REPORT

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ICB-23

"INJURY AND CAUSALITY: FINDINGS IN RECENT PANEL AND APPELLATE BODY DETERMINATIONS; REGULATORY FRAMEWORK AND PRACTICE OF THE EUROPEAN UNION"

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INTRODUCTION

Activity ICB-23, entitled "Trade Defence Administration Capacity Building for VCA officials and business sector", requires the preparation of a report presenting and explaining the injury findings in recent panel and Appellate Body determinations. This report therefore concerns obligations contained in the WTO Anti-Dumping and Subsidies and Countervailing Measures (SCM) Agreements. The Vietnam Competition Authority (VCA) intends to use this report as a support material when conducting injury determinations. By taking into consideration the views expressed by panels and the Appellate Body, the determinations made by the Vietnamese investigating authority will be more solid and more difficult to attack in the WTO.

The report presents the key findings, in their context. For easy of use, it follows the format of the WTO Analytical Index. Thus, the investigating authority can use this report in parallel with the Analytical Index.

In addition, for each provision covered in this report, the regulatory framework[1] and recent EU practice is presented. Injury determinations in the context of original cases[2] and in one expiry (sunset) review[3] have been chosen to show the differences in the analyses between different types of investigations. References to Court[4]cases are presented too, where relevant.

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[1] The basic Anti-Dumping (Council Regulation 1225/2009 of December 2009) and Anti-Subsidy Regulations (Council Regulation 597/2009 of July 2009) contain provisions regulating injury determinations (Articles 3 and 8, respectively). The provisions are crafted along the lines of the WTO Anti-Dumping and SCM Agreements, as shown below. Since the provisions for both instruments are substantially identical, in the following reference will be made only to the basic Anti-Dumping Regulation.

[2] The two original cases examined in this report are as follows:

- "Cold-rolled flat products", whose determination is contained in the Regulation imposing a provisional anti-dumping duty on imports of stainless steel cold-rolled flat products, published in the OJEU L79/23 of 25 March 2015;
- "Acesulfame potassium", whose determination is contained in the Regulation imposing a provisional anti-dumping duty on imports of acesulfame potassium as well as acesulfame potassium contained in certain preparations and/or mixtures, published in the OJEU L125/15 of 21 May 2015.

[3] "Steel wires", whose determination is contained in the Regulation imposing a definitive anti-dumping duty on imports of certain pre- and post-stressing wires and wire strands of non-alloy steel (PSC wires and strands), published in the OJEU L139/12 of 5 June 2015.

[4] This includes judgements of the Court of Justice as well as of the General Court.

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ARTICLE 3 – INJURY DETERMINATION

The General Agreement on Tariffs and Trade (GATT) 1994 provides for the determination of whether the domestic industry experiences material dumping as a result of dumping. Article 3 is divided into 8 paragraphs. Each of these is described in detail below.

Article 3 is related to several other articles in the Anti-Dumping Agreement, as well as to the equivalent provision in the SCM Agreement (Article 15) and, to a lesser extent, to Article 4 of the Agreement on Safeguards. Over and above specific findings by the Appellate Body and panels in respect of the various paragraphs, a Panel has in general found that there is a direct link between Article 3 as a whole and Article 2.1 (definition of dumping):

> *…the fact that all imports are treated as 'dumped' for the purpose of determining injury in an original investigation under Article 3 might also be understood to provide support for the view that 'dumping' concerns the 'product as a whole'.*[5]

The panel hereby confirmed that it not only needs to be shown that the industry experienced material injury, but that such injury is as a result of the *dumped* imports.

In considering the link between Article 3 and Article 11.3 (dealing with sunset reviews), the panel in *EU – Footwear (China)* held that

> *In our view, a failure to examine relevant factors set out in the substantive provisions of Article 3 in the determination of likelihood of continuation or recurrence of injury could preclude an investigating authority from reaching a "reasoned conclusion", which would result in a violation of Article 11.3 of the AD Agreement. However, we recall that a determination of injury under Article 3 is not required under Article 11.3. Thus, we do not consider that all factors relevant to an injury determination under Article 3 are necessarily relevant to a determination of likelihood of continuation or recurrence of injury under Article 11.3.*[6]

[5] Panel Report, *US – Orange Juice,* par. 7.98.

[6] Panel Report, *EU – Footwear (China)*, para. 7.333.

ARTICLE 3.1 – VOLUME, PRICES AND CONSEQUENT IMPACT

The GATT 1994 provides

> *No contracting party shall levy any anti-dumping … duty on the importation of any product of the territory of another contracting party unless it determines that the effect of the dumping … is such as to cause or threaten material injury to an established domestic industry, or is such as to retard materially the establishment of a domestic industry.*[7]

Unlike "dumping", a term clearly defined both in Article VI of GATT[8] and in the Anti-Dumping Agreement,[9] "material injury" is not defined in either document. As regards material injury, Article 3.1 of the Anti-Dumping Agreement provides that a

> *… determination of injury … 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.*

This provision thus sets out two separate examinations that need to be undertaken: first, in respect of the volume of dumped imports and the effect thereof on price; and, second, the consequent impact of these imports on the domestic industry. However, it does not contain any obligations other than that to conduct an "objective examination" based on "positive evidence" and all other obligations are included in the specific requirements of Article 3.2 through 3.8.

Fifteen panel and Appellate Body reports have been published between 1 January 2011 and end of April 2015.[10] In seven of these disputes, claims related to determinations under Article 3.1 have been examined:

[7] Article VI.6 (a) of the GATT 1994.

[8] Article VI.1 of GATT.

[9] Article 2.1 of the Anti-Dumping Agreement.

[10] Technically, however, 19 cases have been examined and decided because, in two cases, more than one country had challenged a particular measure.

#	DS	Short Name	Addressed the issue?
1	382	*US — Orange Juice (Brazil)*	✗
2	397	*EC - Fasteners*	✓
3	402	*US — Zeroing (Korea)*	✗
4	404	*US — Shrimp (Viet Nam)*	✗
5	405	*EU — Footwear (China)*	✓
6	414	*China — GOES*	✓
7	422	*US — Shrimp and Saw blades*	✗
8	425	*China — X-Ray Equipment*	✓
9	427	*China — Broiler Products*	✓
10	429	*US — Shrimp II (Viet Nam)*	✗
11	436	*US — Carbon Steel (India)*	✗
12	437	*US — Countervailing Measures (China)*	✗
13	449	*US — Countervailing and Anti-Dumping Measures (China)*	✗
14	440	*China — Autos (US)*	✓
15	454/460	*China — HP-SSST (EU)* and *China — HP-SSST (Japan)*	✓

However, neither the Appellate Body nor any of the panels analysed Article 3.1 on its own in detail. The reason for this is that the Appellate Body has pointed out that Article 3.1 "is an overarching provision that sets forth a Member's fundamental substantive obligation" with respect to the injury determination, and "informs the more detailed obligations in succeeding paragraphs".[11] Thus, a violation of any of Articles 3.2, 3.3, 3.4, 3.5, 3.6, 3.7 or 3.8 would automatically also be a violation of Article 3.1. Article 3.1 also outlines the content of an injury determination, indicating as different components (a) the volume of dumped imports; (b) the effect of the dumped imports on domestic industry like product prices; and (c) the consequent impact of the dumped imports on domestic producers of the like product, with reference to a list of various injury factors.[12]

1. Choice of analytical methodology

The Appellate Body made a number of general statements to indicate that the positive evidence requirement in Article 3.1 is concerned with the nature of the evidence, rather than with procedural obligations:

[11] Appellate Body Report, *China – GOES*, para. 126 (footnote omitted).

[12] *Ibid.*, para. 127.

> *The focus of Article 3 is thus on **substantive** obligations that a Member must fulfil in making an injury determination…*
>
> *[T]he ordinary meaning of [positive evidence and objective examination] 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…*
>
> *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.*
>
> *Therefore, in our view, the European Union's complaint that MOFCOM failed to inform interested parties that it had modified certain data supplied by [the domestic industry] 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".*[13]

The panel therefore drew a clear distinction between the requirement to conduct an objective evaluation based on positive evidence and the steps to be taken to obtain, evaluate and explain such analysis. The Appellate Body also noted that

> *Article 3.1 requires that an injury determination be based on "positive evidence". Pursuant to Article 3.4, such "positive evidence" includes relevant economic factors and indices collected from the domestic industry, which have a bearing on the state of the industry. Naturally, the "positive evidence" to be used in an injury determination requires wide-ranging information concerning the relevant economic factors in order to ensure the accuracy of an investigation concerning the state of the industry and the injury it has suffered. Thus, "a major proportion of the total domestic production" should be determined so as to ensure that the domestic industry defined on this basis is capable of providing ample data that ensure an accurate injury analysis.*
>
> *Moreover, Article 3.1 requires that a determination of injury "involve an objective examination" of, inter alia, the impact of the dumped imports on domestic producers. The Appellate Body has found that an "objective examination" in accordance with Article 3.1 "requires that the domestic industry, and the effects of dumped imports, be investigated*

[13] Panel Report, *China – X-Ray Equipment* para. 7.146-7.147, quoting Appellate Body Report, *Thailand – H-Beams,* paras. 106, 107 and 110.

> *in an unbiased manner, without favouring the interests of any interested party, or group of interested parties, in the investigation". In other words, to ensure the accuracy of an injury determination, an investigating authority must not act so as to give rise to a material risk of distortion in defining the domestic industry, for example, by excluding a whole category of producers of the like product. The risk of introducing distortion will not arise when no producers are excluded and the domestic industry is defined as "the domestic producers as a whole". Where a domestic industry is defined as those producers whose collective output constitutes a major proportion of the total domestic production, it follows that the higher the proportion, the more producers will be included, and the less likely the injury determination conducted on this basis would be distorted. Therefore, the above interpretation is also consistent with the requirement under Article 3.1 that an injury determination be based on an objective examination of the impact of the dumped imports on domestic producers.*[14]

Other than as indicated above regarding an objective evaluation of positive evidence, Article 3.1 does not provide any guidance on *how* the injury investigation should be conducted. Thus, the Panel in *EU – Footwear (China)*, with respect to sampling of the domestic industry to determine injury, remarked that

> *It is clear that Article 3.1 does not contain any guidance on how an investigating authority is to select a sample for purposes of an injury determination. We see nothing in the text of that provision which can be read as establishing how an investigating authority is to obtain information from domestic producers…*[15]

Article 3.1 of the Anti-Dumping Agreement refers explicitly to the "effect" of the imports and requires that a determination of injury "be based on (…) the *effect* of the dumped imports on prices in the domestic market"[16]. Accordingly, Article 3.1 outlines “the content of such determination”. The Appellate Body noted that the other paragraphs under Article 3 merely elaborate on the three essential components referenced in Articles 3.1 and 3.2 and spell out the precise content of an investigating authority's consideration regarding the *effect* of such imports on domestic prices.[17] Accordingly, the Appellate Body considers that the focus

[14] Appellate Body Report, *EC – Fasteners* paras. 413-414 (footnote omitted).

[15] Panel Report, *EU – Footwear (China)*, par 7.358.

[16] Appellate Body Report, *China – GOES*, para. 126 (emphasis added).

[17] *Ibid.*, para. 127 (emphasis added).

of Article 3.1 on price *effects* colours the whole of Article 3.2. It quoted with approval from its earlier finding in *Thailand – H-beams* that Article 3.1 "is an overarching provision that sets forth a Member's fundamental, substantive obligation" with respect to the injury determination, and "informs the more detailed obligations in succeeding paragraphs".[18] The Appellate Body further analysed the meaning of "positive evidence" and found that it "relates to the quality of the evidence that an investigating authority may rely upon in making a determination, and requires the evidence to be affirmative, objective, verifiable, and credible", [19] while the term "objective examination" requires that an investigating authority's examination "conform to the dictates of the basic principles of good faith and fundamental fairness", and be conducted "in an unbiased manner, without favouring the interests of any interested party, or group of interested parties, in the investigation".[20]

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

[18] Appellate Body Report, *Thailand – H-Beams*, para. 106.

[19] *Ibid.*, para. 192.

[20] *Ibid.*, para. 193.

> *15.2 should be consistent with the role these provisions play in the overall framework of an injury determination under Articles 3 and 15.*[21]

Finally, the Appellate Body held that it had to determine

> *whether the quality of the evidence relied on by [the investigating authority] met the "positive evidence" standard set forth in Article 3.1 of the Anti-Dumping Agreement and Article 15.1 of the SCM Agreement. In this regard, we recall that in US – Hot Rolled Steel, the Appellate Body clarified that "positive evidence" relates to the quality of the evidence that authorities may rely upon in making a determination, and that the evidence "must be of an affirmative, objective and verifiable character, and it must be credible".*[22]

In *China – X-Ray Equipment*, the panel quoted the same section from the Appellate Body's finding in *US – Hot-rolled steel* and further noted, with reference to the Appellate Body's finding in *Mexico – Anti-Dumping Measures on Rice*, that

> *The Appellate Body has also agreed that "positive evidence" refers to "evidence that is relevant and pertinent with respect to the issue being decided, and that has the characteristics of being inherently reliable and trustworthy".*[23]

In the most recent dispute, the panel in *China – HP-SSST* confirmed that Article 3.1 "sets forth an overarching requirement that a determination of injury shall involve inter alia an objective examination of 'the effect of the dumped imports on prices in the domestic market for like products'."[24] It also noted that

> *Given the overarching requirements of Article 3.1, an investigating authority's price effects analysis must involve an "objective examination", and must be based on "positive evidence". This means inter alia that, whenever an investigating authority's consideration of the price effects of imports involves a comparison between imported and*

[21] Appellate Body Report, *China – GOES* paras. 7.126-128 (footnotes omitted).

[22] Panel Report, *China – GOES* para. 7.513.

[23] Panel Report, *China – X-ray equipment* para. 7.32.

[24] Panel Report, *China – HP-SSST*, para. 7.122.

> *domestic prices, the authority must ensure that such prices are comparable.*[25]

In *EU – Footwear (China)* the panel indicated that investigating authorities enjoy wide discretion in conducting an injury analysis:

> *It is clear to us, as a number of previous panels and the Appellate Body have found, that Article 3.1 of the AD Agreement does not prescribe a specific methodology that must be followed by an investigating authority in the conduct of its injury analysis.*[728] *As a result, investigating authorities enjoy a certain degree of discretion in the methodologies used in making an injury determination.*[729] *However, investigating authorities do not have unfettered discretion to pick and choose any methodology they see fit, as whatever methodology is used by an investigating authority, the resulting determination of injury must be based on "positive evidence" and an "objective examination" of the volume and effects of dumped imports.*[730]
>
> *In our view, the same rationale applies to the use of a sample for purposes of the injury determination. It is clear that Article 3.1 does not contain any guidance on how an investigating authority is to select a sample for purposes of an injury determination. We see nothing in the text of that provision which can be read as establishing how an investigating authority is to obtain information from domestic producers for the purposes of selecting a sample, how a sample is to be selected, or criteria for judging the sample selected.*[26]

[728] *Appellate Body Report, Mexico – Anti-Dumping Measures on Rice, para. 204; and Panel Report, EC – Salmon (Norway), paras. 7.128-7.129.*
[729] *Appellate Body Reports, EC – Bed Linen (Article 21.5 – India), para. 113; and Mexico – Anti-Dumping Measures on Rice, para. 204.*

The panel also found that 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.[27] Accordingly, the panel found that "the only obligation … with respect to sampling in the

[25] Panel Report, *China – HP-SSST*, para. 7.113.

[26] Panel Report, *EU – Footwear (China),* para. 7.357-7.358.

[27] *Ibid.,* para. 7.368. See also Appellate Body Report, *US – Hot-rolled steel*, para.193; Panel Report, *EC – Salmon (Norway)*, para. 7.130.

context of injury determinations is that the sample selected must be 'sufficiently representative of the domestic industry".”[28]

2. Interaction with other Articles and Agreements

As indicated above, Article 3.1 of the Anti-Dumping Agreement is inextricably linked with all other provisions of Article 3. Thus, for example, the panel in *China – HP-SSST* discussed the application of Article 3.1 with direct reference to the analysis conducted under Article 3.2[29] as follows:

> *We note the complainants' argument that Article 3.1 refers to "the effect of the dumped imports on prices in the domestic market for like products". According to them, the use of the definite article "the" in conjunction with "domestic market for like products" is necessarily a reference to the entire domestic market and therefore the like product as a whole. We disagree. We see nothing in Article 3.1 to suggest that the existence of price undercutting must be considered in respect of the entire range of the like product in the domestic market of the importing Member. Rather, Article 3.1 admits of an interpretation whereby an authority considers the effect of subject import prices on prices for certain goods within the like product in the domestic market. The reference to "the" domestic market simply means that prices in the domestic market should be used, rather than those in any other market. We note in this context that there can be one domestic like product, or more than one domestic like product, corresponding to the imports subject to an anti-dumping investigation. Thus, while the text leaves open the possibility of more than one like product, it does not, in our view, establish that price undercutting must be found with respect to the entire range of goods making up the domestic like product(s).*[30]

The same panel also conducted a combined analysis of Articles 3.1 and 3.4.[31] Likewise, the panel in *China – HP-SSST* held that "Article 3.4 implements the requirement in Article 3.1 pertaining to "the consequent impact" of dumped imports on the domestic industry".[32]

The panel in *EC – Tube or Pipe Fittings* held that the "overarching obligation in Article 3.1 applies also to the determination made in Article 3.3, requiring an

[28] Panel Report, *EU – Footwear (China)* para. 7.368.

[29] See the discussion in Panel Report, *China – HP-SSST*, para. 7.105 et seq.

[30] Panel Report, *China – HP-SSST*, para. 7.141 (footnotes omitted).

[31] *Ibid.*, paras. 7.145 *et seq.*

[32] *Ibid.*, para. 7.163.

investigating authority to base its determination of appropriateness to cumulate on an 'objective examination' of 'positive evidence'."[33]

However, Article 3.1 is also linked with a number of other provisions.

2.1. *Interaction between Article 3.1 and Article 2.1*

It has to be determined whether "dumping" has caused material injury. Accordingly, the panel in *US – Orange Juice* drew a direct link between the dumping, as determined under Article 2.1 of the Anti-Dumping Agreement, and material injury.

2.2. *Interaction between Article 3.1 and Article 4.1*

Article 4.1 of the Anti-Dumping Agreement sets forth the definition for the domestic industry for purposes of the Agreement, either as the domestic producers as a whole or those of them whose collective output represents a major proportion of total domestic production. Investigating authorities may exclude producers that might otherwise fall within the definition, if they fall within one of the two listed exceptions. The domestic industry defined under those provisions forms the basis of an investigating authority's injury determination which is governed by Article 3.1. Thus the two provisions are inextricably linked.[34]

The Appellate Body explained the relationship between the definition of the domestic industry in Article 4.1 and the obligation to base injury determinations on an "objective examination" in *EC – Fasteners (China)*. In particular, the Appellate Body clarified that to ensure the accuracy of an injury determination, an investigating authority must not act so as to give rise to a material risk of distortion in defining the domestic industry, for example, by excluding a whole category of producers of the like product.[35]

The panel in *China – Autos* confirmed that "it is clear that the 'domestic industry' as defined under Articles 4.1 of the Anti-Dumping Agreement and 16.1 of the SCM Agreement will form the basis of the injury determination, which must be made consistently with Articles 3 and 15, respectively."[36] It also quoted with approval the following passages from the panel report in *EC – Salmon (Norway)*:

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[33] Panel Report, *EC – Tube or Pipe Fittings*, para. 7.243.

[34] Panel Report, *China – Broiler Products*, para. 7.408.

[35] Appellate Body Report, *EC – Fasteners (China)*, para. 414.

[36] Panel Report, *China – Autos*, para. 7.208.

> *If the EC's approach to defining domestic industry in this case resulted in an investigation concerning a domestic industry that did not comport with the definition set forth in Article 4.1, then it seems clear to us the EC analyzed the wrong industry in determining the adequacy of support for the initiation of the investigation under Article 5.4 of the AD Agreement, and in considering injury and causation under Article 3, committing an error which is potentially fatal to the WTO-consistency of the investigating authority's determinations on those issues.*[37]

> *… the EC's approach to defining the domestic industry in this case resulted in an investigation concerning a domestic industry that did not comport with the definition set forth in Article 4.1 of the AD Agreement. As a consequence, the EC's determination of support for the application under Article 5.4 was based on information relating to a wrongly-defined industry, and is therefore not consistent with the requirements of that Article. Furthermore, the EC's analyses of injury and causation were based on information relating to a wrongly-defined industry, and are therefore necessarily not consistent with the requirements of Articles 3.1, 3.4, and 3.5.*[38]

The panel in *China – Autos* agreed with this approach, indicating that "a wrongly-defined domestic industry necessarily leads to an injury determination that is inconsistent with the Agreements."[39]

2.3. *Interaction between Article 3.1 and Articles 6 and 12*

Article 6 of the Anti-Dumping Agreement deals with the issue of evidence in investigations, while Article 12 deals with the requirement to properly explain any findings in public notices or reports. The Appellate Body has found that the question whether there has been an objective investigation is removed from the question whether it properly explained its findings.

> *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*

[37] Panel Report, *EC- Norway (Salmon)*, par 7.118.

[38] *Ibid.*, par 7.124.

[39] Panel Report, *China – Autos*, para. 7.210.

> *of the reasoning or method by which the investigating authority derived the evidence.*[40]

2.4. *Interaction between Article 3.1 and Article 6.8*

Article 6.8 of the Anti-Dumping Agreement deals with the application of facts available in instances where an interested party did not cooperate fully or failed to provide relevant information. This is generally applied to the determination of the margin of dumping. The panel in *EC – Footwear (China)* held that the obligations in Article 6.8 did not extend to injury determinations:

> *We fail to see how the Article 3.1 obligation to undertake an objective evaluation of positive evidence can be interpreted as requiring an investigating authority to use facts available, particularly where the prerequisite conditions of Article 6.8 are not satisfied. Indeed, it seems to us that an investigating authority which receives information that is erroneous and then works with the provider to correct that information is in fact making an effort to ensure that its determination is based on an objective examination of positive evidence.*[41]

> *Even assuming there were a practice with respect to use of facts available with respect to exporters, as asserted by China, we do not agree that not applying the identical practice to domestic producers demonstrates a violation of either Article 6.8 or Article 3.1.*[42]

2.5. *Interaction between Article 3.1 and SCM Agreement*

The provisions in Article 15 of the SCM Agreement are *mutatis mutandis* identical to those in Article 3 of the Anti-Dumping Agreement. Accordingly, there is a direct link between injury determinations under Art 15.1 of the SCM Agreement and those under Article 3.1 of the Anti-Dumping Agreement.

2.6. *Interaction between Article 3.1 and Safeguards Agreement*

Whereas the Anti-Dumping Agreement requires the determination of *material* injury to a domestic industry producing the *like product*, Article 4 of the Safeguards Agreement requires the determination of *serious* injury to the domestic industry producing *the like or directly competitive product*. Although both Agreements require the determination of injury and a link between the imports and the injury, there are clear differences in what the injury entails and

[40] Panel Report, *China – X-ray equipment* para. 7.146.

[41] Panel Report, *EU – Footwear (China)*, par 7.817.

[42] *Ibid.*, par 7.818.

how it is to be determined. Accordingly, the link between Article 3.1 and the Safeguards Agreement is quite weak.

