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## **UNITED STATES - ANTI-DUMPING DUTY ON DYNAMIC RANDOM ACCESS MEMORY SEMICONDUCTORS (DRAMS) OF ONE MEGABIT OR ABOVE FROM KOREA**

### *Report of the Panel*

The report of the Panel on United States – Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMS) of one Megabit or above from Korea is being circulated to all Members, pursuant to the DSU. The report is being circulated as an unrestricted document from 29 January 1999. Pursuant to the Procedures for the Circulation and Derestriction of WTO Documents (WT/L/160/Rev.1). Members are reminded that in accordance with the DSU only parties to the dispute may appeal a panel report. An appeal shall be limited to issues of law covered in the Panel report and legal interpretations developed by the Panel. There shall be no *ex parte* communications with the Panel or Appellate Body concerning matters under consideration by the Panel or Appellate Body.

Note by the Secretariat: This Panel Report shall be adopted by the Dispute Settlement Body (DSB) within 60 days after the date of its circulation unless a party to the dispute decides to appeal or the DSB decides by consensus not to adopt the report. If the Panel Report is appealed to the Appellate Body, it shall not be considered for adoption by the DSB until after the completion of the appeal. Information on the current status of the Panel Report is available from the WTO Secretariat.



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## I. INTRODUCTION

### A. BACKGROUND

1.1 On 14 August 1997, Korea requested consultations with the United States regarding "the failure of the United States to revoke the anti-dumping duty order on *DRAMs from Korea*" (WT/DS99/1). Korea made its request pursuant to Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (the DSU), Article XXIII:1 of the General Agreement and Article 17.3 of the Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade (the AD Agreement).

1.2 Pursuant to this request, Korea consulted with the United States in Geneva on 9 October 1997. No mutually satisfactory solution was reached.

1.3 On 6 November 1997, Korea requested the establishment of a panel with the standard terms of reference provided by Article 7 of the DSU (WT/DS99/2). Korea made this request pursuant to Article 6 of the DSU, Article XXIII:2 of the General Agreement and Article 17.5 of the AD Agreement.

### B. ESTABLISHMENT AND COMPOSITION OF THE PANEL

1.4 At its meeting on 16 January 1998, the Dispute Settlement Body (the DSB) established a panel pursuant to Korea's request (WT/DS99/3). The Panel's terms of reference are:

To examine, in the light of the relevant provisions of the covered agreements cited by Korea in document WT/DS99/2 the matter referred to the DSB by Korea in that document and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements. (WT/DS/99/3.)

1.5 Pursuant to a request by Korea, and as provided in paragraph 7 of Article 8 of the DSU, on 19 March 1998, the Director-General accordingly composed the Panel as follows:

Chairman: Mr. Crawford Falconer

Members: Mr. Meinhard Hilf

Ms. Marta Lemme

### C. PANEL PROCEEDINGS

1.6 The Panel met with the Parties on 18/19 June 1998 and on 21/22 July 1998.

1.7 On 18 September 1998, the Chairman of the Panel informed the DSB that the Panel would not be able to issue its report within six months of the composition and establishment of the terms of reference of the Panel. The reasons for the delay are set out in WT/DS99/4.

1.8 The Panel submitted its interim report to the parties on 23 October 1998. On 6 November 1998 both parties submitted written requests for the Panel to review precise aspects of the interim report, no further meeting with the Panel was requested. The Panel submitted its final report to the parties on 4 December 1998.

## II. FACTUAL ASPECTS

### A. THE ORIGINAL ANTI-DUMPING DUTY INVESTIGATION

2.1 On 22 April 1992, Micron Technologies, Inc. ("Micron")<sup>1</sup> filed an anti-dumping duty petition with the International Trade Commission ("ITC") and the Department of Commerce ("DOC") against imports of DRAMs of one megabit or above, whether assembled or unassembled, from the Republic of Korea.

2.2 On 10 May 1993 pursuant to an investigation, the DOC issued an Anti-Dumping Duty Order and Amended Final Determination for *DRAMs from Korea*.<sup>2</sup> The notice corrected certain clerical errors and found anti-dumping margins of 0.82 percent for Samsung Electronics Co., Ltd ("Samsung"), 4.97 percent for LG Semicon Co., Ltd ("LG Semicon"), 11.16 percent for Hyundai Electronics Co., Ltd (Hyundai) and 3.85 percent for all others. The parties appealed the DOC's Final Determination to the U.S. Court of International Trade, which remanded the case to the DOC to correct certain errors. In its 24 August 1995 Redetermination on Remand, the DOC found corrected dumping margins of 0.22 percent for Samsung (*de minimis*), 4.28 percent for LG Semicon, 5.15 percent for Hyundai and 4.55 percent for all others.

### B. THE FIRST ADMINISTRATIVE REVIEW

2.3 The DOC initiated the first annual review of *DRAMs from Korea* on 15 June 1994 and investigated whether the Korean companies made sales of DRAMs less than normal value, (i.e. dumped) during the period of review. In its 6 May 1996 Final Results, the DOC found that LG Semicon and Hyundai had not dumped during the period of review.<sup>3</sup>

### C. THE SECOND ADMINISTRATIVE REVIEW

2.4 The DOC initiated the Second Administrative Review on 15 June 1995<sup>4</sup> and then investigated whether Hyundai and LG Semicon made sales of DRAMs less than normal value during the period of review. The DOC published its Final Results on 7 January 1997, and found that Hyundai and LG Semicon had not dumped during the period of review.<sup>5</sup>

### D. THE THIRD ADMINISTRATIVE REVIEW

2.5 On 8 May 1996, the DOC published a Notice of Opportunity to Request Administrative Review for the period of 1 May 1995 to 30 April 1996.<sup>6</sup> On 29 and 31 May 1996, LG Semicon and Hyundai, respectively, asked the DOC to conduct an administrative review and to revoke the anti-dumping duty order. On 25 June 1996, the DOC initiated the Third Annual Review of *DRAMs from Korea*, covering the period of 1 May 1995 to 30 April 1996. At the same time the DOC initiated a revocation review pursuant to a request from the respondents under section 353.25(a)(2) of the DOC regulations to revoke the *DRAMs from Korea* order in part.<sup>7</sup>

2.6 On 24 July 1997, the DOC issued its Final Results and Determination Not to Revoke Order in Part ("*Final Results Third Review*").<sup>8</sup> The DOC found that Hyundai and LG Semicon had not dumped during the period of review.

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<sup>1</sup> Micron later changed its name to Micron Technology, Inc.

<sup>2</sup> 58 Fed. Reg. 27520 (10 May 1993)

<sup>3</sup> 61 Fed. Reg. 20216 (6 May 1996)

<sup>4</sup> 60 Fed. Reg. 31447 (15 June 1995)

<sup>5</sup> 62 Fed. Reg. 965 (7 January 1997)

<sup>6</sup> 61 Fed. Reg. 20791 (8 May 1996)

<sup>7</sup> 61 Fed. Reg. 32771 (25 June 1996)

<sup>8</sup> 62 Fed. Reg. 39809 (24 July 1997)



E. THE US ANTI-DUMPING LEGISLATION AND REGULATION REGARDING REVOCATION

2.7 The relevant US legislation concerning revocation is set forth in Section 751(d) of the Tariff Act of 1930, as amended, which reads :

The administering authority may revoke, in whole or in part, a countervailing duty order or an anti-dumping duty order or finding, or terminate a suspended investigation, after review under subsection (a) or (b) of this section. The administering authority shall not revoke, in whole or in part, a countervailing duty order or terminate a suspended investigation on the basis of any export taxes, duties, or other charges levied on the export of the subject merchandise to the United States which are specifically intended to offset the countervailable subsidy received.

2.8 The relevant DOC regulations concerning revocation are set forth in the DOC's Regulations, Section 353.25(a)(2):

The Secretary [of Commerce] may revoke an order in part if the Secretary concludes that:

- (i) One or more producers or resellers covered by the order have sold the merchandise at not less than foreign market value for a period of at least three consecutive years;
- (ii) It is not likely that those persons will in the future sell the merchandise at less than foreign market value; and
- (iii) For producers or resellers that the Secretary previously has determined to have sold the merchandise at less than foreign market value, the producers or resellers agree in writing to their immediate reinstatement in the order, as long as any producer or reseller is subject to the order, if the Secretary concludes under §353.22(f) that the producer or reseller, subsequent to the revocation, sold the merchandise at less than foreign market value.

### III. FINDINGS AND RECOMMENDATIONS REQUESTED BY THE PARTIES

A. KOREA

3.1 **Korea** requests the Panel to find that: the United States is not in conformity with its obligations under Articles I, VI and X of the General Agreement of Tariffs and Trade 1994 ("GATT 1994") and Articles 2, 3, 5.8, 6, 11.1 and 11.2 of the Agreement on Implementation of Article VI of GATT 1994 ("AD Agreement"). Korea also requests the Panel to suggest that the United States take the following actions: (i) revoke the anti-dumping duty order on *DRAMs from Korea*; (ii) alter the *de minimis* standard for reviews of anti-dumping duty orders; and (iii) eliminate the "no likelihood/not likely" criterion provided for in section 353.25(a)(2)(ii) of the DOC regulations, and otherwise conform its revocation scheme to the requirements of Article 11 of the AD Agreement.

B. UNITED STATES

3.2 The **United States** requests the Panel to find that:

- (a) Korea's claims under Articles 1, 2, 3 and 17 of the AD Agreement are inadmissible (with the exception of claims under Articles 2.1, 2.2, 2.2.1.1, and 3.1);
- (b) Korea's claims concerning the 1993 final determinations by the DOC and the ITC on *DRAMs from Korea* are inadmissible;
- (c) The DOC's *Final Results Third Review* is not inconsistent with Article 11 of the AD Agreement or any other provision of the AD Agreement or GATT 1994;
- (d) The United States anti-dumping statute and regulations are not inconsistent with Article 11 of the AD Agreement or any other provision of the AD Agreement or GATT 1994;
- (e) The above measures do not nullify or impair benefits accruing to Korea under the AD Agreement or GATT 1994.

#### IV. MAIN ARGUMENTS OF THE PARTIES

##### A. PRELIMINARY OBJECTIONS

4.1 The **United States** raises preliminary objections concerning the admissibility of certain claims made by Korea.

4.2 **Korea** asserts that all claims are properly before the Panel, and that all of the United States' preliminary objections should be rejected.

##### 1. Admissibility of Korea's Claims Concerning Articles 1, 2, 3, and 17 of the AD Agreement

- (a) Objection of the United States

4.3 The following are the arguments of the **United States** in support of its preliminary objection:

4.4 The United States argues that the Panel must reject as inadmissible Korea's claims concerning Articles 1, 2, 3, and 17 of the AD Agreement. In its request for consultations, Korea did not identify these provisions. Therefore, claims based on these provisions did not constitute part of the "matter" for which consultations were requested under Article 17.3 of the AD Agreement. As a result, the claims based on these provisions also did not constitute part of the "matter" that, under Article 17.4 of the AD Agreement, Korea was entitled to refer to the Dispute Settlement Body ("DSB").

4.5 Article 17.3 of the AD Agreement permits a Member to request consultations concerning a "matter." Article 17.4 of the AD Agreement further permits a Member to refer "the matter" to the DSB -- that is, to request the establishment of a panel. Article 17.5 directs the DSB to establish a panel to examine "the matter." In light of the language used, it is clear that the "matter" for which consultations is requested under Article 17.3, the "matter" referred to the DSB under Article 17.4, and the "matter" to be examined by a panel under Article 17.5, is the same matter. These provisions constitute special or additional rules and procedures. As such, under Article 1.2 of the DSU, they prevail over any inconsistent provisions in the DSU.<sup>9</sup>

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<sup>9</sup> Appendix 2 to the DSU expressly identifies Articles 17.4 and 17.5 as special or additional rules. Because Article 17.3 is incorporated by reference into Article 17.4, Article 17.3 also must prevail over any inconsistent provisions in the DSU.

4.6 A “matter” as used in these provisions consists of the specific claims identified by a Member.<sup>10</sup> A “claim,” in turn, consists of an identification of the provision of the specific agreement alleged to have been violated.<sup>11</sup> Accordingly, because the “matter” to be examined by a panel must be the same “matter” for which consultations were requested, a panel may only consider “claims” that were identified in the request for consultations by means of an identification of the provisions of the specific agreements alleged to have been violated.

4.7 In its request for consultations, Korea identified Article VI of GATT 1994 and Articles 6 and 11 of the AD Agreement. Korea did not identify Articles 1, 2, 3, or 17 of the AD Agreement. Therefore, claims based on these provisions did not, and could not, constitute part of the matter that Korea properly could refer to the DSB under Article 17.4, nor could claims based on these provisions properly constitute part of the matter to be examined by a panel under Article 17.5.<sup>12</sup>

(b) Response by Korea

4.8 In its letter dated 17 June 1998, **Korea** made the following arguments:

4.9 The U.S. objection rests, in large part, on a tortured discussion of the relationship between the terms “matter” and “claim.” The United States correctly notes that a “matter” is composed of the “claim(s)” that make up that matter and that each claim consists of a challenged measure and the WTO provision the complainant claims the measure violates. But this explication, far from supporting the U.S. objection, confirms Korea’s position. Between a matter and the claims that compose it, the matter is the more general. Thus, a requirement that a matter be identified is far less demanding than a requirement that the claims that make it up be identified. The United States attempts to obscure this truth with a circuitous ramble suggesting that since a matter is composed of claims, any requirement to identify the matter can be met only by identifying each claim it subsumes. But, had the negotiators intended to require a complainant to identify all claims composing its as-yet undrafted complaint in its consultation request, Articles 17.3 and 17.4 would refer to “claims” not “matters.” The Panel should reject this baseless attempt to equate the specific with the general, contrary to the obvious intent of the negotiators as shown in the text of the relevant provisions.

4.10 The United States cited the Appellate Body report in *Brazil–Measures Affecting Desiccated Coconut* (*Desiccated Coconut*) to support its objection. However, the passage from that report quoted below confirms that the panel request, not the consultation request, defines the terms of reference:

A panel’s terms of reference are important for two reasons. First, terms of reference fulfil an important due process objective – they give the parties and third parties sufficient information concerning the claims at issue in the dispute in order to allow them an opportunity to respond to the complainant’s case. Second, they establish the jurisdiction of the panel by defining the precise claims at issue in the dispute.<sup>13</sup>

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<sup>10</sup> *Brazil - Measures Affecting Desiccated Coconut*, WT/DS22/AB/R, Report of the Appellate Body adopted 20 March 1997, p. 23 (hereinafter “*Desiccated Coconut*”).

<sup>11</sup> *European Communities - Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, Report of the Appellate Body adopted 25 September 1997, para. 141.

<sup>12</sup> In this regard, it is irrelevant that Korea did not cite Article 17.4 in its request for the establishment of a panel (WT/DS99/2). A complainant cannot circumvent the requirements of the AD Agreement and the DSU by omitting in its request for a panel the provision that imposes the requirements.

Moreover, putting aside the special or additional rules of the AD Agreement, Korea’s claim concerning Article 1 of the AD Agreement is inadmissible because Korea’s request for the establishment of a panel did not include a claim under Article 1 (WT/DS99/2). Thus, this claim is not within the Panel’s terms of reference and must be rejected.

<sup>13</sup> WT/DS22/AB/R (21 February 1997) at page 21.

4.11 Korea agrees with the approach taken in previous adopted reports that a matter, which includes the claims composing that matter, does not fall within a panel's terms of reference unless the claims are identified in the documents referred to or contained in the terms of reference.

4.12 The Panel should reject the attempt by the United States to exclude Korea's claims concerning Articles 2, 3 and 17 of the AD Agreement on the ground that Korea did not specifically identify these articles in its request for consultations. The Appellate Body and WTO panels uniformly have rejected similar attempts, declaring that the legally relevant question is whether a claim was raised in the request for establishment of a panel. That is because the panel request is the document that generally sets a panel's terms of reference. These holdings are based on the language of the Dispute Settlement Understanding (the DSU)--a request for consultations must contain merely "an indication of the legal basis for the complaint," but a panel request must provide a "summary of the legal basis of the complaint." The ordinary meaning of these terms is confirmed by the context, object and purpose of the consultation request and the panel request. As the United States itself argued in *Japan–Measures Affecting Consumer Photographic Film and Paper (Japan–Film)*<sup>14</sup>, a Member cannot know before consultations, when it makes its request, precisely what the scope of a Respondent's possible violations of WTO measures might be.<sup>15</sup> The consultative process, thus, serves two functions: it allows the complainant to develop a better understanding of the precise nature of the possible violations while, at the same time, it allows the Respondent to develop a better understanding of the complaint and, of course, it provides an opportunity to settle the dispute. Based on the consultations, a complainant must set out the legal basis of its complaint with precision in its panel request. That is what Korea did, and so the Panel should dismiss the US preliminary objection.

(c) Clarification by the United States

4.13 Pursuant to written questions posed by the Panel,<sup>16</sup> the **United States** clarified its preliminary objections concerning the admissibility of Korea's claims under Articles 1, 2, 3, and 17 of the AD Agreement.

4.14 The United States is of the view that a claim that was actually raised during consultations may be referred to the DSB. This view was recently confirmed in the *Guatemala Cement* case, in which the panel concluded that "the 'matter' consulted about under Article 17.3, the 'matter' referred to the DSB under Article 17.4, and the 'matter' to be examined by a panel under Article 17.5, is in each instance the same matter ..."<sup>17</sup>

4.15 It is the experience of the United States that the investigating authorities of the various WTO Members adhere to the transparency requirements of the AD Agreement with varying degrees of rigor. In the case of those authorities that adhere rigorously to these requirements, such as the US authorities, it would not be unreasonable to expect that a complaining Member would be able to identify its claims with precision in its written request for consultations. However, in the case of authorities that adhere with less rigor to the transparency requirements of the AD Agreement, a

<sup>14</sup> WT/DS44/R (22 April 1998), para. 3.14.

<sup>15</sup> Korea notes, however, that in this case, it raised Articles 2 and 3 of the AD Agreement during the WTO consultations with the United States. See, e.g., Questions Submitted by the Republic of Korea to the United States, Questions C-9, C-9-1 and D-2. In regard to the other articles cited by the United States, the standards of Article 17 apply to this dispute as a matter of course and although Korea mentioned Article 1 in its First Submission, it advanced no argument based on that Article.

<sup>16</sup> The Panel recalls that the questions were: "The United States' preliminary objections state that certain provisions were not identified in Korea's request for consultations. (a) Could the United States please state whether it considers that a claim which was actually raised during consultations, but was not identified in the request for consultations, is part of a matter which may be referred to the DSB? (b) Could the United States please state whether Korea and the United States in fact consulted with respect to Korea's claims under Articles 1, 2, 3 and 17 of the ADP Agreement?"

<sup>17</sup> *Guatemala - Anti-Dumping Investigation Regarding Portland Cement from Mexico*, WT/DS60/R, Report of the Panel issued 19 June 1998, para. 7.15.

Member requesting consultations may not be in a position, as a practical matter, to identify with precision its claims in its written request for consultations. It may be that only during the course of the consultations will the complaining Member be able to identify with precision the alleged violations committed by the investigating authorities in question. Therefore, a Member should be permitted to refer a claim to a panel if it was actually raised during consultations, even though it may not have been included in the written request for consultations.

4.16 The United States is aware that an identification of the claims on which the parties actually consulted may raise an issue of fact. Normally, there should be documents from the consultations (typically in the form of written questions presented by the complaining Member to the responding Member) that identify the claims actually raised. In the absence of such documentation, a panel should rely on the written request for consultations itself.

4.17 The United States and Korea consulted with respect to claims under Articles 2.1, 2.2, 2.2.1.1, and 3.1. Although, Korea did not identify Article 5.8 by name, in consultations, Korea did refer to “the 2 percent *de minimis* margin threshold of the AD Agreement.”

4.18 The United States and Korea did not consult with respect to claims under Article 1 or Article 17. Moreover, as previously noted by the United States, Article 1 was not included in Korea’s request for the establishment of a panel.

(d) Clarification by Korea:

4.19 Pursuant to a question posed by the Panel,<sup>18</sup> **Korea** states that:

4.20 Korea and the United States consulted regarding Articles 2 and 3 of the AD Agreement. Korea intended to advance no arguments under Article 1. Article 17.6 is a procedural provision that applies to this Panel proceeding as a matter of course.

4.21 **Korea** further clarified its position in response to another question by the Panel:<sup>19</sup>

4.22 Korea does not take the position that the United States “violated” Article 17.6 in the same sense that it violated Articles 2, 5.8, 6, 11.1 and 11.2 of the Anti-Dumping Agreement and Articles I, VI and X of the General Agreement.

## **2. Admissibility of Claims Regarding the Scope of the US Anti-Dumping Order**

(a) Objection of the United States

4.23 The following are the arguments of the **United States** in support of its preliminary objection:

4.24 The Panel must dismiss Korea’s claim because the original anti-dumping investigation on *DRAMs from Korea* simply is not subject to the AD Agreement. Article 18.3 of the AD Agreement provides:

Subject to subparagraphs 3.1 and 3.2, the provisions of this Agreement shall apply to investigations, and reviews of existing measures, initiated pursuant to applications which have been made on or after the date of entry into force for a Member of the WTO Agreement.

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<sup>18</sup> The Panel recalls that the question was: “Could Korea please state whether Korea and the United States in fact consulted with respect to Korea’s claims under Articles 1, 2, 3 and 17 of the ADP Agreement?”

<sup>19</sup> The Panel recalls that the question was: “Korea argues that the United States has violated certain substantive obligations under Article 17.6 of the ADP Agreement. Could Korea please explain the nature of that violation in concrete terms?”

4.25 The application ("petition" in US terminology) for anti-dumping duties in the instant case was made on 22 April 1992, and resulted in a final determination by the DOC on 23 March 1993. As noted previously, the DOC issued an anti-dumping order (definitive duties) on 10 May 1993. Thus, the investigation began and finished well before 1 January 1995, the date on which the WTO Agreement entered into force for the United States. Therefore, determinations made by US authorities in the course of that investigation are not subject to the provisions of the AD Agreement and may not be reviewed by this Panel.

4.26 The Appellate Body reached a similar conclusion in the *Desiccated Coconut* case. That case dealt with the transition provision for countervailing duties contained in Article 32.3 of the Agreement on Subsidies and Countervailing Measures ("SCM Agreement"), a provision that the Appellate Body found to be "identical" to Article 18.3 of the AD Agreement.<sup>20</sup> The Appellate Body described Article 32.3 (and, thus, Article 18.3) as follows:

The Appellate Body sees Article 32.3 of the *SCM Agreement* as a clear statement that for countervailing duty investigations or reviews, the dividing line between the application of the GATT 1947 system of agreements and the *WTO Agreement* is to be determined by the date on which the application was made for the countervailing duty investigation or review. Article 32.3 has limited application only in specific circumstances where a countervailing duty proceeding, either an investigation or a review, was underway at the time of entry into force of the *WTO Agreement*. This does not mean that the *WTO Agreement* does not apply as of 1 January 1995 to all other acts, facts and situations which come within the provisions of the *SCM Agreement* and Article VI of the GATT 1994. However, the Uruguay Round negotiators expressed an explicit intention to draw the line of application of the new *WTO Agreement* to countervailing duty investigations and reviews at a different point in time from that for other general measures. Because a countervailing duty is imposed only as a result of a sequence of acts, a line had to be drawn, and drawn sharply, to avoid uncertainty, unpredictability and unfairness concerning the rights of states and private parties under the domestic laws in force when the *WTO Agreement* came into effect.<sup>21</sup>

4.27 By challenging a determination made before the WTO Agreement came into effect, Korea is attempting to undo the sharp line drawn by the drafters and generate the very uncertainty, unpredictability, and unfairness that the drafters sought to avoid. The Panel should reject this attempt by dismissing Korea's claim regarding the determination made by the DOC and the ITC during the original anti-dumping investigation.

(b) Response by Korea

4.28 In a letter to the Panel dated 17 June 1998, **Korea** made the following arguments in response to the US preliminary objection:

4.29 The Panel has the authority and is obliged to examine Korea's claims regarding the scope of the US anti-dumping order because: (i) not reviewing the claim would allow the United States to act inconsistently with the AD Agreement; and (ii) reviewing the claim would be consistent with the Vienna Convention on the Law of Treaties ("*Vienna Convention*").

4.30 When the WTO Agreement entered into force for the United States, the United States assumed the obligation not to act after that date in a manner inconsistent with the AD Agreement regardless of when the application for anti-dumping duties was made. The United States' continued imposition of the flawed scope decision made in the original investigation and each instance of the United States' bringing within the proceeding a higher density chip constitute action inconsistent with

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<sup>20</sup> WT/DS/22/AB/R, Report of the Appellate Body adopted 20 March 1997, at 19 n. 23.

<sup>21</sup> *Id.* at 19 (footnotes omitted).

the AD Agreement. According to Article 18.3 of the AD Agreement, the provisions of the AD Agreement apply to reviews of existing measures made on or after the date of entry into force of the WTO Agreements. The Third Review in this proceeding was initiated on 8 May 1996, thus Korea's claim regarding the continuing flawed scope determination would be properly before the Panel.

4.31 The application of the AD Agreement in this case would not constitute retroactive application of the AD Agreement. According to Article 28 of the *Vienna Convention*:

Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party. (Emphasis added by Korea.)

4.32 The United States' continued imposition of the flawed scope decision has not "ceased to exist" and, thus, is subject to the AD Agreement. The United States' continued imposition of the flawed scope decision subject to the AD Agreement is an act occurring after 1 January 1995, as is each instance of the United States' bringing within the proceeding a higher density chip.

(c) Rebuttal arguments made by the United States

4.33 At the second meeting of the Panel, the **United States** made the following additional arguments:

4.34 Korea's claims under Articles 2 and 3 are vulnerable to attack on all fronts. In its first written submission, Korea complained about two, and only two, decisions by the United States. First, Korea alleged that the Commission, in its original investigation, failed to include DRAMs with densities of less than one megabit in its injury analysis. Second, Korea alleged that the DOC, by issuing an anti-dumping order that covered DRAMs of one megabit or above, improperly included products that were not in existence at the time of the original investigation. According to Korea's first submission, the scope of the order "includes products such as 64 megabit DRAMs that were not even shipped to the United States until 1996 ..." These statements and others in Korea's first submission establish, without doubt, that Korea seeks to overturn determinations made before the WTO entered into force. Such challenges are prohibited by the express terms of Article 18.3 of the AD Agreement. If Korea or the respondents thought these determinations were wrong, they should have challenged them back in 1992-93. Now is too late and beyond the authority of this Panel to entertain.

4.35 In its rebuttal submission, Korea attempts to make it appear that it is challenging determinations made after 1 January 1995, when the WTO entered into force for the United States. However, Korea never identifies which determinations it is challenging or the basis for its challenge. Is it challenging the questionnaire that the DOC sent out in the third administrative review of the anti-dumping order on *DRAMs from Korea*? If it is, it has provided no evidence for its claim that respondents reported data for an allegedly new product, 64 megabit ("Meg") DRAM, or that the DOC calculated a dumping margin based on that data. Korea also seems to believe 64 Meg DRAMs were not "in existence" when the original investigation was conducted; were 16 Meg in existence when the original investigation was conducted? And how does Korea define "in existence" – must the DRAM be produced or shipped, and shipped on a commercial basis or is a trial basis good enough? These and other questions are never addressed by Korea and the Panel has no way of answering them largely because the evidence that was before the investigating authorities when they made their original determinations on scope and like product is not before this Panel.

4.36 In response to a question from the Panel,<sup>22</sup> the **United States** made the following clarification concerning the application of Article 18.3 of the AD Agreement in the context of administrative reviews:

4.37 The United States considers reviews under section 751(a) of the Tariff Act of 1930, as amended (the "Act"), and section 353.22 of the regulations promulgated by the DOC (commonly referred to as "administrative reviews") to constitute "reviews of existing measures" within the meaning of Article 18.3 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the "AD Agreement"). Administrative reviews contain elements of both an Article 9.3 assessment proceeding (because they determine, *inter alia*, final liability for duties) and an Article 11.2 review (because they alter the cash deposit rate and may lead to revocation). Accordingly, the relevance of Article 18.3.1 to this case is unclear.

4.38 In the instant case, the third administrative review of the anti-dumping duty order on *DRAMs from Korea* (for purposes of determining the amount of duties to be assessed on prior entries, the estimated cash deposit to be required on future entries, and whether the order should be revoked pursuant to section 353.25(a)) is subject to the AD Agreement by virtue of Article 18.3. Korea's scope challenge, however, is not directed at the administrative review but, rather, at the original investigation. Indeed, Korea is challenging not a new decision on scope in the administrative review, but an immutable aspect of the order which was adopted before the WTO Agreement took effect for the United States.

4.39 Finally, the United States wishes to emphasize that Article 18.3 is an entry-into-force provision. It is not intended to override the language of the other 17 articles by making all provisions that apply to investigations applicable to reviews. Thus, Article 18.3 does not preempt the AD Agreement's distinction between investigations and other administrative proceedings.

### **3. Admissibility of Claims under Article XVI.4 of the Marrakesh Agreement Establishing the World Trade Organization and Article 18.4 of the AD Agreement**

#### **(a) Objection of the United States**

4.40 The **United States** in its oral statement at the second meeting of the Panel with the Parties raised a preliminary objection questioning the admissibility of Korea's claims under Article XVI.4 of the Marrakesh Agreement Establishing the World Trade Organization and Article 18.4 of the AD Agreement. The following are the US arguments in support of its preliminary objection:

4.41 In its 10 July 1998 rebuttal submission, Korea raises several new claims to which the United States objects. Korea's claims regarding Article XVI.4 of the Marrakesh Agreement Establishing the World Trade Organization and Article 18.4 of the AD Agreement are entirely new. These new claims (i) were not consulted on, (ii) were not included in Korea's panel request, and (iii) heretofore, have not made an appearance in this dispute settlement proceeding. The dispute settlement process under the AD Agreement and the DSU cannot (and does not) condone these types of actions by Korea. It is settled law under the Appellate Body decisions in *Bananas III* and the *India Patents* decisions that claims not raised in the request for the establishment of a panel are not within the Panel's terms of reference and must be dismissed.

#### **(b) Response by Korea**

4.42 In answer to a question by the Panel<sup>23</sup> and during the second meeting of the Panel with the Parties, **Korea** made the following arguments in response to the US preliminary objection:

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<sup>22</sup> The Panel recalls that the question was: "Does the United States consider that 'administrative reviews' constitute 'reviews of existing measures' within the meaning of Article 18.3 ADP. Why or why not? Please address the relevance, if any, of footnote 21 and Article 18.3.1 to your answer."



4.43 Korea is not making a separate claim because a Member automatically violates Article 18.4 whenever a Member violates another provision of the AD Agreement. Korea takes the same position with respect to claims under Article XVI.4 of the Marrakesh Agreement Establishing the World Trade Organization.<sup>24</sup>

B. STANDARD OF REVIEW

(a) Submission by the United States

4.44 The **United States** submits that Korea seeks to retry the factual issues that were before the DOC in the underlying administrative proceeding. The following are the arguments of the United States in support of this submission:

4.45 Panel review is not a substitute for proceedings conducted by national investigating authorities. Numerous panels have recognized that the role of panels is not to conduct a *de novo* review of factual issues. In describing the role of panels when reviewing factual issues, the panel in the *Korea – Anti-Dumping Duties on Imports of Polyacetal Resins from the United States (Korean resins)* case stated, in part:

The Panel . . . should [not] substitute its own judgment for that of the KTC as to the relative weight to be accorded to the facts before the KTC. To do so would ignore that the task of the Panel was not to make its own independent evaluation of the facts before the KTC to determine whether there was material injury to the industry in Korea but to review the determination as made by the KTC for consistency with the Agreement, bearing in mind that in a given case reasonable minds could differ as to the significance to be attached to certain facts.<sup>25</sup>

4.46 The standard of review to be applied by this Panel is set forth in Article 17.6 of the AD Agreement. In sub-paragraph “(i),” panels are instructed not to substitute their judgment for that of the national investigating authorities:

in its assessment of the facts of the matter, the panel shall determine whether the authorities’ establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned ...<sup>26</sup>

4.47 Moreover, when applying this standard, Article 17.5(ii) directs the Panel to limit its review to the facts that were before the DOC when it made its determination (*i.e.*, the evidence contained in the administrative record).

4.48 In reviewing legal questions that turn on the proper meaning to be ascribed to the AD Agreement, sub-paragraph “(ii)” of Article 17.6 states:

the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that

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<sup>23</sup> The Panel recall that the question was: "In response to a from the Panel, (Ex. ROK-84), Korea states that the US "has violated Article 18.4" AD Agreement . Is Korea raising a separate claim under Article 18.4? If so, please specify where this claim is identified in Korea's request for establishment (WT/DS99/2)."

<sup>24</sup> The Panel notes that Korea made this last statement orally during the second meeting of the Panel with the Parties.

<sup>25</sup> *Korea – Anti-Dumping Duties on Imports of Polyacetal Resins from the United States*, BISD 40S/205, para. 227.

<sup>26</sup> AD Agreement, art. 17.6(i).

a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.<sup>27</sup>

4.49 Thus, the relevant question in every case is not whether the challenged determination rests upon the best or the "correct" interpretation of the AD Agreement, but whether it rests upon a "permissible interpretation" (of which there may be many). If it does, then this Panel must uphold the determination.

4.50 The **United States**, in its oral presentation at the first meeting of the Panel with the Parties, further argued as follows:

4.51 Both Korea and the United States agree that the applicable standard of review in this dispute is Article 17.6 of the AD Agreement. This standard of review governs the Panel's review of determinations by administrative agencies such as the DOC in this case. It relates to both *factual* establishment and evaluation of the facts of the matter, as well as *legal interpretation* of the AD Agreement.

(i) *Article 17.6(i)*

4.52 With respect to its assessment of *factual* matters before the administrative authorities, Article 17.6(i) provides that the Panel shall do the following:

First: "determine whether the authorities' establishment of the facts was proper"

This means that the Panel should determine whether the authorities followed procedures for collecting, evaluating, and processing facts during their investigation which were consistent with the requirements of the AD Agreement.

Second: determine whether the authorities' "evaluation of those facts was unbiased and objective"

This provision means that the Panel must evaluate whether (a) the authorities examined all of the relevant facts before it, including facts which might detract from an affirmative determination, (b) whether adequate explanation has been provided of how the determinations made by the authorities are supported by facts in the record, and (c) whether the authorities based their determinations on an examination of factors required by the AD Agreement.

4.53 In making this evaluation, Article 17.6(i) directs the Panel not to substitute its judgement of the facts for those of the authorities. There may be situations where the facts in a hotly-contested case such as the one presented in this dispute could lead to more than one conclusion. Thus, there may well be some facts lending support to Korea's arguments that dumping is not likely. However, there are also many facts -- indeed it is argued, the bulk of the evidence in this case -- supporting the conclusion that dumping is likely. The significance of Article 17.6(i) is that it prohibits the Panel from overturning the evaluation of the authorities as long as the "establishment of the facts was proper" and the "evaluation was unbiased and objective." Thus, if the process by which the domestic authorities established the facts is consistent with the AD Agreement, and the authorities assessed all of the evidence in the record, then the authorities' determination must be upheld by the Panel if it is supported by a factual basis in the record.

4.54 This interpretation of Article 17.6(i) is consistent with its text, as well as its object and purpose, as well as with decisions of numerous GATT 1947 panels.

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<sup>27</sup> *Id.*, art. 17.6(ii).

(ii) Article 17.6(ii)

4.55 Another important aspect of the standard of review is Article 17.6(ii) which addresses procedures for assessing the interpretation of the relevant portions of the AD Agreement. The first sentence of Article 17.6(ii) directs the panel to interpret the relevant provisions of the Agreement in accordance with the customary rules of interpretation of public international law. In the context of practice developed by the Appellate Body and panels, such a direction has meant the application, *inter alia*, of the provisions of the *Vienna Convention*. In the typical case, a panel or the Appellate Body has used the *Vienna Convention* as a tool for determining a *single* meaning for a particular WTO text. However, Article 17.6(ii) reveals that the negotiators anticipated that it may well be possible for Members' authorities to interpret the text of provisions of the AD Agreement in more than one "permissible" way. In making the assessment whether there is more than one permissible way to interpret an AD text, the panel could make use of the *Vienna Convention* to determine whether an interpretation of a particular authority -- such as the United States in this dispute -- is permissible. If the panel finds that the text is susceptible to more than one permissible meaning, then Article 17.6(ii) provides that "the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations."

4.56 Accordingly, Article 17.6(ii) is intended to provide a certain flexibility -- where the language was undefined or otherwise ambiguous -- for authorities to establish (or maintain) implementing procedures. This is particularly the case such as the instant dispute where the key terms are undefined, such as the terms "necessary" and "warranted" in Article 11.2.

4.57 The DOC's decision not to revoke the anti-dumping duty order on *DRAMs from Korea* rests upon a "permissible" interpretation of Article 11 of the AD Agreement that is based upon both the ordinary meaning of the terms of Article 11, as well as their context and the general object and purpose of the AD Agreement. Moreover, in considering whether the DOC's determination rests upon a "permissible" interpretation of the relevant WTO provisions, the Panel will discover that the agency assembled a voluminous record. In fact, the DOC compiled an extensive record. The agency then conducted a painstaking, fact-intensive review of that record, including all arguments presented by Hyundai and LG Semicon, before deciding not to revoke the anti-dumping order on *DRAMs from Korea*. Consistent with Article 17.6(i) of the AD Agreement, the facts of this case were properly established and reasonably supported the determination made by the DOC. Pursuant to Article 17.6(i), the only question is whether the DOC's establishment of the facts was "proper" and whether its "evaluation of those facts was unbiased and objective." If it was, then Article 17.6(i) of the AD Agreement requires the Panel to uphold this determination.

(b) Rebuttal response by Korea

4.58 **Korea** makes the following arguments in rebuttal to the United States submission on standard of review:

4.59 Unlike the other WTO agreements, the AD Agreement prescribes a standard of review. With regard to review of facts, there is no significant difference in the views of Korea and the United States regarding the appropriate standard of review. However, with regard to review of legal interpretations, the standard proposed by the United States—that the Panel must uphold US interpretations unless Korea proves that they are "forbidden"—finds no support in the text or interpretive assessments of Article 17.6(ii) of the AD Agreement.

(i) *In Reviewing Facts, the Panel Should Determine Whether a Reasonable, Unprejudiced Person Would Have Found, Based on the Evidence Before the DOC, That the Facts Reasonably Supported the Conclusions of the DOC.*

4.60 The standard of review regarding assessment of facts is set out in Article 17.6(i) of the AD Agreement:

in its assessment of the facts of the matter, the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned.

4.61 This standard was interpreted by the panel in the recent decision in *Guatemala -- Anti-dumping Investigation Regarding Portland Cement from Mexico*.<sup>28</sup> There, at paragraphs 7.54 through 7.57, the Panel cited as sensible and consistent with the standard of review under Article 17.6(i) the approach spelled out by the Panel in *United States -- Measures Affecting Softwood Lumber from Canada*.<sup>29</sup> As set forth by the *Guatemala -- Cement* panel:

[W]e are to examine whether the evidence relied on by the Ministry was sufficient, that is, whether an unbiased and objective investigating authority evaluating that evidence could properly have determined that sufficient evidence of dumping, injury, and causal link existed to justify initiating the investigation.<sup>30</sup>

4.62 There is no significant dispute between Korea and the United States regarding this standard, but there is total disagreement as to its application in this dispute. Korea establishes that the DOC based its determination not to revoke on unverified information and mere conjecture from the US petitioner, while failing to consider fairly and objectively verified and verifiable information submitted by the Korean Respondent companies. Korea is confident that the Panel will share its view that, given the evidence in the DOC's record, an unbiased and objective person would have concluded that, even assuming that DOC's criteria for revocation were consistent with the United States' WTO obligations, the Korean Respondent companies satisfied them. Korea does not accept that the DOC's revocation criteria are permissible under the WTO, but even assuming for the sake of argument that they are, the United States made a determination that is not supportable under the Article 17.6(i) standard of review.

(ii) *In Reviewing Legal Interpretations, the Panel Should Follow the Interpretive Rules of the Vienna Convention; There is no Basis for virtually total deference to the DOC, as Argued by the United States.*

4.63 The standard of review regarding legal interpretation is set out in Article 17.6(ii) of the AD Agreement:

[T]he panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.

4.64 The United States, focusing on the second sentence of this provision, argues that the legal interpretation of the United States regarding Article 11 of the AD Agreement must be upheld unless it is "forbidden."

4.65 The United States ignores the first sentence of Article 17.6(ii), which mandates the Panel in the first instance to interpret Article 11 (and the other provisions of the AD Agreement at issue in this dispute) "in accordance with customary rules of interpretation of public international law" (*i.e.*, in accordance with Articles 31 and 32 of the *Vienna Convention*).

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<sup>28</sup> WT/DS60/R (dated 19 June 1998).

<sup>29</sup> BISD 40S/358, page 490, para. 335 (27 October 1993).

<sup>30</sup> WT/DS60/R at para. 7.57 (footnote omitted).

4.66 One of the world's leading GATT/WTO scholars, Professor John Jackson, has analyzed Article 17.6(ii) in depth.<sup>31</sup> He decisively rejects the extremely deferential standard of review advocated by the United States, based on a thorough review of Article 17, the *Vienna Convention* and the reasons cited in support of a deferential review standard. First, he establishes that the purpose of the *Vienna Convention* is to resolve ambiguities in the text of an agreement. Thus, after Article 31 (and, where appropriate, Article 32) is applied, there will be no lingering ambiguities. The second sentence of Article 17.6(ii) will rarely come into play because there usually will not be "more than one permissible interpretation" of Article 11 (or any other provision of the AD Agreement).

4.67 Second, Professor Jackson demolishes the intellectual underpinnings for application of a deferential standard of review. At pages 202 through 211 of his article, he critiques the applicability in the WTO context of the US court decision that is widely recognized as the model used by the US negotiators in proposing what became Article 17.6(ii)--*Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*<sup>32</sup> Professor Jackson demonstrates that none of the three bases for deference to administrative agencies that may apply to domestic legal proceedings is relevant in the context of WTO panel reviews. First, unlike domestic legal proceedings, in which an administrative agency has "expertise" regarding its particular regulatory area, no WTO Member has any greater expertise relative to other WTO Members regarding the interpretation and application of provisions of the WTO agreements. In Professor Jackson's words:

Countries party to an anti-dumping dispute are not delegates whose technical expertise specially qualifies them to make authoritative interpretive decisions. They are, rather, interested parties whose own (national) interests may not always sustain a necessary fidelity to the terms of international agreements.<sup>33</sup>

4.68 Next, Professor Jackson demonstrates that the so-called "democracy" rationale is inapplicable. (This is based on the principle that because federal judges in the United States are not elected, judicial deference to agency decisions, which flow from decisions taken by elected presidents and legislators, enhances the legitimacy of administrative decisionmaking.) National authorities are not accountable to the WTO Membership at large; indeed, WTO panels are the Members' delegates. Thus, the concept of deference to those accountable to the populace has no counterpart in the WTO context.

4.69 Finally, Professor Jackson dissects and rejects the "efficiency" rationale of *Chevron*--that a single interpretation by the agency charged to administer a law is preferable to the potential of multiple interpretations by different courts. At page 210 of his article he shows that, in the WTO context, deference to national authorities would lead to the very multiplicity of interpretations that the "efficiency" rationale was meant to prevent:

Whereas in the US administrative law setting there is typically little danger of multiple interpretations of the statutory language by several different agencies, in the GATT/WTO setting multiple interpretations of agreement provisions is precisely one of the problems that panel review is designed to ameliorate.<sup>34</sup>

4.70 This extensive analysis of Professor Jackson's article proves the intellectual deficiencies of the deferential standard of review advocated by the United States. Because the virtually total deference advocated by the United States, in addition to not being mandated by the text of Article 17.6(ii), is intellectually unsound, the Panel should reject it. The Panel should, as commanded by the first sentence of Article 17.6(ii), apply the interpretive rules of the *Vienna Convention* to the

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<sup>31</sup> See Steven P. Croley & John H. Jackson, *WTO Dispute Procedures, Standard of Review, and Deference to National Governments*, 90 AM. J. INT'L L. 193 (1996) (Ex. ROK-88).

<sup>32</sup> 467 US 837 (1984) (Ex. ROK-89).

<sup>33</sup> 90 AM. J. INT'L L. at 209.

<sup>34</sup> *Id.* at 210.

legal interpretations involved in this dispute. When the Panel does so, Korea is confident that it will agree with Korea that the United States has violated its obligations under Articles 2, 5.8, 6, 11.1 and 11.2 of the AD Agreement.

(c) Rebuttal response by the United States

4.71 The **United States** made the following arguments in its second oral statement before the Panel:

4.72 With one possible exception, there seems to be agreement between Korea and the United States over the standard of review to be applied by this Panel to factual issues. That exception concerns the panel's report in the *Guatemala Cement* case, which Korea quotes with approval in its rebuttal submission. At paragraph 57 (Findings) and elsewhere, the panel in the *Guatemala Cement* case articulates the standard as "whether an unbiased and objective investigating authority evaluating that evidence could *properly* have determined ..." (emphasis added by the United States). While the panel purports to be following the standard in *Lumber*, which it quotes in the preceding paragraph, we believe the panel inserts the word "*properly*" which suggests a higher degree of second-guessing on the part of the panel than either *Lumber* or Article 17.6(i) would seem to contemplate. The panel may have thought it was simply incorporating the word "proper" from the phrase "establishment of the facts was proper" in 17.6(i); however, if that was the intention, we respectfully submit that this was a mistake because that phrase deals with questions like whether the authorities improperly refused to allow certain information to be on the record.

4.73 With respect to the assessment of factual matters before an investigating authority, Article 17.6(i) directs panels to, first, "determine whether the authorities' establishment of the facts was proper." This means that the Panel should determine whether the DOC followed procedures for collecting, evaluating, and processing facts during its administrative proceeding which were consistent with the requirements of the AD Agreement. Second, panels must determine whether the authorities' "evaluation of those facts was unbiased and objective." This provision means that the Panel must evaluate whether (a) the DOC examined all of the relevant facts before it, including facts which might detract from the challenged determination, (b) whether adequate explanation has been provided of how the determination made by the DOC is supported by facts in the record, and (c) whether the DOC based its determination on an examination of factors required by the AD Agreement.

4.74 It must be emphasized, that Article 17.6(i) directs the Panel not to substitute its judgment of the facts for those of the investigating authority. There may be situations where the facts in a hotly contested case, such as the one here, could lead to more than one conclusion. Thus, there may be some facts lending support to Korea's arguments. However, there are also many facts – indeed, we would argue, the bulk of the evidence – which support the determination made by the DOC in this case. The significance of Article 17.6(i) is that it prohibits the Panel from overturning the evaluations of the DOC as long as the "establishment of the facts was proper" and the "evaluation was unbiased and objective." The United States respectfully submits that this interpretation of Article 17.6(i) is consistent with its text (as well as its object and purpose), and with the decisions of numerous GATT 1947 panels.

C. BURDEN OF PROOF

(a) Submission by the United States

4.75 The **United States** submits that Korea has the burden of establishing a violation of a provision of a WTO agreement. The following are the arguments of the United States in support of this claim:

4.76 The fact that the complainant has the burden of proof has been made clear by the Appellate Body in the *Wool Shirts* case when it stated:

[W]e find it difficult, indeed, to see how any system of judicial settlement could work if it incorporated the proposition that the mere assertion of a claim might amount to proof. It is, thus, hardly surprising that various international tribunals, including the International Court of Justice, have generally and consistently accepted and applied the rule that the party who asserts a fact, whether the claimant or the Respondent, is responsible for providing proof thereof. Also, it is a generally-accepted canon of evidence in civil law, common law and, in fact, most jurisdictions, that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence.<sup>35</sup>

4.77 This principle is not affected by Korea's incorrect assertion that anti-dumping measures constitute "derogations" from alleged free-trade principles of the WTO.<sup>36</sup> To the contrary, the right conferred by Article VI and the AD Agreement to impose anti-dumping measures forms part of the carefully constructed balance of rights and obligations that make up the WTO free-trade regime. To diminish this right, as suggested by Korea, by characterizing Article VI and the AD Agreement as "derogations" would constitute an impermissible failure to respect this balance.

4.78 Even if anti-dumping measures could be described as a derogation from, or an "exception" to, such alleged free-trade principles, this would not affect the assignment of the burden of producing evidence of a violation. As the Appellate Body stated in the *Hormones* case:

The general rule in a dispute settlement proceeding requiring a complaining party to establish a prima facie case of inconsistency with a provision of the SPS Agreement before the burden of showing consistency with that provision is taken on by the defending party, is not avoided by simply describing that same provision as an "exception". In much the same way, merely characterizing a treaty provision as an "exception" does not by itself justify a "stricter" or "narrower" interpretation of that provision than would be warranted by examination of the ordinary meaning of the actual treaty words, viewed in context and in the light of the treaty's object and purpose, or, in other words, by applying the normal rules of treaty interpretation.<sup>37</sup>

4.79 More generally, there simply is no justification for treating anti-dumping measures as derogations or exceptions. The case typically cited by proponents of this view is the *Pork from Canada* case, in which the panel characterized Article VI:3 of GATT 1947, which authorized the imposition of countervailing duties, "as an exception to basic principles of the General Agreement had to be interpreted narrowly and that it was up to the United States, as the party invoking the exception, to demonstrate that it had met the requirements of Article VI:3."<sup>38</sup> However, the panel's statement was conclusory in nature, and the panel cited no authority for the proposition that Article VI was an "exception." Moreover, this aspect of the panel's decision was *dicta*, because nothing in the remainder of the panel report indicates that the panel's characterization of Article VI:3 as an "exception" influenced the panel's analysis of the matter.

4.80 Perhaps more significantly, other than *Pork from Canada*, of the fourteen panel reports following the *Wine and Grape Products* case that addressed Article VI of GATT 1947 or the Tokyo Round agreements based on Article VI, none of the panels (1) found that Article VI was an exception,

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<sup>35</sup> WT/DS33/AB/R, at 14 (footnote omitted).

<sup>36</sup> The Panel notes that this argument by Korea is set out at paragraph 4.90 of this report.

<sup>37</sup> *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, Report of the Appellate Body adopted 13 February 1998, para. 104.

<sup>38</sup> *United States - Countervailing Duties on Fresh, Chilled and Frozen Pork from Canada*, DS7/R, Report of the Panel adopted 11 July 1991, BISD 38S/30, para. 4.4.

(2) imposed the “burden of proof” on the party imposing anti-dumping or countervailing duties, or (3) expressly indicated a requirement to interpret Article VI in a narrow manner. In all of these disputes, the complaining party complied with its burden of producing *prima facie* evidence of a violation, and the defending party responded with argument and other evidence.

4.81 Moreover, in the only case thus far to consider Article VI of GATT 1994, both the panel and the Appellate Body refrained from treating Article VI as an “exception.” In the *Desiccated Coconut* case, the Philippines made the “Article VI-as-exception” argument in support of its claim that it could challenge Brazil’s countervailing duty order as a violation of Article VI of GATT 1994.<sup>39</sup> Brazil, in turn, argued that Article VI could not be applied independently of the SCM Agreement, and that under the transition rules of the SCM Agreement, the Brazilian determination was not subject to the SCM Agreement. If the Philippines were correct that Article VI is an exception, then both the panel and the Appellate Body presumably would have focused on the violation of the “core rules” of GATT 1994 (Articles I and II) that allegedly occurred *after* 1 January 1995, and they would have placed the burden on Brazil to establish that its determination was not subject to Article VI. However, neither the panel nor the Appellate Body accepted the Philippines’ “Article VI-as-exception” argument.<sup>40</sup>

4.82 Article VI and the AD Agreement do not constitute derogations or exceptions from the rest of the WTO framework. Even if they did, they would be subject to the same rules of interpretation as any other provision of the WTO agreements, and the burden of producing evidence of a violation still would rest with Korea as the complaining party.

(b) Rebuttal response by Korea

4.83 **Korea** makes the following arguments in rebuttal to the US position on burden of proof:

4.84 Korea’s view of the burden of proof in this case is reasonable, balanced and accurate. It is firmly rooted in the decision of the Appellate Body in *United States -- Measure Affecting Imports of Woven Wool Shirts and Blouses from India*.<sup>41</sup> First, Korea initially bears the burden of showing the US violations--it is for Korea “to submit a *prima facie* case of violation.”<sup>42</sup> In response, the United States must rebut Korea’s presentation--it is “for the United States to convince the Panel that, at the time of its determination it had respected” its WTO obligations.<sup>43</sup> (The United States has chosen not to directly counter Korea’s Article 11 arguments.) Second, Korea need only demonstrate that the United States violated a specific provision. In doing so here, Korea need only present an interpretation of the specific provision, *e.g.*, Article 11, that shows the precise nature of the US violation. Contrary to the assertions of the United States, Korea is not obliged to set forth a “Treatise on the Law of” each of the provisions Korea has demonstrated that the United States has violated. In this case, neither Korea, nor the Panel, need to define precisely the location of the “line of violation” which the United States obviously has crossed. Rather, a demonstration that the United States has crossed that line is sufficient. If a prosecutor can prove that a defendant murdered the victim, does the defendant go free because the prosecutor cannot prove the precise moment in time that the defendant murdered the victim? Certainly not. The violation is established, and that is sufficient for a finding of guilt.

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<sup>39</sup> WT/DS22R, Report of the Panel, as modified by the Appellate Body, adopted 20 March 1997, para. 73 and 85.

<sup>40</sup> *Id.*; and WT/DS22/AB/R.

<sup>41</sup> WT/DS33/AB/R (25 April 1997), pages 15-20.

<sup>42</sup> *Id.*, page 16 (quoting *United States -- Measure Affecting Imports of Woollen Shirts and Blouses from India* (6 January 1997), WT/DS33/R, para. 6.7).

<sup>43</sup> *Id.*



D. CLAIMS UNDER ARTICLE 11 OF THE AD AGREEMENT AND ARTICLE VI OF GATT 1994

1. **Limitations Imposed by Article VI of GATT 1994 and Article 11 of the AD Agreement**

(a) Claim raised by Korea

4.85 **Korea** claims that by virtue of Article VI of GATT 94 and Article 11 of the AD Agreement, a Member may impose a duty only to offset dumping that is causing injury and may maintain a duty only as long and as to the extent necessary to offset dumping that is causing injury. The following are Korea's arguments in support of this claim:

4.86 Article VI of the General Agreement sets forth the general restrictions and procedures regarding the ability of a Member to impose and maintain anti-dumping duties. Paragraph 1 of Article VI defines and condemns dumping that is causing or threatening material injury to a domestic industry. Paragraph 2 allows a Member to offset or prevent dumping that is causing or threatening injury by imposing a duty in the amount of the margin of dumping. And Paragraph 6(a) establishes the following limitation on a Member's ability to impose or maintain a duty, stressing that the prohibition of dumping is limited to dumping that is causing or threatening injury:

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.

4.87 Article 11 of the AD Agreement further specifies requirements to achieve the goal of limiting the duration of anti-dumping duties.

4.88 According to Paragraph 1:

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

4.89 To maintain an anti-dumping duty, a Member must establish three elements: that the responding company (i) is dumping and (ii) thereby causing (iii) injury to a domestic industry. A GATT panel reached a similar conclusion regarding Article 9 of the Tokyo Round Anti-Dumping Code, the predecessor of Article 11 of the AD Agreement. In *Swedish Stainless Steel Plate*, the panel found that "anti-dumping duties were temporary and remedial in nature," and rejected the US argument to the contrary.<sup>44</sup> Specifically, the panel concluded: "Article 9.1 obliged Parties to the Agreement not to maintain anti-dumping duties when such duties were no longer necessary to counteract [i] dumping which was [ii] causing [iii] injury."<sup>45</sup> The United States refused to allow the adoption of this decision; however, the panel's interpretation is unassailable.

4.90 The panel's conclusion is the clearest statement imaginable of the limits of a Member's authority to impose anti-dumping duties. It demonstrates, in clear, certain terms, that anti-dumping duties are a derogation from the main thrust of the WTO regime--which is to promote free trade--by clearly defining the temporal limits of anti-dumping duties.<sup>46</sup> In other words, when injurious dumping ends, so must the duty.

4.91 Paragraph 2 of Article 11 of the AD Agreement further specifies the application of the general rule set forth at Paragraph 1. It provides:

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<sup>44</sup> See *United States-Anti-Dumping Duties on Imports of Stainless Steel Plate from Sweden* (24 February 1994), ADP/117, para. 231 (see also para. 232) (unadopted).

<sup>45</sup> *Id.* at para. 223.

<sup>46</sup> See *id.* at para. 232.

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

4.92 The first sentence of Paragraph 2 requires authorities to conduct reviews both: (i) “where warranted” “on their own initiative”; or (ii) “upon request” supported by positive information. The second sentence *requires* authorities to provide parties the right to request examination of whether dumping is occurring, whether injury would continue if the duty were removed or varied or both. The third sentence *requires* authorities to terminate *immediately* any duty that is no longer warranted.

4.93 Each of the three sentences that compose Paragraph 2 is a directive commanding certain conduct by administering authorities<sup>47</sup> to effect the general rule set forth in Paragraph 1. Paragraph 1 is the basic or primary provision of Article 11. It states a general rule limiting the maintenance of anti-dumping duties. Paragraph 2 then sets forth specific administrative requirements to achieve the general directive of Paragraph 1. Thus, the provisions of Paragraph 2 must be interpreted as further establishing and specifying the requirements of Paragraph 1 and Paragraph 2 must be interpreted so as to give life to Paragraph 1.<sup>48</sup> Accordingly, in light of Paragraph 1, Paragraph 2 provides a set of procedures to be followed to ensure that a duty is not applied when it is no longer necessary to offset dumping that is causing injury, *e.g.*, where, as in this case, a Respondent is found not to have been dumping.

4.94 Under Paragraph 1 of Article 11, to maintain the anti-dumping duties in this case, the US Government would have had to establish three elements: (i) that a product was still being dumped and (ii) that the dumping was causing (iii) injury to the domestic industry.

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<sup>47</sup> Korea notes that Footnote 22 to Article 11.3 does grant authorities the quite limited discretion in “sunset” reviews to maintain a duty if, based on the most recent retrospective assessment, no margin is found. The footnote is not relevant to this proceeding, because this is not a “sunset” review covered by Article 11.3 and, even if it were, the U.S. authorities found no margins for three consecutive years.

<sup>48</sup> See *United States-Anti-Dumping Duties on Imports of Stainless Steel Plate from Sweden* (24 February 1994), ADP/117, para. 224 (unadopted).

Korea notes that the WTO Appellate Body and GATT panels have found that Paragraph 1 of Article III of the General Agreement is the primary provision of Article III and, thus, guides the interpretation and application of the remaining paragraphs of Article III. For example, the Appellate Body in *Japan-Taxes on Alcoholic Beverages* stated: “Consequently, the Panel is correct in seeing a distinction between Article III:1, which ‘contains general principles’, and Article III:2, which ‘provides for specific obligations regarding internal taxes and internal charges’. Article III:1 articulates a general principle that internal measures should not be applied so as to afford protection to domestic production. This general principle informs the rest of Article III.” WT/DS8/AB/R, pp. 17-18 (4 October 1996) (citation omitted). Relevant GATT precedent includes the Report of the Panel in *United States-Measures Affecting Alcoholic and Malt Beverages*, which stated: “The basic purpose of Article III is to ensure, *as emphasized in Article III:1*, ‘that internal taxes and other charges, and laws, regulations and requirements affecting the internal sale, purchase, transportation, distribution or use of products . . . should not be applied to imported or domestic products so as to afford protection to domestic production’.” BISD 39S/206, 276, para. 5.25 (19 June 1992) (emphasis added). Because Article III:1 states the purpose of Article III, all other provisions of Article III must be interpreted according to Article III:1. The Panel in *United States-Measures Affecting Alcoholic and Malt Beverages* “considered that the . . . purpose of Article III has to be taken into account in interpreting the term ‘like products’” in terms of Article III:2. *Id.* The Panel in *United States-Section 337 of the Tariff Act of 1930* rejected an interpretation of Article III:4 that would “defeat the purpose of Article III, which is to ensure that internal measures ‘not be applied to imported or domestic products so as to afford protection to domestic production’ (Article III:1).” BISD 36S/345, 385, para. 5.10 (7 November 1989).

4.95 However, the United States, itself, determined for over three consecutive years that the product was not being dumped.<sup>49</sup> No dumping existed; and no dumping means no injury due to dumping and obviously, no causal relationship between the two non-existent conditions.

4.96 Nonetheless, the DOC followed its regulations in this case and maintained the anti-dumping duties after it found for three consecutive reviews that no dumping was occurring. Therefore, as applied in this case, the DOC's regulations and practices violated the obligations of the United States under Article VI of the General Agreement and Article 11.1 of the AD Agreement.

4.97 The United States also violated Paragraph 2 of Article 11. Paragraph 2 provides that an administering authority must conduct a review upon request by an interested party after a reasonable time elapses and must revoke the duty "immediately" if continued imposition of the duty is not necessary to offset dumping that is causing injury. For three consecutive years, the DOC found that Hyundai and LG Semicon were not dumping. No dumping having been found, the continued imposition of the duty was not "necessary to offset dumping." But, nonetheless, the DOC, following its regulations, failed to terminate the duties immediately. Thus, on their face and as applied, the DOC's regulations and practices violate Article 11.2 of the AD Agreement and Article VI of the General Agreement.

4.98 Paragraph 2 of Article 11 requires Members to find that "the continued imposition of the [anti-dumping] duty is necessary to offset dumping." However, the DOC maintained the duty without making this finding.

