"

203. In *EC – Bed Linen*, the Panel examined whether, further to having defined the Community industry as a group of 35 producers and resorted to a sample of those producers, the European Communities was precluded from considering information relating to producers not within that sample, or not within the Community industry.[268] The Panel resolved the issue whether "consideration of evidence for domestic producers outside the selected sample *but within the domestic industry* constitutes, *ipso facto*, a violation of Article 3.4"[269], as follows:

> "[I]t is clear from the language of the *AD Agreement*, in particular Articles 3.1, 3.4, and 3.5, that the determination of injury has to be reached for the *domestic industry* that is the subject of the investigation. … In our view, it would be anomalous to conclude that, because the [investigating Member] chose to consider a sample of the domestic industry, it was required to close its eyes to and ignore other information available to it concerning the domestic industry it had defined. Such a conclusion would be inconsistent with the fundamental underlying principle that anti-dumping investigations should be fair and that investigating authorities should base their conclusions on an objective evaluation of the evidence. It is not possible to have an objective evaluation of the evidence if some of the evidence is required to be ignored, even though it relates precisely to the issues to be resolved. Thus, we consider that the [investigating authority] did not act inconsistently with Articles 3.1, 3.4, and 3.5 of the *AD Agreement* by taking into account in its analysis information regarding the … industry as a whole, including information pertaining to companies that were not included in the sample."[270]

204. Similarly, the Panel in *EC – Fasteners (China)*, in a finding upheld by the Appellate Body, found:

> "The Commission defined the domestic industry in this case as comprising 46 EU producers of fasteners, and subsequently selected a sample of those producers for purposes of the investigation. It is clear that the sample is not the domestic industry. In our view, if, as we have found in this case, the sample is properly constituted, information for the sample may be relied upon as representative of the entire domestic industry. Thus, reliance on information for the sample for some factors, and on information for the entire domestic industry for others, does not mean that the investigating authority did not consider the injury factors in relation of an industry defined in a consistent manner – there is only one industry defined in this case, the 46 EU producers of fasteners. The sample is not a different 'definition' of the domestic industry. We agree with China to the extent that, once the domestic industry has been defined, it is clear that the examination, analysis, and determination of injury must be with respect to that industry. However, this does not limit the right of the

[267] Panel Report, *EU – Footwear (China)*, para. 7.458.

[268] The Panel also indicated that "[they] express no opinion as to the correctness *vela non* of the European Communities' interpretation of Article 4 of the *AD Agreement* or its application in this case". Panel Report, *EC – Bed Linen*, para. 6.175.

[269] Panel Report, *EC – Bed Linen*, para. 6.180.

[270] Panel Report, *EC – Bed Linen*, para. 6.181.

> investigating authority to rely on information for a properly constituted sample of the domestic industry in that examination, analysis and determination. As the panel observed in *Mexico – Steel Pipes and Tubes*, 'once an investigating authority has identified the framework for its analysis … it must use this identified framework consistently and coherently throughout an investigation'. In our view, that is what the Commission did in this case, making a determination with respect to the domestic industry as it was defined in this investigation. The use of information relating to both the industry and the sample does not affect this view."[271]

1.7.3.3 Companies outside the domestic industry

205. Regarding the issue of information concerning Article 3.4 factors for companies outside the domestic industry, the Panel in *EC – Bed Linen* held that information about companies which are not part of the domestic industry "provides no basis for conclusions about the impact of dumped imports on the domestic industry":

> "In our view, information concerning companies that are not within the domestic industry is irrelevant to the evaluation of the 'relevant economic factors and indices having a bearing on the state of the industry' required under Article 3.4. This is true even though those companies may presently produce, or may have in the past produced, the like product … Information concerning the Article 3.4 factors for companies outside the domestic industry provides no basis for conclusions about the impact of dumped imports on the domestic industry itself."[272]

206. The Panel in *EC – Tube or Pipe Fittings* held that if like product-specific information was not available, investigating authorities could use other broader data:

> "[W]hile data and information pertaining specifically to the 'like product' is to be used to the extent possible, the Agreement also envisages resort to a broader spectrum of data where separate identification of like product specific data is not possible. It is therefore permissible for an investigating authority to assess the effects of the dumped imports by the examination of the production of a broader range of products, which includes the like product, for which the necessary information can be provided if like-product-specific information is not available."[273]

207. In *Russia – Commercial Vehicles*, the Appellate Body found that "evidence pertaining to inventories of a related dealer that does not produce the like product and is not formally part of the domestic industry may be pertinent, in a particular case, to the evaluation of a relevant economic factor or index having a bearing on the state of the domestic industry", but agreed with the Panel that "whether an evaluation under Article 3.4 requires a consideration of such evidence can be assessed only on a case-by-case basis."[274]

1.7.4 "all relevant economic factors and indices having a bearing on the state of the industry"

1.7.4.1 Mandatory or illustrative nature of the list of factors

208. The Panel in *EC – Bed Linen*, in a finding not specifically addressed by the Appellate Body, considered whether the list of factors in Article 3.4 is illustrative or mandatory. Further to concluding that the list is mandatory, the Panel addressed the issue of whether only the four groups of "factors" represented by the subgroups separated by semicolons in Article 3.4 must be evaluated, or whether each individual factor listed must be considered:

> "The use of the phrase 'shall include' in Article 3.4 strongly suggests to us that the evaluation of the listed factors in that provision is properly interpreted as mandatory in all cases. That is, in our view, the ordinary meaning of the provision is that the

[271] Panel Report, *EC – Fasteners (China)*, para. 7.390.
[272] Panel Report, *EC – Bed Linen*, para. 6.182.
[273] Panel Report, *EC – Tube or Pipe Fittings*, para. 7.327.
[274] Appellate Body Report, R*ussia – Commercial Vehicles*, para. 5.156.

> examination of the impact of dumped imports must include an evaluation of all the listed factors in Article 3.4.
>
> …
>
> With regard to the use of the word 'including', we consider that this simply emphasises that there may be other 'relevant factors and indices having a bearing on the state of the industry' among 'all' such factors that must be evaluated. We recall that, in the Tokyo Round AD Code, the same list of factors was preceded by the phrase 'such as', which was changed to the word 'including' that now appears in Article 3.4 of the *AD Agreement*. … We thus read the phrase 'shall include an evaluation of all relevant factors and indices having a bearing on the state of the industry, including …' as introducing a mandatory list of relevant factors which must be evaluated in every case. The change in the wording that was introduced in the Uruguay Round in our view supports an interpretation of the current text of Article 3.4 as setting forth a list that is mandatory, and not merely indicative or illustrative.
>
> [I]n our view, neither the presence of semicolons separating certain groups of factors in the text of Article 3.4, nor the presence of the word 'or' within the first and fourth of these groups, serves to render the mandatory list in Article 3.4 a list of only four 'factors'. We further note that the two 'ors' appear within – rather than between – the groups of factors separated by semicolons. Thus, we consider that the use of the term 'or' here does not detract from the mandatory nature of the textual requirement that 'all relevant economic factors' shall be evaluated. With respect to the second 'or,' it appears in the phrase 'ability to raise capital or investments', which clearly indicates that the factor that an investigating authority must examine is the 'ability to raise capital' or the 'ability to raise investments', or both.
>
> …
>
> Based on the foregoing, we conclude that *each* of the fifteen factors listed in Article 3.4 of the *AD Agreement* must be evaluated by the investigating authorities in each case in examining the impact of the dumped imports on the domestic industry concerned."[275]

209. The Panel in *Mexico – Corn Syrup* confirmed the mandatory nature of the list of factors in Article 3.4. The Panel indicated that, in its view, the language of Article 3.4 makes it clear that the listed factors in Article 3.4 must be considered in all cases "even though such consideration may lead the investigating authority to conclude that a particular factor is not probative in the circumstances of a particular industry or a particular case, and therefore is not relevant to the actual determination".[276] According to the Panel, Article 3.4 requires that the consideration of each of the factors "must be apparent in the final determination".[277]

210. The Panel in *Thailand – H-Beams*, in a finding endorsed by the Appellate Body[278], also confirmed that Article 3.4 requires the examination of *all* the listed factors.[279]

211. Also, in support of its proposition referenced above in *Thailand – H-Beams*, the Panel examined the presence of the word "or" in Article 3.4, but concluded that the use of this word did not serve to detract from the mandatory nature of the list of factors under this provision:

> "We are of the view that the language in Article 3.4 makes it clear that all of the listed factors in Article 3.4 must be considered in all cases. The provision is specific and

[275] Panel Report, *EC – Bed Linen*, paras. 6.154-6.159. *See* also Panel Reports, *Mexico – Corn Syrup*, para. 7.128; *Egypt – Steel Rebar*, para. 7.36. With respect to a very similar issue concerning the term "all relevant factors" under Article 4.2(a) of the Safeguards Agreement, see the explanations on Article 4 of the Agreement on Safeguards. See also Panel Report, *Pakistan – BOPP Film (UAE)*, para. 7.350.

[276] Panel Report, *Mexico – Corn Syrup*, para. 7.128.

[277] Panel Report, *Mexico – Corn Syrup*, para. 7.128.

[278] Appellate Body Report, *Thailand – H-Beams*, paras. 121-128.

[279] Panel Report, *Thailand – H-Beams*, para. 7.225. Also see Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.314.

> mandatory in this regard. We do not consider that the presence of semi-colons separating certain groups of factors in the text of Article 3.4, nor the presence of the word 'or' within the first and fourth of these groups serve to render the mandatory list in Article 3.4 a list of only four 'factors'. We note that the two 'ors' appear within – rather than between – the groups of factors separated by semi-colons. The first 'or' in Article 3.4 appears at the end of a group of factors that may indicate declines in the domestic industry (i.e. 'actual and potential decline in sales, profits, output, market share, productivity, return on investments, *or* utilization of capacity' (emphasis added)). In our view, the use of the word 'or' here is textually linked to the phrase 'actual and potential decline', and may indicate that such 'declines' need not occur in respect of each and every one of the factors listed in this group in order to support a finding of injury. Thus, we do not consider that the use of the term 'or' here detracts from the textual requirement that 'all relevant economic factors' be evaluated. Moreover, we note that this first group of factors in Article 3.4 contains factors that all relate to, and are indicative of, the state of the industry.[280]
>
> With respect to the second 'or,' we note that it appears in the phrase 'ability to raise capital or investments'. In our view, this 'or' indicates that the factor that an investigating authority must examine is 'ability to raise capital' or 'ability to raise investments', or both."[281]

212. In *Guatemala – Cement II*, the Panel found that in violation of Article 3.4, Guatemala's authority had not considered certain factors among those enumerated in that Article. In doing so, the Panel agreed with the finding of the Panel in *Mexico – Corn Syrup* referenced in paragraph 209 above. In further support of its finding, the Panel also noted a finding of the Panel in *Korea – Dairy* with respect to Article 4.2 of the Agreement on Safeguards, "which is very similar to Article 3.4 of the *AD Agreement*."[282]

213. The Panel in *EC – Bed Linen (Article 21.5 – India)* underlined that "there is no requirement in Article 3.4 that each and every injury factor, individually, must be indicative of injury".[283] The Panel concluded that:

> "[A]n analysis of injury does not rest on the evaluation of the Article 3.4 factors individually, or in isolation. Nor is it necessary that all factors show negative trends or declines. Rather, the analysis and conclusions must consider each factor, determine the relevance of each factor, or lack thereof, to the analysis, and consider the relevant factors together, in the context of the particular industry at issue, to make a reasoned conclusion as to the state of the domestic industry."[284]

214. The Panel in in *Thailand – H-Beams* held, in a finding not addressed by the Appellate Body, that even though the Anti-Dumping Agreement does not require that all injury factors show a negative trend, an investigating authority is required to explain why it has made an affirmative injury determination despite the existence of injury factors showed a positive trend:

> "While we do not consider that such positive trends in a number of factors during the IP would necessarily preclude the investigating authorities from making an affirmative determination of injury, we are of the view that that such positive movements in a

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[280] *(footnote original)* We note that Article 4.2(a) of the Agreement on Safeguards, which contains a requirement that the investigating authorities "shall evaluate all relevant factors … having a bearing on the situation of that industry, in particular, … changes in the level of sales, production, productivity, capacity utilization, profits and losses, and employment" has been interpreted to require an evaluation of each of these listed factors having a bearing on the state of the industry. See Appellate Body Report, *Argentina – Footwear (EC)*, para. 136 and Panel Report, *Argentina – Footwear (EC)*, para. 8.123. While the standard for injury in safeguards cases ("serious injury") is different from that applied to injury determinations in the anti-dumping context ("material injury"), the same type of analysis is provided for in the respective covered agreements, i.e. evaluation or examination of a listed series of factors in order to determine whether the requisite injury exists.

[281] Panel Report, *Thailand – H-Beams*, paras. 7.229-7.230.

[282] Panel Report, *Guatemala – Cement II*, fn. 884, where the Panel refers to Panel Report, *Korea –Dairy*, para. 7.55. With respect to the term "all relevant factors" under Article 4.2(a) of the *Safeguards Agreement*, see the explanations on Article 4 of the Agreement on Safeguards.

[283] Panel Report, *EC – Bed Linen (Article 21.5 – India)*, para. 6.163.

[284] Panel Report, *EC – Bed Linen (Article 21.5 – India)*, para. 6.213.

> number of factors would require a compelling explanation of why and how, in light of such apparent positive trends, the domestic industry was, or remained, injured within the meaning of the Agreement. In particular, we consider that such a situation would require a thorough and persuasive explanation as to whether and how such positive movements were outweighed by any other factors and indices which might be moving in a negative direction during the IP."[285]

1.1. The Panel in *Morocco - Hot-Rolled Steel (Turkey)* confirmed the mandatory nature of the list of factors in Article 3.4 when examining the impact of dumped imports where the injury determination is based on material retardation. The Panel noted that "[n]othing in the text of Article 3 supports Morocco's argument that an investigating authority is not required to address the Article 3.4 factors 'with the same rigor' in a material retardation analysis as in a material injury analysis."[286] The Panel clarified that "even if an investigating authority did not make a separate record of the evaluation of a particular factor, and had implicitly evaluated that factor through its evaluation of other factors, the record would need to show that the authority did in fact implicitly evaluate that factor".[287]

1.7.4.2 Other factors not listed in Article 3.4

215. The Panel in *Mexico – Corn Syrup* indicated that, in a particular case, the examination of relevant economic factors other than those listed in Article 3.4 could be required:

> "In our view, this language [of Article 3.4] makes it clear that the listed factors in Article 3.4 must be considered in all cases. There may be other relevant economic factors in the circumstances of a particular case, consideration of which would also be required. In a threat of injury case, for instance, the *AD Agreement* itself establishes that consideration of the Article 3.7 factors is also required."[288]

216. In *US – Hot-Rolled Steel,* the Appellate Body ruled that the obligation of evaluation that Article 3.4 imposes on investigating authorities is not confined to the listed factors, but extends to "all relevant economic factors":

> "Article 3.4 lists certain factors which are deemed to be relevant in every investigation and which must always be evaluated by the investigating authorities. However, the obligation of evaluation imposed on investigating authorities, by Article 3.4, is not confined to the listed factors, but extends to 'all relevant economic factors'. We see nothing in the *Anti-Dumping Agreement* which prevents a Member from requiring that its investigating authorities examine, in every investigation, the potential relevance of a particular 'other factor', not listed in Article 3.4, as part of its overall 'examination' of the state of the domestic industry."[289]

217. The Panel in *Korea – Certain Paper* noting that the list of injury factors under Article 3.4." is not exhaustive", stated that "Article 3.4 does not preclude the possibility that there may be other factors that should be analyzed by the IA, depending on the circumstances of a specific investigation."[290]

218. The Panel in *Korea – Certain Paper* stated that to fulfil its obligation to evaluate all factors set out in Article 3.4 in an analysis of the impact of dumped imports on the domestic industry in the importing Member, the investigating authority has:

> "[O]bviously to collect the data relating to each of the factors set out in Article 3.4. … Having gathered the relevant data, the IA then has to evaluate them in context and in connection with one another.

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[285] Panel Report, *Thailand – H-Beams*, para. 7.249.
[286] Panel Report, *Morocco – Hot-Rolled Steel (Turkey)*, paras. 7.232-7.233.
[287] Panel Report, *Morocco – Hot-Rolled Steel (Turkey)*, para. 7.238.
[288] Panel Report, *Mexico – Corn Syrup*, para. 7.128. See also Panel Report, *Thailand – H-Beams*, para. 7.225.
[289] Appellate Body Report, *US – Hot-Rolled Steel*, para. 195.
[290] Panel Report, *Korea – Certain Paper*, para. 7.281.

> The IA's obligation to evaluate all relevant economic factors under Article 3.4 shall be read in conjunction with the overarching obligation to carry out an 'objective examination' on the basis of 'positive evidence' as set out under Article 3.1. Therefore, the obligation to analyse the mandatory list of fifteen factors under Article 3.4 is not a mere 'checklist obligation' consisting of a mechanical exercise to make sure that each listed factor has somehow been addressed by the IA. We recognize that the relevance of each one of these injury factors may vary from one case to the other. The fact remains, however, that Article 3.4 requires the IA to carry out a reasoned analysis of the state of the industry. This analysis cannot be limited to a mere identification of the 'relevance or irrelevance' of each factor, but rather must be based on a thorough evaluation of the state of the industry. The analysis must explain in a satisfactory way why the evaluation of the injury factors set out under Article 3.4 lead to the determination of material injury, including an explanation of why factors which would seem to lead in the other direction do not, overall, undermine the conclusion of material injury."[291]

219. With regard to the analysis of factors not listed in Article 3.4, the Panel in *EU – Footwear (China)* held that:

> "Merely that consideration of certain factors might, in general, make a determination better does not demonstrate that such consideration is required, despite the factors in question not being mentioned in Article 3.4."[292]

1.7.4.3 "having a bearing on"

220. In *Egypt – Steel Rebar*, the Panel rejected Türkiye's argument that Article 3.4 required a full causation analysis, including a non-attribution analysis, which, according to the Panel, stemmed from Türkiye's reading of the words "having a bearing on" as having to do exclusively with causation:

> "Turkey's argument that Article 3.4 requires a full 'non-attribution' analysis appears to stem from its reading of the term 'having a bearing on' as having to do exclusively with causation, (i.e., as meaning factors *having an effect on* the state of the industry). There is another meaning of this term which we find more pertinent in the overall context of Article 3.4, however. In particular, the term 'having a bearing on' can mean *relevant to* or *having to do with* the state of the industry, and this meaning is consistent with the fact that many of the factors listed in Article 3.4 are descriptors or indicators *of* the state of the industry, rather than being factors *having an effect* thereon. For example, sales levels, profits, output, etc. are not in themselves *causes* of an industry's condition. They are, rather, among the factual indicators by which that condition can be judged and assessed as injured or not. Put another way, taken as a whole, these factors are more in the nature of *effects* than *causes*.
>
> This reading of 'having a bearing on' finds contextual support in the wording of the last group of factors in Article 3.4, namely 'actual and potential negative *effects on* cash flow, inventories, …' (emphasis added). Further contextual support is found in the cross-reference to Article 3.4 contained in the first sentence of Article 3.5: '… the *effects* of dumping as set forth in paragraph [] 4 [of Article 3]'.(emphasis added)
>
> We note in addition that if Turkey were correct that the full causation analysis, including non-attribution, were required by Article 3.4, this would effectively render redundant Article 3.5, which explicitly addresses causation, including non-attribution. Such an outcome would not be in keeping with the relevant principles of international treaty law interpretation, or with consistent practice in WTO dispute settlement. "[293]

221. In *Russia – Commercial Vehicles*, the Appellate Body examined the words "having a bearing on" in the context of Article 3.4:

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[291] Panel Report, *Korea – Certain Paper*, para. 7.272.
[292] Panel Report, *EU – Footwear (China)*, para. 7.444.
[293] Panel Report, *Egypt – Steel Rebar*, paras. 7.62-7.64.

> "[T]he clause 'having a bearing on the state of the industry' focuses the evaluation on the factors and indices relevant to the state of the domestic industry. The dictionary definition of the term 'bearing' includes '[p]ractical relation or effect (up)on; influence, relevance'. This definition suggests to us that Article 3.4 calls for an evaluation of the economic factors and indices that influence the state of the domestic industry. In addition, the reference to 'all' relevant economic factors and indices does not imply a narrow scope of evaluation. These factors and indices include those expressly listed in Article 3.4, as well as additional ones if they are relevant to the assessment of the state of the domestic industry. Thus, in our view, evidence on the record concerning all relevant economic factors and indices that influence the state of the domestic industry falls within the scope of an investigating authority's evaluation under Article 3.4."[294]

1.7.5 Evaluation of relevant factors

1.7.5.1 Concept of evaluation

222. In *Thailand – H-Beams*, the Panel opined that each of the factors listed in Article 3.4 must be evaluated, not merely as to whether it is "relevant" or "irrelevant", but on the basis of a "thorough evaluation" of the state of the industry at issue. While the Appellate Body in *Thailand – H-Beams* explicitly endorsed the Panel's finding that consideration of all factors listed under Article 3.4 is mandatory, it did not address this particular finding:

> "Article 3.4 requires the authorities properly to establish whether a factual basis exists to support a well-reasoned and meaningful analysis of the state of the industry and a finding of injury. This analysis does not derive from a mere characterization of the degree of 'relevance or irrelevance' of each and every individual factor, but rather must be based on a thorough evaluation of the state of the industry and, in light of the last sentence of Article 3.4, must contain a persuasive explanation as to how the evaluation of relevant factors led to the determination of injury."[295]

223. In *Egypt – Steel Rebar*, the Panel considered whether the mere presentation of tables of data, without more, constituted an "evaluation" in the sense of Article 3.4. Egypt had gathered data on all of the listed factors but could not adduce sufficient evidence of its authorities' evaluation of all those factors. The Panel considered that "the 'evaluation' to which Article 3.4 refers is the process of analysis and interpretation of the facts established in relation to each listed factor". Since, in spite of having gathered data on all of the factors listed in Article 3.4, the Egyptian investigating authority had failed to evaluate a number of listed factors, the Panel found that Egypt acted inconsistently with Article 3.4.[296] After listing three dictionary definitions of "evaluation", the Panel analysed:

> "We find significant that all of these definitions and synonyms connote, particularly in the context of 'evaluation' of evidence, the act of analysis, judgement, or assessment. That is, the first definition recited above refers to 'estimating the force of' evidence, evoking a process of weighing evidence and reaching conclusions thereon. The second definition recited above -- to determine the significance, worth, or condition of, usually by careful appraisal or study -- confirms this meaning. Thus, for an investigating authority to 'evaluate evidence concerning a given factor in the sense of Article 3.4, it must not only gather data, but it must analyse and interpret those data.
>
> We nevertheless do recognize that, in addition to the dictionary meanings of 'evaluation' that we have cited, the definitions set forth above also refer to a purely quantitative process (i.e., calculating, stating, determining or fixing the value of something). If this were the definition applicable to the word 'evaluation' as used in Article 3.4, arguably mere compilation of data on the listed factors, without any narrative explanation or analysis, might suffice to satisfy the requirements of Article 3.4. We find, however, contextual support in Article 17.6(i) of the *AD Agreement* for our reading that 'evaluation' is something different from, and

[294] Appellate Body Report, *Russia – Commercial Vehicles*, para. 5.155.
[295] Panel Report, *Thailand – H-Beams*, para. 7.236.
[296] Panel Report, *Egypt – Steel Rebar*, para. 7.51.