3. EU's regulatory framework and practice

Articles 3.1 and 15.1 of the Anti-Dumping and SCM Agreements have been transposed almost verbatim in the EU Regulations. As an example, the relevant text of Article 3 of the basic Anti-Dumping Regulation is presented below:

> *(1) Pursuant to this Regulation, the term 'injury' shall, unless otherwise specified, be taken to mean material injury to the Community industry, threat of material injury to the Community industry or material retardation of the establishment of such an industry and shall be interpreted in accordance with the provisions of this Article.*
>
> *(2) A determination of injury shall be based on positive evidence and shall involve an objective examination of both:*
>
> *a. the volume of the dumped imports and the effect of the dumped imports on prices in the Community market for like products; and*
>
> *b. the consequent impact of those imports on the Community industry.*

Article 3(1) is a definitional provision, which incorporates the text of footnote 9 of the WTO Anti-Dumping Agreement. Most injury determinations in the EU are based on the existence of material injury. A few cases are based on threat of material injury. (see for instance certain seamless tubes and tubes of iron or steel from China) There are no recent cases in which injury has been based on retardation of the establishmentof a Community industry.

Article 3(2) sets forth various obligations. In its chapeau, it requires that an injury determination be based on positive evidence and involve an objective determination. In paras. a. and b.,it indicates the substantive content of any injury determination. Paras. a. and b. cannot be seen alone. Article 3(3) develops para. 3(2) a. In turn, Article 3(5) develops para. 3(2) b.

References to Articles 3(1) and 3(2) are occasionally made in the context of injury determinations. However due to their nature, discussion of their content seldom happens in the context of investigations.[43]

[43] By contrast, Article 3(3) and 3(5), both of which develop Article 3(2), are frequently argued. References to findings will be included later in this report.

It should be noted that parts of Article 3 are applicable in the context of expiry reviews. For instance, in the *Steel wires* expiry review, when examining the situation of the domestic industry during the period of investigation, reference is made to Article 3(5).[44] The factors assessed are the same as in original investigations.[45] A conclusion on injury, taking into consideration the findings for each of the economic factors and indices, is formulated. In addition, in case of expiry reviews, determinations include an analysis on the likelihood of (continuation or) recurrence of injury.[46]The factors that are considered in this part of the analysis vary from review to review. However, often the projected volume of imports from the country subject to the review as well as price effects in case of repeal of the anti-dumping measures are part of the assessment. This is for instance the case in the *Steel wires* determination.

The European Courtshave examined Article 3(2) in various occasions. Since often the examination is done in conjunction with Article 3(3) or 3(5), relevant findings will be presented below.

[44] It is stated "In accordance with Article 3(5) of the basic Regulation, the Commission examined all economic factors and indices having a bearing on the state of the Union industry."

[45] Namely, volume and market share as well as prices of imports from the country(ies) concerned; import volume and market share of other third countries; and economic situation of the domestic industry as shown by information on production, production capacity, capacity utilisation, sales volume, market share, growth, employment, productivity, prices, factors affecting prices, labour costs, inventories, profitability, cash flow, return on investments, ability to raise capital, magnitude of the dumping margin and recovery from past dumping.

[46] See e.g. paras. 101-109 of the Steel wires determination.

ARTICLE 3.2 – VOLUME AND PRICE EFFECTS

Article 3.2 of the Anti-Dumping Agreement (and its equivalent, Article 15.2 of the SCM Agreement) requires investigating authorities to *consider* the existence of a significant increase in dumped (subsidised) imports and the effect of those dumped (subsidised) imports on prices of the domestic industry. The increase of dumped (subsidised) imports may be measured either in absolute terms or relative to production or consumption in the importing Member.

In regard to prices, Article 3.2 states that investigating authorities must consider whether:

- there has been a significant price undercutting by the dumped (subsidised) imports; or
- the effect of such imports is otherwise to depress prices to a significant degree; or
- the effect of the dumped (subsidised) imports is to prevent price increases, which otherwise would have occurred, to a significant degree.

Fifteen panel and Appellate Body reports have been published between 1 January 2011 and end of April 2015.[47] In six disputes, claims related to determinations under Article 3.2 have been examined:

#	DS	Short Name	Addressed the issue?
1	382	*US — Orange Juice (Brazil)*	✗
2	397	*EC – Fasteners*	✗
3	402	*US — Zeroing (Korea)*	✗
4	404	*US — Shrimp (Viet Nam)*	✗
5	405	*EU — Footwear (China)*	✓
6	414	*China — GOES*	✓
7	422	*US — Shrimp and Saw blades*	✗
8	425	*China — X-Ray Equipment*	✓
9	427	*China — Broiler Products*	✓
10	429	*US — Shrimp II (Viet Nam)*	✗
11	436	*US — Carbon Steel (India)*	✗
12	437	*US — Countervailing Measures (China)*	✗
13	449	*US — Countervailing and Anti-Dumping Measures (China)*	✗

[47] Technically, however, 19 cases have been examined and decided because, in two cases, more than one country had challenged a particular measure.

14	440	*China — Autos (US)*	✓
15	454/460	*China — HP-SSST (EU)* and *China — HP-SSST (Japan)*	✓

1. Choice of analytical methodology

In the case *EU — Footwear (China),* China claimed that the European Union failed to adequately examine the volume of imports under Articles 3.1 and 3.2. While the EU noted the acceleration of imports due to developments with respect to Chinese imports, it failed to conduct "an in-depth" examination of the volume of imports and determine which volume of imports could be considered in line with expectations and which volume was due to the lifting of the quota. The panel rejected China's claim saying that:

> *Article 3.1 requires an objective examination of the volume of dumped imports, while Article 3.2 specifies that, "[w]ith regard to the volume of 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."* ***Neither provision contains any guidance as to how an investigating authority is to examine the volume of dumped imports, or consider whether they have increased.*** *We certainly see nothing in those provisions that would require consideration of whether the lifting of a quota caused dumped imports to increase. In our view, nothing in Articles 3.1 and 3.2 suggests that an "in-depth" analysis, such as proposed by China, of the reasons underlying changes in the volume of dumped imports is required. Indeed, we fail to see the relevance of the reasons for a significant increase in dumped imports to the investigating authority's examination and consideration under Articles 3.1, 3.2 or 3.4 at all.*[48] *[emphasis added]*

As previous panels, this one reminded that Article 3.2 does not provide any type of methodology on how to analyse the behaviour of dumped imports. The view was repeated by the same panel when addressing a separate claim regarding price considerations:

> *However, again, nothing in Article 3.2 prescribes a particular methodology for the considerations that the investigating authority must undertake, including consideration of whether there has been "significant price undercutting". China's arguments with respect to Article 3.2 simply assert a conceptual similarity between "price undercutting" referred to in Article 3.2, and the notion of "price*

[48] Panel Report, *EU — Footwear (China),* para. 7.462.

> *underselling" in the European Union's calculation of the lesser duty to be applied. Even assuming that the two are similar concepts, we fail to see how this can establish that, in considering the question of price underselling, the European Union is required to comply with Article 3.2, which as noted,* ***establishes no specific guidelines for the consideration of price undercutting****.*[49] *[emphasis added]*

Neither of these determinations was examined by the Appellate Body. Whereas the panel may be correct in its interpretation of the level and intensity of obligations in the Anti-Dumping Agreement, an earlier Appellate Body's finding should not be forgotten:

> *Paragraphs 1 and 2 of Article 3 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" ofdumped imports*** *— rather than imports that are found not to be dumped —* ***it is not consistent with paragraphs 1 and 2 of Article 3****. …*
>
> *… The approach taken by the European Communities in determining the volume of dumped imports* ***was not based on an "objective examination". The examination was not "objective" because its result is predetermined by the methodology itself****. …*
>
> *… For these reasons, we conclude that the European Communities' determination that all imports attributable to non-examined producers were dumped … did not lead to a result that was* ***unbiased, even-handed, and fair****.*[50] *[emphasis added]*

An investigating authority must therefore never lose sight of the fact that the general requirements of Article 3.1 of the Anti-Dumping Agreement are applicable to Article 3.2 analyses and determinations. Because of this, and in spite of Article 3.2 silence regarding methodological approaches, evidence and analyses must meet the threshold obligations of Article 3.1 – in particular involve an objective examination on the part of the investigating authority – in

[49] Panel Report, *EU — Footwear (China),* para. 7.929.

[50] Appellate Body Report, *EC — Bed Linen (Article 21.5 — India)*, paras. 113, 132 and 133.

order to ensure a panel finding that the determination was unbiased, even-handed and fair.

In conclusion, an investigating authority should consider carefully any evidence it has been provided specifically for the purpose of the analyses to be conducted under Article 3.2, as well as any other evidence on record which is evidently related to those analyses, and evaluate it in an objective manner. The methodological issue comes in here. The evaluation will require adopting a methodological approach, which may – or may not be accepted – by each interested party. Since Article 3.2 does not establish any methodological approach, in choosing its methodological approach, the investigating authority must likewise conduct an objective examination. Otherwise, this decision will taint the ultimate determination. For this reason, it is essential that the investigating authority fully explains and justifies in its determination the methodological choice.

2. The effect of the dumped imports on prices

Previous panels have analysed important aspects relating to the implementation of this provision of the Anti-Dumping Agreements. For instance, in *EC – Countervailing Measures on DRAM Chips*, the panel found that the Agreement only requires the consideration of the effect of the dumped imports on prices; thus rejecting Korea's contention that for a positive injury finding an investigating authority should determine that dumped imports had an effect on domestic industry prices. The Appellate Body in confirmed this view:

> *… in Article 3.2 of the* Anti-Dumping Agreement *and Article 15.2 of the* SCM Agreement*, an investigating authority is instructed to "consider" a series of specific inquiries. …*
>
> *The notion of the word "consider", when cast as an obligation upon a decision maker, is to oblige it to* take something into account *in reaching its decision. 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.*[217] *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. … 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.*[51] *[emphasis added]*

More recently, the panel *China — GOES* has dealt with this part of Article 3.2, finding that:

> *… the analysis envisaged by the second sentence of Article 3.2 of the Anti-Dumping Agreement and Article 15.2 of the SCM Agreement concerns "**the effect of the [dumped/subsidized] imports on prices**." Furthermore, the authority must **consider** whether "the effect of [dumped/subsidized] imports is … to depress prices to a significant degree". Accordingly, **merely showing the existence of significant price depression does not suffice for the purposes of Article 3.2 of the Anti-Dumping Agreement and Article 15.2 of the SCM Agreement. An authority must also show that such price depression is an effect of the subject imports**.*[52] *[emphasis added]*

Examining an appeal against the above determination, the Appellate Body said that:

> *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***

[51] Appellate Body Report, *China — GOES,* paras. 129-131 and footnote 217.

[52] Panel Report, *China — GOES,* para. 7.520.

> ***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.*[53] *[emphasis added]*

Thus, in the view of this panel, an investigating authority must carefully assess whether subject imports have "explanatory force" for certain specified consequences, that is, the significant depression or suppression of domestic prices.

3. Price Analysis

An investigating authority must analyse whether there is price undercutting, suppression or depression. In a recent dispute, the Appellate Body explained what the later two concepts mean:

> *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".* [231] *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.*[54]

Article 3.2 requires indeed not only a mere presentation of data, but a reasonable judgment about the interaction among the relevant elements of the determination. In *China – Autos (US)*, the panel said

> *…where an IA relies on both subject import prices and volumes in its price effects analysis but provides no explanation or reasoning as to whether or how the prices and volumes of subject imports interacted to produce an effect on domestic prices, a panel may find itself unable to disentangle the relative contribution of these price and volume effects in the IA's final determination, without risking that it substitute its*

[53] Appellate Body Report, *China — GOES,* para. 138.

[54] *Ibid.,* para. 141.

> *judgment for that of the IA.* [428] *As we are similarly unable to disentangle the relative contributions of MOFCOM's findings on import volumes from its findings on parallel pricing and market share gains, we find that we cannot uphold MOFCOM's price depression determination on the basis of its findings on subject import volumes alone.*[55]

A flaw finding at this stage will taint the causation analysis too, as acknowledged by the panel in *China — X-Ray Equipment*:

> *… 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.*[56]

3.1. *Price comparability*

The current view on the requirement imposed by Article 3.2 of the Anti-Dumping Agreement is that:

> *… neither Article 3.2 of the Anti-Dumping Agreement nor Article 15.2 of the SCM Agreement explicitly require an IA to ensure price comparability between subject imports and the domestic like product when considering price effects. Nevertheless,* ***the duty of an IA to conduct an objective examination based on positive evidence pursuant to Article 3.1 of the Anti- Dumping Agreement and Article 15.1 of the SCM Agreement would, in our view, generally require an IA to comparelike with like in comparing prices****. Indeed, this was the conclusion of both the panel and the Appellate Body in China – GOES.*[57] *[emphasis added]*

The panel in *China — Autos* went on stating that

> *The Appellate Body's findings in China – GOES, a case involving consideration of price undercutting in the context of a determination of price depression and price suppression, support our view* ***that the***

[55] Panel Report, *China — Autos,* para. 7.266.

[56] Panel Report, *China — X-Ray Equipment,* para. 7.239.

[57] Panel Report, *China — Autos,* para. 7.256.

> ***need to consider comparable prices in order to undertake an objective examination of positive evidence is not limited to cases in which a comparison of actual prices is undertaken, but applies to the consideration of price effects in general***. [438] *We thus find that the IA's obligation to ensure price comparability between subject imports and the domestic like product is not affected by the type of price effects being considered or found to affect domestic industry prices. In our view, this obligation arises whenever an IA examines price effects within the meaning of Article 3.2 of the Anti-Dumping Agreement and Article 15.2 of the SCM Agreement.*[58] *[emphasis added]*

3.2. *Price undercutting*

In order to confirm the existence or not of any price undercutting the authority will have to engage in a price comparability exercise. This exercise shall take into consideration all differences between products in order to assure that any finding be objective. The panel in *China — GOES* stated:

> *In our view, a proper finding of the existence of price undercutting necessarily entails a comparison of prices, and the authority should ensure that the prices it is using for its comparison are properly comparable. As soon as price comparisons are made, price comparability necessarily arises as an issue. MOFCOM's reliance on AUVs,* ***without any consideration of the need for adjustments to ensure price comparability, is neither objective, nor based on positive evidence****.*[59] *[emphasis added]*

The above view has been accepted by other panes such as the one examining the *China — Broiler Products*:

> *Nonetheless, Articles 3.2 and 15.2 require the investigating authority to consider "whether there has been a significant price undercutting by the [dumped or subsidized] imports as compared with the price of a like product of the importing Member".* ***There can be no question that the prices being compared must correspond to products and transactions that are comparable if they are to provide any reliable indication of the existence and extent of price undercutting*** *by the dumped or subsidized imports as compared with the price of the domestic like product, which may then be relied upon in assessing*

[58] Panel Report, *China — Autos,* para. 7.277.

[59] Panel Report, *China — GOES,* para. 7.530.

> *causality between subject imports and the injury to the domestic industry.*[60] *[emphasis added]*

Ensuring price comparability is a duty imposed on the investigating authority. Citing previous reports of the Appellate Body, the panel in *China — Broiler Products* said:

> *7.478. … the obligations under Articles 3.1 and 3.2 "must be met by every investigating authority in every injury determination", meaning that the requirement to ensure price comparability does not depend on the respondents having raised the issue before the investigating authorities.*
>
> *7.479. These decisions stand for the proposition that price comparability needs to be examined any time that a price comparison is performed in the context of a price undercutting analysis, yet also recognize that the need for adjustments necessarily depends on the factual circumstances of the case and the evidence before the authority…*[61]

Thus, an objective and impartial investigating authority must first adjust prices, before attempting to determine if subject imports were priced lower than domestic products. The panel on *China — Broiler Products* recognized[62] that several factors determine the sales price in a given transaction, and that, consequently, price comparability has to be ensured in terms of the various features of the products and transactions being compared. In particular, the sales price of a product reflects the commercial transactions and circumstances in which the product is traded. For instance, the components of sales price start with an amount that represents the cost of production and sale of the product, to which is added an amount for profit. Depending on the particular realities of the relevant market, additional pricing elements may be charged, such as additional costs and profit for each of the successive participant in the distribution chain. The price will normally increase as the product gets traded further down the distribution chain, from producer to wholesaler, from wholesale to retailer, and from retailer to end-user:

> *Hence, the level of trade at which a transaction takes place – whether the sale takes place between a producer and a wholesaler or between a wholesaler and a retailer for example – is an important characteristic*

[60] Panel Report, *China — Broiler Products,* para. 7.475.

[61] *Ibid.,* para. 7.478 – 7.479.

[62] *Ibid.,* para. 7.480.

> *of a transaction as it determines which pricing components are included in the sales price. In our view,* ***for a price comparison to be informative of the level of price undercutting by subject imports, it must compare transactions that include the same pricing components*** *(insofar as pricing components have an impact on the price).* ***This means that it must compare transactions at the same level of trade.Alternatively, if the transactions are at different levels of trade, the authority must apply appropriate adjustments to render them comparable in terms of the pricing components that they include****.*[63] *[emphasis added]*

The panel then assessed whether a comparison of a CIF-import level price with the ex works price of the domestic industry is consistent with Article 3.2:

> *…the Panel is of the view that a c.i.f. price to which appropriate adjustments are made to reflect the price paid by the first purchaser in the country of import (i.e. the importer) is comparable to an ex works price to the first purchaser in the importing country. Both prices are situated at the first point at which a purchaser may take delivery of the product in the country of importation and both contain pricing elements that reflect the first point in the distribution chain where imported and like domestic products enter into competition. Expressed differently, they are the prices upon which the "first" purchaser in the country of import will base its purchasing decision to either import directly or to buy directly from domestic producers. For these reasons, we are of the view that the two prices are, in principle, at the same level of trade.*[64]

The panel went on analysing how an investigating authority should address differences in physical characteristics:

> ***Another fundamental determining factor of the price is the physical characteristics of the product****. Articles 3.1/15.1 and 3.2/15.2 mandate an analysis of the effects of prices on the domestic market of the "like product". Yet, in our view, ensuring that the products being compared are "like products" will not always suffice to ensure price comparability.* ***Where the products under investigation are not homogenous, and where various models command significantly different prices, the investigating authority must ensure that the product compared on both sides of the comparison are sufficiently similar such that the resulting price difference is informative of the "price undercutting", if any, by the imported***

[63] Panel Report, *China — Broiler Products,* para. 7.481.

[64] *Ibid.,* para. 7.486.

> ***products**. For this reason, **for the price undercutting analysis to comply with Articles 3.1/15.1 and 3.2/15.2 may well require the investigating authority to perform its price comparison at the level of product models**. In a situation in which it performs a price comparison on the basis of a "basket" of products or sales transactions, **the authority must ensure that the groups of products or transactions compared on both sides of the equation are sufficiently similar so that any price differential can reasonably be said to result from "price undercutting" and not merely from differences in the composition of the two baskets being compared. Alternatively, the authority must make adjustments to control and adjust for relevant differences in the physical or other characteristics of the product**.[65] [emphasis added]*

3.3. *Price suppression*

Article 3.2 of the Anti-Dumping Agreement and Article 15.2 of the SCM Agreement do not prescribe the manner in which an investigating authority must establish the existence of price suppression. However these provisions do not exclude an investigating authority's reliance on changes in per unit price-cost ratios. In the light of the text of these provisions, the panel in *China — GOES* considered that an authority is entitled to find price suppression whenever prices have not been able to match increases in costs.[66]

In *China — X-Ray Equipment*, the panel found that the investigating authority failed to conduct an objective examination of the evidence because it limited itself to establishing a mere difference in prices between the dumped imported products and the domestic prices. The conclusion of the panel was that a mere difference in prices is not sufficient. In order to comply with the letter of Article 3.2, the authority must establish that the effect (price suppression) is linked to the dumped imports. Inconsistencies with other parts of the analysis may undermine the determination of price effects:

> *…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*

[65] Panel Report, *China — Broiler Products,* para. 7.483.

[66] Panel Report, *China — GOES,* para. 7.546.

> *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...*[67]

In the dispute at stake, inconsistencies found ultimately also led the panel to conclude that the causality determination was also in breach of Article 3.5:

> *Consequently, there is nothing in the Final Determination that would allow the Panel to conclude that either the price or the volume of dumped imports alone could sustain MOFCOM's findings on price effects under Article 3.2 or its consequent finding on causation under Article 3.5. In these circumstances, the Panel considers that MOFCOM's findings regarding the prices of subject imports were so central to its price effects and causation analyses that even if we were to find MOFCOM's volume effects analysis were consistent with Article 3.5, the flaws in MOFCOM's findings regarding the impact of the prices of subject imports on the prices of domestic products would in any event invalidate MOFCOM's overall causation finding…*[68]

This determination shows the importance of ensuring a watertight determination of the price effects of imports. This is especially the case when an investigating authority will use this determination to support other parts of the injury or causality determination.

3.4. *Price depression*

As stated above, the Appellate Body in *China – GOES* found that in addition to a "consideration" of the existence of a price effect on domestic prices, an analysis of price effects requires to determine whether dumped or subsidised imports have an "explanatory force" for such price effect. The panel *China — Autos*concluded that an investigating authority must:

> *…examine the relationship between subject imports and domestic prices, which cannot be done properly if the IA confines its analysis to what is happening to domestic prices, without consideration of subject imports and their prices. The Appellate Body observed that elements relevant to a consideration of price undercutting may differ from those relevant to a consideration of price depression or price suppression, such that subject imports may still have a price depressing effect, even if they do not significantly undercut domestic prices. In all cases, however, the IA may not disregard evidence that calls into question the*

[67] Panel Report, *China — X-Ray Equipment,* para. 7.247 and para .7-248.

[68] *Ibid.,* para. 7.251.

explanatory force of subject imports on alleged price effects to domestic industry prices.[69]

4. Relationship with other Articles and Agreements

Findings of effects on the domestic industry's prices under Article 3.2 of the Anti-Dumping Agreement are often used to support causality determinations under Article 3.5. As a result of this, panels have enquired into the relationship between these two provisions:

> *…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. As discussed, an understanding of the latter relationship serves as a basis for the injury and causation analysis under Articles 3.5 and 15.5. In addition, Articles 3.5 and 15.5 require an investigating authority to demonstrate that subject imports are causing injury "through the effects of [dumping or subsidies]", as set forth in Articles 3.2 and 15.2, as well as in Articles 3.4 and 15.4. We recall that Articles 3.4 and 15.4 require an investigating authority to examine the impact of subject imports on the domestic industry on the basis of "all relevant economic factors and indices having a bearing on the state of the industry", and provide a list of such factors and indicia that the authority must evaluate. Thus, the examination under Articles 3.5 and 15.5 encompasses "all relevant evidence" before the authority, including the volume of subject imports and their price effects listed under Articles 3.2 and 15.2, as well as all relevant economic factors concerning the state of the domestic industry listed in Articles 3.4 and 15.4. The examination under Articles 3.5 and 15.5, by definition, covers a broader scope than the scope of the elements considered in relation to price depression and suppression under Articles 3.2 and 15.2.*[70]

The Appellate Body has also confirmed the close link between Article 3.2 and Article 12.2, which deals with public notice and explanation of findings:

> *…an investigating authority's consideration under Articles 3.2 and 15.2 must be reflected in relevant documentation, such as an authority's*

[69] Panel Report, *China — Autos,* para. 7.255.

[70] Appellate Body Report, *China — GOES,* para. 147.

final determination, so as to allow an interested party to verify whether the authority indeed considered such factors.[71]

5. EU's regulatory framework and practice

5.1. *General*

Articles 3.2 and 15.2 of the Anti-Dumping and SCM Agreements have been transposed almost verbatim in the EU Regulations. The relevant text of Article 3 of the basic Anti-Dumping Regulation is presented below:

(3) With regard to the volume of the dumped imports, consideration shall be given to whether there has been a significant increase in dumped imports, either in absolute terms or relative to production or consumption in the Community. With regard to the effect of the dumped imports on prices, consideration shall be given to whether there has been significant price undercutting by the dumped imports as compared with the price of a like product of the Community industry, or whether the effect of such imports is otherwise to depress prices to a significant degree or prevent price increases, which would otherwise have occurred, to a significant degree. No one or more of these factors can necessarily give decisive guidance.