4.99 The DOC's regulations depart from the requirements of Article 11. Under its regulations the DOC may revoke only if a Respondent meets three requirements, one of which is the "no likelihood/not likely" requirement. In the Third Annual Review, the DOC found that Respondents had not met the "no likelihood/not likely" requirement, but this finding cannot serve as the basis for refusing to revoke under Article 11. The DOC failed to find that "the continued imposition of the duty is necessary to offset dumping," as Article 11 requires. Thus, the DOC violated the second sentence of Article 11 (and the third sentence, which requires termination where the Member does not find that continuation is necessary and, thus, finds that the duty is "no longer warranted").<sup>50</sup>

(b) Response by the United States

4.100 The following are the **United States'** arguments in response to Korea's claim:

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<sup>49</sup> See the three Final Results--61 Fed. Reg. 20216 (6 May 1996) (Ex. ROK-18) (amended by 61 Fed. Reg. 51410 (2 October 1996) and 62 Fed. Reg. 2654 (17 January 1997) (Ex. ROK-51)); 62 Fed. Reg. 965 (7 January 1997) (Ex. ROK-20) (amended by 62 Fed. Reg. 18742 (17 April 1997) (Ex. ROK-52)); 62 Fed. Reg. 39809 (24 July 1997) (Ex. ROK-3).

<sup>50</sup> The Panel notes that Korea does not claim any inconsistencies concerning Section 353.25(a)(2)(i) of the DOC regulations (the three years of no dumping requirement). At the first meeting of the Panel with the Parties the Panel asked: "Does Korea consider that a finding of no-dumping for a three-year period is significant for the purpose of its interpretation of Article 11.2 of the ADP Agreement, or would Korea adopt the same interpretation if no-dumping had been found for only e.g. one or two years?" Korea responded to this question as follows:

In Korea's view, 3.5 years is not a clear dividing line. Rather, 3.5 years of no dumping (no injury and no causation) is far beyond whatever line is established by Paragraphs 1 and 2 of Article 11. Thus, in the Government's view, it is not necessary for either Korea or the Panel to determine precisely where the line is, but merely to know and hold that maintaining a definitive duty after finding no dumping for 3.5 years is beyond the pale.

4.101 Korean producers have a history of dumping DRAMs in the United States.<sup>51</sup> The principal issue in this case is whether the DOC was required to revoke the anti-dumping order maintained by the United States on *DRAMs from Korea* when Respondents stopped dumping for three consecutive years.

4.102 Korea believes this obligation can be found in Article 11 of the AD Agreement and Article VI of GATT 1994. This belief is not grounded in an analysis of these agreements which relies upon customary international rules of treaty interpretation.

4.103 The United States agrees that WTO Members may not assess (or “levy”) anti-dumping duties on imports if they are not dumped. This explains why the United States did not assess anti-dumping duties on merchandise produced by Respondents that entered during the period covered by the third administrative review (or during the period covered by the first two administrative reviews, for that matter). In fact, the so-called “retrospective” assessment system maintained by the United States, under which duties are not collected upon importation but only after a determination of dumping, seeks to guarantee this result. Hence, this is not the issue presented by Korea’s submission. The fundamental point on which the United States and Korea differ is whether Article 11 and Article VI required the DOC to revoke the anti-dumping order on *DRAMs from Korea* as soon as Respondents went three consecutive years without dumping. The United States believes that Korea has failed to meet its burden of producing evidence of a violation because there is no evidence. Nothing in Article VI or the AD Agreement supports Korea’s argument. Indeed, a proper analysis of Article 11 leads to exactly the opposite conclusion.

4.104 Dumping is a pernicious trade practice which is to be “condemned” if it causes or threatens material injury to an industry in the importing country.<sup>52</sup> In 1955, a Working Party report adopted by the CONTRACTING PARTIES to GATT 1947 instructed signatories to “refrain from encouraging dumping ... by [their] private commercial enterprises.”<sup>53</sup>

4.105 The purpose of Article VI and the AD Agreement is to ensure that relief is made available to producers adversely affected by dumping. Under these provisions, a broad framework of rights and obligations has been created which regulates the determination of dumping and the application of remedial anti-dumping duties. Within this framework, WTO Members are free to adopt national standards governing the determination of dumping and the application of anti-dumping duties, as long as such measures rest upon a “permissible” interpretation of the AD Agreement.<sup>54</sup>

4.106 Anti-dumping duties are not meant to be permanent measures. The 1959 Report of the Group of Experts on Anti-dumping and Countervailing Duties provided: “[i]t was generally agreed that anti-dumping duties should remain in place only so long as they were genuinely necessary to counteract dumping which was causing or threatening material injury to a domestic industry.”<sup>55</sup>

4.107 In the 1979 AD Agreement, Article 9 contained two paragraphs which described the obligation of signatories regarding the duration of anti-dumping duties. The first paragraph established the fundamental proposition that “anti-dumping duties shall remain in force only as long as, and to the extent necessary to counteract dumping which is causing injury.”<sup>56</sup> The second paragraph provided a procedural mechanism by which signatories were to ensure the temporary and

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<sup>51</sup> See Final Determination of Sales at Less Than Fair Value: Dynamic Random Access Memory Semiconductors of One Megabit and Above From the Republic of Korea, 58 Fed. Reg. 15467(1993) (“DRAM LTFV”) (Ex. USA-4).

<sup>52</sup> GATT 1994, Article VI:1.

<sup>53</sup> GATT, adopted on 3 March 1955, 3d Supp. BISD 223, para. 4.

<sup>54</sup> AD Agreement, art. 17.6(ii).

<sup>55</sup> Adopted 13 May 1959, BISD 8S/151-152, para. 23.

<sup>56</sup> 1979 AD Agreement, art. 9:1.

remedial character of anti-dumping duties as expressed in Article 9:1. Specifically, Article 9:2 provided:

The investigating authorities shall review the need for the continued imposition of the duty, where warranted, on their own initiative or if any interested party so requests and submits positive information substantiating the need for review.<sup>57</sup>

4.108 The only case ever to turn on an interpretation of Article 9 was *Plate from Sweden* which involved a challenge by Sweden to a 1987 decision by the ITC not to review (pursuant to section 751(b) of the Act) a determination of material injury made in 1973.<sup>58</sup> In that case, the panel determined that Article 9:1, by itself, did not constitute an independent legal ground pursuant to which a signatory was obliged to review the continued need for anti-dumping duties.<sup>59</sup> This followed, the panel reasoned, from:

The silence of Article 9:1 regarding the means by which a Party was to determine when an anti-dumping duty was no longer necessary within the meaning of that provision, together with the mandatory review procedure specifically provided for in Article 9:2, the purpose of which could only be understood in light of the requirement embodied in Article 9:1, contradicted the view that Article 9:1 by itself obliged Parties to take specific procedural steps to satisfy themselves as to the continued need for the imposition of an anti-dumping duty distinct from those required under Article 9:2.<sup>60</sup>

4.109 In the Uruguay Round of multilateral trade negotiations, the basic outline of Article 9 was preserved. Renumbered as Article 11 of the AD Agreement, the first paragraph of the new article is identical to Article 9:1 of the 1979 AD Agreement. Paragraph one continues to state a “general rule” regarding the duration of anti-dumping duties.

4.110 Paragraph 2 (in new Article 11) has been expanded. It still provides the “specific obligation” to examine whether the continued imposition of anti-dumping duties is “necessary” within the meaning of Article 11.1. However, now, paragraph 2 sets forth in greater detail the administrative procedures needed to fulfill this objective. In addition, the paragraph concludes with a new sentence which states that “[i]f, as a result of the review under this paragraph, the authorities determine that the anti-dumping duty is no longer warranted, it shall be terminated immediately.”<sup>61</sup>

4.111 Perhaps the biggest change occasioned by the Uruguay Round in this area is the addition of a third paragraph to Article 11. This is the so-called “sunset” provision which requires WTO Members to revoke all anti-dumping measures after five years unless “the authorities determine, in a review initiated before that date on their own initiative or upon a duly substantiated request made by or on behalf of the domestic industry within a reasonable period of time prior to that date, that the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury.”<sup>62</sup>

4.112 Korea never explains how the language of Article 11, or for that matter any other aspect of the AD Agreement, supports its argument. Instead, it simply repeats that if there is no dumping there can be no injury, and if there is no injury, there can be no duty. This can not substitute for a reasoned analysis of Article 11 which is based upon the customary international rules of treaty interpretation prescribed by Article 17.6(ii) of the AD Agreement.

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<sup>57</sup> *Id.* art. 9.2.

<sup>58</sup> *United States - Anti-Dumping Duties on Imports of Stainless Steel Plate from Sweden*, ADP/117, Report of the Panel issued 24 February 1994 (unadopted), (“*Plate from Sweden*”).

<sup>59</sup> *Id.* para. 228.

<sup>60</sup> *Id.* para. 226.

<sup>61</sup> *Id.* (emphasis added by the United States).

<sup>62</sup> AD Agreement, art. 11.3.

4.113 In the *Reformulated Gasoline* case, the Appellate Body concluded that the fundamental rule of treaty interpretation set out in Article 31(1) of the *Vienna Convention* has “attained the status of a rule of customary or general international law.”<sup>63</sup> In the *Japan Taxes* case, the Appellate Body said the same thing about the supplementary means of treaty interpretation set forth in Article 32 of the *Vienna Convention*.<sup>64</sup>

4.114 Article 31 of the *Vienna Convention* provides that the words of a treaty must form the starting point for the process of interpretation. In this regard, words must be interpreted according to their “ordinary meaning” taking into account their “context” (*i.e.*, other provisions of the treaty) and the “object and purpose” of the agreement.<sup>65</sup> While recourse to a treaty’s object and purpose is permissible, it may not override the clear meaning of the text. As the Appellate Body in the *Japan Taxes* case recognized, a “treaty’s ‘object and purpose’ is to be referred to in determining the meaning of the ‘terms of the treaty’ and not as an independent basis for interpretation.”<sup>66</sup>

4.115 When the text of a treaty either leaves the meaning ambiguous or obscure, or leads to a manifestly absurd or unreasonable result, Article 32 of the *Vienna Convention* authorizes recourse to further means of interpretation, including a treaty’s negotiating history. “Moreover, such recourse may be had to verify or confirm a meaning that emerges as a result of the textual approach.”<sup>67</sup>

4.116 As previously noted, nothing in the text of Articles 11.1 or 11.2 mandates revocation of an anti-dumping order as soon as a Respondent stops dumping. First, as the panel in *Plate from Sweden* found, the obligation to review the continued need for an anti-dumping order finds expression in the language of Article 11.2, not Article 11.1.<sup>68</sup> Secondly, footnote 22 to Article 11.3 expressly states that an anti-dumping duty order may be maintained beyond the initial five-year period even when a Respondent has not dumped during the “most recent assessment proceeding.”<sup>69</sup> Thirdly, this interpretation of Article 11 is supported by the express requirement in Article 11.2, which did not appear in Article 9 of the 1979 AD Agreement, that interested parties wait “a reasonable period of time” before requesting a revocation review.<sup>70</sup> This change in language suggests that national investigating authorities may require, before initiating a revocation review, a “reasonable period of time” to elapse during which no dumping is taking place. Finally, this construction of Articles 11.1 and 11.2 comports with the object and purpose of the AD Agreement, which is to provide a framework within which Members may address injurious dumping through remedial duties.

4.117 Korea also cannot interpret the language of Article 11 to amount to a requirement that anti-dumping orders must be revoked whenever a Respondent goes three years without dumping. While the first two paragraphs do discuss the “need” for an order and whether an order is “necessary” or

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<sup>63</sup> *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, Report of the Appellate Body adopted 20 May 1996, at 17.

<sup>64</sup> *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, Report of the Appellate Body adopted 1 November 1996, at 10.

<sup>65</sup> See, e.g., *Competence of the General Assembly for the Admission of a State to the United Nations (Second Admissions Case)*, [1950], ICJ Rep., at 8 (“The Court considers it necessary to say that the first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty, is to endeavour to give effect to them in their natural and ordinary meaning in the context in which they are occur.”)

<sup>66</sup> WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, at 12 n. 20.

<sup>67</sup> I. Brownlie, *Principles of Public International Law*, 4th ed. (Clarendon Press, 1990), p. 630 (“*Brownlie*”).

<sup>68</sup> *Plate from Sweden*, ADP/117, para. 224-26. (arguing that “The United States Violated Paragraph 1 of Article 11”).

<sup>69</sup> *Id.*, art. 11.3 n. 22. Moreover, if zero dumping margins do not require revocation under Article 11.3’s sunset provisions (which require revocation unless national authorities find a likelihood of dumping and injury), then zero dumping margins should not require revocation under Article 11.2 (where there is no such requirement).

<sup>70</sup> AD Agreement, art. 11.2.

“warranted,” these words are never defined, and dictionary definitions are not instructive.<sup>71</sup> Article 11 simply does not provide that investigating authorities must revoke an order solely because there have been three years of no dumping. Inserting such a requirement into the text would be an impermissible interpretation of Article 11. Moreover, consulting the AD Agreement’s negotiating history confirms this result. This history reveals that Korea and several other Members, including Japan and India, strongly supported a “sunset provision” in the AD Agreement which would have required the automatic revocation (or “termination”) of all anti-dumping measures within as little as three years.<sup>72</sup> These types of proposals were rejected in favor of the sunset provision now found in Article 11.3, which requires the sunset process to commence after five years, not three. Indeed, if, as argued by Korea, revocation were required as soon as an exporter ceased dumping, Article 11.3 would be superfluous insofar as a consideration of dumping (as opposed to injury) is concerned.

4.118 In short, Korea’s interpretation of Article 11 is strained and without support. Rather than prescribe the specific circumstances that must lead to revocation, the drafters of Article 11 chose instead to impose upon Members an obligation to “review,” under certain circumstances, the “need for the continued imposition” of the anti-dumping order. Once that review is completed, and only if the investigating authority “determine[s] that the anti-dumping duty is no longer warranted” based upon one or more of the reviews described in Article 11.2, must a Member revoke the anti-dumping order.<sup>73</sup>

4.119 In the instant case, Respondents asked the DOC to revoke the anti-dumping order on *DRAMs from Korea* pursuant to section 353.25 of the agency’s regulations. Under this regulation, the DOC does not examine “whether the injury would be likely to continue or recur if the duty were removed or varied.”<sup>74</sup> Pursuant to section 353.25, the DOC examines whether the “continued imposition of the [anti-dumping] duty [order] is necessary to offset dumping.” The DOC does this by examining all of the evidence before it, especially: (i) whether the Respondent has sold the subject merchandise in the United States at not less than normal value for at least three consecutive years; (ii) whether a resumption of less-than-normal-value sales is not likely; and (iii) whether the Respondent has agreed not to resume sales at less than normal value.<sup>75</sup>

4.120 Once the Respondents in *DRAMs from Korea* provided “positive information” (in the form of three years without dumping) substantiating the need for a determination under section 353.25, the United States undertook a factual examination of whether “the continued imposition of the [anti-dumping] duty [order] is necessary to offset dumping.” By any measure, the United States satisfied this obligation. The DOC engaged in a painstaking analysis of voluminous data on the administrative record and only then did it determine that the order on *DRAMs from Korea* was necessary to offset dumping.<sup>76</sup>

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<sup>71</sup> For example, “warranted” is defined in the dictionary as “to justify or call for.” Webster’s II New Riverside University Dictionary, 1302 (1984).

<sup>72</sup> See, e.g., MTN.GNG/NG8/3, circulated 20 May 1987, at 5; MTN.GNG/NG8/W/10, circulated 30 September 1987, at 10; MTN.GNG/NG8/W/30, circulated 20 June 1988, at 13 (Ex. USA-77).

<sup>73</sup> AD Agreement, art. 11.2. Of course, to withstand scrutiny by a WTO panel, the national investigating authority must render a determination that satisfies the standard of review prescribed by Article 17.6 of the AD Agreement.

<sup>74</sup> Under US law, this task is performed by the ITC.

<sup>75</sup> 19 C.F.R. § 353.25(a) (1997) (Ex. USA-24).

<sup>76</sup> At one point in its submission, Korea suggests that the DOC’s determination was contrary to Article 11.2 because instead of finding that the continued imposition of the order is “necessary to offset dumping,” the DOC found an absence of future dumping “not likely.” For the following reasons, this assertion is groundless. First, toward the end of its notice, the DOC expressly found “that there is a need for the order to remain in place.” *Final Results Third Review*, 62 Fed. Reg. at 39819 (Ex. USA-1). Second, the AD Agreement establishes a broad framework which regulates the determination of dumping and the application of remedial anti-dumping duties. Within this framework, WTO Members are free to adopt national standards governing the determination of dumping and the application of anti-dumping duties. No panel has ever held that national anti-

4.121 The **United States**, in response to a question from the Panel,<sup>77</sup> subsequently further argued as follows:

4.122 Section 353.25 of the DOC's regulations sets forth three independent criteria that the agency applies with equal force in every case under the regulation.

4.123 While the DOC always applies the same criteria in every revocation case under section 353.25(a), the agency must conduct a case-by-case analysis of the evidence in the administrative record to determine if the three criteria have been satisfied. As the United States explained in its first written submission and during the first meeting of the Panel, the DOC has a long history of considering the satisfaction of the first and third criteria to be relevant to whether the second criterion (*i.e.*, the "not likely" criterion) has been satisfied. Indeed, as the DOC explained in the *Final Results Third Review*:

In evaluating the "not likely" issue in numerous cases, Commerce has considered three years of no dumping margins, plus a Respondent's certification that it will not dump in the future, plus its agreeing to immediate reinstatement in the order all to be indicative of expected future behavior. In such instances, this was the only information contained in the record regarding the likelihood issue. . .

In other cases, when additional evidence is on the record concerning the likelihood of future dumping, Commerce is, of course, obligated to consider that evidence. In this regard, in evaluating such record evidence to determine whether future dumping is not likely, the DOC has a longstanding practice of examining all relevant economic factors and other information on the record in a particular case.<sup>78</sup>

4.124 Second, all three criteria relate to the concept of necessity because they all bear on whether a Respondent, for which no dumping margins have been found for a three-year period, is likely to resume dumping if the order is revoked. In this regard, it cannot be denied that the imposition of an anti-dumping order is intended to alter the behavior of companies exporting merchandise subject to the order. If the remedy works as intended, the imposition of an anti-dumping order should make dumping less likely to occur than in the absence of the order. However, once the disciplines of an anti-dumping order are terminated (*i.e.*, revoked), a Respondent may resume dumping. Under section 353.25, the DOC seeks to determine, based upon evidence, whether the dumping which had occurred in the past, and which led to the imposition of the order, is likely to recur if the order is revoked. The DOC does this by looking at the Respondent's past and expected behavior. The Respondent's past behavior is relevant to the first and second criteria under section 353.25(a). Its expected behavior is relevant to the second and third criteria. If a resumption of dumping is likely should the order be terminated, then a plain reading of the terms of Article 11 indicate that the "continued imposition of the duty is necessary to offset dumping."

(c) Rebuttal arguments made by Korea

4.125 **Korea** makes the following arguments in rebuttal to the United States responses:

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dumping standards must mirror verbatim the language of Article VI or the AD Agreement (or the predecessors to the AD Agreement).

<sup>77</sup> The Panel recalls that the question was as follows: "Article 11.2 of the ADP Agreement refers to an examination by the investigating authorities as to "whether the continued imposition of the duty is necessary to offset dumping". The United States suggests that the DOC conducts this examination by applying the three criteria contained in section 353.25(a)(2) of the DOC regulations ((i) three years without dumping; (ii) dumping "not likely" in the future; and (iii) acceptance of immediate reinstatement ). Could the United States clarify how it sees each of these criteria relate to the concept of necessity under this Article?"

<sup>78</sup> *Final Results Third Review*, 62 Fed. Reg. at 39810 (citations omitted) (Ex. USA-1).



4.126 In an attempt to interpret the nature of the obligations imposed by Article 11, the United States asserts:

While the first two paragraphs [of Article 11] do discuss the “need” for an order and whether an order is “necessary” or “warranted,” these words are never defined and dictionary definitions are not instructive.<sup>79</sup>

This amounts to avoidance of interpretation. As they appear in Paragraphs 1 and 2, “need,” “necessary” and “warranted” are not terms requiring dictionary interpretation in the first place.

4.127 Paragraph 1 of Article 11 imposes a clear, substantive obligation upon all Members that use anti-dumping duties:

An anti-dumping duty shall remain in force only as long as and to the extent necessary to counteract dumping which is causing injury. (Emphasis added by Korea.)<sup>80</sup>

4.128 Moreover, Paragraph 1, on its face, clearly states that a Member shall not maintain a duty where a Respondent is dumping, but is causing no injury. The Panel, then, should reject the United States’ argument that Article 11 allows a Member to maintain a duty on a Respondent which the Member itself has found, for three-and-one-half consecutive years, is not dumping.

4.129 The fact that Paragraph 1 does not prescribe specific circumstances requiring revocation (or detail factors to be considered) is inapposite. It establishes a rule of general application--like the vast majority of legal requirements--which Members must follow. Paragraph 2 then establishes procedural guidelines for implementing the Paragraph 1 rule.

4.130 The United States suggests that the fact that the rule is general means it has no force. This is incorrect. Indeed, the fact that it is general means that it has greater force. Thus, the US assertion that the rule, being “broad-based,” gives “wide latitude” to Members is incorrect. The negotiators wisely left the rule in its general form, knowing they could not specify each and every example in which a Member would be required to revoke. They presumably also knew that, if they tried to do so, they would create a “blueprint for avoidance” that would allow the most recalcitrant authorities to maintain duties in ways not specifically prohibited, but nonetheless contrary to the general principles of the AD Agreement. Paragraph 1 is a crystal clear statement of the limits of a Member's ability to impose antidumping duties.

4.131 Paragraph 2 also is instructive. It provides for a review of “whether the continued imposition of the duty is necessary to offset dumping.” The words “is” and “offset” are the keys to this inquiry. The negotiators chose the present-tense verb “is” and tied it to another present-tense verb, “offset.” They did not select either “will be” for “is” or “prevent” for “offset.” Nor did they permit a forward-looking “likely” analysis. Thus, the forward-looking analysis used by the United States is an impermissible interpretation of this provision.

4.132 Also, “offset” has a specific meaning in the anti-dumping context. It means to impose a duty on the imported product to re-establish competitive equilibrium or to “offset” the competitive

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<sup>79</sup> The United States avoids the clear meaning of the English language again when it states that the terms “not likely” and “no likelihood” have the same meaning as a *matter of English* (as a matter of law, they arguably might, but certainly not as a matter of English); *Wieland-Werke AG v. United States*, Customs Bulletin and Decisions, 32(16), Ct. No. 96-10-02297, Slip Op. 98-23 (22 April 1998), at pages 35-36 (Ex. ROK-85).

<sup>80</sup> The Panel should look to the text of a provision to determine its nature. The text of Paragraph 1 is strongly worded and establishes that the drafters meant to confine anti-dumping duties to certain limited situations.

advantage the Respondent has obtained in the Member's market through low prices. Thus, the word "offset" presumes that dumping is occurring.

4.133 In sum, contrary to the United States' assertions,<sup>81</sup> the text of Paragraphs 1 and 2 require revocation in this case. The analysis above further establishes that the United States is in violation of its Article 11 obligations.

4.134 Paragraph 3 Article 11, including Footnote 22, confirm Korea's position on paragraphs 1 and 2. The relevant portions of Paragraph 3 of Article 11, including Footnote 22, are:

Notwithstanding the provisions of paragraphs 1 and 2,<sup>[82]</sup> any definitive anti-dumping duty shall be terminated on a date not later than five years from its imposition . . . , unless the authorities determine, in a review initiated before that date . . . , that the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury.<sup>22/</sup>

<sup>22/</sup> When the amount of the anti-dumping duty is assessed on a retrospective basis [as in the US system], a finding in the most recent assessment proceeding . . . that no duty is to be levied shall not by itself require the authorities to terminate the definitive duty.

4.135 A number of aspects of Paragraph 3 and its relationship to Paragraphs 1 and 2 illuminate the issues Korea has raised in this case. First, there is no basis to the US claim that Korea's interpretation of Paragraphs 1 and 2 renders Paragraph 3 superfluous. To the contrary, the US reading of Paragraphs 1 and 2 would render Paragraph 3 surplusage. Paragraphs 2 and 3, interpreted in light of Paragraph 1, impose two very distinct sets of obligations on Members. Korea has demonstrated that after a Member has found that a Respondent has not dumped for three-and-one-half consecutive years, Paragraphs 1 and 2 require revocation. Paragraph 3, in contrast, requires Members either to revoke a duty or re-establish that dumping is causing injury through sunset (or expiry) reviews within five years of the most recent dumping, injury and causation findings. Importantly, this provision applies even where a Member has found that a Respondent has engaged in significant dumping in every single review period leading up to the sunset (or expiry) review. Thus, Korea's demonstration of the US violations does not even encroach upon Paragraph 3, much less render it superfluous.<sup>83</sup>

4.136 Second, even though Paragraph 3 addresses sunset (or expiry) reviews, an analysis of its provisions may illuminate the meaning and scope of Paragraphs 1 and 2. Paragraph 3 contains language indicating that the negotiators could have, but decided not to, expand a Member's authority to conduct a forward-looking "likely" analysis in conducting dumping reviews under Paragraph 2. Paragraph 3 requires revocation of a duty no later than five years after its imposition, unless the

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<sup>81</sup> Korea also notes that according to the United States, "the DOC has revoked literally hundreds of anti-dumping measures based upon an absence of dumping." Indeed, the United States has not revoked hundreds, or even dozens, of orders based on the absence of dumping where it has conducted a full-blown "no likelihood/not likely" analysis. The United States applies the full analysis where it wishes to block revocation. This exercise of unfettered discretion violates Paragraphs 1 and 2 of Article 11. The Panel notes that this argument by the United States is reflected in Paragraph 4.180.

<sup>82</sup> Korea notes that this introductory clause establishes that Paragraph 3 is an exception to Paragraphs 1 and 2. However, an analysis of Paragraph 3 nonetheless is instructive.

<sup>83</sup> Indeed, the Panel should reject the United States' position, which focuses on Paragraph 3, because that position would reduce Paragraphs 1 and 2 to "inutility." See *United States -- Standards for Reformulated and Conventional Gasoline* (20 May 1996), WT/DS2/AB/R, para 23.

The United States also asserts that the AD Agreement's negotiating history indicates that Korea and several other Members supported a sunset or expiry review position with a three-year threshold, instead of a five-year threshold. Because the texts of Paragraphs 1 and 2 are quite clear, this point is not admissible under Article 32 of the *Vienna Convention*. But, even if it were admissible, it is irrelevant. A three-year sunset or expiry review provision would apply even where dumping was occurring and in the context of a retrospective regime would serve to ensure that a Member was not maintaining a duty absent injury and causation.

Member conducts injury and dumping reviews and determines “that the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury.” In contrast, Paragraph 2 allows a similar inquiry regarding injury only. Paragraph 2 limits dumping reviews to an examination of “whether the continued imposition of the duty is necessary to offset dumping.” The use of present-tense language (e.g., “offset dumping” vs. “prevent dumping”), coupled with the omission of the “likely to continue or recur” provision, indicates that a forward-looking analysis is not permitted in regard to Paragraph 2 dumping reviews. The fact that Paragraph 3 specifies a forward-looking “likely to continue or recur” analysis both for dumping and injury (and that Paragraph 2 provides for a “likely” analysis for injury, but not dumping) demonstrates that the negotiators could have chosen to extend a forward-looking analysis to dumping as well as to injury under Paragraph 2, but decided not to and, instead, expressly limited the analysis. The United States should not be permitted to add a requirement to the plain language of Paragraph 2, especially after the negotiators chose not to.

4.137 Finally, Footnote 22 does not support the US position in any way. Instead, it further confirms Korea’s interpretation of Article 11.

4.138 The United States would have the Panel believe that Footnote 22 operates as a blanket, fully insulating Members with retrospective regimes from having to revoke a definitive duty after finding no dumping. First, the footnote establishes an exception only under Paragraph 3 (which, of course, is an exception to Paragraphs 1 and 2). Second, the exception applies only to those Members with retrospective regimes. Third, the limit is set at one year (“the most recent assessment proceeding”). Finally, Footnote 22 is discretionary in operation.

4.139 Most significantly, though, Footnote 22 has nothing to do with this proceeding. The obvious implication is that the exception of Footnote 22 is limited to one year and that, if in the most recent assessment proceedings, the Member repeatedly has found no dumping, the Member’s conduct no longer falls within the special terms of Footnote 22 and the Member must revoke because “[a]n anti-dumping duty shall remain in force only as long as and to the extent necessary to counteract dumping which is causing injury.” Thus, Footnote 22, which in any case applies only to Paragraph 3, not to Paragraphs 1 and 2, cannot insulate the US conduct at issue here.

4.140 In any event, the Panel should not countenance the US attempt to: (i) export Footnote 22 from Paragraph 3 and import it into Paragraphs 1 and 2; and then (ii) expand it so as to allow the United States to refuse to revoke (or even conduct an injury investigation) where Respondents were found to have small dumping margins in the six-month period of the original investigation (1992), but have been found not to have dumped in every subsequent review, covering some 42 months.

4.141 In *Swedish Stainless Steel Plate*, the panel examined, among other things, Sweden’s claim that the procedures employed by the United States in deciding not to review an injury determination, i.e., a decision not to initiate an injury review, violated Paragraphs 1 and 2 of Article 9 of the 1979 AD Agreement (the predecessors of Paragraphs 1 and 2 of Article 11).<sup>84</sup> As the United States concedes by citing this report, although the panel’s conclusions are not part of the WTO *acquis* (it was not adopted), the panel’s analysis provides useful guidance and its conclusions are well-founded.<sup>85</sup> However, the United States has not accurately presented the findings of the panel with respect to Article 9.1/11.1 and 9.2/11.2.

4.142 According to the United States, “the panel concluded that paragraph 1 did not impose an independent legal obligation upon GATT signatories.” This mischaracterizes the panel’s conclusion. Sweden had argued that the United States had breached procedural obligations under both paragraphs

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<sup>84</sup> In *Swedish Stainless Steel Plate*, unlike here, the DOC never found that the Respondent had stopped dumping.

<sup>85</sup> See *Japan -- Taxes on Alcoholic Beverages* (1 November 1996), WT/DS8, 10 & 11/AB/R, page 15 and *United States -- Import Prohibition of Certain Shrimp and Shrimp Products* (15 May 1998), WT/DS58/R, para. 7.16, note 623, for discussions of the relevance of adopted and unadopted panel reports.

1 and 2.<sup>86</sup> In contrast to the US account, the panel actually found that Paragraph 1 imposes a far-reaching substantive obligation and that Paragraph 2 imposes a procedural obligation:

223. The panel noted that under Article 9:1 “An anti-dumping duty shall remain in force only as long as, and to the extent necessary to counteract dumping which is causing injury.” Accordingly, Article 9:1 obliged Parties to the Agreement not to maintain anti-dumping duties when such duties were no longer necessary to counteract dumping which was causing injury. However, the text of Article 9:1 did not provide an express obligation regarding the steps to be taken by Parties to the Agreement in order to make a determination on whether the continued imposition of an anti-dumping duty was necessary to counteract dumping which was causing injury.

224. In contrast, Article 9:2 provided for a specific obligation to “review” the need for the continued imposition of the duty, on the initiative of investigating authorities, or upon a duly substantiated request by any interested party. In the Panel’s view, the purpose of the review procedure under Article 9:2 could only be understood if Article 9:2 was read in the light of Article 9:1. The references in Article 9:2 to “the need for the continued imposition of the duty” and “the need for review” could only be interpreted in a meaningful manner when read in conjunction with the obligation in Article 9:1. Thus, a review under Article 9:2 of “the need for the continued imposition of the duty” was a review of whether that duty continued to be “necessary to counteract dumping which is causing injury”. Similarly, “positive information substantiating the need for review” in Article 9:2 necessarily meant information relevant to the issue of whether the anti-dumping duty remained “necessary to counteract dumping which is causing injury.”

225. The Panel thus read Article 9:1 as requiring Parties not to maintain anti-dumping duties longer than necessary to counteract dumping which was causing injury, and Article 9:2 as setting forth an obligation of Parties regarding the undertaking of a factual examination of whether the continued imposition of anti-dumping duties was necessary within the meaning of Article 9:1.<sup>87</sup>

4.143 Thus, Paragraph 1 of Article 11 does impose substantive legal obligations. Moreover, contrary to the United States’ assertion, it constitutes an independent legal ground obligating revocation in certain cases, including this one. Finally, paragraph 224 of the Panel Report confirms that Paragraph 1 establishes the legal obligation that guides the application and interpretation of Paragraph 2.

4.144 The United States violated Article 11 of the AD Agreement not only because of the way it applied its revocation scheme in the *DRAMs from Korea* case, but also because the regime on its face is inconsistent with Article 11 of the AD Agreement.

4.145 Article 11.1 permits imposition of anti-dumping duties “only as long as and to the extent necessary to counteract dumping which is causing injury.” Where the duty is no longer warranted under this standard, Article 11.2 requires that “it shall be terminated immediately.”

4.146 Contrary to the dictates of Article 11, which require revocation when duties are not necessary to counteract dumping which is causing injury, the US revocation scheme permits duties to continue indefinitely except where the Secretary of Commerce, on the basis of unfettered discretion rather than objective criteria, decides to revoke. In addition to the lack of objective criteria and the concomitant existence of unfettered discretion, the US revocation regime also mandates proof of no likelihood of

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<sup>86</sup> See *United States -- Anti-Dumping Duties on Imports of Stainless Steel Plate from Sweden* (24 February 1994), APD/117, para. 221 (unadopted).

<sup>87</sup> *Id.* at paras. 223-25 (emphasis added by Korea).

resumption of dumping and forces Respondents, as a condition of revocation, to agree to forgo their rights to an injury determination if the DOC concludes that Respondent has resumed dumping.

4.147 Thus, this case is not analogous to situations in which legislation permits, but does not mandate, action inconsistent with a WTO obligation. This is not like *US Superfund*, in which the law directed imposition of a tax inconsistent with Article III of the General Agreement, but provided for the possibility of regulations setting out requirements under which this penalty tax would not be applied.<sup>88</sup> Nor is it like *Thai Cigarettes*, in which a Thai law authorized the imposition of discriminatory excise taxes, but regulations promulgated under the law taxed imported and domestic cigarettes at the same rate.<sup>89</sup>

4.148 Unlike *US Superfund*, *Thai Cigarettes* and similar disputes, in this case the Secretary of Commerce cannot act in conformity with the obligations of Article 11. Inclusion of the “no likelihood/not likely” criterion and the mandatory cession of the right to an injury review (embedded in a Respondent’s agreement to immediate reinstatement in the anti-dumping duty order), on their face, require action that is inconsistent with the dictates of Article 11.1.

4.149 Thus, the first, not the second, principle set out in the *US Tobacco* decision applies:

[T]he Panel recalled that panels had consistently ruled that legislation which mandated action inconsistent with the General Agreement could be challenged as such, whereas legislation which merely gave the discretion to the executive authority of a contracting party to act inconsistently with the General Agreement could not be challenged as such; only the actual application of such legislation inconsistent with the General Agreement could be subject to challenge.<sup>90</sup>

The US revocation scheme mandates action inconsistent with the WTO AD Agreement and so it can be challenged as such.

4.150 The US revocation scheme also breaches both of Article XVI:4 of the Marrakesh Agreement Establishing the World Trade Organization, which requires each Member to “ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements,” and of Article 18.4 of the AD Agreement, which mandates that “[e]ach Member shall take all necessary steps... to ensure ... the conformity of its laws, regulations and administrative procedures with the provisions of this Agreement . . .”

4.151 Thus, the US revocation scheme, on its face, by allowing the US to maintain duties in situations in which Article 11 requires revocation, violates not only Article 11 itself, but also Article 18.4 of the AD Agreement and Article XVI:4 of the Marrakesh Agreement.<sup>91</sup>

(d) Rebuttal arguments made by the United States

4.152 The **United States** makes the following arguments in rebuttal:

4.153 Article 11.1 does not impose, as Korea seems to suggest, an independent obligation on WTO Members to: (i) revoke anti-dumping orders as soon as dumping stops, and/or (ii) examine dumping

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<sup>88</sup> See *United States -- Taxes on Petroleum and Certain Imported Substances* (17 June 1987), BISD 34S/136, pages 163-64, para. 5.2.9, (“*US – Gasoline*”).

<sup>89</sup> See *Thailand -- Restrictions on Importation and Internal Taxes on Cigarettes* (7 November 1990), BISD 37S/200, page 227, para. 86, (“*Thailand – Cigarettes*”).

<sup>90</sup> See *United States -- Measures Affecting the Importation, Sale and Use of Tobacco* (4 October 1994), DS44/R, para. 118, (“*US – Tobacco*”) (emphasis added by Korea).

<sup>91</sup> The Panel notes that the United States raised a preliminary objection with regards to Korea's claims under Article XVI:4 of the Marrakesh Agreement Establishing the World Trade Organization and Article 18.4 of the AD Agreement. The arguments of the Parties on this matter can be found in Section IV.A.3 of this report.

*and* injury as part of every review under Article 11.2.<sup>92</sup> With respect to the first point, the plain terms of Article 11.1 simply do not direct a Member to take any action to implement the general principle contained in Article 11.1. There certainly is no language in Article 11.1 which requires WTO Members to revoke (*i.e.*, “terminate”) anti-dumping orders as soon as dumping stops.<sup>93</sup> With respect to the second point, Article 11.2 cannot be given its full meaning, as it must, if Korea’s interpretation of Article 11.1 is correct (*i.e.*, if Article 11.1 requires an examination of dumping *and* injury in every review under Article 11). Article 11.2 provides for several different types of reviews. For example, under Article 11.2, investigating authorities are directed to review, in certain instances, whether the “continued imposition of the duty is necessary to offset dumping.” These provisions would be a nullity if Korea’s interpretation of Article 11.1 were correct.<sup>94</sup>

4.154 The better view of Article 11.1, and the one which comports with the ordinary meaning of its terms, is that Article 11.1 states a general rule which informs the rest of Article 11. The specific obligations established in Article 11 are set forth in Articles 11.2 through 11.5.<sup>95</sup> Of these provisions, only Article 11.2 is directly at issue in this case.

4.155 If the terms of Article 11 are given their ordinary meaning in the context within which they occur, it becomes manifestly apparent that Article 11.2 does not *require* revocation after one year (or even three years) of no dumping. First, footnote 22 to Article 11.3, disposes of any suggestion that revocation is mandated whenever a Respondent stops dumping. Second, Article 11.2 simply does not prescribe the specific circumstances that must lead to revocation. It certainly does not contain language which mandates revocation in the event that a Respondent goes three years without dumping. Third, a review of the negotiating history of Article 11 reveals that Korea and several other WTO Members supported a provision in the AD Agreement which would have required the automatic revocation (or “termination”) of all anti-dumping orders after three years. These types of proposals were rejected in favor of the “sunset” provision now found in Article 11.3, which requires the sunset process to commence after five years. Thus, far from contradicting the plain-text interpretation advanced by the United States, the negotiating history of Article 11 confirms the views of the United States.

4.156 Finally, Korea’s interpretation of Article 11.2 is at odds with Article 11.3, footnote 22. Under Article 11.3, once every five years, investigating authorities must review, *inter alia*, whether revocation of the “duty would be likely to lead to continuation or recurrence of dumping ... .” According to footnote 22, however, “a finding in the most recent assessment proceeding under subparagraph 3.1 of Article 9 that no duty is to be levied shall not by itself require the authorities to

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<sup>92</sup> In its first written submission, Korea appeared to concede that Article 11.1 merely states a general rule which is implemented by, *inter alia*, Articles 11.2 and 11.3. However, at various times since then, including in its oral statement before the Panel, Korea seems to suggest that Article 11.1 creates a legal obligation, quite apart from Articles 11.2 and 11.3, which the United States is claimed to have violated.

<sup>93</sup> Indeed, a prior panel recognized that Article 9.1 of the Tokyo Round Anti-Dumping Code (which is virtually identical to Article 11.1 of the AD Agreement) calls for a prospective analysis. *Plate from Sweden*, ADP/117, para. 233.

<sup>94</sup> Korea’s interpretation of Article 11 would violate the principle of interpretation expressed in the maxim: *Ut res magis valeat quam pereat*, often referred to as the rule of “effectiveness.” Under this rule, courts and panels should interpret treaty provisions so as to give full effect to their ordinary meaning. As the Appellate Body has stated: “An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility.” *United States - Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, WT/DS4/AB/R, Report of the Appellate Body adopted 20 May 1996, p. 23.

<sup>95</sup> A similar type of framework was identified by the Appellate Body in the Japan Taxes case which had before it Article III of GATT 1994. In ruling that Japan’s Liquor Tax Law violated provisions of Article III, the Appellate Body stated that Article III:1 articulates the general rule that “internal measures should not be applied so as to afford protection to domestic production.” *Japan - Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, Report of the Appellate Body adopted 1 November 1996, p. 18. This rule, the Appellate Body stated, “informs” the rest of Article III, including Article III:2, which “provides for specific obligations regarding internal taxes and internal charges.” *Id.*

terminate the definitive duty.” Yet, under Korea’s construction of Article 11.2, any time a Respondent ceases dumping, investigating authorities must immediately terminate (*i.e.*, revoke) the duty. Thus, under Korea’s construction, footnote 22 never can come into play, because a finding of no dumping must result in the immediate revocation of an order. In other words, footnote 22 is superfluous.<sup>96</sup>

4.157 In sum, Korea is asking the Panel to go far beyond an interpretation of the AD Agreement and to prescribe the circumstances under which an anti-dumping order must be revoked. As discussed, Korea’s “interpretation” of Article 11 is contrary to the “customary rules of interpretation of public international law” prescribed by Article 17.6(ii) of the AD Agreement and Article 3.2 of the DSU. Furthermore, if Korea’s position were embraced by the Panel and adopted by the Dispute Settlement Body (“DSB”), it would create, contrary to Articles 3.2 and 19.2 of the DSU, a right or obligation where none currently exists.

4.158 In response to a question by the Panel,<sup>97</sup> the **United States** further argued:

4.159 In *U.S. - Tobacco* and the *Superfund* case, the panels recognized that legislation mandatorily requiring authorities to impose GATT-inconsistent measures, whether or not such legislation has been applied, may constitute a violation of the General Agreement. However, in both of those cases, there existed legislation or regulations providing the authorities with the possibility of avoiding the need to apply the GATT-inconsistent legislation. As a result, the panels concluded that the mere existence of the mandatory, GATT-inconsistent legislation did not, by itself, constitute a violation of the General Agreement.<sup>98</sup>

4.160 Thus, where legislation which, “on its face” (or as a matter of law), mandates action inconsistent with Article 11.2, but additional legislative or regulatory provisions permit action consistent with Article 11.2, a Member may not challenge the mandatory piece of legislation until it (or some other enactment) is applied in a manner that violates Article 11.2.

4.161 In the instant case, section 353.25(a) does not mandate action inconsistent with Article 11.2. and even if it does, other legislative avenues for revocation exist. First, on its face and as applied, section 353.25(a) rests upon a permissible interpretation of Article 11.2. Second, section 353.25(a) is not “mandatory” in the sense that it requires WTO inconsistent action. Indeed, Korea has often said in this proceeding that the regulation allegedly confers upon the Secretary of Commerce “unfettered discretion.” As the United States explained at the second meeting of the Panel, the Secretary cannot have the “unfettered discretion” to revoke an anti-dumping order and, at the same time, be required to apply the regulation in a mandatory fashion. The two arguments are mutually exclusive. Finally, even assuming *arguendo* that section 353.25(a) mandates action inconsistent with Article 11.2,

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<sup>96</sup> Hence, Korea’s interpretation of Article 11.2 would, once again, violate the rule of “effectiveness.” In this regard, in the recently issued report in the *Indonesia Autos* case, the panel rejected an argument by Indonesia that, if accepted, would have reduced Article III:2 of GATT 1994 to inutility. *Indonesia - Certain Measures Affecting the Automobile Industry*, WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R, Report of the Panel issued 2 July 1998, para. 14.40 (unadopted).

<sup>97</sup> The Panel recalls that the question was as follows: “In *US – Tobacco*, the panel recalled ‘that panels had consistently ruled that legislation which mandated action inconsistent with the General Agreement could be challenged as such, whereas legislation which merely gave the discretion to the executive authority ... to act inconsistently with the General Agreement could not be challenged as such...’ In the event that a particular review provision does not allow a Member to terminate a duty in circumstances where such termination is required by Article 11.2, is this in and of itself sufficient for a finding of ‘mandatory’ legislation inconsistent with the ADP Agreement, *i.e.*, if other legislative avenues exist whereby termination of an anti-dumping duty through an Article 11.2-type review could be sought, is this relevant? Why or why not?”

<sup>98</sup> *Thailand - Restrictions on Importation of and Internal Taxes on Cigarettes*, BISD 37S/200 (adopted 7 November 1990) at paras. 84-86; *United States - Taxes on Petroleum and Certain Imported Substances*, BISD 34S/136 (adopted 17 June 1987) at paras. 5.2.9-5.2.10.

respondents are free to pursue revocation through an Article 11.2-type review under section 751(b) of the Act (and sections 353.22(f) and 353.25(d) of the DOC's regulations).

## 2. Secretary of Commerce's Discretion

### (a) Claims raised by Korea

4.162 **Korea** claims that the DOC's regulations, including the "no likelihood/not likely" criterion, give the Secretary of Commerce unreasonably broad discretion in making revocation determinations and allow the Secretary to maintain the duty in an arbitrary and unjustifiable manner in violation of Article 11. The following are Korea's arguments in support of this claim:

4.163 Under US law, the Secretary *may, but is not required to*, revoke an order if a Respondent meets the three requirements above. Thus, a Respondent has the burden of establishing each of these elements, but even if the Respondent meets this burden, the Secretary nonetheless has the discretion to refuse to revoke the order. Also, the statute and regulations contain *absolutely* no standards or factors governing the "not likely" determination.

4.164 The DOC has concurred with this analysis. According to the DOC, this scheme is permitted by the enabling legislation:

*DOC's Position:* The applicable statutes and regulations grant the DOC broad discretion in determining whether to revoke an anti-dumping finding. The only relevant statutory provision states: "The administering authority may revoke, in whole or in part, a countervailing duty order or an anti-dumping duty order \* \* \* after a review under this section." 19 U.S.C. section 1675(c) (emphasis supplied). Therefore, *except for the requirement for conducting an administrative review, Congress has not specified any procedure that the DOC must follow or any criteria that it must consider in determining whether to revoke a particular anti-dumping duty order. The applicable Commerce regulation, contained in 19 CFR 353.25, preserves the broad discretion granted by Congress, by providing in pertinent part: "[T]he Secretary may revoke an order or terminate a suspended investigation if the Secretary concludes that \* \* \** In short, the regulation like the governing statute, vests a great deal of discretion in the Secretary to determine the propriety of revocation.<sup>99</sup>

4.165 That the Secretary's discretion not to revoke is utter and complete under US law has been confirmed by the US courts. According to the US Court of International Trade:

- "The language of the regulations indicates that the Secretary is not compelled to grant revocation even when plaintiffs satisfy the requirements for revocation";<sup>100</sup>
- "The regulation does not present objective criterion for determining whether there is "no likelihood" of resumption of LTFV sales. Instead, the petitioner [the Respondent before the DOC] must establish this fact to the satisfaction of the Secretary";<sup>101</sup>

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<sup>99</sup> *Frozen Concentrated Orange Juice from Brazil*, 56 Fed. Reg. 52510, 52513 (Response of the DOC to Comment 3) (21 October 1991) (emphases added by Korea) (Ex. ROK-4).

<sup>100</sup> *Toshiba*, 15 C.I.T. at 599 (citation omitted) (denying plaintiff/Respondent's challenge to the DOC's determination not to revoke) (Ex. ROK-5).

<sup>101</sup> *Id.* at 600.



- “[The regulation] vests a great deal of discretion in the Secretary to determine the propriety of revocation . . .”

“[T]he language employed indicates that Commerce is not compelled to grant revocation, as the above noted sections refer to what the Secretary *may* do when acting on an application for revocation . . .”

“[E]ven if the administrative reviews reveal that plaintiffs have not been dumping for the periods in question, Commerce may exercise its discretion not to grant revocation”;<sup>102</sup> and

- “[E]ven assuming the plaintiffs had, as they claim, satisfied all of the requirements for revocation contained in [the regulation], the ITA was not required to grant their request.”<sup>103</sup>

4.166 These excerpts confirm that the Secretary’s discretion not to revoke an order is unfettered.

4.167 Finally, the US anti-dumping law and all of the Secretary’s determinations that follow it are completely insulated from domestic claims that the US law (or the Secretary’s determination) violates a US obligation under any of the WTO agreements, including the AD Agreement. Section 102(a)(1) of the Uruguay Round Agreements Act (the legislation implementing the WTO Agreements) provides:

(1) UNITED STATES LAW TO PREVAIL IN CONFLICT.—No provisions of any of the Uruguay Round Agreements, nor the application of any such provision to any person or circumstance, that is inconsistent with any law of the United States shall have effect.

4.168 Thus, even where the Secretary follows a US law that a reviewing court later finds is inconsistent with a US obligation under a WTO agreement, the court is required by US law to find that the WTO Agreement provision has no effect.

4.169 The United States’ revocation scheme completely ignores the requirements of Article 11 of the AD Agreement. It fails to recognize that in certain situations, such as that presented here, the AD Agreement *requires* the Secretary to revoke an order. This is the purpose—the very essence, if you will—of Article 11. Moreover, as applied in the Third Annual Review of *DRAMs from Korea*, the US scheme violated Article 11.

4.170 In contrast, the US regime *never requires* the Secretary to revoke an order. No matter what the circumstances are, the Secretary always has the discretion to refuse to revoke an order. A step-by-step review of the US revocation scheme shows the absolute discretion bestowed on the Secretary.

4.171 First, the US regulations impose three requirements on a Respondent before revocation will even be considered. In brief they are:

1. three consecutive years of no or *de minimis* margins<sup>104</sup>;

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<sup>102</sup> *Matsushita*, 688 F. Supp. at 623 (citations omitted) (denying plaintiff/Respondent’s challenge to the DOC’s determination not to revoke), *aff’d*, 861 F.2d 257 (Fed. Cir. 1988) (Ex. ROK-6).

<sup>103</sup> *Manufacturas Industriales*, 666 F. Supp. at 1565 (denying plaintiff/Respondent’s challenge to the DOC’s determination not to revoke) (Ex. ROK-7).

<sup>104</sup> The United States limits application of the two percent *de minimis* threshold required by Article 5.8 of the AD Agreement to the investigation stage of proceedings. For administrative reviews, the United States maintains its pre-WTO *de minimis* threshold of 0.5 percent. *See* 19 C.F.R. § 351.106(c) of the DOC’s anti-dumping regulations; 62 Fed. Reg. 27296, 27382-83 (19 May 1997) (Ex. ROK-49).

2. a showing that dumping is “not likely” to recur (or, that there is “no likelihood” that dumping will recur);
3. a written agreement that the duty/order will be reinstated if dumping does recur.<sup>105</sup>

The key requirement here is the second--the “no likelihood/not likely” requirement--because the DOC found that Respondents met the first and third requirements, but not the second requirement.

4.172 Under US law, the Respondent bears the burden of establishing that future dumping is “not likely,”<sup>106</sup> and this shifting of the burden of proof is, by itself, a violation of Article 11. However, it is exacerbated by the fact that the “no likelihood/not likely” requirement has no “objective criterion” according to the US court that reviews challenged anti-dumping determinations of the DOC:

The regulation does not present an objective criterion for determining whether there is “no likelihood” of resumption of LTFV sales. Instead, the petitioner [the Respondent company seeking revocation] must establish this fact to the satisfaction of the Secretary.<sup>107</sup>

Thus, the Secretary makes the determination as to whether the Respondent has met the second requirement and, conducts the analysis without consistent reference to transparent and established standards.<sup>108</sup>

4.173 Second, even in those cases where the Secretary finds that a Respondent has satisfied all three requirements, the Secretary still has the discretion to not revoke the order. This is because the regulation states only that “[t]he Secretary *may* revoke” an order where he finds that the three criteria have been met to his satisfaction.<sup>109</sup>

4.174 Finally, the Secretary’s exercise of discretion is virtually unrestrained. This is due primarily to US federal court holdings that the decisions of the Secretary are subject to “tremendous deference”<sup>110</sup> by the reviewing courts (the CIT and the CAFC), and also to the use of the word “may” in the statute and the regulation.

4.175 In sum, the “no likelihood/not likely” requirement grants the Secretary unbounded discretion and, even where the Secretary finds that a Respondent has met each of the three requirements, the Secretary can, by executive fiat, refuse to revoke the duties. Because revocation is not a matter of discretion under the WTO, the United States has turned Article 11 on its head. In the United States, revocation is *always* a matter of discretion, without any regard to WTO requirements, and, as exercised in this case, the US discretion violated Article 11 of the AD Agreement.

(b) Response by the United States

4.176 The following are the **United States'** arguments in response to Korea's claim:

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<sup>105</sup> See 19 C.F.R. § 353.25(a)(2) (1996).

<sup>106</sup> See *Sanyo Electric*, 15 C.I.T. 609, 1991 C.I.T. LEXIS 441 (Ex. ROK-50); *Toshiba*, 15 C.I.T. at 600 (Ex. ROK-5); *Manufacturas Industriales*, 666 F. Supp. at 1566 (Ex. ROK-7).

<sup>107</sup> See *Toshiba*, 15 C.I.T. at 600 (Ex. ROK-5).

<sup>108</sup> The Secretary apparently considers many factors, but a review of past practice shows that there is no consistent method or means of analysis.

<sup>109</sup> See also 19 U.S.C. § 1675(d)(1) (“The administering authority *may* revoke . . . an anti-dumping duty . . .” (emphasis added by Korea)).

<sup>110</sup> See, e.g., *Manufacturas Industriales*, 666 F. Supp. at 1567 (quoting *Smith-Corona v. United States*, 713 F.2d 1568, 1582 (Fed. Cir. 1983)) (Ex. ROK-7).

4.177 The Congress of the United States has given the DOC broad discretion in administering the anti-dumping law, in general, and in the revocation of orders, in particular.<sup>111</sup> Section 751(d) of the Act states, in part:

... The administering authority may revoke, in whole or in part, a countervailing duty order or an anti-dumping duty order ... after [an administrative] review ...<sup>112</sup>

4.178 Therefore, except to impose a requirement that revocation occur after a review under section 751 of the Act, Congress has not specified the procedures that the DOC must follow, or the criteria that it must consider, in determining whether to revoke an outstanding anti-dumping duty order.<sup>113</sup> Instead, like legislatures around the world, Congress delegated to an administrative agency (here, the DOC) the responsibility for working out the details.

4.179 This is not to say, however, that the DOC can do whatever it wants, as Korea suggests. The agency's discretion, vis-à-vis interested parties, is limited by its regulations, administrative practice, and relevant administrative law doctrines.<sup>114</sup> In the exercise of the authority conferred on it by the Congress, the DOC has promulgated section 353.25 of its regulations which sets out the criteria for revocation.<sup>115</sup> This regulation limits the DOC's discretion to an examination of the issues surrounding the established criteria. Furthermore, in applying the regulation, the DOC has developed an administrative practice, from which it may not deviate unless it provides an explanation.<sup>116</sup> For the courts of the United States to uphold a deviation from past practice, the explanation must be consistent with a reasonable interpretation of the law and be supported by substantial evidence on the record of the underlying administrative proceeding.<sup>117</sup> Even then, the DOC's discretion may be further constrained by the legal doctrines of "collateral estoppel"<sup>118</sup> and the "law of the proceeding."<sup>119</sup>

4.180 In fact, over the years, the DOC's administrative practice regarding revocation has been exceedingly consistent. The "no likelihood"/"not likely" standard first appeared in the DOC's

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<sup>111</sup> *Oregon Steel Mills Inc. v. United States*, 862 F.2d 1541, 1544 (Fed. Cir. 1988) (Ex. USA-68); *Toshiba Corp. v. United States*, 15 CIT 597, 599 (1991) (Ex. USA-69).

<sup>112</sup> 19 U.S.C. § 1675(d)(1) (1997) (emphasis added by the United States) (Ex. USA-19).

<sup>113</sup> In fact, the statute provides several means by which an anti-dumping duty order may be revoked. For example, section 751(d) of the Act provides that an order may be revoked following a "changed circumstances" review pursuant to section 751(b) of the Act. 19 U.S.C. § 1675(d)(1) (1997) (Ex. USA-19). The principal issue in this case, however, is whether the United States acted in accordance with its international obligations when it did not revoke, in part, the anti-dumping duty order on *DRAMs from Korea* following an "administrative" review pursuant to section 353.25(a) of the DOC's regulations.

<sup>114</sup> *Manufacturas*, 666 F. Supp. at 1565 (the DOC's discretion is not "unbounded") (Ex. USA-60).

<sup>115</sup> See 19 C.F.R. § 353.25(a) (1997) (Ex. USA-24).

<sup>116</sup> *UAW v. NLRB*, 459 F.2d 1329, 1341 (D.C. Cir. 1972) (Ex. USA-70); see also *Ipsco v. United States*, 687 F. Supp. 614 (Ct. Int'l Trade 1988) (although the DOC needs discretion to formulate and adjust methodologies to new factual situations, it cannot avoid explaining the basis for departing from administrative precedent by pointing to an arbitrary standard not adopted by formal rule-making) (Ex. USA-71).

<sup>117</sup> 19 U.S.C. § 1516a (1998) (Ex. USA-62).

<sup>118</sup> Under United States law, an administrative agency, such as the DOC, may be collaterally estopped from departing from past determinations of fact where a party has detrimentally relied on those determinations and where the party has been given insufficient notice of the change. See, e.g., 4 Davis, *Administrative Law* § 20:12 (1983) (Ex. USA-72).

<sup>119</sup> Under the "law of the proceeding" doctrine, a well-established administrative practice which has gone unchallenged for some time and upon which the parties have reasonably come to rely may acquire the status of a regulation, such that an administrative agency may not change that practice without an explanation that justifies the change. See, e.g., *Shikoku Chemicals v. United States*, 795 F. Supp. 417 (Ct. Int'l Trade 1992) (Ex. USA-73).

regulations in 1980.<sup>120</sup> Since then, the DOC has revoked literally hundreds of anti-dumping measures based upon an absence of dumping.

4.181 Lastly, while Korea is presenting its claim before this Panel that the DOC's discretion is "unfettered," the Respondents are currently prosecuting a lawsuit in the CIT challenging the DOC's failure to revoke in the *Final Results Third Review*.<sup>121</sup> If the DOC's discretion truly was incapable of being checked or regulated by the courts, then Respondents' lawsuit would be pointless.

4.182 Korea claims, quite apart from the *Final Results Third Review*, that the DOC's regulations confer upon the Secretary of Commerce a level of discretion that violates Article 11 of the AD Agreement. According to Korea, the "not likely" standard in section 353.25(a) of the DOC's regulations has no "objective criterion." Therefore, the DOC allegedly conducts its analysis "without consistent reference to transparent and established standards."<sup>122</sup>

4.183 First, the DOC's discretion is not "unbounded." The DOC's discretion is limited by its regulations, administrative practice, and administrative law doctrines.

4.184 Secondly, while the statute uses the term "may revoke," and the term "not likely" is not defined further in the DOC's regulations, no panel has ever demanded that a regulation which implements a GATT or WTO obligation must be drafted in such a way as to define each element of the regulation. Indeed, discretionary legislation which arguably permits, but does not require, an administrative agency to promulgate regulations or take other action that is WTO-inconsistent does not, as such, violate the WTO agreements.<sup>123</sup> A complaining party must show that the agency actually took WTO-inconsistent action.<sup>124</sup>

4.185 Finally, it is hard to understand how the "not likely" standard can be condemned for lacking so-called "objective criteria," when Article 11, itself, lacks such criteria. For example, there is nothing in the AD Agreement that fleshes out the terms "necessary" or "warranted." If these terms lack "objective criteria," is each WTO Member which considers treaties self-executing under its legal and constitutional systems guilty of violating the AD Agreement if it fails to promulgate regulations that further define these terms?

4.186 The **United States**, in response to a question from the Panel,<sup>125</sup> subsequently further argued as follows:

4.187 The discretion granted to the Secretary under section 353.25(a)(2) is subject to legal/judicial control. The DOC's discretion is limited by its regulations, administrative practice, and relevant administrative law doctrines. In addition, in order for a determination by the DOC under section 353.25(a)(2) to be sustained by the US courts, the determination must be consistent with a reasonable interpretation of the law and be supported by substantial evidence on the record of the underlying administrative proceeding.

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<sup>120</sup> *Anti-dumping Duties*, 45 Fed. Reg. 8182 *et seq.* (1980) (section 353.54(a)) (Ex. USA-74).

<sup>121</sup> *Hyundai Electronics Industries Co., Ltd., et al. v. United States*, Consol. Ct. No. 97-08-01409, Ct. Int'l Trade (Before: Judge Richard Goldberg).

<sup>122</sup> Korea also argues that section 751(d) of the Act confers a level of discretion on the Secretary that violates Article 11 when it uses the words "may revoke." *Id.* para. 4.26 n. 85.

<sup>123</sup> See generally GATT, Analytical Index: Guide to GATT Law and Practice, Updated 6<sup>th</sup> Edition (1995), 645-48.

<sup>124</sup> *Id.*

<sup>125</sup> The Panel recalls that the question was as follows: "Article 11.2 of the ADP Agreement states that an anti-dumping duty 'shall be terminated immediately' if the investigating authorities determine that the duty is 'no longer warranted'. In this regard, could the United States explain why section 353.25(a)(2) of the DOC regulations provides that the Secretary of Commerce 'may' revoke if the three criteria set forth therein are met, rather than specifying that the Secretary of Commerce 'shall' revoke if those criteria are met? Is the exercise of the Secretary's discretion under section 353.25(a)(2) subject to legal / judicial control?"