> more than, simple compilation of tables of data. We recognize that Article 17.6(i) does not apply directly to investigating authorities, and that instead, it is part of the standard of review to be applied by panels in reviewing determinations of investigating authorities. However, Article 17.6(i) identifies as the object of a panel's review two basic components of a determination: first, the investigating authority's 'establishment of the facts', and second, the investigating authority's 'evaluation of those facts'. Thus, Article 17.6(i)'s characterization of the essential components of a determination juxtaposes 'establishment of the facts' with the 'evaluation of those facts'. That panels are instructed to determine whether an investigating authority's 'establishment of the facts' was proper connotes an assessment by the panel of the means by which the data before the investigating authority were gathered and compiled. By contrast, the fact that panels are instructed to determine whether an investigating authority's 'evaluation of those facts' was objective and unbiased, provides further support for our view that the 'evaluation' to which Article 3.4 refers is the process of analysis and interpretation of the facts established in relation to each listed factor."[297]

224. A similar view was expressed by the Panel in *EC – Tube or Pipe Fittings*. The Panel considered that "an evaluation of a factor, in our view, is not limited to a mere characterisation of its relevance or irrelevance. Rather, we believe that an 'evaluation' also implies the analysis of data through placing it in context in terms of the particular evolution of the data pertaining to each factor individually, as well as in relation to other factors examined".[298] According to the Panel:

> "[A] meaningful investigation must also take into account the actual intervening trends in each of the injury factors and indices -- rather than just a comparison of 'end-points'. There must a streamlined, genuine and undistorted picture drawn from the facts before the investigating authority. Only on the basis of such a thorough and dynamic evaluation of data capturing the current state of the industry in the determination would a reviewing panel be able to assess whether the conclusions drawn from the examination are those of an unbiased and objective authority".[299]

225. In *China – HP-SSST (Japan) / China – HP-SSST (EU)*, the Appellate Body stressed that an investigating authority's ultimate task under Article 3.4 is to examine the impact of dumped imports on the domestic industry as a whole:

> "While the second sentence of Article 3.2 requires an investigating authority to consider the effect of the dumped imports on *prices*, the focus of Article 3.4 is on the state of the *domestic industry*. The Appellate Body has clarified that it would be compatible with Article 3.4 for investigating authorities to evaluate factors having a bearing on the state of the domestic industry on the basis of an evaluation of specific parts, sectors, or segments within the domestic industry. Such a sectoral analysis 'may be highly pertinent, from an economic perspective, in assessing the state of an industry *as a whole*'. As we see it, while there is no exclusive methodology prescribed for an investigating authority to conduct an examination under Article 3.4, an investigating authority's examination of the relationship between the dumped imports and the state of the domestic industry must be one that enables the investigating authority to derive an understanding about the impact of the dumped imports on the domestic industry *as a whole*."[300]

226. In *China – HP-SSST (Japan) / China – HP-SSST (EU)*, the Appellate Body clarified that an authority's task under Article 3.4 is not simply to examine the state of the domestic industry, but to understand the impact of dumped imports on that industry. The Appellate Body stated that, to this end, Article 3.4 requires the examination of the "explanatory force" of dumped imports on the state of the domestic industry:

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[297] Panel Report, *Egypt – Steel Rebar*, paras. 7.42-7.45. For a similar view see Panel Report, *EC – Bed Linen (Article 21.5 – India)*, para. 6.162; Panel Report, *EC – Tube or Pipe Fittings*, para. 7.314.
[298] Panel Report, *EC – Tube or Pipe Fittings*, para. 7.314.
[299] Panel Report, *EC – Tube or Pipe Fittings*, para. 7.316.
[300] Appellate Body Reports, China – HP-SSST (Japan) / China – HP-SSST (EU), para. 5.204.

> "Article 3.4 does not merely require an examination of the state of the domestic industry, but contemplates that 'an investigating authority must derive an understanding of *the impact of* subject imports on the basis of such an examination'. Consequently, Article 3.4 is concerned with 'the relationship between subject imports and the state of the domestic industry, and this relationship is analytically akin to the type of link contemplated by the term 'the effect of' under Article[] 3.2'. In other words, Article 3.4 requires an examination of the 'explanatory force' of subject imports for the state of the domestic industry. As noted, the Appellate Body stated in *China – GOES* that the inquiries under Article 3.2, and the examination required under Article 3.4, are necessary in order to answer the ultimate question in Article 3.5 as to whether dumped imports are causing injury to the domestic industry. The Appellate Body has clarified that, similar to the consideration under Article 3.2, the examination under Article 3.4 '*contributes to*, rather than duplicates, the overall determination required under Article[] 3.5'. However, whilst an investigating authority is required to *examine* the impact of dumped imports on the domestic industry pursuant to Article 3.4, it is *not* required to *demonstrate* that dumped imports are causing injury to the domestic industry, which is an analysis specifically mandated by Article 3.5."[301]

227. In the investigation at issue in *China – HP-SSST (Japan) / China – HP-SSST (EU)*, there was a disparity between product types that were imported and those that were produced domestically. The Appellate Body agreed with the Panel's view that it was appropriate for the investigating authority to examine the impact of dumped imports on the state of the domestic industry on the basis of the production of all product types. The Appellate Body stressed, however, that there may be situations where an investigating authority may be required to take into account relative market shares of the various product types in its impact analysis under Article 3.4:

> "We recall that, in the present case, the majority of Chinese domestic production consisted of Grade A HP-SSST, but Chinese producers also produced Grades B and C. We further note that MOFCOM 'defined the domestic industry as comprising two domestic producers accounting for the major proportion of total domestic production' of HP-SSST. We agree with the Panel that it was therefore appropriate for MOFCOM to examine the impact of the dumped imports on the state of 'those two producers, with respect to their production of all types of HP-SSST'. Contrary to what the European Union appears to suggest, such an approach would not necessarily mean that the investigating authority's *ultimate* determination of injury will include injury that is *not attributable* to the dumped imports. …
>
> Having said this, we note that Article 3.4 does not merely require an examination of the state of the domestic industry, but contemplates that an investigating authority 'must derive an understanding of *the impact of* subject imports on the basis of such an examination.' The evaluation of all relevant economic factors and indices having a bearing on the state of the industry, including market share and factors affecting domestic prices, must be such that it provides a 'meaningful basis' for an analysis of whether the dumped imports are, through the effects of dumping, as set forth in Articles 3.2 and 3.4, causing injury to the domestic industry. Depending on the particular circumstances of each case, an investigating authority may therefore be required to take into account, as appropriate, the relative market shares of product types with respect to which it has made a finding of price undercutting; and, for example, the duration and extent of price undercutting, price depression or price suppression, that it has found to exist."[302]

228. The Panel in *Russia – Commercial Vehicles* stated that where an investigating authority uses different years as starting points in its end-point to end-point analysis of various injury factors, concerns may arise about the objectivity of its determination:

> "In this respect, where an investigating authority compares data for different factors on an end-point to end-point basis, but uses different starting points within the period of consideration without justification or explanation, concerns may arise about the

[301] Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.205.
[302] Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, paras. 5.210-5.211.

> sufficiency and objectivity of the examination. It leaves open the possibility that the selection of the starting points may have been result-driven. Nevertheless, in the absence of a specific requirement in the Anti-Dumping Agreement, we do not consider that lack of consistency in the selection of beginning or ending points in an end-point to end-point comparison in itself gives rise to an inconsistency with Articles 3.1 and 3.4. Such an inconsistency must be demonstrated by reference to the examination under Article 3.4 as a whole. Thus, the question before us is whether, on the facts of this case, the European Union has demonstrated that the fact that the DIMD used different starting points for the end-point to end-point comparisons it made in the course of its analysis resulted in a determination that a reasonable and objective investigating authority could not have made."[303]

229. In *Korea – Pneumatic Valves (Japan)*, the Panel recalled that Article 3.4 requires that the *examination* of the impact of the dumped imports on the domestic industry *shall* include an *evaluation* of all relevant economic factors, including each of the fifteen listed in that provision. The Panel then distinguished such an "examination" from a "determination", stating that:

> "Article 3.4 does not require an investigating authority to make a *determination* regarding the impact of dumped imports, but rather to *examine* that impact. The fact that no determination need be made makes it clear that no particular outcome is a necessary prerequisite for going on to address and resolve the 'ultimate question' of injury caused by dumped imports. Neither Article 3.4 nor any other provision of the Anti-Dumping Agreement provides any guidance regarding a specific methodology on how these factors and indices shall be evaluated. The evaluation of the relevant factors must respect, however, the overarching principle set out in Article 3.1 concerning the objective examination of positive evidence. An 'evaluation' of each of the factors in Article 3.4 requires a process of analysis and assessment of the role, relevance and relative weight of each factor in the particular investigation. In addition, if an investigating authority concludes that a particular factor listed in Article 3.4 is not relevant, this conclusion must be explained."[304]

230. The Panel in *China — AD on Stainless Steel (Japan)* stated that an evaluation of the impact of dumped imports on the state of the domestic industry does not necessarily require an investigating authority to take into consideration relative changes in the volume of dumped imports in the base year of the period of investigation for the injury determination:

> "We next consider Japan's argument that MOFCOM did not properly evaluate *relative changes* in the sales volume of subject imports and domestic like products between 2014 and 2015. In our view, Japan has not explained why MOFCOM's examination of the impact of *dumped* imports on the domestic industry ought to have addressed sales volume trends from 2014 to 2015. We note that the relevant inquiry under Article 3.4 pertains to the 'examination of the impact of the *dumped* imports on the domestic industry'. MOFCOM found subject imports to be dumped during the period 1 January 2017 to 31 December 2017. Thus, the question before MOFCOM for the purpose of Article 3.4 pertained to the impact of these dumped imports on the state of the domestic industry. MOFCOM found that the volume of subject imports increased in 2017, whereas the volume of domestic sales decreased. The trends in 2017 must be certainly viewed in context of the trends in the overall injury POI (1 January 2014 to 31 March 2018), which includes the base year 2014-2015. However, whether or not the volume of subject imports and domestic like products declined together in that base year (i.e. 2014, a period at the very beginning of the injury POI which did *not* coincide with the dumping POI), does not speak directly to the question of whether the 'dumped' imports had an impact on the state of the domestic industry."[305]

1.7.5.2 Objective analysis of the factors affecting domestic industry

231. In *Morocco – Definitive AD Measures on Exercise Books (Tunisia)*, the Panel considered whether the Moroccan investigating authority's analysis of the impact of dumped imports on the

[303] Panel Report, *Russia – Commercial Vehicles*, para. 7.129.
[304] Panel Report, *Korea – Pneumatic Valves (Japan)*, para. 7.179.
[305] Panel Report, *China — AD on Stainless Steel (Japan)*, para. 7.191.

domestic industry was objective, and explained that there was a requirement to conduct a representative analysis of the factors affecting the domestic industry:

> "Tunisia contends that 'MIICEN had sufficient data not to rule out the possibility that the decline in sales and market share in January-April 2017, compared to January-April 2016, had been largely offset during the rest of the year'. Indeed, since the January-April period ends in the middle of the period when deliveries take place, this four-month period does not take into account, by definition, deliveries that take place in May, which can create an incomplete picture of the evolution of sales and market share. Thus, the confidential data for the year 2016 showed that the domestic industry's market share was lower in the period January-April [[***]] % when compared to its market share for the entire year [[***]] %. For these reasons, we agree with Tunisia that an objective and unbiased authority should have taken into account the seasonality of sales in its assessment of the importance of the data for the periods January-April 2016 and 2017, and examined the possibility that the decline in these indices in the first four months of 2017 was not sufficiently representative. However, the paragraphs presenting MIICEN's analysis of sales and market share contain no remarks on either the seasonal nature of exercise book sales or the reliability of the data for the January-April period. For this reason, we consider that giving determinative weight to the data for the four-month periods without addressing whether these data present a representative picture of the evolution of these factors affects the objectivity of the analysis."[306]

232. Further, in relation to the investigating authority's analysis of the productivity of the domestic industry, the Panel explained that an impact analysis which selectively focuses on data from limited time periods within the investigation period, but does not provide a rational explanation for using such limited data, is inconsistent with the objectivity obligation in Article 3.1:

> "We consider that the requirements of Article 3.1 mean that an investigating authority is obliged to ensure that the data on which it bases its injury determination accurately and credibly reflect the state of the domestic industry. As we have already noted, the data for the whole year typically provide a more accurate picture of the state of the domestic industry than the data for part of the year. In a similar vein, we agree with the panel in *Mexico - Steel Pipes and Tubes*, which cautioned against the use of 'temporal subsets within a period, without a sufficient explanation and without a consideration as to whether the developments within that temporal subset are reflective of developments throughout the period or whether and why these subsets are justified and not anomalous.'
>
> It is apparent from MIICEN's explanation that the decrease in production observed during the period January-April 2017 was a *key element* of the conclusions of injury. In this regard, we note that MIICEN failed to explain how it had ensured that the four-month period provided a reliable picture of the production trends and was not anomalous. In these circumstances, focusing definitively *on* a *very limited subset of data* within the investigation period in order to draw a definitive conclusion on the production trends demonstrates, in our view, a lack of objectivity."[307]

233. The Panel agreed with Tunisia that an objective investigating authority is required to provide a rationale for its selection of a limited time period to determine the state of the domestic industry, in circumstances where the broader trend is inconsistent with the trend in the selected period:

> "Second, Tunisia criticizes the fact that MIICEN based its conclusions on the decrease in production in January-April 2017, while the rest of the investigation period (the four full years from 2013 to 2016) showed a positive trend. The record shows that MIICEN did indeed describe this four-year positive trend in its examination, but chose to focus on the decrease in production in January-April 2017.

[306] Panel Report, *Morocco – Definitive AD Measures on Exercise Books (Tunisia)*, para. 7.276.
[307] Panel Report, *Morocco – Definitive AD Measures on Exercise Books (Tunisia)*, paras. 7.289-7.290.

> We consider that, in the light of the 33-point increase in production over four years, an objective and unbiased authority should have outlined why it considered the data for the four-month period of 2017 to be determinative. However, the only explanation that we find in the report on the definitive determination is that 'the positive developments in production between 2013 and 2016, examined in the light of the non-profitable sales made [during] this entire period, give rise to the conclusion that the increase in production is not an indication of the performance of the [domestic industry], which explains the [domestic industry's] inability to maintain this pace and led it to decrease its production in January-April 2017. In our view, this sentence does not explain why the data for the first four months of 2017 more accurately reflected the state of the domestic industry than the data over four years."[308]

234. Based on this, the Panel concluded that the investigating authority had failed to conduct an objective examination under Article 3.1:

> "In summary, we recall that, under Article 3.1 of the Anti-Dumping Agreement, the investigating authority is required to conduct an objective examination of the evidence before it. More specifically, it must ensure that the data substantiating its determination credibly and accurately reflect the state of the domestic industry. In our view, an objective authority should have explained why a decrease in the first four months of 2017 was more relevant than a trend over four years and should have addressed how the data for the four months were representative of the state of the domestic industry. The absence of an explanation of these points affects, in our view, the objectivity of the examination conducted by MIICEN."[309]

235. The Panel also rejected Tunisia's argument that during the impact analysis under Article 3.4 the investigating authority is required to examine other known injury factors not attributable to dumped imports:

> "Tunisia asserts that, in the light of the evidence before it, MIICEN should have called into question the explanation offered by the applicants (in particular, that the negative profitability was due to the need to maintain a low price level in the face of the Tunisian imports).
>
> It should be recalled that Article 3.4 of the Anti-Dumping Agreement requires an examination of 'the impact of the dumped imports on the domestic industry' and an evaluation of all relevant economic factors and indices 'having a bearing on the state of the industry'. Nothing in the text of this provision requires the investigating authority to examine all the possible causes of the indices showing negative developments. In this regard, we agree with the Appellate Body's view that Article 3.5 of the Anti-Dumping Agreement covers a broader scope than the examination under Article 3.4 and requires a non-attribution analysis. The investigating authority must examine other known injury factors as part of this analysis. Therefore, we are not convinced that the investigating authority was required to examine under Articles 3.1 and 3.4 of the Anti-Dumping Agreement whether the negative profitability was attributable to reasons other than the imports. According to our assessment, Tunisia's argument falls within the scope of Article 3.5 rather than that of Article 3.4. We thus agree with Morocco's view that MIICEN was not required to examine this particular issue, albeit for different reasons."[310]

236. The Panel further considered whether the investigating authority's impact analysis had failed to objectively examine evidence casting doubt on the explanatory force of dumped imports for the state of the domestic industry. The Panel concluded that the investigating authority had failed to conduct an objective examination of the factors affecting the profitability of the domestic industry because its report did not explain why the imports were depressing the price of the like domestic product:

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[308] Panel Report, *Morocco – Definitive AD Measures on Exercise Books (Tunisia)*, paras. 7.291-7.292.
[309] Panel Report, *Morocco – Definitive AD Measures on Exercise Books (Tunisia)*, para. 7.294.
[310] Panel Report, *Morocco – Definitive AD Measures on Exercise Books (Tunisia)*, paras. 7.300-7.301.

> "The data taken from the record by Tunisia demonstrate that the price of the Tunisian imports exceeded the domestic industry's cost of production between 2014 and 2016 (for three years of a data collection period of four years and four months) which, in turn, exceeded the price of the domestic product. However, the analysis of the domestic industry's profitability conducted by MIICEN makes no reference to the interaction among the prices of the domestic product, the Tunisian product and the cost of production of the domestic product. MIICEN simply asserted that 'the dumped imports of Tunisian exercise books prevented the [domestic industry] from reaching non-injurious price levels' and that '[i]n order to maintain production and sales volumes, the domestic industry was forced to offer prices lower than the prices of the dumped imports from Tunisia, thereby sacrificing its profit margins and accepting to sell at a loss.'
>
> Morocco contends that the domestic industry was seeking to maintain its market share by reducing its prices to remain competitive. In this regard, MIICEN clarified that the domestic industry had chosen to continue 'selling at prices as competitive as those of Tunisian exporters in order to limit market share losses, thereby directly affecting profitability margins'. We have found above that MIICEN's conclusions concerning the developments in the domestic industry's market shares and sales were not based on an objective examination of the data. We also note that MIICEN's explanation fails to consider the specific interaction among the prices of the domestic product, the Tunisian product and the cost of production of the domestic product. The record shows that not only were the prices of the Tunisian product higher than the price of the domestic like product, but they also followed *an opposite trajectory* between 2014 and 2016. However, MIICEN failed to explain why, in view of the upward trend in the prices of the Tunisian product, the domestic industry was forced to continue lowering its prices, thereby sacrificing its profits. MIICEN thus failed to examine in an objective manner whether the subject imports had 'explanatory force' for the negative profitability of the domestic producers.
>
> For the reasons set out above, we conclude that MIICEN failed to examine the negative profitability of the domestic industry in an objective manner and therefore violated Articles 3.1 and 3.4 of the Anti-Dumping Agreement."[311]

237. Based on the foregoing reasoning, the Panel concluded that the Moroccan investigating authority's evaluation of the factors affecting the domestic industry violated Articles 3.1 and 3.4 of the Anti-Dumping Agreement.[312]

238. In *Dominican Republic – AD on Steel Bars (Costa Rica),* the Panel found that the investigating authority had acted inconsistently with Article 3.4 by failing to consider the relevant economic factors and indices in a holistic manner and assessing their relative weight of each factor.[313] In this context, the Panel pointed out that "the general characterization of the trends in all indices as 'fluctuating' does not amount to an assessment of the role, relevance and relative weight of each factor".[314]

1.7.5.3 Evaluation of all listed factors

1.7.5.3.1 Evaluation of all listed factors must be apparent in the authorities' conclusions

239. The Panel in *EC – Bed Linen* stated that the evaluation of all the factors by the investigating authorities must be apparent in the final determination:

> "[W]hile the authorities may determine that some factors are not relevant or do not weigh significantly in the decision, the authorities may not simply disregard such factors, but must explain their conclusion as to the lack of relevance or significance of such factors. … [W]e are of the view that every factor in Article 3.4 must be considered, and that the nature of this consideration, including whether the

[311] Panel Report, *Morocco – Definitive AD Measures on Exercise Books (Tunisia)*, paras. 7.305-7.307.
[312] Panel Report, *Morocco – Definitive AD Measures on Exercise Books (Tunisia)*, para. 7.310.
[313] Panel Report, *Dominican Republic – AD on Steel Bars (Costa Rica),* para. 7.227.
[314] Panel Report, *Dominican Republic – AD on Steel Bars (Costa Rica),* para. 7.229.

> investigating authority considered the factor relevant in its analysis of the impact of dumped imports on the domestic industry, must be apparent in the final determination."[315]

240. Similarly, the Panel in *Guatemala – Cement II* stated that "the consideration of the factors in Article 3.4 must be apparent in the determination so the Panel may assess whether the authority acted in accordance with Article 3.4 at the time of the investigation."[316]

241. On the other hand, in its Report on *EC – Tube or Pipe Fittings*, the Appellate Body stated that Article 3.4 "requires an investigating authority to evaluate all relevant economic factors in its examination of the impact of the dumped imports. By its terms, it does not address the manner in which the results of this evaluation are to be set out, nor the type of evidence that may be produced before a panel for the purpose of demonstrating that this evaluation was indeed conducted".[317] In other words, the Appellate Body considered that the text of Article 3.4 "does not address the *manner* in which the results of the investigating authority's analysis of each injury factor are to be set out in the published documents".[318] This led the Appellate Body to reject Brazil's claims that the absence of an explicit evaluation in the published record of the investigation of one of the factors of Article 3.4 – i.e. the factor "growth" – was inconsistent with Article 3.4:

> "Accordingly, because Articles 3.1 and 3.4 do not regulate the *manner* in which the results of the analysis of each injury factor are to be set out in the published documents, we share the Panel's conclusion that it is not required that in every anti-dumping investigation a separate record be made of the evaluation of each of the injury factors listed in Article 3.4. Whether a panel conducting an assessment of an anti-dumping measure is able to find in the record sufficient and credible evidence to satisfy itself that a factor has been evaluated, even though a separate record of the evaluation of that factor has not been made, will depend on the particular facts of each case. Having said this, we believe that, under the particular facts of this case, it was reasonable for the Panel to have concluded that the European Commission addressed and evaluated the factor 'growth'.
>
> Having regard to the nature of the factor 'growth', we believe that an evaluation of that factor necessarily entails an analysis of certain other factors listed in Article 3.4. Consequently, the evaluation of those factors could cover also the evaluation of the factor 'growth'."[319]

242. In *Pakistan – BOPP Film (UAE)*, the Panel interpreted the text of Article 3.4, particularly the terms "evaluate" and "impact of the dumped imports on the domestic industry". From the term "evaluate", the Panel understood that an authority must analyse and interpret the data in a way that is discernible from the investigation record:

> "We agree with previous panels that have understood the obligation to 'evaluat[e]' under Article 3.4 to require an analysis and interpretation of the data relating to the economic factors and indices, and an assessment of the 'role, relevance and relative weight of each factor in the particular investigation'. Therefore, an investigating authority may not limit itself to setting out trends relating to the economic factors and indices. Instead, it must analyse and interpret the data, in a way that is then discernible from the investigation record."[320]

243. The Panel added that Article 3.4 requires an investigating authority to examine the impact of the dumped imports on the domestic industry. In the Panel's view, an investigating authority is required to identify the trends in the injury factors and place those trends in the relevant context that is informative of the injury suffered by the domestic industry, taking into account the relevant evidence and explanations on its record:

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[315] Panel Report, *EC – Bed Linen*, para. 6.162.
[316] Panel Report, *Guatemala – Cement II*, para. 8.283.
[317] Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 131.
[318] Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 157.
[319] Appellate Body Report, *EC – Tube or Pipe Fittings*, paras. 161-162.
[320] Panel Report, *Pakistan – BOPP Film (UAE)*, para. 7.351.