The two factors will be addressed separately below.

5.2. *Volume effects*

Normally, the assessment of the volume of imports is based on information from Eurostat, checked against data submitted by the exporters and the statistics of the exporting country. Where the Combined Nomenclature code of the EU includes products not covered by the investigation, the Commission will determine the volume of imports on exporters' data checked against the statistics of the exporting country.

Since the WTO dispute *EC – Bed linen*, the Commission excludes non-dumped imports for the purpose of assessing the volume effects.

In addition to data on the absolute increase of imports, the market share is regularly presented, and assessed, in this part of the determination. Small or decreasing market shares, unless considered negligible, are not sufficient grounds for terminating an investigation. In calculating market share of imports, imported products which have not yet been marketed at the time the period of

[71] Appellate Body Report, *China — GOES,* para. 131.

investigation ends (i.e. that are part of the inventories of importers) may not be taken into consideration.

Intervening trends are analysed. In other words, the Commission does not conduct a mere comparison between the situations at the beginning and at the end of the period of investigation. Events that may have affected the development of imports during the intermediate periods are taken into consideration in the analysis and determination.

Where the investigation targets various countries, and provided that it has been determined that requirements for cumulation are met, the volume effects will be assessed for all investigated countries jointly.[72]

In expiry reviews, volume and market share of imports from the country subject to a measure are also analysed. The findings are part of the injury determination, as in any original investigation.[73]

5.3. *Price effects*

In compliance with the basic Regulations, EU determinations present information on the prices of imports covered by the investigation and on the price undercutting calculation. On few occasions, price suppression or price depression are assessed too. As a matter of example, the determination in Cold-rolled flat products is presented below

> *(41) The Commission established the prices of imports on the basis of data from the cooperating producers from the PRC. The weighted average CIF price in euro per kilo of imports into the Union from the PRC developed as follows:*
>
> *Table 3*
>
> ***CIF import prices from the PRC (EUR/kg)***
>
> *…*
>
> *(42) The average prices of imports from the PRC have consistently decreased during the period considered by 30%.*
>
> *(43) The Commission determined the price undercutting during the investigation period by comparing:*

[72] See e.g. determination in Cold-rolled flat products.

[73] See e.g. determination in Steel wires.

(a) the weighted average sales prices of the sole Union producer charged to unrelated customers on the Union market for the product types exported to the Union by the Chinese exporting producers, adjusted to an ex-works level; and

(b) the corresponding weighted average prices per product type of the imports from the cooperating exporting producers to the first independent customer on the Union market, established on a cost, insurance, freight (CIF) basis, with appropriate adjustments for customs duties (6,5%) and post-importation costs.

(44) The weighted average Union industry's price was compared with the corresponding weighted average prices per product type of the imports from the cooperating exporting producers for transactions at the same level of trade, after deduction of rebates and discounts as well as after the adjustments to the Union industry price for quality difference and the market perception thereof and R&D and marketing expenses for the same reasons as those mentioned in recital 27 above. The result of the comparison was expressed as a percentage of the Union producers' turnover during the investigation period. The Commission found a weighted average undercutting margin of between 18% and 45% by the imports from the PRC on the Union market.

Regarding the establishment of overall prices, the Commission may use Eurostat as a basis except where the Combined Nomenclature code of the EU includes products not covered by the investigation. In this case, the Commission will determine the price of imports on exporters' data checked against the statistics of the exporting country.[74]The development of these prices will be assessed, taking into account intervening trends, and a conclusion will be provided in the determination.

As a next step, the Commission will examine the existence of price undercutting. Normally, the Commission makes this calculation based on the methodology explained in para. 43 of the Acesulfame potassium determination.[75] In any event, the particular conditions of each investigated product, or like product, need to be considered in each investigation. Para. 44 of the Acesulfame potassium determination presents one such situation (quality differences, market perception etc.). In the Cold-rolled flat products, by contrast, the Commission was faced with a request to make an adjustment because of the different levels of trade.

[74] See e.g. determination in Acesulfame potassium.

[75] In Cold-rolled flat products, exactly the same methodology was used.

Moving to the methodology itself, calculations/comparisons are made on a “per product type”, for sales to “unrelated parties”. The prices of the domestic industry are at ex-works level, while export prices are CIF “with appropriate adjustments for customs duties and post-importation costs”. Other adjustments may be necessary. The result of the comparison is expressed as a percentage of the domestic industry’s turnover during the period of investigation.

A finding of no undercutting does not impede a determination of injury. A finding of price depression or price suppression demonstrates as well that imports had a price effect. The Commission has developed a methodology to calculate price underselling, which permits to determine the price effect of imports when any of those two situations occur.

The Court has validated the Commission’s decision to calculate price undercutting in respect of a segment of the like product based on the fact that almost all imports of the product under investigation pertained to a single segment.

In T-122/09 Zhejiang Xinshiji Foods et al., the Court interpreted the obligation to be as follows:

> *(79) With regard to th[e price undercutting] calculation, it should be borne in mind that, under Article 3(2) of the basic regulation, the determination of the injury suffered by the Community industry involves an objective examination of the impact which dumped imports have had on the Community industry. It requires a fair comparison to be made between the export price and the price that was or should have been obtained by the Community industry in sales within Community territory. In order to ensure that the comparison is fair, it is necessary to be satisfied, first of all, that* ***the prices are being compared at the same level of trade****. A comparison of prices obtained at different levels of trade, that is to say, one which does not include all the costs relating to the levels of trade which must be taken into account, would necessarily be* ***misleading in its results*** *and would* ***not allow a correct assessment to be made*** *of the actual injury suffered by the Community industry. [emphasis added]*

Based on the facts of the case, the Court determined that the Commission had not acted consistently with Article 3.3 of the basic Regulation.

In T-107/08 Kazchrome et al., the Court also had the opportunity to examine a claim regarding a price undercutting calculation. The Court stated as follows:

> *(55) The Court notes that it transpires from the arguments of the parties that the most accurate way of calculating price undercutting would be*

to compare import prices with the prices of goods of the Community industry by including all the costs incurred up until the customers' premises. Since this approach is not practical because of the large number of calculations which it would involve, the parties agree that ***a fair comparison can be made by comparing the 'ex-works' price, excluding transport costs, of goods of the Community industry with import prices, including part of the transport costs****, to take account of the fact that imports do not compete with Community goods at their 'ex-works' price and that they have to be transported over longer distances before arriving at the premises of Community customers.*

(56) The parties disagree, however, with regard to whether the reference point, from which transport costs of imports do not have to be included in the prices of imports, in order to ensure that the comparison with goods of the Community industry is fair, is the point of customs clearance, as submitted by the applicants, or the place at which the imports enter Community (land) territory for the first time, as argued by the Council. …

(62) The Court notes that, as submitted by the applicants, the prices used by the Council do not reflect the prices negotiated with customers in the Community, that is to say, generally speaking, cif (cost, insurance and freight) prices at the port of customs clearance, and represent only a value constructed by the Council. Although it is true that all anti-dumping proceedings involve complicated calculations and, frequently, the taking into account of constructed values, the fact remains that, since the value used by the Council to examine undercutting was calculated during the investigation with the information provided by the applicants, it could ***not*** *have been taken into account by customers when deciding whether to buy from the Community industry or from the applicants. That value could not even have been estimated by those customers, since there is nothing to suggest that they were aware of the exact route taken by the goods before arriving at the point of customs clearance and, consequently, that they knew that part of the transportation of the goods had already taken place in Community territory. Accordingly, the Council admitted, in response to a question put by the Court at the hearing, that it did not know whether customers knew the route which the goods had taken, but that, in any event, that route was of no interest to them, since they are interested only in the final price of the goods when they enter their factories.*

(63) Consequently, ***it is the prices negotiated between the applicants and the customers and not the prices at an intermediate stage of transport, even if in Community territory,***

> ***which could have led customers to opt for the applicants' goods instead of those of the Community industry***. *Even if, as the Council submits, what interests customers is the final price of the product when it arrives in their factories, the fact none the less remains that, as pointed out by the applicants in response to a question put by the Court at the hearing, the customers are well aware of transport costs from the port of customs clearance to their factories and could, therefore, easily calculate the final price from the cif price negotiated with them at the port of customs clearance.…*
>
> *(67) In those circumstances, the Court takes the view that, in the present case, the Council* ***committed a manifest error of assessment*** *in considering that the objective comparison between the import prices and those of the Community industry, in this case, required that the reference point for determining the import prices should be the border between Belarus and Lithuania for the applicants' goods which had been transported via the ports of Klaipėda and Kaliningrad. [emphasis added]*

In sum, the Court is ready to examine in-depth assessments and determinations made by the Commission in light of the obligations contained in Article 3(3) and Article 3(2) ("objective examination").The fair comparison principle must therefore be respected when conducting such assessments.

In expiry reviews, price undercutting is also assessed. Because there may have been limited imports in the EU following the imposition of the original (or extended) anti-dumping measures, calculation of price undercutting may be more complicated. As a matter of example, in Steel wires

> *(63) As it was not possible to use the Chinese trade statistics concerning Chinese exports to other markets (see recital 40 above), the likely export price was established on the basis of certain third countries trade statistics concerning imports of PSC wires and strands from China (see recital 41 above).*
>
> *(64) A comparison was made between the prices of the like product produced and sold by the Union industry and the prices of PSC wires and strands produced in China sold to certain third countries, adjusted to CIF at Union frontier level.*
>
> *(65) The price comparison showed a significant likely undercutting margin of 47 %.*

ARTICLE 3.3 – CUMULATION

1. Cumulation in the WTO Agreements

Article 3.3 of the Anti-Dumping Agreement provides for the cumulative assessment of dumped imports from various countries under certain conditions. Article 3.3 provides as follows:

> *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.*

As confirmed by the panel in *EU – Footwear (China)*, Article 3.3

> *…allows, but does not require, investigating authorities to 'cumulatively assess the effects' of imports of a product from more than one country when those imports are simultaneously subject to investigation.*[76]

To date, Article 3.3 has only been the subject of very few disputes in the WTO. First, in *EC – Tube or Pipe Fittings* the panel examined the second requirement, namely that that 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. The Panel considered the issues of "appropriate" and "conditions of competition" separately and noted that "appropriate" was to be understood as "especially suitable or fitting", while the phrase "conditions of competition" to refer to the dynamic relationship between products in the marketplace.[77] It continued to find that

> *The phrase "conditions of competition" in Article 3.3 is not accompanied by any sort of qualifier (for example, "identical" or*

[76] Panel Report, *EU – Footwear (China)*, para. 7.402. See also Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 144.

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

> *"similar"). The term is unqualified. 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". 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).*[78]

The panel also held that the determination under Article 3.3 was subject to the Article 3.1 requirements of an objective evaluation of positive evidence.[79] Since the EC showed that it had considered "like product finding; the significance of the import volume level; the development and level of the prices of imports and their undercutting or not of the Community industry; and similarity of sales channels" in its determination of "appropriateness", the panel found that the EC's practice was not in violation of its obligations. As regards competition between imports from different countries, the panel held that

> *Given that the text of Article 3.3(b) contains no explicit reference to any particular factors or indicators by which to assess the conditions of competition, including, in particular, no explicit reference to import volume trends – let alone identical or similar import volume trends – we find no basis in the text for Brazil's argument and do not consider that an investigating authority is required to conduct a country-by-country import volume examination as a precondition for deciding whether or not a cumulative assessment is appropriate within the meaning of the "conditions of competition" element of Article 3.3(b). While a parallel increase or decrease in volume of imports from various sources may well indicate competition among these imports, it will not necessarily do*

[78] Panel Report, *EC – Tube or Pipe Fittings*, para. 7.242 (footnote omitted).

[79] *Ibid.*, para. 7.243.

> *so: products with non-parallel volume trends may also be competing in certain circumstances.*[80]

In the *EU - Footwear (China)*dispute, the panel held that

> *…while investigating authorities enjoy a certain degree of discretion in establishing an analytical framework for determining whether a cumulative assessment is appropriate under Article 3.3, investigating authorities must take into account the particular circumstances of the case in light of the particular conditions of competition in the marketplace. While we agree with China that Article 3.1 informs the obligations under Article 3.3 as a general matter, we consider that this obligation requires that the investigating authority rely on positive evidence and an objective examination of that evidence in exercising its right to undertake a cumulative assessment. It does not, however, establish any substantive obligations on the analysis of whether a cumulative assessment of the effects of imports is appropriate.*[81]

In *US – Anti-Dumping Measures on OCTG* the Appellate Body considered the issue of cumulation in sunset reviews. The Panel had found that "the silence of the AD Agreement on the question of cumulation in sunset reviews is properly understood to mean that cumulation is permitted in sunset reviews."[82] The Panel had also found that cumulation, when used in sunset reviews, does not need to satisfy the conditions of Article 3.3, because that provision "on its face establishes conditions for the use of cumulative analysis which apply *only* in original anti-dumping investigations." [83] The Appellate Body endorsed the Panel's findings in this regard.

In *US — Carbon Steel (India)*, the Appellate Body found that Article 3.3 of the Anti-Dumping Agreement and Article 15.3 of the SCM Agreement required that the product be subject to anti-dumping and to countervailing investigations respectively, and that no cross-cumulation could take place between anti-dumping and countervailing investigations.[84]

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[80] Panel Report, *EC – Tube or Pipe Fittings*, para. 7.253.

[81] Panel Report, *EU – Footwear (China)*, para. 7.403.

[82] Panel Report, *US – Anti-Dumping Measures on OCTG*, para. 7.148 (referring to Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 294).

[83] Panel Report, *US – Anti-Dumping Measures on OCTG*, para. 7.150.

[84] See the discussion in section 4.3 under Article 3.5.

Finally, as regards the conditions of competition that would allow an authority to cumulate imports, the Panel in *EU–Footwear (China)* found that

> *…we see no basis in the text of Article 3.3 for China's view that an investigating authority must establish 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".*[85]

The Appellate Body, in turn held that

> *By seeking to place additional obligations on investigating authorities beyond those specified in Article 3.3, namely, that investigating authorities first determine* on a country-specific basis *the existence of significant increases in dumped imports, and their potential for causing injury to the domestic industry, Brazil ignores the role of cumulation in ensuring that each of the multiple sources of 'dumped imports' that cumulatively contribute to a domestic industry's material injury be subject to antidumping duties.*[86]

2. EU's regulatory framework and practice

Cumulation is regulated in Article 3(4) of the basic Regulation, which has an important difference with Article 3.3 of the Anti-Dumping Agreement. Thus, while the Agreement states that "the investigating authorities may cumulatively assess the effects of such imports", the basic Regulation mandates cumulation: "the effects of such imports shall be cumulatively assessed". Other than this, the basic Regulation transposes the Agreement.

Regarding the margin of dumping, the basic Regulation includes a *de minimis* threshold identical to Article 5.8 of the Anti-Dumping Agreement.

The determination of whether imports are negligible is done by assessing the market share of imports of each investigated country. Thus, the Commission does **not** use the import share as benchmark. This assessment will be done taking into consideration the imports which took place during the dumping investigation period. (see example of Cold-rolled flat products below)

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

[86] Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 117 (emphasis in original).

In case of expiry reviews, the negligible volume threshold is not applicable.[87]If the market share of imports is below 1%, cumulation is not precluded. In such reviews the question is rather whether *de minimis* imports would increase to reach significant levels in the future if anti-dumping measures were repealed. A forward-looking analysis must be conducted to reply to this question. (see T-432/12 Volžskij trubnyi zavod et al. below)

The third, and final, requirement is the examination of the conditions of competition. Traditionally, the Commission examines three possible factors: 1) Similarity of physical characteristics and interchangeability of end-uses, 2) Similarity of exporters' market behaviour and 3) Similarity of channels of distribution of the investigated product. The Commission has decumulated imports where for instance one country is focused on a market segment, and the pricing behaviour is, different from the other countries subject to investigation.

Cumulation is first the assessment and determination to be made by the Commission after determining the consumption in the EU. The remainder of the injury determination will depend on the conclusion regarding the cumulation (or not) of the countries subject to investigation.

Cumulation of imports is quite frequently a controverted matter. In the excerpt cited below, we can see that the Taiwanese argued against cumulation with China. However, these arguments are seldom accepted by the Commission.

The EU practice is shown with the following example from the Cold-rolled flat products determination:

> *(97) The Commission examined whether imports of the product concerned originating in the countries concerned should be assessed cumulatively, in accordance with Article 3(4) of the basic Regulation.*
>
> *(98) The margin of dumping established in relation to the imports from the PRC and Taiwan was above the de minimis threshold laid down in Article 9(3) of the basic Regulation. The volume of imports from each of the countries concerned was not negligible within the meaning of Article 5(7) of the basic Regulation. Market shares in the investigation period were 5,1% for Taiwan and 4,3% for the PRC.*
>
> *(99) The conditions of competition between the dumped imports from the PRC and Taiwan and the like product were similar. More*

[87] Article 5(7) of the basic Regulation, setting forth the negligible market share for injury purposes, applies only to proceedings (i.e. new investigations). Thus, the threshold does not apply to any review.

specifically, the imported products competed with each other and with the like product produced in the Union because all products comply with the same global standards and are therefore interchangeable. Also, they are sold through the same sales channels and to similar categories of customers.

(100) The Taiwan Steel & Iron Industries Association ('TSIIA') argued that the Commission should not cumulatively assess the effects of the dumped imports from the PRC and Taiwan. It claimed that although SSCR may be considered as alike in the sense of the basic Regulation, Taiwanese sales on the Union market do not share the same conditions of competition with those of Chinese imports. They would differ mainly with regard to grades and quality, with Taiwanese products being of a higher quality.

(101) The claim regarding different grades only refers to speciality products accounting for less than 1% of imports. Moreover, all products (EU, Chinese and Taiwanese) comply with the same worldwide standards and no claims quantifying differences in physical properties between the like product produced in the Union and imports were brought forward, leaving this argument unsubstantiated. Consequently, the claim was rejected.

(102) Therefore, all the criteria set out in Article 3(4) of the basic Regulation were met and imports from the PRC and Taiwan were examined cumulatively for the purposes of the injury determination.

The Court has had the opportunity to review the use of cumulation in the context of expiry reviews. In T-432/12 Volžskij trubnyi zavod et al., the Court found as follows

(45) Since it is apparent from recital 3 in the preamble to Regulation No 1225/2009 that the purpose of the regulation is, inter alia, to transpose into EU law, as far as possible, the rules set out in the Anti-Dumping Agreement, ***it follows that the provisions of that regulation must be interpreted, as far as possible, in the light of the corresponding provisions of the Anti-Dumping Agreement*** *(see, to that effect, judgments of 14 July 1998 in Bettati, C-341/95, ECR, EU:C:1998:353, paragraph 20, and Transnational Company 'Kazchrome' and ENRC Marketing v Council, paragraph 34 above, EU:T:2011:619, paragraphs 34 and 35). Moreover, there is nothing to prevent the Court from referring to the interpretations of the Anti-Dumping Agreement by the WTO's dispute settlement body, where, as in the present case, Article 3(4) of Regulation No 1225/2009 falls to be interpreted (judgment in Transnational Company 'Kazchrome' and*

ENRC Marketing v Council, paragraph 34 above, EU:T:2011:619, paragraph 36).

(46) Thus, it is appropriate to recall that, in its report on the case 'United States — Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina', adopted on 29 November 2004 (WT/DS268/AB/R, points 302 and 304), ***the WTO's appellate body held that the conditions set out in Article 3.3 of the Anti-Dumping Agreement did not automatically apply to likelihood-of-injury determinations in sunset reviews****. Article 3(4) of Regulation No 1225/2009 represents the transposition into EU law of Article 3.3 of the Anti-Dumping Agreement.*

(47) Moreover, it is apparent from paragraphs 21 to 25 above that, following an anti-dumping expiry review, the institutions are required to establish that the expiry of those measures would encourage recurrence of the injury ***by demonstrating only the probability of such a recurrence, in the light, in particular, of a prospective assessment of imports*** *from the country or countries concerned by that procedure, in this case Russia and Ukraine.*

*(48) Accordingly, it follows from the rules governing the expiry review in respect of the expiry of anti-dumping measures that, in order to determine the volume of imports being dumped****, the Council is entitled to use the likely volume of imports from exporting countries instead of the actual volume of imports during the [Review Investigation Period] and to cumulate them in order to establish the likelihood of recurrence of injury****, given that the conditions set out in Article 3(4) of Regulation No 1225/2009 — specifically that relating to the fact that the volume of imports from each country is not negligible — are not automatically applicable in the case of such a review (see paragraph 46 above),* ***since the risk of recurrence of injury is then determined through the use of a prospective analysis of dumped imports****.*

(49) Consequently, the Council did ***not*** *err in law in cumulating imports from Russia and those from Ukraine on the basis of likely import volumes. [emphasis added]*

Thus, in this case, the Court decided in line with the WTO Appellate Body findings (which is not always the case).

In that proceeding, the applicants further submitted that, on the basis of the evidence available, the Council should **not** have cumulated imports from Russia and those from Ukraine, in the light of the significant difference in import volumes during the Review Investigation Period, the divergent developments

since 2009 and the unlikelihood of any spare capacity in the Russian industry being used for exports to the European Union. The Court disagreed:

> *(57) The condition set out in Article 3(4)(b) of Regulation No 1225/2009 relates to the conditions of competition between imported products and between imported products and the like EU product. It requires a determination, on the one hand, as to whether those products have similar physical characteristics and whether their end use is interchangeable and, on the other hand, as to whether the market behaviour of exporters is similar. The institutions* ***cannot therefore be required, in order to apply that provision, to examine the volumes of imports from different countries and the development of those imports****. None the less, the issue of import volumes is relevant for the purpose of determining whether it is possible to cumulate imports from several countries, but is addressed through the condition set out in Article 3(4)(a) of Regulation No 1225/2009, which relates to the determination as to whether the nature of imports from each of the countries concerned is negligible or not.*
>
> *(58) Moreover, it should be noted that the WTO's Appellate Body came to the decision set out paragraph 57 above, since* ***Article 3.3 of the Anti-Dumping Agreement does not in any way provide for a country-by-country analysis of the potential negative effects of volumes, their development and the prices of dumped imports as a prerequisite for a cumulative assessment of the effects of all dumped imports*** *(see report on the case 'European Communities — Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil', adopted on 22 July 2003 (WT/DS219/AB/R, paragraphs 110 and 117)).*
>
> *(59) Consequently, the applicants are* ***not*** *in a position, by their arguments, to show that the Council committed a manifest error in its assessment of the facts as a result of having cumulated imports from Russia and from Ukraine despite significant differences between those imports. [emphasis added]*

ARTICLE 3.4 – EFFECT ON THE INDUSTRY

Article 3.4 of the Anti-Dumping Agreement (and its equivalent, Article 15.4 of the SCM Agreement), requires investigating authorities to examine the impact of the dumped imports on the domestic industry. Article 3.4 provides as follows:

> *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.*

In *China – GOES* the Appellate Body confirmed that *all* relevant economic factors needed to be evaluated in every investigation. It also confirmed that injury is to be determined on the basis of an overall determination, and not with relevance to only one or even several factors:

> *Articles 3.4 and 15.4 require an investigating authority to examine the impact of subject imports on the domestic industry on the basis of "all relevant economic factors and indices having a bearing on the state of the industry", and provide a list of such factors and indicia that the authority must evaluate.*[88]

Panels and the Appellate Body have held that the determination of injury "shall include an evaluation of all relevant economic factors and indices".[89] Thus, each of the factors has to be evaluated.[90] Every single indicator does not have

[88] Appellate Body Report, *China — GOES,* para. 147.