4.188 Indeed, the US courts themselves have best explained the legal/judicial controls on the DOC's discretion. The US Court of International Trade ("CIT") in *Manufacturas Industriales De Nogales, S.A. v. United States*, 666 F. Supp. 1562, 1565 (Ct. Int'l Trade 1987), declared that the DOC's discretion is not "unbounded." In addition, the US Court of Appeals for the Federal Circuit, which reviews decisions of the Court of International Trade, has stated:

The Secretary of Commerce (Secretary) has been entrusted with responsibility for implementing the anti-dumping law. The Secretary has broad discretion in executing the law. While the law does not expressly limit the exercise of that discretion with precise standards or guidelines, some general standards are apparent and these must be followed. The Secretary cannot, under the mantle of discretion, violate these standards or interpret them out of existence.<sup>126</sup>

4.189 As the United States has discussed, the "general standards" to which the court refers include the expectation that the DOC will examine only those issues related to the criteria set forth in its regulation, the requirement to adhere to prior administrative practice, and the necessity that each decision be based upon substantial evidence contained in the administrative record.<sup>127</sup>

4.190 Based upon the manner in which the question has been framed, there is apparent interest by the Panel in whether section 353.25(a)(2) properly reflects the obligations contained in Article 11. The United States maintains that section 353.25(a)(2) actually tracks the obligations contained in Article 11. In this regard, Article 11 requires Members to review whether the continued imposition of a definitive anti-dumping duty is warranted. Similarly, section 353.25(a)(2) requires the DOC, upon proper request, to review whether revocation of an anti-dumping order is appropriate. Moreover, Article 11 requires a Member to terminate the anti-dumping duty if, as a result of a review under Article 11.2, the authorities determine that the anti-dumping duty is no longer warranted. Likewise, section 353.25(a)(2) imposes an obligation on the DOC to revoke the anti-dumping order if the three criteria related to the need for the continued imposition of the order are satisfied.

4.191 The fact that section 353.25(a)(2) contains the term "may," as opposed to the term "shall," is merely a reflection of the discretion accorded to the DOC by the United States Congress. This discretion is embodied in section 751(d) of the Tariff Act, which states that "the administering authority may revoke, in whole or in part, . . . an anti-dumping duty order or finding . . . after review . . ." The DOC, in promulgating section 353.25(a)(2), determined that revocation of an order will occur if the three criteria set forth in that provision are satisfied. Therefore, the use of the term "may" does not connote an ability to deviate from its practice of revoking an anti-dumping order whenever those three criteria are satisfied.

4.192 In its second oral statement before the Panel, the **United States** further argued:

4.193 Korea also asserts that the United States has misled the Panel by claiming that the DOC has revoked literally hundreds of anti-dumping measures based upon an absence of dumping. The United States has not misled the Panel. First of all, the representation made by the United States is absolutely true and Korea does not present evidence to the contrary. What Korea has done is to recast the statement to cover a different universe of cases -- that is, cases where the DOC received and examined evidence directly bearing on the no likelihood/not likely criterion. This universe of cases, Korea asserts, shows that the DOC only applies the not likely criterion when it wants to "block revocation." However, the United States has already shown that the depth of the agency's analysis under section 353.25 depends, almost exclusively, upon the arguments of the parties and the evidence on the record of the administrative proceeding -- not the whim of the DOC. Secondly, a review of the cases over the past 19 years where the DOC has examined the no likelihood/not likely standard reveals that in a

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<sup>126</sup> *Smith-Corona Group v. United States*, 713 F.2d 1568, 1571 (1983), cert. denied, 465 U.S. 1022, 104 S.Ct. 1274, 79 L.Ed. 2d 679 (1984) (emphasis added by the United States)(footnote omitted).

<sup>127</sup> *See id.*

substantial number of cases, the United States revoked the subject order. Now, if the United States only applied the not likely criterion when it wanted to "block revocation," as Korea asserts, wouldn't one expect all, or at least most, of these cases to result in maintenance of the order -- not revocation?

### 3. Speculative Analysis of Future Dumping

#### (a) Claim raised by Korea

4.194 **Korea** claims that by imposing a "no likelihood/not likely" recurrence of dumping criterion which must be met for an order to be revoked, the United States is in violation of Article 11.2 which does not allow a forward looking analysis in the case of dumping. The following are Korea's arguments in support of that claim:

4.195 The "no likelihood/not likely" criterion focuses on whether dumping will recur in the future.<sup>128</sup> Speculation as to whether *dumping* will recur is not permitted by Paragraph 2 of Article 11 of the AD Agreement.

4.196 The relevant sentence of Paragraph 2 is the second:

Interested parties shall have the right to request the authorities to examine whether the continued imposition of the duty is necessary to offset dumping, whether the injury would be likely to continue or recur if the duty were removed or varied, or both.

First, this sentence provides rights to interested parties, thus imposing requirements on Members. Second, it limits Members' discretion as to the type of analysis they can conduct. Although the sentence allows Members to conduct a forward-looking analysis of whether *injury* would be likely to continue or recur,<sup>129</sup> it does not call for or allow a prospective analysis of whether dumping "would be likely to continue or recur." As revealed in the plain language of the sentence, the negotiators did not extend the "likely to" concept to the dumping context and doing so by implication is impermissible. Rather, regarding dumping, the Member is permitted only to examine "whether the continued imposition of the duty is necessary to offset dumping."<sup>130</sup> Where, as here, no dumping has occurred for three consecutive years, the duty is not "necessary to offset dumping" because there is no dumping (much less injury).

4.197 This analysis is confirmed by a review of Paragraph 3 of Article 11, the so-called "sunset provision." Paragraph 3 requires a Member to revoke a duty no later than five years from its imposition. The only exception to this rule is where a Member conducts a review and determines "that the expiry of the duty would be likely to lead to continuation or recurrence of *dumping and injury*" (footnote omitted; emphasis added by Korea). The fact that the negotiators specifically provided for a forward-looking analysis of dumping and applied the word "likely" to cover both dumping and injury in Paragraph 3, but not in Paragraph 2, confirms that such an analysis is not permitted under Paragraph 2 of Article 11.

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<sup>128</sup> See 19 C.F.R. § 353.25(a)(2)(ii) (1996).

<sup>129</sup> Korea notes, in this regard, that the United States has failed to comply with this requirement as well. Under US law, when the ITC examines whether a duty should be revoked for changed circumstances, it is *required* to presume that future sales will be dumped, absent a review of the matter and contrary conclusion by the DOC. See *Matsushita Elec. Indus. Co. v. United States*, 569 F. Supp. 853, 856 (C.I.T. 1983), *rev'd on other grounds*, 750 F.2d 927 (Fed. Cir. 1984) (Ex. ROK-55); *American Permac, Inc. v. United States*, 656 F. Supp. 1228 (C.I.T. 1986), *aff'd*, 831 F.2d 269, *cert. denied*, 485 U.S. 901, 108 S. Ct. 1067 (Ex. ROK-56).

<sup>130</sup> This analysis complies with the directive of the *Vienna Convention*, Article 31.1 ("A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.").

4.198 **Korea**, in response to a question from the Panel<sup>131</sup>, subsequently further argued as follows:

4.199 First, as a matter of textual interpretation, there is no relationship between “necessary” in Article 11.1 and “likely” in Article 11.3, and thus a finding of “likelihood” under Paragraph 3 can neither satisfy nor fail to satisfy the “necessary” requirement in Paragraph 1. Paragraph 3 begins: “Notwithstanding the provisions of paragraphs 1 and 2, . . .” Thus, this Paragraph is an exception from Paragraphs 1 and 2 that is segregable from them and should not be used to interpret those Paragraphs.

4.200 Second, this point is confirmed by an examination of the differing requirements and standards of Paragraphs 2 and 3. Paragraph 3 requires revocation of a duty no later than five years after its imposition, unless the Member conducts injury and dumping reviews and determines “that the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury.” In contrast, Paragraph 2 limits dumping reviews to an examination of “whether the continued imposition of the duty is necessary to offset dumping.” The use of present-tense language, coupled with the omission of the “likely to continue or recur” provision, indicates that a forward-looking analysis is not permitted in regard to Paragraph 2 dumping reviews. The fact that Paragraph 3 specifies a forward-looking “likely to continue or recur” analysis both for dumping and injury, while Paragraph 2 provides for a “likely” analysis only for injury, demonstrates that the negotiators were aware that they could extend a forward-looking analysis to dumping as well as to injury under Paragraph 2, but decided not to do so. For purposes of Article 11.2, then, the question of whether a duty is “necessary to counteract dumping,” as set out in Paragraph 1, is answered by reference to whether “continued imposition of the duty is necessary to offset dumping.”

4.201 The negotiators: (i) chose a “likely” standard for Paragraph 3; (ii) did not change the Paragraph 2 dumping standard; and (iii) included at the start of Paragraph 3 the phrase, “Notwithstanding the provisions of paragraphs 1 and 2.” These facts confirm that the United States violated its Article 11 obligations when it conducted a forward-looking analysis of dumping in this case.

4.202 After finding for three consecutive reviews that no dumping was occurring, the United States should have revoked on that basis alone. Having failed to revoke (in violation of Article 11), the United States should have conducted only the present-tense dumping examination provided for by Paragraph 2; the United States violated Paragraph 2 by conducting a forward-looking analysis. But, even assuming, for the sake of argument, that Paragraph 2 (or, somehow, Paragraph 3) permits the United States to conduct a forward-looking review, the United States violated those provisions: (i) by devolving the likely criterion to “no likelihood/not likely” (which enables the United States to maintain anti-dumping duties years after dumping and any resulting injury have ceased); (ii) by shifting the burden of proof to Respondents; and (iii) by setting the standard so that, in this case at least, it simply could not be met. And the United States took all of these actions and created these insurmountable barriers after finding for three-and-one-half consecutive years that Respondents had not dumped (and, thus, had not caused injury).

(b) Response by the United States

4.203 The following are the **United States** arguments in response to Korea's claim:

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<sup>131</sup> The Panel recalls that the question was as follows: "The Panel notes that Article 11.1 of the ADP Agreement provides that 'an anti-dumping duty shall remain in force only as long as and to the extent necessary to counteract dumping which is causing injury', whereas the penultimate sentence of Article 11.3 provides for the continued application of an anti dumping duty if its expiry 'would be likely to lead to continuation or recurrence of dumping and injury.' What is the relationship between the concept of necessity in Article 11.1 and the concept of likelihood in Article 11.3? How does a finding of 'likelihood' under Article 11.3 satisfy the “necessity” requirement of Article 11.1?"

4.204 Korea focuses on the time period that the DOC examined when it determined that an absence of dumping by Respondents was “not likely” in *Final Results Third Review*. In particular, Korea contends that Article 11.2 of the AD Agreement does not permit investigating authorities (i) to examine whether dumping will recur, and (ii) to conduct a “forward-looking analysis.” These arguments fail.

4.205 The United States demonstrated that Article 11 does not require Members to revoke anti-dumping orders as soon as a Respondent stops dumping. Thus, if an order may cover an exporter or reseller that was found not to be dumping during the most recent assessment period, it is only logical that the inquiry under Article 11.2 may, when appropriate, look at whether “dumping will recur.” There certainly is nothing in Article 11.2 or the context of the AD Agreement which precludes this type of examination.

4.206 There also is nothing in Article 11 which defines the time period that investigating authorities must examine when deciding if an order is “necessary to offset dumping.” In the instant case, the DOC conducted an extensive analysis of the entire record which included Respondents’ past conduct (e.g., three years of no dumping), as well as data regarding the first part of 1997, which Respondents characterized as a market upturn.<sup>132</sup> In describing the temporal scope of its review, the DOC stated, in part:

Common sense, however, dictates that the DOC should, as always, base its determination on all record evidence.

In this revocation proceeding the DOC considered all publicly available data and information placed on the record by all parties ...<sup>133</sup>

4.207 Korea seeks to pick and choose the information in the record that it thinks is most helpful to Respondents. In doing so, however, it never provides any authority for its position nor explains why an investigating authority should not be allowed to rely on the most current information available when making a determination under Article 11.2.

4.208 Finally, Korea’s construction of Articles 11.2 and 11.3 and, in particular, its discussion of the term “likely,” is flawed. Article 11.2 articulates a relatively broad standard regarding the revocation (or “termination”) of anti-dumping duties that implements the “general rule” set forth in Article 11.1. Article 11.3, on the other hand, articulates a very specific standard. It requires WTO Members to revoke all anti-dumping measures after five years unless “the authorities determine ... that the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury.”<sup>134</sup> While it is true that Article 11.3 (but not Article 11.2) uses the term “likely” in the dumping context, this does not mean the specific standard does not (or cannot) fit within the more general standard. It simply means the “likely” standard is mandatory in the context of Article 11.3 and a “permissible” interpretation of the AD Agreement in the context of Article 11.2. Indeed, it is impossible to imagine how section 353.25, when it uses a term found in Article 11.2 and Article 11.3, could be anything *other* than a permissible interpretation of the AD Agreement.

4.209 The **United States**, in response to a question from the Panel<sup>135</sup>, further argued as follows:

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<sup>132</sup> *Final Results Third Review*, 62 Fed. Reg. at 39814 (Ex. USA-1).

<sup>133</sup> *Id.*

<sup>134</sup> AD Agreement, art. 11.3 (emphasis added by the United States).

<sup>135</sup> The Panel recalls that the question was: “Article 11.1 of the ADP Agreement provides that an anti-dumping duty may only remain in force as long as it is necessary to counteract dumping which ‘is’ causing injury. Article VI:1 of GATT 1994 condemns dumping if it ‘causes’ or ‘threatens’ material injury. The verbs quoted from these provisions are expressed in the present tense. Does the United States consider that the use of



4.210 Article VI and Article 11 address different questions. Article VI asks whether an anti-dumping duty needs to be imposed because an industry currently is being injured by dumped imports. Article 11, on the other hand, takes as a given that the imposition of the definitive anti-dumping duty was necessary to offset injurious dumping. It, therefore, asks whether the “continued imposition of the duty is necessary to offset dumping” or whether the injury originally found would be likely to “continue or recur if the duty were removed or varied” (emphasis added by the United States).

4.211 The Appellate Body has affirmed, on more than one occasion, that the principles of treaty interpretation laid down in the *Vienna Convention* should guide panels when they seek to discern the meaning of WTO agreements.<sup>136</sup> Article 31 of the *Vienna Convention* provides that the terms of a treaty must form the starting point for the process of interpretation. In this regard, terms must be interpreted according to their “ordinary meaning” taking into account, *inter alia*, their “context” (*i.e.*, the other provisions of the agreement).

4.212 If this approach is followed with respect to the language in Article 11 of the AD Agreement, it becomes quite clear that the provisions of Article 11 do not condition the maintenance of definitive anti-dumping duties (*i.e.*, anti-dumping orders) upon a finding that present dumping is presently causing (or presently threatening to cause) material injury. Specifically, Article 11.2 states that, in conducting a review, authorities must examine, *inter alia*, “whether the injury would be likely to continue or recur if the duty was removed or varied.” This indicates that “recurrence” of injury is reason to keep an order in effect. In other words, that injury may have ceased does not warrant revocation of an order if the revocation is likely to cause injury to recur. Similarly, Article 11.3 allows maintenance of anti-dumping duties beyond five years when “expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury.” The “recurrence” language indicates that anti-dumping orders can be maintained when dumping and/or injury do not currently exist, but is likely to recur upon revocation of the order. In sum, it would be inconsistent with Articles 11.2 and 11.3 of the AD Agreement to construe Article 11.1 as requiring that an order be kept in effect only if there is present dumping which is presently causing or presently threatening to cause material injury.

4.213 In this regard, the panel in the *Swedish Plate* case found that Article 9.1 of the Tokyo Round Anti-Dumping Code called for a prospective analysis.<sup>137</sup> But for the deletion of a comma, Article 9.1 is identical to Article 11.1 of the AD Agreement.

(c) Rebuttal arguments made by Korea

4.214 **Korea** makes the following arguments in rebuttal to the United States' response:

4.215 Paragraph 2 provides for a review of “whether the continued imposition of the duty is necessary to offset dumping.” The words “is” and “offset” are the keys to this inquiry. The negotiators chose the present-tense verb “is” and tied it to another present-tense verb, “offset.” They did not select either “will be” for “is” or “prevent” for “offset.” Nor did they permit a forward-looking “likely” analysis. Thus, the forward-looking analysis used by the United States is an impermissible interpretation of this provision.

4.216 Paragraph 3 contains language indicating that the negotiators could have, but decided not to, expand a Member's authority to conduct a forward-looking “likely” analysis in conducting dumping

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the present tense suggests that anti-dumping measures should only remain in place to the extent that present dumping is presently causing or presently threatening to cause material injury? If not, why not?”

<sup>136</sup> See, e.g., *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, Report of the Appellate Body adopted 20 May 1996, at 17; *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, Report of the Appellate Body adopted 1 November 1996, at 10.

<sup>137</sup> *United States - Anti-Dumping Duties on Imports of Stainless Steel Plate from Sweden*, ADP/117 and Corr. 1, Report of the Panel issued 24 February 1994 (unadopted), para. 233.

reviews under Paragraph 2. Paragraph 3 requires revocation of a duty no later than five years after its imposition, unless the Member conducts injury and dumping reviews and determines “that the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury.” In contrast, Paragraph 2 allows a similar inquiry regarding injury only. Paragraph 2 limits dumping reviews to an examination of “whether the continued imposition of the duty is necessary to offset dumping.” The use of present-tense language (*e.g.*, “offset dumping” vs. “prevent dumping”), coupled with the omission of the “likely to continue or recur” provision, indicates that a forward-looking analysis is not permitted in regard to Paragraph 2 dumping reviews. The fact that Paragraph 3 specifies a forward-looking “likely to continue or recur” analysis both for dumping and injury (and that Paragraph 2 provides for a “likely” analysis for injury, but not dumping) demonstrates that the negotiators could have chosen to extend a forward-looking analysis to dumping as well as to injury under Paragraph 2, but decided not to and, instead, expressly limited the analysis. The United States should not be permitted to engraft a specious requirement on to the plain language of Paragraph 2, especially after the negotiators chose not to.

(d) Rebuttal arguments made by the United States

4.217 The **United States** makes the following arguments in rebuttal:

4.218 The purpose of the AD Agreement is to ensure that relief is made available to producers adversely affected by dumping. The agreement accomplishes this goal by establishing a broad framework of rights and obligations which regulates the determination of dumping and the application of remedial anti-dumping duties. Within this framework, Article 11 seeks to ensure that anti-dumping measures do not become permanent fixtures that take on a life of their own. In particular, Article 11.1 states the general principle that “[a]n anti-dumping duty shall remain in force only as long as and to the extent necessary to counteract dumping which is causing injury.”<sup>138</sup>

4.219 Article 11 does not pursue this principle by stating a *per se* rule which mandates revocation whenever a Respondent goes three years without dumping. Indeed, as the United States has stated repeatedly throughout this dispute settlement proceeding, Article 11 does not prescribe the specific circumstances that must lead to revocation or the factors that an administering authority must consider when deciding if an order is “necessary to offset dumping.” The drafters of Article 11 chose instead to impose upon Members an obligation to “review,” under certain circumstances, the “need for the continued imposition” of the anti-dumping duty. Once that review is completed, and only if the investigating authority “determine[s] that the anti-dumping duty is no longer warranted” based upon one or more of the reviews described in Article 11.2, must a Member revoke an anti-dumping order.

4.220 Korea’s allegation that Article 11 somehow proscribes a prospective (or “forward-looking”) analysis under Article 11.2 is completely without merit. First, Article 11, as discussed, does not define the time period that an investigating authority must examine when deciding if the “continued imposition of the duty is necessary to offset dumping.” Second, Article 11.3, footnote 22, clearly permits a Member with a retrospective assessment system, such as the United States, to maintain an anti-dumping duty (*i.e.*, an order) even though the most recent assessment period may have revealed an absence of dumping. Given this fact, it is only logical that the inquiry under Article 11.2 may involve a prospective analysis of whether dumping is likely to resume. Finally, the ordinary meaning of the expression “continued imposition,” in Article 11.2, suggests an analysis that goes beyond the immediate question of whether a Respondent is presently dumping. Rather, it suggests a broad inquiry into the anti-dumping order’s continuing necessity -- necessity based upon past and expected behavior. This is precisely the type of inquiry that is provided for under section 353.25(a) of the DOC’s regulations.

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<sup>138</sup> AD Agreement, art. 11.1.

4.221 The **United States**, in response to a question from the Panel,<sup>139</sup> further argued as follows:

4.222 Article 11 does not indicate what time period should be considered when determining whether the continued imposition of the duty is necessary to offset dumping. In most cases under section 353.25(a), the arguments of the parties determine which time period will be important to the DOC's analysis. In this regard, the DOC examines current trends that may have some bearing on the foreseeable future (*e.g.*, within the coming year). For example, the existence of inventories and capacity utilization may offer some indication about what is likely to happen in the next few months. Still, high inventories for different industries may have different implications on the period of time which is relevant. Similarly, different industries may have business cycles of different lengths. Therefore, the experience of the United States in administering the anti-dumping duty law suggests that the specific business cycles and trends of the industry in question are relevant. The appropriate time period depends on the facts of each case.

4.223 With regard to when the relevant time period is set, it is the parties themselves that provide evidence deemed relevant to the inquiry. Thus, the DOC does not "establish" a time period under section 353.25(a). The DOC may conclude as it did in *DRAMs from Korea*, that, of all the evidence, some is more probative of likelihood of future dumping than others. However, even in this context, the DOC still did not "establish" a time period in the sense of declaring evidence related to a particular time period as irrelevant or inadmissible.

#### **4. Burden of Proof**

(a) Claim raised by Korea

4.224 **Korea** claims that by applying a revocation requirement that the company subject to an anti-dumping duty prove that it is "not likely" to dump in the future, the United States has shifted the burden of proof away from the Member imposing the duty in violation of Article 11 of the AD Agreement. The following are Korea's arguments in support of this claim:

4.225 The regulations applied by the DOC in this case allow the Secretary to revoke the anti-dumping duties if it finds that, among other things, "[i]t is not likely that [Respondents will] in the future" dump.<sup>140</sup> US courts reviewing these regulations have found that the Respondent bears the burden of proving that it is "not likely" to dump in the future (or, alternatively, that there is "no likelihood" of future dumping).<sup>141</sup>

4.226 This formulation unjustifiably shifts the burden of proof from the Member imposing the duty, which must justify continuing the duty, to the responding companies.<sup>142</sup> This is contrary to the text and structure of Article 11.

4.227 First, the "no likelihood/not likely" criterion is inconsistent with the text of Paragraph 2 of Article 11. In Paragraph 2 (unlike Paragraph 3), the word "likely" does *not* apply to dumping, but only to injury. However, even assuming that it did apply to dumping, the United States has pushed the text of Paragraph 2 still further without support. The United States has turned the "likely"

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<sup>139</sup> The Panel recalls that the question was: "At what point during the revocation review proceeding is the time period for examining the 'not likely' criterion determined and notified to the parties? Has it always been the same point? If not, why not?"

<sup>140</sup> See 19 C.F.R. § 353.25(a)(2)(ii) (1996).

<sup>141</sup> See, *e.g.*, *Sanyo Electric Co. v. United States*, 15 C.I.T. 609 (Ex. ROK-50); *Toshiba*, 15 C.I.T. at 600 and 603 (Ex. ROK-5); *Manufacturas Industriales*, 666 F. Supp. at 1566 (Ex. ROK-7).

<sup>142</sup> As the CIT has stated: "The regulation does not present an objective criterion for determining whether there is no likelihood of resumption of LTFV sales. Instead, the petitioner [the Respondent before the DOC] must establish this fact to the satisfaction of the Secretary." See *Toshiba*, 15 C.I.T. at 600 (Ex. ROK-5).

standard on its head, transmogrifying it to “not likely,” and requiring Respondents to bear the burden of proving the standard even though Paragraph 2 clearly imposes the burden on Members.

4.228 Moreover, each sentence of Paragraph 2 either: (i) imposes an obligation on a Member that is maintaining anti-dumping duties (the first and third sentences); or (ii) grants a right to a Respondent company subject to such duties (the second sentence). In doing so, Paragraph 2 sets forth procedures to implement the general directive of Paragraph 1 that anti-dumping duties may be imposed by a Member *only* to offset dumping that is causing injury. Paragraph 2 does not allow, and cannot reasonably be interpreted to allow, a Member to impose such substantial obligations on Respondents seeking revocation.<sup>143</sup>

4.229 Second, the DOC’s shifting of the burden of proof, both in general and in *DRAMs from Korea*, is inconsistent with the structure of Article 11 and with US obligations under the AD Agreement. As a derogation from the general principle of free trade the WTO regime protects, the right to impose anti-dumping duties is granted, but is tightly circumscribed, by the text of the AD Agreement.<sup>144</sup> Where a party has been found to be dumping and thereby injuring a domestic industry, a Member may impose duties. However, this is the limit of the Member’s discretion.

4.230 Paragraph 1 of Article 11 prohibits a Member from maintaining a duty where no dumping is occurring (or has occurred). And, if a Member is not allowed to impose or maintain a duty absent dumping, it certainly cannot do so *and*, then, condition revocation on a Respondent’s meeting the burden of proving to the satisfaction of the Member that dumping is “not likely” to recur. Thus, where a Member’s own authorities have concluded—for three consecutive years—that a Respondent has not dumped, the Member is obliged by Article 11 to revoke the duty. On its face, Article 11 does not permit a Member to force a Respondent to bear the burden of proving some speculative “fact.”

4.231 The DOC’s regulations, on their face and as applied, permit the DOC to shift the burden of proof to a Respondent and to employ the “no likelihood/not likely” criteria in a biased fashion. Therefore, the United States has violated and is violating Article 11 of the AD Agreement.

(b) Response by the United States

4.232 The following are the **United States'** arguments in response to Korea's claim:

4.233 Under section 353.25(a)(2) of the DOC’s regulations, an absence of dumping for three years does not entitle a Respondent to revocation.<sup>145</sup> The agency must also be satisfied that a resumption of less-than-normal-value sales to the United States by the Respondent is not likely.

4.234 The DOC’s likelihood determination is case-specific. It engages in a fact-intensive, case-by-case analysis of all of the information on the record in order to determine if a resumption of less-than-normal-value sales to the United States is “not likely.”<sup>146</sup>

4.235 In administrative proceedings in which the parties do not submit evidence or argument concerning the likelihood of resumption of dumping, the fact that a Respondent has not dumped for three consecutive years and certified that it will not dump in the future may constitute the only

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<sup>143</sup> This is particularly true where, as here, the authority found in three consecutive years that Respondents were not dumping (and, thus, perforce were not causing injury). Moreover, where, for three years, a Respondent has been found not to be dumping, Article 11 requires the Member to revoke the anti-dumping duties.

<sup>144</sup> See *United States-Anti-Dumping Duties on Imports of Stainless Steel Plate from Sweden* (24 February 1994), ADP/117 (unadopted).

<sup>145</sup> 19 C.F.R. § 353.25(a)(2) (1997) (Ex. USA-24). In its first submission, Korea mistakenly claims that three consecutive years of no dumping “satisfied the requirements for revocation set out in 19 C.F.R. § 353.25(a)(2) (1996).”

<sup>146</sup> 19 C.F.R. § 353.25(a)(2) (1997) (Ex. USA-24).

evidence in the administrative record on the likelihood issue.<sup>147</sup> In such cases (which constitute the vast majority since 1980), the DOC has generally found that a resumption of dumping is not likely based upon the un-controverted record evidence.<sup>148</sup> Over the years, this practice has evolved into a *de facto* presumption that if a Respondent has not dumped within the prior three-year period, it is not likely to resume dumping in the future.<sup>149</sup>

4.236 In contrast, in cases in which the parties raise concerns and submit evidence about the likelihood of resumption of dumping, the DOC analyzes the arguments and evidence, and decides whether or not to revoke based upon a review of all of the record evidence. Sometimes this process produces a result favorable to the petitioning industry in the United States,<sup>150</sup> and sometimes it does not.<sup>151</sup>

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<sup>147</sup> *Tatung Co. v. United States*, 18 CIT 1137, 1144 (1994) (Ex. USA-37).

<sup>148</sup> See, e.g., *Red Raspberries From Canada; Final Results of the Anti-dumping Duty Administrative Review, and Revocation in Part of the Anti-dumping Duty Order*, 57 Fed. Reg. 49686, 49686-88 (1992); *Final Results of Anti-dumping Duty Administrative Reviews: Fishnetting of Man-made Fibers From Japan*, 56 Fed. Reg. 49456, 49457 (1991); *Elemental Sulphur From Canada; Final Results of Anti-dumping Duty Administrative Review and Revocation In Part*, 56 Fed. Reg. 16068 (1991) ("*Sulphur from Canada*"); *Spun Acrylic Yarn From Japan; Final Results of Anti-dumping Duty Administrative Review and Revocation in Part*, 52 Fed. Reg. 43781, 43782 (1987); *Clear Sheet Glass From Japan; Final Results of Administrative Review and Revocation of Anti-dumping Finding*, 47 Fed. Reg. 14506 (1982). These administrative determinations appear in the order cited at Ex. USA-38 through Ex. USA-42.

<sup>149</sup> See *New AD Regulations*, 62 Fed. Reg. at 27326 (Ex. USA-43). But see, e.g., *Certain Circular Welded Carbon Steel Pipes and Tubes from Taiwan; Final Results of an Anti-dumping Duty Administrative Review and Determination not to Revoke in Part*, 56 Fed. Reg. 8741, 8742 (1991) (Ex. USA-44); and *Final Results of Anti-dumping Duty Administrative Review; Large Power Transformers From Italy*, 53 Fed. Reg. 29367, 29370 (1988) (Ex. USA-45). In both of these cases, the DOC was not satisfied that future dumping was unlikely, despite the apparent absence of any comment or argument from the petitioning industry.

<sup>150</sup> See, e.g., *Brass Sheet and Strip From Germany; Final Results of Anti-dumping Duty Administrative Review and Determination Not To Revoke in Part*, 61 Fed. Reg. 49727, 49732 (1996) ("*Brass Sheet from Germany*"); *Television Receivers, Monochrome and Color, From Japan; Final Results of Anti-dumping Duty Administrative Review and Determination Not To Revoke in Part*, 54 Fed. Reg. 35517, 35518-19 (1989) ("*Televisions from Japan*"); *Impression Fabric of Man-Made Fiber From Japan; Final Results of Anti-dumping Duty Administrative Review*, 52 Fed. Reg. 41601, 41602 (1987); *High Power Microwave Amplifiers and Components Thereof From Japan; Final Results of Anti-dumping Duty Administrative Review*, 51 Fed. Reg. 43402, 43403 (1986); *Cadmium From Japan; Final Results of Administrative Review of Anti-dumping Finding and Determination Not To Revoke*, 46 Fed. Reg. 50815, 50816 (1981); *Canned Bartlett Pears From Australia; Final Results of Administrative Review of Anti-dumping Finding and Determination Not to Revoke*, 46 Fed. Reg. 43224, 43224-25 (1981). These administrative determinations appear in the order cited at Ex. USA-46 through Ex. USA-51.

<sup>151</sup> See, e.g., *Steel Wire Rope From the Republic of Korea; Final Results of Anti-dumping Duty Administrative Review and Revocation in Part of Anti-dumping Duty Order*, 62 Fed. Reg. 17171, 17173-74 (1997) ("*Steel Rope from Korea*"); *Certain Forged Steel Crankshafts From the United Kingdom; Final Results of Anti-dumping Duty Administrative Review and Revocation of Anti-dumping Duty Order*, 62 Fed. Reg. 16768, 16771 (1997); *Fresh Cut Flowers From Mexico; Final Results of Anti-dumping Duty Administrative Review and Revocation in Part of Anti-dumping Duty Order*, 61 Fed. Reg. 63822, 63825 (1996) ("*Flowers from Mexico*"); *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From Italy; Final Results of Anti-dumping Duty Administrative Reviews and Revocation In Part of an Anti-dumping Duty Order*, 60 Fed. Reg. 10959, 10967 (1995); *Flowers From Colombia*, 59 Fed. Reg. at 15167 (Ex. USA-30); *Final Results of Anti-dumping Duty Administrative Review and Revocation in Part: Titanium Sponge From Japan*, 57 Fed. Reg. 557, 557 (1992) ("*Sponge from Japan*"); *FCOJ from Brazil*, 56 Fed. Reg. at 52511 (Ex. USA-31); *Color Television Receivers, Except for Video Monitors, From Taiwan; Final Results*, 55 Fed. Reg. 47093, 47097 (1990); *Printed Vinyl Film From Brazil; Final Results of Administrative Review of Anti-dumping Finding and Revocation in Part*, 49 Fed. Reg. 33158, 33158 (1984).

These administrative determinations appear in the order cited at Ex. USA-52 through Ex. USA-58. In *Sponge from Japan*, the notice states that "[t]he petitioner indicated that they had no objection to this revocation." 57 Fed. Reg. at 557. However, in an earlier, related notice, the petitioner's objection to revocation on various grounds was made evident. See *Titanium Sponge From Japan; Final Results of Anti-dumping Duty*

4.237 US courts have held that the burden is on the party seeking revocation to come forward with "real evidence"<sup>152</sup> to persuade the DOC to revoke the order.<sup>153</sup> However, once the factual record closes, all such burdens evaporate and it falls to the DOC to make a determination that is in accordance with law and based upon substantial evidence.<sup>154</sup>

4.238 The DOC closed the administrative record to new factual information on 2 May 1997. It gave all parties to the proceeding a full and fair opportunity to comment in writing upon the facts in the record. The DOC held a public hearing on 5 May 1997 which was attended by Respondents and Micron. Once all the facts and arguments were identified, the DOC analyzed everything in the administrative record which bore on the likelihood issue. It then summarized its conclusions in memoranda which contain very detailed evaluations of company-specific, confidential information provided by Respondents and several of their OEM customers.<sup>155</sup> Among other things, the DOC examined the nature of the subject merchandise, trends in the domestic and home market industries, and currency movements. The agency also conducted extensive analyses of supply and demand, price trends during all phases of the business cycle, and the importance of the US market to the Respondents.

4.239 This type of fact-intensive, case-by-case analysis was (and is) fully consistent with the DOC's long-standing practice of examining all relevant economic factors and other information on the record in a particular case.<sup>156</sup> In the instant case, it led to a determination not to revoke the order that was based upon facts which were properly established, and whose evaluation was unbiased and objective

4.240 Korea argues that the DOC's regulations, "on their face" and as applied in *Final Results Third Review*, permit the DOC to shift the burden of proof to a Respondent to show that a resumption of dumping is "not likely." Korea also contends that the DOC employs the "not likely" standard in its regulations in a "biased fashion." Both situations, Korea asserts, violate Article 11 of the AD Agreement.

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*Administrative Review and Tentative Determination To Revoke in Part*, 54 Fed. Reg. 13403, 13405 (1989) (comment 9) (Ex. USA-59).

<sup>152</sup> *Sanyo Elec. Co. v. United States*, 15 CIT 609, 614 (1991) ("the investigation was conducted at Sanyo's request, and it was for Sanyo to come forward with real evidence to persuade Commerce to revoke the order"), citing *Manufacturas Industriales De Nogales, S.A. v. United States*, 666 F. Supp. 1562, 1566 (Ct. Int'l Trade 1987) (hereinafter "*Manufacturas*") (Ex. USA-60).

<sup>153</sup> The DOC, in practice, actually places the burden initially on the petitioning US industry to come forward with evidence relevant to the "not likely" issue. It is only after the petitioner has satisfied this requirement that the burden, in effect, switches to the Respondent to come forward with evidence which indicates that a resumption of dumping is "not likely."

This is not to say, however, that the DOC must deny revocation under these circumstances if a Respondent fails to put evidence on the record (beyond three years of no dumping) regarding the likelihood issue. The ultimate question in every proceeding is whether the weight of the evidence justifies maintenance of the order. In this regard, under US law, it is incumbent upon the DOC to render a decision that is based upon substantial evidence and in accordance with law. 19 U.S.C. § 1516a (1998) (Ex. USA-62). Moreover, the DOC may, quite apart from evidence introduced by the parties, exercise its investigatory powers (as it did in the instant case) to collect public information on its own to help it decide the "not likely" issue. See, e.g., *Televisions Receivers, Monochrome and Color, From Japan; Determination Not To Revoke in Part*, 55 Fed. Reg. 11420, 11422 (1990) (Ex. USA-61).

<sup>154</sup> 19 U.S.C. § 1516a (1998) (Ex. USA-62). See also 2 Charles H. Koch, Jr. *Administrative Law and Practice* § 5.51 (2d ed. 1997) ("In reality then the burden of persuasion always rests with the agency.") (Ex. USA-63).

<sup>155</sup> See, e.g., Charts from Agency Analyst to File ("Prelim. Analysis") (Ex. USA-13); Analysis Memorandum from Program Manager to Deputy Assistant Secretary of Import Administration, 16 July 1997 ("Final Analysis") (Ex. USA-34).

<sup>156</sup> See, e.g., *Steel Rope from Korea*, 62 Fed. Reg. at 17173-74 (Ex. USA-52); *Brass Sheet from Germany*, 61 Fed. Reg. at 49730-32 (Ex. USA-46); *FCOJ from Brazil*, 56 Fed. Reg. at 52511 (Ex. USA-31).

4.241 The AD Agreement does not prevent importing countries from requiring Respondents to come forward with evidence which indicates that a resumption of dumping is “not likely.” Article 11 does not prescribe the specific factors that an investigating authority must consider when determining whether anti-dumping duties are “warranted.” It also does not prescribe the specific procedural steps that must be followed when conducting a review under Article 11.2. Within this framework, the “not likely” standard is a reasonable exercise of the United States’ legitimate interest in ensuring that relief to those domestic industries that have been adversely affected by dumping is not withdrawn earlier than is “necessary.”

4.242 Whether it is “not likely” that dumping will resume is an issue that directly and logically relates to whether anti-dumping duties continue to be necessary or warranted. The fact that an exporter revises its prices to eliminate dumping while the anti-dumping remedy is in place does not necessarily mean that the exporter will not resume dumping once the remedy is removed. By considering such factors as trends in costs and prices, along with Respondents’ pricing practices over the prior three-year period, the DOC is able to evaluate whether the anti-dumping order remains “necessary to offset dumping.” In this respect, there is nothing facially invalid about the DOC’s revocation standard, in general, or the “not likely” standard, in particular. The DOC’s standard, therefore, reflects a “permissible” interpretation of Article 11 of the AD Agreement.

4.243 Lastly, Korea’s position, if taken to its logical extreme, would preclude importing countries from imposing any type of evidentiary burden on Respondents during the course of a proceeding under Article 11. This would be inconsistent with numerous provisions in the AD Agreement. For example, Article 6 of the agreement reflects the long-standing practice of national investigating authorities to solicit information on sales and costs by means of a questionnaire and to allow interested parties otherwise to submit information on the record in support of their positions regarding the issue of dumping.<sup>157</sup> The solicitation of comparable information in the context of a proceeding under section 353.25(a) of the DOC’s regulations is by no means unfair or unusual. Finally, in the instant case, the DOC did not demand that Respondents prove a negative (or the impossible) -- that they would not dump if the order was revoked. Instead, the DOC established a procedure “at the request of the parties” for the submission of factual information regarding market conditions, coincidence of dumping with downturns, and related matters.<sup>158</sup>

(c) Rebuttal arguments made by Korea

4.244 **Korea** makes the following arguments in rebuttal to the United States responses:

4.245 The US revocation scheme, on its face and as applied, violates Article 11 of the AD Agreement. Because the US revocation regime, on its face and as applied, shifts the burden of proof to Respondents, the Panel should find that the United States has violated Article 11.

4.246 The US first submission ostensibly takes issue with Korea’s demonstration, but actually contains several statements that confirm that the US regime does, indeed, place the burden of proof on Respondents. For example, the United States declares:

The agency must also be satisfied that a resumption of less-than-normal-value sales to the United States by the Respondent is not likely.

The use of the word “satisfied” indicates that the burden of proof is on the Respondent, and not on the agency or the petitioner.<sup>159</sup> Later, at paragraph 77, the United States actually agrees with Korea that

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<sup>157</sup> AD Agreement, art. 6.

<sup>158</sup> *Final Results Third Review*, 62 Fed. Reg. at 39810 (Ex. USA-1).

<sup>159</sup> For example, instead of “must also be satisfied,” the United States could have used “must determine” or “must conclude” or “must find.”

“US courts have held that the burden is on the party seeking revocation to come forward with ‘real evidence’ to persuade the DOC to revoke the order.”

4.247 Thus, by its own admission, the United States’ revocation regime shifts the burden of proof to respondents. The United States improperly imported the “likely” standard from injury reviews under Paragraph 2 to dumping reviews, thereby expanding the burden of proof applied in dumping reviews. Then, the United States turned the standard on its head, transmogrifying it to “not likely,” and requiring Respondents to bear the burden of proving the standard even though Paragraph 2 clearly imposes the burden on Members. This extension and shifting of the burden of proof violates Article 11 of the AD Agreement, which places the burden squarely on the administering authorities.

4.248 The United States several times has stated that there will be dire consequences if the Panel accepts Korea’s interpretation of Article 11. For example, the United States asserts that Korea’s position, “if taken to its logical extreme,” would preclude a Member from imposing any evidentiary burden on a Respondent seeking revocation. This might be true if one took Korea’s position to its illogical extreme, but nothing which Korea has advanced even suggests this.

4.249 Under the US system, the Korean Respondents demonstrated for three consecutive reviews that they were not dumping. That is an exceedingly substantial evidentiary burden. It required Respondents to comply with US dumping laws and to submit voluminous data, all of which the DOC verified, to demonstrate their compliance.

4.250 But, having done so, the United States was required to revoke the definitive duty, unless it initiated reviews under Paragraph 2 and found that “continued imposition of the duty is necessary to offset dumping” and that the “injury would be likely to continue or recur if the duty were varied.”

(d) Rebuttal arguments made by the United States

4.251 The **United States** makes the following arguments in rebuttal:

4.252 In its first written submission, Korea states that section 353.25(a) of the DOC’s regulations, “on its face and as applied,” improperly requires Respondents to bear the burden of showing that a resumption of dumping is “not likely.” At no time since then has Korea ever explained how section 353.25(a), “on its face,” places the burden of proof on Respondents to show anything. Korea *does* try to elicit support for its position by emphasizing the negative phraseology of the not-likely standard, and even characterizing the standard as “transmogrified.” However, whether the standard is “transmogrified”, it is still just a standard and nothing on “the face” of the regulation speaks to allocation of the burden of proof.

4.253 In its first written submission, the United States demonstrated that the DOC did not place the burden of proof (in the sense of a burden of persuasion) on the Korean Respondents. At the first meeting of the Panel, Korea attempted to rebut this demonstration by pointing to the fact that in the *Final Results Third Review*, the DOC cited to several court decisions that, according to Korea, stand for the proposition that a party seeking revocation of an anti-dumping order in the United States bears the burden of proving that a resumption of dumping is “not likely.” The answer to Korea’s arguments is that (i) the court decisions do not stand for the proposition claimed by Korea, and (ii) the DOC’s reliance on the court decisions was appropriate.

4.254 Unfortunately, the term “burden of proof” is often used with imprecision in GATT/WTO jurisprudence. It tends to carry with it excess baggage that more often than not creates confusion on the part of observers and practitioners, alike.

4.255 In general, “burden of proof” is used to describe two different concepts. The first is the “burden of persuasion” (otherwise known as the necessity of establishing a fact) which never shifts from one party to the other at any stage of a proceeding in which the relevant rules establish such a



burden. The second concept is the "burden of going forward with the evidence," which may shift back and forth between the parties as a proceeding progresses.<sup>160</sup> The DOC imposed a burden of proof on the Respondents in the sense of a burden of going forward with the evidence once the US industry (represented by Micron Technology, Inc. ("Micron")) came forward with evidence suggesting that dumping would recur if the anti-dumping order were revoked. Korea, however, asserts that the DOC imposed a burden of proof in the sense of a burden of persuasion.

4.256 Turning to the court decisions referred to by Korea and cited by the DOC in *Final Results Third Review*, a review of these decisions establishes that the courts did not impose a burden of persuasion on exporters seeking the revocation of an order.<sup>161</sup> Instead, the courts were discussing the "burden of proof" in the sense of the burden of coming forward with evidence. This fact can best be understood by discussing the decisions in reverse chronological order.

4.257 The most recent cases were *Sanyo* and *Toshiba*, which were issued within a few weeks of each other.<sup>162</sup> In both decisions, the US Court of International Trade ("CIT") stated that it was for the party seeking revocation to come forward with real evidence to persuade the DOC to revoke the order.<sup>163</sup> In both decisions, the court cited to *Manufacturas Industriales De Nogales, S.A. v. United States*, 666 F. Supp. 1562, 1566 (Ct. Int'l Trade 1987) (Ex. USA-60). *Manufacturas Industriales*, in turn, cited to the decision of the US Court of Appeals for the Federal Circuit ("Federal Circuit") in *Matsushita Electric Industrial Co. v. United States*, 750 F.2d 927 (Fed. Cir. 1984) (additional views of Nichols, J.), for the proposition that it was for the proponent of revocation to come forward with real evidence to persuade the DOC to revoke an order.<sup>164</sup>

4.258 In *Matsushita*,<sup>165</sup> the ITC conducted a review of an anti-dumping order and determined that injury was likely to recur if the order were revoked. The CIT overturned the ITC's determination, ruling that the ITC had inappropriately placed the burden of proof (as in burden of persuasion) on the parties seeking revocation. On appeal, the Federal Circuit reversed the decision of the lower court, thereby sustaining the ITC's determination. Among other things, the Federal Circuit held that the ITC had not placed the burden of proof on the parties seeking revocation:

Finally, we do not discern that the ITC imposed a "burden of proof" on the Japanese importers to prove no injury was likely to occur. The ITC's decision does not depend on the "weight" of the evidence, but rather on the expert judgment of the ITC based on the evidence of record. On review, the question is whether there was evidence which could reasonably lead to the ITC's conclusion, that is, does the administrative record contain substantial evidence to support it and was it a rational decision?<sup>166</sup>

In his separate views, Judge Nichols elaborated on this point:

The CIT judge said this lament reflected an impermissible throwing of the burden of proof on the proponents of lifting the order. I do not agree. There is a subtle but

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<sup>160</sup> See, e.g., *Black's Law Dictionary*, 6<sup>th</sup> ed. (West Publishing Co., 1990), p. 196 ("burden of proof" describes two different concepts) (Ex. USA-85).

<sup>161</sup> The court decisions in question are cited in *Final Results Third Review*, 62 Fed. Reg. at 39812 (Ex. USA-1).

<sup>162</sup> *Sanyo Elec. Co. v. United States*, 15 CIT 609 (1991) (Ex. USA-60); *Toshiba Corp. v. United States*, 15 CIT 597 (1991) (Ex. USA-69).

<sup>163</sup> *Sanyo*, 15 CIT at 614 (Ex. USA-60); *Toshiba*, 15 CIT at 603 (Ex. USA-69).

<sup>164</sup> 666 F. Supp. at 1566 (Ex. USA-60).

<sup>165</sup> In the judicial hierarchy of the federal court system in the United States, the Federal Circuit is superior to, and reviews the decisions of, the CIT. In this particular instance, Judge Nichols' views were issued separately as an appendix to the decision (rather than as a concurring opinion) because, according to the court, "they read so well as separately stated." *Matsushita*, 750 F.2d at 936, n. 14 (Ex. USA-60).

<sup>166</sup> *Id.* at 933 (citations omitted).

recognizable difference between the burden of proof and the burden of going forward. This investigation was conducted at all because these attorneys had requested on behalf of their clients that it should be. If they did not intend to waste [ITC] resources, it would be reasonable to think they would be in possession of information which, if believed and not controverted, would constitute a *prima facie* case ...<sup>167</sup>

4.259 Thus, *Matsushita* distinguished between the burden of persuasion and the burden of coming forward with evidence, finding that it was permissible for the ITC to impose a burden of coming forward on the proponent of revocation. *Manufacturas Industriales* relied on this proposition, as did *Sanyo* and *Toshiba*, in turn, through their reliance on *Manufacturas Industriales*. Thus, when the DOC cited to *Matsushita*, *Sanyo*, and *Toshiba* in its discussion of the evidentiary burden placed on the Korean Respondents in the *Final Results Third Review*, it was referring only to the burden of coming forward with evidence and not, as asserted by Korea, the ultimate burden of persuasion.<sup>168</sup>

4.260 Further support for this view can be found in the DOC's practice under section 353.25(a) of its regulations. The DOC actually places the burden initially on the petitioning US industry to come forward with evidence relevant to the "not likely" issue. If the petitioning industry fails to present evidence, the DOC typically revokes the underlying anti-dumping order even though the concerned Respondent(s) may have presented no evidence directly bearing on the "not likely" criterion. If, as Korea asserts, the burden of proof (as in the burden of persuasion) truly were on the Respondent to show that a resumption of dumping was "not likely," the DOC could not revoke an order if the Respondent did not present any evidence directly bearing on the not-likely criterion. As a matter of law, a party that bears the burden of persuasion cannot prevail if that party presents no evidence.

4.261 In sum, Korea is wrong, as a factual matter, when it claims that the DOC imposed a burden of persuasion on the Korean Respondents.<sup>169</sup> Once Micron presented a *prima facie* case against revocation, the burden effectively shifted to Respondents to come forward with evidence to rebut Micron's evidence. However, the ultimate burden of persuasion always remained with the DOC.<sup>170</sup>

4.262 With the facts thus clarified as to what the DOC actually did, the United States does not understand Korea to be complaining about the fact that the Korean Respondents were required to present evidence relating to the likelihood of future dumping once Micron had submitted evidence establishing a *prima facie* case against revocation. If Korea is complaining of such a requirement, then the United States simply notes that the imposition of such a burden is reasonable and is not precluded by anything in the AD Agreement.

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<sup>167</sup> *Id.* at 937.

<sup>168</sup> The DOC could not have been referring to the burden of persuasion, as claimed by Korea, because the cited court decisions dealt with the burden of proof in the sense of the burden of coming forward with evidence.

<sup>169</sup> Thus, Korea has failed to meet the burden placed on it by customary international law to prove, before this Panel, the truth of the fact asserted. *United States – Measures Affecting Imports of Woven Wool Shirts and Blouses From India*, WT/DS33/AB/R, Report of the Appellate Body adopted 23 May 1997, at 16 (hereinafter "Wool Shirts"). It is an accepted principle of public international law that municipal law and practice is a fact to be proven before an international tribunal, such as the present one. *Case Concerning Certain German Interests in Polish Upper Silesia*, [1926], PCIJ Rep., Series A, No. 7, at 19 (Ex. USA-6); *Case Concerning the Payment in Gold of Brazilian Federal Loans Contracted in France*, [1929], PCIJ Rep., Series A, No 15, at 124-25 (hereinafter "Brazilian Loans") (Ex. USA-7). See also Brownlie, pp. 40-42 (Ex. USA-8).

<sup>170</sup> Although the DOC did not impose a burden of persuasion on the Korean Respondents, it must be noted that nothing in the AD Agreement prevents an investigating authority from imposing such a burden on a Respondent. Indeed, the very fact that Article 11.2 does not require revocation of an anti-dumping order unless and until an investigating authority makes certain findings, and given the broad standard set forth in Article 11.2 (which only requires revocation if the relief provided by an order is no longer "warranted"), it is hard to imagine how the imposition of such a burden could rest upon an impermissible interpretation of Article 11.

## 5. Impossibility to Meet the DOC's Revocation Standard

### (a) Claim raised by Korea

4.263 **Korea** claims that the DOC's revocation standard was impossible to meet in this proceeding and, thus, both on its face and as applied, is inconsistent with Article 11 of the AD. The following are Korea's arguments in support of this claim.

4.264 Article 11.1 of the AD Agreement requires Members to apply anti-dumping duties only for as long as they are "necessary to counteract dumping which is causing injury." Article 11.2 of the AD Agreement requires that, if "the anti-dumping duty is no longer warranted, it shall be terminated immediately." In the Third Administrative Review (the Review), the United States failed to determine objectively and fairly "whether the continued imposition of the duty is necessary to offset dumping."<sup>171</sup> Therefore, the United States violated its obligations under the AD Agreement. The DOC attempted to camouflage its departure from its normal revocation practice (in which it revokes solely on the basis of three years of no dumping, plus a promise not to dump in the future) and imposed a subjective and unnecessary "no likelihood/not likely" requirement, based on speculation and conjecture of future dumping, that was impossible for Respondents to satisfy.

4.265 The DOC erroneously supported its departure from its normal revocation practice by declaring that DRAM producers routinely dump during cyclical downturns.<sup>172</sup> As precedents for its "conclusion," the DOC cited the antidumping proceedings against the Japanese DRAM producers in the mid-1980's<sup>173</sup> and against the Korean DRAM producers in 1992.<sup>174</sup> The DOC supported its reliance on these past proceedings by surmising that, because DRAMs are commodity products, any company from any country is likely to dump in any cyclical downturn. On this basis, the DOC concluded that it must examine a downturn period and determine that Respondents would not dump in that period, before it could revoke the order.<sup>175</sup>

4.266 All of the parties accept that the DRAM industry is characterized by upturns and downturns. However, as Respondents established during the many phases of the proceeding, prices of imports in economic downturns are not necessarily "dumped" prices. Indeed, during the last two severe downturns in the DRAM market, the DOC found that neither Respondent had dumped. The first downturn occurred during 1993, a period which the First Administrative Review covered. As Figure 1<sup>176</sup> shows, the book-to-bill ratio<sup>177</sup> consistently declined during 1993. Yet, the DOC found that Respondents were not dumping. The second downturn occurred in late 1995 and early 1996, during the period of the Third Administrative Review. Again, the book-to-bill ratio declined (even more precipitously than in 1993). Yet, still, the DOC found Respondents had not dumped. Thus, contrary to its conclusions *en route* to denying revocation in the Third Annual Review, the DOC, itself, previously had found that Respondents had not dumped during a variety of market conditions, including the last two cyclical downturns.

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<sup>171</sup> Anti-Dumping Agreement, Article 11.2.

<sup>172</sup> *Notice of Final Results of Antidumping Duty Administrative Review and Determination Not to Revoke Order in Part; DRAMs from Korea*, 62 Fed. Reg. 39809, 39810 (24 July 1997) (Ex. ROK-3).

<sup>173</sup> See, e.g., *64K Dynamic Random Access Memory Components (64K DRAMs) from Japan; Final Determination of Sales at Less than Fair Market Value*, 51 Fed. Reg. 15943 (29 April 1986) (64K DRAMs from Japan) (Ex. ROK-53).

<sup>174</sup> *Final Determination of Sales at Less than Fair Value: Dynamic Random Access Memory Semiconductors of One Megabit and Above from the Republic of Korea*, 58 Fed. Reg. 15467 (23 March 1993) (Ex. ROK-9).

<sup>175</sup> *Notice of Final Results of Antidumping Duty Administrative Review and Determination Not to Revoke Order in Part; DRAMs from Korea*, 62 Fed. Reg. 39809, 39810 (24 July 1997) (Ex. ROK-3).

<sup>176</sup> See Case Brief of LG Semicon, Case No. A-580-812 (21 April 1997) at 19 (Ex. ROK-2).

<sup>177</sup> The book-to-bill ratio is a measure designed by the U.S. Semiconductor Industry Association and used by market experts to track market cyclicalities. It represents the value, month by month, of new orders (book) to deliveries (bill).

4.267 The explanation for the DOC's findings of no dumping during the previous two downturns is quite simple. DRAM production costs constantly decrease and, thus, downward price pressure, whether due to "supply/demand cyclicity" or another cause, does not inexorably lead to dumping, as the DOC claims in the Final Results.<sup>178</sup>

4.268 By determining that a future downturn must be examined because of an alleged history in the DRAM industry of dumping during cyclical downturns, and coupling this with the "no likelihood/not likely" criterion, the DOC set an impossible, completely subjective standard for revocation. Moreover, to make this determination, the Department used speculative price and cost scenarios proffered by the U.S. petitioner of what *might* occur in the future. An authority will *always* find that dumping *may* occur in the future *if* the variables of its analysis are biased by speculation and conjecture masquerading as data proffered by a petitioner. The DOC's use of this test of whether dumping *may* occur in the future if certain economic variables *might* be realized was an unnecessary and unsupported exercise leading to a foregone conclusion.

4.269 In addition, the DOC's reliance on the earlier Japanese and Korean DRAM dumping cases to establish the necessity for conducting a speculative analysis in a cyclical downturn was biased and unsound. The economic conditions, analytical variables and results of the earlier Japanese and Korean DRAM investigations are dissimilar. Thus, the Japanese investigation is not analogous and, in any case, this proceeding is about Korean DRAM manufacturers, not Japanese DRAM manufacturers.

4.270 First, in the *DRAMs from Japan* investigation, the DOC found that *all* of the respondents had dumped.<sup>179</sup> In contrast, as discussed above, in the 1992 *DRAMs from Korea* investigation, the largest producer, Samsung Electronics, was *excluded* from the investigation because it was found not to have dumped (Samsung accounted for *over 70 percent* of Korea's imports). Second, in contrast to the *DRAMs from Japan* investigation, where the "all others" margin was 39.68 percent, the "all others" margin in the *DRAMs from Korea* case was only 4.55 percent.<sup>180</sup> Third, although the DOC found that the Japanese producers had dumped in a cyclical downturn, the DOC has found that the Korean DRAM manufacturers have not dumped during cyclical downturns. Finally, the two Korean DRAM manufacturers remaining subject to the anti-dumping duty order have not dumped in three consecutive administrative reviews and have filed with the DOC the requisite statement affirming that they will not dump in the future (and will submit to reinstatement in the order if they do).

4.271 Because there was no reliable evidence on the record that Korean DRAM manufacturers will dump in the next downturn or any future downturns, the DOC's premise for departing from its normal revocation practice of examining historical data to make its "likelihood" determination is unsupported and an abuse of discretion. Even if one assumes that the DOC's examination of whether there is a likelihood of dumping in the future by Korean DRAM manufacturers was acceptable under Article 11 (it was not), the examination should be based on actual verified data on the record – no dumping or insignificant margins in the investigation, no dumping by the two remaining Respondents for three consecutive years and a pledge not to dump in the future.

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<sup>178</sup> See 62 Fed. Reg. 39809, 39810 and 39817 (24 July 1997) (Ex. ROK-3).

<sup>179</sup> See, e.g., *Dynamic Random Access Memory Semiconductors of 256 Kilobits and Above from Japan: Preliminary Determination of Sales at Less Than Fair Value*, 51 Fed. Reg. 9475, 9477 (19 March 1986) (DRAMs from Japan) (Ex. ROK-54).

<sup>180</sup> "All others" rates are generally representative of the average dumping margins for an investigation. The actual average dumping margin for the investigation is less than two percent when Samsung's *de minimis* margin of 0.22% is included. A peculiar twist of "all others" calculations omits zero or *de minimis* margins from the "all others" rate calculation. Therefore, even though each Respondent's dumping margin decreased when the Department amended its final results, the "all others" rate increased. A more realistic comparison would include Samsung's results and would yield an "all others" or average rate of less than two percent. Thus, in *DRAMs from Korea*, the weighted average margin for all Respondents met the current *de minimis* standard of the Anti-Dumping Agreement.

4.272 The AD Agreement envisions a decision-making process based on fact, not speculation. The facts in this case indicate that the Korean manufacturers have not dumped since the investigation and that the two Respondents remaining in the investigation have a multi-year record of trading at or above normal value. These two Respondents have provided the statements required by the DOC that they will not dump in the future and will submit to reinstatement in the order if they do. This pledge and the empirical data before the DOC clearly indicate that the DOC was required to revoke the order. The DOC's failure to do so violates Article 11 of the AD Agreement.

4.273 In deciding not to revoke the duty, the DOC focused on the period immediately following the Third Administrative Review and rejected Respondents' requests that it examine a more recent - and therefore more relevant - period (assuming, for the sake of argument, that it should conduct such an analysis in the first place).<sup>181</sup> As Respondents pointed out during the Third Administrative Review :

the issue before the Department is not what may or may not have happened last year. It is what is likely to happen in the future if the order is revoked. In order to make a reasonable prediction of the future, the Department's decision must be based on the most recent information available<sup>182</sup>.

4.274 The Department failed to correct this deficiency in its Final Results<sup>183</sup>. It violated Article 11.2 by failing to conduct a forward-looking analysis (assuming, for the sake of argument, it was not simply required to revoke the order).

(b) Response by the United States

4.275 The following are the **United States'** arguments in response to Korea's claim:

4.276 Korea tries to convince this Panel that: (i) downturns in the DRAM market occurred during the first and third administrative reviews; (ii) respondents were found not to be dumping during these periods; therefore, (iii) the Department erred when it determined that market downturns "inexorably" lead to dumping. This flaw in the DOC's thinking, Korea argues, also led to a legal standard for revocation that allegedly is impossible for producers in cyclical industries to meet. For the following reasons, these arguments are without merit and should be rejected by the Panel.

4.277 To begin with, the periods covered by the first and third reviews (*i.e.*, 1993 to 1995) were, as discussed above, unusually robust.<sup>184</sup> According to every important measure (*e.g.*, prices, revenues, and profits), the DRAM industry was not in a "downturn" during this time period. Korea stumbles on this point because it appears to focus exclusively on "book-to-bill" data prepared by the U.S. Semiconductor Industry Association ("SIA"). However, evidence on the record establishes that the SIA stopped publishing this data around the end of 1996 because its utility to market forecasters was limited.<sup>185</sup>

4.278 Secondly, Korea ignores the lag that tends to exist between highs and lows in the book-to-bill ratio, and turning points in sales growth. Put another way, even if the book-to-bill ratio is an accurate indicator of market cycles for DRAMs, Korea overlooks the fact that a downturn in the market may not manifest itself for many months following a low point in the book-to-bill ratio. For example, according to data compiled by Merrill Lynch (which covers all semiconductors and not just DRAMs), the lowest point in the 1990-1991 downturn occurred in April of 1990, eight months after the low

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<sup>181</sup> See 62 Fed.Reg. 39809, 39813-14 (24 July 1997) (Ex. ROK-3).

<sup>182</sup> Case Brief of Hyundai, Case No. A-580-812 (21 April 1997) at 17 (Ex. ROK - 35).

<sup>183</sup> See 62 Fed.Reg. 39809, 39813-14 (24 July 1997) (Ex.ROK-3).

<sup>184</sup> See Case Brief of LG Semicon, Ex. B (Paine Webber) ("1993-1995 boom period") (Ex. USA-15).