> "Article 3.4 requires an investigating authority to examine the impact of the dumped imports on the domestic industry. Thus, the text of Article 3.4 creates a link between dumped imports and the state of the domestic industry. Therefore, in our view, an investigating authority is required to identify the trends in the injury factors and place those trends in the relevant context that is informative of the injury suffered by the domestic industry, taking into account the relevant evidence and explanations that are on its record. The precise contours of this analysis will vary on a case-by-case basis, depending on the evidence and explanations on the record of the investigating authority. Where the evidence on the investigating authority's record suggests alternative readings of the trends observed, an objective examination would include considering that evidence, and reconciling it with the authority's reading of the trends it observes."[321]

244. The Panel also noted that, in assessing the factors listed in Article 3.4, an investigating authority may find that some of the factors are not relevant or do not indicate injury:

> "While an investigating authority must assess the factors listed in Article 3.4, this provision does not require all factors to be indicative of injury. An investigating authority may find that some factors are not relevant, or have limited relevance, and explain the basis for such findings. And it is possible for an investigating authority to conclude that there is injury to the domestic industry where some of the relevant individual factors are not indicative of injury, provided that the authority adequately explains how its evaluation of the relevant economic factors and indices support the overall determination of injury."[322]

1.7.5.3.2 Adequacy of the evaluation

245. The Panel in *EC – Bed Linen (Article 21.5 – India)* addressed the question of the adequacy of the evaluation in the case of a redetermination by the investigating authority in order to implement a recommendation by the DSB to bring the measure into conformity. In doing so, the Panel made the following finding:

> "With respect to the adequacy of the evaluation of the elements as an overall matter, we look to the explanation of the EC regarding its conclusions, based on the combination of elements discussed in the original determination and redetermination. While this is perhaps less straightforward than we might wish, it is clear to us that merely because the redetermination confirms or adopts certain findings made in the original determination does not **demonstrate** a failure to carry out an overall evaluation of the information in making the injury redetermination."[323]

1.7.5.3.3 Checklist approach

246. In *EC – Bed Linen*, the European Community objected to what it termed the "checklist" approach to the list of factors under Article 3.4 and argued that the relevance of some factors may be apparent early in the investigation. The Panel concluded that "as long as the lack of relevance or materiality of the factors not central to the decision is at least implicitly apparent from the final determination, the Agreement's requirements are satisfied. While a checklist would perhaps increase an authority's and a panel's confidence that all factors were considered, we believe that it is not a required approach to decision-making under Article 3.4."[324]

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[321] Panel Report, *Pakistan – BOPP Film (UAE)*, para. 7.352.
[322] Panel Report, *Pakistan – BOPP Film (UAE)*, para. 7.353.
[323] Panel Report, EC – Bed Linen (Article 21.5 – India), para. 6.173.
[324] Panel Report, *EC – Bed Linen*, para. 6.163. *See also* Panel Report, *Thailand – H-Beams*, para. 7.236 where the Panel concluded: "We are of the view that the 'evaluation of all relevant factors' required under Article 3.4 must be read in conjunction with the overarching requirements imposed by Article 3.1 of 'positive evidence' and 'objective examination' in determining the existence of injury. Therefore, in determining that Article 3.4 contains a mandatory list of fifteen factors to be looked at, we do not mean to establish a mere 'checklist approach' that would consist of a mechanical exercise of merely ensuring that each listed factor is in some way referred to by the investigating authority. It may well be in the circumstances of a particular case that certain factors enumerated in Article 3.4 are not relevant, that their relative importance or weight can vary significantly from case to case, or that some other non-listed factors could be deemed relevant."

247. In *US – Hot-Rolled Steel*, the issue was whether the US investigating authority had violated Article 3.4 by failing to explicitly discuss, in its determination, certain factors for each year of the period of investigation. In that case, according to the Panel, the authority had discussed each of the factors for the final two years of the three-year period of investigation, and only some of them for the first year of that period. The Panel found that the determination explained the particular relevance of the second and third years of the period, and that the authority's failure to explicitly address each factor in its discussion of the first year of the period did not constitute a violation of Article 3.4.[325] The Panel thus found that each of the listed Article 3.4 factors was explicitly discussed in the authority's determination, and given the explanations provided in that determination for the particular emphasis on a part of the period of investigation, the evaluation of the facts was deemed adequate by the Panel.[326]

248. The Panel in *China – X-Ray Equipment* stressed the importance of examining the trends in the evolution of injury factors, and explaining the interaction between positive and negative factors in coming to an overall conclusion on injury:

> "The parties agree that MOFCOM found 9 of the 16 indicia of the state of the industry to be 'positive'. The European Union's complaint is that rather than explaining why the negative developments in the industry were such as to outweigh the positive developments, MOFCOM merely juxtaposed the positive and negative factors.
>
> The Panel recalls that MOFCOM's treatment of certain individual injury factors did not reflect an objective examination of the evidence. In the Panel's view, this consequently affects MOFCOM's overall assessment of the state of the industry. In particular, aside from the question of whether MOFCOM examined and explained the interaction between the positive and negative injury factors, the fact that MOFCOM ignored the trends in certain injury factors and did not explain the basis for some of its conclusions, for instance the basis for 'expected profits', undermines the overall assessment of the state of the industry. Further, the Panel notes that aside from listing all 16 injury factors and the trends observed in them over the course of the POI, MOFCOM did not otherwise refer to or explain the developments in capacity utilization, productivity and wages in the descriptive section of its analysis of the industry. In the Panel's view, a more balanced approach would have been explicitly to analyse each of the 16 factors in the description of the state of the industry and to weigh them in the assessment. In the light of these problems with MOFCOM's analysis of the state of the industry, the Panel does not consider it necessary to make a determination regarding whether MOFCOM was obliged to provide a more 'compelling explanation' regarding the interaction between the positive and negative injury factors than the one that it did."[327]

1.7.5.3.4 Relevance of written record of authorities' evaluation

249. In *Egypt – Steel Rebar*, Egypt had gathered data on all of the listed factors but could not adduce sufficient evidence of its authorities' evaluation of all those factors on its written analysis. See paragraph 223 above. The Panel stressed the importance of the written record in the context of an anti-dumping investigation for burden of proof purposes:

> "Here we must emphasize that in the context of an anti-dumping investigation, which is by definition subject to multilateral rules and multilateral review, a Member is placed in a difficult position in rebutting a *prima facie* case that an evaluation has *not* taken place if it is unable to direct the attention of a panel to some contemporaneous written record of that process. If there is no such written record -- whether in the disclosure documents, in the published determination, or in other internal documents -- of how certain factors have been interpreted or appreciated by an investigating authority during the course of the investigation, there is no basis on which a Member can rebut a *prima facie* case that its 'evaluation' under Article 3.4 was inadequate or did not take place at all. In particular, without a written record of the analytical process undertaken by the investigating authority, a panel would be forced to embark

[325] Panel Report, *US – Hot-Rolled Steel*, paras.7.235-7.236.
[326] See also Panel Report, *Egypt – Steel Rebar*, para. 7.47.
[327] Panel Report, China – *X-Ray Equipment*, paras. 7.214-7.215. See also ibid. paras. 7.204 and 7.209.

> on a *post hoc* speculation about the thought process by which an investigating authority arrived at its ultimate conclusions as to the impact of the dumped imports on the domestic industry. A speculative exercise by a panel is something that the special standard of review in Article 17.6 is intended to prevent. Thus, while Egypt attempts to derive support from the panel report in the *US – Hot-Rolled Steel* dispute for its position that Article 3.4 does not require an explicit written analysis of all of the factors listed therein, to us, the findings in that dispute confirms our interpretation, in that what was at issue, was the substantive adequacy of the authority's written analysis of *each* of those factors."[328]

250. In *Egypt – Steel Rebar*, the Panel rejected the argument of one of the parties whereby the requirement of a written analysis of the Article 3.4 factors would be exclusively governed by Article 12 of the Anti-Dumping Agreement:

> "Nor do we consider, as suggested by Egypt, that the requirement of a written analysis of the Article 3.4 factors is exclusively governed by Article 12 of the *AD Agreement* (public notice and explanation of determinations). While Article 12 contains a requirement to *publish*, and to make available to the interested parties in the investigation, some form of a report on the investigating authority's determination, this is, as the Appellate Body has noted, a procedural requirement having to do with due process, rather than with the relevant substantive analytical requirements (which in the context of this claim are found in Article 3.4)."[329]

251. The Panel in *Russia – Commercial Vehicles* held that explanations regarding dumping margins in the part of the Russian investigating authority's determination dealing with cumulation were not relevant to whether the authority had considered the magnitude of dumping margins as an injury factor for purposes of Article 3.4:

> "Articles 3.1 and 3.4 do not require that an investigating authority set out its assessment of injury factors in any particular section of its report. At issue here, however, is not the placement of the evaluation, but whether it was done at all. Under Article 3.4, the issue is the impact of dumped imports on the domestic industry; thus, it requires an evaluation of the magnitude of the margin of dumping in that context. In the present case, in section 4.1 of the Investigation Report, the DIMD was addressing the issue whether the margin of dumping for each of the countries potentially subject to a cumulative assessment was greater than *de minimis* (2%). There is no discussion of the impact of dumped imports on the domestic industry, or the magnitude of the margin of dumping in that context. There is no basis for us to conclude that the analysis in section 4.1 for the purposes of Article 3.3 was relevant to, or considered in, the context of the Article 3.4 examination. Section 4.1 of the Investigation Report does not, therefore, contain an evaluation of the magnitude of the margin of dumping for purposes of Article 3.4.
>
> For this reason, we conclude that the DIMD failed to evaluate the magnitude of the margin of dumping, and thus acted inconsistently with Article 3.4."[330]

1.7.5.3.5 Evaluation of specific listed factors

1.7.5.3.5.1 "profits"

252. In *Egypt – Steel Rebar*, Türkiye claimed that Egypt had violated Article 3.4 because its investigating authorities had not examined all factors affecting profits. The Panel disagreed:

> "We recall that Turkey's claim is that Egypt violated Article 3.4 because the IA did not examine *all factors affecting profits*, and did not examine *all factors affecting domestic prices*. The above text indicates to us, however, a different requirement on an investigating authority. In particular, the text is straightforward in that the requirement is to examine all relevant factors and indices *having a bearing on the*

[328] Panel Report, Egypt – *Steel Rebar*, para. 7.49.
[329] Panel Report, *Egypt – Steel* Rebar, para. 7.50.
[330] Panel Report, *Russia – Commercial Vehicles*, paras. 7.161-7.162.

> *state of the industry*. The text then lists a variety of such factors and indices that are presumptively relevant to the investigation and must be examined, one of which is 'profits'. The text does not say, as argued by Turkey, 'all factors affecting profits'. To us, this text means that in its evaluation of the state of the industry, an investigating authority must include an analysis of the domestic industry's profits. Turkey has raised no claim that the IA failed to conduct such an analysis in the rebar investigation."[331]

253. The Panel in *EU – Footwear (China)* found that "while Article 3.4 requires an investigating authority to evaluate 'profits', there is no explicit requirement that it evaluate variations in profitability, or whether such variations are large or small".[332]

254. In *Dominican Republic – AD on Steel Bars (Costa Rica)*, in the underlying investigation the investigating authority had determined that the decline in the domestic industry's profits coincided with the decline in its domestic sales and the entry of dumped imports into the market.[333] Having found no evidentiary basis for these determinations on the investigation record, the Panel found that the authority had acted inconsistently with Article 3.4.[334] In so finding, the Panel disregarded the *ex post* explanations made by the Dominican Republic during the panel proceedings.[335]

1.7.5.3.5.2 "market share"

255. The Panel in *EU – Biodiesel (Argentina)*, as part of its examination of the non-attribution determination of the EU Commission in the contested investigation, pointed out that "nothing in the Anti-Dumping Agreement supports the proposition that imports by the domestic producers must be included in the domestic industry's market share".[336]

256. The Panel in *China — AD on Stainless Steel (Japan)* stated that apparent domestic consumption represents the amount of subject product consumed from all sources:

> "Japan also appears to take the view that the figures for apparent domestic consumption should only include the production volume attributable to domestic industry and should exclude the production volume attributable to Chinese producers that were not included in the domestic industry. This view is mistaken, however, because apparent domestic consumption represents the amount of the subject product from *all sources* being consumed domestically in a year, and not just the amount of production attributable to the domestic industry. Indeed, this is also why apparent domestic consumption includes import volumes from investigated countries *and non-investigated countries*."[337]

257. The Panel in *Dominican Republic – AD on Steel Bars (Costa Rica)* faulted the Dominican Republic's investigating authority for finding that the domestic industry's loss of market share was attributable to imports from Costa Rica even though the record evidence demonstrated that "the loss of market share during the most recent period was, to a large extent, contextualized by imports from other sources".[338]

1.7.5.3.5.3 "utilization of capacity"

258. The Panel in *EU – Biodiesel (Argentina)*, while not making findings under Article 3.4, expressed views on the meaning of the term "capacity utilization". As to whether the part of installed capacity that is not available for use may be excluded from a company's total production capacity, the Panel stated that:

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[331] Panel Report, *Egypt – Steel* Rebar, para. 7.60.
[332] Panel Report, *EU – Footwear (China)*, para. 7.448.
[333] Panel Report, *Dominican Republic – AD on Steel Bars (Costa Rica),* para. 7.194.
[334] Panel Report, *Dominican Republic – AD on Steel Bars (Costa Rica),* paras. 7.195 and 7.200.
[335] Panel Report, *Dominican Republic – AD on Steel Bars (Costa Rica),* para. 7.199.
[336] Panel Report, *EU – Biodiesel (*Argentina*)*, para. 7.488.
[337] Panel Report, *China — AD on Stainless Steel (Japan)*, para. 7.210.
[338] Panel Report, *Dominican Republic – AD on Steel Bars (Costa Rica),* para. 7.217.

> "Insofar as productive assets are genuinely not available for use, as noted above, an investigating authority could, in our view, properly consider that they do not form part of the domestic industry's production capacity. However, capacity utilization as a factor or index bearing on the state of the domestic industry would be less than meaningful or would be undermined if production capacity that is not being used as a result of the impact of dumped imports is excluded from the determination of rates of capacity utilization.
>
> …
>
> It is not clear whether 'idle capacity', as that term was used by the EBB and the EU authorities, corresponds to plants that entirely stopped producing on a permanent basis or plants that were temporarily shut down but could be put back into use once the necessity arose, or both of them, or any other types of plants. Of particular concern is the reference by the EU authorities in the Definitive Regulation to capacity which was 'not immediately available for use'. In principle, one would expect that the fact that certain capacity is momentarily unavailable is not sufficient to exclude it from the production capacity of a producer or of the overall industry. Where an investigating authority decides to exclude such production capacity from its evaluation, we would expect a plausible explanation of its reasons for doing so."[339]

259. The Panel in *China – Broiler Products (Article 21.5 – US)* described the nature of an investigating authority's finding on capacity utilization, as follows:

> "A capacity utilization rate involves two figures: a numerator (the volume of production) and a denominator (the available production capacity of the domestic industry). Rates may be meaningfully <u>compared</u> for the domestic industry over a period of time where:
>
> a. at least one factor is, or is kept, constant;
>
> b. if both factors vary over time, at least one factor is controlled or adjusted for any changes; or
>
> c. if both factors vary over time and are not controlled or adjusted for any changes, a reasonable explanation of the circumstances and any reliance on the comparison is provided.
>
> We stress that there is nothing inherently wrong about comparing rates over time where both the numerator and the denominator change."[340]

260. Turning then to the investigation at issue, the Panel in *China – Broiler Products (Article 21.5 – US)* found that the Chinese investigating authority had failed to make a proper determination on capacity utilization, in particular because it had failed to analyse capacity utilization rates in the context of the continuous increases in production capacity that were observed during the period of investigation:

> "[T]he US argument is that, on the facts of this case, because the domestic industry capacity increased throughout the POI, a simple comparison of rates was unreliable for the purposes of evaluating the impact of subject <u>imports</u> on the domestic industry. We agree. In the absence of any effort by MOFCOM to either control or adjust for this change, or any explanation of the circumstances and why reliance on the comparison was nonetheless appropriate, we cannot conclude that MOFCOM's examination was such as would be expected of an objective investigating authority in this context. MOFCOM merely set out figures for 'apparent consumption' and 'production quantity', but did not put the capacity utilization <u>rates</u> in perspective. MOFCOM's response to the objections of the interested parties during the redetermination in fact highlights its failure to engage with the question:

[339] Panel Report, *EU – Biodiesel (*Argentina*)*, paras. 7.419 and 7.421.
[340] Panel Report, *China – Broiler Products (Article 21.5 – US)*, para. 7.139.

> [D]ata indicated that: when the domestic demand increased continuously, the production capacity utilization rate from 2006 to 2008 was lower than 80%, but … in the first half of 2009, the domestic demand further increased, but the production quantity of the like product of the domestic industry didn't increase correspondingly with the increase of production capacity, instead, it decreased by 4.37% compared to the same period of the previous year.

MOFCOM did not address the problem of comparability of the rates in the light of continuous increases in production capacity. Given those increases, it is not clear what, if anything, the comparison of capacity utilization rates might explain in respect of the impact of imports. For instance, MOFCOM did not take into account in its evaluation:

a. whether capacity was increasing in response to, in tandem with, or ahead of domestic demand;

b. in what way any of these might affect the significance of any comparison of capacity utilization rates; or

c. how shifts in the industry from smaller producers outside the defined domestic industry to larger producers within it could explain or affect the reliability of the data before it."[341]

261. The Panel in *China – Broiler Products (Article 21.5 – US)* underlined the importance of comparing the injury factors set out in Article 3.4 in conjunction with one another, and found that MOFCOM's flawed assessment of capacity utilization also rendered its overall injury determination inconsistent with Article 3.4.[342]

1.7.5.3.5.4 "factors affecting domestic prices"

262. In *Egypt – Steel Rebar*, Türkiye claimed that Egypt had violated Article 3.4 because its investigating authorities had not examined all factors affecting prices. The Panel disagreed:

> "We recall that Turkey's claim is that Egypt violated Article 3.4 because the IA did not examine … *all factors affecting domestic prices*. …
>
> … Here again, we note that contrary to Turkey's argument, the text does not read 'all factors affecting domestic prices'. Rather, what is required is that there be *an* evaluation of factors affecting domestic prices. This requirement is clearly linked to the requirements of Articles 3.1 and 3.2 for an 'objective examination' of 'the effect of dumped imports on prices in the domestic market for like products'. …
>
> In our view, this means that in its evaluation of the state of the industry, an investigating authority must in every case include a price analysis of the type required by Articles 3.1 and 3.2. Turkey has raised no claim that the IA failed to conduct such an analysis in the rebar investigation. In addition, in our view, an investigating authority must consider generally the question of 'factors affecting domestic prices'."[343]

263. The Panel in *EC – Tube or Pipe Fittings* stated that it saw "no basis in the text of the Agreement for Brazil's argument that would require an analysis of factors affecting domestic prices beyond an Article 3.2 price analysis, and observe that certain of the factors potentially affecting price may be more in the way of causal factors to be analysed under Article 3.5, rather than under 3.4."[344]

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[341] Panel Report, *China – Broiler Products (Article 21.5 – US)*, para. 7.140.
[342] Panel Report, *China – Broiler Products (Article 21.5 – US)*, paras. 7.143-7.144.
[343] Panel Report, *Egypt – Steel Rebar*, paras. 7.60-7.61.
[344] Panel Report, *EC – Tube or Pipe Fittings*, para. 7.335.

264. The Panel in *EU – Footwear (China)* found that "consideration of 'factors affecting domestic prices' does not require an investigating authority to analyse the causes of changes in those prices *per se*."[345]

265. The Panel in *Morocco - Hot-Rolled Steel (Turkey)* found that "the manner in which an investigating authority decides to evaluate factors affecting domestic prices falls within the bounds of the authority's discretion" and declined to read into Article 3.4 "an obligation for an investigating authority to make an express statement in its determination to the effect that the authority is 'not aware of other relevant factors affecting prices'".[346]

1.7.5.3.5.5 "magnitude of the margin of dumping"

266. The Panel in *EU – Footwear (China)* noted:

> "[T]here is nothing in Article 3.4 that provides any guidance as to how an investigating authority is to evaluate the magnitude of the margin of dumping, or what information should be taken into account in that evaluation – beyond, of course, the actual margin of dumping in question."[347]

267. The Panel in *China – X-Ray Equipment* stressed the importance of evaluating the magnitude of the margin of dumping and assessing its relevance to the injury determination, and pointed out that a simple listing of dumping margins in the "Dumping" sections of a determination would not achieve this:

> "In the circumstances of this case, MOFCOM did not refer to the 'magnitude of the margin of dumping' in its Final Determination when conducting its injury analysis and in particular when conducting its 'assessment of industry-related economic factors and indicators'. However, in two sections of the Final Determination, namely in the sections entitled 'Dumping and Dumping Margin' and 'Final Conclusion upon Investigation', MOFCOM listed the margins of dumping for Smiths and 'all others'. China argues that this constituted an express examination by MOFCOM of the margin of dumping. Further, although MOFCOM did not explicitly characterise the margins as 'substantial' or 'significant', 'it follows from the decision itself to impose measures that the margins were not considered to be *de minimis*'.
>
> In the view of the Panel, the simple listing of the margins in the 'Final Conclusion' and 'Dumping' sections of the determination is not sufficient evidence that the magnitude of the margin of dumping was evaluated in the context of examining the state of the domestic industry. In our view, an investigating authority is required to evaluate the magnitude of the margin of dumping and to assess its relevance and the weight to be attributed to it in the injury assessment. In our view, MOFCOM did not do this, but rather was silent on the relevance or irrelevance of the magnitude of the margin of dumping in relation to the impact of the dumped imports on the domestic industry."[348]

268. In making these findings, the Panel in *China – X-Ray Equipment* rejected China's argument that because its authorities had imposed anti-dumping duties this meant that the magnitude of dumping margins had been taken into consideration:

> "China argues that the fact that it imposed anti-dumping duties indicates that it concluded that the dumping margins were not *de minimis* under Article 5.8 of the Anti-Dumping Agreement. However, in our view this is not a particularly convincing argument under Article 3.4. If the Panel were to accept China's reasoning, the implication would be that every time an investigating authority imposed anti-dumping duties, this would indicate that the authority had evaluated the 'magnitude of the

[345] Panel Report, *EU – Footwear (*China*)*, para. 7.445.
[346] Panel report, *Morocco - Hot-Rolled Steel (Turkey)*, para. 7.261.
[347] Panel Report, *EU – Footwear (*China*)*, para. 7.456.
[348] Panel Report, *China – X-Ray* Equipment, paras. 7.182-7.183.