[89] Panel Report, *EC – Bed Linen*, para. 6.167; Panel Report, *Guatemala – Cement II*, para. 8.283; Panel Report, *Mexico – HFCS*,para. 7.128; Panel Report, *Thailand – H-Beams*,para. 7.231; Panel Report, *Egypt – Rebar*,para. 7.37; Panel Report, *China – GOES*; Panel Report, *China – X-Ray Equipment*; Panel Report, *China – HP-SSST*.

[90] See e.g. Panel Report, *Mexico – HFCS*, para. 7.129, where it was held that "while the authorities may determine that some factors are not relevant to 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" and that "authorities are required to consider, and their determination must reflect the consideration of, all the factors concerning injury".

to indicate a negative pattern and a holistic determination must be made on the overall evaluation of the factors.[91]

1. Requirement for an objective evaluation

Article 3.4 of the Anti-Dumping requires an "evaluation" of the 15 injury factors listed in the Article. As stated by the panel in *EC – Tube or Pipe Fittings*:

> *... an evaluation of a factor (...) 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.[92] (footnotes omitted)*

In this respect, Article 3.1 requires that an injury determination be based on "positive evidence". Pursuant to Article 3.4, such "positive evidence" includes relevant economic factors and indices collected from the domestic industry, which have a bearing on the state of the industry. Naturally, the "positive evidence" to be used in an injury determination requires wide-ranging information concerning the relevant economic factors in order to ensure the accuracy of an investigation concerning the state of the industry and the injury it has suffered.[93]

The panel in *China – X-Ray Equipment* specified that, for the purposes of conducting an "evaluation" under Article 3.4, it is not sufficient for an investigating authority to simply list the margins of dumping "in the 'Final Conclusion' and 'Dumping' sections of the [final] determination".[94] Rather, the 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".[95]

Several panels,[96] including *China – X-Ray Equipment*,[97] have confirmed that a proper "evaluation" of injury factors needs to be undertaken.

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[91] See section 2 below.

[92] Panel Report, EC – Tube or Pipe Fittings, para. 7.314.

[93] Appellate Body Report, *EC – Steel Fasteners* para. 413.

[94] Panel Report, *China – X-Ray Equipment*, para. 7.183.

[95] *Id*.

[96] See e.g. Panel Report, *US – Shirts and Blouses*,para. 7.25; Panel Report, *Guatemala – Cement II*,para. 8.285; Panel Report, *Mexico – HFCS 21.5*, para. 6.34-6.35.

[97] Panel Report, *China – X-Ray Equipment*, para. 7.178-7.183.

In *EC – Bed Linen (Article 21.5 - India)* the panel held that

> *…an "evaluation" is a process of analysis and assessment requiring the exercise of judgment on the part of the investigating authority. It is not simply a matter of form, and the list of relevant factors to be evaluated is not a mere checklist. As the relative weight or significance of a given factor may naturally vary from investigation to investigation, the investigating authority must therefore assess the role, relevance and relative weight of each factor in the particular investigation. Where the authority determines that certain factors are not relevant or do not weigh significantly in the determination, the authority may not simply disregard such factors, but must explain their conclusion as to the lack of relevance or significance of such factors. The assessment of the relevance or materiality of certain factors, including those factors that are judged to be not central to the decision, must therefore be at least implicitly apparent from the determination. Silence on the relevance or irrelevance of a given factor will not suffice.*[98]

In considering the information before it in *China - X-Ray Equipment*, the panel considered the EU's complaint that China had not properly evaluated the information before it as the information it relied on differed in critical respects from the information submitted by the only Chinese producer. MOFCOM indicated that the domestic industry's information was adjusted following verification thereof and that it had indeed relied on the correct information. The panel agreed with MOFCOM and indicated that authorities had an obligation to make a determination based on positive evidence.[99]

2. Requirement to evaluate all 15 injury factors

The Appellate Body[100] and several panels[101] have already held that all 15 injury factors listed under Article 3.4 of the Anti-Dumping Agreement have to be taken

[98] Panel Report, *EC – Bed Linen (Article 21.5 - India)* par 6.162.

[99] Panel Report, *China – X-Ray Equipment*, para. 7.101. Note that the question whether MOFCOM should have made the updated information available to parties could not be addressed under Articles 3.1 and 3.4, as it relates to information that should be made available under Article 6.5.

[100] In Appellate Body Report, *Thailand – H-Beams*, para. 125 the Appellate Body stated "[t]he Panel concluded its comprehensive analysis by stating that 'each of the fifteen individual factors listed in the mandatory list of factors in Article 3.4 must be evaluated by the investigating authorities …'. We agree with the Panel's analysis in its entirety, and with the Panel's interpretation of the mandatory nature of the factors mentioned in Article 3.4 of the AD Agreement."

into consideration in the determination of material injury, even though this does not necessarily means that there had to be 15 separate findings,[102] and the panel in *China - X-Ray Equipment* concurred with this view.[103] However, the evaluation is not only limited to these factors, but must include "all relevant economic factors", including factors not listed in Article 3.4.[104]

In addition, panels have held that each of these factors have to be "evaluated",[105] that "the mere recital of data does not constitute explanation, or findings and conclusions, sufficient to satisfy the requirements"[106] of the Anti-Dumping Agreement and that "an evaluation of a factor… is not limited to a mere characterisation of its relevance or irrelevance" but "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."[107] In *China – X-Ray Equipment*, the panel held that

> *7.179 We note that the Appellate Body and a number of panels have found that it is mandatory for an investigating authority to evaluate each of the 15 factors listed in Article 3.4 of the Anti-Dumping Agreement108. For instance, in Thailand – H-Beams the Appellate Body stated:*
>
> *The Panel concluded its comprehensive analysis by stating that "each of the fifteen individual factors listed in the mandatory list of factors in Article 3.4 must be evaluated by the investigating authorities …". We*

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[101] See e.g. Panel Report, *EC – Bed Linen*, para. 6.167; Panel Report, *Guatemala – Cement II*, para. 8.283; Panel Report, *Mexico – HFCS*, para. 7.128; Panel Report, *Thailand – H-Beams*, para. 7.231; Panel Report, *Egypt – Rebar*, para. 7.36; Panel Report, *Argentina – Poultry*, para. 7.314; Panel Report, *EC – Tube or Pipe Fittings*, para. 7.304.

[102] Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 161.

[103] Panel Report, *China – X-Ray Equipment*, para. 7.181.

[104] Panel Report, *EU – Footwear (China)*, para.7.413.

[105] Panel Report, *Mexico – HFCS*, para. 7.140 note 610.

[106] *Id*.

[107] Panel Report, *EC – Tube or Pipe Fittings*, para. 7.314 (footnotes omitted). See also Appellate Body Report, *U.S. – Hot-Rolled Steel*,para. 197; Panel Report, *Thailand H-Beams*, para. 7.161; Panel Report, *Egypt- Rebar*, para. 7.44; Panel Report, *Argentina – Preserved Peaches*, para. 7.97; Panel Report, *US – Hot-Rolled Steel*, para. 7.232-7.233.

[108] Appellate Body Report, *Thailand – H-Beams*, para. 125; Panel Reports, *EC – Bed Linen (Article 21.5 - India)*, para. 6.161; *EC – Bed Linen*, para. 6.154, *Guatemala – Cement II*, para. 8.283.

agree with the Panel's analysis in its entirety, and with the Panel's interpretation of the mandatory nature of the factors mentioned in Article 3.4 of the Anti-Dumping Agreement.

7.180 Further, certain panels have reasoned that an "evaluation" of the factors in Article 3.4 of the Anti-Dumping Agreement requires a process of analysis and assessment. Where an investigating authority concludes that a particular factor listed in Article 3.4 is not relevant, this conclusion must be explained. According to the panel in EC – Bed Linen (Article 21.5 - India):

[A]n "evaluation" is a process of analysis and assessment requiring the exercise of judgment on the part of the investigating authority. It is not simply a matter of form, and the list of relevant factors to be evaluated is not a mere checklist. As the relative weight or significance of a given factor may naturally vary from investigation to investigation, the investigating authority must therefore assess the role, relevance and relative weight of each factor in the particular investigation. Where the authority determines that certain factors are not relevant or do not weigh significantly in the determination, the authority may not simply disregard such factors, but must explain their conclusion as to the lack of relevance or significance of such factors. The assessment of the relevance or materiality of certain factors, including those factors that are judged to be not central to the decision, must therefore be at least implicitly apparent from the determination. Silence on the relevance or irrelevance of a given factor will not suffice.[109]

7.181 In the Panel's view, the text of Article 3.4 of the Anti-Dumping Agreement, namely that the examination "shall" include an evaluation of all relevant economic factors, including the 15 listed in the provision, clearly requires that each of the factors be evaluated. Therefore, the Panel agrees with the reasoning of previous panels and the Appellate Body in this regard.

7.182 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

[109] Panel Report, *EC – Bed Linen (Article 21.5 - India)*,para. 6.162.

as "substantial" or "significant", "it follows from the decision itself to impose measures that the margins were not considered to be de minimis".

7.183 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.

7.184 We note China's reliance on the Appellate Body's conclusion in EC – Tube or Pipe Fittings, namely that a separate record of the evaluation of each injury factor listed in Article 3.4 is not necessary where there is sufficient evidence on the record that the factor has nevertheless been evaluated. However, in our view, the reasoning in EC – Tube or Pipe Fittings does not advance China's position. It seems difficult to conclude that merely listing the margins of dumping constitutes an evaluation, in the sense of an analysis and an assessment, of the magnitude of the margin of dumping in terms of its relevance to the impact of the dumped imports on the domestic industry. Further, there is nothing implicit in the statement of the margins of dumping, or elsewhere in the Final Determination, to indicate that an evaluation of the factor occurred, although was not explicitly explained. 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 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. [110]

Although China had evaluated all 14 factors, the panel held that MOFCOM had not "evaluated" the margin of dumping as an injury factor but merely listed the margins of dumping both for the cooperating exporter and for all other

[110] Panel Report, *China – X-Ray Equipment*, paras. 7.179-7.184 (footnotes omitted).

exporters.[111] The panel stated that "the simple listing of the margins … 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" and that "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."[112] It therefore rejected China's argument that the fact that it had imposed anti-dumping measures indicates that it concluded that the dumping margins were not *de minimis* as this would render its inclusion in the list in Article 3.4 superfluous.[113] This confirms that a "mere listing" is insufficient and that each injury factor has to be comprehensively evaluated and that such evaluation has to be contained in published documents.

The same panel also noted that aside from listing all the injury factors and the trends observed in them over the course of the investigation period, the investigating authority 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."[114]

In *China – X-Ray Equipment* the investigating authority found that the industry experienced losses throughout the period of investigation, albeit decreasing losses over the period, yet the panel found that the authority had to evaluate, and include in its reasoning, an "estimation, calculation or explanation" on profitability to show that the lack of profit was the effect of the dumped imports.[115]

Panels have also commented specifically on what an "evaluation" would entail. The issue was first addressed in *Mexico – HFCS*, where the panel already indicated that "the mere recital of data does not constitute explanation, or findings and conclusions, sufficient to satisfy the requirements … of the AD Agreement."[116] The panel in *EC – Tube or Pipe Fittings* also remarked that "an evaluation of a factor, in our view, is not limited to a mere characterisation of its

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[111] Panel Report, *China – X-Ray Equipment*, para. 7.182.

[112] *Ibid*., para. 7.183.

[113] *Ibid*., para. 7.184.

[114] *Ibid*., para. 7.187.

[115] *Ibid*., paras. 7.200-7.201.

[116] Panel Report, *Mexico – HFCS*,note 610.

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."[117] In *Thailand - H-Beams*, the panel indicated that

> *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 … 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" the relevant factors.*[118]

In *Egypt – Rebar* the panel stated that "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 analyze and interpret those data."[119]

2.1. *Sales volumes*

The sales volume of the domestic industry is the first of the 15 injury factors indicated in Article 3.4 of the Anti-Dumping Agreement. It is submitted that this, in itself, indicates the relative importance of the factor *vis-à-vis* those of the other Article 3.4 factors.[120] This is supported by the fact that it was not listed as the first injury factor under the *Anti-Dumping Code 1979*.[121]

2.2. *Factors affecting domestic prices*

In the *China - X-Ray Equipment* case, the EU argued that the domestic industry's aggressive pricing policy, whereby it decreased prices in order to gain market share, was something that should have been considered as "a factor affecting domestic prices". The panel disagreed and noted that it rather supported the panel's statement in *EC – Tube or Pipe Fittings* that:

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[117] Panel Report, *EC – Tube or Pipe Fittings*,para. 7.314.

[118] Panel Report, *Thailand - H-Beams*,para. 7.161.

[119] Panel Report, *Egypt – Rebar*,para. 7.44.

[120] However, note that Art 3.4 provides that the list of injury factors is not exhaustive, "nor can one or several of these factors necessarily give decisive guidance."

[121] See Art 3.3 of the *Anti-Dumping Code 1979*, which listed sales after output.

> *[T]his requirement [of an evaluation of "factors affecting domestic prices"] is inextricably linked to the requirements of Articles 3.1 and 3.2 to conduct an objective examination of the effects of dumped imports on prices in the domestic market for like products …We see no basis in the text of the Agreement for [the] 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 Article 3.4.*[122]
>
> *Consequently, in the Panel's view, any alleged pricing strategy pursued by [the domestic industry] is better characterised as a possible cause of injury, rather than a factor indicative of the state of the industry. A pricing strategy may affect the level of price undercutting, suppression or depression or certain other factors listed in Article 3.4, such as sales, profits and market share.*[123]

2.3. *Profits*

As regards profit, MOFCOM found that the industry experienced losses throughout the period of investigation, albeit decreasing losses over the period. MOFOM, however, failed to indicate in its final report on what basis it had concluded that the domestic industry did not realise the "expected profits", which was an important element of its reasoning. The panel rejected MOFCOM's arguments that there was no need to calculate or quantify the amount of such "expected profits" as "an objective and even-handed examination of the expected level of profit, by which the industry's actual profit level was assessed, needs to be based on more than an assertion that the 'company expected to be profitable'."[124] The panel indicated that "[s]ome form of estimation, calculation or explanation regarding why profitability in the absence of subject imports was a reasonable expectation should have been provided".[125] The panel further indicated that in its view

> *an even-handed examination of profits required an acknowledgement of the positive trend in which this factor was moving and an accompanying explanation regarding why, in the light of this and other positive factors, the industry should nevertheless be considered injured. In the Panel's view, focusing only on absolute levels, and*

[122] Panel Report, *EC – Tube or Pipe Fittings*, para. 7.335.

[123] Panel Report, *China – X-Ray Equipment*, paras. 7.259-7.260.

[124] *Ibid*., para. 7.200.

[125] *Id*.

ignoring trends, has the potential to give a partial picture of the state of an industry.[126]

2.4. *Net cash flow and rate of return*

In the X-Ray equipment investigation, MOFCOM found that injury as regards net cash flow and return of interest on the basis that there was cash outflow and a negative rate of return throughout the course of the period of investigation. The panel, however, indicated that an objective and impartial examination would have required an acknowledgement and analysis of the fluctuations in the factors over the period of investigation, including the upward trend they both experienced in the final year.[127]

2.5. *Employment*

In the X-Ray equipment investigation, MOFCOM found that injury as regards employment as the total number of employees in the industry at the end of the investigation period was lower than the number at the start. However, the panel held that MOFCOM's failure to analyse fluctuations within the period was inconsistent with an unbiased examination.[128]

2.6. *Margin of dumping*

The panel in *China – HP-SSST* held that a "simple assertion that the margins of dumping are more than de minimis provides no basis on which we can conclude that [the investigating authority] actually evaluated the magnitude of those margins in the context of its Article 3.4 analysis."[129]

In *China – X-Ray Equipment*, the investigating authority argued that it had considered the margin of dumping as it found that the margins both for the cooperating exporter and all other exporters were more than *de minimis*. It further argued that the DSB had previously found that "there does not need to be an 'explicit' evaluation of the factors, provided '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'."[130] However, the panel found that, for the purposes of conducting an "evaluation"

[126] Panel Report, *China – X-Ray Equipment*,para. 7.201.

[127] *Ibid.*, para. 7.204.

[128] *Id*.

[129] Panel Report, *China – HP-SSST*, para. 7.161.

[130] Panel Report, *China – X-Ray Equipment*, paras. 7.125, quoting Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 161.

under Article 3.4, it is not sufficient for an investigating authority to simply list the margins of dumping "in the 'Final Conclusion' and 'Dumping' sections of the [final] determination".[131] Rather, the 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".[132]

Note, however, that Articles 3.1 and 3.4 do not require an authority to evaluate the *significance* of dumping margins. In contrast, other provisions of the Anti-Dumping Agreement may direct an authority to assess the "significance" of a factor, such as Article 3.2.[133] Moreover, neither Article 3.1 nor Article 3.4 requires that the magnitude of the margins of dumping be given any particular weight, or that they be evaluated in any particular way. On the other hand, Article 3.4 of the Anti-Dumping Agreement, as clarified by the case law, mandates that the impact assessment include at least a reference to this factor.

2.7. *Investment and financing capacity*

The EU argued that MOFCOM's finding that the domestic industry "saw continued expansion" could not be reconciled with the finding that the "investment and financial capacity of the Petitioner declined". The panel noted that while MOFCOM's explanations of its findings were not particularly clear, it did not consider that less than clear drafting in a determination is an indication of a lack of an objective examination.[134]

3. Requirement to evaluate impact on "domestic industry"

The evaluation and analysis of the 15 injury factors under Article 3.4 of the Anti-Dumping Agreement must be based on the impact on the domestic industry, as defined in Article 4.1 of the Anti-Dumping Agreement. Thus, the panel in *China – X-Ray Equipment* held that

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[131] Panel Report, *China X-Ray Equipment*, para. 7.183.

[132] *Id*.

[133] Article 3.2 of the AD Agreement states that investigating authorities shall consider whether there was been a "significant increase in dumped imports," "significant price undercutting by the dumped imports," "or whether the effect of such imports is otherwise to depress prices to a significant degree."

[134] Panel Report, *China – X-Ray Equipment*, para. 7.209. Note that the panel took the "less than clear" explanations into account in its determination of whether China complied with the requirements of Art. 12.2.

> *We note that the Appellate Body and a number of panels have interpreted the meaning of the obligation to examine the impact of the dumped imports on the "domestic industry" under Article 3.4 of the Anti-Dumping Agreement. In US – Hot Rolled Steel, the Appellate Body noted that the term "domestic industry" is defined in Article 4.1 of the Anti-Dumping Agreement and refers to "domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products". Therefore, the Appellate Body reasoned that the reference to the "domestic industry" in Article 3.4 indicates that the injury examination must focus on the totality of the "domestic industry" and not simply on one party, sector or segment of it. Having said this, the Appellate Body noted that in some circumstances it may be "highly pertinent", from an economic perspective, for an investigating authority to undertake an evaluation of particular parts, sectors or segments within a domestic industry in assessing the state of the industry as a whole. However, any segmented analysis must be conducted in an "objective manner". According to the Appellate Body, this means that where one sector within the domestic industry is examined under Article 3.4, an investigating authority should also examine all other sectors making up the industry, as well as the industry as a whole. A number of panels have employed the same reasoning as that found within the Appellate Body report. We note that while the Appellate Body has commented that supplementing an assessment of the state of the entire domestic industry with a segmented analysis may be highly pertinent in some circumstances, the Appellate Body has never been required to consider whether a failure to conduct an analysis by sector may in some circumstances amount to acting inconsistently with Articles 3.1 and 3.4 of the Anti-Dumping Agreement.*[135]

The panel further noted that the pricing strategy allegedly pursued by the domestic industry "may cause changes in certain factors listed in Article 3.4, but that it is not in itself indicative of whether the domestic industry is injured."[136]Accordingly, the panel concluded that the factors at issue "are best characterised as having the potential to *affect* the state of the industry, rather than factors indicative of the state of the industry."[137]

[135] Panel Report, *China – X-Ray Equipment*, para. 7.187 (footnotes omitted).

[136]*Ibid.*, para. 7.261.

[137]*Ibid.*, para. 7.262.

The panel, as regards a discrepancy between information submitted by the domestic industry in its application and the information contained in audited financial statements, recalled that

> *…in the context of assessing whether MOFCOM's injury analysis under Article 3.4 of the Anti-Dumping Agreement was based on positive evidence, the Panel concluded that the differences in the data relied upon by MOFCOM and that found in the annual reports of Nuctech's parent company were adequately explained due to inclusion in the annual report of statistics regarding a broader range of products than the like domestic product.*[138]

The panel finally noted that

> *…it is unclear to us how a determination of injury in respect of the domestic industry as a whole – including an evaluation of the state of that industry as a whole - may be premised, from the outset, on the exclusion of a given segment of that industry.*[139]

In *China – Broiler Products* the panel specifically investigated the question whether an authority was required to attempt to identify and seek information from all domestic producers. It held that there was no requirement to do this:

> *We do not see how requiring investigating authorities to first try to define the domestic industry as a whole would require the inclusion of non-petitioning producers in the domestic industry as even pursuant to the United States' own interpretation, an investigating authority may still ultimately use a "major proportion" for its injury analysis. Additionally, an investigating authority is not allowed to ignore the situation of other domestic producers in its injury determination. An investigating authority will make its analysis under Articles 3.2 and 3.4 with reference to the defined domestic industry, but will still need to assess the situation of other domestic producers in its evaluation of whether it is the impact of the subject imports that have explanatory force for the changes in the various economic factors and whether the strength of other domestic producers could be a possible separate cause of injury to the defined "domestic industry."*[140]

[138] Panel Report, *China – X-Ray Equipment*, par 7.284.

[139] *Ibid.*, para. 7.154.

[140] Panel Report, *China – Broiler Products* para. 7.419.

4. Interaction between injury factors

With respect to the injury factors, Article 3.4 of the Anti-Dumping Agreement states that no single or several factor(s) can "necessarily give decisive guidance" as to whether or not material injury occurred. In order to reach a finding under Article 3.4, an investigating authority must weigh the importance of these factors. However, this weighing exercise is not limited to a mathematical assessment of the importance of each individual factors. Rather, the evaluation of the different factors should also take place in relation to the other factors examined. The panel in *China – X-Ray Equipment* required not only that each of the injury factors be separately analysed, but also that the factors be weighed in the overall injury determination:

> *…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****.*[141] *[emphasis added]*

In *China – X-Ray Equipment* the EU argued that MOFCOM failed to make a proper evaluation of the overall development and interaction among injury factors.[142] It contested two different aspects of MOFCOM's examination of the injury factors and claimed that each of these aspects individually gave rise to a violation of Articles 3.1 and 3.4.[143] First, it argued that MOFCOM did not conduct an objective examination when considering the interaction between positive and negative injury factors and that MOFCOM had failed to examine all factors in their proper context and, second, that MOFCOM had failed to take into account all facts and arguments on the record relating to the state of the industry. The parties agreed that MOFCOM had found only seven of the sixteen factors to be indicative of material injury and the EU complained that MOFCOM had failed to indicate "why the negative developments in the industry were such as to outweigh the positive developments".[144]

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[141] Panel Report, *China – X-Ray Equipment*, para.7.215.

[142] *Ibid.*, para. 7.190.

[143] *Ibid.*, para. 7.191.

[144] *Ibid.*, para. 7.214.