<sup>185</sup> LGS Ltr.-1, Ex. 1 (Lawrence Fisher, *Index of Demand for Chips Soars to High for This Year*, N.Y. Times, 12 Nov. 1996, at D11) (Ex. USA-21).

point in the book-to-bill ratio.<sup>186</sup> The same phenomenon manifested itself in the 1996 downturn. There, the low point in the book-to-bill ratio occurred in April of 1996, but the downturn in the market did not reach its lowest point until December of 1996 – eight months after the period covered by the third administrative review.<sup>187</sup>

4.279 Lastly, the DOC did not determine that downturns in the DRAM market “inexorably” lead to dumping. The United States agrees with Korea’s claim that the “prices of imports in economic downturns are not necessarily ‘dumped’ prices.”<sup>188</sup>

4.280 The DOC also did not apply a legal standard for revocation that is “impossible” for producers in cyclical industries to meet. First of all, the administrative determination being challenged in this case did not cover any product or any industry other than *DRAMs from Korea*. Thus, broad statements about the alleged implications of this case for other markets that may or may not be “cyclical” in nature are without foundation.

4.281 Secondly, the DOC did not presume that dumping occurred during the 1996 downturn. The agency engaged in a painstaking analysis of voluminous data on the administrative record and only then did it determine that “dumping may have taken place during the 1996 downturn.”<sup>189</sup> In a different case, involving a different cyclical industry, such evidence may not exist and the DOC may find that a resumption of dumping would not be likely if the order in question were revoked.

4.282 Lastly, the fundamental flaw in Korea’s claim is perhaps best captured by the simple fact that the DOC has revoked anti-dumping duty orders covering producers within cyclical industries. Examples of such cases include *Carbon Steel Bars and Structural Shapes From Canada*, 51 Fed. Reg. 41364, 41364 (1986) (Ex. USA-28), and *Steel Reinforcing Bars From Canada; Final Results of Antidumping Duty Administrative Review and Revocation in Part*, 51 Fed. Reg. 6775, 6775 (1986) (Ex. USA-29). The DOC has also revoked anti-dumping duty orders that covered products within “seasonal” industries. See, e.g., *Certain Fresh Cut Flowers From Colombia; Final Results of Antidumping Duty Administrative Review, and Notice of Revocation of Order (in Part)*, 59 Fed. Reg. 15159, 15167 (1994) (“*Flowers from Colombia*”) (Ex. USA-30); *Frozen Concentrated Orange Juice From Brazil; Final Results and Termination In Part Of Antidumping Duty Administrative Review; Revocation In Part of Antidumping Duty Order*, 56 Fed. Reg. 52510, 52511 (1991) (“*FCOJ From Brazil*”) (Ex. USA-31). In both instances, prices, costs, and sales vary widely over the course of the business or seasonal cycle.<sup>190</sup>

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<sup>186</sup> Case Brief of LG Semicon, Ex. B (Merrill Lynch) (Ex. USA-15).

<sup>187</sup> *Id.*

<sup>188</sup> Indeed, the DOC determined that Samsung did not dump DRAMs in the United States during the 1990-91 downturn.

<sup>189</sup> *Final Results Third Review*, 62 Fed. Reg. at 39814 & 39817 (Ex. USA-1). Later in the notice, the DOC expanded on this conclusion:

... in light of the market conditions during the downturn and the fact that the months actually examined during the POR did not include the lowest point in the downturn, we find that the existence of below-cost sales during May and June of 1996 suggests that the number of below-cost sales increased following the end of the third review period as the DRAM market worsened. As prices in the DRAM market fell, a substantial number of sales were made below cost. This pattern is suggestive of deteriorating market conditions that often give rise to dumping. *Id.* at 39817

<sup>190</sup> See, e.g., *Frozen Concentrated Orange Juice from Brazil; Final Determination of Sales at Less Than Fair Value*, 52 Fed. Reg. 8324, 8330 (1987) (respondent argued that FCOJ was a “seasonal product”) (Ex. USA-32); *FCOJ from Brazil*, 56 Fed. Reg. at 52511 (The DOC acknowledged that “sharp price fluctuations are frequent occurrences in the FCOJ industry”) (Ex. USA-31).

## 6. Certification Regarding Future Dumping

### (a) Claim raised by Korea

4.283 **Korea** claims that by imposing a revocation requirement on exporters to certify that they will not dump in the future the United States violates Article 11 of the AD Agreement. The following are Korea's arguments in support of this claim.

4.284 The United States has maintained the anti-dumping duties even though it has failed to meet the requirements of Paragraphs 1 and 2 of Article 11 for maintaining an order. The United States' violation does not end here, however. The United States refused Respondents' direct request to revoke the duties in spite of the fact that, in addition to three years without dumping (and thus no injury due to dumping), the two companies formally certified that they would not dump in the future, and agreed to the immediate reinstatement of the duties in the event that they resumed dumping.<sup>191</sup>

4.285 This is an abuse of discretion and violates US obligations under Article 11 of the AD Agreement. First, the limited authority granted Members under Article 11 to impose and maintain anti-dumping duties does not extend so far as to permit a Member to impose a certification requirement for revocation.

4.286 Second, the certification requirement of the US revocation regime<sup>192</sup> requires a Respondent to forgo its right under Paragraph 2 of Article 11 to an injury finding. If the DOC concludes that the Respondent has resumed dumping, the US Government does not conduct any injury analysis, but simply reinstates its collection of deposits or duties. This violates Paragraph 2 of Article 11 of the AD Agreement, which requires Members to impose duties only where dumping exists and is causing injury and obliges Members to conduct investigations of dumping and injury before imposing (or maintaining) any duty.

4.287 Far from complying with Article 11, the US regime is so biased that even where, as here, the responding companies have not dumped for three years *and* have agreed to allow the US Government to re-impose the duties on a moment's notice, the United States nonetheless refused to revoke the duties. Moreover, before it will even consider revocation, the US regime requires a Respondent to forgo rights granted under Article 11. These are violations of Article 11 of the AD Agreement.

### (b) Response by the United States

4.288 The following are the **United States'** arguments in response to Korea's claim:

4.289 None of the parties involved in this dispute, including Korea, deny that Respondents had several options under United States law when it came to revocation of the anti-dumping duty order on *DRAMs from Korea*. For example, they could have pursued a "changed circumstances" review before the DOC and/or the ITC pursuant to section 751(b) of the Act.<sup>193</sup> Either or both of these options could have led to the revocation of the order. Instead, Respondents chose to proceed under section 353.25(a) of the DOC's regulations.

4.290 One of the criteria the DOC is required to consider when deciding whether to revoke an anti-dumping order under section 353.25 is whether the Respondents at issue have "agree[d] in writing to their immediate reinstatement in the order ... if the Secretary concludes under § 353.22(f) [of the DOC's regulations] that the producer or reseller, subsequent to the revocation, sold the merchandise at

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<sup>191</sup> See 62 Fed. Reg. 39809 (24 July 1997) (Ex. ROK-3).

<sup>192</sup> 19 C.F.R. § 353.25(a)(2)(iii) (1996).

<sup>193</sup> Section 751(d) of the Act provides that an order may be revoked following a "changed circumstances" review pursuant to section 751(b) of the Act. 19 U.S.C. § 1675(d)(1) (1997) (Ex. USA-19).

less than foreign market value.”<sup>194</sup> In the instant case, Hyundai and LG Semicon voluntarily submitted the appropriate certifications,<sup>195</sup> which were, in turn, accepted by the DOC.

4.291 Before this Panel, Korea argues that Article 11 does not “permit a Member to impose a certification requirement for revocation.” According to Korea, the certification provided for in section 353.25 of the DOC’s regulations is an “abuse of discretion” because it allows the United States to impose duties “on a moment’s notice” without a new finding of injury. For the following reasons, Korea’s comments lack merit.

4.292 In the nearly twenty years since section 353.25 has been in existence (in one form or another), the DOC has never used the certification provision to reinstate an anti-dumping order. Hence, Korea’s sweeping declarations about “bias” and an “abuse of discretion” lack any foundation in fact. These claims also ignore the principle, that discretionary legislation which permits, but does not require, administrative agencies to promulgate WTO-inconsistent regulations, does not, as such, violate GATT 1994 or any of the covered agreements.<sup>196</sup> A complaining party must show that the agency actually took WTO-inconsistent action.<sup>197</sup> In the instant case, that proof is lacking.

4.293 Secondly, Korea ignores the explicit language in section 353.25 which requires a finding of dumping under section 353.22(f) of the DOC’s regulations before reinstatement may occur. Paragraph (f) in section 353.22 describes the standards and procedures associated with a changed circumstances review pursuant to section 751(b) of the Act.<sup>198</sup> Thus, far from permitting duties to be re-imposed “on a moment’s notice,” the DOC’s regulations prescribe a review on the record in accordance with the United States’ established anti-dumping methodology.

4.294 Finally, Korea argues that the certification provided for in section 353.25 of the DOC’s regulations is contrary to Article 11 because paragraph 2 requires Members to “conduct investigations of dumping and injury before imposing (or maintaining) any duty.” In point of fact, the obligation to conduct investigations of dumping and injury before imposing (or maintaining) an anti-dumping duty is found in Articles 1 and 5 of the AD Agreement. Article 11 says nothing about conducting dumping or injury *investigations*.

4.295 More importantly, Article 11.2 establishes a broad based standard under which revocation is warranted if national investigating authorities determine that an order is no longer “necessary to offset dumping.” Article 11 does not prescribe the specific factors that an investigating authority must consider when determining whether anti-dumping duties are “warranted.” It also does not prescribe the specific procedural steps that must be followed when conducting a review under Article 11.2. Within this framework, the certification provision in the DOC’s regulations is a permissible exercise of the United States’ legitimate interest in ensuring that relief to those domestic industries that have been adversely affected by dumping is not withdrawn earlier than is “necessary.”

4.296 The **United States**, in response to a question from the Panel,<sup>199</sup> further argued as follows:

4.297 Section 353.25(a) conditions the reinstatement of duties upon a finding of dumping under section 353.22(f) of the DOC’s regulations. Section 353.22(f) sets forth in full the rights and obligations attendant to a review under section 751(b) of the Act (*i.e.*, a “changed circumstances”

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<sup>194</sup> 19 C.F.R. § 353.25(a)(2) (1997) (Ex. USA-24).

<sup>195</sup> *Final Results Third Review*, 62 Fed. Reg. at 39810 (Ex. USA-1).

<sup>196</sup> See generally GATT, Analytical Index: Guide to GATT Law and Practice, Updated 6<sup>th</sup> Edition (1995), 645-48.

<sup>197</sup> *Id.*

<sup>198</sup> 19 C.F.R. § 353.22(f) (1997) (Ex. USA-24).

<sup>199</sup> The Panel recalls that the question was: "Could the United States explain the purpose of the certification requirement, whereby respondents agree to their immediate reinstatement in an anti-dumping order if they dump subsequent to revocation. If respondents agree to their immediate reinstatement in the order, why is it necessary to determine whether or not it is 'not likely' that respondents will dump in the future?"



review). Among the rights and obligations contained in section 353.22(f) is the opportunity for “notice and comment.” In other words, section 353.22(f) guarantees to every interested party, *inter alia*, the right to review and comment upon the DOC’s determination. This process, from start to finish, typically takes between six and nine months to complete. If one adds to this the time between revocation (or “termination”) of the anti-dumping duty order and the initiation of a review pursuant to the reinstatement provision in section 353.25(a), a year or more may have passed before duties are once again applied to the Respondent that resumed dumping merchandise subject to the order.

4.298 The “not likely” criterion performs, therefore, an important function. It seeks to provide some assurance to the DOC that the Respondent which has stopped dumping for at least three years (section 353.25(a)(2)(i)), and agreed to reinstatement in the order if it resumes dumping (section 353.25(a)(2)(iii)), will not dump during the period immediately after revocation (section 353.25(a)(2)(ii)). It is not a perfect system. No investigating authority, including the DOC, can ever be completely certain that an exporter will not resume injurious dumping the minute an order is lifted. However, it is a “permissible” approach, within the meaning of Article 17.6(ii) of the AD Agreement, which seeks to ensure that the anti-dumping relief obtained by the injured domestic industry is terminated only when it is no longer warranted.<sup>200</sup>

## 7. Need for Injury Finding

### (a) Claim raised by Korea

4.299 **Korea** claims that by failing to initiate *ex officio* an injury review where evidence showed that it was warranted the United States violates Article 11 of the AD Agreement. The following are Korea’s arguments in support of this claim:

4.300 Sales at less than normal value (dumping), alone, are not prohibited by the WTO agreements; rather, the WTO agreements prohibit only dumping that is causing injury.<sup>201</sup> A Member must establish that a Respondent is dumping and also that the dumping is causing injury before it can impose or maintain a duty.<sup>202</sup> Thus, even assuming for the sake of argument that the DOC’s finding that renewed dumping was likely was correct (and that the DOC’s imposition of the various criteria was permissible), the US Government failed to make any determination that dumping which is *causing injury* was likely.

4.301 The provisions of the AD Agreement establish three requirements on Members that would impose or maintain a duty: dumping, injury and causation. First, the Member must establish that a product is being *dumped*, i.e., “introduced into [its] commerce . . . at less than its normal value.”<sup>203</sup> The methodology for establishing dumping is set out in Article 2. Second, the Member must establish that its domestic industry is *materially injured*. The methodology for establishing injury is set out in Article 3. Finally, the Member must establish that the dumping is *causing* the material injury. Guidelines for establishing causation are set forth in Article 3.5. Absent any one of these three elements, a Member shall not impose or maintain an anti-dumping duty.

4.302 In regard to maintaining a duty, Paragraph 2 of Article 11 of the AD Agreement requires a Member, on its own initiative, to conduct a review of injury to the domestic industry (as well as of dumping) “where warranted.” According to the first sentence of Paragraph 2:

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<sup>200</sup> Moreover, the DOC has never reinstated an anti-dumping order pursuant to section 353.25(a)(iii) of its regulations. Therefore, as a practical matter, the “not likely” criterion and the reinstatement requirement are not redundant.

<sup>201</sup> See General Agreement, Article VI; AD Agreement, Articles 11:1 and 11:2. See also *United States-Anti-Dumping Duties on Imports of Stainless Steel Plate from Sweden* (24 February 1994), ADP/117, para. 231 (see also para. 232) (unadopted).

<sup>202</sup> *Id.*

<sup>203</sup> AD Agreement, Article 2:1.

The authorities shall review the need for the continued imposition of the duty, where warranted, on their own initiative . . .<sup>204</sup>

According to the third sentence of Paragraph 2:

If, as a result of the review under this paragraph, the authorities determine that the anti-dumping duty is no longer warranted, it shall be terminated immediately.

4.303 In *DRAMs from Korea*, circumstances clearly “warranted” an injury review by the US Government. For three consecutive years, the US Government, itself, had found that no dumping existed. The logical consequence of this finding is that no injury caused by dumping could have occurred during this same three-year period--if there is no dumping, there is no injury and, of course, the duty is not necessary. But, even if the authorities had been justified in concluding that a resumption of dumping was likely, they made no determination as to whether a resumption of injury--after three years of no injury--was likely. After concluding that for three years no injury was occurring as a result of dumping, the authorities had an obligation on their own initiative (it was “warranted”) to investigate whether injury as well as dumping would be likely to resume if the order were revoked. Paragraph 2 of Article 11 required a separate determination regarding injury and the US Government failed to comply with this requirement and thereby violated Article 11.

4.304 Furthermore, the ITC, the US agency that conducts injury investigations, does not even have the authority to conduct such a review so as to be able to meet its obligation under Paragraph 2 of Article 11. Quite simply, the United States has failed to implement this requirement of Paragraph 2 of Article 11 and this, too, is a violation of the AD Agreement.

4.305 **Korea**, in response to a question from the Panel,<sup>205</sup> further argued as follows:

4.306 The Korean Government’s understanding is that the Respondents requested revocation under Section 353.25(a)(2) and not Section 207.45(a) for a number of reasons. In the United States, after the original investigation is complete, the procedure shifts away from the ITC. The DOC is the entity that conducts the administrative reviews. Having been found not to be dumping by the Department for three consecutive reviews, covering three-and-one-half years, the Respondents presumably thought that revocation pursuant to the DOC’s regulation was basically a formality, as it is in most cases.

4.307 In any case, as the title of Section 353.25(a) is “Revocation based on absence of dumping,” this regulation is the more appropriate regulation. The ITC, of course, does not have a regulation providing for revocation based upon an absence of dumping. Instead, Section 207.45(a) is the ITC’s “changed circumstances” review regulation--it presumes that dumping is occurring, but allows a respondent to demonstrate that market circumstances have changed such that the dumping no longer is causing injury. (The DOC also has a changed circumstances regulation, at Section 353.25(d).)

4.308 The United States suggests that the Respondents should have pursued a changed circumstances review at the DOC and/or the ITC. The United States thus continues to attempt to improperly burden the Respondents. The United States implies that the fact that they did not seek such a review somehow undermines Korea’s case. But this is not true. The DOC’s regulations provide specifically for “Revocation based on absence of dumping,” and, as Korea has demonstrated,

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<sup>204</sup> See also *United States-Anti-Dumping Duties on Imports of Stainless Steel Plate from Sweden* (24 February 1994), ADP/117, paras. 251-252 (unadopted).

<sup>205</sup> The Panel recalls that the question was: "At para. 4.4, Korea states that 'the United States...failed to conduct an injury review, which clearly was warranted in this case'. At para. 4.55, Korea states that Art. 11.2 'obliges Members to conduct investigations of dumping and injury before imposing (or maintaining) any duty'. Could Korea please explain why the respondents requested revocation under section 353.25(a)(2) of the DOC regulations, and why they did not request revocation under section 207.45(a) of the ITC regulations?"

even if that regulation complied with the AD Agreement (which it does not), the Respondents met its requirements and were denied revocation only because of bias and the Secretary of Commerce's unfettered discretion in these matters. The implication of the United States that, had Respondents requested changed circumstances reviews, the United States would have revoked the order, is baseless given the DOC's conduct in this case. Also, it is another attempt by the United States to shirk its Article 11 obligations to self-initiate where warranted.

4.309 Finally, in its response to Korea's claims that the United States improperly failed to initiate a changed circumstances injury review (or dumping review), which clearly was warranted, the United States apparently is attempting improperly to conflate two of the obligations of Article 11.2--the obligation to self-initiate where warranted and the obligation to provide for initiation upon request under certain circumstances. As stated above, the Government supposes that the companies did not request an ITC review because they understood that the ITC injury provision applies where a company is dumping, but nonetheless is seeking revocation on the basis that, due to "changed circumstances" in the market, the dumping no longer is injuring the domestic industry. Thus, this provision is not appropriate here. (Moreover, based on U.S. procedure, Respondents would have had no cause to do so until after the DOC denied revocation.)

4.310 The U.S. position on this point demonstrates, in general, the poverty of the U.S. position. In this case, what would the ITC have examined? Korea's argument is not changed circumstances but revocation based on no dumping and no injury caused by dumping. In this context, what is the relevance of a change in market conditions?

4.311 Also, the United States conveniently fails to note that its suggestion would have imposed on the Korean companies the burden of establishing "changed circumstances sufficient to warrant the institution of a review investigation." 19 C.F.R. § 207.45(a). In other words, simply to obtain a review that might, possibly, result in revocation, the companies would have had to meet a burden of proof that Article 11 does not allow a Member to assign to a company to obtain revocation itself. The companies then, of course, would have had to meet an even greater and more improper burden to obtain revocation. Thus, even the procedure for simply requesting an injury review under 19 C.F.R. 207.45(a) violates Article 11.2.

4.312 With this argument, the United States apparently has conceded that Korea is correct that the United States improperly places the burden of proof on the responding companies. Perhaps more importantly, under Article 11.2, the United States was required to self-initiate an injury investigation "where warranted," a standard that certainly was met here, where for over 3 years the Department found no dumping, and thus the injury finding from the original investigation was stale and no longer applicable.

4.313 **Korea**, in response to another question from the Panel,<sup>206</sup> also made the following arguments:

4.314 If the Department fails to revoke, the ITC must self-initiate, because three consecutive reviews of no dumping is the strongest possible evidence that, at the very least, the ITC's original finding of injury by reason of dumping is no longer valid and that an injury review is necessary.

(b) Response by the United States

4.315 The following are the **United States'** arguments in response to Korea's claim:

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<sup>206</sup> The Panel recalls that the question was: "Under Article 11.2 of the AD Agreement, investigating authorities are to 'review the need for the continued imposition of the duty, where warranted'. At para. 4.60 of its first submission, Korea asserts that the United States was required to self-initiate an injury review in this case. Does Korea argue that the ITC should self-initiate an injury review as soon as the DOC finds that respondents have not dumped for three consecutive years, or does Korea consider that additional conditions should also be met before the ITC must self-initiate? If so, what other conditions were met in the present case?"

4.316 Korea argues that the United States was obligated to conduct an “injury review” pursuant to Article 11.2 of the AD Agreement. According to Korea, an inquiry into whether a “resumption of injury ... was likely” was “warranted” because Respondents had gone three years without dumping. Korea also asserts that the United States lacks the ability to comply with Article 11.2 because the ITC lacks the authority under United States law to conduct this type of review. As with Korea’s other claims, these too fail.

4.317 First, the ITC’s authority to self-initiate a review of its injury determination is expressly provided for in section 751(b) of the Act<sup>207</sup> and section 207.45(c) of its regulations.<sup>208</sup> Secondly, Respondents never asked the ITC to exercise its authority in this regard. No one, including Korea, ever raised this issue until after the DOC issued the *Final Results Third Review*. As a result, this Panel lacks an adequate factual and legal record to review under Articles 17.5 and 17.6 of the AD Agreement. Lastly, as the complaining party, Korea bears the burden of coming forward with evidence to support its claim. To support its claim that a review of the injury question was “warranted,” Korea must present evidence which shows: (i) that injury to the domestic industry in the United States was not likely “to continue or recur if the duty were removed or varied,” and (ii) that the responsible investigating authority in the United States was in possession of this information a reasonable period of time before Korea instituted the present action.<sup>209</sup> Korea has done neither. All it has done is cite to the fact that Respondents were found not to be dumping during a three-year period when the order was in existence.<sup>210</sup>

4.318 The **United States**, in response to a question from the Panel,<sup>211</sup> further argued as follows:

4.319 A Member is required to self-initiate a review only “where warranted.” In this case, Korea has not asserted that anything, other than an absence of dumping for three years, indicated that an injury review was “warranted” within the meaning of Article 11.2.

4.320 Evidence that dumping has stopped does not, in and of itself, indicate that an injury review is “warranted” under Article 11.2. For one thing, a lack of current dumping does not necessarily indicate a change in the relevant market conditions. Rather, a Respondent may simply have changed its pricing practices in response to the issuance of the anti-dumping order or may even have ceased or curtailed its exports because of an inability to compete at a fairly traded price.

4.321 It also is not enough to claim, as Korea does, that injury has stopped subsequent to the issuance of an order. First of all, the AD Agreement recognizes that this may be the case in a particular situation; that is why Article 11.2 calls for evidence that the injury is not likely to “recur.” It also explains why the test turns on what will happen if the “duty were removed or varied.” In other words, the drafters of Article 11.2 assumed that in some, but not necessarily all cases, maintenance of the order will remedy injury.

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<sup>207</sup> 19 U.S.C. § 1675(b) (1997) (Ex. USA-19).

<sup>208</sup> 19 C.F.R. § 207.45(c) (1997) (Ex. USA-78).

<sup>209</sup> See AD Agreement, art. 11.2.

<sup>210</sup> Korea’s argument also glosses over an important fact. At the time the DOC initiated the challenged (third) administrative review in June of 1996, only one administrative review had been completed which revealed zero or *de minimis* margins for Respondents. See *First Review* 61 Fed. Reg. 20216 (Ex. USA-22). Presumably, Korea does not believe that a single year without dumping “warrants” a review of the injury issue.

<sup>211</sup> The Panel recalls that the question was: “The United States argues that the respondents never asked the ITC to ‘self-initiate’ a review of its injury determination, that Korea did not raise this issue until after the final results of the third administrative review were issued, and that, as a result, the Panel lacks an adequate factual and legal record to review under Articles 17.5 and 17.6 of the AD Agreement. Is it the view of the United States that the obligation of a Member to review the need for the continued imposition of an anti-dumping duty on its own initiative can only be challenged in WTO dispute settlement if such a ‘self-initiation’ comes in response to a request from an interested party?”

4.322 In short, a self-initiated review of injury is “warranted” within the meaning of Art. 11.2 when a Member is in possession of information which bears on what the condition of the industry would be after an anti-dumping order is “removed or varied.” Evidence limited exclusively to a Respondent’s pricing practices during the existence of the order misses the mark because it says next to nothing about the condition of the industry if the duty is removed or varied. Under section 751(b), interested parties also have the opportunity to *request* a review of the ITC’s injury determination.

(c) Rebuttal arguments made by Korea

4.323 **Korea** makes the following arguments in rebuttal to the United States responses:

4.324 The United States asserts that for a self-initiated review to be warranted:

Korea must present evidence which shows that injury to the domestic industry in the United States was not likely “to continue or recur if the duty were removed or varied.”

4.325 As this statement demonstrates, even in the context of the standard for simply initiating a self-initiated review, the United States seeks to impose on a Respondent the burden of “show[ing] that injury . . . was not likely to continue or recur . . .”

4.326 This is not a permissible interpretation of the requirement of Paragraph 2 of Article 11. Paragraph 2 does not allow a Member to impose on a Respondent a burden equal to proving that a duty should be revoked merely to obtain initiation of a self-initiated review.

4.327 A self-initiated review is just that--self-initiated. It is not initiated because a Respondent has made a certain showing--that is termed a “review upon request” in Paragraph 2. The two are quite distinct. The provision of a review upon request is contingent on an interested party having submitted “positive information substantiating the need for review.” The United States, however, would import this requirement from the “review upon request” provision to the self-initiated review provision. In doing so, it would completely undercut the reason for having a separate self-initiated review provision in the first place. Thus, the US “criticism” that “Respondents never asked the ITC to exercise its authority in this regard” misses the point entirely.

4.328 This is not the first time that the United States has sought to avoid its Article 11.2 responsibilities regarding injury reviews.<sup>212</sup> In *Swedish Stainless Steel Plate*, the panel concluded that the predecessor of Article 11.2 established two distinct sets of obligations regarding injury reviews--one set relating to self-initiated reviews and one set relating to reviews upon request.<sup>213</sup> Moreover, the panel found that, in the context of a self-initiated review, a Member cannot impose on the Respondent a burden drawn from thin air in order to protect the Member’s market. Rather, the Member must self-initiate an injury review, where warranted, including in situations where the data warranting the review are possessed only by the Member.<sup>214</sup> As the panel aptly noted:

[T]here could be situations in which information indicating that initiation of a review was warranted was more readily available to investigating authorities than to interested parties.<sup>215</sup>

4.329 In sum, the United States imports the burden of proof from “review upon request” into a self-initiated review, in an attempt to deflect Korea’s demonstration in its first submission that the United States violated the Article 11.2 obligation to self-initiate an injury review.

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<sup>212</sup> See, e.g., *United States -- Anti-Dumping Duties on Imports of Stainless Steel Plate from Sweden* (24 February 1994), ADP/117, paras. 247-52 (unadopted).

<sup>213</sup> *Id.* at para. 251.

<sup>214</sup> *Id.*

<sup>215</sup> *Id.*

4.330 Self-initiation by the United States of an injury review clearly was warranted in this case. Apart from any evidence which the United States had regarding the state of the US market and the impact of Japan- and EC-based competitors on the domestic DRAM industry, Korea demonstrated to the US Government for a period of more than three consecutive years that it was not dumping. Three-and-one-half years of no dumping means three-and-one-half years of no injury and three-and-one-half years of no causation. Thus, for over three years, Korea demonstrated that not one of the three prerequisites for imposing an anti-dumping duty was met. What, possibly, could the ITC have examined? There was no dumping. Therefore, even if there was injury, there was no causation.<sup>216</sup>

(d) Rebuttal arguments made by the United States

4.331 The **United States** makes the following arguments in rebuttal:

4.332 Korea has not cited to any evidence which “warranted” a review under Article 11.2 of whether injury to the US DRAM industry would be likely to continue or recur if the duty were removed or varied. All Korea has done is cite to the Respondents’ lack of dumping during a three-year period. However, as the United States discussed during the Panel meeting, evidence limited exclusively to a Respondent’s pricing practices during the existence of an order says next to nothing about the condition of the industry if the duty is “removed or varied.”<sup>217</sup>

4.333 Nor is it correct that the ITC lacks the authority to initiate, on its own initiative, an injury review if there are no current dumping margins. Briefly, the ITC has previously conducted such reviews (pursuant to section 751(b) of the Act) both when the most recent dumping margins have been zero, *see Electric Golf Carts from Poland*, Inv. No. 751-TA-1, USITC Pub. 1069 (June 1980) (Ex. USA-86), and when there are current dumping margins, *see Salmon Gill Fish Netting of Manmade Fiber from Japan*, Inv. No. 751-TA-7, USITC Pub. 1387 (June 1983) (Ex. USA-87). That the ITC’s conduct of a section 751(b) review is dependent on neither the presence or absence of a current dumping margin is illustrated by the pending injury review concerning *Titanium Sponge from Japan, Kazakstan, Russia, and Ukraine*, Inv. No. 751-TA-17-20, in which the imports from Japan have been subject to a zero duty rate for the past three years, but current duties are in effect with respect to imports from the other three subject countries.

4.334 Next, Korea accuses the United States of conflating the standard for initiating reviews upon request with the standard for self-initiated reviews. To buttress its argument, though, Korea misconstrues the statement made by the United States at the first meeting of the Panel. The United States was not referring to an evidentiary showing applicable to *respondents* before the *investigating authorities* in the United States. Rather, the United States was discussing the showing that *Korea*, before this *Panel*, must make in order to establish that a self-initiated injury review was “warranted” within the meaning of Article 11.2.

## 8. Respondents Met the Criteria for Revocation

(a) Submission by Korea

4.335 **Korea** submits to the Panel that the record evidence supported revocation, even applying the US scheme (which it deems improper), and that in support for its failure to revoke the United States

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<sup>216</sup> The United States cites as “important” the fact that at the time the DOC initiated the Third Review, only one administrative review had been completed. But, Korea’s injury argument, does not depend upon all of the reviews having been completed at the *start* of the Third Review. Rather, Korea’s argument is based upon the fact that the United States itself, *after* completing three reviews, effectively determined that there had been 3.5 years of no injury, and did not determine that a recurrence of injury was likely (even assuming that a recurrence of dumping was likely), as required by Paragraph 2 of Article 11.

<sup>217</sup> See AD Agreement, art. 11.2.

mischaracterized the facts on the administrative record. Korea presents the following arguments in support of this submission:

(i) *The Record Evidence Supported Revocation, Even Applying the US Scheme.*

4.336 Even assuming for the sake of argument, that the US revocation scheme complies with the WTO agreements. Korea will demonstrate once again that the Panel should find that the DOC's establishment of the facts was improper and that its evaluation of the facts was biased and not objective.

4.337 In this regard paragraph 56 of the US first submission states:

56. In its rebuttal submission, Korea will undoubtedly argue that one of the ways the market could have "changed" at this time was for the better. It will cite passages in the administrative record where various investment bankers and industry experts predict higher prices and better times for the DRAM industry in 1997. What it will ignore, is roughly the same number of experts who were not sure which way the market was headed and who openly expressed concerns about its future.<sup>218</sup>

4.338 In this passage, the United States concedes that the import of the record evidence regarding the market was at least 50-50 in support of revocation.<sup>219</sup> In other words, at least half the record evidence supported the conclusion that the market was getting healthier and, in the words of the United States, "roughly the same number of experts . . . were not sure which way the market was headed and . . . openly expressed concern about its future." So, actually, 50 percent of the experts said the market was getting healthier and 50 percent said they were not sure which way the market would go. The United States therefore concedes that the split is not 50-50, but that 50 percent predicted a recovery and 50 percent were not sure and, thus, the evidence is strongly in favor of recovery and revocation. Thus, even if these forecasts were the only evidence on the record, it could not support a "no likelihood/not likely" finding even under the DOC's own regulations.

4.339 But this was not the only evidence on the record. During the 18-19 June 1998 Panel meeting, the United States stated that three consecutive reviews of no dumping (the first criterion) and certification not to dump and to submit to reinstatement of the order (the third criterion) also bore on the "not likely" issue (the second criterion).<sup>220</sup>

4.340 So, the United States admits that the record evidence in favor of a finding of "not likely" and revocation was, at a minimum:

1. three consecutive reviews (three-and-one-half years) of no dumping by Respondents;
2. a certification by Respondents that they would not dump in the future and would submit to reinstatement if they were to do so; and
3. the considered opinion of at least 50 percent of the experts on the record that the DRAM market would continue to strengthen or, in the words of the

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<sup>218</sup> The Panel notes that this argument is set forth in Paragraph 4.412 of this report.

<sup>219</sup> Elsewhere, the United States concedes that a recovery was underway, noting its opinion that the recovery "was, at best, bumpy."

<sup>220</sup> The United States thus effectively concedes that it is in violation of its GATT Article X obligations, because the relevant US regulation (19 C.F.R. § 353.25(a)) does not reflect this methodology. Korea also notes that the US imposition of the certification and "no likelihood/not likely" requirements is incoherent. To test the likelihood of future dumping after obtaining a certification makes no sense--the certification is legally binding on the Respondents and, thus, is definitive, but the likelihood test is based largely on speculation.

United States, that the future would bring “higher prices and better times for the DRAM industry.”<sup>221</sup>

And, in favor of rejecting revocation, the United States points to:

1. a number of experts “who were not sure which way the market was headed and who openly expressed concern”; and
2. a fiction that the companies had dumped during the “last downturn” (in the original investigation) and, thus, would do so again.<sup>222</sup>

4.341 This summary of the record evidence and US admissions demonstrate that there was not a 50-50 split in the record evidence; to the contrary, the record evidence was and is strongly in Respondents’ favor. Thus, even accepting all of the United States’ assertions, the United States’ basic argument must fall.

4.342 The AD Agreement does not permit the United States to maintain a definitive duty where only a minimal portion of the evidence, at most, supports doing so. In this case, the Korean producers overwhelmingly demonstrated, through their past conduct, through their certification and through expert economic opinion and analysis, that they would not resume dumping if the DOC were to revoke the order. By refusing to revoke, the United States has abused the limited right to impose and maintain anti-dumping remedies granted by the AD Agreement.

4.343 Moreover, the language chosen by the United States to discuss its findings indicates its lack of certainty and shows that it was speculating as to what was “likely” or “not likely” to occur. For example, in the Final Results of the Third Review, the DOC discusses the 1996 downturn and concludes that revocation should be denied, in part, because the pricing pattern it saw was “suggestive of deteriorating market conditions that often give rise to dumping.”<sup>223</sup> The DOC did not find that the pricing pattern “showed” or even “indicated” deteriorating conditions that, *e.g.*, always give rise to dumping. This type of speculation appears throughout the Final Results and, also, the first US submission. For example, according to the United States:

The agency engaged in a painstaking analysis of voluminous data on the administrative record and only then did it determine that “dumping may have taken place during the 1996 downturn.

First, how “painstaking” could an analysis be that found only that dumping “may” have occurred? In any case, even if the analysis was painstaking, that is not the point. The DOC did not make the finding Article 11 requires. Second, each of the DOC’s stated rationales for failing to revoke are speculative: “may,” “suggestive,” “often.”

4.344 This, Korea submits, is not a permissible way to regulate dumping. The United States clearly has violated its WTO obligations under Article 11 of the AD Agreement and Article VI of the General Agreement.

(ii) *The United States Has Mischaracterized the Facts on the Administrative Record.*

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<sup>221</sup> There were other facts on the record supporting revocation, including the fact that the Korean producers had weathered two downturns without dumping.

<sup>222</sup> The United States has misstated a number of facts, including the condition of the market during the First and Third Reviews and Respondents’ production cutbacks, in order to try to buttress its failure to revoke.

<sup>223</sup> See *DRAMs from Korea*, 62 Fed. Reg. 39809, 39817 (24 July 1994) (emphasis added by Korea) (Exh. ROK 3).



4.345 Korea asks the Panel to examine four core facts in detail should it conclude that the United States has not otherwise violated Article 11. The following are discussed in turn:

- the United States continues to ignore the downturns that occurred during the First and Third Review Periods;
- the United States ignores the fact that although the 1996 downturn was severe, prices already had begun to recover in 1997;
- the United States selected and analyzed record data in an improper, biased and not objective fashion to avoid the implications of the 1996-1997 recovery; and
- Respondents did, in fact, cut production, but while the United States conveniently recognized Respondents' production cutbacks for one purpose, it then ignored them when it refused to revoke.

(1) *The United States Continues to Ignore the Downturns That Occurred During the First and Third Review Periods.*

4.346 The United States refused to recognize that the DRAM industry suffered downturns during 1993 and during 1995. The record evidence cited by the United States in its first submission demonstrates that industry downturns occurred during the second half of 1993 and during the latter part of 1995 and into early 1996. These periods were covered by the First and Third Administrative Reviews.

4.347 Korea has never argued, as the United States implies, that the semiconductor industry did not experience net positive growth from the end of 1993 through the middle of 1995, *i.e.*, Korea agrees that the book-to-bill ratio indicated that the market was larger and more robust in the middle of 1995 than it was at the end of 1993. However, Korea has demonstrated that a closer look at the ratios shows that downturns in the industry occurred during the second half of 1993 and from the latter part of 1995 into the second half of 1996, periods that fell within the First and Third Administrative Reviews, respectively.

4.348 The book-to-bill ratio was produced for years by the US Semiconductor Industry Association (SIA) and was universally accepted as an indicator of DRAM market conditions. It was relied upon by industry leaders and analysts studying market trends. SIA abandoned the statistic, not because it was inaccurate, but because: (i) it reflected only the conditions of the US market--the key market in this case (and the DRAM market increasingly was perceived as a global market); and, more importantly, (ii) it was thought to be having an unduly strong and negative impact on the prices of stocks in the industry.<sup>224</sup>

4.349 In the Final Results of the Third Administrative Review, the United States noted that "[t]he DRAM industry is highly cyclical in nature with periods of sharp upturn and downturn in market prices."<sup>225</sup> But, the United States attempts to cloud the cyclicity of the DRAM market by quoting completely out of context a passage from Dr. Flamm's economic analysis regarding the alleged stability of prices during 1993, 1994 and 1995. In fact, the study directly contradicts the US position.

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<sup>224</sup> See "Bye-Bye B:B Oct's Rebound," *Electronic Buyer's News*, 18 November 1996 (Ex. ROK-86). (The *Electronic Buyer's News* article not only demonstrates that market analysts widely accepted the book-to-bill ratio as an accurate indicator of market conditions and shows the real reasons SIA abandoned it, but also shows that the end of 1996 coincided with an upturn in the market.)

<sup>225</sup> See *DRAMs from Korea*, 62 Fed. Reg. 39809, 39810 (24 July 1994) (Ex. ROK-3).

4.350 Dr. Flamm's study rests on a quarter-by-quarter analysis of annual pricing data for 1993 through 1996.<sup>226</sup> Dr. Flamm concludes that from the fourth quarter of 1992 through the first quarter of 1996, prices for DRAMs declined in 6 out of 14 quarters (or nearly half of the time). Of course, during this time, the DOC found that neither Hyundai nor LG Semicon were dumping. This led Dr. Flamm to conclude that "even in an environment of falling prices (and falling by quite a lot in the first half of 1996) [Respondent] was not dumping, as verified by the DOC."<sup>227</sup>

4.351 Moreover, these quarterly pricing data fully support the downturns indicated in the book-to-bill ratios. Thus, regardless of whether the DRAM industry experienced overall growth between 1993 and 1995, that same time period also was marked by at least two clear and distinguishable downturns during which the DOC found that LG Semicon and Hyundai were not dumping.

4.352 The United States also relies on a Merrill Lynch report to claim that "Korea overlooks the fact that a downturn in the market may not manifest itself for many months following a low point in the book-to-bill ratio." But the United States ignores the fact that the same Merrill Lynch report uses quarterly sales data that demonstrate that downturns occurred in 1993 and 1995.

4.353 All of the relevant data--including those cited by the United States in this proceeding--demonstrate that downturns occurred during periods covered by the First and Third Administrative Reviews. The DOC found Respondents did not dump during these periods. So, contrary to the DOC's assertion in this proceeding, Respondents did demonstrate that they do not dump during downturns.

(2) *The United States Ignores the Fact That Although the 1996 Downturn Was Severe, Prices Already Had Begun to Recover in 1997.*

4.354 The 1996 downturn was more severe than the 1991 downturn. However, the 1996 downturn began in late 1995 (during the Third Review period) and Respondents showed that the market conditions improved in early 1997.

4.355 The United States attempts to extrapolate from the 1991 downturn to the 1996 downturn. However, the United States would have the Panel ignore, first, that although some analysts remained uncertain or hesitant about the future of the DRAM market in 1997, many analysts confidently asserted that because, unlike the 1991 downturn, the 1996 downturn did not occur during an economic recession in the United States, but, to the contrary, occurred during an unprecedented period of growth, the recovery would be swifter and well underway by 1997.

4.356 Second, the United States would have the Panel ignore that, in any event, because the 1996 downturn began at the end of 1995, it was covered by the Third Review, during which the United States found that LG Semicon and Hyundai were not dumping. The United States can not have it both ways. If it insists that the end of 1996 was characterized as a downturn, it also must acknowledge that the Third Review covered a downturn and, thus, that the DOC had found that Respondents did not dump during the most recent downturn.

(3) *The United States Selected and Analyzed Record Data in an Improper, Biased and Not Objective Fashion to Avoid the Implications of the 1996-1997 Recovery.*

4.357 In discussing DRAM market conditions from 1996 and projecting them into 1997, the United States continued its pattern of selectively choosing and omitting portions of the administrative record in order to create a biased and inaccurately negative market assessment. For example, the United States quotes out of context a passage from a De Dios & Associates report, which states that in

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<sup>226</sup> See Dr. Kenneth Flamm, Economic Analysis of 16 Megabit DRAM Costs and Pricing: Projections for 1997 and 1998 (Revised and Supplemented), April 1997, Figure 3 (Ex. ROK-35, Attachment 2).

<sup>227</sup> *Id.* at page 6.

regard to the recovery in the DRAM market "[w]hat we have here is a temporary situation that will change."

4.358 When read in context, however, the passage has an altogether different meaning. In particular, it does not support, but, in fact, contradicts the US position:

What we have here is a temporary situation that will change. But change does not necessarily mean a plunge in prices similar to last year's behaviour. Many other analysts are too quick to offer this as the only other alternative. How it will change requires a deeper understanding of the market forces that affect price.<sup>228</sup>

The De Dios analysis then goes on to consider the impact of various market forces, concluding that prices should continue to increase.<sup>229</sup>

4.359 In short, the United States has selected fragments from the De Dios and other analyses. A careful reading of those analyses, however, reveals that the vast majority of the evidence on the record indicated the market had strengthened and was continuing to strengthen.<sup>230</sup>

4.360 Finally, the administrative record overwhelmingly supports the fact that the predicted recovery for 1997 would not be due entirely to reports of cutbacks in production by Korean producers. Again, the United States misleadingly cites to the De Dios analysis. But, one need only review the multiple analyses on the administrative record, including the De Dios analysis, to understand that many market forces were driving the market upward. These factors included, in addition to the strong US economy and many other factors, increases in the production and memory content of PCs.<sup>231</sup>

(4) *Respondents Did, in Fact, Cut Production, But While the United States Conveniently Recognized Respondents' Production Cutbacks for One Purpose, It Then Ignored Them When It Refused to Revoke.*

4.361 According to the United States, "a careful reading of the administrative record casts a large shadow of doubt over the 'production cutbacks' announced by the Korean producers."<sup>232</sup> Actually, a "careful reading" of the record reveals that eight days before issuing its Final Results, the DOC acknowledged that Respondents had, indeed, cut production. In order to undercut Dr. Flamm's study so as to provide a rationale for rejecting its conclusions, the DOC stated in its internal decision memorandum, "in light of the announced cutbacks in DRAM production, and the recent

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<sup>228</sup> See Ex. ROK-35, Attachment 5 at 3 (emphasis added by Korea).

<sup>229</sup> *Id.* at 3-5.

<sup>230</sup> According to the US First Submission, the DOC determined that: (i) contract prices follow the direction of spot market prices; and (ii) Respondents' contract prices fell below spot market prices in February 1997. These assertions are not supported. Moreover, though the United States implies that they are correct, for the reasons presented below, they are not. First, contract and spot prices obviously correlate. But this most certainly does not mean that contract prices fell below fair value (or fell faster than costs). Second, unrebutted evidence on the record shows that the gap between Respondent's contract and spot market prices was quite large during the period of review and remained large. Finally, the United States claims that the DOC determined that "contract and spot market prices were rapidly trending below Respondents' reported costs of production throughout the period that immediately followed the third administrative review." Again, the DOC's determination is incorrect. Even worse, the DOC's sole support for this determination was a chart that showed that Respondent's prices actually remained well above its falling costs of production.

<sup>231</sup> See Case Brief of Hyundai, Case No. A-580-812 (21 April 1997), at Attachments 5, 12 and 13 (Ex. ROK-35).

<sup>232</sup> The Panel notes that this argument is set forth in Paragraph 4.422 of this report.

announcements of actual factory shutdowns, it is difficult to accept the [confidential data omitted] scenario."<sup>233</sup>

4.362 Now the United States argues before this Panel, as it did in the Final Results, that Respondents did not cut production. But, if the administrative record allegedly proves that Respondents did not reduce production, why did the DOC acknowledge the opposite just a few days before issuing the Final Results? The United States apparently reached the conclusion that cutbacks had occurred to criticize and reject the results of the Flamm study, and then, eight days later, claimed that cutbacks had not occurred in order to create a negative picture of the DRAM market and to reject revocation. The Panel should not accept this transparently biased and not objective assessment of the record evidence.

(b) Response by the United States

4.363 The **United States** made the following arguments in response to Korea's submission:

4.364 DRAMs are a type of semiconductor.<sup>234</sup> They are used in computers and many other electronic devices that require high-density, random access memory.<sup>235</sup>

4.365 The first commercial shipment of a DRAM occurred in 1971.<sup>236</sup> Back then, the technology was primarily 16 kilobits ("K"). By 1990, the technology was transitioning from its fifth generation (4 megabits ("Meg")) to its sixth (16 Meg).<sup>237</sup>

4.366 As technology and industry standards have matured, DRAMs have become a commodity product.<sup>238</sup> Thus, customers tend to distinguish between products primarily on the basis of price. During significant downturns in the market, the pressure on prices can become acute, forcing producers/resellers to price aggressively in order to stay competitive and maintain their customer base.<sup>239</sup> An examination of historical data on DRAM pricing reveals that foreign producers often dump (*i.e.*, sell at "less than normal value" within the meaning of the AD Agreement) during significant market downturns. For example, various producers were found to have dumped DRAMs in the United States during the dramatic downturn that occurred in the mid-1980s.<sup>240</sup>

4.367 The DRAM industry experienced another, although milder, downturn in 1990 which lasted well into 1991.<sup>241</sup> Faced with what it believed were injurious imports at unfair prices, Micron, a U.S.

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<sup>233</sup> See Analysis of Data, *DRAMs from Korea*, US DOC of Commerce, Case No. A-580-812 (16 July 1997) (Ex. ROK-87).

<sup>234</sup> *Final Results Third Review*, 62 Fed. Reg. at 39809 (Ex. USA-1)

<sup>235</sup> *Id.*

<sup>236</sup> Case Brief of Hyundai, 21 Apr. 1997, Ex. 2 at 4 (Ex. USA-12).

<sup>237</sup> Case Brief of Hyundai, Ex. 2 at 16-17.

<sup>238</sup> *Final Results Third Review*, 62 Fed. Reg. at 39810 (Ex. USA-1).

<sup>239</sup> *Final Results Third Review*, 62 Fed. Reg. at 39810 (Ex. USA-1); *see also* Charts from Agency Analyst to File at 34-35 (hereinafter "*Prelim. Analysis*") (Ex. USA-13). During upturns in the market, prices stabilize or rise. The length and intensity of these business "cycles" is influenced by a variety of factors, including customer demand, overall economic growth, and technological developments. A similar phenomenon occurs in the agricultural industry where "seasonal" cycles are influenced by a variety of factors, including weather and crop disease. *See* Letter from LG Semicon Co., Ltd. and LG Semicon America, Inc. to Secretary of Commerce, 15 Jan. 1997, at 13-14 (hereinafter "LGS Ltr.-2") (Ex. USA-14)

Korea concedes that DRAMs is a cyclical industry. The "cyclicality" of the industry was also a point repeatedly made by the respondents before the DOC in the underlying administrative proceeding. *See, e.g.*, Case Brief of LG Semicon, 21 Apr. 1997, at 16-17 (Ex. USA-15).

<sup>240</sup> *See, e.g.*, *64K Dynamic Random Access Memory Components (64K DRAM's) From Japan: Final Determination of Sales at Less Than Fair Value*, 51 Fed. Reg. 15943 (1986) (Ex. USA-16); Case Brief of LG Semicon, Ex. B (VLSI Research) (Ex. USA-15).

<sup>241</sup> *Prelim. Analysis* at 27 & 34 (Ex. USA-13); Case Brief of LG Semicon, Ex. B (Merrill Lynch) (Ex. USA-15).

manufacturer of DRAMs, filed an anti-dumping petition on behalf of the U.S. industry covering imports of DRAMs from Korea. The petition, which was properly filed with the DOC and the Commission, alleged that Korean manufacturers were dumping DRAMs in the United States.<sup>242</sup> The petition also contained information which indicated that unfairly priced imports from Korea were causing material injury to the DRAM industry in the United States.<sup>243</sup>

4.368 Both the ITC and the DOC conducted investigations into the allegations presented by Micron. Hyundai and LG Semicon participated in those investigations.<sup>244</sup> The DOC's investigation examined a six-month period in accordance with section 353.42(b)(1) of its regulations (19 C.F.R. § 353.42(b)(1) (1991)) which began on 1 November 1991.<sup>245</sup>

4.369 In its final determination published on 23 March 1993, the DOC found that Hyundai and LG Semicon had been making less-than-normal-value sales in the United States. For Hyundai, the DOC determined a dumping margin of 11.16 percent.<sup>246</sup> For LG Semicon, the margin was 4.97 percent.<sup>247</sup> An affirmative injury determination by the ITC led to the publication of an anti-dumping duty order on 10 May 1993.<sup>248</sup>

4.370 In 1994 and 1995, during the anniversary months of the order, the DOC received requests from the respondents to conduct administrative reviews of the order in accordance with section 751(a) of the Tariff Act of 1930, as amended ("the Act").<sup>249</sup> The request made in 1994 covered sales between 1 May 1993 and 30 April 1994. The request made in 1995 covered the twelve months ending 1 May 1995.

4.371 Contrary to Korea's assertion, the 1993-1995 period was a good one for DRAM producers. "DRAMs prices stabilized in mid-1992, and the industry experienced growth until late 1995."<sup>250</sup> Some industry observers have even described 1995 as "incredibl[y]" good.<sup>251</sup> Indeed, the economic consultant retained by Hyundai, Kenneth Flamm (author of the "Flamm Study"), characterized 1993-95 as an "unusual period of relatively stable prices"<sup>252</sup> and at one point marveled at its "unprecedented string of near zero or slightly positive price changes."<sup>253</sup> Within this environment, Hyundai and LG Semicon were able to ship to the United States without dumping.<sup>254</sup> Accordingly, they were not

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<sup>242</sup> *Initiation of Antidumping Duty Investigation: Dynamic Random Access Memory Semiconductors of One Megabit and Above From the Republic of Korea*, 57 Fed. Reg. 21231 (1992) (Ex. USA-17).

<sup>243</sup> *Id.*

<sup>244</sup> *See, e.g., DRAM LTFV*, 58 Fed. Reg. 15467 (Ex. USA-4).

<sup>245</sup> *Id.*

<sup>246</sup> *DRAM Order*, 58 Fed. Reg. 27520 (Ex. USA-2). This amount was subsequently reduced to 5.18 percent as a result of municipal judicial proceedings in *Micron Technology, Inc. v. United States*, 893 F. Supp. 21 (Ct. Int'l Trade 1995) (Ex. USA-18).

<sup>247</sup> *DRAM Order*, 58 Fed. Reg. at 27520 (Ex. USA-2).

<sup>248</sup> *Id.* As the United States noted above, Samsung eventually was found not to be dumping during the period covered by the DOC's original investigation. Therefore, it was (and is) excluded from the anti-dumping order..

<sup>249</sup> 19 U.S.C. § 1675 (Ex. USA-19).

<sup>250</sup> *Dynamic Random Access Memory Semiconductors of One Megabit or Above from the Republic of Korea; Preliminary Results of Antidumping Duty Administrative Review and Notice of Intent Not to Revoke Order*, 62 Fed. Reg. 12794, 12796-97 (1997) (hereinafter "*Preliminary Results Third Review*") (Ex. USA-20).

<sup>251</sup> *See, e.g.,* Letter from LG Semicon Co., Ltd. and LG Semicon America, Inc. to Secretary of Commerce, 2 Jan. 1997 (hereinafter "LGS Ltr.-1"), at App. 1 (article on history of semiconductors by T. J. Rodgers for *Austin American-Statesman*) (Ex. USA-21).

<sup>252</sup> LG Semicon Case Br., Ex. B (VLSI Research) (Ex. USA-15); Hyundai Case Br., Ex. 2 at 5 and Fig. 3 ("Flamm Study") (Ex. USA-12).

<sup>253</sup> *Id.* at 5.

<sup>254</sup> *Dynamic Random Access Memory Semiconductors of One Megabit or Above From the Republic of Korea; Final Results of Antidumping Duty Administrative Review*, 61 Fed. Reg. 20216 (1996) (final results first review) (hereinafter "*First Review*") (Ex. USA-22); *Dynamic Random Access Memory Semiconductors of One*

levied any duties on their DRAM imports and the cash deposit rate for future shipments was set at zero.<sup>255</sup>

4.372 The 1995-1996 period was the subject of a request for an administrative review by respondents on 29 and 31 May 1996.<sup>256</sup> In addition, the DOC was asked by LG Semicon and Hyundai to revoke (in part) the order on *DRAMs from Korea* pursuant to section 353.25(a)(2) of its regulations. That regulation provided the DOC with the authority to revoke an order, in part, whenever:

(i) One or more producers or resellers covered by the order have sold the merchandise at not less than foreign market value for a period of at least three consecutive years; (ii) It is not likely that those persons will in the future sell the merchandise at less than foreign market value; and (iii) ... the producers or resellers agree in writing to their immediate reinstatement in the order ... if the Secretary concludes under § 353.22(f) that the producer or reseller, subsequent to the revocation, sold the merchandise at less than foreign market value.

19 C.F.R. § 353.25 (a)(2) (1997) (Ex. USA-24).<sup>257</sup>

4.373 As a result of respondents' request, the DOC initiated a review pursuant to section 751(a) of the Act on 25 June 1996.<sup>258</sup> During the review, the DOC compiled an extensive factual record which contained, in the words of Korea, "reams of current data regarding pricing trends, inventory levels and various other aspects of market conditions for DRAMs." The DOC issued the preliminary results of its third review on 18 March 1997.<sup>259</sup> In the notice, the DOC informed the respondents of its intention not to revoke the order pursuant to section 353.25. In particular, the DOC determined that the administrative record "does not support a conclusion at this time that there is no likelihood of future dumping by the Korean respondents."<sup>260</sup>

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*Megabit or Above From the Republic of Korea; Final Results of Antidumping Duty Administrative Review*, 62 Fed. Reg. 965 (1997) (final results second review) (Ex. USA-23). The *First Review* was amended on October 2, 1996. See *Dynamic Random Access Memory Semiconductors From the Republic of Korea; Amended Final Results of Antidumping Duty Administrative Review*, 61 Fed. Reg. 51410 (1996).

<sup>255</sup> Under United States law and practice, anti-dumping duty orders, in and of themselves, do not result in the levying (or "assessment") of anti-dumping duties. They also do not, as a rule, delay the entry of imports into the United States. The only thing the United States Customs Service typically holds are the entry documents and a cash deposit or bond covering the potential liability for anti-dumping duties. On the anniversary month of every order, the DOC publishes a notice in the *Federal Register* which reminds interested parties (including foreign exporters) of their right to request an "administrative review" pursuant to section 751(a) of the Act. In an administrative review, the DOC calculates the anti-dumping duties actually owed for merchandise exported to the United States during the previous twelve months and sets the deposit rate for estimated duties that might be owed on future entries. 19 U.S.C. § 1675 (Ex. USA-19). Because the actual duties levied may exceed or fall short of the deposits or bonds posted at the time of entry, the Customs Service either collects additional money or refunds the excess (with interest). 19 U.S.C. § 1677g (Ex. USA-19).

<sup>256</sup> *Preliminary Results Third Review*, 62 Fed. Reg. at 12795 (Ex. USA-20). A request was also received from Micron. *Id.*

<sup>257</sup> The URAA revised certain terminology in the Act, including substituting the term "normal value" for "foreign market value." However, because the instant review was initiated prior to the date the DOC's new regulations took effect on 1 July 1997, the 1996 regulations were still controlling and are, therefore, cited herein unless otherwise noted. These regulations used the previous terminology.

<sup>258</sup> *Initiation of Antidumping and Countervailing Duty Administrative Reviews and Requests for Revocation in Part*, 61 Fed. Reg. 32771 (1996) (Ex. USA-25). The challenged administrative review was conducted pursuant to the Act, as amended by the Uruguay Round Agreements Act ("URAA"). Uruguay Round Agreements Act, Pub. L. No. 103-465, tit. II, 108 Stat. 4808, 4842 (1994).

<sup>259</sup> *Preliminary Results Third Review*, 62 Fed. Reg. 12794 (Ex. USA-20).

<sup>260</sup> *Id.* at 12796.

4.374 At the heart of the DOC's decision was evidence of a dramatic decline in DRAM prices throughout 1996 that was more severe than the market downturn in 1990-91<sup>261</sup> and only "a little less severe" than the one in 1985-86.<sup>262</sup> This downturn in the market caused U.S. and Korean producers to experience double-digit percentage declines in revenue on sales of DRAMS.<sup>263</sup> Exacerbating the situation was the willingness of certain producers at this time to increase production and liquidate inventories of finished goods.<sup>264</sup> As the DOC explained in its notice:

(1) The DRAM market is in a year-long downturn, with steep price declines in the DRAM market beginning in January 1996 and continued price declines forecasted; (2) the downturn has resulted in declines of sales and revenues in the DRAM market, growth in DRAM inventories, and the existence of significant DRAM oversupply; (3) the Korean respondents and other DRAM producers have continued to increase DRAM production during the downturn (which may further depress prices during such an oversupply period); (4) the Korean respondents will likely continue to maintain a substantial presence in the U.S. market during various phases of the business cycle (including periods of significant price decline) in light of substantial Korean capacity and large U.S. demand; and (5) based on the information on the record, Korean pricing in the United States appears, according to price trends, to be at or near normal value, indicating that only a slight downward movement in U.S. price will likely result in dumping margins.

*Preliminary Results Third Review*, 62 Fed. Reg. at 12796 (Ex. USA-20).

4.375 The DOC did not, however, view the 1996 market downturn in isolation. Instead, it analyzed all of the evidence on the record which bore on the likelihood issue. Thus, in addition to respondents' three years of no dumping, the DOC considered, *inter alia*, pricing practices and trends in prior market downturns. When it did this, the DOC discovered that there was a history of dumping in the United States during downturns in the DRAM market. In summarizing its conclusions, the DOC stated, in part:

Given these circumstances, we preliminarily find that it would be difficult for the Korean respondents to remain competitive without selling DRAMs at less than normal value. The history of the DRAM industry is one of dumping in periods of significant downturn. ...While Korean respondents did not dump in the three consecutive review periods, most of this period was marked by an expanding DRAM market. ...This third review period ended in April 1996, and there has been a continuing decline in global prices since that time. Further, we note that the price decline in 1996 was more severe than in prior downturns. ... For these reasons, we preliminarily find that there is no basis to conclude that there is no likelihood of future dumping by LGS and Hyundai

*Id.* at 12796-97 (Ex. USA-20).

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<sup>261</sup> Case Brief of LG Semicon, Ex. B (Merrill Lynch) (Ex. USA-15).

<sup>262</sup> Case Brief of Hyundai, Ex. 2 at 5 (conclusion of Dr. Flamm) (Ex. USA-12); *but see Preliminary Results Third Review*, 62 Fed. Reg. at 12797 (Ex. USA-20). Whether the 1996 downturn was more or less severe than prior downturns is unimportant. What is important is that the 1996 downturn was not unlike prior downturns and during those periods (including the milder one in 1990-91), DRAM producers were found to be dumping.

<sup>263</sup> *DRAMs from Korea: Micron's Third Review Rebuttal Brief*, 30 Apr. 1997, Ex. 7 (hereinafter "Micron Rebuttal Brief") (Ex. USA-26); Case Brief of LG Semicon, Ex. B (VLSI Research) (Ex. USA-15).

<sup>264</sup> *Prelim. Analysis* at 24, 28, & 29 (Ex. USA-13); Case Brief of LG Semicon, Ex. B (Merrill Lynch: "With no recession, the more rapid decline was clearly a massive inventory correction. That is why it fell so quickly.") (Ex. USA-15).

4.376 "Case briefs," which commented on the DOC's preliminary results, were filed by respondents and Micron on 18 April 1997. "Rebuttal briefs" were filed by the parties on 29 April 1997. On 5 May 1997, the DOC held a public hearing at which respondents and Micron presented oral arguments.