> margin of dumping' by virtue of concluding that it was not *de minimis*, and would seem to render superfluous its inclusion in the Article 3.4 list."[349]

269. In *Korea – Pneumatic Valves (Japan)*, the Panel observed that Article 3.4 "does not require that the magnitude of the margin of dumping be evaluated in any particular manner or be given any particular weight".[350] The Panel continued:

> "We recall that there is no guidance in the Anti-Dumping Agreement regarding methodology for the evaluation of economic factors in the context of Article 3.4. We fail to see any textual basis for Japan's argument that, in order to evaluate the magnitude of the margins of dumping, an investigating authority is *required* to undertake some form of counterfactual analysis, specifically in this case by adding the dumping margin to the actual prices of the dumped imports, or comparing the magnitude of the dumping margin with the level of overselling. Japan itself acknowledges that an investigating authority is not always required to conduct a counterfactual analysis in order to evaluate the magnitude of the margins of dumping. Rather Japan suggests that such an analysis may be of particular importance depending on the specific factual circumstances of a case. However, even assuming that such an analysis might be relevant, a question which is for an investigating authority to consider in the first instance, Japan has failed to demonstrate what specific factual circumstances made such an analysis obligatory in this case. In our view, the KTC's statement in its Final Resolution is sufficient to demonstrate that it evaluated the magnitude of the margins of dumping 'as a substantive matter'."[351]

270. On appeal, the Appellate Body confirmed the Panel's conclusion, while noting that it may be useful or necessary in light of the particular circumstances of a case "to assess the relationship between the magnitude of dumping margins and prices of dumped and domestic like product in order to derive an understanding of the impact of subject imports on the state of the domestic industry."[352] With respect to the requirement to undertake a counterfactual analysis under Article 3.4, the Appellate Body found:

> "In the present case, Japan relies on the overselling by the dumped imports as the basis for requiring a counterfactual analysis. … While a counterfactual analysis may be useful in certain circumstances, we consider that Japan has not established that the existence of overselling in this case necessarily renders a counterfactual analysis obligatory under Article 3.4. As such, we find that the Panel did not err in finding that 'Japan has failed to demonstrate what specific factual circumstances made [the proposed counterfactual] analysis obligatory in this case'."[353]

271. In P*akistan – BOPP Film (UAE)*, the Panel determined that Pakistan's investigating authority (NTC) had acted inconsistently with Article 3.4 by failing to evaluate the magnitude of the margin of dumping in its examination of the impact of the dumped imports on the domestic industry. Pakistan had argued that, in assessing injury, the NTC *implicitly* considered the magnitude of the margins of dumping and concluded that they were indicative of injury.[354] The Panel recalled that Article 3.4 allows an investigating authority to undertake an "implicit analysis" of a factor, provided that the record contains evidence that the factor has been evaluated:

> "We recall that Article 3.4 does not prescribe the manner in which an investigating authority must examine and present its evaluation of the relevant economic factors and indices in its published documents. An investigating authority may undertake an

[349] Panel Report, *China – X-Ray* Equipment, para. 7.184.
[350] Panel Report, *Korea – Pneumatic Valves (Japan)*, para. 7.189. See also Appellate Body Report, *Korea – Pneumatic Valves (Japan)*, para. 5.172.
[351] Panel Report, *Korea – Pneumatic Valves (Japan)*, para. 7.191.
[352] Appellate Body Report, *Korea – Pneumatic Valves (Japan)*, para. 5.172.
[353] Appellate Body Report, *Korea – Pneumatic Valves (Japan)*, para. 5.180.
[354] Panel Report, *Pakistan – BOPP Film (UAE)*, paras. 7.355-7.356.

> 'implicit analysis' of a factor, provided that the record contains sufficient and credible evidence that the factor has been evaluated."[355]

272. The Panel then turned to the NTC's determination to verify whether the NTC had undertaken an implicit analysis of the magnitude of the margin of dumping.[356] The Panel observed that the NTC had listed the margins of dumping for each relevant source in a table but provided no accompanying discussion or analysis, implicit or explicit, with the table:

> "In the portion of the Report on final determination that Pakistan points us to, towards the end of the section on 'determination of dumping', the NTC lists, in a table, the margins of dumping for each relevant source. There is no accompanying discussion or analysis, explicit or implicit, associated with this table. In our view, this does not satisfy the requirements of Article 3.4 because the evaluation of the factors listed in Article 3.4 requires investigating authorities to exercise their judgment, i.e. to assess the role, relevance, and relative weight of each factor.
>
> While Pakistan asserts that with dumping margins of this magnitude the injurious effect is obvious, especially for a commodity product, there is nothing on the NTC's record to suggest that this was, in fact, the NTC's implicit reasoning. In reaching this conclusion, we note that the table that Pakistan refers to appears in the section of the report involving the calculation of the margin of dumping, and not that on injury to the domestic industry. Moreover, the NTC does not connect that information to the injury analysis in any way."[357]

273. The Panel thus concluded that the NTC had not evaluated the magnitude of the margin of dumping in the context of its injury analysis, explicitly or implicitly. Therefore, the Panel found that the NTC had acted inconsistently with Article 3.4 of the Anti-Dumping Agreement, by failing to evaluate all the relevant factors listed in that provision.[358]

1.7.5.3.5.6 "cash flow"

274. In *Dominican Republic – AD on Steel Bars (Costa Rica)*, the Panel faulted the investigating authority for basing its determination on cash flow on mere temporal coincidence and for not substantiating its conclusion on cash flow trends by reference to other indicators:

> "The Dominican Republic notes that the CDC's conclusion is based 'on the temporal correlation between the decrease in the cash flow and the profits of the domestic industry and the increase in dumped imports from Costa Rica', and that the record contains '[t]he relevant data for cash flow, profits, and volumes and prices of imports'. However, we note that a mere coincidence between alleged dumping and the decrease in the domestic industry's cash flow (and/or profits) does not in itself, or necessarily, prove that the decline in these economic factors was attributable to this dumping.
>
> Lastly, we note that the CDC's entire cash flow analysis is set out in a single paragraph that consists of a description of the trend followed by the indicator during the POI and the conclusion reached. The CDC does not attempt to contrast the cash flow trend with any other index and/or factor, and, if anything, limits itself to attributing the trend in this factor to the fall in profits, without any type of substantiation. In our view, the CDC's consideration does not constitute a reasoned and adequate explanation as to how the evidence supports its conclusion regarding cash flow."[359]

1.7.5.3.5.7 "inventories"

275. The Panel in *Russia – Commercial Vehicles* found that Article 3.4 did not require an investigating authority to take into consideration the inventories of a dealer that was related to a

[355] Panel Report, *Pakistan – BOPP Film (UAE)*, para. 7.357.
[356] Panel Report, *Pakistan – BOPP Film (UAE)*, para. 7.358.
[357] Panel Report, *Pakistan – BOPP Film (UAE)*, paras. 7.359-7.360.
[358] Panel Report, *Pakistan – BOPP Film (UAE)*, para. 7.361.
[359] Panel Report, *Dominican Republic – AD on Steel Bars (Costa Rica)*, paras. 7.205-7.206.

domestic producer but that was not itself a producer of the subject product. On this basis, the Panel also found that the European Union had failed to demonstrate that the inventories of such a dealer was a relevant factor to consider in the investigation at issue:

> "We find nothing in Article 3.4 that suggests to us that an investigating authority is generally required to consider the inventories of a dealer related to a domestic producer, but not itself a producer of the like product and therefore by definition not part of the domestic industry. We do not exclude the possibility that in certain circumstances, evidence pertaining to such a related trader may constitute evidence pertaining to 'a relevant economic factor[]' having a bearing on the state of the industry such that an investigating authority is required to evaluate it. However, the relevance of such evidence would have to be demonstrated to the investigating authority, on the basis of the facts of the particular investigation, in order that the investigating authority can be satisfied that it relates to the domestic industry and is therefore to be considered.
>
> The European Union has not pointed to any evidence before the DIMD that would support the conclusion that Turin Auto's inventories were a relevant economic factor having a bearing on the state of the domestic industry producing LCVs. For this reason, we conclude that the European Union has not established that the DIMD acted inconsistently with Articles 3.1 and 3.4 in not considering the inventories data of Sollers' related trader in the Investigation Report."[360]

276. On appeal, the Appellate Body stated that "evidence pertaining to inventories of a related dealer that does not produce the like product and is not formally part of the domestic industry may be pertinent, in a particular case, to the evaluation of a relevant economic factor or index having a bearing on the state of the domestic industry", but agreed with the Panel that "whether an evaluation under Article 3.4 requires a consideration of such evidence can be assessed only on a case-by-case basis".[361] The Appellate Body continued:

> "We do not consider the degree of proximity in the relationship between different entities to be dispositive, without more, of whether evidence relating to the inventory of a related dealer is pertinent to the evaluation of the injury factor 'inventories' under Article 3.4. As explained above, the focus of the evaluation under this provision is not on the nature of the relationship between companies such as producers and dealers; it centres instead on the relevant economic factors and indices having a bearing on the state of the domestic industry. Thus, regardless of whether a domestic producer included in the domestic industry and a dealer are independent from one another, related to each other, or part of the same economic entity, an investigating authority is required to assess whether the evidence on record concerns a relevant economic factor or index having a bearing on the state of the domestic industry. To the extent that this includes evidence relating to a dealer, an investigating authority is required to examine it under Article 3.4."[362]

1.7.5.3.5.8 "employment"

277. In the investigation at issue in *Dominican Republic – AD on Steel Bars (Costa Rica)*, the investigating authority's assessment on employment consisted of noting the trends in employment during the period of investigation and noting the applicant's allegation that the decline in employment was due to dumped imports.[363] The Panel found several shortcomings in the investigating authority's evaluation of trends in employment, and concluded that this evaluation was not substantiated:

> "We note that the figures in table 34 of the Final Technical Report show a varying trend during the injury POI with respect to the different categories of employees. Furthermore, the reduction in the workforce does not concern all the categories. For instance, we note that, despite fluctuations, the number of 'employees' in the

[360] Panel Report, *Russia – Commercial Vehicles*, paras. 7.122-7.123.
[361] Appellate Body Report, *Russia – Commercial Vehicles*, para. 5.156.
[362] Appellate Body Report, *Russia – Commercial Vehicles*, para. 5.157.
[363] Panel Report, *Dominican Republic – AD on Steel Bars (Costa Rica),* paras. 7.210-7.211.

period January-April 2018 exceeds the number of employees in 2015. Similarly, 'total employment' in January 2018 is almost at the level of total employment for 2015. The CDC also indicated that its analysis was conducted on the basis of the number of total employees, which reflects a decrease in 2017 and January-April 2018 in relation to the comparable period.

However, we do not find any explanation in the CDC's examination that links the domestic industry's need to reduce its workforce '[with the objective of] reduc[ing] its fixed costs and thereby lower[ing] its average cost', which formed the basis for the CDC's conclusion that the reduction in employment had been caused by the entry of imports. Apart from indicating that this conclusion was reached in '[a]ccord[ance with] the information provided by the Applicant', and citing information provided by the latter on 11 September 2018, the CDC failed to provide explanations or an analysis to substantiate its conclusion. As a result, we do not see how the CDC's determination provided a reasoned and adequate explanation as to how the evidence on the record supported its conclusion."[364]

1.7.5.3.5.9 "growth"

278. In *Egypt – Steel Rebar*, the Panel considered that the Article 3.4 threshold as regards addressing the factor "growth" had been satisfied by Egypt since its authorities had addressed sales volume and market share in their final determinations.[365]

279. In *Morocco - Hot-Rolled Steel (Turkey),* the Panel stated that "while the evaluation of the growth factor necessarily entails an analysis of certain other factors listed in Article 3.4, an evaluation of those factors 'could', but does not necessarily, amount to the evaluation of the growth factor.[366] Whether or not an evaluation of certain factors listed in Article 3.4 may also be considered to amount to an evaluation of the growth factor, will depend on the particular facts of each case and on whether the record of the investigation in question contains 'sufficient and credible evidence' to demonstrate that the growth factor has been evaluated."[367]

1.7.5.3.5.10 "ability to raise capital or investments"

280. In *Korea – Pneumatic Valves (Japan)*, Japan argued that the investigating authority gave insufficient weight to the fact that the domestic industry engaged in massive investment in new facilities in 2011 and 2012 at the same time when it was incurring losses, and to the fact that a continued operating loss does not always negatively affect the domestic industry's ability to raise capital. The Panel was not persuaded by Japan's arguments:

"In order to demonstrate that the KTC acted inconsistently with Articles 3.1 and 3.4, Japan bears the burden of persuading us that the KTC's analysis was not objective and that a reasonable and unbiased investigating authority could not have evaluated the ability of the domestic industry to raise capital as the KTC did. The mere allegation that an increase in investment expansion during one part of the period of trend analysis somehow contradicts the KTC's finding that investment is expected to shrink due to over-investment and low capacity utilization is not sufficient in this regard. In the context of declining demand for the product in the domestic market and operating losses in the domestic industry, we do not see a necessary contradiction between the fact that investment increased in the first two years of the period examined and the KTC's overall evaluation that the industry's ability to fund investment decreased by the end of the period. Moreover, we are not persuaded that the KTC's view that the continued operating losses weakened the domestic industry's ability to raise capital is one that no reasonable and unbiased investigating authority could have reached. While we agree that it is possible that a loss-making enterprise may still be able to raise capital on the market by taking a loan or selling its shares, under normal market conditions, a company's ability to raise capital is strengthened if it is profit making, and is weakened when it is loss making. Japan has not pointed to any facts on the

[364] Panel Report, *Dominican Republic – AD on Steel Bars (Costa Rica),* paras. 7.212-7.213.
[365] Panel Report, *Egypt – Steel Rebar*, para. 7.37.
[366] Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 162.
[367] Panel Report, *Morocco - Hot-Rolled Steel (Turkey)*, para. 7.248.

record that would suggest that in this case, it was unreasonable for the KTC to consider that the normal situation prevailed."[368]

1.7.5.4 Relationship with other paragraphs of Article 3

281. With respect to the relationship of paragraph 4 with paragraphs 1, 2, 3 and 5 of Article 3, see paragraphs 2-3 above.

282. With respect to the relationship between Article 3.4 and Article 3.7, see paragraphs 358-359 below.

283. In *China – HP-SSST (Japan) / China – HP-SSST (EU)*, the Appellate Body disagreed with the Panel's view that the results of the inquiry under Article 3.2 are not relevant to an authority's impact analysis under Article 3.4:

> "We agree with the Panel that the results of the inquiries, pursuant to Article 3.2, relating to the volume of the dumped imports and the effects of the dumped imports on prices are relevant to the causation analysis required under Article 3.5. However, unlike the Panel, we consider that the results of these inquiries are also relevant to the impact analysis required under Article 3.4, given that this provision requires the evaluation of *all* relevant economic factors and indices having a bearing on the state of the industry, including market share and factors affecting domestic prices. Significantly, as discussed at paragraph 5.141 above, the disciplines that apply under Article 3, while distinct, are interlinked and logically progress to answering the question of whether the dumped imports are causing injury to the domestic industry. As the Appellate Body stated in *EC – Tube or Pipe Fittings*, 'Article 3.1 and the succeeding paragraphs of Article 3 clearly indicate that volume and prices, and the consequent impact on the domestic industry, are closely interrelated for purposes of the injury determination.' Accordingly, we do not agree with the Panel that, because the results of the inquiry under Article 3.2 are relevant for an investigating authority's causation and non-attribution analyses under Article 3.5, they are not relevant for the impact analysis under Article 3.4."[369]

1.8 Article 3.5

1.8.1 General

284. The Panel in *EU – Fatty Alcohols (Indonesia)* refused to limit scope of its review of the EU Commission's non-attribution analysis in the investigation at issue to the part of the Commission's Determination in the section entitled "Causation". The Panel pointed out that there was no such requirement under Article 3, and stressed the textual linkages between paragraphs 4 and 5 of Article 3:

> "Accordingly, on the basis of both the text of Articles 3.4 and 3.5 and the nature of the factor at issue in the present case, namely, a general economic crisis, it is not unreasonable for an investigating authority's analysis of that factor to appear in both the context of the impact of the dumped imports on the domestic industry and in the context of ensuring injurious effects of other 'known factors' are not attributed to the dumped imports. We therefore do not consider it inappropriate in the present case to take into account the EU authorities' analysis of the economic crisis in the context of the impact of the dumped imports on the domestic industry as part of our assessment whether the EU authorities' adequately separated and distinguished the injurious effects of the economic crisis from the dumped imports."[370]

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[368] Panel Report, *Korea – Pneumatic Valves (Japan)*, para. 7.185.
[369] Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.209.
[370] Panel Report, *EU – Fatty Alcohols (Indonesia)*, para. 7.174.

285. The Panel in *Russia – Commercial Vehicles* held that "[t]he fact that dumped imports displaced third country imports does not, on its own, preclude or undermine a finding that dumped imports also displaced the domestic like product."[371]

1.8.2 Article 3.5 requirements for investigating authorities

286. In *US – Hot-Rolled Steel,* the Appellate Body laid down the requirements that Article 3.5 imposes on the investigating authorities when performing a causation analysis as follows:

> "This provision requires investigating authorities, as part of their causation analysis, first, to examine *all* 'known factors', 'other than dumped imports', which are causing injury to the domestic industry 'at the same time' as dumped imports. Second, investigating authorities must ensure that injuries which are caused to the domestic industry by known factors, other than dumped imports, are not '*attributed* to the dumped imports.' (emphasis added)"[372]

287. In *EU – Footwear (China)*, the Panel held that:

> "[I]n order to establish a violation of Article 3.5 of the AD Agreement, it does not suffice to demonstrate that another conclusion could be reached by an unbiased and objective investigating authority on the basis of the facts before it and in light of the arguments."[373]

288. The Panel in *China – X-Ray Equipment*, while acknowledging that a correlation between dumped imports and injury may support a finding of causation, cautioned against attributing determinative effect to such correlation:

> "The Panel acknowledges that an overall correlation between dumped imports and injury to the domestic industry may support a finding of causation. However, such a coincidence analysis is not dispositive of the causation question; causation and correlation are two distinct concepts. In the circumstances of this case, even accepting China's position that the domestic industry experienced injury as the dumped imports entered the market at large volumes and low (albeit increasing) prices, in the Panel's view, the causation question is not resolved by such a general finding of coincidence. Rather, we consider that MOFCOM was required to conduct a more detailed analysis. In our view, MOFCOM's analysis was not adequate, due to its failure to explain why the prices of the domestic scanners could not rise at least to the level of the dumped imports in 2008, in circumstances where MOFCOM found no other causes of injury apart from the dumped imports.
>
> Consequently, the Panel concludes that MOFCOM did not provide a reasoned and adequate explanation regarding how the dumped imports caused price suppression in the domestic industry, particularly in 2008 when the prices of the dumped imports were above those of the domestic industry. For this reason, the Panel is of the view that the MOFCOM did not conduct an objective examination of the evidence and concludes that China acted inconsistently with Articles 3.1 and 3.5 of the Anti-Dumping Agreement."[374]

289. The Panel in *EU – Footwear (China)* found that the fact that one of the product types included in the like product definition performed better than other product types is irrelevant to the investigating authority's causation determination:

> "We agree that, in a situation where numerous different types of footwear constitute one like product, consideration of the performance of a particular type as opposed to other types within one like product is not necessarily relevant. We recall that the industry is defined as producers of the like product, and the determination to be made is whether the industry as a whole is materially injured by dumped imports. In this

[371] Panel Report, *Russia – Commercial Vehicles*, para. 7.192.
[372] Appellate Body Report, *US – Hot-Rolled Steel*, para. 222.
[373] Panel Report, *EU – Footwear (China)*, para. 7.523.
[374] Panel Report, *China – X-Ray Equipment*, paras. 7.247-7.248.

> context, we consider that declining consumption in one market segment need not be analysed as an 'other factor' causing injury to the industry of which that market segment is a part."[375]

290. The Panel in *China – Autos (US)* found that the Chinese investigating authority's causation determination was not reasoned and adequate because it failed to take into account that the producers within the domestic industry definition had lost market share mostly to producers outside that definition:

> "We found above, in considering the US price effects claim, that the record shows that the domestic industry lost market share in 2007 mostly to Chinese producers not part of the domestic industry. This data also indicates that subject imports and the domestic like product gained market share mostly from third country imports in the interim 2009 period. Thus, in our view, the evidence before MOFCOM clearly shows that the market shares of Chinese producers not part of the domestic industry and third country imports during the POI were relevant to MOFCOM's analysis of causation.
>
> Yet, the final determination contains no discussion of the role of Chinese producers not part of the domestic industry or their market share in connection with the analysis of causation. In our view, the absence of such a discussion requires us to conclude that MOFCOM's analysis of the causal relationship between subject imports and injury to the domestic industry was not reasoned and adequate."[376]

291. Similarly, the Panel in *China – Autos (US)* found that the Chinese investigating authority's causation determination was not reasoned and adequate because it failed to take into account the decline in labour productivity:

> "It seems clear to us that this data show that the domestic industry experienced increased labor costs and decreased pre-tax profits towards the end of the POI. This coincides with the 33.24% decline in productivity reported by MOFCOM for the interim 2009 period. Under circumstances where productivity declines sharply at the same time as labor costs almost double, we consider that an objective and unbiased IA should have inquired further into the extent to which the decline in productivity throughout the POI affected the domestic industry's financial indicators. Therefore, in our view, MOFCOM should have assessed the impact of the decline in labor productivity on the state of the domestic industry. This assessment could have resulted in a conclusion that the decline in labor productivity was insignificant, having regard to other factors. However, in the absence of any discussion in the final determination, or elsewhere in the record, we cannot assume that any assessment of this matter in fact occurred.
>
> In the absence of any such assessment, we find that MOFCOM's dismissal of the relevance of productivity trends in finding a causal relationship between subject imports and injury to the domestic industry was not reasoned and adequate."[377]

292. The Panel in *China – Autos (US)* also found that the Chinese investigating authority's causation determination was not reasoned and adequate because it failed to take into account the lack of competitive overlap between dumped imports and the domestic like product:

> "We found above, in relation to the US price effects claim, that data on the record, notably submissions by certain US respondents and MOFCOM's own like product determination, suggest a lack of competitive overlap between subject imports and the domestic like product. On this basis, we consider that MOFCOM should have been aware of the need to address this issue in its analysis of causation. The finding of like product does not alone suffice to fulfil the obligation to make a reasoned determination of causation. We can readily envisage a scenario where domestic and imported goods are found to be 'like' within the meaning of Article 2.6 of the Anti-Dumping Agreement and/or footnote 46 to the SCM Agreement, but differentiation of

[375] Panel Report, *EU – Footwear (China)*, para. 7.533.
[376] Panel Report, *China – Autos (US)*, paras. 7.331-7.332.
[377] Panel Report, *China – Autos (US)*, paras. 7.341-7.342.

> goods within those two categories affects the competition between them in ways that have an impact on the assessment of causation."[378]

293. In the investigation at issue in *China – Cellulose Pulp*, China's investigating authority, MOFCOM, had, in its causation determination, relied both on its volume and price effects analyses. The Panel found that MOFCOM's causation determination was inconsistent with Article 3.5 because MOFCOM had failed to take into account the developments in the market share of non-dumped imports:

> "MOFCOM also referred to the increase in the market share of the dumped imports over the POI in its assessment of causal link, an increase of 1.3 percentage points. In this regard, we note that the domestic industry's market share also increased, by 6.5 percentage points, while the market share of non-dumped imports increased by 6.7 percentage points during the same period. The increase in the market share of non-dumped imports, which were sold at prices close to those of the dumped imports, was not addressed by MOFCOM in the context of its demonstration of a causal relationship between dumped imports and material injury. However, we would have expected a reasonable and objective investigating authority to at least consider in these circumstances the possible role of non-dumped imports in the price depression MOFCOM found to have been contributing to causing material injury to the domestic industry."[379]

294. The Panel in *China — AD on Stainless Steel (Japan)*, having found that MOFCOM's price effects analysis was inconsistent with Articles 3.1 and 3.2 and its impact analysis with Articles 3.1 and 3.4 of the AD Agreement, concluded that, as a consequence, its causation analysis was also inconsistent with Articles 3.1 and 3.5 of the Agreement.[380]

295. The Panel in *Dominican Republic – AD on Steel Bars (Costa Rica)* explained, with regard to the requirements of Article 3.5 in the context of a finding of threat of injury, that "in order to demonstrate causation in the context of a threat of injury, an investigating authority must find that *further dumped imports would cause material injury*".[381] The Panel found that the investigating authority had failed to demonstrate a causal link between the state of the domestic industry and the dumped imports in the investigation at issue:

> "We note that in none of these sections, whether in the public or the confidential versions, does the CDC refer to the issue of whether future injury could be caused by dumped imports. Moreover, we see nothing in the evidence on the record (nor has the Dominican Republic told us where in the record to look) that shows that the CDC relied on the past correlation between the state of the domestic industry and dumped imports 'to make reasonable assumptions' that any future injury would be caused by future dumped imports."[382]

1.8.3 Scope of the non-attribution language in Article 3.5

296. The Appellate Body in *US – Hot-Rolled Steel* delimitated the situations where the non-attribution language of Article 3.5 plays a role. In this regard, the Appellate Body specified that this language applies "solely [to] situations where dumped imports and other known factors are causing injury to the domestic industry *at the same time*".[383]

297. The Panel in *US – Coated Paper (Indonesia)* stated that the non-attribution obligation also applies in the context of a finding of threat of injury.[384] The Panel outlined the authorities' task in conducting a non-attribution analysis in the threat context, as follows:

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[378] Panel Report, *China – Autos (US)*, para. 7.343.
[379] Panel Report, *China – Cellulose Pulp*, para. 7.150.
[380] Panel Report, *China — AD on Stainless Steel (Japan)*, para. 7.238.
[381] Panel Report, *Dominican Republic – AD on Steel Bars (Costa Rica),* para. 7.325.
[382] Panel Report, *Dominican Republic – AD on Steel Bars (Costa Rica),* para. 7.317.
[383] Appellate Body Report, *US – Hot-Rolled Steel*, para. 223.
[384] Panel Report, *US – Coated Paper (Indonesia)*, para. 7.206.