In support of its arguments the EU argued that MOFCOM found certain factors to be indicative of injury "by ignoring positive trends exhibited by each of the factors at issue, making contradictory observations and failing to explain the basis for its assertions regarding certain injury indicia."[145] In this regard, it relied on *Thailand –H-Beams*, where the panel held that

> *While we do not consider that such positive trends in a number of factors during the [POI] would necessarily preclude the investigating authorities from making an affirmative determination of injury, we are of the view that such positive movements in a 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 [investigation period].*[146]

In the panel's evaluation of MOFCOM's injury determination it was indicated that one of MOFCOM's shortcomings was that it had not properly analysed the relationship between the different injury factors and, specifically, between factors showing positive and negative trends. After evaluating the Members' arguments, the panel concluded 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.*[147]
>
> *In particular, we consider that such a situation would require a thorough and persuasive explanation as to whether and how such positive*

[145] Panel Report, *China – X-Ray Equipment*, para. 7.193.

[146] Panel Report, *Thailand – H-Beams*, para. 7.249. See also Panel Report, *EC – Countervailing Measures on DRAM Chips*, para. 7.372 and Panel Report, *EC – Fasteners*, para. 7.399.

[147] Panel Report, *China – X-Ray Equipment*, para. 7.215 (emphasis added).

> *movements were outweighed by any other factors and indices which might be moving in a negative direction during the [POI].*[148]

In the *China - X-Ray Equipment* case, the EU raised two important issues in the determination of material injury:

a) "that MOFCOM incorrectly characterised certain factors as 'negative' by ignoring positive trends exhibited by each of the factors at issue, making contradictory observations and failing to explain the basis for its assertions regarding certain injury indicia"; and
b) that MOFCOM failed to provide a compelling explanation regarding why the negative factors supported an affirmative injury determination in the light of several factors exhibiting positive trends.

The EU argued that MOFCOM failed to provide a compelling explanation regarding why the negative injury factors supported an affirmative injury determination in the light of several factors exhibiting positive trends. The parties agreed that MOFCOM found 9 of the 16 indicia of the state of the industry to be "positive". The EU's complaint was 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.

First, the panel noted that issue (a) had been previously considered by the *EC - Fasteners(China)* panel, which upheld a finding that a profit rate of 4.4% was "low", on the basis that the investigating authority had found that a profit margin of 5% could be expected in the industry in the absence of injurious dumping.[149] The panel also noted that factors exhibiting a positive trend may be considered "negative" when the increases are significantly less than the expansion in demand, i.e., when the actual situation is measured vis-à-vis what the situation would have been in the absence of injurious dumping.[150]

The panel further noted that issue (b) had been previously considered by a number of panels and by the Appellate Body and quoted with approval the *Thailand – H-Beams* panel finding that

[148] Panel Report, *Thailand – H-Beams*, para. 7.249 (emphasis added). See also Panel Report, *EC – Countervailing Measures on DRAM Chips*, para. 7.372 and Panel Report, *EC – Fasteners*, para. 7.399.

[149] Panel Report, *EC – Fasteners (China)*, para. 7.399.

[150] *Ibid.*, para. 7.403.

> *While we do not consider that such positive trends in a number of factors during the [POI] would necessarily preclude the investigating authorities from making an affirmative determination of injury, we are of the view that such positive movements in a 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 [POI].*[151]

The panel also cross-referenced to *EC – Countervailing Measures on DRAM Chips*, a case relating to countervailing measures, and quoted with approval as follows:

> *In EC – Countervailing Measures on DRAM Chips, a case considering the analogous provision under the Agreement on Subsidies and Countervailing Measures (SCM Agreement), the panel held that the investigating authority had examined all factors both individually and in an overall context and had provided a reasoned and adequate explanation to support its determination. Although a number of factors had grown in absolute terms during the POI, the panel placed considerable emphasis on the fact that the investigating authority had explained that the levels of growth were well below those necessary to remain competitive in the industry at issue. Therefore, while only 3 factors developed negatively over the POI, the investigating authority had taken into account the negative effects on other factors, which had in fact grown in absolute terms.*[152]

Finally, the panel noted that a decline with respect to only one injury factor would not necessarily prevent a finding of injury. However, in such a case, "the nature of the product, industry and market, as well as the reasoning of the investigating authority, would be critical considerations for a reviewing panel".[153]

The panel in *EU - Footwear (China)*also found that all factors need not be given the same weight in an investigation and also that not all factors need to show injury:

[151] Panel Report, *Thailand – H-Beams*, para. 7.249.

[152] Panel Report, *EC – Countervailing Measures on DRAM Chips*, para. 7.372.

[153] Panel Report, *EC – Fasteners (China)*, para. 7.401, footnote 814.

> *…while all listed factors must be considered in every investigation, this does not mean that each of those factors will be relevant to the investigating authority's determination in a given case, as the relevance, and significance, of each factor will vary depending on the nature of the product and industry in question. In addition, we consider it clear that it is not necessary that all relevant factors, or even most or a majority of them, show negative developments in order for an investigating authority to make a determination of injury.*[154]

In *China – HP-SSST* the panel also considered whether the investigating authority had properly weighed "positive" and "negative" injury factors in its determination of material injury.[155] The panel found that

> *Although brief, MOFCOM's determination does discuss the interplay between the positive and negative injury factors. Thus, while MOFCOM acknowledges that factors such as domestic sales, market share, capacity, output and employment indicate that the domestic industry has grown, it also observes that sales revenue has declined as a result of the fall in domestic prices. MOFCOM finds that this, in turn, has resulted in a decline in profitability, as sales revenue has not kept pace with cost increases. MOFCOM's Final Determination is therefore not "silent" on the interplay between positive and negative injury factors. Nor does MOFCOM fail to provide any explanation "whatsoever" regarding its weighing of negative and positive injury factors.*[156]

It accordingly held that the investigating authority had not failed to properly weigh positive and negative injury factors.

Panels have also held that a holistic approach must be taken to the overall determination of material injury. Thus, thus panel in *EU - Footwear (China)*held that

> *…as the text of the Article 3.4 explicitly states, no one or several factors can necessarily give decisive guidance. In our view, this means that an overall evaluation of the information, in context, is necessary, as well as an explanation of how the facts considered by the investigating authority support its determination."*[157]

[154] Panel Report, *EU – Footwear (China)*, para. 7.413.

[155] Panel Report, *China – HP-SSST*, para. 7.164 et seq.

[156] *Ibid.*, para. 7.167.

[157] Panel Report, *EU – Footwear China)*, para. 7.413.

5. Relationship with other Articles and Agreements

There is a close relationship between Article 3.4 and Articles 2.1, 3.1, 3.2, 3.3, 3.5, 3.6, 3.7. 3.8, 4.1, 5.1, 5.2, 5.3, 5.7, 5.8, 6.5.1 and 12 of the Anti-Dumping Agreement. Despite this, the DSB had not specifically ruled on the interaction with each of these provisions.

5.1. *Interaction between Article 3.4 and Articles 3.1 and 3.2*

A panel has ruled as follows on the interaction with Articles 3.1 and 3.2:

> *…in the Panel's view, there is considerable overlap between the European Union's claim under Articles 3.1 and 3.2 of the Anti-Dumping Agreement and its claim under Articles 3.1 and 3.4. Essentially, the European Union complains that the analysis of domestic prices and costs, in the context of the price effects analysis, should have been disaggregated under Article 3.4. However, the Panel's finding under Article 3.2, namely that MOFCOM erred in failing to take into account the differences between products in its analysis of price undercutting and price suppression, addresses the concerns regarding the aggregation of prices raised by the European Union under Article 3.4. The Panel does not consider it necessary to make a further finding of inconsistency, this time under Article 3.4, in relation to the same aspect of MOFCOM's reasoning. In the light of this, and the fact that the Panel has elsewhere found China to have acted inconsistently with Article 3.4, the Panel exercises judicial economy in relation to this section of the European Union's Article 3.4 claim.*[158]

5.2. *Interaction between Article 3.4 and Article 3.5*

Regarding the interaction with Article 3.5, the Appellate Body remarked that Article 3.4 requires:

> *"an examination of the explanatory force of subject imports for the state of the domestic industry". However, it does not require a demonstration that subject imports are causing injury to the domestic industry. Rather, the latter analysis occurs under Article 3.5, which also requires a non-attribution analysis relating to all factors causing injury to the domestic industry.*[159]

In the*China - X-Ray Equipment* case, the domestic industry was still in a start-up situation. The panel found that the start-up situation affected several injury indicators and that this supported the panel's view that the alleged business

[158] Panel Report, *China – X-Ray Equipment*, para. 7.189.

[159] Appellate Body Report, *China – GOES*,para. 150.

expansion "was a factor having an effect upon certain indicia of the state of the industry found in Article 3.4 of the Anti-Dumping Agreement, rather than a factor which itself gave an indication of whether the industry was injured",[160] i.e. that this related to Article 3.5 rather than to Article 3.4.

Still on the interaction with Article 3.5, the Appellate Body in *China – GOES* remarked that

> *Articles 3.4 and 15.4 set out the economic factors that must be evaluated regarding the impact of such imports on the state of the domestic industry, and Articles 3.5 and 15.5 require an investigating authority to demonstrate that subject imports are causing injury to the domestic industry.[(213)161]*
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> *[213] Additionally, Articles 3.3 and 15.3 stipulate the conditions under which an investigating authority may cumulatively assess the effects of imports from more than one country. Articles 3.6 and 15.6 specify that the effect of the subject imports must be assessed in relation to the production of the like domestic product. Articles 3.7 and 3.8 of the Anti-Dumping Agreement and Articles 15.7 and 15.8 of the SCM Agreement set out the requirements regarding the determination of a threat of material injury.*

5.3. *Interaction between Article 3.4 and Article 2.1*

Article 3.4 requires an examination of the impact of *dumped* imports on the domestic industry. The panel in *EC – Bed Linen* ruled that individual import transactions found not to be dumped did not have to be excluded from the injury analysis, but that all transactions from an exporter found to be dumping could be included in the injury analysis.[162] The panel considered

> *…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*

[160] Panel Report, *China – X-Ray Equipment*, para. 7.258.

[161] Appellate Body Report, *China – GOES*, para. 127.

[162] Panel Report, *EC – Bed Linen*, para. 6.122.

analysis of "dumped imports" under Articles 3.1, 3.4, and 3.5 of the AD Agreement.[163]

5.4. *Interaction between Article 3.4 and Article 4.1*

The panel in *China – HP-SSST* noted the close relationship between Articles 3.4 and 4.1 of the Anti-Dumping Agreement and indicated that

> *…"the examination of the impact of the dumped imports on the domestic industry" provided for in Article 3.4 "shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the **industry**" (emphasis supplied). In our view, the complainants' approach to Article 3.4, and its focus on particular segments of the domestic industry, is overly focused on the causal connotations of the term "impact", and overlooks the obligation in Article 3.4 to evaluate the state of the domestic **industry**, as defined by Article 4.1 of the Anti-Dumping Agreement.*[164]

The same panel noted that the "industry" refers to the industry as defined in Article 4.1 and that segments of the industry could not be excluded from the analysis:

> *…it is unclear to us how a determination of injury in respect of the domestic industry as a whole – including an evaluation of the state of that industry as a whole - may be premised, from the outset, on the exclusion of a given segment of that industry.* [165]

5.5. *Interaction between Article 3.4 and Article 6.5.1*

In *China – Broiler Products* the panel held that there was a clear link between Article 3.4 and Article 6.5.1, which deals with the requirement to provide proper non-confidential versions of information submitted in confidence.

> *We are of the view that the graphs and explanations included in the non-confidential version do not provide the summaries required under Articles 6.5.1 and 12.4.1. First, we have already rejected China's argument that compliance with Articles 6.5.1 and 12.4.1 must be assessed in the light of the substantive provision the information may be used to address. Second, the graphs included in this section of the*

[163] Panel Report, *EC – Bed linen*, para. 6.136. See also GATT Panel Report *Salmon – Anti-DumpingDuties*, paras. 565-571; GATT Panel Report *Salmon - Countervailing Duties*, paras. 328-340.

[164] Panel Report, *China – X-Ray Equipment*, para. 7.153.

[165] *Ibid.*, para. 7.154.

> *Petition provide neither figures nor a range of figures of production capacity or capacity utilization in relevant years; rather the graphs are set to unmarked scale lines. A partial estimation of redacted information on yearly capacity and capacity utilization could be constructed by connecting information from different parts of the Petition and then applying it to the graphs. The outcome of such an exercise, however, remains insufficient to provide an understanding of the redacted information and consequently does not fulfil the due process objective underlying the requirement to provide non-confidential summaries. Finally, the very exercise of calculating an approximate figure of production capacity through a series of operations requires interested parties to derive and piece together their own summary of the redacted information. Such an obligation is not contained in the text of Articles 6.5.1 and 12.4.1, which place the burden of providing an adequate non-confidential summary on the party submitting the confidential information.*[166]

Although it may not be immediately clear from the text, the issue at stake is that when a proper non-confidential version is not supplied, it means that the other party is not placed in a position to comment properly on the information submitted in confidence. This, in turns, means that there is a possibility that the investigation may not be objective, as information that could have been submitted if a proper non-confidential version had been supplied, could now not be submitted or considered.

5.6. *Interaction between Article 3.4 and Article 12.2*

Although the DSB has indicated that the requirement under Article 3.4 to conduct an objective analysis of material injury and the requirement under Article 12.2 to publish the outcome of any analysis are two separate issues, in *China – Broiler Products* the US, with reference to the panel report in *Egypt – Rebar*, claimed that "a responding Member would have a difficult time rebutting a prima facie case that it did not conduct an 'evaluation' pursuant to Article 3.4 if there is no written record of said evaluation".[167] In *China – X-RayEquipment*, MOFOM's failure to provide adequate reasoning for its findings therefore led the panel to conclude "that MOFCOM did not conduct an objective examination of the evidence."[168]

[166] Panel Report, *China – Broiler Products*, para. 7.60.

[167] *Ibid.*, note 230.

[168] Panel Report, *China – X-Ray Equipment*, para. 7.216.

Accordingly, whether the evaluation was clearly set out in any record could have a significant impact on the Panel's determination of whether an objective evaluation was conducted.

6. EU's regulatory framework and practice

The requirements regarding the assessment of the impact of dumped imports are contained in Article 3(5) of the basic Regulation, which has an important difference with Article 3.4 of the Anti-Dumping Agreement. Thus, in addition to the factors cited in the Agreement, Article 3(5) includes the examination of "the fact an industry is still in the process of recovering from the effects of past dumping or subsidisation". Other than this, the basic Regulation transposes the Agreement.

While in the past the Commission may not have examined all the factors listed in Article 3(5) (and in Article 3.4 of the Anti-Dumping Agreement), thus acting inconsistently with that Agreement (see*EC – Bed Linen*), in recent times the determinations appear to address all of the factors.

For instance, in the determinations concerning Cold-rolled flat products and Acesulfame potassiumthe Commission examined the following factors:

- production, production capacity and capacity utilisation;
- sales and market share;
- growth;
- employment and productivity;
- magnitude of the dumping and recovery from past dumping;
- prices and factors affecting prices;
- labour costs;
- inventories;
- profitability, cash flow, investments, return on investments and ability to raise capital.

As it can be noted, factors are grouped. For instance, all financial factors are currently examined together, under a single sub-section. This facilitates a comparative examination between them.

For already some time, where sampling of domestic producers is used, the Commission presents and analyses data for the "Community industry", in case of some factors (macroeconomic ones), while for other indicators (microeconomic ones), only data for the sampled producers are presented and analysed. For instance, in Cold-rolled flat products the Commission justified this approach as follows

(114) As mentioned in recital 8 above, sampling was used for the determination of possible injury suffered by the Union industry. Four producers have been sampled.

(115) For the injury determination, ***the Commission distinguished between macroeconomic and microeconomic injury indicators****. The Commission evaluated the* ***macroeconomic indicators*** *on the basis of data collected from the sampled producers and the data from the complaint for the other Union producers.* ***The data related to all Union producers****. The Commission evaluated the* ***microeconomic indicators*** *on the basis of data contained in the questionnaire replies from the sampled Union producers.* ***The data related to the sampled Union producers****. Both sets of data were found to be representative of the economic situation of the Union industry.*

(116) The ***macroeconomic indicators*** *are:* ***production, production capacity, capacity utilisation, sales volume, market share, growth, employment, productivity and magnitude of the dumping margin****.*

(117) The ***microeconomicindicators*** *are:* ***averageunitprices,unitcost,labourcosts,inventories,profitability,cashflow, investments, return on investments, and ability to raise capital****.*

(118) Interested parties argued that the data of the sampled Union producers should be consistently used for the injury assessment instead of dividing the indicators into macroeconomic indicators and microeconomic indicators. They argued that the separate analysis of macroeconomic and microeconomic indicators was subject to manipulation by the complainant, as the complainant could steer the data collection at the macroeconomic level, as the decision whether a specific indicator was a macroeconomic or a microeconomic indicator was based on the availability of information.

(119) The Commission established and analysed macroeconomic indicators as they were found at Union level and not only at the level of the sampled Union producers. ***It is considered that as far as macroeconomic indicators are concerned, complete data of the whole Union industry****, which also includes the data from the sampled companies,* ***reflect better the situation during the period considered than data for only part of the industry****.*

(120) The data provided by the complainant for the evaluation of the macroeconomic indicators was considered accurate and reliable. The validity of the data was checked against the information submitted by the sampled Union producers. For the sake of the argument, an injury

analysis consistently using only the data provided by the sampled Union producers would show a more negative picture for the macroeconomic indicators. There were no grounds to establish that the complainant deliberately withheld information to manipulate the injury analysis. There is therefore no reason to disregard the information provided by the complainant concerning the macroeconomic indicators. Therefore, the argument that the analysis of all injury indicators should be limited to the information submitted by the sampled Union producers only cannot be accepted. [emphasis added]

As will be shown below, the separate analysis of macro and microeconomic factors has been validated by the Court. The consistency of this approach with the Anti-Dumping Agreement needs to be yet tested.

Protection of confidential information is important. Where the number of domestic producers is limited (less than 3), information is indexed and in some cases, provided in ranges.

Data for the whole of the investigation period are presented for each factor, normally in tabular form. After the table, data are analysed. Intervening trends are discussed, where necessary. As a matter of example the analysis of financial factors in Acesulfame potassium is presented below

(65) Profitability, cash flow, investments and return on investments of the Union producer developed over the period considered as follows:

Table 10

Profitability, cash flow, investments and return on investments

	2011	2012	2013	Investigation period
Profitability of sales in the Union to unrelated customers — Index	100	74	48	26
Cash flow — Index	100	85	75	78

	2011	2012	2013	Investigation period
Investments — Index	100	51	48	34
Return on investments — Index	100	68	44	25

Source: Data provided by Union industry.

(66) The Commission established the profitability of the Union industry by expressing the pre-tax net profit of the sales of the like product to

unrelated customers in the Union as a percentage of the turnover of those sales. In calculating profitability, the Commission deducted from the reported costs all R & D and marketing costs which it considered to be of an exceptional nature, as also mentioned in recital 27 above. Without this deduction, the Union industry would have reached a loss-making situation in the investigation period. In line with the fall in profitability, net cash flow, investments and return on investments also decreased.

(67) The Union industry claimed that the deducted R & D and marketing costs were normal, ongoing costs related to the product concerned. However, the investigation concluded that these costs related to a new product, albeit a product falling within the product scope of this investigation. These exceptional and high costs would not occur in a normal or representative year for the Union industry. In addition, these costs concern the R & D and marketing of a product that was not sold in significant volumes on the Union market during the period considered.

(68) Even with the above mentioned exclusion of costs, the Union producer's profitability decreased sharply and consistently over the period considered. The Commission considered the level of profitability in the investigation period and the trend of profitability to be injurious because of the clear and substantial fall described above.

(69) The steep fall in profitability was mainly due to the allocation of steadily increasing fixed costs per tonne as compared to the reducing volume of production and sale. In addition, there was a clear fall in average prices, which led to the inability of the Union industry to sustain profit levels and as a result the profitability dropped dramatically. As shown in Table 10 above, the other performance indicators followed a similar trend to return on turnover.

(70) The net cash flow is the ability of the Union producers to self-finance their activities. Expressed as an index, the trend in net cash flow developed negatively over the period considered, decreasing by 22% as a consequence of the profitability decrease.

(71) The Union industry's investments decreased even more significantly. The volume of investments during the investigation period was only around one third of the volume of investments in 2011. As for profitability, investments in the new product were not taken into account for this calculation.

(72) The return on investments expresses the profit in percentage of the net book value of investments. It fell strongly and consistently from 2011 to the investigation period, dropping around 75%.

(73) Being part of a large international group the sole Union producer did not claim that its ability to raise capital had so far been affected by the above developments. However, the Union industry made clear during the procedure that the current situation was not sustainable.

Generally, data regarding sales volume and prices, and profitability concern activities with unrelated customers. (see determinations in Acesulfame potassium and Cold-rolled flat products)

After the presentation, and analysis, of data factor-by-factor, each injury determination contains a section where the Commission inter-relates the findings for each factor. From this joint assessment of all factors, the Commission reaches a conclusion on the existence (or not) of material injury. Acesulfame potassium is presented as example

(74) Significant negative trends were observed in the following economic indicators: production, capacity utilisation, market share, employment, sales volume and sales prices on the Union market. Stocks (as percentage of production) increased although they decreased in absolute terms. The impact of consistently decreasing sales prices in combination with overall decreasing sales volumes have been substantial, leading to a considerable drop in market share, profitability, return on investment and cash flow.

(75) The fact that the Union market is dominated by large players in the food and beverage sector and that such business is conducted through annual contracts means that in this sector the Union industry is particularly sensitive to falls in sales volumes and prices even if these falls concern a small number of customers.

(76) Productivity on the other hand improved. However, the development was a consequence of a reduction in the number of employees due to the decrease in demand and, consequently, production, which made some of the workers redundant. Therefore, under these circumstances the increase in productivity cannot be considered a positive element.

(77) Union consumption has also increased. However the Union industry was not able to benefit from it due to the fall in both sales volume and sales prices mentioned above.

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(78) An interested party questioned the existence of injury. This party argued that the situation of the Union industry during the investigation period was normal. It claimed that the Union industry had lost patent protection and subsequently its dominant market position. Therefore, it should now accept lower profits and lower sales volumes.

(79) This argument is unfounded. The main production patent expired in 2005 (two smaller patents expired before and after that date). Following the expiry of the production patent in 2005, and well before the period considered, new players entered the market, namely the Chinese exporting producers, and their presence has been gradually increasing since then. In 2009, well before the beginning of the period considered, the market share of the Union industry had dropped from its so far dominant position to below 50 %. By 2011, the beginning of the period considered, the market share of Chinese imports in the Union market already by far and large exceeded the Union industry's market share. Therefore, indeed the expiry of the patent protection in 2005 led to a market of more than one player.

(80) Further, the injurious situation has been analysed over the period considered, that is to say from 2011 to 2014 or as much as six years following the expiry of the production patent. The development of the majority of the injury indicators over that period (2011 — investigation period) was profoundly negative for the Union industry. More specifically, it had lost market share, decreased its sales prices, it experienced sharp declines in profitability and the rest of the financial indicators examined above, the productivity decreased, shut-downs became necessary in order to cut costs and no benefits were experienced from an increasing consumption as explained in recital 74 above. Such an economic situation cannot be simply explained by the possibility for new players to enter the market, which is the consequence of the expiry of the patent protection. In any event, this situation cannot be considered normal in the sense of a sustainable and healthy situation. First, the production patent expired well before the period considered and therefore there was sufficient time for the Union industry to react to the lack of protection. Second, even though the expiry of the patent protection could be marked with certain declines in performance, the levels of the injury indicators in the investigation period itself are considerably low for a sustainable and healthy industry. Moreover, despite this loss of patent protection the Union industry maintained a healthy economic and financial situation until 2011.

(81) On this basis the argument that the Union industry does not suffer injury must be rejected. The expiry of the patent protection, however, is

further analysed as a factor contributing to the injury suffered by the Union industry.