4.377 In their comments on the preliminary results, respondents did not argue that the DOC's revocation standards or procedures were contrary to the AD Agreement. In fact, Hyundai stated just the opposite -- it acknowledged that United States law was "within the letter and spirit of Article 11."<sup>265</sup> Instead, respondents argued, *inter alia*, that the DOC's use of the phrase "no likelihood" distorted the regulatory standard and allegedly forced them to prove the impossible -- that the likelihood of future dumping was "almost zero."<sup>266</sup> Respondents also maintained that the DOC ignored data which supported a "not likely" determination. In particular, they pointed to (i) their lack of dumping between the 1991 and 1996 market downturns, and (ii) record evidence which, they believed, showed a dramatic improvement in the market by the end of 1996 that was characterized by decreases in production, increases in demand, and rising prices for DRAMs in the United States.<sup>267</sup>

4.378 In its final determination published on 24 July 1997, the DOC once again found that Hyundai and LG Semicon had not sold DRAMs in the United States at less than normal value during the period covered by the third review (*i.e.*, 1 May 1995 through 30 April 1996).<sup>268</sup> The agency also reaffirmed its preliminary finding that the evidence on the record of the review did not support a finding that a resumption of dumping was not likely under section 353.25(a)(2) of the regulations.<sup>269</sup> In making this determination, the DOC emphasized several points it had made in its preliminary determination. First, the DOC discussed the cyclical nature of the DRAM industry and the pricing practices of DRAM producers during market downturns:

The DRAM industry is highly cyclical in nature with periods of sharp upturn and downturn in market prices. In the past, the DRAM industry has been characterized by dumping during periods of significant downturn. For instance, various foreign producers were found to have dumped during the downturn in the mid-1980s . . . and the Korean respondents in this proceeding were found to have dumped in the less than fair value investigation during 1991-1992, the last period when there was a significant downturn in the DRAM industry. Because DRAMs are a commodity product, DRAM producers/resellers must price aggressively during a downturn period in order to stay competitive and maintain their customer base. This is especially true during the lowest point in the downturn. Therefore, it is reasonable to conclude that information regarding the selling activities and pricing practices of respondents, as well as other market conditions, during periods of significant downturn are relevant to whether dumping is not likely to occur in the future. Thus, . . . we found the January through December 1996 time period to be particularly relevant to the "not likely" issue because it corresponded with a significant "downturn" in the DRAM industry.<sup>270</sup>

4.379 Next, the DOC addressed its findings regarding respondents' pricing practices and production levels during the market downturn that began toward the end of the third review period and continued throughout 1996 and into 1997:

. . . according to Electronic Buyers News, total worldwide market revenue plunged 38% to \$25.13 billion in 1996. Both Hyundai and LGS reported dramatic decreases in revenues in their 1996 publicly available financial statements. . . . Although we agree with the respondents that DRAM prices have recovered somewhat during 1997, prices

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<sup>265</sup> See, e.g., Case Brief of Hyundai, at 5 (Ex. USA-12).

<sup>266</sup> *Final Results Third Review*, 62 Fed. Reg. at 39812 (Ex. USA-1).

<sup>267</sup> *Id.* at 39814-16.

<sup>268</sup> *Id.* at 39824.

<sup>269</sup> *Id.* at 39810, 39811, & 39816.

<sup>270</sup> *Id.* at 39810.



fell significantly during the 1996 downturn. In any case, it appears that pricing in the DRAM market has not yet fully recovered. Current prices are still lower than in the years preceding the 1996 market downturn, years in which the respondents were found not to be dumping. Furthermore, prices have, in fact, decreased recently . . . the average price for a 64M DRAM is now in the mid \$40 range, down from \$55 earlier this year.

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In regard to inventory levels and the supply of DRAMs, the record demonstrates that supply exceeded demand during 1996 and thus far in 1997 . . . [I]t is uncertain how long it will be before production returns to previous levels in anticipation of increased demand in the marketplace. According to Electronic Buyer's News (January 27, 1997, Issue 1042), an upturn in demand in October, 1996, triggered a simultaneous increase in production . As a result, the DRAM market was glutted, driving prices down in December, 1996 to one of the lowest levels during the downturn.<sup>271</sup>

4.380 At this point, the DOC turned its attention to evidence on the record concerning the possibility of sales at less than normal value in the United States. In particular, the agency summarized the company-specific data submitted by respondents as part of the third administrative review (*i.e.*, data up to, and including, April 30, 1996) and the data received or obtained by the DOC regarding subsequent periods:

...(1) The respondents' own sales and cost data indicate that there were a substantial number of home market sales made at prices below COP during the two months immediately following the close of the third administrative review, (2) the lowest point of the downturn, in terms of DRAM pricing and other market conditions, did not occur until after mid-1996 (well after the end of the third administrative review period); (3) publicly available spot market pricing data, when viewed in conjunction with the respondent's cost data, extrapolated to a future point in time, indicate that LGS and Hyundai may have made U.S. sales at prices below COP during 1996; (4) respondent's own pricing data indicate that [their] contract prices generally follow the same pricing patterns as spot market prices . . . [I]n light of the market conditions during the downturn and the fact that the months actually examined during the POR [period of review] did not include the lowest point in the downturn, we find that the existence of below-cost sales during May and June of 1996 suggests that the number of below-cost sales increased following the end of the third review period as the DRAM market worsened. As prices in the DRAM market fell, a substantial number of sales were made below cost. This pattern is suggestive of deteriorating market conditions that often give rise to dumping.<sup>272</sup>

4.381 Lastly, after discussing LG Semicon's assertion that it has no economic incentive to dump in the United States,<sup>273</sup> the DOC addressed respondents' argument that they did not dump subsequent to the third review period because their production costs were declining as fast as prices were falling:

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<sup>271</sup> *Id.* at 39816-17.

<sup>272</sup> *Id.* at 39817 (emphasis added).

<sup>273</sup> The relevant portion of the notice states:

In this regard, LGS argues that it has a relatively small share of the U.S. market, which decreases its economic incentive to dump. However, the United States is part of the world's largest regional market for DRAMs, with considerable growth potential. Given the importance of the U.S. market, as a general matter, even a producer with a relatively small market share would have an incentive to ride out industry downturns. The fact that DRAM producers, including the Korean respondents, have historically been found to have dumped during downturns supports this conclusion.

*Id.* at 39819.

Historical data support the premise that both costs and prices of any given generation of DRAM will decline over time. What respondents have been unable to demonstrate, however, is that the decline in costs kept up with the rapid rate of decline in prices during the second half of 1996.<sup>274</sup>

4.382 As a result of the DOC's final determination, it did not revoke the anti-dumping order. However, entries covered by the challenged review were not assessed (or levied) anti-dumping duties and the cash deposit rate for subsequent entries (*i.e.*, entries made after 30 April 1996) of respondents' merchandise was set at zero.<sup>275</sup>

#### E. CLAIMS UNDER ARTICLES 2, 6 AND 17 OF THE AD AGREEMENT

##### 1. Failure to Verify Information from the US, and Failure to Consider Fairly and Objectively Respondents' Information and Data

###### (a) Claim raised by Korea

4.383 **Korea** claims that in analyzing the "no likelihood/not likely" criterion for revocation, the United States violated its obligations under and the standards set forth in Articles 2.2.1.1, 6.6 and 17.6(i) of the AD Agreement. The following are Korea's argument in support of that claim:

4.384 In analyzing the "no likelihood/not likely" criterion, the United States violated its obligations under and the standards set forth in Articles 2.2.1.1, 6.6 and 17.6(i) of the AD Agreement.

4.385 Article 17.6(i) states in relevant part:

the panel shall determine whether [i] the authorities' establishment of the facts was proper and whether [ii] their evaluation of those facts was unbiased and objective.

4.386 The United States: (i) improperly established the facts; and (ii) evaluated the facts in a biased and non-objective manner. Thus, the Panel should find that the United States violated the standards for review set forth at Article 17.6.

4.387 Article 6.6 states in relevant part:

the authorities shall during the course of an investigation satisfy themselves as to the accuracy of the information supplied by interested parties upon which their findings are based.

4.388 The United States violated its obligation under Article 6.6 because it failed to satisfy itself as to the accuracy of data supplied by Petitioner. Indeed, the United States uncritically accepted and relied on Petitioners' data without taking any action to confirm that it was accurate.

4.389 Article 2.2.1.1 states in relevant part:

costs shall normally be calculated on the basis of records kept by the exporter or producer . . . , provided that such records are in accordance with the generally accepted accounting principles of the exporting country and reasonably reflect the costs associated with the production and sale of the product under consideration.

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<sup>274</sup> *Id.*

<sup>275</sup> These entries are, in fact, the subject of an administrative review initiated by the DOC on 19 June 1997. As part of this review, respondents have renewed their requests for revocation pursuant to section 353.25(a) of the DOC's regulations. See *Dynamic Random Access Memory Semiconductors of One Megabit or Above From Korea; Preliminary Results of Antidumping Duty Administrative Review and Notice of Intent not to Revoke Order*, 63 Fed. Reg. 11411 (9 Mar. 1998) (Ex. USA-27).

4.390 The United States disregarded cost data prepared by Respondents which were in accordance with generally accepted accounting principles of Korea and accurately reflected costs, thereby violating its obligation under Article 2.2.1.1.

4.391 To support its decision regarding the likelihood of dumping in the future, the United States disregarded a valid econometric study on DRAM cost and pricing and Respondent-specific cost and pricing data<sup>276</sup> and relied instead on irrelevant spot market pricing and speculative assumptions of future costs supplied by Petitioner.<sup>277</sup> Also, the DOC disregarded Respondents' data collection proposal, apparently assuming (incorrectly) that it had no bearing on the likelihood issue.

4.392 The US divided its analysis of the revocation issue into four topics:

- Pricing Trends in the DRAM Industry;
- Inventory Levels;
- Petitioner's Allegation that LG Semicon and Hyundai Were Dumping in 1996; and
- Whether Korean DRAM Producers Can Remain Competitive in the US Market Without Dumping.<sup>278</sup>

As discussed in detail below, in analyzing each of these four topics, the DOC chose Petitioner's position over Respondents'. In doing so, the DOC unfairly disregarded actual Respondent-specific price and cost data and embraced Petitioner's irrelevant data, broad-brush allegations and unfounded theories.

(i) *Pricing Trends in the DRAM Industry.*

4.393 The DOC analyzed pricing trends in the spot market and disregarded the actual price data submitted by Respondents. However, as Respondents demonstrated to the DOC during the Third Review, Respondents rely primarily on long-term contracts, not the spot market.<sup>279</sup> Moreover, the DOC's analysis did not even acknowledge the fact that the cost of producing 16 megabit DRAMs (indeed of producing any DRAM)<sup>280</sup> has decreased dramatically because of die shrinkage and yield improvements.<sup>281</sup> The DOC concluded its analysis of this topic by indicating that "although the DRAM market has stabilized somewhat, prices continue to *fluctuate* and a large degree of uncertainty about the direction of the market remains."<sup>282</sup> That statement is hardly indicative of a fair and objective determination of future dumping by Respondents. Obviously, DRAM prices fluctuate--this is a commodity market, after all. However, just as important and inexorable, DRAM costs fall. There

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<sup>276</sup> See Case Brief of Hyundai, Exhibits 2 and 3, Case No. A-580-812 (21 April 1997) (Ex. ROK-35).

<sup>277</sup> Notice of Final Results of Anti-dumping Duty Administrative Review and Determination Not to Revoke Order in Part; *DRAMs from Korea*, 62 Fed. Reg. 39809, 39814-39819 (24 July 1997) (Ex. ROK-3).

<sup>278</sup> *Id.*

<sup>279</sup> Case Brief of Hyundai, Case No. A-580-812 (21 April 1997) at 14 (Ex. ROK-35); Notice of Final Results of Anti-dumping Duty Administrative Review and Determination Not to Revoke Order in Part; *DRAMs from Korea*, 62 Fed. Reg. 39809, 39817 (24 July 1997) (Ex. ROK-3). Generally, in a declining market, spot market prices will be lower than previously negotiated long-term contracts. Therefore, an analysis between spot prices and cost unfairly disadvantaged Respondents, which sold primarily pursuant to long-term contracts.

<sup>280</sup> Shipments of 16 megabit DRAMs in the United States more than doubled between 1995 and 1996 and were the major density category in 1997.

<sup>281</sup> The shrinkage and yield improvements inherently drive costs down. Costs are important because, as DRAMs are a commodity product with high value and low transportation costs, unitary worldwide pricing precludes a finding of dumping based on price-to-price analyses. However, when pricing falls below cost there are certain scenarios where dumping may occur. See Article 2.2 of the AD Agreement.

<sup>282</sup> Notice of Final Results of Anti-dumping Duty Administrative Review and Determination Not to Revoke Order in Part; *DRAMs from Korea*, 62 Fed. Reg. 39809, 39817 (24 July 1997) (emphasis added by Korea) (Ex. ROK-3).

is no indication on the record that DRAM prices fell or will fall faster or for a more sustained period than DRAM costs. On the other hand, the record does contain an econometric study regarding Respondents' cost trends which concludes that Respondents will not dump in the future. The DOC summarily rejected this report.<sup>283</sup> The DOC's conclusion reflecting an axiom of commodity markets--"prices fluctuate"--would not be an adequate basis for a decision not to revoke were it standing alone, much less here, where the record contains contrary empirical data and a valid econometric study.

(ii) *Inventory Levels.*

4.394 In discussing whether inventory levels would increase or decrease,<sup>284</sup> the DOC acknowledged that Respondents publicly had announced DRAM production cutbacks "and it appears that the market has reacted with higher prices." However, it then concluded erroneously that "it is unclear how much of an effect this will have on the overall supply of DRAMs."<sup>285</sup> It should have been obvious to the DOC that, in this commodity market, if prices were to rise and demand did not, then production and inventory would have been cut. There is no credible evidence on the record that production did not decrease just as Respondents stated. Inventory levels naturally decreased and prices rose in response to these production and inventory decreases.

4.395 The DOC refused to revoke the order even though Respondents' data were not refuted. The DOC failed to apply basic economic supply and demand theories or to distinguish between Respondents' facts and the US petitioner's unfounded assertions.

(iii) *Petitioner's Allegations that LG Semicon and Hyundai Were Dumping in 1996.*

4.396 The DOC employed unreliable extrapolations and suppositions and irrelevant spot market pricing, and ignored Respondents' verified actual costs, *en route* to determining that Respondents did not satisfy the "no likelihood/not likely" criterion for revocation because they *may* have dumped in 1996. Even while agreeing with Respondents that an allegation concerning sales at below COP largely was irrelevant for purposes of detecting dumping in the post-review period, the United States relied on that irrelevant data to find that future possible market conditions (also based largely on irrelevant spot-market pricing) produced a "pattern [that] is suggestive of deteriorating market conditions that often give rise to dumping."<sup>286</sup> The DOC's use of irrelevant data to "suggest" that dumping *may* occur directly contravenes the mandate of Article 17.6 of the AD Agreement, which requires Members to base determinations on an objective and fair analysis of facts, not speculation and conjecture.

4.397 In addition, in analyzing whether Respondents had dumped in 1996, the DOC relied on unverified data from Micron, while rejecting verified data supplied by Respondents. Micron's "data" consisted of news articles and research reports regarding the state of the industry, including spot market prices. The data were not verified (and were not specific or, even, germane to either Respondent). Respondents, in contrast, submitted actual cost and price data for the period. The DOC verified the data for that part of 1996 that was within the period of review. These data and Respondents' actual cost and price data demonstrated, conclusively, that Respondents were not dumping in 1996. The DOC's failure to treat properly Respondents' actual cost and price data, and acceptance of Petitioner's data, violates Articles 2.2.1.1 and 6.6, respectively, of the AD Agreement.

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<sup>283</sup> Case Brief of Hyundai, Exhibit 2, Case No. A-580-812 (21 April 1997) (Ex. ROK-35); Notice of Final Results of Anti-dumping Duty Administrative Review and Determination Not to Revoke Order in Part; *DRAMs from Korea*, 62 Fed. Reg. 39809, 39818 (24 July 1997) (Ex. ROK-3).

<sup>284</sup> In theory, large inventory overhangs will either depress prices by their very existence or will depress prices once the inventory is released.

<sup>285</sup> Notice of Final Results of Anti-dumping Duty Administrative Review and Determination Not to Revoke Order in Part; *DRAMs from Korea*, 62 Fed. Reg. 39809, 39817 (24 July 1997) (Ex. ROK-3).

<sup>286</sup> *Id.*

Moreover, the DOC's treatment of these data violates the standard of Article 17.6 of the AD Agreement, which requires Members to base determinations on an objective and fair analysis of facts.

(iv) *Whether Korean DRAM Producers Can Remain Competitive in the US Market Without Dumping.*

4.398 In the DOC's Final Results, it stated that "[i]n sum, the current condition of the DRAM market and the data on the record supports a conclusion that the not likely criterion for revocation has not been satisfied."<sup>287</sup> The DOC also unreasonably claimed that "Respondents have been unable to demonstrate . . . that the decline in costs kept up with the rapid rate of decline in prices during the second half of 1996."<sup>288</sup>

4.399 This is inaccurate. The record evidence--including the economic analyses of Dr. Flamm and Law & Economics Consulting Group--establishes that Korean DRAM manufacturers have not dumped and will not dump in the future. In addition, Respondents provided actual cost and price data to refute Micron's unfounded speculation and conjecture. As Respondents pointed out in the Review, costs decrease rapidly in the DRAM industry and prior cost decreases were sufficient to ensure that Respondents did not dump in the relevant examination periods, which included significant downturns. Moreover, Respondents demonstrated in numerous ways that they had no economic incentive to dump in the US market.

For example:

Hyundai

1. does not depend on exports from Korea to supply the U.S. market because it has invested \$1.4 billion to construct a DRAM wafer-fabrication facility in the United States; and
2. does not have to rely on the U.S. market to absorb its Korean production, because demand for DRAMs is growing in Korea, Southeast Asia and Europe.<sup>289</sup>

LG Semicon

1. has a stable, relatively small presence in the United States;
2. has a customer base of first-tier computer manufacturers that depend on steady supply (in this sub-market, pricing is significantly less volatile than it is in the spot market); and
3. is focusing on Southeast Asian markets.<sup>290</sup>

4.400 In addition, each company submitted detailed economic studies demonstrating that it had no economic incentive to dump.<sup>291</sup>

4.401 Respondents have not dumped; Respondents have no reason to dump in the United States; and the record data verified that they will not dump in the future. Therefore, the DOC's analysis of

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<sup>287</sup> *Id.* at 39819.

<sup>288</sup> *Id.*

<sup>289</sup> See Case Brief of Hyundai, Case No. A-580-812 (21 April 1997) at 16 and 26-27 (Ex. ROK-35).

<sup>290</sup> See Case Brief of LG Semicon, Case No. A-580-812 (21 April 1997) at 16-61 (Ex. ROK-2); Rebuttal Brief of LG Semicon Co., Ltd., Case No. A-580-812 (30 April 1997) at 8-20 (Ex. ROK-39).

<sup>291</sup> See Exs. ROK-39, ROK-30 and ROK-35.

this topic and its conclusion that Respondents' inability "to demonstrate" precludes revocation is not indicative of Respondents' data or the state of the market." It is unreasonable, conclusory and unsupported by the facts.

4.402 In addition, in analyzing whether Respondents could remain competitive without dumping (as was the case in analyzing whether Respondents had dumped in 1996--see paragraph 4.74), the DOC relied on unverified data from Micron, while rejecting verified data supplied by Respondents. The DOC's reliance on unverified, non-germane data rather than Respondents' verified data violates Article 6.6 of the AD Agreement, which requires Members to "satisfy themselves as to the accuracy" of data submitted and relied upon to support a finding. It also violates the standard of Article 17.6 of the AD Agreement, which requires Members to base determinations on an objective and fair analysis of facts.

4.403 **Korea**, in response to a question from the Panel,<sup>292</sup> subsequently clarified its claim under Article 17 as follows:

4.404 Korea's claim is that when the Panel examines the conduct of the United States, applying the standards of review at Article 17.6, the Panel should find that:

- the DOC's establishment of the facts was improper;
- the DOC's evaluation of the facts was biased and not objective; and
- the US interpretations of various provisions of the AD Agreement are impermissible.

4.405 As a result of these findings, the Panel then should make appropriate recommendations and suggestions to the US Government. Use of the word "violated" in a few instances in Korea's first submission was meant as a shorthand reference to this point. Korea does not take the position that the United States "violated" Article 17.6 in the same sense that it violated Articles 2, 5.8, 6, 11.1 and 11.2 of the AD Agreement and Articles I, VI and X of the General Agreement.

(b) Response by the United States

4.406 The following are the **United States'** arguments in response to Korea's claim:

4.407 Korea attacks the DOC's analysis of the DRAM market and Respondents' selling activities during and after the lowest point in the 1996 market downturn. According to Korea, the DOC based its determination not to revoke "on unverified information from the US petitioner and on mere conjecture, and by failing to consider fairly and objectively Respondents' information and data." The DOC's analysis, Korea insists, "is nothing more than a transparent effort . . . to substantiate its groundless conclusion." Korea even accuses the United States of a "pattern of bias [that] is pervasive."

4.408 These allegations are without merit.

(i) *Pricing Trends in the DRAM Industry*

4.409 Korea's basic allegation is that the DOC erred when it concluded that the DRAM market experienced a significant downturn in 1996 that might continue well into 1997. Korea maintains that the record in the underlying administrative proceeding established that: (i) by the end of 1996, the

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<sup>292</sup> The Panel recalls that the question was: "Korea argues that the United States has violated certain substantive obligations under Article 17.6 of the AD Agreement. Could Korea please explain the nature of that violation in concrete terms?"

DRAM market was firmly on the road to recovery; (ii) the DOC focused on price trends in the spot market and ignored data on Respondents' contract prices to original equipment manufacturers ("OEMs"); (iii) the DOC did not even "acknowledge" that DRAM costs constantly decline; and (iv) DRAM prices were not falling faster (or for a more sustained period) than DRAM costs.

4.410 In point of fact, when the administrative record closed to new factual information on 2 May 1997, the road to recovery for the DRAM industry was, at best, bumpy. First of all, the enormity of the 1996 downturn cannot be over-stated. It was the first year of negative growth for the DRAM industry since the downturn in 1985.<sup>293</sup> As put by Kenneth Flamm, Hyundai's economic consultant, "[n]o forecaster predicted the exceptional magnitude of the enormous decline in DRAM prices that took place in the 2<sup>nd</sup> quarter of 1996."<sup>294</sup>

4.411 Secondly, the only reason anyone in the industry was talking about a recovery in 1997 is because the Korean producers announced production cutbacks toward the end of February, 1997,<sup>295</sup> and not because the systemic problems which plague this industry (*e.g.*, excess production capacity, excess supply, accumulated inventory) had corrected themselves.<sup>296</sup> Therefore, while the announcement had a positive impact on the market,<sup>297</sup> it was, at best, a temporary measure which could easily reverse itself.<sup>298</sup> According to a February, 1997 report prepared by De Dios & Associates, and cited by Korea:

You will notice, however, that the basis for the momentum deviates from the normal causes of price increases. We did not mention overwhelming demand or true and prolonged lack of supply as reasons for the momentum. In the end, strong demand and prolonged lack of supply are the bases for a true shortage. *What we have here is a temporary situation that will change.*<sup>299</sup>

4.412 In its rebuttal submission, Korea will undoubtedly argue that one of the ways the market could have "changed" at this time was for the better. It will cite passages in the administrative record where various investment bankers and industry experts predict higher prices and better times for the DRAM industry in 1997.<sup>300</sup> What it will ignore, is roughly the same number of experts who were not sure which way the market was headed and who openly expressed concerns about its future.<sup>301</sup> This evidence, which was put on the record as late as 2 May 1997 (more than six weeks after the DOC's

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<sup>293</sup> LG Semicon Case Br., Ex. B (VLSI Research) (Ex. USA-15); Case Brief of Hyundai, Ex. 2 at 5 and Fig. 3 ("Flamm Study") (Ex. USA-12).

<sup>294</sup> *Id.*, Ex. 2 at 22 (emphasis added by the United States).

<sup>295</sup> Micron Rebuttal Br., Ex. 1 (Goldman Sachs) (Ex. USA-26); Case Brief of Hyundai, Ex. 7-11 (Ex. USA-12).

<sup>296</sup> *See, e.g.*, Case Brief of Hyundai, Ex. 10 (Morgan Stanley) ("the global oversupply problem still remains") (Ex. USA-12). For a fuller discussion of the economic forces that were pulling on the DRAM industry during the very volatile period before and after the DOC's preliminary results in this case, *see Id.*, Ex. 5 (De Dios & Associates: "The DRAM Market Advisor") (Ex. USA-12).

<sup>297</sup> Indeed, spot market prices for 16 Meg DRAMs reportedly rose by approximately twenty percent on mere rumors of the *announcement*. *Id.*, Ex. 7 (Electronic News) (Ex. USA-12).

<sup>298</sup> *Id.*, Ex. 5 (De Dios & Associates) (Ex. USA-12).

<sup>299</sup> *Id.* (emphasis added by the United States).

<sup>300</sup> *See, e.g., Id.*, Ex. 10 (Morgan Stanley) and Ex. 15 (Merrill Lynch) (Ex. USA-12); LG Semicon Case Br., Ex. B (VLSI Research) (Ex. USA-15).

<sup>301</sup> *See, e.g.*, Case Brief of Hyundai, Ex. 5 (De Dios & Associates: "The momentum and market psychology can still shift back in the opposite direction.") and Ex. 7 (Electronic News: "... others are left wondering if the market can absorb the combined capacity coming from Korea, Japan and elsewhere ...") (Ex. USA-12). *See also* Letter from Hale and Dorr to Secretary of Commerce, 2 May 1997, at Ex. 1 (Electronic Buyers' News (28 Apr. 1997): "The mainstay 16-Mbit market last week continued to be highly unstable. Analysts and independent distributors all agreed that average selling prices slipped about 10 percent in the spot market.") (Ex. USA-33).

preliminary results), established that numerous forces threatened to reverse the market's brief turnaround, including:

- the temptation on the part of Korean vendors to “ship more of their accumulated inventory”;<sup>302</sup>
- excessive customer inventories due to “slow PC end-use demand”;<sup>303</sup>
- the tendency of some Japanese producers to “weigh additional profit margin against strategic customer relationships”;<sup>304</sup>
- global oversupply and excess production capacity;<sup>305</sup> and,
- the pricing strategies of European and US DRAM suppliers.<sup>306</sup>

4.413 Moreover, the uncertainty surrounding the direction of the market had not resolved itself by the time the DOC issued its final results on 24 July 1997. For example, after initially rising on news of the Korean “production cutbacks,” spot market prices for the 1Mx16 EDO DRAM decreased from the \$7.45 to \$8.09 range on 13 June 1997 to the \$6.30 to \$6.85 range on 27 June 1997.<sup>307</sup>

4.414 This evidence, when measured with the entire record, led the DOC to conclude:

In sum, although the DRAM market has stabilized somewhat, prices continue to fluctuate and a large degree of uncertainty about the direction of the market remains.<sup>308</sup>

4.415 Far from being a “tepid conclusion” which states the obvious, this finding by the DOC accurately described the volatile state of the DRAM market in the late spring and early summer of 1997. As the DOC emphasized in later sections of its notice:

wholly apart from the data concerning the 1996 downturn, ... our analysis indicates that market conditions in the DRAM industry *remain volatile*. As stated previously, while the plunge in prices began to stabilize somewhat in early 1997, recent data indicate that prices are headed downward again. For example, according to publicly available data, the average US price for a 16M DRAM fell from approximately \$18.00 in May 1996 to approximately \$7.00 in December 1996. According to Dataquest, the price for the 16M *as of June 30, 1997*, is approximately \$6.50. This represents a 64 percent decline in prices between the end of the third period of review (April 30, 1996) and *June 1997*. Since DRAMs are a commodity product, it is reasonable to expect that Korean producers will match prevailing market prices in the United States.<sup>309</sup>

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<sup>302</sup> Case Brief of Hyundai, Ex. 5 (De Dios & Associates) (Ex. USA-12).

<sup>303</sup> *Id.*

<sup>304</sup> *Id.*

<sup>305</sup> *Id.* See also *Id.*, Ex. 10 (Morgan Stanley) (Ex. USA-12).

<sup>306</sup> *Id.* As if to underscore this point, Compaq Computer Corporation (“Compaq”), one of Respondents’ “premium” OEM customers in the United States, stated in a letter to the DOC on 15 July 1997 that “[t]here is only one, worldwide DRAM market. What is done in Europe affects the market in the United States.” Letter from Vinson & Elkins (on behalf of Compaq, et al.) to Secretary of Commerce, 15 July 1997, at 4 (hereinafter “Compaq Ltr.”) (Ex. USA-34).

<sup>307</sup> *Final Results Third Review*, 62 Fed. Reg. at 39817, citing Dataquest (“The Semiconductor DQ MONDAY Report,” Issue 24, 23 June 1997, and Issue 25, 30 June 1997) (Ex. USA-1).

<sup>308</sup> *Id.*

<sup>309</sup> *Final Results Third Review*, 62 Fed. Reg. at 39818 (emphasis added by the United States) (Ex. USA-1).



4.416 In short, Korea's claim that the DRAM market was firmly on the road to recovery by the end of 1996 is without merit.<sup>310</sup> The DOC reasonably determined based upon facts properly established that US market conditions in the DRAM industry remained volatile during the first part of 1997.

4.417 Equally infirm is Korea's contention that the DOC ignored or disregarded: (i) Respondents' contract prices to OEMs, (ii) the constant decline in DRAM costs, and (iii) the absence of any evidence on the record which indicated that DRAM prices were falling faster (or for a more sustained period) than DRAM costs. On the contrary, the administrative record is replete with evidence that the DOC gave careful consideration to each of these matters before making its final determination.

4.418 For example, the DOC determined, based upon company-specific cost and price data provided by Respondents (and verified by the DOC), that as the market downturn in 1996 worsened after the close of the third review, Respondents were forced to price a "substantial" portion of all home market sales below their declining cost of production.<sup>311</sup> In addition, the DOC verified, as Respondents had alleged, that their sales were based primarily on contract prices to OEMs (such as Compaq), as opposed to "spot market" prices, and that contract prices tended to lag behind market prices in a declining market.<sup>312</sup> However, the DOC also determined, based upon record evidence, that: (i) contract prices to OEM customers follow the direction of prices on the spot market; and (ii) when Respondents restricted the supply of DRAMs to distributors and brokers in February of 1997 in order to stabilize spot market prices, their contract prices fell below the spot market.<sup>313</sup> According to some industry observers, contract prices for DRAMs fell by as much as \$4 below the spot market.<sup>314</sup> In summarizing its conclusions on these points, the DOC stated, in part:

We disagree with the Respondents' assertion that the average US prices presented in the petitioner's analysis bear no relation to their actual US prices. We recognize that the petitioner based its analysis upon average US spot market prices instead of contract prices. However, based upon the average gross unit prices calculated using Respondent's own data from the POR, it appears that contract prices generally follow the same pricing patterns as spot market prices. There is even evidence on the record indicating that the actual contract prices were sometimes lower than the average spot prices presented in the petitioner's analysis.<sup>315</sup>

4.419 Finally, the DOC determined, based upon record evidence, that contract and spot prices were rapidly trending below Respondents' reported costs of production throughout the period that

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<sup>310</sup> Also without merit is Korea's claim that the DOC based its determination solely "on events during calendar year 1996 ; and it did so despite acknowledging that market conditions in the DRAM industry had recovered in 1997." The DOC based its final determination upon properly established facts covering 1996 and 1997.

<sup>311</sup> Analysis Memorandum from Program Manager to Deputy Assistant Secretary for Import Administration, 16 July 1997, bates no. 41-45 (hereinafter "*Final Analysis*") (Ex. USA-35).

<sup>312</sup> *Final Analysis*, bates no. 52. See also LG Semicon Case Br., at 31-34 (Ex. USA-15). The DOC did not verify, and the record does not support, Korea's suggestion that contract prices were set over a "long-term." In a volatile market such as the one that prevailed throughout 1996, DRAM customers, such as Compaq, insist upon renegotiating their purchase prices at least every quarter. *Final Results Third Review*, 62 Fed. Reg. at 39819 (Ex. USA-1).

<sup>313</sup> See, e.g., Case Brief of Hyundai, Ex. 5 at 12 (De Dios & Associates) (Ex. USA-12), Ex. 9 (Computer Reseller News) (Ex. USA-12), and Ex. 11 (Electronic Buyers News) (Ex. USA-12). According to Morgan Stanley, "[t]he Korean firms executed the change skillfully. For example, they used a clever tactic when they cut their shipments to discount brokers, who have a big influence on the spot price." *Id.*, Ex. 10 (Morgan Stanley) (Ex. USA-12).

<sup>314</sup> *Id.*, Ex. 9 (Computer Reseller News) (Ex. USA-12).

<sup>315</sup> *Final Results Third Review*, 62 Fed. Reg. at 39817-18 (Ex. USA-1). Later in the notice, the DOC revisited the relationship between spot and contract prices during the first several quarters of 1997: "In fact, even into 1997, prices to OEM customers remained depressed, and below spot market prices, even as the spot market prices began to show some increase." *Id.* at 39819.

immediately followed the third administrative review.<sup>316</sup> Indeed, part of the DOC's basis for this determination was price data for the first quarter of 1997 provided by some of Respondents' OEM customers and company-specific cost projections for the second quarter of 1997 contained in the Flamm Study.<sup>317</sup>

(ii) *Inventory Levels*

4.420 In the *Final Results Third Review*, the DOC stated:

although the Respondents have made public announcements regarding DRAM production cut-backs and it appears that the market has reacted with higher prices, it is unclear how much of an effect this will have on the overall supply of DRAMs.<sup>318</sup>

4.421 Korea contends that it "should have been obvious to the DOC that, in this commodity market, if prices were to rise and demand did not, then production and inventory would have been cut."<sup>319</sup> According to Korea, "[t]here is no credible evidence on the record that production did not decrease just as Respondents stated."

4.422 On the contrary, a careful reading of the administrative record casts a large shadow of doubt over the "production cutbacks" announced by the Korean producers. First, record evidence indicates that the Respondents never actually "reduced" production. At most, they simply held back on previously announced increases in production.<sup>320</sup> Secondly, the administrative record is awash in evidence that the Respondents orchestrated a very "clever" tightening of the spot market in February of 1997 by cutting back on shipments to distributors and brokers (who have a big influence on the spot price), while maintaining shipments to their "premium," OEM customers.<sup>321</sup> The record also establishes that the Respondents were able to affect this change in the "market's psychology," as one observer put it, by accumulating inventory.<sup>322</sup> Goldman Sachs, for example, informed clients as late as 14 April 1997 that the Korean producers never instituted any type of production cutbacks. Instead, they simply built up inventories "that will be unleashed on the market later."<sup>323</sup>

(iii) *Petitioner's Allegation that LG Semicon and Hyundai Were Dumping in 1996*

4.423 Korea argues that the DOC based its determination not to revoke the anti-dumping order on *DRAMs from Korea*, in part, on certain data reported by Respondents which showed that their home market sales made below cost increased at a rapid pace in May and June of 1996 as the downturn in the DRAM market worsened. Korea contends that because the DOC conceded that this information was "irrelevant" to its analysis of dumping, the DOC should not have relied on these data to inform its revocation decision. However, Korea misstates what the DOC actually did.

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<sup>316</sup> *Final Analysis*, bates no. 52-57, and 59 (Ex. USA-35).

<sup>317</sup> *Id.* bates no. 59. While it is true that the DOC considered many aspects of the study prepared by Dr. Flamm to be unduly optimistic, *see Final Results Third Review*, 62 Fed. Reg. at 39818, Korea's repeated assertion that the DOC "ignored" or "summarily rejected" the study rings hollow. The DOC not only scrutinized every inch of the study, *see, e.g., Final Analysis*, bates no. 58 (Ex. USA-35), but actually compared some of Dr. Flamm's optimistic projections of future costs with prices reported by several US customers of Respondents.

<sup>318</sup> 62 Fed. Reg. at 39817 (Ex. USA-1).

<sup>319</sup> Whether "obvious" or not, Korea claims, without support or citation, that "[i]nventory levels naturally decreased and prices rose in response to these production and inventory decreases."

<sup>320</sup> Case Brief of Hyundai, Ex. 10 at 1 (Morgan Stanley: "hold down increases in 16m DRAM production . . . The recent announcement by the Koreans is that they will hold capacity expansion 30 percent below originally projected levels.") (Ex. USA-12) and Ex. 11 (Electronic Buyer's News: "scale back a planned 16-Mbit production expansion by 30 percent") (Ex. USA-12).

<sup>321</sup> *Id.*, Ex. 10 at 2 (Morgan Stanley) (Ex. USA-12).

<sup>322</sup> *See, e.g., Case Brief of Hyundai*, Ex. 5 at 2-3 & 6 (De Dios & Associates) (Ex. USA-12).

<sup>323</sup> Micron Rebuttal Br., Ex. 1 (Goldman Sachs) (Ex. USA-26).

4.424 To begin with, the DOC did not disregard any home market sales on the basis that they were below cost when it calculated normal value in the final results of the third administrative review.<sup>324</sup> Thus, any arguments based upon the requirements of the below-cost test under United States law are of no consequence.<sup>325</sup>

4.425 Secondly, the DOC did not equate sales made below cost during a two-month period with dumping. As the agency clearly stated in its final results:

We note that, according to the DOC's cost test methodology, these below cost sales were not sufficiently numerous for the DOC to reject as a basis for determining normal value in this third review. We also agree with LG Semicon that whether it made home market sales at prices below the COP during the two months immediately following the close of the third review period in and of itself does not demonstrate that dumping occurred.<sup>326</sup>

4.426 Instead, the DOC weighed all of the record evidence and arguments made by the parties before it decided that the requirements set forth in 19 C.F.R. § 353.25 (1997) had not been met. As the DOC explained in the final results of the challenged determination, Respondents' dramatic increase in below-cost sales immediately after the period of review was only one factor that influenced its decision:

. . . we find that the not likely criterion for revocation has not been satisfied for the following reasons: (1) The Respondents' own sales and cost data indicate that there were a substantial number of home market sales made at prices below COP during the two months immediately following the close of the third administrative review; (2) the lowest point of the downturn, in terms of DRAM pricing and other market conditions, did not occur until after mid-1996 (well after the end of the third administrative review period); (3) publicly available spot market pricing data, when viewed in conjunction with the Respondent's cost data, extrapolated to a future point in time, indicate that LG Semicon and Hyundai may have made US sales at prices below COP during 1996; (4) Respondent's own pricing data indicate that [their] contract prices generally follow the same pricing patterns as spot market prices. . . [I]n light of the market conditions during the downturn and the fact that the months actually examined during the POR did not include the lowest point in the downturn, we find that the existence of below-cost sales during the May and June of 1996 suggests that the number of below-cost sales increased following the end of the third review period as the DRAM market worsened. As prices in the DRAM market fell, a substantial number of sales were made below cost. This pattern is suggestive of deteriorating market conditions that often give rise to dumping.<sup>327</sup>

(iv) *Whether Korean DRAM Producers Can Remain Competitive in the US Market Without Dumping*

4.427 Korea asserts that the Respondents had no incentive to dump in the United States because they were either establishing production facilities in the United States, had limited sales to the United

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<sup>324</sup> *Final Results Third Review*, 62 Fed. Reg. at 39817 (Ex. USA-1).

<sup>325</sup> Under section 773(b) of the Act, home market sales that are below cost may be disregarded in the calculation of normal value if they are made "within an extended period of time." 19 U.S.C. § 1677b(b)(1) (1997) (Ex. USA-19). "As in the [AD] Agreement, the term 'extended period of time' is defined in new section 773(b)(2)(B) as being normally one year, but not less than six months." Statement of Administrative Action (URAA), H.R.Doc. 103-316, vol. 1, at 831-32 (1994) (Ex. USA-36). Since Respondents' prices did not begin to fall below their costs in substantial quantities until the end of the period covered by the third administrative review (*i.e.*, 1 May 1995 to 30 April 1996), none of these sales were excluded from the DOC's calculation of normal value. *Final Results Third Review*, 62 Fed. Reg. at 39817 (Ex. USA-1).

<sup>326</sup> *Id.* at 39817.

<sup>327</sup> *Id.*

States, or because demand in other parts of the world was so great they could afford not to dump in the United States.

4.428 With respect to Korea's assertion that LG Semicon's share of the US market was too small to justify dumping, the record actually demonstrates that the company's share of the US market, both in relative and absolute terms, was far from insignificant.<sup>328</sup>

4.429 As for Korea's claim that both Respondents focus more on Southeast Asia and/or Europe, and less on the United States, the record confirms that the United States is home to the world's largest consumers of DRAMs, including important customers of both LG Semicon and Hyundai.<sup>329</sup> Moreover, data obtained from Dataquest shows the Americas to be close to twice the size of other regional markets for DRAMs. In 1996, for example, the Americas accounted for a reported \$10,107 million in DRAM consumption, compared with \$5,895 million for Asia/Pacific (excluding Japan), \$5,166 million for Japan, and \$4,759 million for Europe.<sup>330</sup> In addressing these issues in the *Final Results Third Review*, the DOC stated, in part:

... the United States is part of the world's largest regional market for DRAMs, with considerable growth potential. Given the importance of the US market, as a general matter, even a producer with a relatively small market share would have an incentive to ride out industry downturns. The fact that DRAM producers, including the Korean Respondents, have historically been found to have dumped during downturns supports this conclusion.<sup>331</sup>

4.430 Finally, Korea's claim that Hyundai had no incentive to dump because it is building a DRAM factory in the United States cannot be sustained. First of all, what little information is on the record regarding this issue indicates that the plant had not been completed, let alone begun commercial operations, at the time the DOC issued the *Final Results Third Review*.<sup>332</sup> Secondly, there is nothing on the record of the underlying administrative proceeding which demonstrates that Hyundai would not continue to import DRAMs into the United States once the plant was completed.

(c) Rebuttal arguments made by Korea

4.431 **Korea** in its oral statement at the first meeting of the Panel with the Parties, further argued as follows:

4.432 The United States improperly established the facts; and evaluated the facts in a biased and non-objective manner, in violation of the standards set forth in Article 17.6. The United States violated its obligation under Article 6.6 by failing to satisfy itself as to the accuracy of data supplied by Petitioner. Indeed, the United States uncritically accepted and relied on Petitioners' data without taking any action to confirm that it was accurate. The United States disregarded cost data prepared by Respondents which were in accordance with generally accepted accounting principles of Korea and accurately reflected costs, thereby violating its obligation under Article 2.2.1.1. Finally, to support its decision regarding the likelihood of dumping in the future, the United States disregarded a valid econometric study on DRAM cost and pricing and Respondent-specific cost and pricing data and relied instead on irrelevant spot market pricing and speculative assumptions of future costs supplied by Petitioner. Also, the DOC disregarded Respondents' data collection proposal, apparently assuming (incorrectly) that it had no bearing on the likelihood issue.

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<sup>328</sup> *Final Analysis*, bates no. 50 (Ex. USA-35).

<sup>329</sup> *Id.*

<sup>330</sup> *Id.*

<sup>331</sup> 62 Fed. Reg. at 39819 (Ex. USA-1).

<sup>332</sup> Case Brief of Hyundai, at 26 (Ex. USA-12).

(d) Rebuttal arguments made by the United States

4.433 The **United States** makes the following rebuttal arguments:

(i) *The United States Appropriately Satisfied Itself as to the Accuracy of the Data Relied Upon*

4.434 Korea's generalized allegation that the DOC relied upon data submitted by Micron without satisfying itself as to the accuracy of the data is baseless. The DOC appropriately evaluated all of the information gathered in the underlying administrative proceeding, and relied upon information submitted by both Respondents and by Micron in reaching its determination concerning the likelihood of future dumping.

4.435 First, the DOC conducted on-site verifications of the cost and sales data submitted by LG Semicon and Hyundai in their questionnaire responses for the May 1995 to April 1996 third review period (including home market cost and price data through June 1996).<sup>333</sup> As discussed in the first US submission, the DOC relied on this verified cost and price data in its determination not to revoke, when it concluded: (i) that Respondents had made a substantial number of sales below cost in Korea in May and June 1996, as the rapid and continuing decline in DRAM prices drove their prices below cost; and, (ii) that Respondents' verified cost data for 1995 and the first half of 1996, extrapolated forward to the second half of 1996, indicated that Respondents may have already resumed dumping in the latter half of 1996.<sup>334</sup>

4.436 Second, the DOC satisfied itself as to the accuracy of the information it relied upon concerning developments following the end of the third-review period. This information, submitted by the Respondents as well as by Micron and other interested parties, included independent market analysts' reports from such reputable brokerage houses as Goldman Sachs, Merrill Lynch, Lehman Brothers, and ABN Amro Hoare Govett; business and market news reporting by well-known news organizations such as the Wall Street Journal, New York Times, Financial Times, Reuters, Korea Herald, and Nikkei; and reports from various trade journals.<sup>335</sup> As the DOC noted in the *Final Results Third Review*, the Respondents and their customers submitted data on average US prices reported by Dataquest and the American IC Exchange, studies by independent analysts and numerous newspaper and magazine articles.<sup>336</sup>

4.437 The DOC did not accept such reports uncritically, but instead appropriately evaluated the factual assertions made by the interested parties, and satisfied itself as to the accuracy of the information on which it relied. For example, as discussed in the first US submission, the Korean Respondents contended that the prevailing excess of DRAM supply over demand would be ameliorated in the future by production cutbacks the Korean producers had announced on 30 January 1997. However, while their own production figures were obviously available to them, the Respondents did not provide any data to substantiate their assertion that they had, in fact, cut back production. Instead, in their 18 April 1997 case briefs before the DOC, they relied exclusively on *news reports* concerning their earlier announcements.<sup>337</sup> The DOC appropriately discounted the news reports of production cutbacks which were not substantiated by data readily available to Respondents.

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<sup>333</sup> *Final Results Third Review*, 62 Fed. Reg. at 39815-17 (Ex. USA-1).

<sup>334</sup> *Final Results Third Review*, 62 Fed. Reg. at 34817 (Ex. USA-1).

<sup>335</sup> See, e.g., LG Semicon Case Br. at Appendix B (submitting 13 industry research studies) and Appendix C (submitting 18 news reports) (Ex. USA-15 & 96); Case Brief of Hyundai Ex. 5, 10, 15 (market analysts' reports) and Ex. 7-9, 11 (news reports) (Ex. USA-12); Micron Rebuttal Br. Ex. 1 (Goldman Sachs) and Ex. 2, 3, 7-9 (news reports) (Ex. USA-26 & 97).

<sup>336</sup> *Final Results Third Review*, 62 Fed. Reg. at 39814 (Ex. USA-1).

<sup>337</sup> Case Brief of Hyundai at 19-20 and Ex. 7 (Ex. USA-12 & 98); LG Semicon Case Br. at 66-69 (Ex. USA-99). In this regard, it is worth noting that in the *Indonesia Autos* case, the panel justified a negative ruling of market displacement or impedance under Article 6.3 of the Agreement on Subsidies and Countervailing Measures on the failure of the complainants to provide evidence that, according to the panel, was at the disposal

4.438 Similarly, the DOC carefully considered each of the parties' contentions concerning both the reliability of the submitted information and the appropriate conclusions to be drawn from it.<sup>338</sup> For example, the DOC specifically addressed LG Semicon's argument that the DRAM pricing data series compiled by Lehman Brothers (a well-known US brokerage house) and submitted by Micron was unreliable, noting that [t]hese data were similar to other pricing data submitted on the record, including the pricing data obtained from the American Integrated Chip Exchange (AICE) and Dataquest.<sup>339</sup> In each case, the DOC applied its considerable experience in market analysis and considered the source of the information, its internal logic, and its consistency with other information in determining its accuracy and usefulness. In short, there simply is no basis for Korea's claim that the DOC did not satisfy itself as to the accuracy of the data that it relied upon.

(ii) *The United States Properly Evaluated All Cost Data Submitted by the Korean Respondents*

4.439 Korea alleges that the United States violated Article 2.2.1.1 of the AD Agreement by disregarding cost data prepared by Respondents, which, it claims, was prepared in accordance with Korean GAAP and accurately reflected costs. The record is clear, however, that the DOC verified the cost data submitted by both Respondents as it pertained to cost of production for the third-review period (covering quarterly costs from the first quarter of 1995 through the second quarter of 1996). The DOC relied on this verified cost data in considering whether Respondents may have resumed dumping in the months following the end of the third-review period.

4.440 In addition to the cost data for the third review submitted by both Respondents, late in the proceeding, LG Semicon also submitted information which purportedly represented its cost of production for two DRAM models in the second half of 1996. These data were *not* submitted in the same format as the data in the third review questionnaire response, with underlying detail and copies of the company's financial statements for the period, nor were they provided in the form of hard figures of the kind that could be verified by reconciliation to financial and cost records. Instead, the claimed cost of production information was submitted in the form of data points on a graph, with an express disclaimer that [t]he reported figures were calculated based on best information currently available.<sup>340</sup>

4.441 In addition, numerous news reports and market analysts' reports were submitted which indicated that LG Semicon had made several changes in accounting practices, including changes in the accounting for depreciation and for foreign exchange losses.<sup>341</sup> These reports indicated that LG Semicon had a loss of 40 billion won in the second half of 1996, and would have reported a loss for the year if it continued to use the accounting methods it had used in the prior year.<sup>342</sup> The DOC noted these changes, and further noted the fact that LG Semicon failed to identify these adjustments to its costs significantly reduces the reliability of the information. We are uncertain whether LG Semicon made other adjustments to its reported costs.<sup>343</sup>

4.442 Despite LG Semicon's claim that its late-submitted 1996 cost data were prepared in conformity with its financial statements, LG Semicon never submitted its 1996 financial statements to allow the DOC to confirm LG Semicon's assertion, or to determine whether any other accounting

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of the companies in question. *Indonesia - Certain Measures Affecting the Automobile Industry*, WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R, Report of the Panel issued 2 July 1998, para. 14.234 (unadopted).

<sup>338</sup> See *Final Results Third Review*, 62 Fed. Reg. at 39817 ( We have reviewed the data submitted by the petitioner as well as all arguments and information on the record regarding the veracity of the data and the underlying assumptions. . . . [M]any of the Respondents' arguments concerning the alleged distortions and inaccuracies in the petitioner's analysis lack merit. ) (Ex. USA-1).

<sup>339</sup> *Id.* at 39818. See also Micron Rebuttal Br. Ex. 6 (Ex. USA-97); Case Brief of Hyundai Ex 5 (Ex. USA 12).

<sup>340</sup> LG Semicon Case Br. at 57, n. 21 (Ex. USA-99).

<sup>341</sup> *Final Results Third Review*, 62 Fed. Reg. at 39818 (Ex. USA-1).

<sup>342</sup> Micron Rebuttal Br. at 8-10 and Exhibits 2 & 3 (Ex. USA-97).

<sup>343</sup> *Final Results Third Review*, 62 Fed. Reg. at 39818 (Ex. USA-1).

changes had been made. Under these circumstances, the DOC properly concluded that, taking into consideration LG Semicon's verified cost data for the first half of 1996, that the piecemeal data submitted for the second half of 1996 could not be accepted at face value. The DOC was under no obligation to accept the incomplete cost data in the format submitted by LG Semicon when it contained undisclosed changes in accounting methods and an unsubstantiated claim that it was prepared in accordance with its normal accounting records.

(iii) *The United States Appropriately Discounted Hyundai's Economic Study Containing Unrealistic Projections of Costs and Prices and Respondents' Unsubstantiated Cost and Pricing Data*

4.443 Korea also claims that the DOC improperly disregarded an economic study submitted by Respondent Hyundai that purported to show, based on a number of assumptions concerning the trend in prices and costs, that Hyundai's prices would remain above its costs in the second half of 1997 and 1998. The DOC did not ignore the Flamm study. To the contrary, in the *Final Results Third Review*, the DOC carefully considered Respondent's submissions, but concluded that the unrealistic assumptions on which the study was based (which assumptions were contradicted by other data submitted by Respondents and by pricing data submitted by their computer customers) rendered the study's projections unreliable.<sup>344</sup> Indeed, as noted by the DOC, those optimistic projections had already proved incorrect by the pricing trends and analysts' reports in June 1997.<sup>345</sup> While baldly asserting that the Flamm study was a valid econometric study, Korea does not address any of the specific flaws in its underlying assumptions that the DOC identified in its determination.

4.444 Korea also complains that the DOC disregarded the Respondent-specific cost and pricing data submitted by the companies. The DOC in fact relied upon the verified cost and pricing data for the third-review period that Respondents had submitted in their questionnaire responses. In addition, one Respondent, LG Semicon, submitted monthly averages for selected cost and pricing data. The DOC properly discounted that data (which in itself showed that LG Semicon's earlier projections were erroneous).

4.445 Korea further asserts that Respondents' data (which were verified by the DOC) showed that their contract prices were above spot prices. However, Korea does not cite any specific evidence in the record to support its assertion, apparently relying generally on its earlier reference to the data submitted by Respondents in their 18 April 1997 case briefs. The DOC properly evaluated Respondents' data, in light of all the evidence on the record including actual pricing data submitted by the OEM computer customers themselves and concluded that Respondents' contract pricing generally followed the pricing trends in the spot market.<sup>346</sup>

4.446 LG Semicon submitted two charts in its 18 April 1997 case brief (at 49-50, Figures 5 and 6) in support of its argument that its contract prices to OEMs during the third-review period were above the average US spot-market price. Those charts actually support the DOC's conclusion that Respondents' US prices followed the declining trend of spot prices, and that the extrapolation of those trends indicated that Respondents already may have made sales below cost during 1996.

4.447 To the extent that the charts show a lag between LG Semicon's prices and the rapidly declining spot prices in the second quarter of 1996, it reflects a fundamental distortion in the way the data were presented by LG Semicon. The charts present LG Semicon's *quarterly* average prices and costs for 4 meg and 16 meg DRAMs from the first quarter of 1995 through the second quarter of 1996, based on US prices and cost data submitted in the third review. However, because the third

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<sup>344</sup> *Final Results Third Review*, 62 Fed. Reg. at 39818 (Ex. USA-1). See also Micron Rebuttal Br. at Ex. 5 (Critique of Flamm Analysis) (Ex. USA-97).

<sup>345</sup> *Id.* (current market conditions do not bear the strong demand assumption out).

<sup>346</sup> *Final Results Third Review*, 62 Fed. Reg. at 39817-18 (Ex. USA-1).

review covered US sales made during the period 1 May 1995 through 30 April 1996,<sup>347</sup> what is shown in the chart as the average US price for the second quarter of 1996 actually represents sales *for just the first month* (April 1996) in the quarter. In a rapidly declining market, using prices for just the first month of a quarter to represent a quarterly average badly skews the comparison. This error was compounded when LG Semicon uses these quarterly averages to derive trends on which it based cost and price projections for the second half of 1996.<sup>348</sup>

4.448 The distortion in the calculation of LG Semicon's average DRAM prices for second quarter 1996 was demonstrated by the additional pricing data submitted by LG Semicon, purporting to show actual monthly average US prices for May to December 1996.<sup>349</sup> The monthly US pricing data for May and June show the gross distortion reflected by the quarterly average data for the second quarter of 1996, as well as in the projections for the second half of 1996 that are based on a trend using the distorted quarterly average.<sup>350</sup>

(iv) *The United States Properly Relied on Publicly Available Reports Concerning Market Price Trends and Projections of Costs Based on Respondents' Verified Cost Submissions*

4.449 Korea contends that the DOC improperly relied on publicly reported spot-pricing data in considering pricing trends and price levels, arguing that spot prices are irrelevant to the assessment of the market-pricing trends. Similarly, Korea asserts that the DOC improperly utilized the cost projections submitted by Micron, which were based on Respondents' own verified cost data for the third-review period. The United States reaffirms the discussion in its first written submission which showed that Korea's arguments are groundless.

4.450 The DOC carefully considered Respondents' arguments against reliance on independent analysts' spot-market pricing data in making determinations concerning the pricing levels and trends in the DRAM market. Respondents claimed that their sales to OEM customers, which Korea now asserts were made according to long-term contracts, did not precisely track spot-market prices.

4.451 First, the evidence does not support Korea's assertion that Hyundai and LG Semicon sold to US customers pursuant to long-term contracts. While Respondents may have reached periodic understandings on prices with their OEM customers, the actual prices were set in individual purchase orders, and were subject to change. As stated in their questionnaire responses, Respondents reported the invoice date (generally coincident with the date of shipment to the customer) as the date of sale.<sup>351</sup> Under the DOC's well-established practice, if all of the material terms of a sale are fixed in a legally binding long-term contract including, most importantly, the product, the price and quantity of the sale then the DOC would use the date of the long-term contract, not the invoice date, as the date of sale in

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<sup>347</sup> By contrast, pursuant to its standard questionnaire format, the DOC had collected information on Respondents' costs and sales in the home market through June 1996, as potential comparisons for the reported US sales for the period through April 1996.

<sup>348</sup> LG Semicon Case Br. at 52-54, Figures 7 and 8 (Ex. USA-99).

<sup>349</sup> *Id.* at 58-59, Figures 9 and 10 (Ex. USA-99). These unsubstantiated data, first submitted late in the proceeding with the case briefs, were submitted only in the form of data points on a graph showing simple monthly weighted average prices, an averaging methodology that is not consistent with the DOC's practice.

<sup>350</sup> Compare LG Semicon Case Br. at 52-54 with *id.* at 55-59 (Ex. USA-99).

<sup>351</sup> See, e.g., LG Semicon Questionnaire Response, Section C, 16 August 1996, at 7 ( LG Semicon has reported invoice date as date of sale ) (Ex. USA-100); *id.*, Section A, at 15 ( A variety of changes occur after the initial {purchase order} that affect the terms of the sale. Price. As a result of changing market conditions, the customer may demand a lower price. . . . ) (Ex. USA-100); Hyundai Questionnaire Response, Section A, 19 August 1996, at A-10 ( the product, unit price and quantity are shown in the purchase order from the customer. Once a sales order has been issued, the terms, *i.e.*, price, product, and quantity, may be modified. If so, then a new sales order is issued. ) (Ex. USA-101).



its dumping analysis.<sup>352</sup> Neither Respondent indicated in its verified questionnaire response that it sold pursuant to such long-term contracts, and the DOC used the date of invoice as the date of sale.

4.452 Second, the evidence showed that even those OEM customers that had non-binding understandings regarding pricing over longer periods abandoned such understandings as the DRAM market price continued its dramatic fall throughout 1996. A report on LG Semicon from the brokerage house ABN Amro Hoare Govett, prepared in November 1996, stated:

LG Semicon's interim net profits fell 60 percent {year-over-year} in 1H96 as prices tumbled. However, the worst is yet to be reported for the company. . . . [A]lthough spot market DRAM prices declined sharply in the first half of the year, the average for the half was much higher than those which have prevailed so far in the second half. However, the difference between the prices that LG Semicon actually realized in the first half and the second half is likely to be even more pronounced because of long-term contracts that many DRAM producers had signed. These were typically quarterly contracts, and had the effect of keeping contract high above the spot market prices . . . By mid-year, many industry sources confirmed that *quarterly contracts had been replaced by monthly contracts, and that prices were being renegotiated as often as once per week. Consequently, the prices that DRAM makers have received on the bulk of their products in the second half have been much closer to the spot market rate.* As a result, we expect that *LG Semicon will post negative gross profits for the second half of 1996.*<sup>353</sup>

4.453 Consequently, while *LG Semicon* might have been in a position to obtain some price premium over spot-market prices at the beginning of 1996, this situation clearly evaporated by the second half of 1996, as longer-term price agreements were displaced and OEM customers had ample access to an excess supply of DRAMs at even lower prices.

F. CLAIMS UNDER ARTICLE X:1 AND X:2 OF GATT 1994

1. **Transparency and Due Process in the Administration of Government Measures**

(a) Submission by Korea

4.454 **Korea** makes the following arguments on the application of Article X:

4.455 Unlike most GATT provisions, which are concerned with the content of a government's laws, regulations, decisions and rulings, Article X of the General Agreement focuses on the administration of those laws, regulations, decisions and rulings.<sup>354</sup> It articulates the fundamental principles of transparency (publication and disclosure of government measures and actions) and what is widely known as due process (fundamental fairness).

4.456 Despite its importance, there is very little precedent regarding Article X. A review of the relevant chapter of the *GATT Analytical Index* discloses that, in most disputes, complainants made subsidiary claims regarding Article X. When panels found violations of a substantive GATT article, however, they declined to rule on the subsidiary claim.<sup>355</sup> Given the past treatment of Article X,

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<sup>352</sup> See *Anti-dumping Duties; Countervailing Duties; Final Rule*, 62 Fed. Reg. 27296, 27348-50 (Ex. USA-102); *id.* at 27411 (codifying practice in new regulation, 19 CFR § 351.401(i)) (9 May 1997) (Ex. USA 102).

<sup>353</sup> Letter from Micron Technology, Inc. to Assistant Secretary LaRussa, 28 January 1997, at Ex. 1, p.18 (emphasis added by the United States) (Ex. USA-103).

<sup>354</sup> The Appellate Body referenced this distinction in *European Communities—Regime for the Importation, Sale and Distribution of Bananas* (9 September 1997), WT/DS 27/AB/R, para. 200.

<sup>355</sup> See 1 GATT, ANALYTICAL INDEX: GUIDE TO GATT LAW AND PRACTICE 293-312 (6th ed. 1995).

Korea stresses its Article X claims are not subsidiary to any other claim. They are independent – separate and distinct.

4.457 The GATT *Analytical Index* notes that Article X was based on the 1923 International Convention Relating to the Simplification of Customs Formalities and on US proposals.<sup>356</sup> In Article 1 of the Simplification Convention, “[t]he Contracting States . . . undertake that their commercial relations shall not be hindered by excessive, unnecessary or arbitrary customs or other similar formalities.”

4.458 The concerns that led to the drafting of GATT Article X are fully expressed in the so-called Sullivan Study, prepared by the US Department of State to annotate and explain the articles of the US model friendship, commerce and navigation (FCN) treaty.<sup>357</sup> In the annotation for Article XV of the US model FCN, which closely follows GATT Article X, the drafters state:

Inclusion of Article XV in the treaty is based primarily because of concern that customs administration could nullify or impair the benefits occurring from the liberalization of trade. *This Article is intended to provide protection against a variety of forms of administrative inequity or harassment which cumulatively could become a serious impediment to trade.* Article XV is based on ample precedents, including reciprocal trade agreements, GATT, the proposed ITO Charter, and various multilateral conventions on customs administration and formalities dating back to the 1920’s.<sup>358</sup>

4.459 The WTO Appellate Body has recognized the critical role of the GATT Article X obligations. In *United States – Restrictions on Imports of Cotton and Man-made Fibre Underwear* it stated:

Article X:2, *General Agreement*, may be seen to embody a principle of fundamental importance – that of promoting full disclosure of governmental acts affecting Members and private persons and enterprises, whether of domestic or foreign nationality. *The relevant policy principle is widely known as the principle of transparency and has obviously due process dimensions.* The essential implication is that Members and other persons affected, or likely to be affected, by governmental measures imposing restraints, requirements and other burdens, should have a reasonable opportunity to acquire authentic information about such measures and accordingly to protect and adjust their activities or alternatively to seek modification of such measures.<sup>359</sup>

4.460 This quotation, which relates to the requirement of prior publication set out in Article X:2, applies with equal force to Articles X:1 and X:3(a), which state in relevant part:

1. Laws, regulations, judicial decisions and administrative rulings of general application, made effective by any contracting party, pertaining to the classification or the valuation of products for customs purposes, or to rates of duty, taxes or other charges, or to requirements, restrictions or prohibitions on imports or exports or on the transfer of payments therefor, or affecting their sale, distribution, transportation, insurance, warehousing, inspection, exhibition, processing, mixing or other use, shall be *published promptly in such a manner as to enable governments and traders to become acquainted with them.*

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<sup>356</sup> See *id.* at 309. The 1923 Convention is printed in 30 League of Nations Treaty Series, No. 775, p. 378 (Ex. ROK-74).