> "In light of the above, the principal issue to be addressed in considering Indonesia's non-attribution claims is whether the USITC ensured, in its threat of injury determination, that it did not attribute to dumped and subsidized imports from Indonesia and China any (future) injury likely to be caused by alleged 'other factors'. In addressing this issue, insofar as Indonesia's arguments raise questions in this regard, we will consider whether the USITC provided a satisfactory explanation of the nature and extent of the likely injurious effects of the other factors, as distinguished from the likely injurious effects of the subsidized imports, and whether the USITC's explanations allow us to determine that the conclusions it reached are such reasonable conclusions as could be reached by an unbiased and objective investigating authority in light of the facts and arguments before the USITC."[385]

298. Drawing on the panel's finding in *EU – Biodiesel (Argentina)* that injury refers to a deterioration of the domestic industry's situation by dumped imports, the Panel in *US – Coated Paper (Indonesia)* found that the fact that factors other than dumped imports have rendered the domestic industry vulnerable does not preclude authorities from finding a causal link between dumped imports and threat of injury to the domestic industry. The Panel added, however, that in such situations authorities should ensure that any likely future injury resulting from other factors is not attributed to dumped imports:

> "We agree with the understanding of the panel in *EU – Biodiesel (Argentina)*. In our view, the same considerations apply in the context of a threat analysis. The fact that other factors may have contributed to rendering the domestic industry 'vulnerable' – i.e. more susceptible to future injury – does not, in our view, preclude an investigating authority from finding a causal link between subject imports and a threat of future injury to the domestic industry. Thus, to the extent that Indonesia is suggesting that the fact that the domestic industry's vulnerable condition was caused by factors other than dumped or subsidized imports requires the authority not to attribute future injury to subject imports or precludes a finding of threat of injury, we consider that there is no basis in Articles 3 and 15 for this suggestion. We reject the view that, if a domestic industry is found to be vulnerable to future injury for reasons other than the effect of subject imports during the POI, then it cannot be found to be threatened with injury by future subject imports. That said, where other factors contributed to the vulnerability of a domestic industry, we would expect that the likely future impact of such other factors would be considered and addressed by the investigating authority, so as to ensure that any likely future injury resulting from these other factors is not attributed to the subject imports."[386]

299. The Panel in *US – Coated Paper (Indonesia)* rejected the argument that the non-attribution part of Article 3.5 requires investigating authorities, in certain situations, "to rely on quantitative methods, economic constructs or models in their assessment of the injury caused by other factors".[387] The Panel continued:

> "While it might, depending on the record information before the investigating authority and the circumstances of the investigation at issue, be useful or desirable for an investigating authority to undertake a quantitative assessment of the impact of other factors, there is no requirement that it do so: an adequately reasoned explanation of the qualitative effects of other factors based on the evidence before it will suffice."[388]

1.8.4 "dumped imports"

300. In *EC – Bed Linen*, the Panel rejected the argument that "dumped imports" must be understood to refer only to imports which are the subject of transactions in which the export price was below normal value. See the material in paragraph 67 and following. See also the material in

[385] Panel Report, *US – Coated Paper (Indonesia)*, para. 7.211. See also Panel Report, *Dominican Republic – AD on Steel Bars (Costa Rica),* para. 7.325.
[386] Panel Report, *US – Coated Paper (Indonesia)*, para. 7.233.
[387] Panel Report, *US – Coated Paper (Indonesia)*, para. 7.209.
[388] Panel Report, *US – Coated Paper (Indonesia)*, para. 7.210.

paragraph 196 and following regarding the concept of "dumped imports" under Article 3.4 of the Anti-Dumping Agreement.

301. The Panel in *Canada – Welded Pipe* stressed that Article 3.5 focuses on the effects of dumped imports, rather than the effects of dumping:

> "Chinese Taipei's claim is inconsistent with the text of Article 3.5. The text of this provision focuses the injury analysis on the effect of the dumped imports, rather than on the effects of the dumping *per se*. The first sentence of Article 3.5 requires the investigating authority to 'demonstrate[] that the dumped imports are, through the effects of dumping, as set forth in paragraphs 2 and 4, causing injury'. The first sentence of Article 3.5 therefore refers to injury being caused by the dumped imports that are the subject of the investigation, rather than by the effects of dumping. Moreover, 'effects of the dumping' is modified by the phrase 'as set forth in [Articles 3.2 and 3.4]'. Article 3.2 requires investigating authorities to consider the volume and price effects of the dumped imports. Similarly, Article 3.4 requires investigating authorities to examine 'the impact of the dumped imports on the domestic industry'. The focus on the dumped imports continues in the non-attribution provision in the third sentence of Article 3.5, which requires investigating authorities to examine any known factors 'other than the dumped imports' which at the same time are injuring the domestic industry, and ensure that any injury caused by such other factors is not attributed 'to the dumped imports'. Logically, the imports subject to the investigation cannot simultaneously be both the 'dumped imports' referred to in these provisions **and** factors 'other than the dumped imports' referred to in the third sentence of Article 3.5."[389]

302. In *Korea – Pneumatic Valves (Japan)*, Japan argued that dumped imports held in inventory should be excluded from the consideration of whether there has been a significant increase in "dumped imports", because they do not compete with the domestic like product. The Panel disagreed:

> "The question under Article 3.5 is whether dumped imports are, through the effects of dumping, causing injury to a domestic industry. 'Dumped imports' are those imports for which the investigating authority has made a proper determination of dumping. Article 2.1 of the Anti-Dumping Agreement provides that a product is to be considered as dumped, i.e. 'introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than' the normal value. Thus, the relevant imports for purposes of determining causation in this case are Japanese valves which were 'introduced into the commerce' of Korea at prices below normal value. We recall that a determination of dumping is made with respect to the product as a whole. There is nothing in the definition of dumping, in the determination of dumping, or the concept of dumped imports, that would support Japan's notion that only dumped imports that have been sold to independent customers in the market of the importing country are to be considered in determining the existence of a causal relationship between dumped imports and injury.
>
> In our view, the introduction of a product 'into the commerce of another country' at less than the normal value (i.e. dumping) occurs when the goods in question have cleared the importing country's customs procedures. It is the introduction of a product 'into the commerce of another country' that is relevant, and not whether that product is subsequently stored in inventory for later sale, or immediately sold to an independent buyer. We do not see any basis to introduce any other criterion for defining the term 'dumped imports'. Nor do we see any reason to interpret the term 'dumped imports' in the context of the determination of causation differently than for other provisions of the Anti-Dumping Agreement, and Japan has made no arguments that would suggest a contrary result. Thus, we see no basis to conclude that there

[389] Panel Report, *Canada – Welded Pipe*, para. 7.100.

> was any error in the KTC's failure to exclude dumped imports held in inventory from consideration in its determination of causation."[390]

1.8.5 "any known factors other than dumped imports"

1.8.5.1 Concept of known factors

303. In *Guatemala – Cement II*, the Panel agreed with Mexico's claim that Guatemala's authority failed to take into account certain undumped imports, and accordingly, failed to assess other factors which were injuring the domestic industry at the same time, in violation of Article 3.5.[391]

304. On the issue of what are "known factors" other than the dumped imports, the Panel in *Thailand – H-Beams* found that other "known factors" would include factors "clearly raised before the investigating authorities by interested parties in the course of an AD investigation" and that investigating authorities are not required to seek out such factors on their own initiative:

> "We consider that other 'known' factors would include those causal factors that are clearly raised before the investigating authorities by interested parties in the course of an AD investigation. We are of the view that there is no express requirement in Article 3.5 AD that investigating authorities seek out and examine in each case *on their own initiative* the effects of *all* possible factors other than imports that may be causing injury to the domestic industry under investigation. … We note that there may be cases where, at the time of the investigation, a certain factor may be 'known' to the investigating authorities without being known to the interested parties. In such a case, an issue might arise as to whether the authorities would be compelled to examine such a known factor that is affecting the state of the domestic industry. However, it has not been argued that such factors are present in this case."[392]

305. The Appellate Body in *EC – Tube or Pipe Fittings* disagreed with the Panel's understanding of the term "known" in Article 3.5. The Panel had considered that the alleged causal factor *was* "known" to the European Commission in the context of its dumping and injury analyses, but that the factor was nevertheless not "known" in the context of its causality analysis.[393] The Appellate Body disagreed with this approach and considered that "a factor is either "known" to the investigating authority, or it is not "known"; it cannot be "known" in one stage of the investigation and unknown in a subsequent stage."[394]

306. In *EC – Salmon (Norway),* Norway argued that the EC had failed to consider the allegedly injurious impact on the domestic industry of two "known factors", one of which was increased production costs.[395] The EC argued that Norway had to explain to the Panel why it believed costs should not have increased as they did. The Panel did not agree:

> "Norway has demonstrated that the facts before the investigating authority showed that EC industry production costs increased, and that it was argued to the investigating authority that that increase in costs caused injury. The Provisional and Definitive Regulations do not address this contention. The EC has not brought forward any information that was before the investigating authority or analysis on this issue. In the absence of consideration of this argument, the EC has not demonstrated that an objective and unbiased investigating authority could have concluded that increased production costs were not causing injury to the domestic industry, and therefore that injury caused by this factor was not attributed to dumped imports. In these

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[390] Panel Report, *Korea – Pneumatic Valves (Japan)*, paras. 7.336-7.337.

[391] Panel Report, *Guatemala – Cement II*, paras. 8.268-8.272. The Panel also found a violation of Articles 3.1 and 3.2 with respect to the failure by Guatemala's authority to take into account certain un-dumped imports. See paras. I.A.1(a)(i)89 and I.A.1(a)(i)107 above.

[392] Panel Report, *Thailand – H-Beams*, para. 7.273. See also Panel Report, *Russia – Commercial Vehicles*, para. 7.208.

[393] Panel Report, *EC – Tube or Pipe Fittings*, para. 7.362.

[394] Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 178.

[395] Panel Report, *EC – Salmon (Norway)*, para. 7.656.

> circumstances, our view is that Norway has demonstrated that the EC failed to comply with Article 3.5 of the AD Agreement."[396]

307. In *China – GOES*, the Panel pointed out that once a factor other than dumped imports becomes known to the authorities they come under an obligation to investigate the impact of that factor, and that a respondent is not required to provide evidence regarding such a factor:

> "[W]e do not consider that a respondent is required to provide evidence regarding 'other factors'. Article 3.5 of the Anti-Dumping Agreement and Article 15.5 of the SCM Agreement provide that '[t]he authorities shall also examine any known factors other than the [subject] imports which at the same time are injuring the domestic industry'. Accordingly, once the 'other factor' becomes 'known' to the investigating authority, it is for the investigating authority to investigate."[397]

308. The Panel in in *China – X-Ray Equipment* found that where an interested party identifies a factor other than dumped imports but does not provide evidence showing that this factor is causing injury to the domestic industry, the investigating authority is not required to make a determination with regard to that factor, but should indicate this in its determination:

> "As a general proposition, we agree with China that if there is no relevant evidence before an investigating authority to indicate that a factor is injuring the domestic industry, there is no requirement for the investigating authority to make a finding regarding whether the factor is indeed causing injury, and subsequently to proceed to conduct a non-attribution analysis. In our view, where an interested party has raised an 'other factor', it would be preferable for an investigating authority to expressly state that the party has not presented evidence that the factor is injuring the domestic industry, rather than not mentioning the factor at all in its determination. However, where there is indeed no such evidence before the investigating authority, we agree that there can be no inconsistency with Article 3.1 and 3.5 in failing to conduct a non-attribution analysis."[398]

309. The Panel in in *China – X-Ray Equipment* found a violation of Article 3.5 with regard to an investigation where the investigating authority failed to take into consideration, as part of its causation analysis, the fact that the annual report of one of the domestic producers indicated that the company's expansion caused increases in its inventories:

> "The Panel is less convinced that it was reasonable for MOFCOM to disregard as completely irrelevant the statements in the annual report that Nuctech's business expansion caused increases in inventories. The extracts from the annual reports cited by Smiths state that in 2008 Nuctech was 'increasingly expanding scale of business and increased amount of inventory' and that the expansion in the inventories between 2006 and 2007 'was caused by the expansion of business scopes of our subsidiaries Nuctech'. While we have concluded that the differences in the *data* relied upon by MOFCOM and that found in the annual reports could reasonably be explained by the broader range of products covered by the annual report statistics, it is quite a different proposition for MOFCOM to have completely ignored *explicit statements regarding other causes of injury* to the domestic industry, leading to increased inventories. This is particularly the case in the light of MOFCOM's finding that Nuctech was expanding its capacity by approximately 50% each year, which was more than the annual increase in domestic demand. Given this finding, the Panel considers that an objective and unbiased investigating authority would have assessed whether the statements in the annual reports about Nuctech's business expansion and resulting increased inventories related to that portion of Nuctech's production made up by the like domestic product.
>
> Consequently, by failing to take into consideration and to investigate the relevance of the statements by Nuctech's parent company regarding the cause of Nuctech's increase in inventories, the Panel finds that MOFCOM failed to make an objective

[396] Panel Report, *EC – Salmon (Norway)*, para. 7.660.
[397] Panel Report, *China – GOES*, para. 7.636.
[398] Panel Report, *China – X-Ray Equipment*, para. 7.267.

> examination of the evidence before it, as required by Articles 3.1 and 3.5 of the Anti-Dumping Agreement."[399]

310. Similarly, the Panel in in *China – X-Ray Equipment* found that in the investigation at issue the investigating authority acted inconsistently with Article 3.5 by failing to take into account, in its causation determination, the impact of the aggressive pricing policy pursued by one of the domestic producers:

> "The Panel notes that the evidence on the record relied upon by the European Union to support its argument is not direct evidence of the existence of an aggressive pricing policy on the domestic market. However, given the highly confidential nature of a company's pricing strategies, any evidence from a competitor regarding the existence of a particular pricing policy will necessarily be circumstantial. In the Panel's view, Smiths presented such circumstantial evidence to MOFCOM. In particular, Smiths referred to a study detailing the pricing strategy pursued by Nuctech in the high-energy export market. It also outlined how MOFCOM's injury findings, in particular the trends in Nuctech's pricing and its level relative to dumped import prices in 2008, were consistent with an aggressive pricing policy. In the Panel's view, in the light of this evidence, when assessing the causes of injury to the domestic industry, an objective and unbiased decision maker would have investigated the possibility of the existence of such a pricing policy. The fact that MOFCOM did not do so was inconsistent with Articles 3.1 and 3.5 of the Anti-Dumping Agreement."[400]

311. The Panel in *Morocco – Definitive AD Measures on Exercise Books (Tunisia)* did not share Tunisia's view that "mere knowledge of the existence of a potential injury factor is sufficient to trigger the obligation to investigate this factor"[401] and agreed with the findings of previous panels that if there is no evidence before an investigating authority to indicate that an "other factor" is injuring the domestic industry, the investigating authority is not required to examine that factor as part of the non-attribution analysis.[402] On this basis, the Panel proceeded to consider whether the investigating authority had acted inconsistently with Articles 3.1 and 3.5 by failing to consider, in its non-attribution analysis, the effects of competition from a domestic producer of the like product that was not included in the definition of domestic industry:

> "Morocco does not contest the fact that the exporters drew MIICEN's attention to competition from Imprimerie Moderne. It is therefore clear that the presence of Imprimerie Moderne was 'known' to the authority. It is also undisputed that competition from Imprimerie Moderne was a factor 'other than the dumped imports'.
>
> However, the parties disagree as to whether there was evidence before MIICEN to indicate that competition from Imprimerie Moderne caused injury to the domestic industry. The question before us is therefore whether MIICEN had evidence before it concerning the negative effects of the presence of Imprimerie Moderne on the state of the domestic industry."[403]

312. The Panel found that, on the basis of the facts before the investigating authority, it was not clear what fraction of the sales of the producer at issue were made in the domestic market and what fraction were exported. Therefore, it was unclear what competition existed between the products of domestic industry as defined by the authority and those of the other domestic producer at issue. Further, the evidence on the record also did not provide information that would allow for an assessment of whether the producer at issue could have exerted pressure on domestic industry prices, nor was there evidence as to the effects of competition from that producer on the state of the domestic industry.[404] Based on these findings, the Panel concluded that there was no evidence to support a conclusion by the investigating authority that the effect of the competition was injuring the domestic industry, and that, accordingly, the investigating authority had not

[399] Panel Report, *China – X-Ray Equipment*, paras. 7.285-7.286.
[400] Panel Report, *China – X-Ray Equipment*, para. 7.291.
[401] Panel Report, *Morocco – Definitive AD measures on Exercise Books (Tunisia*), para. 7.328.
[402] Panel Report, *Morocco – Definitive AD Measures on Exercise Books (Tunisia)*, para. 7.328.
[403] Panel Report, *Morocco – Definitive AD Measures on Exercise Books (Tunisia)*, paras. 7.329-7.330.
[404] Panel Report, *Morocco – Definitive AD Measures on Exercise Books (Tunisia)*, paras. 7.333-7.336.

violated Articles 3.1 and 3.5.[405] The Panel in *Russia – Commercial Vehicles* found that the Russian investigating authority acted inconsistently with Articles 3.1 and 3.5 by failing to examine, as part of its non-attribution analysis, whether the overly ambitious business plan and excessive capacity of a domestic producer was a cause of injury:

> "We recognize that, in some situations, the installation or existence of a large amount of production capacity could by itself result in low capacity utilisation, and cause injury to the domestic industry. It is not necessarily unreasonable for a start-up operation to install capacity sufficient to, if the enterprise is successful, serve its domestic market. However, we would have expected a reasonable and objective investigating authority to have considered, in the light of the facts and arguments in this case, whether the level of installed capacity in the domestic industry was an 'other factor' causing injury and addressed it in its non-attribution analysis. There is nothing in the Investigation Report to suggest that the DIMD considered the possible cause of low capacity utilisation, an allegedly overly ambitious business plan and excessive capacity, in its assessment of non-attribution. To the contrary, despite the evidence of an overly ambitious capacity installation at the outset of Sollers' operations, the DIMD relied on low capacity utilisation in its finding of material injury.
>
> For the reasons above, we find that by failing to address PCA's argument regarding the possible cause of Sollers' low capacity utilisation during the period of consideration in its non-attribution analysis, the DIMD acted inconsistently with Articles 3.1 and 3.5."[406]

313. The Panel in *China — AD on Stainless Steel (Japan)* rejected Japan's argument that the fluctuations in nickel prices prior to the POI for dumping determinations represented a factor that MOFCOM should have been aware of within the meaning of Article 3.5:

> "We note that pursuant to the third sentence of Article 3.5, the issue that we must address is whether the decrease in the price of nickel between May 2014 to the end of 2015 was a 'known factor[] other than the dumped imports which at the same time [was] injuring the domestic industry'. We recall, however, that the POI to determine the existence of dumping in this case was 1 January 2017 to 31 December 2017. Thus, the period of the decrease in nickel prices (May 2014 to end of 2015) was not part of the dumping period, and MOFCOM did not make findings on whether subject imports were dumped during this preceding period. For this reason, we do not consider that arguments and evidence presented by the Japanese respondents in respect of 'fluctuation' in the pricing of nickel meant that MOFCOM should have been aware that the decrease in price of nickel between May 2014 and end of 2015 was causing injury to the domestic industry '*at the same time* [*as the dumped imports*]'. Accordingly, we find that Japan has not established that MOFCOM acted inconsistently with Articles 3.1 and 3.5 of the Anti-Dumping Agreement by failing to perform a non-attribution analysis in respect of the decrease in nickel prices between May 2014 and the end of 2015."[407]

1.8.5.2 Illustrative list of known factors

314. In *Thailand – H-Beams* the Panel further stated that "[t]he text of Article 3.5 indicates that the list of other possible causal factors enumerated in that provision is illustrative."[408]

1.8.6 Non-attribution methodology

315. In *US – Hot-Rolled Steel*, the Appellate Body considered that the Panel had erred in its interpretation of the non-attribution language by finding that this language does not require the investigating authorities to separate and distinguish the injurious effects of the other known causal

[405] Panel Report, *Morocco – Definitive AD Measures on Exercise Books (Tunisia)*, paras. 7.337-7.338 and 7.340.
[406] Panel Report, *Russia – Commercial Vehicles*, paras. 7.225-7.226.
[407] Panel Report, *China — AD on Stainless Steel (Japan)*, para. 7.244.
[408] Panel Report, *Thailand – H-Beams*, para. 7.274. See also Panel Report, *Egypt – Steel Rebar*, para. 7.115.

factors from the injurious effects of the dumped imports. The Panel had followed the interpretive approach set forth by the GATT Panel in *US – Norwegian Salmon AD* which the Appellate Body thus also presumably considered erroneous. The Appellate Body ruled that the non-attribution language in Article 3.5 "requires a satisfactory explanation of the nature and extent of the injurious effects of the other factors, as distinguished from the injurious effects of the dumped imports".[409] In making this finding, the Appellate Body stated:

> "The non-attribution language in Article 3.5 of the *Anti-Dumping Agreement* applies solely in situations where dumped imports and other known factors are causing injury to the domestic industry *at the same time*. In order that investigating authorities, applying Article 3.5, are able to ensure that the injurious effects of the other known factors are not 'attributed' to dumped imports, they must appropriately assess the injurious effects of those other factors. Logically, such an assessment must involve separating and distinguishing the injurious effects of the other factors from the injurious effects of the dumped imports. If the injurious effects of the dumped imports are not appropriately separated and distinguished from the injurious effects of the other factors, the authorities will be unable to conclude that the injury they ascribe to dumped imports is actually caused by those imports, rather than by the other factors. Thus, in the absence of such separation and distinction of the different injurious effects, the investigating authorities would have no rational basis to conclude that the dumped imports are indeed causing the injury which, under the *Anti-Dumping Agreement*, justifies the imposition of anti-dumping duties.
>
> We emphasize that the particular methods and approaches by which WTO Members choose to carry out the process of separating and distinguishing the injurious effects of dumped imports from the injurious effects of the other known causal factors are not prescribed by the *Anti-Dumping Agreement*. What the Agreement requires is simply that the obligations in Article 3.5 be respected when a determination of injury is made."[410]