(82) On the basis of the above, the Commission concluded at this stage that the Union industry suffered material injury within the meaning of Article 3(5) of the basic Regulation.

In the practice of the Commission, five factors play a key role in any injury determination: actual or potential decline in sales, profits, the development of market shares, Community prices and the utilisation of capacity. (Mueller, Khan, Scharf, 2009)

In spite of the different nature of expiry reviews, the Commission also presents and analyses data for the factors enumerated in Article 3(5). Thus, for instance, in Steel wires the Commission examined all of the factors that it had considered in Cold-rolled flat products and Acesulfame potassium. In spite of this similarity, there are major differences in injury assessments in original investigations and in reviews.

A first difference can be noticed in the joint assessment of the factors. In expiry reviews, the Commission's analysis focuses on the impact of the existing measures on the situation of the domestic industry. The determination in Steel wires is reproduced as a matter of example

(95) The main injury indicators showed a negative trend, related to the impact of the crisis experienced in the construction sector. Thus, consumption, production volume and sales declined by 12% over the period considered.

(96) However, the measures have been effective in helping the Union industry to weather this crisis and undertake a significant effort of restructuring materialised by a reduction of production capacity and workforce.

(97) Signs of improvement have emerged in the last years of the period considered where an increase of productivity and capacity utilisation can be observed. Furthermore, costs of production have been brought close to the average sales price.

(98) Nevertheless, the situation of the Union industry remains fragile. While most financial indicators have improved, they have not reached a sustainable level. Consumption and prices remain depressed and there are sign of persisting overcapacity in the Union.

(99) The anti-dumping measures have partially achieved their objective by removing some of the injury suffered by the Union industry as a

consequence of dumped imports from China. While financial indicators such as profit- ability and return on investment have improved throughout the period considered, they remain negative. Cash flow has also improved and became slightly positive. Therefore it is clear that the Union industry has not yet fully recovered from the effects of past dumping and is still in a fragile situation, thus very vulnerable to any recurrence of dumped imports.

(100) Even if the fragile situation of the Union industry was qualified as a material injury, this cannot be attributed to the imports from China representing a market share of less than 1% on the Union market. In the absence of price pressure from China, the Union industry has been able to maintain their market share and reduce their losses.

A second difference is that in expiry reviews the Commission will, in addition, present and analyse information on the likelihood of continuation or recurrence of injury. The basic Regulation is silent on the specific factors that should be examined in the context of an injury assessment in an expiry review. In Steel wires, for instance, the Commission looked at the impact of the projected volume of imports from China and price effects in case of repeal of measures.

Meeting the evidentiary threshold that would allow the extended measure to stand a Court/WTO DSB attack is not always easy. In recent times, and especially in reviews of measures imposed against China, there is no cooperation from exporters and limited from importers. Against this background, the Commission – supported by the domestic industry – must actively search for evidence to build up a sufficiently strong injury determination.

Injury determinations are very often reviewed by the Courts. There is therefore a large body of jurisprudence. Quite often, however, the judgments examine factual aspects of investigations, or interpretations thereof. Thus, systemic findings are not common (unlike in WTO Appellate Body determinations).

Importantly, in T-310/12 Yuanping Changyuan Chemicals the Court seems to have implicitly validated the Commission's approach to divide the factors into macro- and micro-economic and to assess factors on the basis of different data sets (data for the Community industry vs. data for sampled/subset of producers within the Community industry).

ARTICLE 3.5 - CAUSATION

Fifteen panel and Appellate Body reports have been published between 1 January 2011 and end of April 2015.[169] In eight disputes, claims related to causality determinations have been examined:

#	DS	Short Name	Addressed the issue?
1	382	*US — Orange Juice (Brazil)*	✗
2	402	*US — Zeroing (Korea)*	✗
3	404	*US — Shrimp (Viet Nam)*	✗
4	405	*EU — Footwear (China)*	✓
5	414	*China — GOES*	✓
6	415/416/417/418	*Dominican Republic — Safeguard Measures*	✓
7	422	*US — Shrimp and Saw blades*	✗
8	425	*China — X-Ray Equipment*	✓
9	427	*China — Broiler Products*	✓
10	429	*US — Shrimp II (Viet Nam)*	✗
11	436	*US — Carbon Steel (India)*	✓
12	437	*US — Countervailing Measures (China)*	✗
13	440	*China – Autos (US)*	✓
14	449	*US — Countervailing and Anti-Dumping Measures (China)*	✗
15	454/460	*China — HP-SSST (EU)* and *China — HP-SSST (Japan)*	✓

A recent panel indicated what is the relationship between Article 3.5 and the rest of Article 3 of the Anti-Dumping Agreement:

> *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*

[169] Technically, however, 19 cases have been examined and decided because, in two cases, more than one country had challenged a particular measure.

inquiries thus form the basis for the overall causation analysis contemplated in Articles 3.5 and 15.5.[170] *[footnote omitted]*

1. Requirements for investigating authorities

In general "causality" or "causation" has been defined as the relation between an event (the cause) and a second event (the effect), where the second event is understood to be a consequence of the first. The connection between the cause and the effect in this way is normally referred as a causal nexus or relationship, in WTO terms "the causal link".

The analysis, as clarified by many panels and the Appellate Body, has two parts:

- An investigating authority must demonstrate, based on evidence, that a causal relationship link between the dumped/subsidised/increased imports and the serious injury or threat of serious injury; and
- An investigating authority must investigate if there are factors other than dumped/subsidised/increased imports which are at the same time causing injury to the domestic industry. If there are any such factors, the investigating authority must not attribute the injury caused by them to the dumped/subsidised/increased imports.

The reference to "injuries" in Article 3.5 makes it clear that multiple factors may be injuring the domestic industry at the same time; therefore investigating authorities must not attribute to dumped/subsidised/increased those injuries caused by other factors. Determinations must include reasoned explanations, based on accurate (verified) data. An investigating authority must be unbiased and objective throughout the investigation; determinations must take into account the facts and arguments before it. In this regard, the panel report in *China — Autos (US)* stated the following:

> *An IA's determination of the causal relationship between subject imports and injury to the domestic industry* ***must be "reasoned and adequate".*** *In making such a determination, the IA must demonstrate a relationship of cause and effect, such that subject imports* ***are shown to have contributed to the injury to the domestic industry.That other factors may also have caused injury to the domestic industry is no bar to establishing this causal relationship, provided that subject imports have contributed to the injury. In other words, subject imports need not be "the" cause of the injury***

[170] Appellate Body Report, *China – GOES* para. 128.

> ***suffered by the domestic industry, provided they are "a" cause of such injury.***[171] *[emphasis added]*

Since a causation analysis requires considering any other known factors that may be impacting the domestic industry, an investigating authority will be required to weigh data and arguments regarding all factors found to be present, and ultimately determine, if the effect of these factors is such as to break the causal link. However, as the panel in *China — Autos (US)* stated in the above-cited excerpt: a causal link may still exist *where there are other factors that at the same time may be impacting the domestic industry*.

1.1. *Obligation to develop a proper analysis of causation*

Panels and the Appellate Body have repeatedly stated that the analysis must be rigorous and deep enough to show a real investigative and analytical labour. This is required for all trade defence instruments. In *Dominican Republic — Safeguard Measures*, the panel found that the analysis of the investigating authority was insufficient:

> *…the DEI's Preliminary and Final Technical Reports confine themselves to citing relevant legal provisions, repeating the arguments of the interested parties during the national investigation procedure, and suggesting that there are elements of injury that "could determine the existence" of a "direct link" between the increased imports of polypropylene bags and tubular fabric and the commercial situation facing the domestic industry. The DEI's reports do not therefore contain any finding, but put the decision on whether or not to impose a provisional or definitive safeguard measure before the plenary meeting of the Commission. Neither does the injury section in the technical reports provide any explanation concerning the causation itself.*
>
> *…the Panel notes that the Commission concluded that there was a causal link between the increased imports and the serious injury without having analyzed the elements to be taken into account in order to reach such a determination... in its preliminary and definitive Resolutions the Commission does not provide any explanation of how this conclusion would justify the determination of the existence of a causal link between the increased imports and the injury. Neither does the Commission provide any analysis how it was ensured that the effects of the injury to the domestic industry caused by other factors were not attributed to the increased imports.*[172]

[171] Panel Report, *China — Autos (US),* para. 7.322.

[172] Panel Report, *Dominican Republic — Safeguard Measures*, para. 7.352-7.354.

The obligation to conduct a proper analysis and to include the necessary references on the determinations was clearly pointed out in the case *China — X-Ray Equipment*. The exporter claimed that the domestic industry was being injured by other known factors, including “product quality and technology factors" as well as "fair competition". The panel considered that the investigating authority had not conducted an objective examination of the evidence, as required by Articles 3.1 and 3.5 of the Anti-Dumping Agreement, because it just included a brief one-sentence summary of the content of the reports in the list of exhibits at the end of the injury brief. The panel said that in its view, the evidence presented by the exporter was such as to require a more reasoned and detailed response from the authority.

1.2. *Causality in an Article 11.3 review*

Following an earlier finding of the Appellate Body, the panel in *EU – Footwear (China)* stated that Article 11.3 of the Anti-Dumping Agreement does not address the question of the relevance of Article 3.5 in expiry reviews:

> ***On its face, Article 11.3 does not require investigating authorities to establish the existence of a 'causal link' between likely dumping and likely injury****. Instead, by its terms, Article 11.3 requires investigating authorities to determine whether the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury. Thus, in order to continue the duty, there must be a nexus between the 'expiry of the duty', on the one hand, and 'continuation or recurrence of dumping and injury', on the other hand, such that the former 'would be likely to lead to' the latter. This nexus must be clearly demonstrated.*[173]
>
> *…the Appellate Body concluded that "this does not mean that a causal link between dumping and injury is required to be established anew in a "review" conducted under Article 11.3 of the Anti-Dumping Agreement. This is because the 'review' contemplated in Article 11.3 is a 'distinct' process with a 'different' purpose from the original investigation…*[174] *[emphasis added]*

In that case the Appellate Body differentiated the need to conduct a causation analysis in an original dumping investigation and in a review under Article 11.3. The causation analysis in a review does not need to be conducted on the same

[173] Appellate Body, *US –Oil Country Tubular Goods Sunset Reviews*, para. 108, cited by Panel Report, *EU — Footwear (China)*, para. 7.494.

[174] Panel Report, *EU — Footwear (China),* para. 7.494.

terms of an ordinary investigation. Both are different procedures and the review should only focus on the likelihood of continuation or recurrence of injury:

> *In this case, it is undisputed that the European Union in fact made a determination with respect to causation, including with respect to non-attribution under Article 3.5, in the context of its injury determination in the expiry review. We recall that the Review Regulation specifically addresses the question whether factors other than dumped imports would put into question the likely effect of dumped imports on the situation of the EU industry in the future, and refers in this regard to the discussion in the context of the injury determination. We will therefore examine each of China's allegations of error with respect to Article 3.5 in the context of the Review Regulation, in order to evaluate whether China has established that any inconsistencies with the AD Agreement in the Commission's analysis and determination of causation demonstrate that the Commission failed to make a likelihood determination based on a "sufficient factual basis" allowing it to draw "reasoned and adequate conclusions" concerning the likelihood of continuation or recurrence of injury.*[175]

Since the EU included a causation analysis in its determination, the panel found a justification to examine whether that analysis was conducted in compliance with Article 3.5.

2. Scope of the causation and non-attribution language

2.1. *Correlation between prices of dumped imports and injury*

Article 3.5 of the Anti-Dumping Agreement requires from an investigating authority to demonstrate that the "dumped imports are, through the effects of dumping, as set forth in paragraphs 2 and 4, causing injury", where paragraph 2 sets out the requirements for analysing the volume and price effects of the dumped imports. Equivalent requirements are set in Article 15.2 of the SCM Agreement and Article 4.2 (b) of the Safeguards Agreement.

The existing language of causation requires establishing a causal link between dumped imports and injury. The coincidence between trends in injury factors and in dumped imports will support the existence of a causal relationship. However, frequently the mere demonstration of the existence of a coincidence will not suffice; a reasoned and adequate explanation will have to accompany it. In this sense the panel in *China — X-Ray Equipment* indicated that:

[175] Panel Report, *EU — Footwear (China),* para. 7.496.

> *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.*[176]

China did not provide a reasonable and adequate explanation regarding how the dumped imports caused price suppression in the domestic industry (the panel found that in 2008 the prices of the dumped imports were above those of the domestic industry, which contradicted the price suppression finding). For that reason, the panel considered that China had not conducted an objective examination of the evidence and concluded that China acted inconsistently with Articles 3.1 and 3.5 of the Anti-Dumping Agreement.

2.2. *Concept of known factors*

(While not excluding that the obligation went beyond), the panel in *EU — Footwear (China)* found that factors raised by the parties should be examined by investigating authorities:

> *"…it is also clear that there is* ***no requirement under Article 3.5 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****… Although, the AD Agreement does not indicate how other factors might become "known" to the investigating authority, or how they should be raised by interested parties in order to become "known", we consider that* ***"known" other factors would, at a minimum, include factors allegedly causing injury that are clearly raised by interested parties*** *during the course of the anti-dumping investigation.* [177] *[emphasis added]*

[176] Panel Report, *China — X-Ray Equipment*, para. 7.247.

[177] Panel Report, *EU — Footwear (China),* para. 7.484.

In addition, the panel made it clear that there is *no open-endedobligation* on the investigating authority to seek out and examine *all possible factors*. What is important is that it examines those raised by the parties and those that an unbiased and objective investigating authority, based on the information in the record, would have found out.

The panel in *China — Autos (US)* agreed with the above findings:

> *Regarding non-attribution, whether an "other factor" was "known" to an IA will normally turn on an evaluation of the extent to which that factor was "clearly raised" before the IA by interested parties in the course of an investigation. An IA is under no obligation to seek out and identify all possible other factors causing injury to the domestic industry in a given investigation. Moreover, the factors listed in Articles 3.5 and 15.5 do not constitute a mandatory list of factors that must be examined by an IA in every case. However,* ***once a factor is known, the IA must explicitly address whether that factor was a cause of injury to the domestic industry. If the IA finds it was not, it need not consider it further. However, should the IA conclude that such a known "other factor" was causing injury, the IA must then "separate and distinguish" the injurious effects of each other factor from those of the subject imports****.*[178] *[emphasis added]*

As this panel recognises, there are two possible outcomes of the examination of a known factor. In the latter case, the investigating authority is required to undertake the additional step of “separating and distinguishing”.

The panel in *EU — Footwear (China)* recalled that the Appellate Body’s finding that a factor must be examined when three requirements are cumulatively met:

> *[i]n order for this obligation to be triggered, Article 3.5 requires that the factor at issue: (a) be "known" to the investigating authority; (b) be a factor "other than dumped imports"; and (c) be injuring the domestic industry at the same time as the dumped imports.*[179]

In *EU — Footwear (China)* China claimed that the European Commission had failed to analyse “outsourcing” as an “other factor” causing injury. In dismissing the claim, the panel stated that the mere reference to that element in the questionnaires was not sufficient for it to qualify as an “other factor”.

[178] Panel Report, *China — Autos (US),* para. 7.323.

[179] Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 175, quoted by the Panel Report, *EU — Footwear (China),* para. 7.484.

> *Although the Union interest questionnaires provide information with respect to "outsourcing", we see nothing in them that would identify "outsourcing" as an "other factor" allegedly causing injury… Thus, merely because the Community interest questionnaires mention outsourcing is not sufficient to demonstrate that this was an "other factor" causing injury which the European Union was required to consider in its determination. We therefore reject this aspect of China's claim.*[180]

The reasoning of the panel clearly indicates that unless a situation has been identified as an "other factor", the investigating authority is not under the obligation to consider it as such and include it in the non-attribution analysis. This position is also supported by the panel in the case *China — GOES*, when it concluded that:

> *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.*[181]

Additionally, the party claiming the existence of other known factors shall provide a minimum of evidence in support of its claim. Otherwise, the investigating authority may dismiss the argument and will not be required to make a finding about it.

> *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***

[180] Panel Report, *EU — Footwear (China),* para. 7.512.

[181] Panel Report, *China — GOES,* para. 7.636.

> ***authority, we agree that there can be no inconsistency with Article 3.1 and 3.5 in failing to conduct a non-attribution analysis***.[182] *[emphasis added]*

2.3. *Specific analyses of "other known factors"*

2.3.1. Structural inefficiency of producers

In *EU — Footwear (China)*, the complainant argued that the EU producers were incapable of producing footwear on a mass scale. Therefore, those producers could not withstand competition from non-dumped imports. They were being injured as a result of their inefficient production structures. The European Union asserted that China could not transfer the injury caused by dumped imports to the structure of the EU industry. Both positions were presented during the EU investigation; the investigating authority disregarded China's argumentation accepting the domestic industry position. At the end, the investigating authority concluded that if the domestic industry were restructured, "it would be in a better position to meet this unfair competition, but even in its restructured state it would had difficulty matching the prices of those imports." The panel stated:

> *The fact that the EU industry could restructure and thus reduce the injurious effects caused by dumped imports does not mean that the structure of the EU industry itself is causing injury. China argues that the European Union offered no factual support for its conclusion. However, we consider that a lack of direct evidence for such reasoning is not fatal, particularly where, as in this case,* ***the reasoning itself is a rational explanation of the observed facts, and is not undermined by other evidence before the Commission***.[183] *[emphasis added]*

Efficiency of the domestic industry can usually be measured based on its productivity. In the case *China — Autos (US),* some parties raised the issue of declining productivity and increasing labour costs as other factors causing injury. The analysis of the argumentation of parties showed that labour costs, as a percentage of total costs, doubled throughout the POI, from 4% in 2006 to 9% in the interim 2009 period. Also, labour costs almost doubled from interim 2008 to interim 2009 while, per unit costs declined from a high of CNY 312,257 in 2008 to CNY 282,082 in the interim 2009 period. Then, pre-tax profit fell from a peak of CNY 1.721 billion in 2008 to CNY 1.03 billion in the interim 2009 period. Finally, the amount of the increase in labour costs from interim 2008 to interim 2009 (405 million CNY) largely corresponds to the amount of decline in

[182] Panel Report, *China — X-Ray Equipment,* para. 7.267.

[183] Panel Report, *EU — Footwear (China),* para. 7.501.

pre-tax profits in this period (493 million CNY). Under this scenario the panel considered that:

> *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****.*[184] *[emphasis added]*

These cases show how important is to foresee different, but correlated, issues that may result from information on the record. In particular, in the second dispute, the investigating authority was found to be at fault *simply* because it did not examine a factor – productivity – which was only indirectly related to the factors actually evaluated.

2.3.2. Market share and imports from third countries

In *EU — Footwear (China)*, the complainant argued that the EU had failed to properly evaluate the effects of imports from third countries, and especially their export prices. China argued that imports from India and Indonesia were large and increasing, and that they were causing injury to the EU industry. The EU acknowledged that imports from third countries with low prices, such as India and Indonesia, were large and increasing, and that other exporting countries, including India and Indonesia may have been taking market share from China and Viet Nam, but that the price levels were important. Nevertheless, the EU asserted that the significance of the injury caused by dumped imports from China and Viet Nam was adequately assessed, after discounting any effects of non-dumped imports from third countries.

[184] Panel Report, *China — Autos (US),* para. 7.340-7.341.

The panel evaluated the manner in which the European Commission examined this issue:

> *…the difference in price is particularly stark in the case of India, where the average export price is 25,8% higher than the average export price of shoes imported from Viet Nam and 40,3% higher than the average export price of shoes imported from China. Therefore their effect on the Union industry is significantly less pronounced. The average export price of shoes imported from Indonesia is 13,2% higher than the average price of shoes imported from China and comparable to the average export price of shoes imported from Viet Nam. Nevertheless the volumes of Indonesian imports would still mean that their relative impact would be limited. Having regard to the above, the relative volumes and higher prices of imports from other Asian countries do not allow to conclude that their effect would be sufficient to breach the link between the injury suffered by the Union industry and the large volumes of dumped imports from China and Viet Nam.*[185]

The panel in this case concluded that the EU had considered the effect of imports from third countries, but concluded that in light of the price levels, these did not break the link between dumped imports and injury. In the view of the panel, China failed to demonstrate that the EU had not made a reasonable analysis and interpretation of the facts, and that it had reached a conclusion which could not have been reached by an unbiased and objective investigating authority. Therefore, it rejected this aspect of China's claim.

In *China — Autos (US)*, the complainant also argued that the impact of imports from third countries and changes in market were not properly evaluated. The panel concluded that the determination lacked a reasoned and adequate explanation of the role of Chinese producers which were not part of the definition of domestic industry.[186]

2.3.3. Contraction in demand and changes in consumption patterns

One of the factors cited in Article 3.5 is contraction in demand or changes in the patterns of consumption. In *EU — Footwear (China)*, the complainant contended that the European Union did not correctly evaluate injury nor contraction in demand and changes in consumption patterns as "other know factors". With respect to the changes in consumption patterns, the European Union asserted that the determination clearly explained that "the growth in demand for non-leather footwear had not impinged significantly on that for

[185] Panel Report, *EU — Footwear (China),* para. 7.503.

[186] Panel Report, *China — Autos (US),* para. 7.334.

leather footwear." The EU acknowledged that there was a contraction in demand.

> *…The decrease in consumption has to be seen in conjunction with a parallel increase of consumption of other types of shoes outside the product scope (e.g., textile, rubber & plastic). By reference, textile, rubber and plastic shoes consumption increased by 23% in the same period. This appears to point to some substitution amongst the two product categories, linked also to fashion trends (penetration of mixed synthetic/leather shoes, or synthetic shoes which resemble leather). Considering however, that the increase in consumption of other footwear is far higher (23%) than the decrease in consumption of leather footwear (7%), it can however not be concluded that textile and other materials have substituted leather footwear to more than a limited degree.*[187]

This analysis was accepted by the panel as reasonable and objective:

> *We consider this to be a reasonable interpretation of the facts concerning the decline in consumption of the product under consideration and the increased consumption of other footwear, and one which could be reached by an unbiased and objective investigating authority on the basis of the information before it.*[188]

Changes in apparent consumption should logically be expected to have an impact on the domestic industry. Therefore, when a decline in consumption is identified in an investigation, the investigating authority should analyse this factor properly. In *China — Autos (US)*, the panel stated that

> *… MOFCOM's discussion of the purportedly limited impact of apparent consumption does not follow from the evidence on the record before it, and does not present a reasoned evaluation of that evidence. MOFCOM confined its assessment to two indicators, production and sales, in finding that trends in apparent consumption did not cause injury to the domestic industry. However,* ***a decline in apparent consumption will normally lead to decreased sales, increased inventories, and possibly lower prices****, with resulting negative consequences for the state of the domestic industry. Yet, MOFCOM did not address any of these elements, in determining that the decline in apparent consumption was immaterial to its causation analysis. [emphasis added]*

[187] Panel Report, *EU — Footwear (China),* para. 7.506.

[188] *Ibid.,* para. 7.507.

Thus, consumption may interact with factors listed under Article 3.4 of the Anti-Dumping Agreement in such a way that the development of consumption may explain the negative state of the domestic industry. That interaction between consumption and Article 3.4 factors must be examined in-depth and carefully, offering the investigating authority reasoned explanations for any findings.