<sup>357</sup> US DOC of State, *Standard Draft Treaty of Friendship, Commerce and Navigation* (Charles H. Sullivan ed., 1970) (relevant excerpts Ex. ROK-75).

<sup>358</sup> *Id.* at p. 247 (emphasis added by Korea).

<sup>359</sup> *United States – Restrictions on Imports of Cotton and Man-made Fibre Underwear* (10 February 1997), WT/DS24/AB/R, section VI, pp. 21-22 (emphasis added by Korea).

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3. (a) Each contracting party shall administer *in a uniform, impartial and reasonable manner* all its laws, regulations, decisions and rulings of the kind described in paragraph 1 of this Article. (Emphasis added by Korea.)

Government measures must be published in such a manner as to enable governments and traders to become acquainted with them (Article X:1), and they must be administered in a uniform, impartial and reasonable manner (Article X:3(a)).

4.461 In Response to a question from the Panel,<sup>360</sup> **Korea** further argued:

The WTO Agreements are a unitary whole. The transparency and uniformity obligations of Article X apply to the WTO Agreements, including the AD Agreement. When a Member promulgates a law or regulation or issues an administrative ruling of general application, it must comply with Article X:1. Also, the Member must administer each statute, regulation and administrative ruling in a way that complies with Article X:3. Thus, Article X applies to each and every action the Department takes in a revocation proceeding. Any other interpretation would allow a Member to completely avoid the dictates of Article X (and, thereby, the substantive obligations of the AD Agreement).

(b) Response by the United States

4.462 The **United States** responds to Korea's submission with the following arguments:

4.463 Article X:1 provides, in part:

Laws, regulations, judicial decisions and administrative rulings of general application, made effective by any contracting party, pertaining to . . . rates of duty, taxes or other charges, or to requirements, restrictions or prohibitions on imports . . . shall be published promptly in such a manner as to enable governments and traders to become acquainted with them.

4.464 Throughout its submissions, the United States has established that section 751 of the Act and section 353.25(a)(2) of the DOC's regulations govern a decision by the DOC to revoke an anti-dumping duty order. Section 353.25(a)(2) of the regulations sets forth the criteria which the DOC will consider in evaluating whether revocation is appropriate. Moreover, the DOC's regulations require that the final results of all administrative reviews be published, including decisions on revocation.<sup>361</sup> Thus, the United States has complied with its obligations under Article X:1 by promptly publishing all relevant laws, regulations, and administrative decisions in a manner that enables governments and traders to become acquainted with them.

4.465 Considering the undisputed fact that the United States promptly published these statutory and regulatory provisions, the United States has satisfied all the requirements of Article X:1. As the plain language suggests, Article X:1 simply requires Members to publish certain laws and regulations of general application. This provision does not concern itself with the content or substantive elements of a Member's legislation. Indeed, Korea agrees by stating that Article X is unlike most provisions of the WTO agreements, "which are concerned with the content of a government's laws, regulations, decisions and rulings," because Article X relates to the administration of those laws, regulations, decisions and rulings. Nevertheless, Korea's arguments focus solely on the substantive elements of the US anti-dumping law and regulations.

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<sup>360</sup> The panel recalls that the question was: "How would Korea describe the relationship, if any, in legal terms between Article X of GATT 94 and the AD Agreement?"

<sup>361</sup> See 19 C.F.R. §§ 353.22(c)(8) and 353.25(c)(2)(v)(vi) (1997) (Ex. USA-24).

4.466 Aside from publication, Korea believes that the relevant issue under Article X:1 is “whether the criteria on which [the DOC’s] decision was based were objective . . .” No possible interpretation of the plain language of Article X:1 could contemplate a requirement such as the one Korea advocates before this Panel. Article X:1 does not require “objective criteria” to be set forth in the DOC’s regulations. This argument goes to the content of the US laws and regulations which Korea acknowledges to be irrelevant in the context of an Article X:1 argument. Were this not the case, then probably all anti-dumping legislation of every WTO Member with such legislation, including Korea, would be in violation of Article X:1.

4.467 The United States has consistently noted, that Korea, as the complaining party, bears the burden of proving that the DOC’s application of its anti-dumping law and regulations to the *Final Results Third Review* violated Article X. Specifically, under paragraph 1 of Article X, Korea must establish that the United States failed to publish rules and requirements which establish or revise principles applicable in future cases. Moreover, under paragraph 3 of Article X, Korea bears the burden of establishing that the DOC failed to administer its laws and regulations in a uniform, impartial, and reasonable manner. Korea’s mere assertions - unsupported by proof - do not sustain Korea’s burden to establish an Article X violation. Therefore, the United States submits that the Panel must reject these claims.

4.468 Korea recognizes that Article X embodies the fundamental principles of transparency and (what is widely known as) “due process.” These principles do not concern themselves with the consistency of a Member’s laws, regulations, decisions and rulings with the substantive provisions of the WTO agreements, including the AD Agreement.<sup>362</sup> Rather, Article X relates to the administration of a Member’s laws, regulations, decisions, and rulings.<sup>363</sup>

4.469 In discussing the policy underlying the obligations contained in Article X, the Appellate Body has stated:

The essential implication is that Members and other persons affected, or likely to be affected, by governmental measures imposing restraints, requirements and other burdens, should have a reasonable opportunity to acquire authentic information about such measures and accordingly to protect and adjust their activities or alternatively to seek modification of such measures.<sup>364</sup>

4.470 Korea has not sustained its burden to establish that the Korean Respondents in the *Final Results Third Review* did not have a “reasonable opportunity to acquire authentic information” regarding the administration of the US anti-dumping law and regulations. Moreover, Korea’s arguments do not relate to the “administration” of the US measures but, rather, the consistency of such measures with other GATT 1994 or AD Agreement provisions.<sup>365</sup> As such, Korea’s argument that the United States has violated Article X should be rejected.

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<sup>362</sup> See *European Communities - Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, Report of the Appellate Body adopted 9 September 1997, at para. 200.

<sup>363</sup> *Id.*

<sup>364</sup> *United States - Restrictions on Imports of Cotton and Man-made Fibre Underwear*, WT/DS24/AB/R, Report of the Appellate Body adopted 10 February 1997, at 21-22 (emphasis added by the United States).

<sup>365</sup> For example, Korea’s argument that the “not likely” criterion in section 353.25(a)(2) does not contain objective criteria is one of Korea’s central arguments under both Article 11 of the AD Agreement and Article X:1 of GATT 1994. In addition, the argument that the United States failed to provide the same advantage to Korea that was provided to Japan is the basis for Korea’s arguments under GATT 1994 Article I, as well as Article X:3(a). The notion that Article X imposes duplicative obligations on WTO Members is untenable, and is inconsistent with the Appellate Body’s interpretation of Article X.

## 2. Failure to Publish Objective and Specific Factors Regarding the “No Likelihood/Not Likely” Criterion

### (a) Claim raised by Korea

4.471 **Korea** claims that the United States failed to publish objective and specific factors regarding the “no likelihood/not likely” criterion promptly and in such a manner as to enable Korea and Korean companies to become acquainted with them, thus violating Article X:1 of GATT 1994. Korea makes the following arguments in support of this claim:

4.472 The standard governing the objective criteria and methodology which the United States will use in determining whether (and when) to revoke an anti-dumping duty order clearly is (a) a government measure of general application<sup>366</sup> that (b) pertains to (i) rates of customs duty or (ii) requirements on imports. Accordingly, the application of that standard in the proceeding involved in this dispute is subject to the transparency and due process requirements of GATT Article X.

4.473 US law does not set out the objective criteria and methodology for determining entitlement to revocation. The applicable provision (section 751(d)(1) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1675(d)(1)) merely states that “[t]he administering authority may revoke, in whole or in part, . . . an anti-dumping duty order . . . after review under . . . this section.” There are no objective criteria or methodology, merely authorization of unbounded discretion.<sup>367</sup>

4.474 The US regulation also does not set out the objective criteria and methodology for determining entitlement to revocation. The applicable provision provides no guidance in this regard:

(2) The Secretary may revoke an order in part if the Secretary concludes that:

(i) One or more producers or resellers covered by the order have sold the merchandise at not less than foreign market value for a period of at least three consecutive years;

(ii) It is “not likely” that those persons will in the future sell the merchandise at less than foreign market value; and

(iii) For producers or resellers that the Secretary previously has determined to have sold the merchandise at less than foreign market value, the producers or resellers agree in writing to their immediate reinstatement in the order, as long as any producer or reseller is subject to the order, if the Secretary concludes under §353.22(f) that the producer or reseller, subsequent to the revocation, sold the merchandise at less than foreign market value.<sup>368</sup>

Governments and traders are advised that the Secretary has the authority to revoke (but is not required to revoke) if he concludes that “[i]t is not likely that those persons will in the future sell the merchandise at less than foreign market value.” However, they are not advised of the meaning of “not likely” or how it will be applied, and, by virtue of the verb “may” at the start of the regulation, they are reminded that the US authorities have unbounded discretion to decide not to revoke an anti-dumping duty order.

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<sup>366</sup> The recently released Panel Report in *Japan-Measures Affecting Consumer Photographic Film and Paper* clarifies that Article X:1 extends to administrative rulings in individual cases that establish or revise principles or criteria applicable in future cases. WT/DS44/R, para. 10.388 (31 March 1998).

<sup>367</sup> See *Toshiba*, 15 C.I.T. at 598-600 (Ex. ROK-5).

<sup>368</sup> 19 C.F.R. § 353.25(a)(2) (1996).

4.475 US judicial decisions permit this and, thus, are also unenlightening on that point. For example, in *Toshiba*, the CIT declared:

Section 751(c) [now 751(d)(1)] of the Tariff Act of 1930 commits the decision to revoke an anti-dumping order to the *unfettered discretion* of the DOC of Commerce . . .

\* \* \*

The language of the regulations indicates that the *Secretary is not compelled to grant revocation* even when plaintiffs satisfy the requirements for revocation.

\* \* \*

The *regulation does not present an objective criterion* for determining whether there is “no likelihood” of resumption of LTFV [less than fair value (*i.e.*, less than normal value)] sales. Instead, the petitioner must establish this fact to the satisfaction of the Secretary.<sup>369</sup>

4.476 Finally, no objective criteria and methodology for determining entitlement to revocation are set out in US administrative rulings of general application. In the Notice of Final Results in this case the DOC mentioned “the predictive nature of the revocation proceeding.”<sup>370</sup> The US CIT has asserted that ordinarily past behaviour constitutes substantial evidence of expected future behaviour.<sup>371</sup> In the Final Results in this case, the DOC agrees that *normally* three years of no dumping margins plus certification of agreement to reinstatement of the anti-dumping order are all that is required for a decision to revoke.<sup>372</sup> When is satisfaction of these criteria not sufficient in the DOC’s eyes? “When additional evidence is on the record . . .”<sup>373</sup> In other words, the DOC adds a third, vague and undefined requirement for revocation whenever it believes that it should do so. This is not an objective criterion. It is the exercise of unfettered discretion.

4.477 In this way, there is no publication in such a manner as to enable governments and traders to become acquainted with the situations in which the US authorities will choose to add a third requirement to secure revocation. Likewise, there is no such publication of what substantive criteria will be applied in those cases in which the DOC chooses to examine this additional requirement. What does the DOC look at? “[A]ll relevant economic factors and other information on the record in a particular case.”<sup>374</sup> The DOC continues by noting that “depending upon the facts of a case, we consider ‘such factors as . . .’”<sup>375</sup>; a list of factors follows.

4.478 For purposes of GATT Article X, the issue is not whether the DOC explained its decision at length. Rather, the issue is whether the criteria on which its decision was based were objective and were publicized in such a manner as to enable governments and traders to become acquainted with them (*i.e.*, to know ahead of time the criteria on which the determination would be based). They were not.

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<sup>369</sup> *Toshiba*, 15 C.I.T. at 598-600 (emphasis added by Korea) (citations omitted) (Ex. ROK-5).

<sup>370</sup> 62 Fed Reg. 39809, 39812 (24 July 1997) (Ex. ROK-3).

<sup>371</sup> *Tatung Co. v. United States*, 18 C.I.T. 1137, 1144, 1994 C.I.T. LEXIS 288 (Ex. ROK-76).

<sup>372</sup> 62 Fed. Reg. 39809, 39810 (24 July 1997) (Ex. ROK-3).

<sup>373</sup> *Id.*

<sup>374</sup> *Id.*

<sup>375</sup> *Id.* (quoting *Brass Sheet and Strip from Germany*, 61 Fed. Reg. 49727, 49730 (23 September 1996).

4.479 First, the standard applied by the DOC in its preliminary determination not to revoke the anti-dumping duty order was different, and stricter, than the standard set out in the US regulations. The DOC denied revocation on the grounds that the Korean Respondents could not satisfy the DOC that there was “no likelihood” of future dumping.<sup>376</sup> By the final determination, the DOC recognized that it should have applied the standard of whether it was “not likely” that the Korean companies would dump in the future. The DOC also recognized “the potential difference in meaning” between “no likelihood” and “not likely.”<sup>377</sup> However, it sought to argue that it had not applied the erroneous “no likelihood” standard so as to require a higher degree of certainty that dumping would not recur than was implied by the current standard--“not likely.” The explanation rings hollow, but more significant for purposes of GATT Article X, it is an admission that neither the Korean government nor the companies could have known the level of certainty that the DOC would require for revocation in this case.

4.480 Second, neither the Korean government nor the companies could have known the substantive factors that the DOC would consider appropriate. The DOC acknowledges this, albeit in a convoluted fashion, in its notice of final results:

We also disagree with Hyundai’s assertion that the DOC erred by relying on Brass Sheet and Strip as support for its preliminary determination not to revoke. The DOC did not rely upon Brass Sheet and Strip as support for each of the elements addressed in the DOC’s preliminary determination regarding the “not likely” issue. Rather, the DOC relied upon Brass Sheet and Strip primarily to confirm *the legal standard for the type of factors the DOC has considered* relevant in the past (*e.g.*, conditions and trends in the industry, currency movements and the ability of the foreign entity to compete in the US without dumping).<sup>378</sup>

Thus, despite its repeated references to *Brass Sheet and Strip*,<sup>379</sup> the DOC admits that this supposed source of criteria does not in fact specify the criteria that the DOC *will* use in its revocation decision, and indeed it does not necessarily specify the range of factors that Commerce *may* use.

4.481 Thus, the DOC believes it has complete discretion to choose the criteria it wishes to consider determinative in each specific case. The criteria the DOC uses will vary from case to case. They are not uniform or impartial and they are neither known to nor knowable by governments and traders. Therefore, the United States is in breach of its transparency and due process obligations under Article X:1 and X:3(a) of the General Agreement. The United States also is in breach of the obligations of Article 17.6(i) of the AD Agreement to evaluate facts in an unbiased and objective manner.

(b) Response by the United States

4.482 The **United States** responds to Korea's claim with the following arguments:

4.483 Korea complains that the “not likely” criterion included in section 353.25(a)(2) does not advise governments and traders of the “meaning of ‘not likely’ or how it will be applied.” This argument implies that a Member cannot satisfy its obligations under Article X:1 unless interpretive notes and definitions accompany every provision of a Member’s trade legislation. Suggesting that the DOC’s regulations could be consistent with Article X:1 if section 353.25(a)(2) included “the meaning of ‘not likely’ or how it will be applied,” is merely a further attempt by Korea to address the content

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<sup>376</sup> 62 Fed. Reg. 12794, 12796 (18 March 1997) (Ex. ROK-34).

<sup>377</sup> 62 Fed. Reg. 39809, 39812-13 (24 July 1997) (Ex. ROK-3).

<sup>378</sup> *Id.* at 39812 (emphasis added by Korea) (Ex. ROK-3).

<sup>379</sup> *Brass Sheet and Strip from Germany*, 61 Fed. Reg. 49727 (23 September 1996) (Ex. ROK-36).

of the DOC's regulations. The drafters could not have contemplated that Article X:1 would be considered a remedy for such an argument.<sup>380</sup>

4.484 Moreover, Korea suggests that the measure of discretion allowed for in section 751(d)(1) of the Act is inconsistent with Article X:1. For the same reasons discussed above, this argument relates to the content of the statute. While the DOC's discretion may be relevant to the interpretation of the AD Agreement and the issue of whether the United States is in compliance with the agreement, it is irrelevant to the issue of whether the United States published its laws, regulations, and administrative decisions in a manner consistent with Article X:1.

4.485 Korea also suggests that the DOC adds a "vague and undefined requirement for revocation whenever it believes that it should do so." In this regard, Korea states that "the DOC agrees that *normally* three years of no dumping margins plus certification of agreement to reinstatement of the anti-dumping order are all that is required for a decision to revoke." Thus, Korea apparently argues that the DOC's failure to publish when the "not likely" criterion will be applied violates Article X:1.

4.486 Korea predicates this argument upon the false premise that the DOC *normally* will not examine the "not likely" requirement in a revocation inquiry. In the *Final Results Third Review*, the DOC stated:

In evaluating the "not likely" issue in numerous cases, Commerce has considered three years of no dumping margins, plus a Respondent's certification that it will not dump in the future, plus its agreeing to immediate reinstatement in the order all to be indicative of expected future behavior. In such instances, this was the only information contained in the record regarding the likelihood issue. . . .

In other cases, when additional evidence is on the record concerning the likelihood of future dumping, Commerce is, of course, obligated to consider that evidence. In this regard, in evaluating such record evidence to determine whether future dumping is not likely, the DOC has a longstanding practice of examining all relevant economic factors and other information on the record in a particular case.<sup>381</sup>

4.487 To intimate that the above passage reflects a practice of "normally" not considering the "not likely" criterion published in the DOC's regulations belies the unambiguous language contained in the *Final Results Third Review*. The DOC stated that while satisfaction of two of the three criteria contained in the regulation may be "indicative of expected future behavior," it would consider any additional available evidence in conducting its inquiry. Contrary to Korea's contention, section 353.25(a)(2) of the DOC's regulations does not contain a "vague and undefined requirement" that may be applied "whenever [the DOC] believes that it should do so." On the contrary, the level and depth of the DOC's analysis of the "not likely" criterion in any given case is almost entirely dependent on the amount and type of information placed on the record by the parties, including Respondents. Thus, the DOC's published regulations allow governments and traders to become acquainted with all of the criteria which the DOC will apply when determining whether revocation of an anti-dumping order is appropriate.

4.488 While the DOC will apply the criteria contained in section 353.25(a)(2) in each revocation inquiry, the DOC must also evaluate the facts on the administrative record in order to determine whether these criteria have been satisfied. Interestingly, Korea offers the fact that the DOC will examine "information on the record in a particular case" and that a determination to revoke will be

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<sup>380</sup> Of course, parties may "become acquainted" with how the DOC has applied the "not likely" criterion by examining past revocation decisions, all of which have been published in the *Federal Register* in accordance with 19 C.F.R. § 353.25(c)(2)(vi) (1997) (Ex. USA-24) and its predecessor provisions.

<sup>381</sup> *Final Results Third Review*, 62 Fed. Reg. at 39810 (citations omitted)(emphasis added by the United States) (Ex. USA 1).



“depending upon the facts of a case” as evidence of an Article X violation. However, the United States does not violate its obligation to publish laws, regulations, and administrative rulings by examining evidence on a case-by-case basis. The absence of more detailed or specific requirements as they relate to the “not likely” criterion merely reflects the fact-specific, case-by-case analysis in which the DOC engages in order to determine whether revocation is justified.<sup>382</sup>

4.489 Article 11 of the AD Agreement does not provide specific guidance to Members with regard to determining “whether the continued imposition of the duty is necessary to offset dumping, whether the injury would be likely to continue or recur if the duty were removed or varied, or both.” This determination is factual in nature. Certainly, Article X does not require Members to promulgate published rules and regulations in more detail than that which is required under the terms of the AD Agreement.<sup>383</sup> Because the United States published the laws, regulations, and administrative decisions relevant to the application of the “not likely” criterion and the DOC’s revocation decisions, the United States complied with its obligations under Article X:1.

### **3. Failure to Publish Objective and Specific Factors Regarding the Time-Period Used in Analysing the “No Likelihood/Not Likely” Criterion**

#### **(a) Claim raised by Korea**

4.490 **Korea** claims that the failure by the United States to publish objective and specific factors regarding the time-period selected for analyzing the “no likelihood/not likely” criterion violates the transparency obligations of Article X:1 of the General Agreement. The following are Korea’s arguments in support of this claim:

4.491 In the determination itself the DOC states:

There is nothing in the Act, the Department’s regulations or case precedent that defines the relevant time period in considering the likelihood issue.<sup>384</sup>

4.492 Thus, there are no objective criteria published in such a manner as to enable governments and traders to become acquainted with them, in breach of the United States’ obligations under Article X:1 of the General Agreement.

4.493 The United States breached its obligations under Article X of the General Agreement in regard to the period selected by the Department for purposes of analyzing whether it believed that the “no likelihood/not likely” criterion is permissible, its purpose must be to try to predict whether the respondent companies would sell at less than normal value in the future. Thus, one would expect that: (i) the Department would select the period to examine in each case based on objective criteria; and (ii) the period chosen would reasonably seek to be predictive and relevant. The period chosen by the Department in *DRAMS from Korea* fails in both respects

4.494 **Korea** in response to a question by the Panel,<sup>385</sup> further argued as follows:

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<sup>382</sup> Article 17.6 of the AD Agreement, which contains the Panel’s standard of review for this case, recognizes that each anti-dumping determination requires a case-by-case evaluation of the facts.

<sup>383</sup> Otherwise, Members who treat international agreements as self-executing under their legal and constitutional systems would presumably be in violation of Article X.

<sup>384</sup> 62 Fed. Reg. 39809, 39814 (24 July 1997) (Ex. ROK-3).

<sup>385</sup> The Panel recalls that the question was: “Could Korea please explain the essence of its claim under Article X of GATT 1994. Is Korea concerned principally with the alleged failure to publish under Article X:1, or is the focus of Korea’s complaint directed at the alleged failure to administer laws and regulations etc. in the ‘uniform, impartial and reasonable manner’ required by Article X:3(a)?”

4.495 Korea has established that the failure of the DOC to publish objective and specific factors regarding both the “no likelihood/not likely” criterion and the time period used by the DOC in analyzing whether this criterion was met violates the transparency obligation of Article X:1 of GATT 1994. More specifically, the DOC did not publish regulations or administrative rulings of general application “promptly and in such a manner as to enable governments and traders to become acquainted with them.”

(b) Response by the United States

4.496 The **United States** responds to Korea's claim with the following arguments:

4.497 Korea argues that the United States breached its obligations under Article X:1 of GATT 1994 with regard to the period selected by the DOC for purposes of analyzing whether it believed that the “not likely” criterion was satisfied. Korea claims that the DOC failed to publish “objective criteria” that helps define the relevant time period in considering the likelihood issue. Article X:1 does not concern the content of a Member’s laws, regulations, decisions, and rulings. Korea’s argument that the DOC’s regulations do not contain additional elements is wholly irrelevant to the issue of whether the United States published its laws and regulations of general application in accordance with Article X:1.

4.498 Neither the AD Agreement nor Article X:1 requires Members to prescribe in their legislation the time frame that will be applicable in all cases for purposes of determining whether dumping or injury would occur in the future. That is because the time period most relevant to this issue will always depend upon the nature of the evidence on the record in each case. With respect to determining the appropriate time period in applying the “not likely” criterion in the instant case, the DOC stated in its *Final Results Third Review*: “[c]ommon sense . . . dictates that the DOC should, as always, base its determination on all record evidence.”<sup>386</sup> Thus, the DOC “considered all publicly available data and information placed on the record by all parties (including data regarding the January 1997 through April 1997 time period, which Respondents characterize as a market upturn).”<sup>387</sup> A determination that is based upon the record evidence does not reflect a lack of transparency and certainly does not constitute a violation under Article X:1. Therefore, the lack of published “objective criteria” or more specific factors relating to the time period examined when considering the likelihood issue does not violate the United States’ obligations under Article X:1.

4.499 There is no basis for Korea's assertion that the DOC “revived the ‘gap period’ review” without such a requirement being published.<sup>388</sup>

4.500 First, the 1989 amendments to the DOC’s anti-dumping regulations did not affect a substantive change in the likelihood standard. Under this provision, the DOC's long-standing practice has been to examine all economic factors and other information on the record which bear on the issue of future dumping.<sup>389</sup> Korea’s attempts to keep the DOC from looking at the period immediately after the third administrative review are contrary to this practice and without support.

4.501 Secondly, in evaluating whether future dumping is not likely, the DOC may find that market conditions and trends during a certain period or periods are probative. Often times, the agency’s

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<sup>386</sup> *Final Results Third Review*, 62 Fed. Reg. at 39814 (Ex. USA-1).

<sup>387</sup> *Id.*

<sup>388</sup> Prior to the promulgation in 1989 of the regulations which governed this proceeding, the DOC required a finding of no dumping for a period of two years. In addition, it was the DOC’s practice to consider whether dumping took place in the period between the end of the two-year period and the date of its tentative determination to revoke (the “gap period”). The 1989 amendments to the regulations eliminated the need for “gap period” reviews by adopting the current system which is based, *inter alia*, upon three consecutive years of no dumping.

<sup>389</sup> See, e.g., *Steel Rope from Korea*, 62 Fed. Reg. at 17173-74 (Ex. USA-52); *Brass Sheet from Germany*, 61 Fed. Reg. at 49730-31 (Ex. USA-46); *FCOJ from Brazil*, 56 Fed. Reg. at 52511 (Ex. USA-31).

analysis will focus on the period immediately following the close of the three-year period of no dumping because it contains the most recent data available on market conditions and prices.<sup>390</sup> In the instant case, the DOC found the January through December 1996 time frame to be particularly probative because it contained recent data that corresponded with a significant downturn in the DRAM market. As the DOC explained in the final results of its review, the fact that this period coincided with the end of the third review was coincidental:

We consider it merely coincidental that this time frame coincided with the end of the third administrative review and the period immediately following. Had the most recent downturn occurred during a different time frame, it may have been appropriate to take that period into account in our analysis.<sup>391</sup>

4.502 In sum, the fact that the DOC considered the likelihood issue by examining a period of time which extended beyond the end of the third administrative review does not constitute a non-published revival of the “gap period” reviews. The DOC’s regulations, which do not contain a predetermined time frame in which to examine the likelihood issue, are consistent with the United States’ obligations under Article X:1. Moreover, the DOC’s decision to examine a period of time which extended beyond the end of the third administrative review was based solely on record evidence. Contrary to Korea’s argument, the DOC did not effectively resurrect the “gap period review” without publication. Therefore, the United States complied with its Article X:1 obligations by publishing all relevant statutory and regulatory provisions which applied to its revocation decision

(c) Rebuttal arguments made by Korea to both claims under Article X:1 of GATT 1994

4.503 **Korea** makes the following arguments in rebuttal to the United States responses on both Article X:1 claims regarding the failure to publish objective and specific factors regarding the “no likelihood/not likely” criterion and failure to publish objective and specific factors regarding the time-period used in analysing the “no likelihood/not likely” criterion:

4.504 Article X:1 of the General Agreement articulates the fundamental principle of transparency. The procedural protectionism of unknown, unknowable government requirements is every bit as pernicious as the substantive protectionism of discriminatory government measures. This procedural protectionism was condemned by the Appellate Body in *United States -- Cotton Underwear* in the context of Article X:2. The logic of this condemnation applies with equal force to the transparency requirement of Article X:1. If governments and traders are not aware of the substantive requirements that they are required to meet (or, as in this case, that they are required to prove), they will not be able either to protect and adjust their activities or to seek modification of the hidden measures. The United States violated the transparency obligation of Article X:1 by failing to publish objective and specific factors regarding both the “no likelihood/not likely” criterion and the time period used by the DOC in analyzing it. There was no US law, regulation or administrative ruling to which the Korean Respondents could turn to become acquainted with the factors or the time period the DOC would use in assessing whether to revoke the anti-dumping duties.

4.505 This is not, as the United States alleges, an argument addressing the substance of the US revocation scheme. Rather it is an indictment of the uncertainty and confusion flowing from the DOC’s failure to publish the substantive factors and criteria the DOC would apply.

4.506 The United States seeks to excuse its lack of required transparency by claiming that it published the US revocation regulation (Section 353.25(a)(2)) and that the absence of more detailed

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<sup>390</sup> See, e.g., *Steel Rope from Korea*, 62 Fed. Reg. at 17173 (Ex. USA-52); *Silicon Metal From Brazil*; *Final Results of Anti-dumping Duty Administrative Review and Determination Not To Revoke in Part*, 62 Fed. Reg. 1970, 1973 (1997) (Ex. USA-79); *Brass Sheet from Germany*, 61 Fed. Reg. at 49730-31 (Ex. USA-46); *Televisions from Japan*, 54 Fed. Reg. at 35519 (Ex. USA-47).

<sup>391</sup> *Final Results Third Review*, 62 Fed. Reg. at 39814 (Ex. USA-1).

requirements relating to the “no likelihood/not likely” criterion and the time period to be analyzed “merely reflects the fact-specific, case-by-case analysis in which the DOC engages.”

4.507 The fact that revocation decisions are fact-intensive (as are all decisions in anti-dumping proceedings) does not excuse the United States from its GATT Article X:1 obligations. The US revocation regulation does not set out the basis (or bases) on which the United States decides how it will apply the “no likelihood/not likely” criterion or the time period it will examine in assessing whether the criterion is satisfied. Publication in Section 353.25(a)(2) of the regulations of a criterion denominated “not likely” is not enough. Without an articulation of objective and specific factors, the criterion is meaningless, because it does not provide accurate information that enables those seeking revocation to know the substantive requirements the Department will apply. Also, the lack of articulation reinforces the Secretary's discretion and insulates a decision not to revoke from challenge.

4.508 Equally unavailing is the subsidiary US argument that Article X:1 cannot require publication of regulations “in more detail than that which is required under the terms of the AD Agreement.” The United States has not supported and cannot support this assertion. Within national systems, laws provide the basic, general authority. They are implemented and specified by regulations, which, in turn, are further specified by administrative rulings of general application.

4.509 As the United States itself has argued, the AD Agreement (and the other WTO Agreements) set out the parameters within which national governments can legislate and regulate in conformity with their WTO obligations. Just as regulations and rulings are often necessary to flesh out national laws, they are essential in situations such as anti-dumping revocation determinations--they enable governments and traders to become acquainted with how national authorities will apply and administer the requirements mandated by the WTO Agreements.

4.510 To meet the transparency obligation of Article X:1, each national regime must amplify and specify the basic, general authority set out in the AD Agreement. The United States has not satisfied this obligation.

(d) Rebuttal response by the United States to both claims under Article X:1 of GATT 1994

4.511 The **United States** also responds to both Article X:1 claims (*i.e.* failure to publish objective and specific factors regarding the “no likelihood/not likely” criterion and failure to publish objective and specific factors regarding the time-period used in analysing the “no likelihood/not likely” criterion) by Korea in its rebuttal briefs putting forward the following arguments:

4.512 Korea alleges that the United States violated Article X:1 by not further defining the “not likely” criterion with objective criteria. As demonstrated in the first US submission, an interpretation based upon the plain language of Article X:1 does not require that each and every statutory or regulatory provision be further defined by the inclusion of “objective criteria.” Suggesting that the DOC's regulations could be consistent with Article X:1 if section 353.25(a)(2) included “the meaning of ‘not likely’ or how it will be applied” is merely a further attempt by Korea to address the content of the DOC's regulations. Nonetheless, the DOC, through its various decisions in which the “not likely” criterion has been applied, has published factors which have been considered consistently in determining whether the criterion has been satisfied.<sup>392</sup> Therefore, even under an impermissibly broad

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<sup>392</sup> In every proceeding under section 353.25(a) of the DOC's regulations, the agency tends to examine the same factors to determine whether a resumption of dumping is “not likely.” These factors are: the nature of the product(s) at issue; trends in the domestic and home market industries; currency movements; supply and demand conditions; price trends; and, the importance of the US market to the Respondent(s). *See, e.g., Steel Wire Rope From the Republic of Korea; Final Results of Anti-dumping Duty Administrative Review and Revocation in Part of Anti-dumping Duty Order*, 62 Fed. Reg. 17171, 17173-74 (1997) (Ex. USA-52); *Brass Sheet and Strip From Germany; Final Results of Anti-dumping Duty Administrative Review and Determination Not To Revoke in Part*, 61 Fed. Reg. 49727, 49732 (1996) (Ex. USA-46); *Television Receivers, Monochrome*

interpretation of Article X:1, the United States would be found in compliance because all such determinations applying and describing the “not likely” criterion have been published. Significantly, Korea has not alleged that the United States has failed to publish relevant decisions or rulings.<sup>393</sup>

4.513 In addition, Korea alleges that the discretionary nature of section 353.25(a)(2), as well as the failure to publish when the “not likely” criterion will be applied, are violations of Article X:1. These allegations effectively concern the consistency of section 353.25(a)(2) with Article 11 of the AD Agreement. Contrary to Korea’s suggestion, an interpretation based on the ordinary meaning of the language contained in Article X:1 does not require the DOC to eliminate the discretionary element of its regulation. Moreover, the DOC need not publish when the “not likely” criterion will be applied because, pursuant to section 353.25(a)(2), it is applied in every case in which the Secretary conducts a review under this regulation.

4.514 In sum, the United States, consistent with its obligations under Article X:1, published all laws, regulations, judicial decisions and administrative rulings of general application in a manner which enabled the Respondents and Korea to become acquainted with them. For these reasons, the Panel should reject Korea’s claim that the DOC’s regulatory regime governing the revocation of anti-dumping duties violates Article X:1.

#### **4. Imposition of a New Unpublished Requirement in Contravention to Article X Paragraphs 1 and 2 of GATT 1994**

(a) Claim raised by Korea

4.515 **Korea** claims that in selecting the time-period used in analysing the “no likelihood/not likely” criterion the United States imposed a new unpublished requirement in contravention to Article X:2 and Article X:2 of GATT 1994.

4.516 By applying a requirement regarding the period following the Third Annual Review Period, the DOC revived the “gap period” review. Under the DOC’s regulations in the 1980s, a Respondent seeking revocation of an order had to establish, at a minimum, a history of no sales at less than fair value (LTFV sales) for at least two years.<sup>394</sup>

4.517 Although the regulation required a two-year period without dumping for revocation, the DOC adopted a rule of practice requiring a Respondent seeking revocation to submit to an examination of, at a minimum, about two years and nine months of its sales. This rule allowed the DOC to examine the period between the end of the two-year period and the date of the tentative revocation (the so-called gap period). Under the procedure at that time, the Respondent had to show that it was not dumping during the gap period (and that there was no likelihood of future dumping) by presenting its sales and cost data to the DOC for the gap period.

4.518 However, in 1986 the DOC issued proposed amendments to the anti-dumping regulations that substantially revised revocation procedures. The changes were incorporated in the final regulations published in the Code of Federal Regulations in 1990.<sup>395</sup> The new regulations expanded the required period of no dumping from two years to three years and, at the same time, eliminated the requirement for a gap period review.

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*and Color, From Japan; Final Results of Anti-dumping Duty Administrative Review and Determination Not To Revoke in Part*, 54 Fed. Reg. 35517, 35519 (1989) (Ex. USA-47); *Frozen Concentrated Orange Juice From Brazil; Final Results and Termination In Part Of Anti-dumping Duty Administrative Review; Revocation In Part of Anti-dumping Duty Order*, 56 Fed. Reg. 52510, 52511 (1991) (Ex. USA-31).

<sup>393</sup> In addition, Korea has not alleged that the United States has violated the publication and explanation requirements of Article 12 of the AD Agreement.

<sup>394</sup> See, e.g., 19 C.F.R. 353.54(b) (1988) (Ex. ROK-77).

<sup>395</sup> See 19 C.F.R. 353.25 (1990) (Ex. ROK-78).

4.519 In the Third Annual Review of *DRAMs from Korea*, the DOC effectively resurrected the gap period review, applying it to Respondents even though it had been repealed from US law. Apart from being absurdly unfair, this violated Paragraphs 1 and 2 of Article X of the General Agreement because the United States applied a more burdensome requirement that was not published.

4.520 **Korea** in response to a question by the Panel,<sup>396</sup> further clarified its claim under Article X:2 as follows:

4.521 Korea established that by reviewing the time period following the period of review, the Department was applying the so-called “gap-period review” methodology. This methodology legally had ended with the revision of the Department’s regulations in 1986. Therefore, its application to *DRAMs from Korea* in 1997 constituted the imposition of a new, unpublished requirement in contravention of Article X:2 of the General Agreement.

(b) Rebuttal response by the United States

4.522 The **United States** responds to Korea's submission in its rebuttal briefs putting forward the following arguments:

4.523 Korea apparently makes a legal claim under paragraph 2 of Article X. The United States will not address the merits of this claim as Korea apparently did not care to discuss the obligations of Article X:2, nor did Korea provide support for including paragraph 2 in its Article X claim. Indeed, in discussing the policy of transparency which underlies all of Article X, Korea quotes the relevant paragraphs of Article X, omitting paragraph 2. The Panel should, therefore, reject this “claim.”

G. CLAIMS UNDER ARTICLES I AND X:3 OF GATT 1994

## 1. The United States Revoked Anti-Dumping Duties in Like Cases

(a) Claim raised by Korea

4.524 **Korea** claims that the refusal to revoke the anti-dumping duty order in the case of *DRAMs from Korea* constitutes a violation of Articles I and X:3(a) of GATT 94 because in like cases in the past the United States has revoked the order. The following are Korea's arguments in support of this claim:

4.525 In numerous revocation cases, the DOC has revoked an anti-dumping duty order on the basis of only two criteria – three years of no dumping margins and agreement by the Respondent companies to immediate reinstatement in the anti-dumping duty order if they breached their commitment not to dump in the future. The DOC generally does *not* conduct a “no likelihood/not likely” analysis of the type conducted in the Final Determination in the Third Annual Review of *DRAMs from Korea*. Since 1989, the DOC has revoked on the basis of three years of no dumping and a Respondent’s certification in the following cases:

- *Certain Fresh Cut Flowers from Mexico*, 63 Fed. Reg. 1428 (Preliminary) (9 January 1998);
- *Large Power Transformers from Italy*, 62 Fed. Reg. 3661 (24 January 1997);
- *Fresh Cut Flowers from Mexico*, 61 Fed. Reg. 63882 (2 December 1996);

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<sup>396</sup> The Panel recalls that the question was: "Could Korea please explain the essence of its claim under Article X of GATT 1994. Is Korea concerned principally with the alleged failure to publish under Article X:1, or is the focus of Korea’s complaint directed at the alleged failure to administer laws and regulations etc. in the 'uniform, impartial and reasonable manner' required by Article X:3(a)?"

- *Polyethylene Terephthalate Film, Sheet, and Strip from the Republic of Korea*, 61 Fed. Reg. 58374 (14 November 1996);
- *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof from Thailand*, 61 Fed. Reg. 33711 (28 June 1996);
- *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof from France, et al.*, 60 Fed. Reg. 10900 (28 February 1995);
- *Titanium Sponge from Japan*, 59 Fed. Reg. 9963 (2 March 1994);
- *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof from France, Germany, Italy, Japan, Romania, Singapore, Sweden, Thailand, and the United Kingdom*, 58 Fed. Reg. 39729 (26 July 1993);
- *Dichloro Isocyanurates from Japan*, 57 Fed. Reg. 55223 (24 November 1992);
- *Red Raspberries from Canada*, 57 Fed. Reg. 49686 (3 November 1992);
- *Industrial Phosphoric Acid from Israel*, 57 Fed. Reg. 10008 (23 March 1992);
- *Elemental Sulphur from Canada*, 57 Fed. Reg. 1452 (14 January 1992);
- *Titanium Sponge from Japan*, 57 Fed. Reg. 557 (7 January 1992);
- *Elemental Sulphur from Canada*, 56 Fed. Reg. 16068 (19 April 1991);
- *Certain Fresh Cut Flowers from Colombia*, 56 Fed. Reg. 50554 (7 October 1991);
- *Calcium Hypochlorite from Japan*, 55 Fed. Reg. 41259 (10 October 1990); and
- *Elemental Sulphur from Canada*, 55 Fed. Reg. 13179 (9 April 1990).<sup>397</sup>

4.526 In the instant case (as in a small number of other cases), the DOC required satisfaction of a third requirement, which it variously termed the “no likelihood” or the “not likely” criterion.

4.527 Assuming for the sake of argument that the “no likelihood/not likely” criterion is permissible under the WTO rules, the United States would have two choices. It could conduct an analysis of this third criterion for revocation in all cases, or in none. What it cannot do, consistent with its obligations under Article I of the General Agreement, is what it actually has done in practice, which is to base its decision whether to revoke on an analysis of this criterion in some but not all cases.

4.528 Article I:1 of the General Agreement provides:

With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III, any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.

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<sup>397</sup> See Ex. ROK-57 through Ex. ROK-73.

4.529 Criteria for determining whether to revoke an anti-dumping duty order are within the scope of Article I. First, the report of the Panel in *United States – Denial of Most-Favoured-Nation Treatment as to Non-Rubber Footwear from Brazil* found that:

The rules and formalities applicable to countervailing duties, including those applicable to the revocation of countervailing duty orders, are rules and formalities imposed in connection with importation, within the meaning of Article I:1.<sup>398</sup>

4.530 What is true for revoking countervailing duty orders is equally true for revoking anti-dumping duty orders. This is confirmed by a 1968 ruling of the Director-General regarding the application of the obligations of Article I to the provisions of the then-existing Anti-Dumping Code.<sup>399</sup> In that ruling the Director General also declared that the provisions of the Code constituted a “method of levying such duties and charges,” so there is a second basis for finding that criteria for determining whether to revoke an anti-dumping duty order are within the scope of Article I.

4.531 The application of less stringent criteria and procedures in determining whether to revoke an anti-dumping duty order in some cases constitutes an “advantage, favour, privilege or immunity” granted by the United States. The *Brazilian Footwear* case is on point in this regard as well. There, the United States automatically revoked a countervailing duty order retroactively in certain cases, while in others it required countries to request an injury review and did not make the revocation retroactive to the same degree. This discriminatory treatment was found to violate Article I even though the United States was acting under two different laws.<sup>400</sup> Here, on the other hand, the US practice provides differential treatment under the very same law and regulations.

4.532 As regards the “like product” criterion of Article I, once again the *Brazilian Footwear* case is instructive. The report in that proceeding states:

The Panel . . . examined whether the products to which the United States had accorded the advantage of automatic backdating are like the products to which this advantage had been denied. The Panel noted that *the products to which the procedures under Section 331 of the Trade Act of 1974 had actually been applied* (industrial fasteners, industrial lime, automotive glass) *are not like the product to which Section 104(b) of the Trade Agreements Act of 1979 had been applied in the case of Brazil (non-rubber footwear)*. However, the Panel also noted that Brazil not only claimed that the application of these two Acts in concrete cases was inconsistent with Article I:1 of the General Agreement but also that the United States’ legislation itself was inconsistent with that provision. The Panel recalled that *neither Section 331 of the 1974 Act nor Section 104(b) of the 1979 Act makes any distinctions as to the particular products to which each applies*, other than that the former applies to duty-free products originating in the territories of contracting parties and the latter applies to dutiable products originating in the territories of contracting parties signatories to the Subsidies Agreement. *The products to which Section 331 of the 1974 Act accords the advantage of automatic backdating are therefore in principle the same products to which Section 104(b) of the 1979 Act denies the advantage of automatic backdating.*<sup>401</sup>

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<sup>398</sup> *United States-Denial of Most-Favoured-Nation Treatment as to Non-Rubber Footwear from Brazil* (19 June 1992), BISD 39S/128, 150, para. 6.8.

<sup>399</sup> Note by the Director-General (29 November 1968), L/3149, *quoted in* 1 GATT, ANALYTICAL INDEX: GUIDE TO GATT LAW AND PRACTICE 30 (6<sup>th</sup> ed. 1995).

<sup>400</sup> *United States-Denial of Most-Favoured-Nation Treatment as to Non-Rubber Footwear from Brazil* (19 June 1992), BISD 39S/128, 150-53, paras. 6.7-6.17.

<sup>401</sup> *Id.* at 151-52, para. 6.12 (emphasis added by Korea). *See also* *Belgian Family Allowances* (7 November 1952), BISD 1S/59, 60, para. 3, in which a violation of Article I was found regarding a law that discriminated against any product from a country not having a particular system of family allowances.



4.533 For the same reason, it is irrelevant that none of the proceedings which were revoked without analysis of the “no likelihood/not likely” criterion involved DRAMs. The products as to which no analysis was undertaken are in principle the same products as to which the analysis was conducted, thereby satisfying the “like product” criterion.<sup>402</sup>

4.534 The finding of a violation of Article I would not be affected if the United States were to seek to argue that its regulation lists three criteria for revocation, including the “no likelihood/not likely” criterion, and that it was following its regulation. GATT precedent clearly condemns *de facto* as well as *de jure* discrimination (*i.e.*, discrimination in practice even where the law or regulation on its face is not discriminatory). In the *EC Bananas* case, the Appellate Body, citing the panel decision in *Beef from Canada*, declared that Article I applied to actions of a government that had the effect of discriminating against certain imported products.<sup>403</sup>

4.535 The refusal of the United States to revoke the order also violates Article X of the General Agreement. Because in like cases in the past the United States has revoked duties, the United States violated Paragraph 3(a) of Article X by failing to administer its revocation regime in a “uniform, impartial and reasonable” manner.

4.536 Accordingly, by requiring satisfaction of the “no likelihood/not likely” criterion in some cases, while waiving analysis of it in others, the United States does not accord most-favored-nation treatment in its determination of whether to revoke anti-dumping duty orders and it fails to administer its law in a uniform manner. This is in violation of the United States’ obligations under Articles I and X of the General Agreement.

(b) Response by the United States

4.537 The following are the **United States'** arguments in response to Korea's claim:

4.538 Korea argues that the United States violated its obligations under Article I of GATT 1994 by not according most-favored-nation treatment in its revocation decisions. Korea bases its Article I arguments upon its erroneous assertion that the DOC inconsistently applies the “not likely” criterion in its revocation decisions, thus according favorable treatment in cases that allegedly do not consider this criterion. Korea’s arguments lack merit.

4.539 Despite the non-binding, non-authoritative sources relied upon by Korea to establish the applicability of Article I to the DOC’s *Final Results Third Review*,<sup>404</sup> Korea’s substantive claims under Article I are without merit. Korea analogizes this case to the *Brazilian Footwear* case.<sup>405</sup> However, unlike the circumstances before the panel in *Brazilian Footwear*, the United States applies the same statutory and regulatory provisions with regard to the issue of revocation in every case. As such, the same three criteria enunciated in section 353.25(a)(2) of the DOC’s regulations, including

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<sup>402</sup> Korea need not rely on the *Brazilian Footwear* precedent alone because the United States actually discriminated against *DRAMs from Korea* versus DRAMs from another source. The DOC accepted a data collection proposal in the Japanese DRAM case and did not apply the “not likely/no likelihood” criterion. Thus, the administrative process employed by the DOC treated Korean DRAMs in a manner different from the way it treated DRAMs from Japan – there was discriminatory treatment as to a “like product.”

<sup>403</sup> European Communities–Regime for the Importation, Sale and Distribution of Bananas (9 September 1997), WT/DS27/AB/R, para. 232, citing European Economic Community–Imports of Beef from Canada (10 March 1981), BISD 28S/92, 97-98, paras. 4.1-4.3.

<sup>404</sup> Korea relies upon a 1968 ruling of the Director General to establish the applicability of Article I to anti-dumping proceedings. However, the Appellate Body recently noted “that the 1968 Note cannot be considered as an authoritative interpretation of GATT rules because it was never endorsed by a formal decision of the CONTRACTING PARTIES.” *European Communities - Regime for the Importation, Sale and Distribution of Bananas*, WT/DS 27/AB/R, Report of the Appellate Body adopted 9 September 1997, para. 200.

<sup>405</sup> *United States - Denial of Most-Favored-Nation Treatment as to Non-Rubber Footwear from Brazil*, Report of the Panel adopted 19 June 1992, BISD 39S/128.

the “not likely” criterion, are applied in each case. However, as can be expected in any fact-oriented, anti-dumping proceeding, the DOC’s final decision will be based upon the evidence on the administrative record. As the DOC stated in the *Final Results Third Review*:

In evaluating the “not likely” issue in numerous cases, Commerce has considered three years of no dumping margins, plus a Respondent’s certification that it will not dump in the future, plus its agreeing to immediate reinstatement in the order all to be indicative of expected future behavior. In such instances, this was the only information contained in the record regarding the likelihood issue. . . .

In other cases, when additional evidence is on the record concerning the likelihood of future dumping, Commerce is, of course, obligated to consider that evidence. In this regard, in evaluating such record evidence to determine whether future dumping is not likely, the DOC has a longstanding practice of examining all relevant economic factors and other information on the record in a particular case.<sup>406</sup>

4.540 Thus, the DOC recognizes that in some cases, satisfaction of two of the DOC’s criteria, in the absence of other evidence, is relevant to the consideration of whether the “not likely” criterion has been satisfied. When additional evidence relating to the “not likely” criterion is available, the DOC is “obligated to consider that evidence.” Thus, the DOC’s consideration of whether each criterion is satisfied will be based on the record evidence. Indeed, the various cases to which Korea cites reflect this fact-oriented approach, and, contrary to Korea’s claim, indicate that the DOC considers all three criteria identified in section 353.25(a)(2) in the course of a revocation inquiry. While the DOC always applies the same criteria in every revocation decision, the DOC must conduct a case-by-case analysis of the evidence in the administrative record in order to determine if these criteria have been satisfied. Such a case-by-case approach does not constitute *de facto* or *de jure* discrimination, nor does it accord an advantage to any party.

4.541 As a result, Korea errs when it states that “[t]he DOC generally does not conduct a ‘no likelihood/not likely’ analysis” and that the DOC requires “satisfaction of the ‘no likelihood/not likely’ criterion in some cases, while waiving analysis of it in others . . . .” Because section 353.25(a)(2) of the DOC’s regulations governs all revocation decisions and the DOC consistently applies this provision and the same standards to all products from all countries, the United States has complied with its Article I obligations.

4.542 Throughout its arguments regarding Articles I and X:1, Korea interjects claims under Article X:3(a) of GATT 1994. In many respects repeating its arguments under Articles X:1 and I, Korea complains that the case-by-case approach taken by the Department in examining whether the “not likely” criterion has been satisfied violates Article X:3(a). The disjointed manner in which Korea raises these claims reflects the substantive deficiencies in its arguments.

4.543 Article X:3(a) requires each Member to “administer in a uniform, impartial and reasonable manner all its laws, regulations, decisions and rulings.” As the United States has established throughout this submission, the DOC refused to revoke the anti-dumping order on *DRAMs from Korea* based on an unbiased and objective evaluation of the facts which led the DOC to conclude that the “not likely” criterion had not been satisfied. The DOC’s impartial and reasonable application of its regulations and governing statute was consistent with the United States’ obligations under Article X:3(a). As a result, the Panel should reject Korea’s arguments.

4.544 Korea states that “[b]ecause in like cases in the past the United States has revoked duties, the United States violated Paragraph 3(a) of Article X by failing to administer its revocation regime in a ‘uniform, impartial and reasonable’ manner.” The DOC applies the same criteria in every revocation decision. However, as it does in all cases, the DOC considers all of the facts on the record to

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<sup>406</sup> *Final Results Third Review*, 62 Fed. Reg. at 39810 (citations omitted) (Ex. USA-1).

determine whether these criteria have been satisfied. A mere assertion that the United States revoked anti-dumping orders in allegedly “like cases” is not evidence of an Article X:3(a) violation.

(c) Rebuttal arguments made by Korea

4.545 **Korea** makes the following arguments in rebuttal to the United States' responses:

4.546 Article I:1 of the General Agreement requires that: “any advantage, favour, privilege or immunity”; with respect, *inter alia*, to rules and formalities imposed on or in connection with importation or the method of levying customs duties and charges imposed on or in connection with importation; granted by a WTO Member to any product originating in any other country; shall be accorded immediately and unconditionally to the like product originating in all other WTO Member countries.

4.547 The United States does not challenge (presumably because it recognizes that it cannot do so) the facts that:

1. in most cases, the DOC's finding that the “no likelihood/not likely” criterion is satisfied automatically where there have been three consecutive determinations of no or *de minimis* dumping margins and the certification of no future dumping by Respondent companies constitutes an “advantage, favour, privilege or immunity”;
2. the DOC's revocation criteria constitute both: (a) a rule or formality imposed in connection with importation; and (b) a method of levying customs duties and charges;<sup>407</sup>
3. the DOC has not conducted a substantive analysis of the “no likelihood/not likely” criterion in most cases, but rather has automatically concluded that this criterion was satisfied where there have been three consecutive determinations of no or *de minimis* dumping margins and certification of no future dumping by Respondent companies; and
4. the DOC conditioned revocation in *DRAMs from Korea* on proof by the Respondent companies of satisfaction of the “no likelihood/not likely” criterion.

4.548 The United States' only response is that “the United States applies the same statutory and regulatory provisions with regard to the issue of revocation in every case” and that “each anti-dumping proceeding is unique and the DOC must base each decision on the facts before it.”<sup>408</sup>

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<sup>407</sup> Korea does not rely upon “non-binding, non-authoritative sources . . . to establish the applicability of Article I,” as alleged by the United States in paragraph 163 and note 285 of its First Submission. As readily apparent even when one just scans paragraphs 4.84 through 4.88 of Korea's First Submission, Korea establishes the applicability of Article I through determinations and declarations in the adopted panel reports on *United States -- Denial of Most-Favored-Nation Treatment as to Non-Rubber Footwear from Brazil* (19 June 1992), BISD 39S/128; *Belgium Family Allowances* (7 November 1952), BISD 1S/59; *European Communities -- Regime for the Importation, Sale and Distribution of Bananas* (25 September 1997), WT/DS27/R; and *European Economic Community -- Imports of Beef from Canada* (10 March 1981), BISD 28S/92. The 1968 ruling of the Director-General was cited as secondary support for the proposition that criteria for determining whether to revoke are “rules and formalities” and “a method of levying such duties and charges.” Korea believes the reasoning of the Director-General in the 1968 ruling will provide useful guidance to the Panel, as the Appellate Body found with respect to unadopted panel reports in *Japan -- Taxes on Alcoholic Beverages* (1 November 1996), WT/DS8/AB/R, page 15.

4.549 First, the facts that the same US regulation (section 353.25(a)(2)) ostensibly controls in all determinations regarding whether to revoke and that this regulation lists three criteria, including the “no likelihood/not likely” criterion, are not dispositive. The Appellate Body in the *EC Bananas* case, citing with approval the panel decision in *Beef from Canada*, declared that Article I of the General Agreement condemns government actions that have the effect of discriminating against certain imported products.

4.550 That is exactly what happened here. The United States may not have engaged in *de jure* discrimination against Korean DRAMs, because the DOC uses Section 353.25(a)(2) in making its determination of whether to revoke in all cases. The shifting of the standard—not its literal text—is what is at issue here. Conditioning revocation for the Korean Respondents upon proof of the “no likelihood/not likely” criterion, while automatically concluding in other cases that this criterion was satisfied where there had been three consecutive determinations of no or *de minimis* dumping margins and certification of no future dumping by Respondent companies, constitutes *de facto* discrimination. The application of less stringent criteria and procedures in these cases constitutes an “advantage” that was not afforded in the *DRAMs from Korea* case. To be consistent with its obligations under Article I of the General Agreement, the United States should have substantively analyzed the “no likelihood/not likely” criterion in all cases, or in none. Arbitrarily conducting a substantive analysis in *DRAMs from Korea*, while not doing so in other cases, is a *de facto* violation of the most-favoured-nation principle.

4.551 Second, the United States’ assertion that in all cases the DOC bases its revocation decision on the facts on the record is false. The reality is that in the vast majority of cases the DOC automatically presumes satisfaction of the “no likelihood/not likely” criterion when the two primary criteria (no dumping for three reviews and agreement to reinstatement) are satisfied. The only instance in which it does not do so is where the US petitioner chooses to allege that the “no likelihood/not likely” criterion is not satisfied. In these instances, the DOC does not require the US petitioner to prove its allegations; rather, it requires the Respondent companies to prove to the satisfaction of the Secretary (whose decision is not based on any objective criteria) that there is “no likelihood” that dumping will resume (or that the resumption of dumping is “not likely”).

4.552 The United States explicitly admits this where it declares that, except where the US petitioner<sup>409</sup> raises concerns, there is “a *de facto* presumption that if a Respondent has not dumped within the prior three-year period, it is not likely to resume dumping in the future.”

4.553 Thus, the US assertion that different outcomes in its revocation cases are based on different facts boils down to an admission that different outcomes are based on the application of a different standard when the US petitioner so demands. The Panel should reject this attempt by the United States to shield itself from Article I’s requirement of non-discriminatory application of revocation determinations.

(d) Rebuttal response by the United States

4.554 The following are the **United States’** rebuttal arguments in response to Korea’s claim:

4.555 Korea argues that the United States has violated its obligations under Article I of GATT 1994 by not according most-favored-nation treatment in its revocation decisions. Korea bases its Article I arguments upon its erroneous assertion that the DOC inconsistently applies the “not likely” criterion

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<sup>408</sup> The Panel notes that this argument by the United States is presented in Paragraph 4.563 of this report.

<sup>409</sup> While the United States refers to “the parties” raising concerns, no one reasonably can argue that a Respondent company would claim it was likely to dump in the future. Only a US petitioner would ever make such an allegation.

in its revocation decisions, thus according favorable treatment in those cases that do not consider this criterion. Korea's arguments lack merit and should be rejected by the Panel.

4.556 The United States has established that it applies the same statutory and regulatory provisions with regard to the issue of revocation in every case. As such, the same three criteria set forth in section 353.25(a)(2) of the DOC's regulations, including the "not likely" criterion, are applied in each case subject to the regulation. While the three criteria in section 353.25(a)(2) are independently applied in every case, satisfaction of two of the DOC's criteria is relevant to the consideration of whether the "not likely" criterion has been satisfied. When additional evidence relating to the "not likely" criterion is available, the DOC reviews that evidence. Thus, the evidence on the record, not the DOC's whim, will dictate whether the three criteria contained in section 353.25(a)(2) are satisfied. This approach does not constitute *de facto* or *de jure* discrimination, nor does it accord an advantage to any party. As such, the United States has complied with its obligations under Article I.

## 2. Korea Submitted an Effective Data Collection Proposal

### (a) Claim raised by Korea

4.557 **Korea** claims that the refusal of the United States to give Korea the opportunity to negotiate a Data Collection Proposal despite doing so in like cases in the past constitutes a violation of Articles I and X:3 of GATT 1994. The following are Korea's arguments in support of that claim:

4.558 As part of their express, binding commitment not to sell at less than fair value (normal value) in the future, the Korean Respondents agreed to participate in a data collection program (DCP) that the Government of Korea had proposed to the United States. This agreement is noted in the DOC's Notice of Determination Not to Revoke.<sup>410</sup> The DOC rejected the proposed agreement, based on Micron's repeated opposition to it.<sup>411</sup> In the Final Determination, the DOC noted that the DCP originally was proposed prior to the deadline for submitting new information, but then seems to say that the proposal came too late to be considered.<sup>412</sup> Also, the DOC stated that the proposal was "precatory in nature"; presumably, this means that the program was not currently in place.<sup>413</sup> (It could not be, because the United States refused to negotiate it) This part of the Final Determination, in particular, demonstrates the flaws of the DOC's "analysis"

4.559 In a prior anti-dumping proceeding involving semiconductors from Japan, the United States terminated its suspension agreement on 256k and above DRAMs from Japan in return for an agreement similar to that offered by both the Government of Korea and Respondents--an agreement to ensure that there would be no further dumping of the products.

4.560 In this way the United States provided an advantage to Japan with respect to its semiconductor imports concerning a rule or formality applicable to anti-dumping duties (or a method of levying such duties) that it refused to provide to Korea with respect to its semiconductor imports. The failure to grant this advantage – the *opportunity* to negotiate and implement a data collection system in lieu of the imposition of anti-dumping duties – to Korea constitutes *de facto* discrimination in contravention of the United States' obligations under Article I.

4.561 The US conduct also violated Article X. Paragraph 3(a) of Article X requires a Member to administer its laws, regulations, decisions and rulings in a "uniform, impartial and reasonable manner." By refusing Korea's DCP and maintaining the duties, even though in another similar case the DOC accepted such a proposal, the DOC violated Article X.

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<sup>410</sup> 62 Fed. Reg. 39809, 39810-11 (24 July 1997) (Ex. ROK-3).

<sup>411</sup> *Id.* at 39811.

<sup>412</sup> *Id.*

<sup>413</sup> *Id.*

(b) Response by the United States

4.562 The following are the **United States'** arguments in response to Korea's claim:

4.563 Korea's argument that the United States violated its obligations under Article I because the DOC did not accept a data collection program (DCP) proposed by Korea is groundless. The only support Korea musters for this argument is that the United States engaged in another data collection program in another anti-dumping proceeding. Once again, Korea's arguments do nothing more than point to the fact that each anti-dumping proceeding is unique and the DOC must base each decision on the facts before it. Merely noting different outcomes in two different cases is inadequate to sustain an argument under Article I. Therefore, the United States did not violate Article I of GATT 1994 in its *Final Results Third Review*.