316. The Appellate Body in *US – Hot-Rolled Steel* acknowledged the practical difficulty of separating and distinguishing the injurious effects of different causal factors but indicated that:

> "[A]lthough this process may not be easy, this is precisely what is envisaged by the non-attribution language. If the injurious effects of the dumped imports and the other known factors remain lumped together and indistinguishable, there is simply no means of knowing whether injury ascribed to dumped imports was, in reality, caused by other factors. Article 3.5, therefore, requires investigating authorities to undertake the process of assessing appropriately, and separating and distinguishing, the injurious effects of dumped imports from those of other known causal factors."[411]

317. The Appellate Body in *US – Hot-Rolled Steel* supported its interpretation of the non-attribution language of Article 3.5 by referring to its decisions in two safeguards reports, *US – Wheat Gluten* and *US – Lamb* where it had interpreted the non-attribution language in Article 4.2(b) of the Agreement on Safeguards in a similar manner.[412]

318. The Appellate Body in *EC – Tube or Pipe Fittings* addressed the question whether the non-attribution language of Article 3.5 requires an investigating authority, in conducting its causality analysis, to examine the effects of the other causal factors collectively after having examined them individually. The Appellate Body first reiterated its basic view that non-attribution requires separation and distinguishing of the effects of other causal factors from those of the dumped imports so that injuries caused by the dumped imports and those caused by other factors are not "lumped together" and made "indistinguishable". It further stated that "provided that an investigating authority does not attribute the injuries of other causal factors to dumped imports, it is free to choose the methodology it will use in examining the "causal relationship" between dumped imports and injury."[413] On this basis, the Appellate Body did not find that "an examination

[409] Appellate Body Report, *US – Hot-Rolled Steel*, para. 226.
[410] Appellate Body Report, *US – Hot-Rolled Steel*, paras. 223-224.
[411] Appellate Body Report, *US – Hot-Rolled Steel*, para. 228.
[412] Appellate Body Report, *US – Hot-Rolled Steel*, para. 230.
[413] Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 189.

of *collective* effects is necessarily required by the non-attribution language of the *Anti-Dumping Agreement*. In particular, we are of the view that Article 3.5 does not compel, *in every case*, an assessment of the *collective* effects of other causal factors, because such an assessment is not always necessary to conclude that injuries ascribed to dumped imports are actually caused by those imports and not by other factors."[414] At the same time, the Appellate Body recognized that "there may be cases where, because of the specific factual circumstances therein, the failure to undertake an examination of the collective impact of other causal factors would result in the investigating authority improperly attributing the effects of other causal factors to dumped imports".[415]

319. In *EU – Footwear (China)*, the Panel considered it appropriate to evaluate the investigating authority's assessment of another factor causing injury to the domestic industry, even though the assessment did not appear in the part of the relevant determination where other factors were discussed:

> "However, the Review Regulation does address the 'likely impact of fluctuations in exchange rates,' in the section headed 'likelihood of continuation of injury'. Despite its location in the Review Regulation, we consider it appropriate to take this discussion into account. Although it might have been clearer if the Commission had made a reference in the sub-section on 'impact of other factors' to its analysis of exchange rate fluctuations analysis in the section of the Review Regulation entitled 'likelihood of continuation of injury', we see no reason why our evaluation of the consistency of a Member's determination regarding the imposition or continuation of anti-dumping measures should be limited by the structure of the published notice of that determination, or by where in that notice various considerations are addressed. Rather, we consider it appropriate to review the substance of the determination as a whole, to determine whether the Member acted consistently with its obligations."[416]

320. In *China – GOES (Article 21.5 – US)*, the Panel found that the Chinese investigating authority violated Article 3.5 by concluding, without adequate factual support and on the basis of an inconsistent analytical approach, that the domestic industry's expansion and increased production had not caused injury to the domestic industry.[417]

321. The Panel in *EU – Biodiesel (Argentina)*, in a finding upheld by the Appellate Body, found that the EU Commission had not erred by assessing the impact of alleged overcapacity of the domestic industry on the basis of capacity utilization data, noting that overcapacity and capacity utilization were "logically related" concepts:

> "In our view, capacity utilization is logically related to overcapacity, in the sense that the rate of capacity utilization reflects the amount of excess capacity of the domestic industry in relative terms. We fail to see how focusing on the increase in overcapacity in absolute terms, rather than on trends in capacity utilization rates, would have altered the conclusion reached by the EU authorities in this matter. More fundamentally, we see no basis in Article 3 of the Anti-Dumping Agreement – and Argentina has identified none – to support the proposition that an investigating authority would have to consider or give priority to the evolution of the domestic industry's overcapacity in absolute terms as opposed to its evolution in relative terms. In our view, an objective and unbiased investigating authority may well have proceeded to examine the issue of overcapacity on the basis of capacity utilization rather than in terms of the evolution of the domestic industry's overcapacity. In fact, an authority may well consider that the former is a more pertinent and informative basis on which to assess the issue of overcapacity. We therefore reject Argentina's argument that in their non-attribution analysis, the EU authorities improperly focused on capacity utilization as opposed to the increase in overcapacity in absolute terms during the period considered."[418]

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[414] Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 191.
[415] Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 192.
[416] Panel Report, *EU – Footwear (China)*, para. 7.515.
[417] Panel Report, *China – GOES (Article 21.5 – US)*, para. 7.145.
[418] Panel Report, *EU – Biodiesel (Argentina)*, para. 7.468.

322. The Panel in *EU – Biodiesel (Argentina)* underlined, as part of its examination of the EU Commission's non-attribution assessment on the alleged overcapacity of the domestic industry, that a finding of injury does not necessarily require that the domestic industry be in a healthy state at the beginning of the period for the injury determination:

> "The fact that the EU industry may have achieved higher levels of profitability at a time when its capacity utilization rates were higher does not, in our view, undermine the EU authorities' conclusion that, during the period considered, dumped imports caused a deterioration in the situation of the domestic industry and that overcapacity was not such a cause of injury as to break this causal link. In our view, whether an industry is in good or poor condition at the outset of the period examined is not determinative of whether dumped imports caused material injury. We add, in this respect, that the concept of injury under Article 3 of the Anti-Dumping Agreement is not limited to the situation in which a healthy industry is injured by dumped imports. Rather, the notion of 'injury', in our view, calls for an inquiry into whether the situation of the industry *deteriorated* during the period considered. Our view is supported by the fact that Article 3.5 itself envisages the possibility of more than one factor causing injury. We note in this regard that the EU authorities found that while capacity utilization was stable (although low), profits decreased. Merely because the EU domestic industry might have been 'less injured' if the rate of capacity utilization were higher does not undermine the EU authorities' finding that, with a constant state of capacity utilization, the decline in profits can be attributed to dumped imports. The same considerations lead us to reject Argentina's argument that even in the absence of any imports from Argentina and Indonesia, the EU industry would still be operating at a significant level of overcapacity."[419]

323. The Panel in *EU – Biodiesel (Argentina)* pointed out, with regard to the EU Commission's non-attribution assessment concerning the lack of vertical integration in the EU industry and its lack of access to raw materials, that Article 3.5 does not require investigating authorities to conduct a non-attribution analysis in relation to features that are inherent to the domestic industry and that have remained unchanged during the period of investigation for the injury determination:

> "Argentina primarily takes issue with the EU authorities' conclusion that the structure of the EU industry was not a cause of injury. The two factors, namely lack of vertical integration and lack of access to raw materials, identified by Argentina, essentially are inherent features of the EU domestic industry that, according to Argentina, render it less competitive than the Argentine producers. In our view, however, this line of argument is premised on a misreading of Article 3 of the Anti-Dumping Agreement and its various paragraphs, including Article 3.5. The concept of injury envisaged by Article 3 relates to negative *developments* in the state of the domestic industry.[420] Article 3 is not intended to address differences in the structure of the domestic industry as compared to that of the exporting Member. Rather, it is clear from the text of Article 3.5 and from its indicative list of such 'other factors' – which all pertain to *developments* in the situation of the domestic industry – that the authority is not required to conduct a non-attribution analysis with respect to features that are inherent to the domestic industry and have remained unchanged during the period considered by the investigating authority for purposes of its injury analysis."[421]

324. The Panel in *EU – Fatty Alcohols (Indonesia)* rejected the argument that the EU Commission had acted inconsistently with Article 3.5 in the investigation at issue by not using quantitative assessment tools or a basic quantitative method in its non-attribution analysis regarding the economic crisis. According to the Panel, Article 3.5 contained no such requirement, and the record of the investigation showed that the Commission had properly separated and distinguished the effect of the crisis from that of dumped imports:

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[419] Panel Report, *EU – Biodiesel (Argentina)*, para. 7.469.

[420] *(footnote original)* This is particularly clear from the text of Article 3.4, which requires consideration of the evolution of the state of the domestic industry and calls upon the authority to consider, *inter alia*, "declines" in various factors or indices.

[421] Panel Report, *EU – Biodiesel (Argentina)*, para. 7.522. See also Panel Report, *EU – Fatty Alcohols (Indonesia)*, para. 7.198.

> "We disagree. As both parties acknowledge, Article 3.5 does not prescribe a particular methodology for separating and distinguishing the injurious effects of the dumped imports from other known factors. The EU authorities assessed the impact of the dumped imports on the domestic industry during periods when the economic crisis was not affecting the industry, and found downward trends during those periods. In our view, this provided a sufficient basis for them to consider the impact of the dumped imports on the domestic industry and assess whether they were causing injury independently of the effects of the crisis. The EU authorities also assessed the impact of the economic crisis on both the domestic industry and the dumped imports, which showed that the crisis had similar negative effects for both the domestic industry and the dumped imports. As we have explained above, the EU authorities consequently did not attribute the injurious effects experienced by the domestic industry as a result of the crisis to the dumped imports. … Therefore, the EU authorities inferred – both from the decline in the domestic industry's market share in the face of the dumped imports *before* the crisis, and from the persistence of this reduced market share *after* the crisis – that the dumped imports largely contributed to material injury suffered by the domestic industry regardless of the economic crisis. We do not consider this conclusion to be unreasonable. If the economic crisis were the cause of injury to the domestic industry during the period of investigation, we would expect to see the domestic industry recover after the crisis abated and its market position to approach what it had been before it suffered the effects of both the crisis *and* the dumped imports. This was not the case. Although domestic consumption increased by 4.6% after the crisis, sales of the dumped imports increased by 6.6%, while sales of the domestic industry increased by only 4.3%, and this despite reductions in domestic industry prices at a time when the prices of the dumped imports were increasing. The dumped imports thus performed better than the domestic industry after the crisis, and the domestic industry's market share remained stagnant at the level to which it had fallen as a result of the dumped imports before the crisis."[422]

325. The Panel in *China – Cellulose Pulp* found that the Chinese investigating authority, MOFCOM, had not erred by considering production capacity data pertaining to all domestic producers, including those that were not part of the domestic industry definition in the investigation, as part of its non-attribution analysis:

> "Considering the above, we have examined the particular arguments raised by the interested parties concerning the expanded production capacity of the domestic industry as an 'other factor' of injury to see whether there was a justification for MOFCOM to consider data for the larger group of domestic producers. It is apparent that interested parties raised two sets of arguments. First, that the expansion of production capacity caused the cellulose pulp market to slow down, and second, that overcapacity affected domestic producers' costs. It is not clear, however, that these arguments are necessarily limited to only the situation of the domestic industry as defined by MOFCOM. In our view, it was not unreasonable for MOFCOM to consider the data pertaining to changes in the production capacity of all domestic cellulose pulp producers in addressing the first argument of the interested parties' regarding the slowdown in the Chinese cellulose pulp market. Indeed, to focus only on the capacity of the domestic industry as defined in considering the impact of capacity expansion of the Chinese market for cellulose pulp would be to ignore capacity that would necessarily be affecting that market overall. Thus, we do not consider that MOFCOM erred in considering overall domestic capacity in this context."[423]

326. The Panel in *China – Cellulose Pulp* noted that, in the investigation at issue, the effect of non-dumped imports on the domestic industry was similar to that of dumped imports, and therefore found that the Chinese investigating authority had acted inconsistently with Article 3.5 by simply stating, in its non-attribution analysis, that the effect of non-dumped imports had not broken the causal link between dumped imports and the injury suffered by the domestic industry:

[422] Panel Report, *EU – Fatty Alcohols (Indonesia)*, para. 7.179.
[423] Panel Report, *China – Cellulose Pulp*, para. 7.177.

> "The data before MOFCOM suggests that the effect of the non-dumped imports on prices and consequently on the domestic industry was similar to that of the dumped imports – the volumes and prices were similar, and moved similarly over the POI. MOFCOM found that the dumped imports were causing injury to the domestic industry. It would seem that non-dumped imports might therefore be having a similarly injurious effect on the domestic industry. Indeed, MOFCOM did not find that non-dumped imports did not have such an effect, but rather concluded that they did not break the causal link between the dumped imports and the injury to the domestic industry. However, there is little explanation of how MOFCOM reached this conclusion. Simply to state that MOFCOM did indeed separate and distinguish the injury or that non-dumped imports did not break the causal link, without further explanation, does not suffice to persuade us that the investigating authority did in fact undertake the necessary examination and reach an objective conclusion warranted by the evidence and arguments before it that injuries caused by non-dumped imports were not attributed to the dumped imports. Taken together, the failure to specifically discuss non-dumped imports accounting for between 18% and 25% of total imports over the POI, and the failure to explain how MOFCOM reached the conclusion that non-dumped imports, whose volume was greater than that of dumped imports throughout the POI and whose prices were below those of the dumped imports in 2011 and 2012 when MOFCOM found that dumped imports were depressing domestic prices and causing injury, did not break the causal link between dumped imports and material injury, leads us to the view that MOFCOM's conclusions were not such as could have been reached by a reasonable and objective investigating authority in light of the evidence and arguments before it."[424]

327. In the investigation at issue in *China – Broiler Products (Article 21.5 – US)*, the period of data collection for the injury determination was 2006, 2007, 2008 and the first half of 2009. The Panel rejected the United States' argument that MOFCOM had acted inconsistently with Article 3.5 by focusing on the developments in the first half of 2009, noting that information regarding the most recent period is generally most relevant to an injury determination:

> "[T]he United States argues that MOFCOM predicated its causal link determination entirely on developments in the first half of 2009. However, it is clear that MOFCOM examined year-on-year trends in the first three years of the POI, and period-on-period movements for the last six months. More to the point, we see no basis to conclude that MOFCOM was precluded from focusing on the last part of the POI, for at least three reasons:
>
> a. Performance indicators were moving in different directions throughout the first three years of the POI; most indicators, however, trended downward in the first half of 2009. MOFCOM was entitled to look at the information before it and assess the cumulative impact of years of dumped imports on the domestic industry during the most recent period.
>
> b. Information regarding the most recent period is generally most relevant for an analysis of present material injury.
>
> c. An investigating authority is entitled to consider the possibility of a time-lag between dumped and subsidized imports and injury to the domestic industry through their effects."[425]

1.8.7 Relationship with other paragraphs of Article 3

328. The Panel in *China – GOES* found that the Chinese authority's WTO-inconsistent analysis of the price effects of dumped imports also negatively affected its causation analysis and lead to a violation of Article 3.5. In coming to this conclusion, the Panel rejected the argument that the causation determination might rest on the authorities' analysis of the volume effects of dumped imports:

[424] Panel Report, *China – Cellulose Pulp*, para. 7.192.
[425] Panel Report, *China – Broiler Products (Article 21.5 – US)*, para. 7.195.

> "Our evaluation of MOFCOM's findings on price depression and price suppression has revealed a number of shortcomings in MOFCOM's analysis of the price effects of subject imports. Since MOFCOM relied on the price effects of subject imports in support of its finding that subject imports caused material injury to the domestic industry, the abovementioned shortcomings also undermine MOFCOM's conclusion on the causal link between subject imports and the material injury suffered by the domestic industry.
>
> We note China's argument that MOFCOM did not rely exclusively on the price effects of subject imports in the present case, such that MOFCOM's finding of causation might rest on MOFCOM's analysis of the adverse volume effects of the subject imports. We recall our earlier findings in this regard. In particular, while MOFCOM did indeed rely on both the volume and price effects of subject imports, we recall that there is nothing in the final determination to suggest that volume effects were the primary basis for MOFCOM's findings, or that MOFCOM relied more heavily on volume effects than price effects. Rather, MOFCOM's finding that subject imports were priced lower than domestic products was central to MOFCOM's finding that price depression and price suppression was an effect of subject imports, and MOFCOM's overall conclusion that subject imports caused material injury to the domestic industry. In these circumstances, it is not appropriate for us to consider the possibility that MOFCOM's finding of causation might be upheld purely on the basis of MOFCOM's analysis of the volume effects of subject imports."[426]

329. Similarly, the Panel in *China – X-Ray Equipment* found that the inconsistencies found in the investigating authority's price effects analyses under Articles 3.1 and 3.2 also rendered its causation analysis inconsistent with Article 3.5:

> "The Panel has concluded that MOFCOM's price effects analysis suffers from serious shortcomings under Articles 3.1 and 3.2 of the Anti-Dumping Agreement. In particular, although there was evidence on the record to suggest that it should, MOFCOM failed to consider price comparability before undertaking its price effects analysis. Given that MOFCOM relied upon the price effects of subject imports in its causation analysis, the flaws in the price effects analysis also undermine MOFCOM's conclusion on the causal link between the subject imports and the injury suffered by the industry.
>
> Consequently, the Panel concludes that MOFCOM's causation analysis was inconsistent with Articles 3.1 and 3.5 of the Anti-Dumping Agreement."[427]

330. The Panel in *Korea – Pneumatic Valves (Japan)*, in a finding upheld by the Appellate Body,[428] offered some general observations on the relationship between the outcomes of the examination under Articles 3.2 and 3.4, and the demonstration of a causal relationship under Article 3.5:

> "The outcomes of the consideration of volume and price effects of the dumped imports under Article 3.2 and the examination of the impact of the dumped imports on the state of the domestic industry are 'necessary building block[s]' for the demonstration required by Article 3.5. That being said, however, it is clear to us that no particular intermediate findings are a necessary prerequisite for reaching and resolving the 'ultimate question' under Article 3.5. Moreover, an investigating authority is not limited, in addressing the issue of causation, to the consideration, examination, and evaluation of evidence with respect to the factors set forth in Articles 3.2 and 3.4. Article 3.5 provides that the demonstration of a causal relationship 'shall be based on the examination of *all* relevant evidence before the authorities'. It is in our view certainly possible that evidence that does not fall squarely within the parameters of

[426] Panel Report, *China – GOES*, paras. 7.620-7.621.

[427] Panel Report, *China – X-Ray Equipment*, paras. 7.239-7.240. See also Panel Reports, *China – Autos (US)*, paras. 7.327-7.328; *Russia – Commercial Vehicles*, para. 7.182; *China – Broiler Products (Article 21.5 – US)*, para. 7.186; *Morocco – Definitive AD Measures on Exercise Books (Tunisia)*, para. 7.317.

[428] Appellate Body Report, *Korea – Pneumatic Valves (Japan)*, paras. 5.191-5.192.

> Articles 3.2 and 3.4 may be relevant and persuasive with respect to whether a causal relationship can be demonstrated."[429]

331. At the appellate stage in *Korea – Pneumatic Valves (Japan)*, Korea argued that the Panel had effectively interpreted Article 3.5 as setting an independent obligation to examine the volume, price effects, and consequent impact of the dumped imports.[430] Korea submitted that since Article 3.5 deals with the separate question of existence of a causal relationship between dumped imports and injury "as established under Articles 3.2 and 3.4", the reference to paragraphs 2 and 4 of Article 3 in the first sentence of Article 3.5 does not compel a re-examination of these paragraphs under Article 3.5.[431] The Appellate Body agreed and made the following observations:

> "The use of the word 'demonstrate[]' in Article 3.5 in contrast to the words 'consider' in Article 3.2 and 'examination' in Article 3.4 indicates that Article 3.5 establishes a standard that is distinct from Articles 3.2 and 3.4, inasmuch as Article 3.5 is concerned with the establishment of the causal link between dumped imports and injury.
>
> … [W]hile the inquiries foreseen under Articles 3.2, 3.4, and 3.5 are 'interlinked elements of a single, overall analysis addressing the question of whether dumped imports are causing injury', the inquiry under each provision has a distinct focus.
>
> … [W]ith respect to a claim under Article 3.5, a panel is tasked with reviewing an investigating authority's ultimate demonstration that the 'dumped imports are, through the effects of dumping, as set forth in paragraphs 2 and 4, causing injury' to the domestic industry. In so doing, a panel is called upon to review whether the investigating authority properly linked the *outcomes* of its analyses conducted pursuant to Articles 3.2 and 3.4, taking into account the evidence and factors required under Article 3.5, in coming to a definitive determination regarding the causal relationship between dumped imports and injury to the domestic industry. A panel's review of a claim under Article 3.5, therefore, concerns the investigating authority's ultimate determination of causation on the basis of a proper linkage among the various components, in light of all evidence and factors set out in that provision. A panel's review does not, however, call for revisiting the question whether each of the interlinked components of this determination itself meets the applicable requirements set out in Article 3.2 or 3.4. Examining such consistency in the context of a claim under Article 3.5 would effectively require a panel to incorporate and apply requirements and disciplines set out in other paragraphs of Article 3, which are not contained in the text of Article 3.5."[432]

332. Based on this analysis, the Appellate Body in *Korea – Pneumatic Valves (Japan)* found that the Panel's task under Article 3.5 was only "to review whether the investigating authority properly linked the outcomes of its analyses conducted pursuant to Articles 3.2 and 3.4, taking into account the evidence and factors required under Article 3.5, in coming to a definitive determination regarding the causal relationship between dumped imports and injury to the domestic industry."[433] This inquiry, however, does not call for revisiting "the question whether each of the interlinked components of this determination itself meets the applicable requirements set out in Article 3.2 or Article 3.4."[434] An examination of such consistency under Article 3.5 "would effectively require a panel to incorporate and apply obligations and disciplines set out in other paragraphs of Article 3", which the text of Article 3.5 does not envisage.[435] Consequently, the Appellate Body held that the Panel had erred in its application of Article 3.5 by re-assessing the requirements of Articles 3.2 and 3.4 in examining a causation determination.[436]

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[429] Panel Report, *Korea – Pneumatic Valves (Japan)*, para. 7.248.
[430] Appellate Body Report, *Korea – Pneumatic Valves (Japan)*, para. 5.187.
[431] Appellate Body Report, *Korea – Pneumatic Valves (Japan)*, para. 5.187.
[432] Appellate Body Report, *Korea – Pneumatic Valves (Japan)*, paras. 5.192-5.194.
[433] Appellate Body Report, *Korea – Pneumatic Valves (Japan)*, paras. 5.203 and 5.280.
[434] Appellate Body Report, *Korea – Pneumatic Valves (Japan)*, para. 5.280. See also ibid. para. 5.203.
[435] Appellate Body Report, *Korea – Pneumatic Valves (Japan)*, para. 5.280.
[436] Appellate Body Report, *Korea – Pneumatic Valves (Japan)*, paras. 5.280-5.286. See also ibid. paras. 5.203, 5.210-5.213, 5.217, 5.239 and 5.255.

333. With respect to the relationship of paragraph 5 with paragraphs 1, 2, 3, and 4 of Article 3, see paragraphs 2-3 above.