2.3.4. Lack of competitive overlap between domestic and imported goods

The causation analysis requires establishing that injury and dumped imports are connected in a manner that one has been caused by the other. This can only happen if the investigated product and the like product are part of the same market. Therefore, where a party alleges lack of competitiveness, the investigating authority should investigate this matter with care. In *China — Autos (US)*, the United States contended that a lack of competitive overlap between subject imports and the domestic like product undermined MOFCOM's finding of a causal relationship. The panel concluded that:

> *…MOFCOM characterizes Chrysler's argument as being that there was "no competition" between subject imports and the domestic like product, and then dismisses the argument on the basis of Chrysler's own data, which shows that there was some competition. In our view, MOFCOM misconstrued Chrysler's argument. To us, Chrysler's argument seems to be more nuanced than an assertion that there was no competition between domestic and imported goods. We understand Chrysler to have argued that domestic and imported US automobiles occupied largely different market segments, and thus that it was unlikely that subject imports had "a material effect" on the state of the domestic industry. Chrysler relied on sales data showing that between 73.6 and 95.8% of subject imports sales during the POI were in the highest market segment, while between 96.6 and 98.8% of domestic like product sales were in the lowest market segment, a segment in which there were no sales of subject imports during the POI. In our view, **by misconstruing Chrysler's argument, MOFCOM failed to objectively examine the evidence presented by Chrysler, and failed to provide a reasoned explanation for MOFCOM's decision to disregard it**.[189] [emphasis added]*

This case is interesting in that it first shows the importance of having clarity about the arguments presented by the parties in the underlying investigations. In this case, the Chinese investigating authority seemed to have misunderstood the gist, preventing it from addressing the comment correctly. For this reason alone, a violation may occur as was the case in *China — Autos (US)*. Hence, where an argument is not clear, the investigating authority should actively try to

[189] Panel Report, *China — Autos (US),* para. 7.345.

clarify it in the context of the investigation. Second, this dispute shows that the competitive overlap between the products compared is a highly relevant factor, not only in the context of the Article 3.2 price effect determination. Because of this, an investigating authority must carefully evaluate arguments regarding this matter.

2.3.5. Fluctuations in the exchange rates

In *EU — Footwear (China)*, the complainant argued that the EU failed to adequately evaluate and address the effects of the EUR-U.S. dollar exchange rate fluctuation. China argued that, because footwear originating in China is priced in U.S. dollars, the exchange rate itself, that is the appreciation of the EUR vis-à-vis the U.S. dollar, can make such footwear more attractive. China argued that the impact of exchange rate itself is so important in the market that, regardless of whether the goods are being dumped or not in the European Union, Chinese imports would have increased. China claimed that the investigating authority did not include this issue within the non-attribution analysis.

The EU argued that exchange rate fluctuations result in exports priced in U.S. dollars becoming cheaper when priced in EUR. When this situation occurs, exporters may choose to maintain price levels, thereby retaining the price advantage, or they can raise their prices so that the products have the same price in EUR as before the rate change. In the EU's view, if they choose to maintain price levels, and their low prices injure producers in the EU, exporters cannot escape responsibility for that dumping and injury by blaming movements of exchange rates. According to the EU, the investigating authority determined that the development of exchange rate could not be another factor causing injury. The panel sided with the EU, concluding that:

> *Nothing in China's argument undermines the conclusion in the Provisional Regulation that "if the exports are dumped, and even if they benefited from a favourable development of exchange rates, it is difficult to see how the development of such exchange rate could be another factor causing injury…*[190]

Exporters often refer to exchange rate differences as an “other known factor”. This panel’s finding confirms some investigating authorities’ views that this is not a factor that causes injury.

[190] Panel Report, *EU — Footwear (China),* para. 7.537.

2.3.6. Export Sales and non-tariff barriers in the exporting market

In *EU — Footwear (China)*, China argued that the EU failed to objectively assess the level, evolution and injury impact of export sales. China disagreed with the EU's position that export performance does *not* have any impact on most injury indicators. China argued that since most of the injury factors do not distinguish between domestic and export sales, the export performance might impact the development of some injury factors. In this case the panel recognized as valid the reasoning of the investigating authority:

> *…**the injury analysis focuses on the situation of the Community industry on the Community market**. Therefore **a deterioration of the export performance, if any, does not have any impact on most of the indicators analyzed above**, such as sales volume, market share and prices. In terms of the overall production volume, where the distinction between Community and outside Community market cannot be made, since footwear is produced on order, a decrease of sales on the Community market will necessarily translate into a declining production…*[191] *[emphasis added]*

The report of the panel considered China's disagreement with the European Union's conclusion that the "vast majority" of production is for the EU market. China said that the EU interpretation of the facts was not appropriate since industry sales on the EU market accounted for around 70% of the total production (a majority but not the 'vast majority'). Nevertheless, the panel considered that:

> *In our view, China is simply disagreeing with the European Union's characterization of the facts. While China's characterization of the facts is not unreasonable, in 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… A proportionate decline in export performance would not demonstrate that any injury caused by that decline was wrongly attributed to the dumped imports. We therefore reject this aspect of China's claim.*[192]

A similar situation emerged when China argued that the EU failed to analyse non-tariff barriers in EU export markets as "other known factor" causing injury to EU producers, despite the fact that one interested party explicitly identified it as

[191] *Ibid.,* para. 7.521.

[192] Panel Report, *EU — Footwear (China),* para. 7.523.

a factor preventing EU producers from exporting with their full capacity. The EU responded that its investigation already took account of this factor, "in so far as [this "other factor"] referred to loss of export sales, by simply not taking into account any injury that might have been attributed to that source." Finally, the panel validated that position saying that:

> *We also recall that an investigating authority may conclude, notwithstanding the arguments of an interested party, that an alleged "other factor" causing injury* ***does not, in fact, cause injury to the domestic industry at the same time as dumped imports****, in which case, it is in our view apparent that the investigating authority need not address it further. …Thus, despite the fact that it would have been clearer if the Commission had stated that non-tariff barriers were not a factor causing injury, we consider that this is implicit in the Commission's determination regarding loss of export sales. … Thus, we consider the Commission's conclusion to be sufficient, based on a reasonable interpretation of the facts, and one which could be reached by an unbiased and objective investigating authority on the basis of the information before it. We therefore reject this aspect of China's claim.*[193] *[emphasis added]*

In sum, these determinations show that:

- For a "other known factor" to be relevant, it must be proven to have an impact on one or more of the injury factors in Article 3.4 of the Anti-Dumping Agreement. If this is not demonstrated, as was the case with the export performance, the investigating authority can dismiss the "other known factor";
- If different arguments are presented to allegedly demonstrated the existence of "another known factor", the investigating authority should make an effort to address all of them (to the extent they are relevant) in order to avoid possible violations of WTO Agreements;
- Since the Anti-Dumping Agreement does not establish particular methodologies to evaluate the factors, the investigating authority will be acting in accordance with its international obligations if an unbiased and objective investigating authority could have reached the challenged determination based on the facts before the authority at the time of the determination.

2.3.7. Alleged aggressive pricing strategy

In *China — X-Ray Equipment*, the EU claimed that its exporter had presented enough evidence regarding the existence of a pricing strategy that may be

[193] *Ibid.,* para. 7.540.

considered as other factor of injury. China argued that there was no relevant evidence on the record to support the exporter claim, and that China was not under an obligation to address this evidence. Nevertheless the panel concluded that:

> *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. … It also outlined how MOFCOM's injury findings, in particular the trends in … 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.*[194]

This in an important finding. Even if an exporter is not able to provide very solid evidence with respect to the existence/presence of “another known factor”, the investigating authority may **not** reject the exporter’s contention that the investigating authority should examine that factor further if, because of its nature, the evidence regarding the factor is outside the public domain. In this case, it is the investigating authority itself which should, based on the evidence/argumentation of the exporter, go more in-depth into the investigation of the factor. Of course, this does not predetermine the conclusion with respect to the factor itself.

3. Non-attribution determination

The panels examined continued to affirm the general obligation that the injury caused by other factors must be separated and distinguished from the injury caused by the dumped/subsidised/increased imports. For example in *China — GOES*, the panel stated:

> *It is well established that a proper non-attribution analysis requires the injury caused by "other factors" to be separated and distinguished from the injury caused by increased imports. In other words, injury caused*

[194] Panel Report, *China — X-Ray Equipment,* para. 7.291.

> *by other factors must be clearly identified, to ensure that it is not attributed to subject imports.*[195]

Article 3.5 of the Anti-Dumping Agreement does not provide any specific methodology for the non-attribution determination. The panel in *EU – Footwear (China)* recalled

> *… that Article 3.5* ***contains no guidance on the assessment of other factors****, and the reports of the Appellate Body concerning the need to "separate and distinguish" the effects of dumped imports from those of other factors causing injury similarly do not provide any direction to investigating authorities as to how this is to be done…*[983][196]

> *983. Moreover, the Appellate Body has made it clear that a "prima facie case must be based on "evidence and legal argument" put forward by the complaining party in relation to each of the elements of the claim. A complaining party may not simply submit evidence and expect the panel to divine from it a claim of WTO inconsistency. Nor may a complaining party simply allege facts without relating them to its legal arguments." Appellate Body Report, United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services ("US – Gambling"), WT/DS285/AB/R, adopted 20 April 2005, DSR 2005:XII, 5663 (Corr.1, DSR 2006:XII, 5475), para. 140*

The panel however recalled that it is for the complainant before the WTO DSB to build up its case, by presenting facts and arguments. This includes claims against the non-attribution determination of another Member.

In *EU — Footwear (China)*, China asked the panel to indicate how an investigating authority should estimate the extent of the contribution of "other factors". The panel replied

> *We do not consider that it is either possible or appropriate for us to define a general rule regarding whether the investigating authority must estimate the extent of the contribution of various known "other factors". The question whether the determination is consistent with Article 3.5 can only be addressed upon an examination of the particular facts of each case.*[197]

China argued in that case that a collective assessment of the impact of all "other known factors" causing injury, instead of an individual examination, was required. Citing previous determinations, the panel rejected this argument:

[195] Panel Report, *China — GOES,* para. 7.628.

[196] Panel Report, *EU — Footwear (China),* para. 7.483.

[197] *Ibid.,* para. 7.487.

> *Nothing in Article 3.5 requires an investigating authority to examine the collective impact of known "other factors", as long it complies with the obligation to not attribute to dumped imports the injuries caused by "other factors"…*[198]

4. Relationship with other articles of the Agreement

4.1. *About public notice*

The Anti-Dumping Agreement requires informing in sufficient detail about the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities. “All issues of fact and law” include causation issues. Article 12.2.2 of the Anti-Dumping Agreement, and its equivalent Article 22.5 of the SCM Agreement, state that:

> *A public notice of conclusion or suspension of an investigation in the case of an affirmative` determination providing for the imposition of a definitive duty or the acceptance of a price undertaking shall contain, or otherwise make available through a separate report, all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures or the acceptance of a price undertaking, due regard being paid to the requirement for the protection of confidential information.*[199]

In *China — GOES* the panel examined a claim of violation of the above provision, finding that:

> *In any event, it is clear that the causation analysis is one of the essential elements leading to the imposition of final measures. Therefore, the relevant information on matters of fact and law and reasons underlying the causation analysis must be set forth in the public notice or separate report in accordance with Articles 22.5 of the SCM Agreement and 12.2.2 of the Anti-Dumping Agreement. The causation analysis includes examination of other factors, apart from the dumped or subsidized imports, that may be injuring the domestic industry. In this context, MOFCOM considered the effect of non-subject imports on the domestic industry. However,* ***MOFCOM's disclosure in the final determination on this point was extremely limited****. ... While China argues that information on the market share of non-subject imports during 2008 could be derived from disclosures in other sections of the determination, namely that non-subject imports increased by 0.09% in 2008, this disclosure* ***was not explicit and its relevance to***

[198] *Ibid.,* para. 7.489.

[199] Article 12.2.2 of the Anti-Dumping Agreement.

> ***the analysis of the non-subject imports as a factor that could be injuring the domestic industry was not clear****, particularly in the light of the fact that the information from which it could be derived was in a different section of the determination.*[200]

The panel concluded on this matter that

> *…it is our view that the public notice fails to set forth "all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures".*[201]

And,

> *Consequently, in the light of this reasoning, the Panel concludes that China acted inconsistently with Articles 22.5 of the SCM Agreement and 12.2.2 of the Anti-Dumping Agreement.*[202]

Thus, an investigating authority should provide a *separate* reasoned and adequate explanation of pertinent causality and non-attribution matters. It does *not* suffice to refer to aspects dealt with in other sections of technical reports or determinations as an explanation *unless* it is clear that they address causation and non-attribution issues. However, to avoid "problems" later on, an investigating authority should address each substantive element separately (establishing links, as required between them).

4.2. *About price analysis*

Where there are violations of Articles 3.2/15.2 or 3.4/15.4 of the Anti-Dumping/SCM Agreements, the causality/non-attribution determination will be automatically inconsistent with Articles 3.5/15.5 of the said Agreements. Thus, in *China — Broiler Products* the panel found:

> *7.584. Having concluded that MOFCOM's findings on price effects are inconsistent with the relevant obligations and in the light of the relationship between the analysis envisioned under Articles 3.2 and 15.2 and the causation analysis under Articles 3.5 and 15.5, we would not be in a position to find that MOFCOM properly concluded to the existence of a causal link between the subject imports and the injury to the domestic industry. Furthermore, China's implementation of our*

[200] Panel Report, *China — GOES,* para. 7.673.

[201] *Ibid.,* para. 7.674.

[202] *Ibid.,* para. 7.675.

> *findings concerning MOFCOM's findings of price effects will necessarily require that it reconsider MOFCOM's findings of causation.*
>
> *7.585. For the foregoing reasons, making findings with respect to the United States' claims under Articles 3.1/15.1 and 3.5/15.5 would not contribute to the resolution of the dispute between the parties. We therefore abstain from ruling on the United States' claims that MOFCOM's findings of causation in the Final Determinations are inconsistent with China's obligations under Articles 3.1 and 3.2 of the Anti-Dumping Agreement and Articles 15.1 and 15.5 of the SCM Agreement.*[203]

Similarly, the panel in *China — X-Ray Equipment* stated that:

> *7.239 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.*
>
> *7.240 Consequently, the Panel concludes that MOFCOM's causation analysis was inconsistent with Articles 3.1 and 3.5 of the Anti-Dumping Agreement.*[204]

A similar situation was examined in *China — Autos (US).* The panel decided along the same lines of the two previous panels.

4.3. *Cross-cumulation*

In *US — Carbon Steel (India)*, the panel analysed a CVD determination covering hot-rolled steel from among others India. It should be noted that a parallel anti-dumping investigation targeted the countries subject to the CVD investigations, as well as other 6 countries. For injury purposes, in the CVD investigation, the USITC cumulated imports from India to other subsidised imports. Moreover, the USITC cumulated non-subsidised, dumped imports from countries subject to the parallel anti-dumping investigation. According to India, this made it easier for the USITC to find injury in the CVD investigation. The USITC argued that US' domestic law required in certain situations to do that.

[203] Panel Report, *China — Broiler Products,* para. 7.584-7.585.

[204] Panel Report, *China — X-Ray Equipment,* para. 7.239-7.240.

India challenged the US law and practice under various provisions (Article 15.3, to start with, and then other paragraphs of Article 15, including 15.5 (causation/non-attribution)). Regarding Article 15.5, India challenged the requirement that the assessment of injury be based on *inter alia* the volume, effects and impact of *non-subsidized, dumped imports*. The panel found that the:

> *…elements required for injury analysis, consistently refer only to "subsidized imports". As explained above, the express limitation of the imports to be considered under Article 15 suggests to us that, in an injury analysis under that provision, the effects of other "unfairly traded" imports is not a relevant consideration because such imports are not "subsidized imports". Thus, in our view,* ***the use of the term "subsidized imports" in these provisions limits the scope of the investigating authority's injury assessment only to subsidized imports****. We also recall our consideration of Article VI:6 (a) of the GATT 1994 as context for Article 15.3, and our conclusion that it supports our understanding that the effects of subsidized imports are not to be cumulatively assessed with the effects of non-subsidized, dumped imports.*[205] *[emphasis added]*

Having concluded that, the panel moved on to examine the claim of violation of the non-attribution requirement by treating cumulatively subsidised imports with non-subsidised, but dumped, imports:

> *Article 15.5 of the SCM Agreement requires an investigating authority to "examine any known factors other than the subsidized imports which at the same time are injuring the domestic industry", identifies "the volume and prices of non-subsidized imports of the product in question" as a factor which may be relevant in this respect, and requires the investigating authority to ensure that "the injuries caused by these other factors [are] not attributed to the subsidized imports." The United States contends that dumped imports are not an "other known factor" of injury. We do not agree. In our view,* ***the reference in Article 15.5 to "non-subsidized imports" as an "other known factor" would also include "non-subsidized, dumped imports".*** *The text of this provision does not suggest that whether non-subsidized imports are "fairly" or "unfairly" traded must be determined, or, indeed, is even relevant. Rather,* ***the relevant consideration in this respect is that the imports considered in a non-attribution analysis are not subsidized****, so as to ensure that injury caused by other factors,*

[205] Panel Report, *US — Carbon Steel (India),* para. 7.360.

> *including non-subsidized imports, is not attributed to subsidized imports.*[206] *[emphasis added]*

The Appellate Body confirmed that the focus in a CVD investigation is "subsidised imports". Moreover, there is no language to support the US' position regarding cross-cumulation.

> *In sum,* ***the reference in Article 15.3 to "products … simultaneously subject to countervailing duty investigations" indicates that investigating authorities*** *must examine the volume, price effect, and consequent impact of imports that are subsidized, and must* ***exclude from their assessment the volume, price effect, and consequent impact of imports that are not subsidized****. The overarching requirement under Article 15.1 that an injury determination be based on positive evidence and involve an objective examination of the volume and the effect of subsidized imports and the impact of such imports on domestic producers confirms this interpretation. Furthermore, the references to "subsidized imports" in Articles 15.2, 15.4, and 15.5, as well as various references to "subsidized imports" in other provisions of Part V of the SCM Agreement, further confirm that the imposition of a countervailing duty is consistent with the SCM Agreement only if adopted to counteract injury caused by subsidized imports. Accordingly, we consider that Article 15.3 and Articles 15.1, 15.2, 15.4, and 15.5 of* ***the SCM Agreement require that the injury analysis in the context of a countervailing duty determination be limited to consideration of the effects of subsidized imports****.*[207]
>
> *…Based on our interpretation of Articles 15.1, 15.2, 15.4, and 15.5 of the SCM Agreement set out above, we agree with the Panel's finding that the consistent use of the term "subsidized imports" in these provisions limits the scope of the investigating authority's injury assessment to subsidized imports only.*[208] *[emphasis added]*

Based on the above finding, the Appellate Body confirmed that the US argument that Article 15 as a whole must allow an investigating authority to take account jointly of the effects that al unfairly traded imports are having on the domestic industry is *not* consistent with the SCM Agreement.

There are a number of interesting aspects concerning this dispute. First, as already noted above, the original measures were imposed in 2001. In spite of

[206] Panel Report, *US — Carbon Steel (India),* para. 7.368.

[207] Appellate Body Report, *US — Carbon Steel (India),* para. 4.586.

[208] *Ibid.,* para. 4.591.

that, WTO dispute settlement provided relief to the Indian exporters. This may lead to the termination of the case and repeal of the existing duties. Second, the issue of cross-cumulation is an important one since, quite often, cases involve parallel anti-dumping and CVD investigations. In case of a perfect match of investigated parties, the issue may be less sensitive. But, where different parties are investigated, as was the case in the case challenged by India, the WTO has made it clear that the injury determinations should be treated separately.

5. EU's regulatory framework and practice

Unlike Article 3.5 of the Anti-Dumping Agreement, the basic Regulation treats separately the determination of the existence of a causal link from the non-attribution determination. However, both assessments and determinations are intrinsically linked, as shown by the fact that they are dealt with in a common section of the determinations.

5.1. *Causation analysis*

Article 3(6) of the basic Regulation transposes this first part of Article 3.5 of the Anti-Dumping Agreement

> *It must be demonstrated, from all the relevant evidence presented in relation to paragraph 2, that the dumped imports are causing injury within the meaning of this Regulation. Specifically, this shall entail a demonstration that the volume and/or price levels identified pursuant to paragraph 3 are responsible for an impact on the Community industry as provided for in paragraph 5, and that this impact exists to a degree which enables it to be classified as material.*

As it can be noticed, the causality test in the basic Regulation is crafted differently from the first sentence of Article 3.5. In particular, the second sentence of Article 3(6) is a mix of text from Article 3.5 with some additional features. Thus, the Commission must take into account the volume and price effects – up to this point the requirement is identical to Article 3.5 – in order to determine whether those developments "are responsible for an impact on the Community industry".The sequence of the analysis contemplated in Article 3.5 of the Anti-Dumping Agreement is not so prescriptive in respect of the analysis of the effects of dumping under paras. 2 and 4 of Article 3.

The second sentence of Article 3(6) concludes stating that the Commission must assess whether "this impact exists to a degree which enables [the injury] to be classified as material." This text does not appear in the Anti-Dumping Agreement. However, the quoted text reflects findings of the Appellate Body. Thus, it appears to be fully in line with the WTO Agreements.

The Commission, as the determinations in Cold-rolled flat products and Acesulfame potassium show, examines whether there is a coincidence in time between the overall development of the domestic industry, on the one hand, and imports from the investigated country(ies), on the other. The length of this analysis varies depending on the facts of the case. As a matter of example, the examination in Acesulfame potassium is presented below

> *(84) The Union industry's deteriorating situation over the period considered coincided with the increase in imports at dumped prices originating in the PRC. Over the period considered import volumes increased by 14% and their prices fell by 30%. This resulted in a 10% increase in market share for the Chinese exporters. At the same time, the Union industry lost market share, its sales prices were driven downwards and sales volumes also developed negatively.*
>
> *(85) In particular, the profound undercutting margins of between 18 and 45% are further indicators that the dumped imports from the country concerned exercised significant price pressure on the prices of the Union industry.*
>
> *(86) The fall in sales volumes reduced the Union industry's ability to absorb fixed costs. The low priced imports from the country concerned led to the inability of the Union industry to sustain profit levels and as a result the profitability dropped dramatically…*
>
> *(88) On the basis of the above,* ***the Commission concluded that the Union industry's deteriorating state coincided with the substantial increase in imports at decreasing and dumped prices and that these imports had a determining role in the material injury suffered by the Union industry****. Sales prices of the exporting producers decreased 30% during the investigation period. By continuously lowering their unit sales price during the period considered, the producers from the country concerned were able to increase their market share.* ***In view of the clearly established coincidence in time between, on the one hand, the level of dumped imports at continuously decreasing prices and, on the other hand, the Union industry's loss of sales volume and price depression, it is concluded that the dumped imports were responsible for the injurious situation of the Union industry****. [emphasis added]*

Relevant comments submitted by interested parties are assessed and taken into consideration before the overall conclusion is reached. The nature of the comments differs from case to case. However, exporters and importers often raise the lack of correlation between the development of given factors and

imports from the investigated country(ies). These comments must be addressed comprehensively as both WTO panels/Appellate Body and the Court have overturned causality determinations in which the Commission did not respond adequately to similar comments. (see jurisprudence below) As a matter of example, analysis from the determination in Cold-rolled flat products is presented

> *(160) Interested parties claimed that there was no correlation between the level and prices of imports from the PRC and the profitability of the Union industry. In particular, they referred to the decrease of imports and stable prices from the PRC in 2011-2012 which allegedly cannot have caused the decrease of average prices on the Union market. At the same time, Union industry's losses increased and the sales volume was rather stable.*
>
> *(161) However, this analysis selectively focuses on only two years in isolation instead of on the whole period considered. When analysing the whole period, it was clear that the strong increase of dumped imports led not only to deteriorating profitability but also to lost market share by the Union industry and drop in production, capacity utilisation, employment, investments and return on investments. While the year 2012 did not strictly follow the overall trend, the trend remained negative. The purpose of assessing the injury indicators over a longer period of four years is namely to avoid reaching conclusions on the basis of isolated developments, if any. In any event, the effects of the dumped imports from both countries concerned were assessed cumulatively for the reasons explained in recitals 97 to 102 above. Therefore, it was not warranted to assess the independent effects of the dumped imports from the PRC alone.*

The Court often examines causality determinations. In a recent judgment, T-6/12 Godrej Industries et al., the Court identified the requirements of Article 3(6) and 3(7)

> *(62) It follows from Article 3(6) of the basic regulation that the Union institutions must demonstrate that the dumped imports are causing significant injury to the Community industry, owing to their volume and price. That entails what is known as the 'attribution analysis'. It also follows from Article 3(7) of the basic regulation that the institutions must examine all other known factors which are injuring the Community industry at the same time as the dumped imports and, moreover, ensure that the injury caused by those other factors is not attributed to the dumped imports. That entails what is known as the 'non-attribution analysis'.*

(63) The objective of Article 3(6) and (7) of the basic regulation is therefore to ensure that the Union institutions separate and distinguish the injurious effects of the dumped imports from those caused by other factors. If the institutions do not separate and distinguish the impact of the various injury factors, they cannot legitimately conclude that the dumped imports have caused injury to the Community industry.