4.564 Korea argues that the United States violated Article X:3(a) by refusing Korea's DCP after having accepted such a proposal in "another similar case." For the same reasons that the United States did not violate Article X:3(a) by revoking anti-dumping orders in allegedly "similar" cases, the United States did not violate Article X:3(a) with regard to the rejection of Korea's DCP proposal. Certainly, the factual records and procedural history of each case were distinct and, thus, will lead to different results. However, different results based on different facts does not constitute an Article X:3(a) violation

(c) Rebuttal arguments made by Korea

4.565 **Korea** makes the following arguments in rebuttal to the United States' responses:

4.566 In providing the opportunity to negotiate and then accepting a DCP from Japan in *256K and Above DRAMs from Japan*, but refusing to extend as favorable treatment to Korea, the United States failed to grant an "advantage" to Korea that it had granted to Japan. This failure to grant the opportunity to negotiate and implement a DCP in lieu of the imposition of anti-dumping duties constitutes *de facto* discrimination in contravention of the United States' obligations under Article I of the General Agreement.

(d) Rebuttal response by the United States

4.567 The following are the **United States'** rebuttal arguments in response to Korea's claim:

4.568 Korea's additional argument that the United States has violated its obligations under Article I because the DOC did not accept the DCP proposed in the instant case is equally groundless. The paucity of support for this claim is evident in Korea's first submission because Korea has not provided any evidence to support a finding of disparate treatment. Most importantly, Korea has provided no evidence concerning the facts pertaining to the earlier proceeding on DRAMs from Japan.<sup>414</sup> Accordingly, Korea has failed to establish a critical component of a disparate treatment claim that the facts in the two proceedings are similar.

4.569 In its first submission Korea relies entirely on its 17 June 1997 letter containing its DCP proposal, and on the similar suggestions from Compaq and Respondents Hyundai and *LG Semicon*.<sup>415</sup> Those documents make clear that Korea proposed a data collection program modeled on the

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<sup>414</sup> Anti-dumping; Dynamic Random Access Memory Semiconductors of 256 Kilobits and Above from Japan; Suspension of Investigation and Amendment of Preliminary Determination, 51 Fed. Reg. 28396 (7 August 1986) (hereinafter *256K DRAMs from Japan*) (Ex. USA-89).

<sup>415</sup> Case Brief of Compaq, 18 April 1997 at 9-10 (Ex. USA-90), Letter from Doug Young Joo, Commercial Counselor, Embassy of the Republic of Korea, 17 June 1997 (hereinafter *Korea Letter of 17 June 1997*) (Ex. USA-91), and Letter of Michael P. House (counsel to LG Semicon) and Lawrence R. Walders (counsel to Hyundai), 27 June 1997 at 2-3 (Ex. USA-92).

19 December 1996 agreement between the US and Japanese semiconductor industries.<sup>416</sup> By definition, an industry-to-industry agreement does not depend on acceptance by the United States, which is not a party to the agreement. Furthermore, Korea's proposal did not make any reference to the circumstances or agreements involved in the termination of the earlier anti-dumping proceeding in *256K DRAMs from Japan*. The Panel should not find an Article I violation based on the assertions offered by Korea.

4.570 In any case even if the Panel deem Korea's bare assertions sufficient to satisfy its burden of presenting a *prima facie* case of a violation of Article I, publicly available information concerning the earlier investigation demonstrates that the circumstances of the two proceedings are fundamentally dissimilar. The earlier anti-dumping investigation concerning *256K DRAMs from Japan* was suspended in August 1986 pursuant to a statutory suspension agreement (undertaking) concluded in connection with the 1986 US-Japan Semiconductor Agreement.<sup>417</sup> As part of this agreement, the Japanese semiconductor companies undertook to provide a range of cost and pricing data to the DOC on a quarterly basis and to revise their prices to eliminate dumping.<sup>418</sup>

4.571 In 1991, when the 1986 agreement came up for renewal, the DRAM anti-dumping proceeding and related price undertaking were terminated with the express support of the US semiconductor industry.<sup>419</sup> At the same time, the data collection procedures were extended, with the proviso that data would be made available to the DOC only upon initiation of a new anti-dumping investigation. In 1996, the US-Japan Semiconductor Agreement was modified further. This time, the provisions regarding data collection took the form of an industry-to-industry agreement.<sup>420</sup> It was this formulation of the DCP which was suggested as the basis for an arrangement in the instant case.<sup>421</sup>

4.572 This brief review of the circumstances underlying the US-Japan data collection program as it evolved out of the *256K DRAMs from Japan* investigation reveals the substantial differences between that case and the case before this Panel. First, the 1996 US-Japan industry-to-industry data collection agreement, which was identified as the model for Korea's proposal, involved neither acceptance by the United States government, which was not a party to the agreement, nor any action by the United States involving an active anti-dumping proceeding. Second, the DOC's 1991 termination of the suspension agreement in the *256K DRAMs from Japan* case, the central element in Korea's disparate treatment claim, was predicated upon receipt of the express support of the domestic

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<sup>416</sup> See Korea Letter of 17 June 1997 ("Compaq pointed out that the December 19, 1996 agreement between the US Semiconductor Industry Association (SIA) and the Electronic Industries Association of Japan (EIAJ) could provide an appropriate model for resolving the Korean DRAM case. We agree with that suggestion.") (Ex. USA-91).

<sup>417</sup> See *256K DRAMs from Japan*, 51 Fed. Reg. 28396 (7 Aug. 1986) (Ex. USA-89). The US-Japan Semiconductor Agreement also involved market-access commitments in settlement of an investigation under section 301 of the Trade Act of 1974. Presidential Memorandum of 31 July 1986, *Determination Under Section 301 of the Trade Act of 1974*, 51 Fed. Reg. 27811 (4 Aug. 1986) (Ex. USA-93).

<sup>418</sup> *Id.*, 51 Fed. Reg. at 28398-99 (7 Aug. 1986) (Ex. USA-89). The DOC's notice announcing the agreement stated as follows:

*Basis of the Agreement.* On and after the effective date of this Agreement, each signatory producer/exporter individually agrees to make any necessary price revisions to eliminate completely any amount by which the foreign market value of its merchandise exceeds the United States price of its merchandise subject to this Agreement.

*Id.*, 51 Fed. Reg. at 28398 (Ex. USA-89).

<sup>419</sup> *Dynamic Random Access Memory Semiconductors of 256 Kilobits and Above from Japan; Termination of Anti-dumping Duty Investigation*, 56 Fed. Reg. 37522, 37523 (7 August 1991) (Ex. USA-94).

<sup>420</sup> See Office of the US Trade Representative, Press Release 96-65, US and Japan Reach Semiconductor Accord, 2 August 1996 (The heart of the new agreement is an industry-to-industry accord which will provide a broad range of activities across industry as well as serving as a clearinghouse for the collection and analysis of data. The new agreement retains a role for government in reviewing a wide range of qualitative and quantitative data, including market share) (Ex. USA-95).

<sup>421</sup> See Korea Letter of 17 June 1997.

industry, which thereby indicated that it no longer had an interest in the continuation of the suspension agreement. In the present case, there is an outstanding anti-dumping order, not a suspension agreement, and, as Korea acknowledges, the domestic industry has opposed termination of the order.

4.573 The facts underlying the *256K DRAMs from Japan* case demonstrate that Korea's claim under Article I is based on mere assertion of a violation. While the results in the two cases differed, the treatment of Respondents and the application of the DOC's regulations in the two cases was not such that an advantage was provided in *256K DRAMs from Japan* that was not accorded to Respondents in the *Final Results Third Review*. Therefore, the Panel should reject Korea's claims under Article I.

### 3. Variance of the "No Likelihood/Not Likely" Criterion and the Time-Period Selected

#### (a) Claim raised by Korea

4.574 **Korea** claims that by varying the "no likelihood/not likely" criterion and the time-period selected for analyzing it from case to case the United States has Contravened its Obligations under Article X:3(a) of GATT 1994. The Following are Korea's arguments in support of this claim:

4.575 Despite its repeated references to *Brass Sheet and Strip*,<sup>422</sup> the DOC admits that this supposed source of criteria does not in fact specify the criteria that the DOC *will* use in its revocation decision, and indeed it does not necessarily specify the range of factors that Commerce *may* use. Thus, we come back full circle--the DOC believes it has complete discretion to choose the criteria it wishes to consider determinative in each specific case. The criteria the DOC uses will vary from case to case. They are not uniform or impartial. Therefore, the United States is in breach of its transparency and due process obligations under X:3(a) of the General Agreement

4.576 Moreover, given the absence of objective criteria and the resulting unfettered discretion to select any period it desires, the United States is not administering its law in a uniform, impartial and reasonable manner, as required by Article X:3(a).

4.577 The period chosen by the United States illustrates the results of the administrative arbitrariness that Article X is meant to prevent. The administrative determination at issue in this dispute was published in the US *Federal Register* on 24 July 1997. At the time the determination was drafted, actual data were available for the first half of 1997 and credible predictive data were available for the remainder of the year. Yet, the DOC chose to base its "no likelihood/not likely" determination on events during calendar year 1996; and it did so despite acknowledging that market conditions in the DRAM industry had recovered in 1997.<sup>423</sup> The DOC then accepted and rejected data in a biased fashion, to reach its conclusion that the "no likelihood/not likely" standard was not satisfied. Therefore, the period chosen by the United States was neither impartial nor reasonable, and the United States breached its obligations under Article X:3(a) of the General Agreement.

#### (b) Response by the United States

4.578 The **United States** responds to Korea's claim with the following arguments:

4.579 Korea states that the United States violated Article X:3(a) because "[t]he criteria the DOC uses will vary from case to case." The United States addressed this argument in the context of its discussion of Article X:1. As the United States does not vary the criteria relevant to a revocation decision from case to case, the United States has not violated Article X:3(a).

<sup>422</sup> *Brass Sheet and Strip from Germany*, 61 Fed. Reg. 49727 (23 September 1996) (Ex. ROK-36).

<sup>423</sup> 62 Fed. Reg. 39809, 39817 (24 July 1997) (Ex. ROK-3). Also, the DOC rejected the Flamm study because, according to the DOC, the study was overly optimistic. But, elsewhere, the DOC itself acknowledged that market conditions improved, thus confirming the accuracy of Dr. Flamm's assumptions.



4.580 Korea states that “the period chosen by the United States was neither impartial nor reasonable, and the United States breached its obligations under Article X:3(a) of the General Agreement.” The DOC determined the relevant period in which to consider the likelihood issue on the basis of the evidence on the record. The fact that different periods of time may be examined in different cases is a result of the existence of different factual records. Once again, a different result based on different facts does not constitute an Article X:3(a) violation.

#### 4. Rejection and Acceptance of Data

##### (a) Claim raised by Korea

4.581 **Korea** claims that the United States by rejecting verified and corroborated evidence from the Korean Respondent companies while accepting the US petitioner’s claims violated its obligations under Article X:3(a) of GATT 1994. The following are Korea’s arguments in support of that claim:

4.582 The United States, by rejecting and accepting data in a biased fashion, also breached its obligations under Article X:3(a) of the General Agreement. Article X:3(a) requires Members to administer their anti-dumping laws in a uniform, impartial and reasonable manner.

4.583 In its efforts to satisfy the DOC that there was “no likelihood” of future dumping, the Korean companies submitted large amounts of current data regarding pricing trends, inventory levels and various other aspects of market conditions for DRAMs. All of these data were corroborated; indeed, the DOC verified much of it. The US petitioner, on the other hand, generally submitted speculation and innuendo, little of which was corroborated and none of which the DOC verified. Despite this, the DOC uniformly rejected verified and corroborated Korean data and accepted the US petitioner’s speculative claims. For example, with respect to pricing trends in the DRAM industry, the DOC conceded that the Korean companies had established that prices had stabilized, indeed recovered somewhat, during 1997.<sup>424</sup> Yet, the DOC speculatively concluded that “a large degree of uncertainty about the direction of the market remains.”<sup>425</sup> Similarly, with respect to inventory levels, the DOC rejected the companies’ publicly announced and published plans to decrease production levels (even while noting that “the market . . . reacted with higher prices”) and instead accepted speculative assertions that production might increase, due to the possibility that there might be a temporary spike in demand (which would increase prices, of course).<sup>426</sup> Thirdly, although acknowledging that below-cost sales by the Korean companies were not sufficiently numerous to be disregarded in the normal value calculations, the DOC concluded that the record “suggests that the number of below-cost sales increased . . .”<sup>427</sup> This is nothing more than a transparent effort by the DOC to substantiate its groundless conclusion.

4.584 The pattern of bias is pervasive. The DOC wanted to conclude that continued dumping was likely, so it discounted evidence that contradicted this belief. This is not a matter of a few isolated incidents. The pattern is universal--claims by the US petitioner were accepted even if speculative, while those of the Korean companies were rejected even if corroborated and verified. This violates the US obligation under Article X:3(a) to administer its anti-dumping law in a uniform, impartial and reasonable manner.

##### (b) Response by the United States

4.585 The **United States** responds to Korea’s claim with the following arguments:

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<sup>424</sup> 62 Fed. Reg. 39809, 39814 and 39817 (24 July 1997) (Ex. ROK-3).

<sup>425</sup> *Id.* at 39817.

<sup>426</sup> *Id.*

<sup>427</sup> 62 Fed. Reg. 39809, 39817 (24 July 1997) (Ex. ROK-3).

4.586 Korea assails the DOC's consideration of the evidence submitted for the record as "biased" and states that "[t]he pattern of bias is pervasive." Korea couches these allegations in the context of an argument under Article X:3(a). As the *Final Results Third Review* make vividly clear, the DOC afforded all parties an opportunity to submit evidence. The DOC thoroughly evaluated all of the evidence and data submitted by the parties and provided a well-reasoned analysis of this information. The fact that the DOC's evaluation of this data did not produce a result that Korea favors does not provide a basis for Korea's claims of bias. As such, the DOC's consideration of this data did not violate the United States' obligations under Article X:3(a).

(c) Rebuttal arguments made by Korea to all claims under Article X:3(a) of GATT 1994

4.587 **Korea** makes the following arguments in rebuttal to the United States responses on all Article X:3(a) claims (i.e. the United States revoked anti-dumping duties in like cases, Korea submitted an effective data collection proposal, variance of the "no likelihood/not likely" criterion and the time-period selected rejection, and acceptance of data):

4.588 Article X:3(a) of the General Agreement requires governments to administer their laws, regulations and administrative rulings of general application in a "uniform, impartial and reasonable manner." It embodies the fundamental principle of due process. If government measures are arbitrarily applied, the resulting procedural protectionism is as damaging as would be the application of measures that are discriminatory on their face.

4.589 Four aspects of the DOC's actions in *DRAMs from Korea* violate the United States' due process obligation under Article X:3(a):

1. the refusal of the United States to revoke the duties despite doing so in the past,
2. the refusal of the United States to give Korea the opportunity to negotiate a Data Collection Proposal despite doing so in like cases in the past;
3. varying the "no likelihood/not likely" criterion and the time period selected for analyzing it from case to case; and
4. rejecting verified and corroborated evidence from the Korean Respondent companies while accepting the US petitioner's unsubstantiated speculative claims.

4.590 As was true with regard to Article X:1, this is not, as the United States alleges, an argument addressing the substance of the US revocation scheme. Rather, it condemns the arbitrary administration of the law by the DOC. Korea has never argued that the Department denied rights of participation in this proceeding. What it has established is that the United States applied different criteria in this case than in other cases and that it accepted and evaluated data in a biased fashion. These are the denials of due process contrary to Article X:3(a).

4.591 The US argument that its anti-dumping revocation regime is administered in conformity with Article X:3(a) because the same regulation (Section 353.25(a)(2)) ostensibly is applied in all cases, and that different outcomes are due to different facts is no defense. To conform to Article X:3(a), the United States would have had to uniformly apply the standards for determining whether to revoke. Either in its laws, regulations or administrative rulings of general application the United States would have had to set out the specific, objective criteria on which it bases its revocation decisions. The United States has not done so. As acknowledged repeatedly by its own courts, in the United States there are no objective criteria governing revocation.

4.592 The United States claims that the *Brass Sheet and Strip* determination sets out the factors always used by the DOC in analyzing the “no likelihood/not likely” criterion. Yet, at page 49727 of the Final Results of the Third Review,<sup>428</sup> the DOC admits that the determination does not specify the factors the DOC will use in revocation determinations and that *Brass Sheet and Strip* in fact did not set out the factors used in the *DRAMs from Korea* decision.

4.593 In most cases the United States revokes anti-dumping duties without conducting a substantive analysis of the “no likelihood/not likely” criterion. In only a very few cases, including *DRAMs from Korea*, did the DOC substantively analyze this criterion and require Respondents to prove it to the satisfaction of the Secretary. The United States terminated the anti-dumping proceeding on 256K and above DRAMs from Japan in return for a data collection proposal. However, the DOC refused even to allow Korea the opportunity to negotiate a similar proposal. The DOC arbitrarily chose the time period it examined in determining whether the “no likelihood/not likely” criterion was satisfied. Finally, the DOC systematically rejected verified or verifiable evidence submitted by the Korean Respondent companies while accepting the US petitioner’s unverified, speculative claims.

4.594 Each of the four actions set out above demonstrates that the DOC applied its revocation regime in a manner that was neither uniform, impartial, nor reasonable.

4.595 Facts differ from case to case, but Article X:3(a) requires that they be analyzed in a uniform, impartial and reasonable manner. The United States did not do so, and thereby violated its obligations under Article X:3(a).

(d) Rebuttal response made by the United States to all claims under Article X:3(a) of GATT 1994

4.596 The **United States** makes the following arguments in rebuttal all Article X:3(a) claims made by Korea<sup>429</sup> (i.e. the United States revoked anti-dumping duties in like cases, Korea submitted an effective data collection proposal, variance of the “no likelihood/not likely” criterion and the time-period selected rejection, and acceptance of data):

4.597 Korea has failed to establish a violation under Article X:3(a). Korea bears the burden of providing evidence that the DOC, in reaching its determination in *Final Results Third Review*, failed to administer its regulations in a “uniform, impartial and reasonable manner.”<sup>430</sup> Considering the Appellate Body’s finding that “the mere assertion of a claim” does not amount to proof,<sup>431</sup> this Panel should reject Korea’s baseless claims under Article X:3(a).

4.598 Korea asserts that “[t]he criteria the DOC uses will vary from case to case” and, thus, “[t]hey are not uniform or impartial.” The United States has established, however, that the criteria contained in section 353.25(a)(2) have remained substantially the same since the promulgation of this regulation in 1980, and apply in each case where an anti-dumping order may be revoked pursuant to this regulation. Therefore, the premise underlying Korea’s claim that the criteria are not uniform or impartial is not grounded in fact. Because Article X:3(a) concerns itself with the administration of the DOC’s regulations, Korea’s failure to present evidence (beyond mere assertions) that the DOC has applied section 353.25(a)(2) in a non-uniform and biased manner. Korea’s claim fails.

4.599 Korea alleges bias by stating that “[t]he DOC wanted to conclude that continued dumping was likely . . .” The only support offered by Korea consists of isolated instances where the DOC concluded that evidence presented by the Korean Respondents did not support their arguments. A proper review of the record in the underlying administrative proceeding reveals that the DOC’s

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<sup>428</sup> See Ex. ROK-36.

<sup>429</sup> The Panel notes that this includes those Article X:3 claims made in conjunction with Article I claims.

<sup>430</sup> GATT 1994, Art. X:3(a).

<sup>431</sup> *Wool Shirts*, WT/DS33/AB/R, at 14.

conclusions in the *Final Results Third Review* were based on an objective and unbiased evaluation of the facts. While the DOC's conclusions may have been to the detriment of the Respondents, this does not substantiate a claim that the DOC administered its law and regulations in a biased or unreasonable fashion.

4.600 Korea also alleges that "the period chosen by the United States [in which to consider the likelihood issue] was neither impartial nor reasonable, and the United States breached its obligations under Article X:3(a) of the General Agreement." The DOC determined the relevant period in which to consider the likelihood issue on the basis of the evidence provided by the parties to the administrative review. The fact that different periods of time may be examined in different cases derives from the simple fact that the evidentiary records in each case will differ. For the same reasons, Korea's arguments that the DOC rejected a data collection proposal (DCP) after having accepted such a proposal in "another similar case," and that the United States has revoked duties "in like cases in the past," do not establish a violation under Article X:3(a). Korea fails to demonstrate that, despite the different results in different cases with different facts, the DOC failed to administer its laws, regulations, decisions and rulings in a uniform, impartial and reasonable manner. Stated differently, Korea's claims must be rejected, because what little evidence Korea has provided does not relate to the legal obligation imposed by Article X:3(a).

#### H. CLAIMS UNDER ARTICLES 2 AND 3 OF THE AD AGREEMENT

##### 1. The DOC's Decision Regarding the Scope of the Proceeding

###### (a) Claim raised by Korea

4.601 **Korea** claims that the United States violated its obligations under Articles 2 and 3 of the AD Agreement because, during the original investigation of *DRAMs from Korea* the DOC (i) failed to include in the scope products that were in existence and that are like products to the investigated products; and (ii) included products in the scope of its proceeding that did not exist at the time of the original investigation. The following are Korea's arguments in support of this claim:

4.602 Articles 2 and 3 of the AD Agreement set forth procedures and requirements for Members to employ and follow in determining whether a product is dumped and whether that dumping has caused injury to a Member's domestic industry. In order for an anti-dumping measure to be taken, a Member must determine that a like product is being sold at a price below its normal value and that the sales below normal value of the like product cause (or threaten) material injury to a domestic industry of the Member.<sup>432</sup>

4.603 The United States violated its obligations under Articles 2 and 3 of the Agreement by including within the scope of the proceeding products that were not in existence at the time of the original investigation and therefore could not have been investigated to determine if they were dumped and injured an industry in the United States.<sup>433</sup> The United States also violated its obligations under Articles 2 and 3 of the Agreement by excluding certain products that were like those considered

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<sup>432</sup> Articles 2 and 3 of the AD Agreement.

<sup>433</sup> The scope of the anti-dumping duty order includes DRAMs of one megabit and above. See Notice of Final Results of Anti-dumping Duty Administrative Review and Determination Not to Revoke Order in Part; *DRAMs from Korea*, 62 Fed. Reg. 39809 (24 July 1997) (Ex. ROK-3). Theoretically, this scope includes products such as 64 megabit DRAMs that were not even shipped to the United States until 1996, as well as DRAMs with higher densities (memory capacities) that have not yet been developed.

in the investigation. The exclusion of the like products contributed to the issuance of the anti-dumping duty order because they could have significantly altered the dumping and injury results.<sup>434</sup>

4.604 The AD Agreement does not envision manipulation of the scope of a proceeding to, on the one hand, exclude a substantial portion of like products<sup>435</sup> from the original dumping and injury analyses and, on the other hand, create a completely open-ended scope that includes future generations of DRAMs with a memory capacity 64 times, 256 times, or greater, than that of the products originally investigated. Common sense alone dictates that a definition of like products that defines a 64 megabit DRAM (64 times the memory capacity of a one megabit DRAM) as a like product to the one megabit DRAM investigated in the original investigation and defines a 256 kilobit DRAM (a one megabit DRAM has only 4 times the memory capacity of a 256 kilobit DRAM) not a like product is indefensible. Not only does the memory capacity difference between DRAM generations separate DRAMs such as one megabit and four megabit and 64 megabit DRAMs into different like products, an examination of design and process differences further distinguishes one and four megabit DRAMs from 64 megabit and above DRAMs. There are significant design, process and application differences between the categories, that demonstrate that the one and four megabit DRAMs are not like products to the 64 megabit and above DRAMs.

4.605 The open-ended nature of the product scope suggested by Micron and accepted by the DOC embraced not only infinitely increasing memory capacities, but also infinitely advancing technologies. The product scope of the anti-dumping duty order extends to memory devices that are so technically advanced that they cannot reasonably be considered like products to the originally investigated products--they are not merely model-year changes. This, also, violates the United States' obligations under Articles 2<sup>436</sup> and 3 of the AD Agreement.

4.606 A basic limitation faced by DRAM producers is speed. The speed of a DRAM, whether a Fast Page Mode (FPM) DRAM, the type of DRAM investigated during the original investigation, or an Extended Data Output (EDO) DRAM, does not match that of microprocessors. Significant, costly delays, or "wait states," occur when speed mismatches between the DRAM and the microprocessor develop. FPM and EDO DRAMs are referred to as asynchronous DRAMs and, in order to decrease wait states, each type has been subjected to advanced engineering techniques. FPM speeds have been increased by process and photolithographic advances; minor architectural changes have increased the speed of EDO DRAMs. However, FPM and EDO DRAMs still suffer from the mismatch speed problem.

4.607 Synchronous DRAMs (SDRAMs), on the other hand, represent a major technological advance in the memory market. The operation of an SDRAM is fully synchronized with an internal system clock. This is completely different from a conventional DRAM, such as FPM and EDO DRAMs, which lack such a clock. Also, the architecture of SDRAMs (*i.e.*, design topology, operation diagram and function) is radically different from previous DRAMs. The architecture of SDRAMs supports multiple and new functions to synchronize (*e.g.*, multi-bank, on-chip programmable functions and multi-operational mode). The system clock and radical architectural changes synchronize the function of the SDRAM with that of the microprocessor so as to provide a data rate in line with the speed of the microprocessor. Thus, SDRAMs are a complete reinvention of random access memory that provide "burst" technology to deliver data faster and cheaper. In somewhat simpler terms, SDRAMs multiply and synchronize memory access to avoid downtime for the microprocessor and to increase data retrieval speed.

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<sup>434</sup> The DOC's investigation did not examine sales of Korean DRAMs with densities of less than one megabit. In previous investigation, the DOC treated 256 kilobit DRAMs as like products to one megabit DRAMs. See *DRAMs from Japan*, 51 Fed. Reg. 9475 (19 March 1986) (Ex. ROK-54).

<sup>435</sup> During the period of investigation (November 1991 – April 1992), 256 kilobit DRAMs represented a sizable segment of DRAM shipments.

<sup>436</sup> The Panel notes that there was an error in Korea's first submission which originally referred to Article 1 of the AD Agreement. All further incorrect references have also been revised. See also footnote 15.

4.608 In addition, future DRAMs will have new, completely distinct architectures, such as Rambus DRAMs, SyncLink DRAMs and DRAMs with embedded logic. The name, "DRAM," likely will still be used, even though the products are distinct and do not compete.

4.609 Thus, the technological advance from the FPM/EDO DRAMs to SDRAMs is not a matter of generational or memory capacity change. The advance is so radical that including this new type of memory in a proceeding where the original investigation was limited only to sales of FPM and EDO DRAMs is akin to including Ferraris in an anti-dumping proceeding regarding one-horse carts. Articles 2 and 3 of the AD Agreement simply do not permit the open-ended application of anti-dumping duties so as to capture products that because of technological advances are virtually unrelated to the products originally investigated.

4.610 Therefore, the United States violated its obligations under Articles 2 and 3 of the AD Agreement when it excluded products that were clearly like products from its investigation and at the same time determined that there was no upper limit on the memory capacities and additional features or functions of DRAMs considered to be like products and subject to its anti-dumping duty order.

4.611 In response to a question by the Panel,<sup>437</sup> **Korea** further argued as follows:

4.612 Korea is making two legally distinct claims. First, Korea argues that every time since the WTO entered into force that the United States has forced the Respondents to report data for a new product, *e.g.*, the 64M DRAM, and has calculated a dumping margin based in part on that data, the United States has engaged in a "post-GATT" action. These "post-GATT" actions are not, as the United States asserts, insulated from review. They must comply with the dictates of the WTO agreements. In this case, the United States improperly has acted to include within the scope of administrative reviews products that did not even exist at the time of the investigation (indeed, products made using technologies and machines that did not even exist at the time of the investigation). This violates Articles 2 and 3 of the Anti-Dumping Agreement.

4.613 Second, Korea claims that the United States is in violation of its Anti-Dumping Agreement obligations by continuing to apply the original product scope determination in the 1993 *DRAMs from Korea* order. Although the scope determination was made in 1993, the United States has not modified it to conform to its WTO obligations. Thus, each time the United States has published a determination with the same scope it has violated Article 18.4 of the Anti-Dumping Agreement and Article XVI:4 of the WTO Agreement.

4.614 The United States has argued throughout this proceeding that its Federal Register determinations, *e.g.*, the *Final Results in Brass Sheet and Strip*<sup>438</sup>, constitute "administrative rulings of general application" within the meaning of GATT Article X:1. (Korea concurs.) If, indeed, one can (indeed, must) rely on the U.S. administrative rulings to ascertain U.S. law, then obviously those rulings must comply with Article 18.4 and Article XVI:4. If this is true of the "no likelihood/not likely" analysis in *Brass Sheet and Strip*, then it is true of the scope determinations in this proceeding.

(b) Response by the United States

4.615 The Panel notes that the **United States** raised a preliminary objection with regards to Korea's claims under Articles 2 and 3 of the AD Agreement. In light of its preliminary objection the United

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<sup>437</sup> The Panel recalls that the question was: "Could Korea confirm that it is challenging the product scope determination in the 1997 refusal to revoke, and not product scope determination in the original 1993 *DRAMs from Korea* determination? Is Korea making two legally distinct claims: (1) against the original product scope determination in the 1993 *DRAMs from Korea* order, and (2) against the product scope determination contained in the 1997 refusal to revoke? Or does Korea consider that these two claims are essentially linked, to the extent that one claim cannot exist independently of the other?"

<sup>438</sup> 61 Fed. Reg. 49727 (23 September 1996) (Ex. ROK-36))

States did not respond directly to Korea's claim. The arguments of the Parties on this matter can be found in Section IV.A.2 of this report.

I. CLAIMS UNDER ARTICLE 5.8 OF THE AD AGREEMENT

1. *De Minimis* Margin Threshold for Administrative Reviews

(a) Claim raised by Korea

4.616 **Korea** claims that the United States violates Article 5.8 of the AD Agreement by setting the *de minimis* margin threshold for administrative reviews at a level lower than that required by that provision. The following are Korea's arguments in support of that claim:

4.617 The WTO obliges the United States to ensure not only that its practice in administering its anti-dumping law is in conformity with the AD Agreement and the General Agreement, but also that its law and regulations on their face are consistent with those obligations. This claim concerns the latter obligation.

4.618 By setting the *de minimis* threshold in administrative reviews at 0.5 percent,<sup>439</sup> the United States has violated its obligations under Article 5.8 of the AD Agreement, which sets the threshold at two percent. The obligation of Article 5.8 is that:

There shall be immediate termination in *cases* where the authorities determine that the margin of dumping is *de minimis* . . . . The margin of dumping shall be considered to be *de minimis* if this margin is less than 2 percent, expressed as a percentage of the export price. (Emphasis added by Korea.)

4.619 Nor is there any basis to the arguments, as pursued by the United States in the course of enacting its legislation to implement the WTO agreements and its anti-dumping regulations pursuant to that law, that the obligation imposed by Article 5.8 is limited to anti-dumping investigations and does not extend to reviews of anti-dumping duties.

4.620 Article 5.8 uses the word “cases,” a generic word that applies to the review stage of proceedings as well as the investigation stage. “Cases” was used in the comparable provision, Article 5.3, of the Tokyo Round Anti-Dumping Code.<sup>440</sup> Although the focus of revisions to this Article in the Uruguay Round was to make it mandatory (replacing “should” with “shall”) and to replace “negligible” with a quantified “*de minimis*” threshold, the scope of applicability also was addressed.

4.621 A review of the Uruguay Round negotiating history of Article 5.8 shows that the obligation imposed by Article 5.8 is not limited to investigations. Article 5.7 of the 6 July 1990 “Carlisle I” draft read: “For the purpose of this *Code*, the margin of dumping shall be considered to be *de minimis* if this margin is less than x percent *ad valorem* . . . .” (emphasis added by Korea).<sup>441</sup> This attempt to clarify the scope of the provision was opposed by the United States, and so the express application to all phases of an anti-dumping proceeding disappeared in the “Carlisle II” draft of 14 August 1990, which contained two alternate bracketed versions of this provision. One said that “there should be immediate termination of cases, at any stage of the *investigation*, against imports from a particular

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<sup>439</sup> The threshold for reviews is set out in Section 351.106(c) of the DOC’s anti-dumping regulations, 62 Fed. Reg. 27296, 27382-83 (May 19, 1997) (Ex. ROK-49). The current regulation is cited rather than the regulation applicable to the Korean DRAM proceeding because this claim relates to an inconsistency of the regulation on its face rather than as applied in the DRAM proceeding.

<sup>440</sup> Article 5.3 of the Tokyo Round Anti-Dumping Code provided: “There should be immediate termination in cases where the margin of dumping . . . is negligible.”

<sup>441</sup> MTN.GNG/NG8/W/83/Add.5 (23 July 1990), p. 18.

country where the margin of dumping is less than x percent *ad valorem* . . .” (emphasis added by Korea). The other version repeated the formulation of the Tokyo Round Code, substituting a quantified threshold for “negligible”: “There should be immediate termination in *cases* where the margin of dumping is less than x percent *ad valorem*” (emphasis added by Korea).<sup>442</sup>

4.622 By the next draft, the 6 November 1990 New Zealand I, Article 5.8 said: “There should be immediate termination in cases where the margin of dumping is *de minimis*,<sup>10</sup>” and this footnote 10 provided: “For the purpose of this paragraph, a *de minimis* margin of dumping is considered to be less than x percent, expressed as a percentage of the normal value.”<sup>443</sup> This formulation remained unchanged until the “Dunkel Draft” of 20 December 1991, in which the formulation is the same as that quoted above from Article 5.8 of the approved Agreement (except for substitution of the last two words – “export price” is used in the Agreement, whereas the Dunkel Draft referred to “normal value”).<sup>444</sup>

4.623 Thus, the effort by the United States to expressly limit the scope of Article 5.8 to investigations was unsuccessful. The same generic formulation used in the Tokyo Round Code (“in cases”) was maintained.

4.624 The application of the *de minimis* threshold to reviews as well as to investigations also is supported by a review of related Uruguay Round AD Agreement provisions. According to Article 9.2, anti-dumping duties, when imposed, shall be collected “in the appropriate amounts in each case.” That amount, as per Article 9.3, shall not exceed the margin of dumping established under Article 2. The margin of dumping calculation rules of Article 2 apply to both investigations and reviews. This tracing of the rules applicable to the assessment of anti-dumping duties to be collected discloses no logical reason why the *de minimis* level during the review stage of a proceeding should be different than at the investigation stage. That which is the legal equivalent of a zero margin for purposes of determining whether to impose an anti-dumping duty is also the legal equivalent of zero for collecting anti-dumping duties.<sup>445</sup>

4.625 Finally, this analysis is confirmed by the DOC’s own regulations, which, by definition, treat investigations and annual reviews as parts of the same proceeding. Section 353.2(q) defines “Proceeding” as follows:

A “proceeding” begins on the date of the filing of a petition or publication of a notice of initiation under §353.11, and ends on the date of publication of the earliest notice of (1) dismissal of petition, (2) rescission of initiation, (3) termination of investigation, (4) a negative determination that has the effect of terminating the proceeding, (5) *revocation of an order*, or (6) termination of a suspended investigation.<sup>446</sup>

In that investigations and annual reviews are part of the same proceeding, they should be subject to the same *de minimis* threshold.

4.626 The proscription of Article 11.1 is that an anti-dumping duty shall remain in force only as long as and to the extent necessary “to counteract dumping which is causing injury.” Under Article 5.8, a calculated margin of dumping of less than two percent is not “dumping.” Therefore, the

<sup>442</sup> Unpublished working document, reprinted in *Inside US Trade* (21 August 1990) (Ex. ROK-80).

<sup>443</sup> Unpublished working document, reprinted in *Inside US Trade* (9 November 1990) (Ex. ROK-81).

<sup>444</sup> Reprinted in 3 THE GATT URUGUAY ROUND: A NEGOTIATING HISTORY (1986-1992) 457 (TERENCE P. STEWART, ed., 1993) (Ex. ROK-82).

<sup>445</sup> The United States appears to be the only WTO Member that provides a separate, lower *de minimis* threshold for reviews. The EU and Japan, in contrast, expressly apply the AD Agreement’s two percent *de minimis* threshold to both investigations and reviews. See, respectively, G/ADP/N/1/EEC/2/Suppl.1 (1 April 1997), clause 17 and Articles 11(5) and 9(3); G/ADP/Q1/JPN/4 (12 August 1996), para. 4.

<sup>446</sup> 19 C.F.R. § 353.2(q) (1996) (emphases added by Korea) (Ex. ROK-83).



United States is in breach of its WTO obligations by maintaining a *de minimis* threshold of 0.5 percent for administrative reviews.

4.627 At the first meeting of the Panel, **Korea** made the following additional arguments:

4.628 By setting the *de minimis* threshold in administrative reviews at 0.5 percent, the United States has violated its obligations under Article 5.8 of the Anti-Dumping Agreement, which sets the threshold at two percent. The obligation of Article 5.8 applies to “cases,” including reviews as well as investigations.

4.629 The United States has argued, as it did in the course of enacting its legislation to implement the WTO agreements and its anti-dumping regulations pursuant to that law, that the obligation imposed by Article 5.8 is limited to anti-dumping investigations and does not extend to reviews of anti-dumping duties. This is incorrect.

4.630 Article 5.8 uses the word “cases,” a generic word that applies to the review stage as well as the investigation stage of proceedings. The extensive review of the Uruguay Round negotiating history of Article 5.8 contained in our written submission shows that the obligation of Article 5.8 is not limited to investigations and that the effort by the United States during the negotiations to expressly limit the scope of Article 5.8 to investigations was unsuccessful. The same generic formulation used in the Tokyo Round Code (“in cases”) was maintained.

4.631 This analysis is confirmed by an analysis of the provisions both of the Uruguay Round and of the DOC’s own regulations, which, by definition, treat investigations and annual reviews as parts of the same proceeding. In that an investigation and all subsequent reviews are parts of the same “case” or “proceeding,” they are subject to the same *de minimis* threshold.

(b) Response by the United States

4.632 The **United States** responds to Korea's claim with the following arguments:

4.633 Consistent with the framework set forth in the AD Agreement, anti-dumping proceedings in the United States consist of two phases: (1) an initial phase consisting of an investigation; and (2) if an investigation results in the imposition of an order (definitive duties), an assessment and review phase. In an investigation, the DOC applies a *de minimis* standard of 2 percent *ad valorem*.<sup>447</sup> In the assessment and review phase, the DOC applies a *de minimis* standard of 0.5 percent *ad valorem*.<sup>448</sup>

4.634 Under Article 5.8, Members must apply a 2 percent *de minimis* standard in anti-dumping investigations. Korea claims that because the DOC does not apply a *de minimis* standard of 2 percent for purposes of assessments and reviews, the United States is in violation of Article 5.8.<sup>449</sup> Korea’s claim is unfounded, however, because Article 5.8 applies only to initial anti-dumping investigations. Article 5.8 does not apply to assessments and reviews.

4.635 By way of background, the AD Agreement distinguishes between the investigatory phase and the assessment and review phase of an anti-dumping proceeding. Article 5 deals with investigations, while Article 9 deals with assessments and Article 11 deals with reviews. This structure is reflected in other provisions of the AD Agreement. For example, Articles 12.1 and 12.2 set forth obligations concerning the contents of public notices issued during an investigation, while Article 12.3 sets forth

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<sup>447</sup> 19 U.S.C. § 1673b(b)(3) (Ex. USA-19); *New AD Regulations*, 62 Fed. Reg. at 27382-83 (sec. 351.106(b)(1)) (Ex. USA-80).

<sup>448</sup> *New AD Regulations* at § 351.106(c)(1).

<sup>449</sup> Although Korea’s request for the establishment of a panel fails to specify the particular provision of US law alleged to be in violation of Article 5.8, in its first submission, Korea refers to 19 C.F.R. § 351.106(c) (1998).

comparable obligations with respect to reviews. Likewise, Article 18.3, which is a transition rule, distinguishes between “investigations” and “reviews of existing measures.”

4.636 In *Desiccated Coconut*, the Appellate Body recognized this distinction between an initial investigation and the post-investigation phase, noting that the imposition of “definitive” duties (an “order” in US terminology) ends the investigative phase.<sup>450</sup> Although *Desiccated Coconut* was a dispute over countervailing duties, given the similarities between the SCM Agreement and the AD Agreement, the following statement of the Appellate Body is particularly apt:

we see a decision to impose a definitive countervailing duty as the culminating act of a domestic legal process which starts with the filing of an application by the domestic industry, includes the initiation and conduct of an investigation by an investigating authority, and normally leads to a preliminary and a final determination. A positive final determination that subsidized imports are causing injury to a domestic industry authorizes the domestic authorities to impose a definitive countervailing duty on subsidized imports.<sup>451</sup>

4.637 Article 5 is entitled “*Initiation and Subsequent Investigation*.” There is nothing in the text of Article 5 that suggests that the provisions of that article, including Article 5.8, apply to anything other than the investigation phase of an anti-dumping proceeding. Indeed, the first sentence of Article 5.8 makes it clear that Article 5.8, like Article 5 in general, deals only with the investigation phase.<sup>452</sup>

4.638 Korea’s only textual argument is that the word “cases” in the second sentence of Article 5.8 refers “to the review stage of proceedings as well as the investigation stage.” In other words, according to Korea, the word “cases,” appearing in an article that, by its terms, deals only with “investigations,” means “investigations and reviews.”

4.639 Korea must violate basic principles of treaty interpretation in order to reach this result. According to Article 31(1) of the *Vienna Convention*, “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” The first sentence of Article 5.8 also uses the word “case,” and in that sentence it is very clear that “case” means “investigation.” Moreover, the ordinary meaning of the term “case” is: “[a]n instance of the existence or occurrence of something.”<sup>453</sup> The United States previously has established that the context of Article 5.8 is “investigations.” Putting the ordinary meaning of “cases” and the context together, it is clear that the second sentence of Article 5.8 was intended to refer to investigations where there was the existence or occurrence of a *de minimis* dumping margin.

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<sup>450</sup> WT/DS/22/AB/R, p. 11.

<sup>451</sup> *Id.* A similar distinction was recognized under the 1979 AD Agreement. See *EC - Imposition of Anti-Dumping Duties on Imports of Cotton Yarn from Brazil*, ADP/137, Report of the Panel adopted 30 October 1995, para. 585, in which the panel stated:

Those adjustments or allowances mentioned by Brazil were only relevant to the stage of investigation of dumping or injury, whereas the “constructive remedies” in the context of Article 13 only applied once an investigation was completed. Accordingly, such adjustments or allowances would not be “constructive remedies provided for by this Code”. Equally, a determination of negligible margins of dumping or low volume of market share, was required, pursuant to Article 5:3, to be made at a stage of the investigation process prior to the time at which parties were obliged to consider the possibility of constructive remedies; consequently, they should not be considered as “constructive remedies provided for by this Code” either.

<sup>452</sup> The first sentence of Article 5.8 provides as follows: “[a]n application under paragraph 1 shall be rejected and an investigation shall be terminated promptly as soon as the authorities concerned are satisfied that there is not sufficient evidence of either dumping or of injury to justify proceeding with the case.”

<sup>453</sup> Webster’s II New Riverside University Dictionary, 234 (1984).

4.640 Korea cites the fact that the EU and Japan apply a 2 percent *de minimis* standard to both investigations and reviews. This reference is legally irrelevant. While Article 31(3)(b) of the *Vienna Convention* permits a consideration of “any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation,” unilateral policy decisions made by only two signatories to the AD Agreement for purposes of their domestic legislation do not constitute “subsequent practice” within the meaning of Article 31.3(b).<sup>454</sup>

4.641 Finally, Korea’s discussion of the negotiating history of Article 5.8 is both legally irrelevant and contradicts Korea’s own position. Korea’s discussion is legally irrelevant because under Article 32 of the *Vienna Convention*, recourse may be had to the preparatory work of a treaty “when the interpretation according to Article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.” The application of Article 31 to Article 5.8 makes it clear that the 2 percent *de minimis* standard applies only to investigations, and not to reviews. Thus, the meaning of Article 5.8 is not “ambiguous or obscure.” Moreover, this result is not “manifestly absurd or unreasonable,” and Korea has not even alleged that it is.

4.642 Moreover, as a factual matter, the drafting history discussed by Korea contradicts its own position. Korea refers to the so-called “Carlisle I” draft, which would have expanded the coverage of Article 5.8 to the entire “Code.” Korea correctly notes that the United States opposed this expansion and that, as a result, the ultimate language of Article 5.8 repeated the formulation in the 1979 AD Agreement. Thus, contrary to what Korea alleges, the drafting history shows that the drafters declined to apply the 2 percent *de minimis* standard to anything other than investigations.

4.643 In light of the above, the Panel should dismiss Korea’s claim and find that the United States’ application of a 0.5 percent *de minimis* standard to the assessment and review phase does not violate US obligations under Article 5.8 of the AD Agreement.

(c) Rebuttal arguments made by Korea

4.644 **Korea** makes the following arguments in rebuttal to the United States responses:

4.645 The United States seeks to make much of the facts that Article 5 of the AD Agreement is entitled “Initiation and Subsequent Investigation” and that the Appellate Body in *Brazil -- Coconut* recognized there were two distinct phases in an anti-dumping proceeding--investigation and reviews.

4.646 The second US fact is self-evident, uncontested and irrelevant. The issue is whether the mere fact that the *de minimis* threshold appears in Article 5 is dispositive. It is not.

4.647 As to the first “fact,” Article 5.9 clearly is not limited to the investigation stage. It provides that “[a]n anti-dumping proceeding shall not hinder the procedures of customs clearance.” (Emphasis added by Korea.) Thus, Article 5 is not limited to investigations, its title notwithstanding.

4.648 Also, the *de minimis* threshold set out in the second sentence of Article 5.8 uses the generic word “cases.” Granted, as a matter of drafting, the use of “proceedings” (as in Article 5.9), rather than the retention of the more amorphous “cases” (as originally used in the comparable provision (Article 5.3) of the Tokyo Round Anti-Dumping Code), would have been preferable. However, US argument to the contrary notwithstanding, “cases” as used in Article 5.8 cannot be interpreted textually to refer only to the investigation stage of an anti-dumping proceeding.

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<sup>454</sup> See *EC - Imposition of Anti-Dumping Duties on Imports of Cotton Yarn from Brazil*, ADP/137, Report of the Panel adopted 30 October 1995, para. 497 (“The practices of three of the total signatories to an Agreement did not constitute subsequent practice in the application of the treaty in accordance with Article 31(3)(b) of the Vienna Convention on the Law of Treaties.”).

4.649 The purpose of the AD Agreement and of GATT Article VI--to define the circumstances in which and procedures by which a Member legitimately can apply an anti-dumping measure--also supports finding that a good-faith interpretation of the *de minimis* provision must apply the provision to all phases of an anti-dumping proceeding. There is no logical reason why the *de minimis* level during the review stage of a proceeding should be different than at the investigation stage. Moreover, any other holding would allow a Member such as the United States to set the review threshold as low as it wished.

4.650 Application of the *de minimis* threshold to the review stage of a proceeding thus is supported by the interpretive rules of Article 31 of the *Vienna Convention*. According to Article 32 of the *Vienna Convention*, recourse to the preparatory work of the AD Agreement and the circumstances of its conclusion is permissible to confirm the meaning of the *de minimis* provision. Alternatively, recourse to supplemental means of interpretation would be permissible if the Panel were to find either that limiting the threshold to the investigation stage would lead to an unreasonable, indeed manifestly absurd, result, or that the meaning of "cases" is ambiguous.

4.651 The negotiating history shows clearly that the US effort to limit the provision to investigations failed. The arguments to the contrary in the US first submission do not square with the facts. The Tokyo Round Code used the generic word "cases." Attempts in the "Carlisle I" and "Carlisle II" drafts to specify more clearly the scope of the provision were unsuccessful. Therefore, in the "Dunkel Draft," as in the text of Article 5.8 appearing in the approved legal text, the Tokyo Round Code's reference to "cases" was retained.

4.652 Thus, the text of Article 5.8, rules of treaty interpretation, the Uruguay Round negotiating history and common sense dictate that the 2.0 percent *de minimis* threshold apply to anti-dumping reviews. Because Section 351.106(c) of the DOC's regulations<sup>455</sup> sets the *de minimis* threshold for administrative reviews at 0.5 percent, the United States is in breach of its WTO obligations.

(d) Rebuttal arguments made by the United States

4.653 The **United States** makes the following arguments in rebuttal:

4.654 In its first written submission to the Panel, the United States established that the text and context of Article 5.8 demonstrate that this provision applies only to initial anti-dumping investigations, and not to reviews of definitive anti-dumping duties, such as the underlying administrative review of the order on *DRAMs from Korea*. There is one additional contextual point that further confirms the fact that Article 5.8 applies only to investigations.

4.655 Korea's argument, as the United States understands it, is that due to the presence of the word "cases" in the second sentence of Article 5.8, Article 5.8 applies to an anti-dumping proceeding as a whole, and not merely to the initial investigatory phase. The natural consequence of this argument is that whenever the authorities find a dumping margin of less than 2 percent, then they must consider the margin *de minimis* and immediately terminate the case (or, in US terminology, "revoke" the anti-dumping order).

4.656 However, this result is at odds with Article 11.3, footnote 22. That provision says that in countries with a retrospective assessment system, such as the United States, a finding "that no duty is to be levied shall not by itself require the authorities to terminate the definitive duty." In other words, under footnote 22, a finding of a zero dumping margin does not require termination of an anti-dumping order, even though such a dumping margin would be considered *de minimis* under Article 5.8.

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<sup>455</sup> See 62 Fed. Reg. 27296, 27382-83 (19 May 1997) (Ex. ROK-49).

4.657 Put simply, if Article 5.8 means what Korea says it means, then footnote 22 is a nullity. If Article 5.8 applies to more than initial investigations, then any time an authority administering a retrospective system finds a dumping margin of less than 2 percent, under Article 5.8 it must immediately terminate the case (or revoke the order). Under Korea's interpretation, one never gets to footnote 22, because one of the events that triggers its application (a finding of a zero dumping margin) automatically results in the termination of the duty, and there is nothing left to do under Article 11.

4.658 Obviously, this construction violates the principle of "effectiveness" of treaty interpretation which. Therefore, the United States respectfully submits that the Panel must find that Article 5.8 only applies to initial anti-dumping investigations. Such an interpretation renders both Article 5.8 and Article 11.3 (footnote 22) effective, and, as a result, conforms to accepted rules of treaty interpretation.

4.659 Finally, although the text and context of Article 5.8 make clear that Article 5.8 applies only to investigations, Korea has suggested that it somehow makes no sense to have different *de minimis* standards apply to different phases of an anti-dumping proceeding. To the contrary, there is a very good reason for having different standards.

4.660 Injurious dumping is a pernicious trade practice which the international community has "condemned" for over fifty years.<sup>456</sup> Dumping is defined as the amount by which the normal value of a like product sold in the ordinary course of trade exceeds the export price of the product.<sup>457</sup> Any excess, however small, constitutes dumping.

4.661 In the Uruguay Round of multilateral trade negotiations, however, the drafters recognized that for purposes of investigations, a higher (more forgiving) standard of "actionable dumping" (which is what a *de minimis* standard is) was appropriate. This recognition is consistent with the fact that the calculation of a dumping margin necessarily involves scores (and in some cases, hundreds) of discrete factual determinations, some of which may involve situations where the outcome is close and the exercise of human judgment is unavoidable. For example, in the case of an adjustment to normal value, it may be a "close call" as to whether a particular expense is direct or indirect or whether the amount of the adjustment has been properly documented. This inevitable aspect of the anti-dumping process arguably makes it unfair to subject parties involved (perhaps for the first time) in an initial investigation of dumping to an overly rigorous standard of actionable dumping.

4.662 Following an investigation, however, an exporter knows how the anti-dumping rules apply to its particular factual situation. Therefore, it is appropriate to hold the exporter to a more demanding *de minimis* standard, because the exporter is in a position to avoid dumping margins of 1-2 percent. Thus, contrary to Korea's assertions, there is a sound basis for apply different *de minimis* standards to different phases of an anti-dumping proceeding.

4.663 Finally, Korea's reliance on the negotiating history of Article 5.8 remains misplaced. First of all, it is clear from the plain text (and context) of Article 5.8 that it applies only to investigations. Thus, reliance on negotiating history to reach a different interpretation is precluded by the *Vienna Convention*. Secondly, as discussed in our first written submission, that negotiating history actually confirms the position of the United States. Specifically, it shows that there was an attempt to render the definition of *de minimis* in Article 5.8 applicable to more than just the investigatory phase. However, this attempt was not successful.

4.664 At the second meeting of the Panel, the **United States** made the following additional rebuttal arguments:

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<sup>456</sup> GATT 1994, Art. VI:1.

<sup>457</sup> *Id.* See also AD Agreement, Art. 2.

4.665 Korea notes that Article 5.9 of the AD Agreement uses the word “proceeding.” According to Korea, this proves that Article 5 is not limited to investigations, and Korea implies that this means that Article 5.8 is not limited to investigations.

4.666 First, it is by no means clear that the term “proceeding,” as used in Article 5.9, refers to something other than an “investigation.” The term “proceeding” is simply not defined in the AD Agreement.

4.667 However, even assuming that Korea is correct in its assertion that the word “proceeding,” as used in Article 5.9, encompasses both the investigatory and post-investigatory phases, this fact would seem to undercut Korea’s argument, because it suggests that the drafters knew what terminology to use when they sought to make a particular right or obligation extend beyond the investigation phase. Thus, if Korea’s definition of “proceeding” is correct, the fact that the drafters declined to use this term in Article 5.8 demonstrates that the drafters intended that Article 5.8 apply only to investigations.

4.668 Indeed, in its rebuttal submission, Korea concedes that it “would have been preferable” if the drafters had used the word “proceeding” in Article 5.8. Certainly, from Korea’s perspective, it would have been preferable if the drafters had done so, because it would have given Korea a textual basis for its claim. Unfortunately for Korea, the drafters did not.

J. INCONSISTENCY OF THE REMEDY SOUGHT BY KOREA

(a) Submission by the United States

4.669 Regarding the findings and recommendations requested by Korea, contained in Section III.A of this report. The **United States** submits that the specific remedy sought by Korea is inconsistent with established panel practice. The following are the arguments of the United States in support of this submission:

4.670 In its first submission, Korea has asked this Panel to recommend that the United States “revoke the anti-dumping duty order on *DRAMs from Korea*.” In so doing, Korea has requested a specific remedy that is inconsistent with established GATT/WTO practice and the DSU. Therefore, should the Panel agree with Korea on the merits, the Panel nonetheless should reject the requested remedy, and instead should make a general recommendation, consistent with the DSU and established GATT/WTO practice, that the United States bring its anti-dumping measure into conformity with its obligations under the AD Agreement.

4.671 The specific remedy<sup>458</sup> of revocation requested by Korea goes far beyond the type of remedies recommended by the overwhelming preponderance of prior GATT 1947 and WTO panels. In virtually every case in which a panel has found a measure to be inconsistent with a GATT obligation, panels have issued the general recommendation that the country “bring its measures . . . into conformity with GATT.”<sup>459</sup> This is true not only for GATT disputes, in general, but for disputes involving the imposition of anti-dumping (and countervailing duty) measures, in particular.<sup>460</sup>

4.672 This well-established practice is codified in Article 19.1 of the DSU, which provides:

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<sup>458</sup> By “specific” remedy, the United States means a remedy that requires a party to take a particular, specific action in order to cure a WTO-inconsistency found by a panel.

<sup>459</sup> See, e.g., *Canada - Measures Affecting Exports of Unprocessed Herring and Salmon*, L/6268, Report of the Panel adopted 22 March 1988, BISD 35S/98, 115, para. 5.1. The United States indicates that in excess of 100 prior panel reports in which panels have made recommendations using similar language.

<sup>460</sup> See, e.g., *Canadian Countervailing Duties on Grain Corn from the United States*, SCM/140 and Corr. 1, Report of the Panel adopted 28 April 1992, BISD 39S/411, 432, para. 6.2; *Korean Resins*, ADP/92, para. 302.

Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement. (footnotes omitted).

4.673 Indeed, in the first case to work its way through the WTO dispute settlement system, the recommendations of both the panel and the Appellate Body carefully adhered to Article 19.1.<sup>461</sup>

4.674 The requirement that panels make general recommendations reflects the purpose and role of dispute settlement in the WTO, and, before it, under GATT 1947. Article 3.4 of the DSU provides that “[r]ecommendations and rulings made by the DSB shall be aimed at achieving a satisfactory settlement of the matter,” and Article 3.7 provides that “[a] solution mutually acceptable to the parties to a dispute . . . is clearly to be preferred.” To this end, Article 11 of the DSU directs panels to “consult regularly with the parties to the dispute and give them adequate opportunity to develop a mutually satisfactory solution.” Ideally, a mutually agreed solution will be achieved before a panel issues its report. However, if this does not occur, a general panel recommendation that directs a party to conform with its obligations still leaves parties with the necessary room to cooperate in arriving at a mutually agreed solution.<sup>462</sup>

4.675 Indeed, a Member generally has many options available to it to bring a measure into conformity with its WTO obligations. A panel cannot, and should not, prejudge by its recommendation the solution to be arrived at by the parties to the dispute after the DSB adopts the panel’s report.

4.676 In addition, the requirement that panels issue general recommendations comports with the nature of a panel’s expertise, which lies in the interpretation of covered agreements. Panels generally lack expertise in the domestic law of a defending party.<sup>463</sup> Thus, while it is appropriate for a panel to determine in a particular case that a Member’s legislation was applied in a manner inconsistent with that country’s obligations under a WTO agreement, it is not appropriate for a panel to dictate which of the available options a party must take to bring its actions into conformity with its international obligations.

4.677 The compliance process under the DSU makes the precise manner of implementation a matter to be determined in the first instance by the Member concerned, subject to limited rights to compensation or retaliation by parties that have successfully invoked the dispute settlement procedures. In Article 19 of the DSU, the drafters precluded a panel from prejudging the outcome of this process in their recommendations.

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<sup>461</sup> In *Reformulated Gasoline*, the Appellate Body recommended “that the Dispute Settlement Body request the United States to bring the baseline establishment rules contained in Part 80 of Title 40 of the Code of Federal Regulations into conformity with its obligations under the *General Agreement*.” WT/DS2/AB/R, p. 29. The panel in that case issued a virtually identical recommendation. WT/DS2/R, Report of the Panel, as modified by the Appellate Body, adopted 20 May 1996, para 8.2.

Even more noteworthy is *Japan Taxes*, in which the Appellate Body recommended “that the Dispute Settlement Body request Japan to bring the Liquor Tax Law into conformity with its obligations under the General Agreement on Tariffs and Trade 1994.” WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, at 34.

<sup>462</sup> As noted by Prof. Jackson:

One of the basic objectives of any dispute procedure in GATT has been the effective resolution of the dispute rather than “punishment” or imposing a “sanction” or obtaining “compensation.” This objective has been recognized explicitly by GATT committees. The prime objective has been stated to be the “withdrawal” of a measure inconsistent with the General Agreement.

John H. Jackson, *World Trade and the Law of the GATT* 184 (1969) (citations omitted) (Ex. USA 82).

<sup>463</sup> Indeed, Article 8.3 of the DSU provides that citizens of Members whose governments are parties to a dispute normally shall not serve on a panel concerned with that dispute, absent agreement by the parties.

4.678 In sum, specific remedies are at odds with established GATT and WTO practice and the express terms of the DSU. Therefore, regardless of how the merits of this case are decided, Korea's request for revocation of the anti-dumping order on DRAMs should be rejected.

(b) Rebuttal response by Korea

4.679 **Korea** makes the following arguments in rebuttal to the United States submission:

4.680 The United States erroneously asserts that Korea impermissibly requests the Panel to recommend a "specific remedy."

4.681 There are two sentences in Korea's remedy request. In the first, Korea respectfully requests the Panel to find that the United States is not in conformity with its obligations under Articles I, VI and X of the General Agreement and Articles 2, 5.8, 6, 11.1 and 11.2 of the AD Agreement. This is in complete compliance with the so-called "general remedy" recommendation that is mandated by Article 19.1 of the DSU, which provides that "[w]here a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that Agreement." (Footnotes omitted.)

4.682 In the second sentence of its remedy request, Korea "further requests that the Panel suggest that the United States take the following actions to comply with its obligations under the WTO Agreements . . . ." This language was carefully crafted to conform with the second sentence of Article 19.1 of the DSU, which provides:

In addition to its recommendations, the panel or Appellate Body may suggest ways in which the Member concerned could implement the recommendations. (Emphasis added by Korea.)

4.683 In short, Korea is asking the Panel: (a) to make the "general remedy" recommendation called for by the first sentence Article 19.1 of the DSU; and (b) to suggest ways the US could implement that recommendation, as permitted by the second sentence of Article 19.1.

## V. INTERIM REVIEW

5.1 On 6 November 1998, Korea and the United States requested the Panel to review, in accordance with Article 15.2 of the DSU, precise aspects of the interim report issued to parties on 23 October 1998.

### A. COMMENTS BY KOREA

5.2 Korea requested a number of changes to the Panel's description of Korea's main arguments. Certain of these proposed changes were made by the Panel.

5.3 The Panel corrected typographical errors identified by Korea in Section VI of the report.

5.4 At the request of Korea, we corrected our description of the period of the first administrative review at paragraph 6.2. In light of this correction, we amended references in the findings to the period of time during which no dumping was found.

5.5 With regard to paragraph 6.55, Korea asserted that the Panel made a conclusory assertion with no explicit indication of the reasons supporting the finding. Korea asked the Panel to clarify the reasons why the *Final Results Third Review* were inconsistent with Article 11.2 of the AD Agreement. The Panel made a change to this paragraph.