334. In *Pakistan – BOPP Film (UAE)*, the Panel addressed the UAE's argument that, because Pakistan's investigating authority (NTC) had relied, in its causation analysis, on findings that were inconsistent with Articles 3.1, 3.2, and 3.4 of the Anti-Dumping Agreement, the NTC's causation analysis was also inconsistent with Articles 3.1 and 3.5.[437] The Panel began its analysis by recalling that, based on text of Article 3.5, the examination of causation is based on the findings arrived at under Articles 3.2 and 3.4, among others.[438] Because the NTC's examination of each underlying factor was inconsistent with Articles 3.1, 3.2, and 3.4 of the Anti-Dumping Agreement, the Panel thus found that the NTC's causation analysis was inconsistent with Articles 3.1 and 3.5.[439]

1.9 Article 3.6

1.9.1 Domestic industry production

335. The Panel in *Mexico – Corn Syrup* addressed the issue of allowing the determination of injury on the basis of the portion of the domestic industry's production sold in one sector of the domestic market, as follows:

> "Article 3.6 does not, on its face, allow the determination of injury or threat of injury on the basis of the portion of the domestic industry's production sold in one sector of the domestic market, rather than on the basis of the industry as a whole. Indeed, Article 3.6 relates to a situation different from that at issue here. Article 3.6 provides for the situation where information concerning the production of the like product, such as producers' profits and sales, cannot be separately identified. In such cases, Article 3.6 allows the authority to consider information concerning production of a *broader* product group than the like product produced by the domestic industry, which includes the like product, in evaluating the effect of imports. Nothing in Article 3.6 allows the investigating authority to consider information concerning production of a product sub-group that is *narrower* than the like product produced by the domestic industry. In particular, nothing in Article 3.6 allows the investigating authority to limit its examination of injury to an analysis of the portion of domestic production of the like product sold in the particular market sector where competition with the dumped imports is most direct."[440]

336. In *US – Hot-Rolled Steel*, the Appellate Body examined whether the investigating authorities could make a sectoral examination of the domestic industry. See paragraphs 48 and 200.

1.10 Article 3.7: threat of material injury

1.10.1 General

337. The Panel in *US – Coated Paper (Indonesia)* rejected Indonesia's argument that Article 3.7 requires authorities "to consider the totality of what happened during the entire POI and to identify clear and foreseeable changes in circumstances that would cause subject imports to injure the domestic industry."[441] In the Panel's view:

> "[A]n investigating authority may consider the state of the domestic industry at the end of the POI as the starting point of its threat of injury analysis notwithstanding the fact that the state of the domestic industry may in part result from the effect of factors other than subject imports. For this reason, the fact that the decline in demand during the POI negatively affected the domestic industry did not preclude the

[437] Panel Report, *Pakistan – BOPP Film (UAE)*, para. 7.437.
[438] Panel Report, *Pakistan – BOPP Film (UAE)*, paras. 7.439-7.440. See also ibid. para. 7.430.
[439] Panel Report, *Pakistan – BOPP Film (UAE)*, para. 7.441.
[440] Panel Report, *Mexico – Corn Syrup*, para. 7.157. See also the similar issue in *US – Cotton Yarn.* With respect to the issue of a market segment analysis under the *Safeguards Agreement*, see the Section on Article 5 of the Agreement on Safeguards.
[441] Panel Report, *US – Coated Paper (Indonesia)*, para. 7.236.

> USITC from concluding that subject imports would cause injury to the domestic industry in the imminent future. Thus, our analysis focuses on the USITC's consideration of the likely impact, in the imminent future, of the *projected* decline in demand."[442]

338. In *Dominican Republic – AD on Steel Bars (Costa Rica),* the Panel pointed out that, in assessing a determination of threat of material injury, the Panel's analysis would be based on the assessment of the investigating authority's determination as a whole "taking into account the facts under consideration and the analysis carried out".[443]

1.10.2 "allegation, conjecture or remote possibility"

339. The Panel in *US – Coated Paper (Indonesia)* rejected Indonesia's argument that a threat determination wherein projected developments are not based on the events that occurred during the period of investigation would necessarily be based on conjecture:

> "We start by noting that Indonesia's position suggests that a finding with respect to future events contributing to an affirmative threat of injury determination could be considered to be based on conjecture rather than facts if events that occurred during the POI do not clearly reflect the situation the investigating authority predicts would occur. In other words, with respect to the issue before the Panel, if the market share and volume of subject imports, on the one hand, and of the domestic industry, on the other, show no clear inverse correlation during the POI, a determination that in the imminent future subject imports would gain market share at the expense of the domestic industry would necessarily be based on conjecture rather than facts.
>
> We do not agree. In our view, projections about future events need not necessarily reflect a continuation of trends that took place during the POI for a threat of injury determination to be based on facts as opposed to allegation, conjecture or remote possibility. As noted above, an investigating authority is required to provide a reasoned and adequate explanation as to how evidence in the record supports its finding that a situation of injury would occur in the imminent future. While we would expect the authority to rely on facts from the present to support the projections it makes about the future and its resulting conclusions about the future, in our view events that took place during the POI provide the background against which an investigating authority can evaluate the likely future events, but do not limit the scope of projections that the authority may make concerning future events. Of course, the investigating authority would be expected to explain the change in circumstances that will result in the future situation being different from the past."[444]

340. In reiterating the same principle with respect to the prices effects of dumped imports in the context of a threat determination, the Panel in *US – Coated Paper (Indonesia)* pointed out:

> "We see nothing in Article 3.7 and Article 15.7 that would require an investigating authority to have found negative price effects during the POI as a prerequisite for concluding that negative price effects will occur in the imminent future. Indeed, it is the essence of a threat determination that the situation existing during the POI is predicted to change such that there will be injury in the imminent future, if measures are not imposed. The lack of present material injury caused by subject imports may be a consequence of their volumes during the POI, their price effects, their impact during the POI or the injurious effects of other factors. What is important in a determination of threat of injury is that the investigating authority adequately explains, based on the evidence before it, why the situation it predicts can be projected to occur."[445]

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[442] Panel Report, *US – Coated Paper (Indonesia)*, para. 7.240.
[443] Panel Report, *Dominican Republic – AD on Steel Bars (Costa Rica),* para. 7.253.
[444] Panel Report, *US – Coated Paper (Indonesia)*, paras. 7.276-7.277.
[445] Panel Report, *US – Coated Paper (Indonesia)*, para. 7.313.

1.10.3 "change in circumstances"

341. In *Egypt – Steel Rebar*, the Panel considered that the text of Article 3.7 makes explicit that the central question in a threat of injury investigation is whether there will be a "change in circumstances" that would cause the dumping to begin to injure the domestic industry:

> "[T]he text of this provision makes explicit that in a threat of injury investigation, the central question is whether there will be a 'change in circumstances' that would cause the dumping to begin to injure the domestic industry. Solely as a matter of logic, it would seem necessary, in order to assess the likelihood that a particular change in circumstances would cause an industry to begin experiencing present material injury, to know about the condition of the domestic industry at the outset. For example, if an industry is increasing its production, sales, employment, etc., and is earning a record level of profits, even if dumped imports are increasing rapidly, presumably it would be more difficult for an investigating authority to conclude that it is threatened with imminent injury than if its production, sales, employment, profits and other indicators are low and/or declining."[446]

342. The Panel in *US – Softwood Lumber VI* after first noting that the text of Article 3.7 concerning "change of circumstances" is "not a model of clarity"[447], went on to find that Articles 3.7 and 15.7 required that some change in circumstances must be both foreseen and imminent and that this change of circumstances would lead to a situation in which injury would occur:

> "[T]he relevant 'change in circumstances' referred to in Articles 3.7 and 15.7 is one element to be considered in making a determination of threat of material injury. However, we can find no support for the conclusion that such a change in circumstances must be identified as a single or specific event. Rather, in our view, the change in circumstances that would give rise to a situation in which injury would occur encompasses a single event, or a series of events, or developments in the situation of the industry, and/or concerning the dumped or subsidized imports, which lead to the conclusion that injury which has not yet occurred can be predicted to occur imminently."[448]

343. The Panel in *Dominican Republic – AD on Steel Bars (Costa Rica)* noted that "an assessment of whether the change in circumstances was 'clearly foreseen and imminent' in a specific situation 'in which the dumping would cause injury' is possible only when the situation in question is identified by the investigating authority".[449] The Panel did not address this particular issue in this dispute because the investigating authority in the underlying investigation had "failed to properly evaluate the consequent impact of future dumped imports on the domestic industry or to identify a situation in which the dumping would cause injury".[450]

1.10.4 Requirement to "consider" factors of Article 3.7

344. The Panel in *US – Softwood Lumber VI* was of the view that while investigating authorities are not required to make an explicit determination with respect to factors considered under Articles 3.7 and 15.7, they must however do more than simply recite the facts in the abstract:

> "[I]n order to conclude that the investigating authorities have 'considered' the factors set out in Articles 3.7 and 15.7, it must be apparent from the determination before us that the investigating authorities have given attention to and taken into account those factors. That consideration must go beyond a mere recitation of the facts in question, and put them into context. However, the investigating authorities are not required by

[446] Panel Report, *Egypt – Steel Rebar*, para. 7.91.
[447] Panel Report, *US – Softwood Lumber VI*, para. 7.53.
[448] Panel Report, *US – Softwood Lumber VI*, para. 7.57.
[449] Panel Report, *Dominican Republic – AD on Steel Bars (Costa Rica),* para. 7.297.
[450] Panel Report, *Dominican Republic – AD on Steel Bars (Costa Rica),* para. 7.297.

> Articles 3.7 and 15.7 to make an explicit 'finding' or 'determination' with respect to the factors considered."[451]

345. Moreover, according to the Panel in *US – Softwood Lumber VI*, due to the use of the word "should" in Article 3.7, consideration of each of the factors listed in Articles 3.7 and 15.7 is not mandatory:

> "Whether a violation existed would depend on the particular facts of the case, in light of the totality of the factors considered and the explanations given. In this case, it is clear from the face of the determination that the USITC in fact addressed the facts concerning each of the factors set out in Articles 3.7 and 15.7 of the Agreements. Indeed, Canada does not argue that any relevant factor was ignored by the USITC, or not addressed in the determination. Thus, we cannot conclude that the USITC failed to consider the factors set forth in Articles 3.7 and 15.7, in the sense of not taking them into account at all."[452]

346. The Panel in *US – Softwood Lumber VI* hastened to add that the fact that the Article 3.7 factors were "considered" does not answer the question "whether the USITC's overall determination of a threat of material injury is consistent with the requirement of Articles 3.7 that the totality of the factors considered lead to the conclusion that further dumped and subsidized exports are imminent and that, unless protective action was taken, material injury would occur".[453]

1.10.5 Article 3.7(i): "likelihood of substantially increased importation"

347. The Panel in *Mexico – Corn Syrup* found that the investigating authority had failed to adequately address the likelihood of substantially increased imports by failing to properly evaluate the facts concerning, and to provide a reasoned explanation of its conclusions regarding the potential effects of the alleged restraint agreement. The Panel considered as follows:[454]

> "In our view, the question for purposes of an anti-dumping investigation is not whether an alleged restraint agreement in violation of Mexican law existed, an issue which might well be beyond the jurisdiction of an anti-dumping authority to resolve, but whether there was evidence of and arguments concerning the effect of the alleged restraint agreement, which, if it existed, would be relevant to the analysis of the likelihood of increased dumped imports in the near future. If the latter is the case, in our view, the investigating authority is obliged to consider the effects of such an alleged agreement, assuming it exists."[455]

348. The Panel in *Dominican Republic – AD on Steel Bars (Costa Rica)* described the nature of an investigating authority's assessment of the rate of increase of imports in the context of Article 3.7, as follows, and found that this standard had not been met in the investigation at issue:

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

[451] Panel Report, *US – Softwood Lumber VI*, para. 7.67. See also Panel Report, *Dominican Republic – AD on Steel Bars (Costa Rica),* para. 7.250.
[452] Panel Report, *US – Softwood Lumber VI*, para. 7.68
[453] Panel Report, *US – Softwood Lumber VI*, para. 7.69.
[454] Panel Report, *Mexico – Corn Syrup*, paras. 7.173-7.178. See also Panel Report, *Mexico – Corn Syrup (Article 21.5 – US)*, paras. 6.14-6.23.
[455] Panel Report, *Mexico – Corn Syrup*, para. 7.174.

> [W]hile the facts on which the CDC relied could support the conclusion that dumped imports would remain at the levels reached in the past, we do not see how this could be sufficient to indicate the likelihood of a substantial increase in imports and thus to support the conclusion of a threat of injury. In addition, we note that, although imports from Costa Rica increased significantly from 2016 onwards, particularly in 2017 (when they were 156% higher than the year before), import growth slowed in 2018 to 22%."[456]

349. The Panel in *Dominican Republic – AD on Steel Bars (Costa Rica)* found that the investigating authority's determination on the rate of increase of dumped imports, based on three different scenarios, did not meet the requirements of Article 3.7:

> "The CDC's analysis, however, does not mention how it determined the rates of increase of imports used in each of the three scenarios to project the alleged progression in imports up to the year 2022. At the same time, the projected increase in imports from Costa Rica in the 'baseline' scenario (i.e. an annual increase of 3%) cannot, in our view, be considered a substantial increase in imports, and the CDC does not explain which of the scenarios is the most likely to occur. In particular, it is not clear from the record in which of these scenarios the CDC considered there to be 'a significant rate of increase of imports … indicating the likelihood of substantially increased importation'."[457]

350. The Panel in *Dominican Republic – AD on Steel Bars (Costa Rica)* found that certain assumptions relied upon by the investigating authority under the scenarios used as part of its determination on the rate of increase of dumped imports did not have a basis on the investigation record.[458]

351. In the investigation at issue in *Dominican Republic – AD on Steel Bars (Costa Rica)*, the Dominican Republic's investigating authority had relied on certain factors, such as a study by the Costa Rican government measuring the effect of tariff reductions in the imports of the subject product into Costa Rica and the fact that Costa Rica had initiated a safeguard investigation on the imports of the subject product, to support its finding that there were imminent further imports of the subject product into the Dominican Republic.[459] The Panel found that such factors did not support the investigating authority's conclusion on imminent further imports:

> "We do not see how these elements would support a conclusion of imminent further imports. The CDC does not explain why the effect of the 2011 tariff reduction is so long-lasting as to result in imminent further imports to the Dominican Republic in the future. Furthermore, the record reveals that, in absolute terms, ArcelorMittal's sales in Costa Rica's domestic market actually increased during the POI. We also fail to see how the fact that a company requested a safeguard investigation would support the conclusion that further imports to the Dominican Republic were imminent. In other words, in our view, a possible safeguard measure would presumably alleviate the pressure exerted by imports on the domestic market and would enable domestic producers to increase their domestic sales. Therefore, the elements referred to by the CDC do not appear to support its conclusion that further imports are imminent."[460]

352. The Panel in *Dominican Republic – AD on Steel Bars (Costa Rica)* found unconvincing the investigating authority's finding that certain contractual obligations between an importing company and an exporting company showed that further exports were imminent in the future:

> "[T]his alleged 'intention' is not sufficient to support the conclusion that further exports are imminent. This contract also covered products other than the dumped product and related to an increase in imports over a period running up to 2018.

[456] Panel Report, *Dominican Republic – AD on Steel Bars (Costa Rica),* paras. 7.257 and 7.286.
[457] Panel Report, *Dominican Republic – AD on Steel Bars (Costa Rica),* para. 7.263.
[458] Panel Report, *Dominican Republic – AD on Steel Bars (Costa Rica),* paras. 7.264-7.265.
[459] Panel Report, *Dominican Republic – AD on Steel Bars (Costa Rica),* para. 7.288.
[460] Panel Report, *Dominican Republic – AD on Steel Bars (Costa Rica),* para. 7.289.

> Consequently, we fail to see how the contractual obligations cited by the CDC could support its conclusion that further exports are imminent in the future."[461]

1.10.6 Article 3.7(ii): "freely disposable … capacity of the exporter"

353. The Panel in *Dominican Republic – AD on Steel Bars (Costa Rica)* declined to endorse an overly wide interpretation of the obligations imposed on investigating authorities under Article 3.7 with regard to the increase of the capacity of exporters:

> "[W]e see nothing in Article 3.7 that requires an investigating authority to explain why it considers that a company's export strategy would necessarily lead it to export to a particular market, that requires it to analyse in detail the reasons why other markets would not absorb any increase in the use of spare capacity or that requires it to assess whether exports from other countries are likely to increase. Article 3.7 (ii) provides only that the 'freely disposable … capacity of the exporter' must indicate 'the likelihood' of substantially increased importation. In the case at hand, the CDC concluded that the exporting company '*ha[d] significant productive capacity* and, therefore, *could continue* to increase its exports to the Dominican Republic within a short period of time'."[462]

354. The Panel in *Dominican Republic – AD on Steel Bars (Costa Rica)* stressed that factors listed in Article 3.7 have to be considered in their totality, and found, therefore, that "the mere fact that the exporting company's inventory level was not, in itself, an indicator of a threat of injury does not, in our view, mean that, in combination with other factors, it could not serve as a basis for concluding that further dumped exports were imminent".[463] Similarly, the Panel found that:

> "[T]he exporter's freely disposable capacity alone cannot support a conclusion that further exports are 'imminent'. While an existing production capacity may be indicative of potential to export, we do not see how this fact on its own can substantiate the 'imminence' of further exports."[464]

1.10.7 Article 3.7(iii): price depression or suppression

355. The Panel in *Dominican Republic – AD on Steel Bars (Costa Rica)* underlined the difference between the requirements of Articles 3.2 and 3.7(iii) of the Ani-Dumping Agreement, stating that "in contrast to the analysis required by Article 3.2, the consideration required by Article 3.7(iii) is essentially prospective".[465] However, the Panel also pointed out that "the factors set out in Article 3.2 may be relevant when considered in a 'predictive' context in making a threat of material injury determination".[466]

1.10.8 Article 3.7(iv): inventories of the product being investigated

356. In the investigation at issue in *Dominican Republic – AD on Steel Bars (Costa Rica),* the investigating authority had found that "the exporting company did not, in fact, keep a large inventory owing to the nature of its production (in other words, 'ArcelorMittal manufacture[d] after price negotiations and the receipt of purchase orders'), but that this did not preclude reaching the conclusion that, on the basis of the company's freely disposable capacity, it could increase its production, and consequently its exports, within a short period of time."[467] The Panel saw no error in this finding. According to the Panel, "the mere fact that the exporting company's inventory level was not, in itself, an indicator of a threat of injury does not, in our view, mean that, in

[461] Panel Report, *Dominican Republic – AD on Steel Bars (Costa Rica),* para. 7.290.
[462] Panel Report, *Dominican Republic – AD on Steel Bars (Costa Rica),* para. 7.270.
[463] Panel Report, *Dominican Republic – AD on Steel Bars (Costa Rica),* para. 7.283.
[464] Panel Report, *Dominican Republic – AD on Steel Bars (Costa Rica),* para. 7.287.
[465] Panel Report, *Dominican Republic – AD on Steel Bars (Costa Rica),* para. 7.274.
[466] Panel Report, *Dominican Republic – AD on Steel Bars (Costa Rica),* para. 7.275.
[467] Panel Report, *Dominican Republic – AD on Steel Bars (Costa Rica),* para. 7.282.

combination with other factors, it could not serve as a basis for concluding that further dumped exports were imminent."[468]

1.10.9 Analysis of the "consequent impact" of dumped imports on the domestic industry

357. The Panel in *Mexico – Corn Syrup* considered the requirements imposed upon investigating authorities in a determination of a "threat of injury" under Article 3.7. One of the issues which arose in this context was whether a specific analysis of the consequent impact of the dumped imports on the domestic industry is required in a threat of injury determination. Referring to Article 3.7, the Panel stated that "[t]his language, in our view, recognizes that factors other than those set out in Article 3.7 itself will necessarily be relevant to the determination."[469] The Panel concluded that "an analysis of the consequent impact of imports is required in a threat of material injury determination":

> "[I]t is clear that in making a determination regarding the threat of material injury, the investigating authority must conclude that '*material injury would occur*' (emphasis added) in the absence of an anti-dumping duty or price undertaking. A determination that material injury would occur cannot, in our view, be made solely on the basis of consideration of the Article 3.7 factors. Rather, it must include consideration of the likely impact of further dumped imports on the domestic industry.
>
> While an examination of the Article 3.7 factors is required in a threat of injury case, that analysis alone is not a sufficient basis for a determination of threat of injury, because the Article 3.7 factors do not relate to the consideration of the impact of the dumped imports on the domestic industry. The Article 3.7 factors relate specifically to the questions of the likelihood of increased imports (based on the rate of increase of imports, the capacity of exporters to increase exports, and the availability of other export markets), the effects of imports on future prices and likely future demand for imports, and inventories. They are not, in themselves, relevant to a decision concerning what the 'consequent impact' of continued dumped imports on the domestic industry is likely to be. However, it is precisely this latter question – whether the 'consequent impact' of continued dumped imports is likely to be material injury to the domestic industry – which must be answered in a threat of material injury analysis. Thus, we conclude that an analysis of the consequent impact of imports is required in a threat of material injury determination."[470]

358. Having established that an analysis of the impact of imports on the domestic industry is required also in the context of the determination of a "threat of injury", the Panel in *Mexico – Corn Syrup* held that this analysis is to be performed pursuant to Article 3.4, since "[n]othing in the text or context of Article 3.4 limits consideration of the Article 3.4 factors to cases involving material injury":

> "Turning to the question of the nature of the analysis required, we note that Article 3.4 of the *AD Agreement* sets forth factors to be evaluated in the examination of the impact of dumped imports on the domestic industry. Nothing in the text or context of Article 3.4 limits consideration of the Article 3.4 factors to cases involving material injury. To the contrary, as noted above, Article 3.1 requires that a determination of 'injury', which includes threat of material injury, involve an examination of the impact of imports, while Article 3.4 sets forth factors relevant to that examination. Article 3.7 requires that the investigating authorities determine whether, in the absence of protective action, material injury would occur. In our view, consideration of the Article 3.4 factors in examining the consequent impact of imports is required in a case involving threat of injury in order to make a determination consistent with the requirements of Articles 3.1 and 3.7."[471]

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[468] Panel Report, *Dominican Republic – AD on Steel Bars (Costa Rica),* para. 7.283.
[469] Panel Report, *Mexico – Corn Syrup*, para. 7.124.
[470] Panel Report, *Mexico – Corn Syrup*, paras. 7.125-7.126.
[471] Panel Report, *Mexico – Corn Syrup*, para. 7.127. In this regard, see also paragraphs 209 and 215 above. See also Panel Report, *Egypt – Steel Rebar*, paras. 7.93-7.94.