(64) Next, it follows from the case-law that, when determining the injury, the Council and the Commission must, in particular, examine whether the injury which they propose to find might have its cause in the conduct of the Community producers themselves…

Interestingly, the Court accepts as own the Appellate Body finding regarding the need to separate and distinguish injury from dumped imports, on the one hand, from injury caused by other factors, on the other. However, when reviewing Commission determinations, the Court is "less interventionist" than panels. As a result, while in WTO challenges most EU determinations have been found to be inconsistent with Article 3.5 of the Anti-Dumping Agreement, in cases before the Court, the EU is often successful in defending its determinations.

5.2. *Non-attribution*

Article 3(7) of the basic Regulation transposes the relevant part of Article 3.5 of the Anti-Dumping Agreement, with minor differences.

In spite of the fact that the WTO has found in several occasions that the EU has not acted consistently with its obligations under that Article of the Anti-Dumping Agreement, no major changes have occurred in its practice.

The Commission normally examines factors raised by the parties. However, it is not legally limited to examine ex officio other factors. The following factors have been examined over the years:

- Volume and prices of imports not sold at dumped prices and imports from countries not investigated
- Contraction in demand and changes in the pattern of consumption
- Cyclical downturn
- Restrictive practices
- Competition of producers located within the Community
- Increase of the cost of production within the Community
- Poor export performance of the Community industry
- Insufficient productivity of the Community industry
- Wrong assessment of market developments
- Poor marketing performance and after-sales service of the Community industry

- Insufficient product quality or product range
- Threatened prohibition of the product concerned for reasons of consumer protection or protection of the environment
- Exchange rate fluctuations
- Community industry's relocation of production outside the Community
- Community industry's own imports originating in the investigated country
- Decrease in captive consumption
- Community industry's obligation to comply with high environmental standards
- Obligation to pay high royalties

As a matter of example, in the Acesulfame potassium determination, the Commission examined the export performance, the loss of patent protection, as well as the business strategy of the domestic industry. The analysis is reproduced below

5.2.1. Export performance of the Union industry

(89) The volume and average price of exports of the Union industry developed over the period considered as follows:

Table 11

Export performance of the Union industry

	2011	2012	2013	Investigation period
Export volume Index	100	87	75	72
Average price Index	100	112	108	98

Source: Data provided by Union industry.

(90) The export performance of the Union industry has been similar to its sales on the Union market in terms of volume although prices have been maintained at higher levels when expressed in euros. This difference in price development can partly be attributed to the exchange rate development between euro and US dollar in the period considered. The Commission therefore concludes that although the export performance has also been negative it does not explain the injury suffered by the Union industry on the Union market

5.2.2. Loss of Patent Protection

(91) Some interested parties claimed that the injury suffered by the Union industry could be explained by a loss of patent protection on the

Ace-K business by the sole Union producer. This argument is unfounded. As explained in recital 79 above, following in particular the expiry of the production patent in 2005, new players entered the market, namely the Chinese exporting producers, and their presence has been gradually increasing since then. In 2009, well before the beginning of the period considered, the market share of Union industry had dropped from its dominant position granted by patent protection to below 50%. By 2011, the beginning of the period considered, the market share of Chinese imports in the Union market by far and large exceeded the Union industry's market share. Therefore, indeed the expiry of the patent protection led to a market of more than one player.

(92) However, the investigation established the existence of material injury to the Union industry. Given the findings of injury, it is considered that the Union industry maintained a healthy economic and financial situation until 2011 and began deteriorating afterwards. That is to say as much as six years after the expiry of the production patent or after a sufficiently long period of time for the Union industry to react. Therefore, it is unsubstantiated that the Union industry's situation deteriorated because there were more players on the market. The situation of the Union industry rather deteriorated because of the pricing strategies those new players employed that led to the increased unsustainably low-priced import volume and substantial price undercutting.

(93) Therefore, the Commission concludes at this stage that the loss of patent protection did not contribute to the material injury suffered by the Union industry.

5.2.3. Business Strategy

5.2.3.1. Pricing strategy of the Union industry

(94) An interested party claimed that the injury suffered by the Union industry was explained by its decision to maintain its position on the Union market as a manufacturer of high quality products. On the contrary, the investigation concluded that this strategy had ensured its survival. To try to compete on price alone would have led to the closure of the Ace-K business because the dumped import prices had fallen to unsustainable levels. The unsustainable level of the import prices is further corroborated by the fact that the second largest exporting producer, for which Ace-K represents a dominant part of its total turnover, filed for bankruptcy protection under Chinese law in early 2015.

5.2.3.2. Significant R & D and marketing costs incurred by the Union industry

(95) It was claimed by an interested party that the injury suffered by the Union industry was explained by expenditure on a new product over the period considered. It should be noted that such expenditure related to the R & D and marketing of a new product containing Ace-K. However, as explained under recital 66, the costs of this innovation were not taken into account in the injury analysis and therefore the finding of material injury could not be affected by this expenditure.

(96) It is thus concluded that the business strategy adopted by the Union industry did not contribute to the material injury suffered by the Union industry.

Following the analysis of the "other known factors", the Commission makes an overall assessment regarding whether dumped imports have caused, or not, the material injury suffered by the Community industry and whether there are other factors that break the link.

As is the case for causality, many Court judgments deal with the application of Article 3(7). In T-192/08, Kazchrome and ENRC, the Court stated that

(38)…under Article 3(6) and (7) of the basic regulation, no obligation is imposed on the institutions regarding the form of the attribution and non-attribution analyses which they must carry out, or the order in which they must do so. On the contrary, under Article 3(6) and (7), those analyses must be carried out in such a way as to enable the injurious effects of the dumped imports to be separated and distinguished from the injurious effects caused by other factors.

In the same Court case, the applicants argued that the injury factors other than the dumped imports must be examined collectively. The Court said that the basic Regulation is silent on this matter. However, it agreed that in some circumstances a collective assessment might be required

(45) It follows that it must be found – as the applicants have argued – that the effects of the injury factors other than the dumped imports must be analysed collectively in certain circumstances. That is particularly true where the institutions have concluded that a large number of injury factors other than the dumped imports may have contributed to the injury, but that, individually, their impact could not be regarded as significant.

The judgment continued examining particular aspects of the evaluation of non-attribution factors. The applicants' claims were rejected, thus confirming the causation determination.

5.3. *Reviews*

In the context of expiry reviews, the Commission does not examine causality. See, e.g., determination in Steel wires.

ARTICLE 3.6 – DOMESTIC PRODUCTION

1. Data for injury determinations under the WTO Agreements

Article 3.6 of the Anti-Dumping Agreement provides that

> *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.*

This shows the importance of accurately determining the product to be investigated, as well as the domestic like product. If the scope of the investigation is too wide, it may be difficult to prove injury, but if the scope is too narrow, it may be very easy to circumvent any measures imposed. At the same time, in many industries different products may be produced on the same equipment, making it difficult to determine injury strictly on the basis of the domestic like product only.

Many investigations deal with products where there is not perfect overlap between the dumped product and the domestic like product or with cases where injury cannot be determined in respect of the domestic like product on its own, but only in respect of a wider product range. This may be true of products such as welded stainless steel tubes and pipes, which may be produced on the same machinery as galvanized tubes and pipes or seamless tubes and pipes and where separate information on capacity, employment, wages and investments may not be available. The same happens where the imported product is either of a narrower or wider range than the domestic like product, for instance where imported screws cover a wider, or narrower, range of sizes than the domestic like product.

Although Article 3.6 as such has never been specifically considered in a dispute, in *US – Hot-Rolled Steel* the Appellate Body found that "the injury examination must focus on the totality of the 'domestic industry' and not simply on one party, sector or segment of it",[209] and noted that "it may be 'highly

[209] Appellate Body Report, *US – Hot-Rolled Steel*, para. 190.

pertinent', from an economic perspective, for an investigating authority to undertake an evaluation of particular parts, sectors or segments within a domestic industry in assessing the state of the industry as a whole",[210] although such analysis must still be made in an "objective manner". The panel in *China – X-Ray Equipment* quoted these findings with approval.[211] While the Appellate Body has commented that "supplementing an assessment of the state of the entire domestic industry with a segmented analysis may be highly pertinent in some circumstances", it has never considered whether a failure to conduct an analysis by sector may be inconsistent with Articles 3.1 and 3.4 of the Anti-Dumping Agreement.

In *China – X-Ray Equipment*, in considering product differences between the domestic like product and the imported product, the question was whether the injury analysis should have focused on the low-energy scanner industry only or on the total X-ray scanner industry. The panel did not complete the analysis, but it is submitted that the imports could not have caused injury to the industry producing high-energy scanners, as these are not interchangeable, and these scanners should therefore have been excluded both from the determination of material injury and of like product. The problem therefore lies as much with the injury determination as with the domestic like product determination, if not more with the latter. Accordingly, it may have further strengthened the EU's case if it had argued that the like product had been determined incorrectly.

In *China – HP-SSST* China investigated injury to the whole domestic industry, which consisted of three clearly identifiable product categories. However, there were no imports as regards one of the categories and virtually no domestic production or sales as regards one of the other two categories, which means that imports effectively only competed with one of the three product categories. This led to various challenges by both the EU and Japan as regards the objectiveness of China's investigation, as China to a large degree extended its findings as regards the one category to the other categories as well. The Panel noted that there was no requirement in Article 3.2 that the effect of dumping on domestic prices had to be determined with reference to the totality of the domestic market, but that such analysis could be undertaken with reference to "*certain goods* within the like product in the domestic market".[212] In considering the evaluation of Article 3.4, however, the same panel came to a different decision, based on the wording of that Article, when it noted that

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[210] Appellate Body Report, *US – Hot-Rolled Steel*, para. 195.

[211] Panel Report, *China – X-Ray Equipment*, par 7.187.

[212] Panel Report, *China – HP-SSST*, para. 7.141 (emphasis in original).

> *…the examination of the impact of the dumped imports on the domestic industry" provided for in Article 3.4 "shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the **industry**" (emphasis supplied). In our view, the complainants' approach to Article 3.4, and its focus on particular segments of the domestic industry, is overly focused on the causal connotations of the term "impact", and overlooks the obligation in Article 3.4 to evaluate the state of the domestic **industry**, as defined by Article 4.1 of the Anti-Dumping Agreement. In the present case, MOFCOM defined the domestic industry as comprising two domestic producers accounting for a major proportion of total domestic production of the domestic product like the subject imports. The evaluation of the state of the domestic industry envisaged by Article 3.4 must therefore consider the state of those two producers, with respect to their production of all types of HP-SSST. We see no basis in either Article 3.4 or Article 4.1 for limiting this evaluation to the state of those two domestic producers with respect to their production of only Grades B and C.*[213]

Thus, here the panel held that as Article 3.4 specifically referred to the "industry", the investigation into the impact of the dumped imports on the industry had to be determined with reference to the industry as a whole, and not only certain segments of the industry.

Note, also, that in *China – Broiler Products* the panel specifically rejected the notion that an authority was required to attempt to identify and seek information from all domestic producers, but that the "industry" was the industry determined in terms of Article 4.1 and that it could consist of a major proportion of the total industry.[214]

2. EU's regulatory framework and practice

Article 3(8) of the basic Regulation transposes Article 3.6 of the Anti-Dumping Agreement, with minor differences.

In injury questionnaires, the Commission requests information related to the like product, in line with Article 3(8). Data requested covers all types or models of the like product as well as sales via all sales channels, including those under own brand names or under brand names of other parties. Information on captive sales and captive transfers is also requested albeit in some circumstances the Commission may not use it in the injury determination.

[213] Panel Report, *China – HP-SSST*, para. 7.153 (emphasis in original).

[214] Panel Report, *China – Broiler Products*, para. 7.419.

Whether this approach is compatible with the findings in *US – Hot-Rolled Steel* is questionable.

A contentious issue is whether segment-wise information on the like product may be requested and whether it can be analysed separately. In an investigation concerning retail weighing scales (REWs) the Commission divided the like product in three segments. The Chinese exported mainly low-range REWs while the domestic industry mainly produced and sold medium- and high-range REWs. Injury allegedly suffered in the low-range segment was compensated with production and sales in the other two segments. The Commission examined separately information for each segment and concluded that the domestic industry suffered material injury.

That determination was appealed. In T-35/01 Shanghai Teraoka, the Court validated the Commission's approach

> *(127) First, it is not apparent from Article 3(8) of the basic regulation that an assessment by segment may not be carried out and that the average calculation method must be used. As the Council rightly pointed out, when determining injury under Article 3 of the basic regulation**, the Community institutions may make an assessment on a segment-by-segment basis in order to evaluate the various injury indicators, particularly if the results obtained using another method prove to be distorted for one reason or another, provided that account is properly taken of the relevant product as a whole**.*
>
> *(128) According to the 11th recital in the contested regulation, the relevant product comprises three segments. The 12th recital states that the electronic weighing scales manufactured in the Community are, in all respects, similar to the scales manufactured in China, South Korea and Taiwan and exported from those countries to the Community and that, therefore, those products are like products.*
>
> *(129) Moreover, given that the low-range segment accounted for 97% of the imports from the countries concerned in the investigation period (see the 63rd recital), **it is logical, and indeed essential for an accurate result of the investigation, that the low-range segment of that product be assessed separately**. Accordingly, there is no contradiction between the definition of the relevant product and the assessment of injury.*
>
> *(130) Secondly, as regards the applicant's complaint that, by assessing separately the relevant factors, such as sales prices, market share, etc., with respect to the low-range segment, the Council based its assessment on part of the like-product range, it should be observed that, as is clear from the recitals in the contested regulation relating to*

injury, the Council at all times took account of all the electronic weighing scales and not only those in the low-range segment (see the 81st recital). Since the overall examination is based on a like product consisting of three segments and not only a low-range segment, it must be held that the Council did not infringe Article 3(8) of the basic regulation.[emphasis added]

ARTICLE 3.7 – THREAT OF MATERIAL INJURY

Article 3.7 of the Anti-Dumping Agreement provides as follows:

> *"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:*
>
> *(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.*
>
> ---
>
> *[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".*

No recent disputes have specifically considered the issue of a threat of material injury. However, earlier panel and Appellate Body reports did consider the matter.

1. Analytical methodology

In *Mexico – HFCS* the panel noted that "information … concerning the future is at best a calculated estimate based on past experience",[215] indicating that although a threat of material injury must be based on a clear and imminent situation the data do not have to be (nor can it be) precise. The panel also indicated that

> *Merely that dumped imports will increase, and will have adverse price effects, does not, ipso facto, lead to the conclusion that the domestic industry will be injured – if the industry is in very good condition, or if there are other factors at play, dumped imports may not threaten injury. Such a conclusion thus requires the investigating authority to analyze, based on the information before it, the likely impact of further dumped imports on the domestic industry. SECOFI concluded that imports were likely to increase, based on the increases during the period of investigation, and the available capacity of the exporting producers, but there is no meaningful analysis, based on facts, concerning the likely impact of further dumped imports on the domestic industry in the final determination, e.g. SECOFI also concluded that the dumped imports undersold the domestic product during the period of investigation, and that the dumping margins were responsible for the low prices of the dumped imports. Merely that imports are likely to continue to be priced below the domestic product does not necessarily lead to the conclusion that there is a threat of injury.*[216]

In *Korea – Polyacetal Resins* the panel, indicated that "capacity per se was not a sufficient factor in considering the likelihood of increased import volumes," but that it should also be investigated whether there was a "likelihood that such capacity would actually be used to increase supplies to [the importing] market."[217]

The issue was also considered in *US – Hot-Rolled Steel*, where Japan challenged the retrospective application of anti-dumping duties to a date preceding the imposition of the provisional duties on the basis that actual and present injury was required in such instances. However, the panel held that

> *The term "injury" is defined in footnote 9 to Article 3 of the Agreement to include threat of material injury or material retardation of the*

[215] Panel Report, *Mexico-HFCS*, para. 7.77.

[216] *Ibid.*, para. 7.141.

[217] GATT Panel Report, *Korea – Polyacetyl Resins*, para. 281, with reference to the recommendation of the Committee on Anti-Dumping Practices BISD32S/182 at 183.

> *establishment of an industry, unless otherwise specified. Article 10.6 does not "otherwise specify". Consequently, in our view, sufficient evidence of threat of injury would be enough to justify a determination to apply protective measures under Article 10.7.*[218]

In *Mexico – HFCS (Article 21.5 – US)*, the panel confirmed that a threat of material injury finding must be based on events that are "clearly foreseen and imminent",[219] while the panel in *Egypt - Rebar* held that

> *the 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.*[220]

The *Mexico - HFCS* panel observed that Article 3.7 of the Anti-Dumping Agreement sets a "high standard",[221] while another WTO panel observed that the finding of "a likely imminent substantial increase in imports" must be "objective and unbiased".[222]

2. Consideration of Article 3.4 injury factors

The *Mexico - HFCS*panel held that

> *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*

[218] Panel Report, *US – Hot-Rolled Steel*, para. 7.162.

[219] Panel Report, *Mexico – HFCS (Art 21.5 – US)*,para. 6.14.

[220] Panel Report, WTO *Egypt – Rebar*,para. 7.91.

[221] Panel report, *Mexico - HFCS*, para. 100.

[222] Panel Report, *US –Softwood Lumber VI*, para. 7.96.

obligation to consider the impact of dumped imports on the domestic industry in accordance with the requirements of Article 3.4" … .[223]

The *Egypt – Rebar* panel concluded that Article 3.1 applies to "any" injury investigation, whether regarding present material injury, threat of material injury or material retardation and indicated that "the Article 3.4 factors must be examined in every investigation no matter what particular manifestation of injury is at issue in a given investigation,"[224] as it was important to "know about the condition of the domestic industry at the outset" if the investigating authority needs to determine whether a threat of injury exists."[225] It is therefore important that any threat of material injury analysis must not only consider the four factors mentioned in Article 3.7, but also all 15 factors mentioned in Article 3.4, even though there may be some overlap.

3. Relationship with other Articles of the Agreement

3.1. *Interaction between Article 3.7 and Article 3.1*

Article 3.7 of the Anti-Dumping Agreement is clearly linked to Article 3.1 and as indicated above, the panel in *Egypt – Rebar* concluded that Article 3.1 applies to all injury investigations and any Article 3.7 evaluation would therefore have to be objective and relate to positive evidence.

3.2. *Interaction between Article 3.7 and Articles 3.2 and 3.4*

Article 3.7 is clearly linked to Articles 3.2 and 3.4 and as indicated above, the panel in *Egypt – Rebar* concluded that all the Article 3.4 injury factors must be evaluated in "every" investigation. Considering that Article 3.7 also requires an evaluation of the prices of the dumped products and whether such prices would likely lead to further increased imports, it is apparent that an analysis under Article 3.2 would also need to be done.

3.3. *Interaction between Article 3.7 and Article 3.5*

Article 3.7 is clearly linked to Article 3.5, as no anti-dumping duties may be imposed unless it has been shown that dumping was the cause of the threat of injury experienced by the domestic industry.

[223] Panel report, *Mexico - HFCS*, para. 7.137.

[224] Panel Report, *Egypt – Rebar*,para. 7.93 (underlining in original).

[225] Panel Report, *Egypt – Rebar*, para. 7.91.

3.4. *Interaction between Article 3.7 and Articles 10.2 and 10.4*

Article 3.7 is linked to Articles 10.2 and 10.4. Article 10.2 provides for the retrospective application of definitive duties to the date provisional duties were imposed. However, this can only be done if a final determination of actual and present material injury has been made, unless it is shown that the effect of the dumped imports would, in the absence of the provisional measures, have led to a determination of injury. Accordingly, in cases of a determination of a threat of material injury, an additional requirement must be met before provisional duties can be collected definitively. Likewise, Article 10.4 provides that, except under the circumstances provided for in Article 10.2, a definite anti-dumping duty may only be imposed from the date the final determination of threat of injury is made.

4. EU's regulatory framework and practice

Article 3(9) of the basic Regulation addresses threat of material injury. It transposes Article 3.7 of the Anti-Dumping Agreement, with minor differences.

In terms of practice, the Commission seldom makes determinations based on threat of material injury. Experience is therefore very limited.The most recent determination based on threat dates back from 2009 and concerned imports of certain seamless pipes or tubes of iron or steel from China. The final determination of this case can be accessed by clicking here.[226] In this determination, the Commission considered information on all the factors below in order to assess the existence of threat:

- Development of volumes of dumped imports
- Availability of free capacity of the exporters
- Prices of the imports from China
- Level of inventories
- Other elements
- Likely developments of Community consumption, imports from the country concerned and the situation of the Community industry **afterthe investigation period**

In addition to the above factors, in practice the Commission also examines the economic factors and indices listed in Article 3(5) of the basic Regulation.

This determination was challenged before the Court (case T-528/09 Hubei Xinyegang Steel Co.). It determined that the injury determination was

[226] The final determination must be read jointly with the provisional one. This can be accessed clicking here.

inconsistent with Article 3(9). Contradictions between data led the Court to invalidate the determination regarding the development of the volume of imports.

Concerning the availability of free capacity of the exporters, the Court concluded that the Commission had not properly taken into account, in their analysis, “the availability of other export markets to absorb any additional exports”. The analysis was not deep enough, and consumption in China was simply not considered at all. The Court also criticised the fact that the Commission did not examine the possible “replacement effect”, i.e. that Chinese imports increased following the imposition of measures to Russia and Ukraine.

Concerning pricing developments of Chinese exporters, the Court also found serious contradictions between data presented in the determination.

The judgment is under appeal.

In sum, similar to the WTO panels examining threat of material injury determinations, the Court has reviewed in-depth the Commission analyses in order to ensure that any such determination is properly based on facts.

ARTICLE 3.8 – SPECIAL CARE IN THREAT OF MATERIAL INJURY DETERMINATIONS

1. Special care in the WTO Agreements

Article 3.8 of the Anti-Dumping Agreement provides as follows:

> *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.*

Although Article 3.8 specifically has never been the subject of a dispute, the panel in *US – Softwood Lumber VI* understood the obligation in Article 3.8 to mean 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… Articles 3.7 and 15.7, set forth factors specific to the determination of threat of material injury, and state that investigating authorities shall base a determination of threat of material injury on facts and not allegation, conjecture or remote possibility. In our view, Articles 3.8 and 15.8 reinforce this fundamental obligation. Thus, we consider that Article 3.8 and Article 15.8 apply 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.*[227]

2. EU's regulatory framework and practice

An equivalent provision does not exist in the EU basic Regulations. Consequently, there is no practice either.

[227] Panel Report, *US – Softwood Lumber VI*, para. 7.33.