359. The Panel in *Mexico – Corn Syrup* concluded that consideration of the factors in Article 3.4 "is necessary in order to establish a background against which the investigating authority can evaluate whether imminent further dumped imports will affect the industry's condition in such a manner that material injury would occur in the absence of protective actions, as required by Article 3.7."[472] It further indicated:

> "The text of the *AD Agreement* requires consideration of the Article 3.4 factors in a threat determination. Article 3.7 sets out additional factors that must be considered in a threat case, but does not eliminate the obligation to consider the impact of dumped imports on the domestic industry in accordance with the requirements of Article 3.4".[473]

360. The Panel in *Dominican Republic – AD on Steel Bars (Costa Rica)* agreed with this view and further indicated that "in the context of claims relating to a threat of injury determination, a panel must examine whether the investigating authority acted consistently with the provisions of Article 3.4."[474]

361. The Panel in *US – Softwood Lumber VI* agreed with the views expressed by the Panel in *Mexico – Corn Syrup* (see paragraph 359 above), while emphasizing at the same time that there is no requirement under Article 3.7 to conduct a second Article 3.4 analysis:

> "It seems clear to us that, as the Panel found in *Mexico – Corn Syrup*, there must, in every case in which threat of material injury is found, be an evaluation of the condition of the industry in light of the Article 3.4/15.4 factors to establish the background against which the impact of future dumped/subsidized imports must be assessed, in addition to an assessment of specific threat factors. However, once such an analysis has been carried out, we do not read the relevant provisions of the Agreements to require an assessment of the likely impact of future imports by reference to a consideration of projections regarding each of the Article 3.4/15.4 factors. There is certainly nothing in the text of either Article 3.7 of the *AD Agreement* and Article 15.7 of the SCM Agreement, or Article 3.4 of the *AD Agreement* and Article 15.4 of the SCM Agreement, setting out an obligation to conduct a second analysis of the injury factors in cases involving threat of material injury. Of course, such an assessment could be undertaken, to the extent available information permitted, and might be useful. However, in many instances, it seems likely that the necessary information would not be available, for instance projected productivity, return on investment, projected cash flow, etc. Even if projections are made on the basis of the information gathered in the investigation, this might result in a degree of speculation in the decision–making process, which is not consistent with the requirements of the Agreements."[475]

362. The Panel in *US – Softwood Lumber VI* came to a similar conclusion with respect to the absence of a requirement for a second Article 3.2 analysis:

> "With respect to the factors set out in Article 3.2 of the *AD Agreement* and Article 15.2 of the SCM Agreement, we see even less basis for concluding that they must be directly considered in a 'predictive' context in making a threat of material injury determination. These provisions require the investigating authorities to consider events in the past, during the period investigated, in making a determination regarding present material injury. Thus, the text directs the investigating authorities to consider whether there 'has been' a significant increase in imports, whether there 'has been' significant price undercutting, or whether the effect of imports is otherwise to depress prices or prevent price increases which otherwise 'would have' occurred. As with the consideration of the Article 3.4/15.4 factors, the consideration of the

[472] Panel Report, *Mexico – Corn Syrup*, para. 7.132.
[473] Panel Report, *Mexico – Corn Syrup*, para. 7.137.
[474] Panel Report, *Dominican Republic – AD on Steel Bars (Costa Rica).* para. 7.190.
[475] Panel Report, *US – Softwood Lumber VI*, para. 7.105.

> Article 3.2/15.2 factors forms part of the background against which the investigating authorities can evaluate the effects of future dumped and/or subsidized imports."[476]

363. In the investigating at issue in *Dominican Republic – AD on Steel Bars (Costa Rica),* the investigating authority had found that in order to compete with dumped imports, the domestic industry had to decrease its prices by a certain percentage. The Panel found that this finding lacked a forward-looking assessment of the domestic industry's performance:

> "Having examined the CDC's threat of injury determination, we note that the CDC calculated that 'for the domestic industry not to be displaced by Costa Rican dumped imports, it would have to reduce the price by approximately 17%'. However, this determination does not contain any analysis of the future development of the domestic industry in the light of this hypothetical decrease."[477]

364. The Panel in *Dominican Republic – AD on Steel Bars (Costa Rica)* found unconvincing the investigating authority's finding that the domestic industry would have to decrease its prices because of the low level of import prices:

> "We fail to see how the mere fact that the price of the imported products is lower necessarily implies a significant decline in the domestic industry's prices, especially considering the upward trend in the prices of these imports noted by the CDC. We recall that any projections or assumptions made by an investigating authority regarding likely future occurrences must be adequately explained and supported by positive evidence on the record and show a high degree of likelihood that projected occurrences will occur. We do not see how the CDC's conclusion satisfies this requirement."[478]

1.10.10 Distinction between the roles of the investigating authorities and the Panel

365. In *Mexico – Corn Syrup (Article 21.5 – US)*, Mexico had requested the Appellate Body to reverse the finding of the Panel regarding the likelihood of increased imports on the grounds that the Panel had wrongly interpreted Article 3.7 of the Anti-Dumping Agreement and incorrectly applied the standard of review prescribed by Articles 17.5 and 17.6 of that Agreement. The Appellate Body drew the line between the roles of the investigating authorities and the panel in respect of Article 3.7 of the Anti-Dumping Agreement as follows:

> "In previous anti-dumping cases, we have emphasized the importance of distinguishing between the different roles of panels and investigating authorities. We note, in this regard, that Article 3.7 of the *Anti-Dumping Agreement* sets forth a number of requirements that must be respected in order to reach a valid determination of a threat of material injury. The third sentence of Article 3.7 explicitly recognizes that it is the *investigating authorities* who make a determination of threat of material injury, and that such determination – by the investigating authorities – 'must be based on facts and not merely on allegation, conjecture or remote possibility'. Consequently, Article 3.7 is not addressed to panels, but to the national investigating authorities which determine the existence of a threat of material injury.
>
> The *Anti-Dumping Agreement* imposes a specific standard of review on *panels*. With respect to facts, Articles 17.5 and 17.6(i) of the *Anti-Dumping Agreement*, together with Article 11 of the DSU, set out the standard to be applied by panels when assessing whether a Member's investigating authorities have 'established' and 'evaluated' the facts consistently with that Member's obligations under the covered agreements. These provisions do not authorize panels to engage in a new and independent fact-finding exercise. Rather, in assessing the measure, panels must consider, in the light of the claims and arguments of the parties, whether, *inter alia,* the 'establishment' of the facts by the investigating authorities was 'proper', in accordance with the obligations imposed on such investigating authorities under the *Anti-Dumping Agreement*.

[476] Panel Report, *US – Softwood Lumber VI*, para. 7.111.
[477] Panel Report, *Dominican Republic – AD on Steel Bars (Costa Rica).* para. 7.292.
[478] Panel Report, *Dominican Republic – AD on Steel Bars (Costa Rica).* para. 7.294.

> In our view, the 'establishment' of facts by investigating authorities includes both affirmative findings of events that took place during the period of investigation as well as assumptions relating to such events made by those authorities in the course of their analyses. In determining the existence of a *threat* of material injury, the investigating authorities will necessarily have to make assumptions relating to 'the 'occurrence of future events' since such *future* events 'can never be definitively proven by facts'. Notwithstanding this intrinsic uncertainty, a 'proper establishment' of facts in a determination of threat of material injury must be based on events that, although they have not yet occurred, must be 'clearly foreseen and imminent', in accordance with Article 3.7 of the *Anti-Dumping Agreement*."[479]

1.10.11 Relationship with other paragraphs of Article 3

366. In *Thailand – H-Beams*, the Appellate Body referred to Article 3.7 in interpreting Article 3.1. See paragraph 32 above.

367. See also paragraph 23 above.

368. With respect to the relationship between paragraphs 4 and 7 of Article 3, see paragraphs 358-359 above.

1.11 Article 3.8

369. The Panel in *US – Softwood Lumber VI* examined the meaning of the requirement under Article 3.8 of the Anti-Dumping Agreement and Article 15.8 of the SCM Agreement to consider and decide the application of anti-dumping and countervailing duties in a threat of injury case with "special care". Based on dictionary definitions of "special" and "care", the Panel opined that "a degree of attention over and above that required of investigating authorities in all anti-dumping and countervailing duty injury cases is required in the context of cases involving threat of material injury."[480]

370. The Panel in *US – Softwood Lumber VI* further considered that, in spite of the fact that Article 3.8 and Article 15.8 provide that the application of a measure has to be considered with special care, the "special care" obligation applies "during the process of investigation and determination of threat of material injury, that is, in the establishment of whether the prerequisites for application of a measure exist, and not merely afterward when final decisions whether to apply a measure are taken".[481] Faced with the question of what is entailed by this obligation to act with an enhanced degree of attention, so as to demonstrate compliance with the "special care" obligation, the Panel made the following finding:

> "The Agreements require, as noted above, an objective evaluation based on positive evidence in making **any** injury determination, including one based on threat of material injury. Canada has not asserted any specific legal requirements with respect to special care – it has made no arguments as to what it considers might constitute the special care required by the Agreements in threat cases. It is not clear to us what the parameters of such 'special care' in the context of an objective evaluation based on positive evidence would be. In these circumstances, we consider it appropriate to consider alleged violations of Articles 3.8 and 15.8 only after consideration of the alleged violations of specific provisions. While we do not consider that a violation of the special care obligation **could** not be demonstrated in the absence of a violation of the more specific provision of the Agreements governing injury determinations, we believe such a demonstration would require additional or independent arguments concerning the asserted violation of the special care requirement beyond the arguments in support of the specific violations."[482]

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[479] Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, paras. 83-85.
[480] Panel Report, *US – Softwood Lumber VI*, para. 7.33.
[481] Panel Report, *US – Softwood Lumber VI*, para. 7.33
[482] Panel Report, *US - Softwood Lumber VI*, para. 7.34.

371. The Panel in *US – Coated Paper (Indonesia)* refused to find a violation of Article 3.8, which was based on the alleged violation by the USITC of other provisions of the Anti-Dumping Agreement in its threat of injury determination, also rejected by the Panel:

> "We have, in the preceding sections of this Report, found that Indonesia has failed to establish that the USITC's threat of injury determination is inconsistent with Articles 3.5 of the Anti-Dumping Agreement and 15.5 of the SCM Agreement or with Articles 3.7 of the Anti-Dumping Agreement and 15.7 of the SCM Agreement. In doing so, we rejected Indonesia's arguments challenging aspects of the USITC's determination that Indonesia considered were inconsistent with these provisions. Indonesia has not presented any different or additional arguments in support of its contention that the same alleged inconsistencies are also, independently, inconsistent with the 'special care' requirement in Articles 3.8 and 15.8. Thus, to the extent that Indonesia's claims under Articles 3.8 and 15.8 are premised on its claims of violation of the other provisions enumerated above, we find that Indonesia has failed to establish that the United States acted inconsistently with Articles 3.8 and 15.8."[483]

372. The Panel in *US – Coated Paper (Indonesia)* stressed that a threat of injury determination has to be made based on positive evidence and an objective analysis, and that the consistency of an investigating threat determination should be assessed on its own terms:

> "We agree that the Anti-Dumping and SCM Agreements require an investigating authority's threat of injury determination to be based on an objective analysis of positive evidence and to be consistent with the relevant obligations under the applicable provisions of Article 3 of the Anti-Dumping Agreement and Article 15 of the SCM Agreement, including Articles 3.5 and 15.5 and 3.7 and 15.7. Hence, the consistency of an investigating authority's threat of injury determination must be considered on its own terms, and not by comparison to the investigating authority's evaluation of the impact of dumped or subsidized imports on the domestic industry during the POI.[484] Thus, Indonesia's view that Articles 3.8 and 15.8 require that, in a given investigation, the investigating authority's threat of injury analysis be at least as 'robust' or 'rigorous' as its analysis of the situation of the domestic industry during the POI is without support in the text of the Agreements."[485]

373. The Panel in *US – Coated Paper (Indonesia)* found that the obligation in Article 3.8 applies not only to a Member's decision to apply duties after it has been decided that the substantive requirements for doing so have been met, but also to the substantive requirements governing a determination of threat of injury. The Panel found support for this view in Article 6.9 of the Agreement:

> "With respect to the scope of application of the 'special care' provision, we note that Articles 3.8 and 15.8 refer to the 'application' of measures, which shall be 'considered and decided' with special care. The use of the term 'application', combined with the use of the term 'decided', might, at first glance, suggest that the 'special care' obligation concerns a Member's decision to apply duties once it has determined that all the substantive requirements for doing so have been met. We recall, however, that the provisions of the covered agreements are to be interpreted in accordance with the ordinary meaning of their terms, read in context and in light of the object and purpose of the relevant agreements. Here, the context of both Articles 3.8 and 15.8 strongly suggests that they concern the *substantive requirements* for an investigating authority's determination of whether the domestic industry is threatened with material injury by subject imports. In our view, Articles 3.7 and 15.7, which immediately

[483] Panel Report, *US – Coated Paper (Indonesia)*, para. 7.325.

[484] *(footnote original)* Indonesia's position is also problematic in that it assumes that an investigating authority will, in all instances, make a fully analysed determination regarding both present injury and threat of injury. However, while an investigating authority considering the question of threat of injury would be expected to consider the present condition of the domestic industry in that context (see above, para. 7.231), we see no reason why that investigating authority would necessarily be required to consider all aspects required for a present injury determination. An investigating authority could, for instance, conclude that the domestic industry is not presently injured and may therefore go on to consider the question of threat of material injury without addressing the question of causation or non-attribution in the context of present (non)injury.

[485] Panel Report, *US – Coated Paper (Indonesia)*, para. 7.328.

> precede Articles 3.8 and 15.8, provide the most relevant context for their interpretation. The fact that the two sets of provisions apply to determinations of threat of injury and the placement of Articles 3.8 and 15.8 immediately following Articles 3.7 and 15.7 suggests that the 'special care' requirement relates to the obligations set out in those preceding provisions. In this respect, we agree with the United States that the negotiating history of Articles 3.8 and 15.8 suggests that the 'special care' requirement was originally linked to the nature of the information – predictions about the future – that authorities must rely on in making threat of injury determinations. The apparent reason for the inclusion of what became the 'special care' requirement supports our understanding that the obligation applies to an investigating authority's consideration of the substantive requirements for a determination of threat of injury. In addition, Articles 3.8 and 15.8 form part of, respectively, Article 3 of the Anti-Dumping Agreement and Article 15 of the SCM Agreement. The focus of these two Articles, both of which are entitled 'Determination of Injury', is 'on the *substantive* obligations that a Member must fulfil in making an injury determination'. The placement of the 'special care' language in Articles 3 and 15 thus suggests that, in line with all the other provisions of those Articles, the 'special care' provision concerns the substantive requirements for an investigating authority's determination of whether the domestic industry is threatened with material injury by subject imports. By contrast, disciplines on the procedural and evidentiary aspects of anti-dumping and countervailing duty investigations are found primarily in Article 6 of the Anti-Dumping Agreement and Article 12 of the SCM Agreement, and the imposition and collection of duties is addressed in Article 9 of the Anti-Dumping Agreement and Article 19 of the SCM Agreement.
>
> We find further support in Article 6.9 of the Anti-Dumping Agreement and Article 12.8 of the SCM Agreement for our view that Articles 3.8 and 15.8 concern an investigating authority's consideration of the substantive requirements for a determination of threat of injury. Articles 6.9 and 12.8 impose a procedural obligation to disclose the 'essential facts under consideration which form the basis *for the decision whether to apply definitive measures*'. This obligation applies to the facts underlying an authority's *substantive* consideration of the existence of dumping or subsidization, of injury, and of a causal link between the dumped or subsidized imports and the injury. The fact that Articles 6.9 and 12.8 are, like Articles 3.8 and 15.8, formulated in terms of the *decision to apply anti-dumping or countervailing measures* even though they apply to substantive requirements lends support to our view that Articles 3.8 and 15.8 concern the substantive requirements applicable in determining whether a threat of injury exists."[486]

374. The Panel in *US – Coated Paper (Indonesia)* stated that the special care requirement of Article 3.8 does not apply to the decision-making process under a Member's domestic investigative system:

> "In any event, even if the special care requirement could apply to something else than an investigating authority's consideration of the substantive requirements under Articles 3 and 15, we agree with the United States and the European Union that the Anti-Dumping and SCM Agreements generally do not discipline Members' voting procedures or the manner in which decisions to apply duties are made. There is nothing in either the Anti-Dumping or SCM Agreements concerning the structure or responsibilities of the decision-making for investigations beyond the statement in footnote 3 of the Anti-Dumping Agreement that the term 'authorities' used in the Agreement 'shall be interpreted as meaning authorities at an appropriate senior level'. Had the drafters intended for the Anti-Dumping and the SCM Agreements to subject to review the manner in which Members structure their investigating authorities and the manner in which decisions to apply duties are made, they would, we believe, have done so explicitly, particularly in view of the wide variety of ways in which Members have organized and structured their investigating authorities. We see no basis in the texts of the Anti-Dumping or SCM Agreements that would support Indonesia's

[486] Panel Report, *US – Coated Paper (Indonesia)*, paras. 7.343-7.344.

> argument that those Agreements impose procedural disciplines on how determinations are made."[487]

375. The Panel in *US – Coated Paper (Indonesia)* rejected Indonesia's argument that certain provisions regarding decision-making, found in the laws of certain Members and the Statutes of the International Court of Justice represent "circumstances surrounding the conclusion of a treaty" within the meaning of Article 32 of the Vienna Convention, or "subsequent practice" within the meaning of Article 31(3)(b) of the same Convention:

> "Finally, we note Indonesia's argument that the fact that the laws of certain other Members and the Statutes of the International Court of Justice provide for either an odd number of decision-makers or for the presiding member to have a deciding vote are 'circumstances surrounding the conclusion of a treaty' within the meaning of Article 32 of the Vienna Convention, which indicate that the special care requirement is generally perceived to entail a greater degree of diligence than that afforded by the US tie vote provision, thus showing that the provision is inconsistent with Articles 3.8 and 15.8. Indonesia fails to explain how other Members' procedures could properly be regarded as circumstances surrounding the conclusion of the Anti-Dumping and SCM Agreements in this regard, given that the conclusion of these Agreements preceded the adoption of at least some of those procedures; legislation enacted subsequent to the conclusion of a treaty cannot be considered 'circumstances of its conclusion'. Nor has Indonesia explained how tie-breaking provisions in other Members' trade remedy legislation could have been of relevance to, informed, or impacted, the negotiation of Articles 3.8 and 15.8, particularly as these Articles apply only in threat of injury determinations, and on their face have nothing to do with voting procedures.
>
> In its first written submission, Indonesia also argued that these same laws constituted 'subsequent practice' within the meaning of 'Article 31(1)(b) (sic)' of the Vienna Convention. Indonesia later asserted, in its opening statement at the second meeting with the Panel, that it had not invoked Article 31(3)(b) or sought to rely on the subsequent practice of Members. In light of Indonesia's repudiation of its own argument, it is unnecessary to address this question. Nonetheless, we again note that there is no obvious connection between the tie-breaking provisions in other Members' legislation and the special care provision, and that Indonesia refers to the practice of only a handful of WTO Members. Thus, Indonesia in any event failed to demonstrate 'a common, consistent, discernible pattern of acts or pronouncements' that 'imply *agreement* on the interpretation of the relevant provision'. Indonesia also refers to the fact that in safeguards cases, under US law, the US president (who determines whether a measure will be applied and if so what measure) may deem a tied vote by the USITC to be affirmative. However, Indonesia again fails explain the relevance of this decision-making procedure to the interpretation of Articles 3.8 and 15.8."[488]

1.12 Relationship with other provisions of the Anti-Dumping Agreement

1.12.1 Articles 1, 9 and 18

376. In *Guatemala – Cement II*, the Panel found that the Guatemalan anti-dumping duty order at issue was inconsistent with Article 3, and other articles of the Agreement. The Panel then opined that Mexico's claims under Article 1, 9, and 18 were "dependent claims, in the sense that they depend entirely on findings that Guatemala has violated other provisions of the *AD Agreement*."[489] Consequently the Panel considered it not necessary to address these claims.

1.12.2 Article 4

377. In *Mexico – Corn Syrup*, the Panel discussed the relationship between footnote 9 to Article 3 and Article 4.1. See paragraph 17 above.

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[487] Panel Report, *US – Coated Paper (Indonesia)*, para. 7.345.
[488] Panel Report, *US – Coated Paper (Indonesia)*, paras. 7.347-7.348.
[489] Panel Report, *Guatemala – Cement II*, para. 8.296.

378. In *EC – Fasteners (China),* the Panel agreed that "it is only possible to undertake an objective examination pursuant to Article 3.1 if the result of the objective examination is not prejudged by the way the domestic industry is defined."[490]

1.12.3 Article 5

379. The Panel in *Mexico – Corn Syrup* touched on the relationship between Articles 3.2 and 5.2. See the Section on Article 5 of the Anti-Dumping Agreement.

380. In *Guatemala – Cement II*, the Panel discussed the relationship between Article 3.7 and Articles 5.2 and 5.3. See the Section on Article 5 of the Anti-Dumping Agreement.

381. In *Thailand – H-Beams*, the Appellate Body referred to Articles 5.2 and 5.3, as well as to Articles 3.7, 6 and 12 in interpreting Article 3.1. See paragraph 32 above.

1.12.4 Article 6

382. In *Thailand – H-Beams*, the Appellate Body referred to Article 6 as well as Articles 3.7, 5.2, 5.3 and 12 in interpreting Article 3.1. See paragraph 32 above.

383. The Panel in *Morocco - Hot-Rolled Steel (Turkey)* discussed the relationship between Articles 6.5 and 6.5.1, and Article 3.1 of the Anti-Dumping Agreement. See the section on Article 6 of the Anti-Dumping Agreement.

1.12.5 Article 11

384. The Panel in *US – DRAMS* discussed the relationship between Articles 3.5 and 11.2. See the Section on Article 11 of the Anti-Dumping Agreement.

385. Further in *US – DRAMS*, the Panel discussed the relationship between footnote 9 to Article 3 and Article 11.2. See the Section on Article 11 of the Anti-Dumping Agreement.

386. In *US – Oil Country Tubular Goods Sunset Reviews,* the Appellate Body rejected the argument that a likely-hood-of-injury analysis under Article 11.3 requires an analysis of all the factors of Article 3. See below under Article 11.3.

1.12.6 Article 12

387. In *Thailand – H-Beams*, the Appellate Body referred to Article 12 as well as Articles 3.7, 5.2, 5.3 and 6 in interpreting Article 3.1. See paragraph 32 above.

388. The Panels on *EC – Bed Linen* and *Egypt – Steel Rebar* touched on the relationship between Articles 3.4 and 12.2. See the Section on Article 12 of the Anti-Dumping Agreement.

1.12.7 Article 17

389. The Appellate Body in *Thailand – H-Beams* compared the obligation set forth in Article 3.1 with those in Articles 17.5 and 17.6. See paragraph 33 above.

390. In *Mexico – Corn Syrup (Article 21.5 – US)*, the Appellate Body drew a line between the roles of investigating authorities and the panels as regards Article 3.7 threat of injury analysis. In doing so, the Appellate Body referred to Articles 17.5 and 17.6(i). See paragraph 365 above.

[490] Panel Report, *EC – Fasteners (China)*, para. 7.221.

1.13 Relationship with other WTO Agreements

1.13.1 Article VI of the GATT 1994

391. The Panel in *US – 1916 Act (EC)* explained its exercise of judicial economy with respect to Article 3 as follows:

> "Since we found above that the 1916 Act violated Article VI:I by not providing for an injury test compatible with the terms of that Article and since Article 3 simply addresses in more detail the requirement of 'material injury' contained in Article VI:1, we do not find it necessary to make specific findings under Article 3 and therefore exercise judicial economy, as we are entitled to do under GATT panel practice and WTO panel and Appellate Body practice."[491]

392. In *Guatemala – Cement II*, the Panel found that the subject anti-dumping duty order of Guatemala was inconsistent with several articles of the Anti-Dumping Agreement, among them Article 3. The Panel then determined that Mexico's claims under other articles of the Anti-Dumping Agreement and under Article VI of the GATT 1994 were "dependent claims, in the sense that they depend entirely on findings that Guatemala has violated other provisions of the *AD Agreement*."[492] In light of this dependent nature of Mexico's claim, the Panel considered it not necessary to address these claims.

1.13.2 Agreement on Safeguards

393. The Appellate Body in *US – Hot-Rolled Steel* supported its interpretation of the non-attribution language of Article 3.5 by referring to its decisions in two safeguards Reports, *US – Wheat Gluten* and *US – Lamb* where it interpreted the non-attribution language in Article 4.2(b) of the Agreement on Safeguards in a similar manner. See also the Panel Report in *Guatemala - Cement II*, paragraph 212 above.

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[491] Panel Report, *US – 1916 Act (EC)* para. 6.211; See also Panel Report, *US – 1916 Act (Japan)*, para. 6.254.

[492] Panel Report, *Guatemala – Cement II*, para. 8.296.