5.6 With regard to paragraph 6.92, Korea asked the Panel to issue findings regarding GATT 1994 Articles I and X, to avoid the situation described by the Appellate Body in *Australia - Measures Affecting Importation of Salmon*.<sup>464</sup> Korea stated that in that case the Appellate Body found that the panel had erred in law by misapplying the doctrine of judicial economy. We note the Appellate Body's statement in *United States - Shirts and Blouses* that "a panel need only address those claims which must be addressed in order to resolve the matter at issue".<sup>465</sup> We also note that this statement was referred to by the Appellate Body in *Salmon*. In *Salmon*, the Appellate Body also stated that "a panel has to address those claims on which a finding is necessary in order to enable the DSB to make sufficiently precise recommendations and rulings so as to allow for prompt compliance by a Member with those recommendations and rulings 'in order to ensure effective resolution of disputes to the benefit of all Members' [consistent with Article 21.1 of the DSU]." Having found that section 353.25(a)(2)(ii) of the DOC regulations, and the *Final Results Third Review* based on that provision, are inconsistent with Article 11.2 of the AD Agreement, we consider that we have resolved "the matter at issue" and "enable[d] the DSB to make sufficiently precise recommendations and rulings so as to allow for prompt compliance by [the United States] with those recommendations and rulings 'in order to ensure effective resolution of disputes to the benefit of all Members'." For these reasons, we consider that it is not necessary for us to examine Korea's claims under Articles I and X of GATT 1994.

## B. COMMENTS BY THE UNITED STATES

5.7 With regard to paragraphs 6.42 to 6.50, the United States expressed the concern that certain phrases used by the Panel could be taken out of context. The United States asked the Panel to ensure a clear distinction between the type of standard that administering authorities must apply in order to satisfy the "necessary" standard under Article 11.2, and the quantum (and nature) of the evidence that must support conclusions under such a standard. The Panel made some changes to paragraphs 6.43, 6.47 and 6.50.

5.8 The Panel corrected a typographical error identified by the United States in Section VI of the report.

5.9 With respect to the second sentence of paragraph 6.50, the United States proposed replacing the word "likelihood" with "necessity". The Panel did not make this change.

## VI. FINDINGS

### A. INTRODUCTION

6.1 This dispute arises out of the US Department of Commerce ("DOC") 24 July 1997 Notice of Final Results of Antidumping Duty Administrative Review and Determination Not to Revoke Order in Part: Dynamic Random Access Memory Semiconductors of One Megabyte or Above From the Republic of Korea ("*Final Results Third Review*").<sup>466</sup>

6.2 An anti-dumping order was imposed on DRAMs from Korea ("*DRAMs from Korea*") on 10 May 1993,<sup>467</sup> following an investigation initiated pursuant to an application filed on 22 April 1992 by Micron Technologies, Inc. ("Micron"). Two administrative reviews were initiated by the DOC on 15 June 1994 and 15 June 1995, covering the periods 29 October 1992 to 30 April 1994 and 1 May 1994 to 30 April 1995 respectively. The DOC found that LG Semicon Co., Ltd. ("LGS") and Hyundai Electronics Industries, Inc. ("Hyundai") (the "respondents") had not dumped in either period of review.

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<sup>464</sup> Adopted 20 October 1998, WT/DS18/AB/R, hereinafter "*Salmon*".

<sup>465</sup> Adopted 23 May 1997, WT/DS33/AB/R, p. 19.

<sup>466</sup> 62 Fed. Reg. 39809 (24 July 1997).

<sup>467</sup> 58 Fed. Reg. 27520 (10 May 1993).

6.3 The DOC initiated a third annual review on 25 June 1996, covering the period 1 May 1995 to 30 April 1996. At the same time, the DOC initiated a revocation review pursuant to a request from the respondents under section 353.25(a)(2) of the DOC regulations to revoke *DRAMs from Korea* in part. On 24 July 1997, the DOC issued its *Final Results Third Review*, which contained a determination not to revoke *DRAMs from Korea* in part, and a finding that the respondents had not dumped during the period of the third administrative review.

6.4 On 14 August 1997, Korea requested consultations with the United States concerning the DOC's determination not to revoke *DRAMs from Korea*.<sup>468</sup> Consultations were requested under Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("Dispute Settlement Understanding", or "DSU") and Article 17.3 of the WTO Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("AD Agreement"). Consultations were held in Geneva on 9 October 1997, but the parties failed to reach a mutually satisfactory solution.

6.5 On 6 November 1997, Korea requested the establishment of a panel<sup>469</sup> to examine *inter alia* the consistency of (1) section 353.25(a)(2)(ii) and (iii) of the DOC regulations, and (2) the DOC's determination not to revoke, with various provisions of the AD Agreement. This Panel was established on 16 January 1998, with standard terms of reference.<sup>470</sup>

## B. PRELIMINARY ISSUES

6.6 The United States initially raised three preliminary objections. First, the United States asserted that claims raised by Korea under Articles 1, 2, 3 and 17 of the AD Agreement were not properly before the Panel (*i.e.*, were inadmissible) because they were not identified in Korea's request for consultations. Second, the United States asserted that Korea's Article 1 claim was inadmissible because it was not included in Korea's request for establishment of a panel. Third, the United States argued that product scope claims raised by Korea under Articles 2, 3 and 18.4 of the AD Agreement, and Article XVI:4 of the WTO Agreement, were inadmissible because they concerned a product scope determination that is not subject to the disciplines of the AD Agreement.

6.7 In response to questions from the Panel, Korea stated that it "intended to advance no arguments under Article 1",<sup>471</sup> and that it "does not take the position that the United States 'violated' Article 17.6 ...".<sup>472</sup> We therefore consider that Korea has not raised any claims under Articles 1 and 17.6 of the AD Agreement, and do not consider it necessary to rule on the US preliminary objections concerning these issues.

6.8 In response to a question from the Panel, the United States asserted that "a Member should be permitted to refer a claim to a panel if it was actually raised during consultations, even though it may not have been included in the written request for consultations."<sup>473</sup> The United States also asserted that the parties to the present case actually consulted on Korea's claims under Articles 2.1, 2.2, 2.2.1.1 and 3.1 of the AD Agreement. In its second submission, the United States repeated its request for the Panel to find Korea's claims under Articles 1, 2, 3 and 17 of the AD Agreement inadmissible, "with the exception of claims under Articles 2.1, 2.2, 2.2.1.1, and 3.1".<sup>474</sup> We therefore consider that the United States has withdrawn its preliminary objection to Korea's Article 2.1, 2.2, 2.2.1.1 and 3.1 claims, and do not consider it necessary to rule on this matter.

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<sup>468</sup> WT/DS99/1.

<sup>469</sup> WT/DS99/2.

<sup>470</sup> WT/DS99/3.

<sup>471</sup> See para.4.20, *supra*.

<sup>472</sup> See para.4.22, *supra*.

<sup>473</sup> See para.4.15, *supra*.

<sup>474</sup> See para.3.2(a), *supra*.

6.9 Furthermore, Korea stated at the second meeting with the Panel that it is not raising separate claims under Article 18.4 of the AD Agreement or Article XVI:4 of the WTO Agreement.<sup>475</sup> Accordingly, it is not necessary for us to rule on the US preliminary objection concerning such claims.

6.10 In light of the above, we consider that the only preliminary issue before us is the admissibility of Korea's claims under Articles 2 and 3 of the AD Agreement concerning product scope. More particularly, the outstanding preliminary issue concerns the admissibility of Korea's claim that the United States violated Articles 2 and 3 of the AD Agreement by "includ[ing] within the scope of administrative reviews products that did not even exist at the time of the investigation (indeed, products made using technologies and machines that did not even exist at the time of the investigation)." The United States argues that this claim is inadmissible because, in accordance with Article 18.3 of the AD Agreement, there is no product scope determination that is subject to the AD Agreement.

6.11 Article 18.3 provides for the application of the AD Agreement to:

"investigations, and reviews of existing measures, initiated pursuant to applications which have been made on or after the date of entry into force for a Member of the WTO Agreement."

6.12 We note that the WTO Agreement entered into force for the United States on 1 January 1995.

6.13 We recall that Article 3.2 of the DSU requires panels to interpret "covered agreements", including the AD Agreement, "in accordance with customary rules of interpretation of public international law". The rules of treaty interpretation set forth in Article 31 of the Vienna Convention on the Law of Treaties ("Vienna Convention"), have "attained the status of a rule of customary or general international law".<sup>476</sup> Article 31.1 of the Vienna Convention provides:

"A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".

6.14 In our view, pre-WTO measures do not become subject to the AD Agreement simply because they continue to be applied on or after the date of entry into force of the WTO Agreement for the Member concerned. Rather, by virtue of the ordinary meaning of the terms of Article 18.3, the AD Agreement applies only to "reviews of existing measures" initiated pursuant to applications made on or after the date of entry into force of the AD Agreement for the Member concerned ("post-WTO reviews").<sup>477</sup> However, we do not believe that the terms of Article 18.3 provide for the application of the AD Agreement to all aspects of a pre-WTO measure simply because parts of that measure are under post-WTO review. Instead, we believe that the wording of Article 18.3 only applies the AD Agreement to the post-WTO review. In other words, the scope of application of the AD Agreement is

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<sup>475</sup> See para.4.43, *supra*.

<sup>476</sup> *United States - Standards for Reformulated and Conventional Gasoline* (hereinafter *Gasoline*), WT/DS2/AB/R, adopted 20 May 1996, p. 17.

<sup>477</sup> We note that this approach is in line with that adopted by the panel in *Desiccated Coconut* in respect of Article 32.3 of the SCM Agreement, which is virtually identical to Article 18.3 of the AD Agreement. That panel stated that "Article 32.3 defines comprehensively the situations in which the SCM Agreement applies to measures which were imposed pursuant to investigations not subject to that Agreement. Specifically, the SCM Agreement applies to reviews of existing measures initiated pursuant to applications made on or after the date of entry into force of the WTO Agreement. It is thus through the mechanism of reviews provided for in the SCM Agreement, and only through that mechanism, that the Agreement becomes effective with respect to measures imposed pursuant to investigations to which the SCM Agreement does not apply" (*Brazil - Measures Affecting Desiccated Coconut*, WT/DS22/R, para. 230, upheld by the Appellate Body in WT/DS22/AB/R, adopted on 20 March 1997).

determined by the scope of the post-WTO review, so that pursuant to Article 18.3, the AD Agreement only applies to those parts of a pre-WTO measure that are included in the scope of a post-WTO review. Any aspects of a pre-WTO measure that are not covered by the scope of the post-WTO review do not become subject to the AD Agreement by virtue of Article 18.3 of the AD Agreement. By way of example, a pre-WTO injury determination does not become subject to the AD Agreement merely because a post-WTO review is conducted relating to the pre-WTO determination of the margin of dumping.

6.15 The principal issue in this dispute, therefore, is whether the DOC's 1993 product scope determination was subject to review in the third administrative review.<sup>478</sup> Also at issue, however, is whether US "administrative reviews", *i.e.*, Article 9.3.1 duty assessments, constitute "reviews" within the meaning of Article 18.3 of the AD Agreement. In the present case, we note that both parties consider that Article 9.3.1 duty assessment procedures constitute "reviews" within the meaning of Article 18.3.<sup>479</sup> For the purpose of our analysis in this case, therefore, we shall proceed on the assumption that Article 9.3.1 duty assessment procedures do constitute "reviews" within the meaning of Article 18.3.

6.16 There is nothing in the *Final Results Third Review* to indicate that the third administrative review included a review of the 1993 *DRAMs from Korea* product scope determination. Although the *Final Results Third Review* contain a section entitled "Scope of the Review",<sup>480</sup> this does not by itself mean that the 1993 product scope determination was subject to review. To the contrary, the product scope of the *DRAMs from Korea* order, and thus of the third administrative review, was determined once and only once in the original pre-WTO investigation, well before the entry into force of the WTO Agreement for the United States on 1 January 1995. The product scope of the order was not subject to any re-examination in the third administrative review, nor was any determination regarding product scope made at that time. In effect, therefore, Korea is asking the Panel to review the WTO-consistency of an anti-dumping measure with regard to an aspect governed solely by a pre-WTO determination.

6.17 Thus, we find that the scope of the third administrative review set forth in the *Final Results Third Review* did not include the 1993 product scope determination. Proceeding on the basis of the parties' agreement that Article 9.3.1 duty assessments constitute "reviews" within the meaning of Article 18.3 of the AD Agreement (an issue on which we do not make any findings or conclusions), the 1993 product scope determination was not part of that "review" and is therefore not rendered subject to the AD Agreement by virtue of Article 18.3 of the AD Agreement. For this reason, Korea's product scope claim concerning Articles 2 and 3 of the AD Agreement is not admissible.

#### C. CONSISTENCY OF SECTION 353.25(a)(2)(ii) AND (iii) WITH ARTICLE 11.2 OF THE AD AGREEMENT

6.18 The determination not to revoke in part *DRAMs from Korea* was based on section 353.25(a)(2) of the DOC regulations.<sup>481</sup> Section 353.25(a)(2) of the DOC regulations provides that:

"The Secretary may revoke an order in part if the Secretary concludes that:

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<sup>478</sup> Korea's claim appears to include all three post-WTO administrative reviews initiated by the DOC (see para. 4.612, *supra*). However, we note that only the third administrative review, *i.e.*, the *Final Results Third Review*, is included in Korea's request for establishment. In line with consistent WTO panel and Appellate Body practice, the two preceding administrative reviews therefore fall outside the Panel's terms of reference.

<sup>479</sup> In response to questions from the Panel, both parties confirmed their view that administrative reviews (*i.e.*, Article 9.3.1 duty assessment procedures) constitute "reviews" within the meaning of Article 18.3. The United States also asserted that "the third administrative review ... is subject to the AD Agreement by virtue of Article 18.3." (See para. 4.38, *supra*.)

<sup>480</sup> 62 Fed. Reg. 39809 (24 July 1997), at 39809.

<sup>481</sup> 19 C.F.R. §353.25(a)(2) (1997).

(i) One or more producers or resellers covered by the order have sold the merchandise at not less than foreign market value for a period of at least three consecutive years;

(ii) It is not likely that those persons will in the future sell the merchandise at less than foreign market value; and

(iii) For producers or resellers that the Secretary previously has determined to have sold the merchandise at less than foreign market value, the producers or resellers agree in writing to their immediate reinstatement in the order, as long as any producer or reseller is subject to the order, if the Secretary concludes under §353.22(f) that the producer or reseller, subsequent to the revocation, sold the merchandise at less than foreign market value."

6.19 Korea has raised a number of claims concerning the consistency of section 353.25(a)(2)(ii) and (iii) with Article 11.2 of the AD Agreement.<sup>482</sup>

6.20 Article 11.2 of the AD Agreement provides:

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

\* A determination of final liability for payment of anti-dumping duties, as provided for in paragraph 3 of Article 9, does not by itself constitute a review within the meaning of this Article.

6.21 In interpreting Article 11.2 of the AD Agreement, we bear in mind that Article 3.2 of the DSU requires panels to interpret "covered agreements", including the AD Agreement, "in accordance with customary rules of interpretation of public international law". We recall that the rules of treaty interpretation set forth in Article 31 of the Vienna Convention have "attained the status of a rule of customary or general international law".<sup>483</sup> We note that Article 31.2 of the Vienna Convention expressly defines the context of the treaty to include the text of the treaty. Thus, the entire text of the AD Agreement may be relevant to a proper interpretation of any particular provision thereof.

6.22 In examining Korea's claims, we also bear in mind the standard of review set forth in Article 17.6(ii) of the AD Agreement:

"the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations."

6.23 In addressing Korea's claims, the Panel is required to examine:

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<sup>482</sup> We recall that the consistency of section 353.25(a)(2)(i) of the DOC regulations with Article 11.2 of the AD Agreement is not at issue (see note 50, *supra*).

<sup>483</sup> *Gasoline*, WT/DS2/AB/R, adopted 20 May 1996, p. 17.

1. whether Article 11.2 of the AD Agreement precludes an anti-dumping duty being deemed "necessary to offset dumping" where there is no present dumping to offset; and
2. whether sub-paragraphs (ii) and (iii) of section 353.25(a)(2) are consistent with Article 11.2.

**1. Whether Article 11.2 of the AD Agreement precludes an anti-dumping duty being deemed "necessary to offset dumping" where there is no present dumping to offset**

6.24 Korea argues that Article 11.2 of the AD Agreement contains procedures to ensure that a duty is not applied when it is no longer "necessary to offset dumping" that is causing injury, *e.g.*, where an exporter is found not to have been dumping.<sup>484</sup> We understand Korea to claim that Article 11.2 of the AD Agreement precludes an anti-dumping duty being deemed "necessary to offset dumping" where there is no present dumping to offset, and that Article 11.2 requires duties to be revoked as soon as there is a finding of "no dumping".<sup>485</sup>

6.25 Having regard to the rules of treaty interpretation contained in Article 31.1 of the Vienna Convention, we consider that the following textual and contextual analysis of Article 11.2 of the AD Agreement is appropriate in resolving this issue.

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

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

6.28 Furthermore, with regard to injury, Article 11.2 provides for a review of "whether the injury would be likely to continue or recur if the duty were removed or varied" (emphasis supplied). In conducting an Article 11.2 injury review, an investigating authority may examine the causal link

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<sup>484</sup> See para. 4.93, *supra*.

<sup>485</sup> In the US, an anti-dumping order does not of itself result in the levying/assessment of duties, but sets a rate of deposit for estimated duties to be paid on future imports. In the anniversary month of every order, interested parties may request an "administrative review" of the anti-dumping order (*i.e.*, an Article 9.3.1 duty assessment procedure). In an administrative review, the DOC calculates the anti-dumping duties actually owed on imports during the previous 12 months, and sets a new deposit rate for estimated duties on future imports. If the actual duties levied fall short of the deposit rate in the order, the excess is repaid. If the actual duties levied exceed the deposit rate, the additional amount is collected. Despite the imposition of an anti-dumping order, therefore, it is possible that no anti-dumping duties are actually levied. In cases where no anti-dumping duties are levied, one could query whether Article 11.2, which concerns the imposition of a "duty", applies. However, neither party disputes the application of Article 11.2 in such circumstances. In particular, in response to the Panel's question: "Is the United States of the view that an anti-dumping duty is not being 'imposed' within the meaning of Article 11 in cases where no duties are collected as a result of determinations in administrative reviews that there has been no dumping?", the United States asserted that "a definitive anti-dumping duty (or 'order' in U.S. parlance) is 'imposed' within the meaning of Art. 11 even when no duties are actually being 'assessed' (or collected) ...". Korea concurred orally with this view, as it applies in this case. For the purpose of our analysis in this case, therefore, we proceed on the assumption that Article 11.2 does apply.

between injury and dumped imports. If, in the context of a review of such a causal link, the only injury under examination is injury that may recur following revocation (*i.e.*, future rather than present injury), an investigating authority must necessarily be examining whether that future injury would be caused by dumping with a commensurately prospective timeframe. To do so, the investigating authority would first need to have established a status regarding the prospects of dumping. For these reasons, we do not agree that Article 11.2 precludes *a priori* the justification of continued imposition of anti-dumping duties when there is no present dumping.

6.29 In addition, we note that there is nothing in the text of Article 11.2 of the AD Agreement that explicitly limits a Member to a "present" analysis, and forecloses a prospective analysis, when conducting an Article 11.2 review.

6.30 Turning to the context of Article 11.2, we consider that Article 11.3 of the AD Agreement is particularly relevant in giving support for and reinforcing this interpretation. Article 11.3 provides:

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

\* When the amount of the anti-dumping duty is assessed on a retrospective basis, a finding in the most recent assessment proceeding under subparagraph 3.1 of Article 9 that no duty is to be levied shall not by itself require the authorities to terminate the definitive duty.

6.31 We note that, with regard to dumping, the "sunset provision" in Article 11.3 of the AD Agreement envisages *inter alia* an examination of whether the expiry of an anti-dumping duty would be likely to lead to "continuation or recurrence"<sup>486</sup> of dumping. If, as argued by Korea, an anti-dumping duty must be revoked as soon as present dumping is found to have ceased, the possibility (explicitly envisaged by Article 11.3) of the expiry of that duty causing dumping to recur could never arise. This is because the reference to "expiry" in Article 11.3 assumes that the duty is still in force, and the reference to "recurrence" of dumping assumes that dumping has ceased, but may "recur" as a result of revocation. Korea's textual interpretation of Article 11.2 would effectively exclude the possibility of an Article 11.3 review in circumstances where dumping has ceased but the duty remains in force. Korea's interpretation therefore renders part of Article 11.3 ineffective. As stated by the Appellate Body in *Gasoline*, "[a]n interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility".<sup>487</sup> An interpretation of Article 11.2 which renders part of Article 11.3 meaningless is contrary to the customary or general rules of treaty interpretation, and thus should be rejected.

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

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<sup>486</sup> Emphasis supplied.

<sup>487</sup> *Gasoline*, WT/DS2/AB/R, adopted 20 May 1996, p. 23.

the absence of present dumping does not in and of itself require the immediate termination of an anti-dumping duty pursuant to Article 11.2.

6.33 We have also taken into account the basic operation of the AD Agreement more generally. Under the AD Agreement, a Member is entitled to impose anti-dumping duties with prospective effect on the basis of an examination of past dumping during a recent period of investigation, provided that it creates a duty assessment mechanism under Article 9.3 to ensure that the amount of the anti-dumping duty does not exceed the margin of dumping.<sup>488</sup> As the basic operation of the AD Agreement is intrinsically prospective, it appears to us that any departure from this approach would be explicitly provided for, which, as noted in para. 6.29 above, is manifestly not the case. Thus, the Panel finds that, absent any such explicit provision, the AD Agreement does not require the automatic revocation of anti-dumping duties as soon as dumping ceases after the date of imposition of the duties.

6.34 In light of the above, the Panel rejects the claim that Article 11.2 of the AD Agreement requires revocation as soon as an exporter is found to have ceased dumping, and that the continuation of an anti-dumping duty is precluded *a priori* in any circumstances other than where there is present dumping.<sup>489</sup>

## **2. Are sub-paragraphs (ii) and (iii) of section 353.25(a)(2) consistent with Article 11.2?**

6.35 Korea claims that both the section 353.25(a)(2)(ii) "not likely" test and the section 353.25(a)(2)(iii) certification requirement violate Article 11.2 of the AD Agreement. We will address the consistency of both provisions with Article 11.2 in turn.

(a) Consistency of the section 353.25(a)(2)(ii) "not likely" criterion with Article 11.2

6.36 Korea claims that the section 353.25(a)(ii) "not likely" criterion is inconsistent with Article 11.2 of the AD Agreement. Korea argues *inter alia* that Article 11.2 only applies a "likely" test in the context of injury, and not dumping. Korea argues that, even assuming the Article 11.2 "likely" test were to apply in the context of dumping as well as injury, "the United States has pushed the text of Paragraph 2 still further without support. The United States has turned the 'likely' standard on its head, transmogrifying it to 'not likely', ...."

6.37 We recall that section 353.25(a)(2) of the DOC regulations provides in relevant part that:

"The Secretary may revoke an order in part if the Secretary concludes that:

(...)

(ii) It is not likely that those persons will in the future sell the merchandise at less than foreign market value;

(...)

6.38 We note that in the *Final Results Third Review*, the DOC states that it "must be satisfied that future dumping is not likely in order to revoke an order. In this case, based upon the evidence in the record, this standard has not been met and, therefore, we conclude that there is a need for the order to remain in place".<sup>490</sup> On the basis of the clear evidence of record, therefore, it is apparent that section

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<sup>488</sup> It has long been recognised in the GATT system that such an approach, sometimes referred to as a "pre-selection system", is permissible. See, for example, the Second Report on Anti-Dumping and Countervailing Duties, adopted on 27 May 1960, BISD 9S/194, at 195.

<sup>489</sup> Of course, the absence of dumping and the length of time that situation has existed may well be relevant to the issue of the prospect of recurrence of dumping.

<sup>490</sup> 62 Fed. Reg. 39809 (24 July 1997), at 39819.



353.25(a)(ii) is in fact a "not likely" criterion, such that the only determination made under section 353.25(a)(2)(ii) is whether recurrence of dumping is "not likely". If the DOC fails to satisfy itself that recurrence of dumping is "not likely", it will find that there is a need for the continued imposition of the anti-dumping duty.

6.39 In light of the above, we must consider whether the section 353.25(a)(2)(ii) "not likely" criterion is, as claimed by Korea, inconsistent with the terms of Article 11.2. In particular, we must examine whether the terms of Article 11.2 preclude the continued imposition of anti-dumping duties on the basis that an authority fails to satisfy itself that recurrence of dumping is "not likely". In order to do so, we must first examine the relationship between Articles 11.2 and 11.1. In our view, the references in Article 11.2 to "the need for the continued imposition of the duty" and "whether the continued imposition of the duty is necessary to offset dumping" can only be understood in a meaningful manner when read in conjunction with the obligation in Article 11.1, whereby:

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

6.40 Both parties agree that Article 11.2 of the AD Agreement implements Article 11.1. Both parties have argued that Article 11.1 of the AD Agreement contains a general rule that anti-dumping duties shall remain in force only as long as and to the extent necessary to counteract dumping which is causing injury. Both parties have also argued that the general rule contained in Article 11.1 is implemented through Article 11.2 (and Article 11.3).<sup>491</sup>

6.41 We agree with the parties that, by virtue of Article 11.1 of the AD Agreement, an anti-dumping duty may only continue to be imposed if it remains "necessary" to offset injurious dumping. We are of the view that Article 11.1 contains a general necessity requirement, whereby anti-dumping duties "shall remain in force only as long as and to the extent necessary" to counteract injurious dumping. That anti-dumping duties "shall remain in force only as long as and to the extent necessary" to counteract injurious dumping is therefore an unambiguous requirement of Article 11.1. We also agree with the parties that the application of the general rule in Article 11.1 is specified in Article 11.2, which provides generally that "authorities shall review the need for the continued imposition of the duty", and requires authorities "to examine whether the continued imposition of the duty is necessary to offset dumping" in the context of Article 11.2 dumping reviews.

6.42 Accordingly, we must assess the essential character of the necessity involved in cases of continued imposition of an anti-dumping duty. We note that the necessity of the measure is a function of certain objective conditions being in place, *i.e.* whether circumstances require continued imposition of the anti-dumping duty. That being so, such continued imposition must, in our view, be essentially dependent on, and therefore assignable to, a foundation of positive evidence that circumstances demand it. In other words, the need for the continued imposition of the duty must be demonstrable on the basis of the evidence adduced.

6.43 The necessity of the continued imposition of the anti-dumping duty can only arise in a defined situation pursuant to Article 11.2: *viz* to offset dumping. Absent the prescribed situation, there is no basis for continued imposition of the duty: the duty cannot be "necessary" in the sense of being demonstrable on the basis of the evidence adduced because it has been deprived of its essential foundation. In this context, we recall our finding<sup>492</sup> that Article 11.2 does not preclude *a priori* continued imposition of anti-dumping duties in the absence of present dumping. However, it is also clear from the plain meaning of the text of Article 11.2 that the continued imposition must still satisfy the "necessity" standard, even where the need for the continued imposition of an anti-dumping duty is tied to the "recurrence" of dumping. We recognize that the certainty inherent to such a prospective analysis could be conceivably somewhat less than that attached to purely retrospective analysis,

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<sup>491</sup> See, for example, paras. 4.91 (Korea) and 4.154 (United States) *supra*.

<sup>492</sup> See section VI.C.1, *supra*.

reflecting the simple fact that analysis involving prediction can scarcely aspire to a standard of inevitability. This is, in our view, a discernable distinction in the degree of certainty, but not one which would be sufficient to preclude that the standard of necessity could be met. In our view, this reflects the fact that the necessity involved in Article 11.2 is not to be construed in some absolute and abstract sense, but as that appropriate to circumstances of practical reasoning intrinsic to a review process. Mathematical certainty is not required, but the conclusions should be demonstrable on the basis of the evidence adduced. This is as much applicable to a case relating to the prospect of recurrence of dumping as to one of present dumping.

6.44 We must now consider whether a failure to find that the recurrence of dumping is "not likely" meets the standard that the continued imposition of the anti-dumping duty be demonstrable on the basis of the evidence adduced. In doing so, we note the US argument that "under section 353.25, the Department seeks to determine ... whether the dumping which had occurred in the past, and which led to the imposition of the order, is likely to recur if the order is revoked. If a resumption of dumping is likely should the order be terminated, then a plain reading of the terms of Article 11 indicate that the "continued imposition of the duty is necessary to offset dumping."<sup>493</sup> As a first step, therefore, we must consider whether the section 353.25(a)(2)(ii) "not likely" approach utilised by the United States is indeed equivalent to a test of whether dumping is "likely to recur". This is without prejudice to any view at this stage regarding the second step of whether the "likely to recur" standard would be, in turn, itself consistent with the terms of Article 11.2 as regards the necessity of the anti-dumping duty to offset dumping.

6.45 We consider that a failure to find that an event is "not likely" is not equivalent to a finding that the event is "likely". We see a clear conceptual difference between establishing something as a positive finding, and failing to establish something as a negative finding. It is perfectly possible that one could not determine that someone was unlikely to dump and find that they were also likely to dump. But the former determination does not, in and of itself, amount to a demonstrable basis for concluding the latter. This is evident from the fact that the former finding is manifestly compatible also with the reverse of the latter situation, *i.e.*, it is perfectly logical to find that you cannot determine that someone is unlikely to dump, yet also be unable to determine that they were actually likely to dump. In other words, determining that something is not "not likely" is entailed by, but does not itself entail, that something is likely.

6.46 We consider that this reflects common usage of the relevant terms. A finding that an event is "likely" implies a greater degree of certainty that the event will occur than a finding that the event is not "not likely". For example, in common parlance, a statement that it is "likely" to rain implies a greater likelihood of rain than a statement that rain is not unlikely, or not "not likely". Similarly, a statement that a horse is "likely" to win a race implies a greater likelihood of victory than a statement that the same horse is not unlikely to win, or not "not likely" to win. The difference between the concepts of "likely" and "not likely" is perhaps made clearer by interpreting the word "likely" in accordance with its normal meaning of "probable". The question then becomes whether not "not probable" is equivalent to "probable". In our view, the fact that an event is not "not probable" does not by itself render that event "probable".

6.47 Given this reality, it is *a priori* possible that situations could arise where the not "not likely" criterion is satisfied but where the likelihood criterion is not satisfied. Reliance on the not likely criterion clearly fails to provide any reliable means to avoid or preclude this flaw. Given such a fundamental flaw, it cannot constitute a demonstrable basis for consistently and reliably determining that the likelihood criterion is satisfied.

6.48 In light of the above analysis, we conclude that the section 353.25(a)(2)(ii) "not likely" standard is not in fact equivalent to, and falls decisively short of, establishing that dumping is "likely to recur if the order is revoked". This being so, we do not need to address the potential second step of

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<sup>493</sup> See para. 4.124 *supra*.

whether, in turn, the "likely" standard is itself consistent with the terms of Article 11.2 of the AD Agreement.<sup>494</sup>

6.49 We have not found any other detailed argument developed by the United States in justification of its view that the section 353.25(a)(2)(ii) "not likely" criterion is consistent with the terms of Article 11.2. We consider, however, that the US submission could be construed to argue that the necessity of the continued imposition of a duty may be somehow more directly warranted by a finding that it is not possible to determine that recurrence of dumping is "not likely", irrespective of the fact that a finding that recurrence of dumping is not "not likely" is not equivalent to a finding that recurrence of dumping is "likely".

6.50 Recalling our views in para. 6.42 above, we note that "necessity" in the context of Article 11.2 requires the need for the continued imposition of an anti-dumping duty being demonstrable on the basis of the evidence adduced. In our view, given that we have found that a determination that it is not possible to conclude that recurrence of dumping is "not likely" does not in and of itself provide a demonstrable basis to reliably conclude that recurrence of dumping is "likely", we also find that it is logically incapable of providing any predictive assurance at even an equivalent, and certainly not a higher, level than likelihood. Nor has the United States in any case provided any argument as to what, if any, other standard of predictive assurance is in fact consistent with the terms of Article 11.2 short of likelihood. As outlined in para. 6.43 above, while mathematical certainty of recurrence of dumping is not required, the conclusions must still be demonstrable on the basis of the evidence adduced. In this case, however, it is not even established that recurrence of dumping is likely. Absent any other rationale, this amounts to an effective presumption that, in the absence of a finding that recurrence of dumping is not "not likely", anti-dumping duties may continue to be imposed. But "presumption", by definition, exists only where there is no requirement of justification or proof. As such, it is manifestly irreconcilable with the requirements of meeting a standard of necessity which involves demonstrability on the basis of the evidence adduced. In light of this, we are unable to find that the

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<sup>494</sup> While we do not need to proceed to the second step, and have not done so, we make the following observations. We note that Article 11.3 provides for termination of a definitive anti-dumping duty five years from its imposition. However, such termination is conditional. First, the terms of Article 11.3 itself lay down that this should occur unless the authorities determine that the expiry would be "likely to lead to continuation or recurrence of dumping and injury." Where there is a determination that both are likely, the duty may remain in force, and the five year clock is reset to start again from that point. Second, Article 11.3 provides also for another situation whereby this five year period can be otherwise effectively extended, viz in a situation where a review under paragraph 2 covering both dumping and injury has taken place. If, for instance, such a review took place at the four year point, it could effectively extend the sunset review until 9 years from the original determination. In the first case, we note that the provisions of Article 11.3 explicitly conditions the prolongation of the five year period on a finding that there is likelihood of dumping and injury continuing or recurring. In the second case, where there is reference to review under Article 11.2, there is no such explicit reference.

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

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

section 353.25(a)(2)(ii) "not likely" criterion provides any demonstrable basis on which to reliably conclude that the continued imposition of the duty is necessary to offset dumping.

6.51 For these reasons, we find that the section 353.25(a)(2)(ii) "not likely" criterion operates to effectively require<sup>495</sup> the continued imposition of anti-dumping duties, and prevents revocation, in circumstances inconsistent with and outside of those provided for in Article 11.2. Accordingly, we find that section 353.25(a)(2)(ii) constitutes a mandatory requirement inconsistent with Article 11.2 of the AD Agreement.<sup>496</sup>

(b) Is the section 353.25(a)(2)(iii) certification requirement consistent with Article 11.2 of the AD Agreement?

6.52 Korea raises two claims concerning the section 353.25(a)(2)(iii) certification requirement. First, Korea claims that "the limited authority granted Members under Article 11 to impose and maintain anti-dumping duties does not extend so far as to permit a Member to impose a certification requirement for revocation".<sup>497</sup> Second, Korea claims that the certification requirement "requires a respondent to forgo its right under Paragraph 2 of Article 11 to an injury finding. This violates Paragraph 2 of Article 11 of the Anti-Dumping Agreement, which requires Members to impose duties only where dumping exists and is causing injury and obliges Members to conduct investigations of dumping and injury before imposing (or maintaining) any duty".<sup>498</sup>

6.53 We note section 751(b) of the 1930 Tariff Act (as amended) and section 353.25(d) of the DOC's regulations, whereby an anti-dumping order may be revoked on the basis of "changed circumstances". We note that neither of these provisions imposes a certification requirement. In other words, an anti-dumping order may be revoked under these provisions absent fulfilment of the section 353.25(a)(2)(iii) certification requirement. We also note that Korea has not challenged the consistency of these provisions with the WTO Agreement. Thus, because of the existence of legislative avenues for Article 11.2-type reviews that do not impose a certification requirement, and which have not been found inconsistent with the WTO Agreement, we are precluded from finding that the section 353.25(a)(2)(iii) certification requirement in and of itself amounts to a mandatory requirement inconsistent with Article 11.2 of the AD Agreement.

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<sup>495</sup> In making this finding, we note that the DOC's determination in the *Final Results Third Review* is not separable from, or contingent to, the terms of the DOC regulations. Rather, our finding of inconsistency with the terms of the AD Agreement are rooted in and tied to the terms of the DOC regulations. In this way, it is by reason of the section 353.25(a)(2) "not likely" criterion that we find the United States to be in breach of the terms of Article 11.2. The United States is effectively obliged to act upon the DOC regulations, such that to all practical intents and purposes the DOC regulations are mandatorily applicable.

<sup>496</sup> According to the United States, "respondents are free to pursue revocation through an Article 11.2-type review under section 751(b)" of the 1930 Tariff Act, in addition to section 751(a) thereof. We take note of the view that, consistent with reasoning that has been applied in earlier GATT/WTO disputes, the existence of alternative, WTO-consistent legislative avenues for Article 11.2-type reviews (such as section 751(b)) could be considered capable of precluding a finding that the inability of the United States to revoke under section 353.25(a)(2) in and of itself constitutes a mandatory requirement inconsistent with Article 11.2. This issue does not arise in respect of the section 353.25(a)(2)(ii) "not likely" criterion, however, since there are, in any case, no alternative, WTO-consistent avenues for Article 11.2-type reviews available. The United States asserts that "[r]egardless of the procedural mechanism used (e.g., section 751(a) of the Act and section 353.25(a) of the Department's regulations, or section 751(b) of the Act and section 353.25(d) of the Department's regulations), the Department will not revoke an anti-dumping order based on a cessation of dumping unless it determines that a resumption of dumping is not likely" (emphasis supplied). In other words, because the WTO-inconsistent "not likely" criterion will be applied in all cases, there are necessarily no WTO-consistent alternative avenues for Article 11.2-type reviews.

<sup>497</sup> See para. 4.285, *supra*.

<sup>498</sup> See para. 4.286, *supra*.

### 3. Conclusion

6.54 For the above reasons, we conclude that section 353.25(a)(2)(ii) is not consistent with Article 11.2 of the AD Agreement.<sup>499</sup>

#### D. CONSISTENCY OF THE *FINAL RESULTS THIRD REVIEW* WITH ARTICLE 11.2 OF THE AD AGREEMENT

6.55 We have found that section 353.25(a)(2)(ii) of the DOC regulations is inconsistent with Article 11.2 of the AD Agreement. Since the *Final Results Third Review* is itself based on and determined by section 353.25(a)(2)(ii), we must find that the *Final Results Third Review* is thereby also inconsistent with Article 11.2 of the AD Agreement.

#### E. CONSISTENCY OF THE FAILURE TO SELF-INITIATE AN INJURY REVIEW WITH ARTICLE 11.2 OF THE AD AGREEMENT

6.56 Korea raises two claims concerning *ex officio* Article 11.2 injury reviews. First, Korea effectively claims that an *ex officio* injury review was "warranted" in the present case because there had been no dumping -- and therefore no injury caused by dumping -- for three years and six months. Second, Korea claims that even if the US were to have decided that an *ex officio* injury review was "warranted" in the present case, the International Trade Commission ("ITC") does not have the authority to conduct such a review because Article 11.2 is not properly implemented in US legislation.

#### 1. Is an *ex officio* Article 11.2 injury review warranted after three years and six months' no dumping?

6.57 Korea argues that the United States violated Article 11.2 of the AD Agreement because, "after concluding for three years that no injury was occurring as a result of dumping, the authorities had an obligation on their own initiative ('it was warranted') to investigate whether injury as well as dumping would be likely to resume if the order were revoked."<sup>500</sup> Korea is effectively claiming that Article 11.2 necessarily requires an investigating authority to self-initiate an Article 11.2 injury review solely on the basis of three years and six months' no dumping, because any injury found to exist will not be caused by dumped imports due to the absence of dumping.

6.58 The issue before us is whether Article 11.2 necessarily requires an investigating authority, following three years and six months' findings of no dumping, to find that an *ex officio* Article 11.2 review of "whether the injury would be likely to continue or recur if the duty were removed or varied" is "warranted".

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<sup>499</sup> In arriving at our finding, we examined the matter in accordance with the terms of Article 17.6, including 17.6 sub-para (ii). In interpreting the relevant provisions of the AD Agreement in the course of addressing the claims and arguments before it, we have done so in accordance with customary rules of interpretation of public international law. We note that, in making certain of its arguments in response to the claims of Korea, the United States characterised those arguments as constituting a "permissible interpretation" of the terms of the AD Agreement. As a matter of fact, where we failed to find those arguments persuasive, we rejected them on the basis that they were not consistent with the AD Agreement and, in reaching such a view, we did so on the basis of the customary rules of interpretation of public international law. The fact that the arguments concerned had been presented as a "permissible interpretation" did not, in the circumstances of this case, alter the legal basis upon which we were able to, and did, evaluate them, *viz.* the customary rules of interpretation of public international law. We further observe that, as a consequence, there is neither warrant nor need in this case to enquire further as to whether the AD Agreement "more generally", as it were, admits of further interpretation.

<sup>500</sup> See para. 4.303, *supra*.

6.59 A review of "whether the injury would be likely to continue or recur if the duty were removed or varied" could include a review of whether (1) injury that is (2) caused by dumped imports<sup>501</sup> would be likely to continue or recur if the duty were removed or varied. With regard to injury, we believe that an absence of dumping during the preceding three years and six months is not in and of itself indicative of the likely state of the relevant domestic industry if the duty were removed or varied. With regard to causality, an absence of dumping during the preceding three years and six months is not in and of itself indicative of causal factors other than the absence of dumping. If the only causal factor under consideration is three years and six months' no dumping, the issue of causality becomes whether injury caused by dumped imports will recur. This necessarily requires a determination of whether dumping will recur. Thus, the "injury" review that Korea believes is "warranted" on the basis of three years and six months' no dumping would be entirely dependent upon a determination of whether dumping will recur. This is precisely the type of determination that the United States sought to make in the present case. The mere fact of three years and six months' findings of no dumping does not require the investigating authority to, in addition, self-initiate a review of "whether the injury would be likely to continue or recur if the duty were removed or varied".

6.60 We therefore reject Korea's claim that the United States violated Article 11.2 of the AD Agreement by failing to initiate, solely on the basis of three years and six months' no dumping, an *ex officio* Article 11.2 review of "whether the injury would be likely to continue or recur if the duty were removed or varied".

## **2. Does the ITC have the authority to conduct an *ex officio* Article 11.2 injury review?**

6.61 Korea effectively claims that US law is inconsistent with Article 11.2 of the AD Agreement because it does not provide the ITC with the authority to conduct an *ex officio* Article 11.2 injury review where "warranted".

6.62 We reject Korea's claim because the United States has established that the ITC has a general authority to conduct *ex officio* Article 11.2 injury reviews by virtue of section 751(b) of the 1930 Tariff Act and section 207.45(c) of the ITC regulations.<sup>502</sup>

### **F. ARTICLE 2.2.1.1 OF THE AD AGREEMENT**

6.63 Korea submits that the United States violated Article 2.2.1.1 of the AD Agreement because it "disregarded cost data prepared by Respondents which were in accordance with generally accepted accounting principles of Korea and accurately reflected costs".<sup>503</sup> We understand Korea to claim that the United States violated Article 2.2.1.1 by rejecting (a) the Flamm econometric study regarding cost trends (the "Flamm study"), and (b) the cost data submitted by respondents for 1996.

6.64 Article 2.2.1.1 of the AD Agreement provides in relevant part:

"For the purpose of paragraph 2, costs shall normally be calculated on the basis of records kept by the exporter or producer under investigation, provided that such records are in accordance with the generally accepted accounting principles of the

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<sup>501</sup> We note that, by virtue of note 9 of the AD Agreement, the term "injury" in Article 11.2 "shall be interpreted in accordance with the provisions of" Article 3. Article 3.5 of the AD Agreement requires the establishment of a causal link between the dumped imports and the injury found to exist. Thus, we consider that the Article 11.2 examination of "whether the injury would be likely to continue or recur if the duty were removed or varied" may also involve an examination of whether any injury that is found to be likely to continue or recur is caused by dumped imports. We can envisage circumstances, however, when an Article 11.2 injury review need not necessarily include an examination of causal link.

<sup>502</sup> See para. 4.317, *supra*.

<sup>503</sup> See para. 4.390, *supra*.

exporting country and reasonably reflect the costs associated with the production and sale of the product under consideration. ..."

6.65 In addressing these two claims, we note that Article 2.2.1.1 of the AD Agreement applies "[f]or the purpose of paragraph 2" of Article 2, while the cost data in issue was submitted in the context of an Article 11.2 review. However, neither party questioned the applicability of Article 2.2.1.1 in the present case.<sup>504</sup> For the purpose of our analysis in this case, therefore, we proceed on the assumption that Article 2.2.1.1 does apply.

## **1. Rejection of the Flamm study**

6.66 Korea claims that the United States violated Article 2.2.1.1 of the AD Agreement because it disregarded cost data in the Flamm study which (1) were in accordance with the generally accepted accounting principles of Korea and (2) accurately reflected costs. Korea's claim is effectively based on an interpretation of Article 2.2.1.1 of the AD Agreement that requires a Member to accept projections for future costs based on historical cost data provided those projections are "in accordance with the generally accepted accounting principles of the exporting country and reasonably reflect the costs associated with the production and sale of the product under consideration." Article 2.2.1.1, however, clearly indicates that the provisos concerning generally accepted accounting principles and reflection of costs of production and sale only apply to "records kept by the exporter or producer under investigation". As the projections for the Flamm study, which were prepared by an outside consultant on behalf of Hyundai, do not constitute "records kept by the exporter or producer under investigation", we believe that the two provisos contained in the first sentence of Article 2.2.1.1 do not apply to the US treatment of the projections for that study. Accordingly, we must reject Korea's claim based on those provisos, *i.e.*, that the United States violated Article 2.2.1.1 because it rejected projections for future costs based on historical cost data that are "in accordance with the generally accepted accounting principles of the exporting country and reasonably reflect the costs associated with the production and sale of the product under consideration."

6.67 Assuming for the sake of argument that it were permissible to interpret Article 2.2.1.1 of the AD Agreement so as to require a Member to accept projections for future costs based on historical cost data provided they are "in accordance with the generally accepted accounting principles of the exporting country and reasonably reflect the costs associated with the production and sale of the product under consideration", we believe that Korea's claim would still fail. As the *Final Results Third Review* do not suggest that any projected costs were rejected because they were not prepared "in accordance with the generally accepted accounting principles" of Korea, we understand Korea to argue that the United States violated Article 2.2.1.1 by rejecting projected costs that "reasonably reflect the costs associated with the production and sale" of DRAMs. In light of Korea's interpretation of Article 2.2.1.1 of the AD Agreement, and in light of Articles 17.5(ii) and 17.6(i) of the AD Agreement, Korea's claim would require us to determine whether, given the record evidence before the DOC, an unbiased and objective investigating authority could properly have found that the Flamm study did not "reasonably reflect the costs associated with the production and sale" of DRAMs. In its *Final Results Third Review*, the DOC found that "the cost portion of the Flamm study was based on several questionable premises including the assumption of certain production yields and rates." For example, the DOC stated that the Flamm study contained "optimistic capacity rates" that were "difficult to accept" in a context of production cutbacks, and that the capacity scenario was based on a demand assumption that could not be borne out by market conditions present at that time.<sup>505</sup> Korea has failed to challenge the DOC's finding of "questionable premises", and has failed to identify

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<sup>504</sup> The Panel asked both parties oral questions concerning the applicability of Article 2.2.1.1 in the present case. In its oral response, the United States in particular did not dispute the applicability of Article 2.2.1.1. While noting that an Article 2 dumping determination had not been made in the present Article 11.2 review, the United States asserted that cost data submitted for the Article 11.2 review had been assessed using the "Anti-Dumping Agreement, our standard methodology".

<sup>505</sup> 62 Fed. Reg. 39809 (24 July 1997), at 39818.

anything in the record to indicate that, in light of the "questionable premises" identified by the DOC, an unbiased and objective investigating authority could not properly have considered that the study did not "reasonably reflect the costs associated with the production and sale" of DRAMs. Korea merely notes that the "record contains ... a valid econometric study", and accuses the DOC of having "summarily rejected" that study.

6.68 In *EC - Hormones*, the Appellate Body stated that:

"[t]he initial burden lies on the complaining party, which must establish a *prima facie* case of inconsistency with a particular provision of the *SPS Agreement* on the part of the defending party, or more precisely, of its SPS measure or measures complained about. When that *prima facie* case is made, the burden of proof moves to the defending party, which must in turn counter or refute the claimed inconsistency." <sup>506</sup>

6.69 In failing to advance anything beyond conclusory arguments in support of its claim that the DOC should not have rejected the Flamm study, we consider that Korea has failed to "establish a *prima facie* case" that an objective and impartial investigating authority could not properly have found that the study did not "reasonably reflect the costs associated with the production and sale" of DRAMs.

6.70 Accordingly, assuming for the sake of argument that Article 2.2.1.1 of the AD Agreement requires a Member to accept projections for future costs based on historical cost data provided those projections are "in accordance with the generally accepted accounting principles of the exporting country and reasonably reflect the costs associated with the production and sale of the product under consideration", we would reject Korea's claim that the United States violated Article 2.2.1.1 of the AD Agreement by rejecting projections for future costs based on historical cost data that "reasonably reflect the cost of production and sale" of DRAMs.

## 2. Rejection of respondents' 1996 cost data

6.71 Korea further claims that the United States violated Article 2.2.1.1 of the AD Agreement by rejecting respondents' cost data for 1996. We understand Korea's claim to refer exclusively to the DOC's rejection of cost data submitted by LGS for the second half of 1996. The *Final Results Third Review* do not suggest that the DOC rejected LGS cost data for the first half of 1996. <sup>507</sup> Nor do the *Final Results Third Review* suggest that cost data submitted by other respondents for 1996 was rejected.

6.72 As the *Final Results Third Review* do not suggest that LGS cost data for the second half of 1996 were rejected because they were not prepared "in accordance with the generally accepted accounting principles" of Korea, we understand Korea to argue that the United States violated Article 2.2.1.1 by rejecting LGS cost data for the second half of 1996 that "reasonably reflect the costs associated with the production and sale" of DRAMs. In light of Articles 2.2.1.1, 17.5(ii) and 17.6(i) of the AD Agreement, Korea's claim requires us to determine whether, given the record evidence before the DOC, an unbiased and objective investigating authority could properly have found that the cost data submitted by LGS for the second half of 1996 did not "reasonably reflect the costs associated with the production and sale" of DRAMs.

6.73 In its *Final Results Third Review*, the DOC stated that its review of LGS cost data for the second half of 1996 "indicates that there are serious questions whether the reported costs were understated due to significant changes in LGS' depreciation schedule and write-offs of foreign exchange losses." <sup>508</sup> These "serious questions" were then described in greater detail by the DOC in

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<sup>506</sup> *EC Measures Concerning Meat and Meat Products*, WT/DS26/AB/R, adopted 13 February 1998, para. 98.

<sup>507</sup> 62 Fed. Reg. 39809 (24 July 1997), at 39818.

<sup>508</sup> 62 Fed. Reg. 39809 (24 July 1997), at 39818.



the *Final Results Third Review*. However, Korea has failed to challenge the DOC's finding of "serious questions", and has failed to identify anything in the record to indicate that, in light of such "serious questions", an unbiased and objective investigating authority could not properly have considered that the LGS cost data for the second half of 1996 did not "reasonably reflect the costs associated with the production and sale" of DRAMs. Korea merely states that the DOC's "failure to treat properly Respondents' actual cost and price data ... violates Article 2.2.1.1".<sup>509</sup> In failing to advance anything beyond conclusory arguments in support of its claim that the DOC should not have rejected the LGS cost data for the second half of 1996, we consider that Korea has failed to establish a *prima facie* case that an objective and impartial investigating authority could not properly have found that the LGS cost data for the second half of 1996 did not "reasonably reflect the costs associated with the production and sale" of DRAMs. Accordingly, we must reject Korea's claim that the United States violated Article 2.2.1.1 of the AD Agreement by rejecting the LGS cost data for the second half of 1996.

G. ARTICLE 6.6 OF THE AD AGREEMENT

6.74 Korea submits that, in making the alleged errors in its flawed analysis, the DOC infringed Article 6.6 of the AD Agreement because "it failed to satisfy itself as to the accuracy of data supplied by the Petitioner",<sup>510</sup> and uncritically accepted and relied on the petitioner's data without taking any action to confirm that it was accurate. It appears that Korea's claims target principally the DOC's treatment of data supplied by the petitioner, and not data obtained from other sources.<sup>511</sup> In particular, Korea argues that in analyzing whether respondents may have dumped in 1996, and whether respondents could remain competitive without dumping, the DOC relied on unverified data from petitioner Micron.

6.75 Article 6.6 provides:

"Except in circumstances provided for in paragraph 8 [facts available], the authorities shall during the course of an investigation satisfy themselves as to the accuracy of the information supplied by interested parties upon which their findings are based."

6.76 With reference to Articles 6.6, 17.5(ii) and 17.6(i) of the AD Agreement, we must determine whether, on the basis of record evidence before the DOC, an unbiased and objective investigating authority could properly have been satisfied as to the accuracy of the information on which the DOC based its findings of (a) whether respondents had dumped in 1996, and (b) whether respondents could remain competitive without dumping.

**1. Whether respondents had dumped during 1996**

6.77 Korea asserts that the United States violated Article 6.6 of the AD Agreement because, in determining whether the respondents had dumped<sup>512</sup> during 1996, the DOC relied on unverified news articles and research reports regarding the state of the industry, including spot market prices, that had been provided by the petitioner.

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<sup>509</sup> See para. 4.397, *supra*.

<sup>510</sup> See para. 4.388, *supra*.

<sup>511</sup> This is confirmed by para. (g) of Korea's request for establishment, where Korea asserts that the *Final Results Third Review* were "based on unverified information from the petitioning company" (WT/DS99/2).

<sup>512</sup> A careful reading of the *Final Results Third Review* reveals that the DOC did not find that respondents had "dumped" during 1996. The DOC only found that respondents "may have made U.S. sales below COP [cost of production] during 1996", and that "the existence of below-cost sales during May and June of 1996 suggests that the number of below-cost sales increased following the end of the third review period" (62 Fed. Reg. 39809 (24 July 1997), at 39817). A finding of sales below-cost is not equivalent to a finding of dumping within the meaning of Article 2.

6.78 In essence, we understand Korea to argue that Members cannot discharge their Article 6.6 obligation to "satisfy themselves as to the accuracy of the information supplied by interested parties upon which their findings are based" unless they verify the accuracy of that information. However, the text of Article 6.6 does not explicitly require verification of all information to be relied on. Indeed, the term "verify" only arises in Article 6.7 of the AD Agreement. Article 6.6 simply requires Members to "satisfy themselves as to the accuracy of the information". In our view, Members could "satisfy themselves as to the accuracy of the information" in a number of ways without proceeding to some type of formal verification, including for example reliance on the reputation of the original source of the information. Indeed, we consider that anti-dumping investigations would become totally unmanageable if investigating authorities were required to actually verify the accuracy of all information relied on.<sup>513</sup>

6.79 The United States asserts that information submitted by interested parties "included independent market analysts' reports from such reputable brokerage houses as Goldman Sachs, Merrill Lynch, Lehman Brothers, and ABN Amro Hoare Govett; business and market news reporting by well-known news organizations such as the Wall Street Journal, New York Times, Financial Times, Reuters, Korea Herald, and Nikkei; and reports from various trade journals" (footnote omitted).<sup>514</sup> The United States also notes that the respondents and their customers submitted data on "average U.S. prices reported by Dataquest and the American IC Exchange, studies by independent analysts and numerous newspaper and magazine articles".<sup>515</sup> The United States argues that the DOC satisfied itself as to the accuracy of information submitted by interested parties, and refers to specific examples of how the DOC "applied its considerable experience in market analysis and considered the source of the information, its internal logic, and its consistency with other information in determining [the] accuracy and usefulness" of certain news reports presented by the respondents and brokerage house reports presented by the petitioner.<sup>516</sup> Korea has failed to identify anything in the record (other than the fact that the information was not verified) to indicate that an unbiased and objective investigating authority could not properly have been satisfied as to the accuracy of this information.

6.80 We recall that the text of Article 6.6 does not support Korea's argument that it is perforce violated in all cases where a Member fails to verify the accuracy of all information relied on. In the absence of additional argumentation from Korea demonstrating that an unbiased and objective investigating authority could not properly have been satisfied as to the accuracy of the information relied on by the DOC in determining whether respondents had dumped during 1996, we find that Korea has failed to establish a *prima facie* case that the United States violated Article 6.6 of the AD Agreement in determining whether respondents had dumped during 1996.

## **2. Whether respondents could remain competitive without dumping**

6.81 We consider that Korea's claim concerning the use of unverified data regarding the competitiveness of respondents should be rejected for two reasons. First, Korea fails to identify which "unverified data from Micron" is in issue.

6.82 Second, Korea's claim again assumes that Article 6.6 of the AD Agreement requires Members to verify the accuracy of information on which findings are based. However, we recall that failure to verify the accuracy of information does not necessarily constitute a violation of Article 6.6. In the absence of additional argumentation (i.e., other than the failure to verify) from Korea indicating that an objective and unbiased investigating authority could not properly have been satisfied as to the accuracy of information relied on by the DOC in determining whether respondents could remain

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<sup>513</sup> For example, we query whether investigating authorities should be required to verify import statistics from a different government office. We also query whether investigating authorities should be required to verify "official" exchange rates obtained from a central bank.

<sup>514</sup> See para. 4.436, *supra*.

<sup>515</sup> See para. 4.436, *supra*.

<sup>516</sup> See para. 4.438, *supra*.

competitive without dumping, we find that Korea has failed to establish a *prima facie* case that the United States violated Article 6.6 with regard to the DOC's findings as to whether respondents could remain competitive without dumping.

#### H. ARTICLE 5.8 OF THE AD AGREEMENT

6.83 Korea claims that the United States violates Article 5.8 by setting the *de minimis* dumping margin threshold for Article 9.3 duty assessment procedures at 0.5%, instead of the 2% standard set forth in Article 5.8.<sup>517</sup> Korea argues that "[t]he obligation of Article 5.8 applies to 'cases', including [Article 9.3] reviews as well as investigations."<sup>518</sup>

6.84 The text of Article 5.8 reads in relevant part:

"An application under paragraph 1 shall be rejected and an investigation shall be terminated promptly as soon as the authorities concerned are satisfied that there is not sufficient evidence of either dumping or of injury to justify proceeding with the case. There shall be immediate termination in cases where the authorities determine that the margin of dumping is *de minimis*, or that the volume of dumped imports, actual or potential, or the injury, is negligible. The margin of dumping shall be considered to be *de minimis* if this margin is less than 2 per cent, expressed as a percentage of the export price. ... "

6.85 Essentially, the parties disagree as to whether the second sentence (and therefore the *de minimis* standard contained in the third sentence) of Article 5.8 applies to both anti-dumping investigations and Article 9.3 duty assessment procedures (referred to in US parlance as "administrative reviews"), or only to anti-dumping investigations.

6.86 In our view, the scope of the obligation in the second sentence of Article 5.8 is defined by the term "cases". However, the ordinary meaning of that term does not clarify whether it refers to both anti-dumping investigations and Article 9.3 duty assessment procedures, or only to the former. To resolve this matter, therefore, we must consider the following context of Article 5.8, second sentence.

6.87 First, the term "case" is used in the first sentence of Article 5.8. The first sentence is concerned explicitly and exclusively with the circumstances in which an "application" ("under [Article 5,] paragraph 1") shall be rejected and an "investigation" terminated as a result of insufficient evidence to justify proceeding with the "case". As the treatment of the "application" and conduct of the "investigation" is dependent on the sufficiency of evidence concerning the "case", we consider that the term "case" in the first sentence must at least encompass the notions of "application" and "investigation". In our view, it would be meaningless for the term "case" in the first sentence to also encompass the concept of an Article 9.3 duty assessment procedure, since we fail to see how the sufficiency of evidence concerning a subsequent duty assessment could be relevant to the treatment of an "application" or the conduct of an "investigation", both of which precede the Article 9.3 duty assessment procedure.<sup>519</sup> As we consider that the term "case" in the first sentence of Article 5.8 does not include the concept of "duty assessment", we see no reason to adopt a different approach to the term "cases" in the second sentence of that provision.

6.88 Second, we consider that note 22 of the AD Agreement effectively provides that a finding in a US duty assessment procedure that no duty is to be levied "shall not by itself require the authorities to

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<sup>517</sup> The Panel notes that the relevant provision is set forth in section 351.106(c) of the DOC regulations.

<sup>518</sup> See para. 4.628, *supra*.

<sup>519</sup> In this regard, we note that Korea has not argued before us that an Article 9.3 duty assessment procedure should be included within the notion of "investigation" for the purpose of Article 5.8. In the context of Article 5 of the AD Agreement, it is clear to us that the term "investigation" means the investigative phase leading up to the final determination of the investigating authority.

terminate the definitive duty." According to note 22, therefore, a finding in an Article 9.3 duty assessment procedure of a zero percent margin of dumping, which is *de minimis* under both the US 0.5 percent standard and the 2 percent standard advocated by Korea on the basis of Article 5.8, shall not by itself lead to termination of the duty. Nevertheless, by arguing that Article 5.8, including the second sentence thereof, applies in the context of Article 9.3 duty assessments, Korea is effectively arguing that a zero percent, *i.e.*, *de minimis*, margin of dumping shall lead to "immediate termination" of the duty. Thus, to the extent that Korea's interpretation of Article 5.8, second sentence, requires "immediate termination" of the duty in circumstances where termination "shall not" be required by note 22 of the AD Agreement, Korea's interpretation renders note 22 meaningless.<sup>520</sup>

6.89 For these reasons, we conclude that Article 5.8, second sentence, does not apply in the context of Article 9.3 duty assessment procedures. As Article 5.8, second sentence, does not require Members to apply a *de minimis* test in Article 9.3 duty assessment procedures, it certainly cannot require Members to apply a particular *de minimis* standard in such procedures.

6.90 Korea argues that there is "no logical reason why the *de minimis* level during the [Article 9.3.1] review stage of a proceeding should be different than at the investigation stage. That which is the legal equivalent of a zero margin for purposes of determining whether to impose an anti-dumping duty is also the legal equivalent of zero for collecting anti-dumping duties."<sup>521</sup> As explained above, we consider that the text of Article 5.8, when read in its context, does not require that a Member apply the Article 5.8 *de minimis* test in an Article 9.3 duty assessment procedure. In any event, there are possible logical explanations for applying different *de minimis* standards in investigations and Article 9.3 duty assessment procedures. Article 5.8 requires the termination of investigations in cases where the margin of dumping is *de minimis*. Thus, in the context of Article 5.8, the function of the *de minimis* test is to determine whether or not an exporter is subject to an anti-dumping order. In the context of Article 9.3 duty assessment procedures, however, the function of any *de minimis* test applied by Members is to determine whether or not an exporter should pay a duty. A *de minimis* test in the context of an Article 9.3 duty assessment procedure will not remove an exporter from the scope of the order. Thus, the implications of the *de minimis* test required by Article 5.8, and any *de minimis* test that Members choose to apply in Article 9.3 duty assessment procedures, differ significantly. Accordingly, we are not convinced that Korea's policy argument requires us to abandon our conclusion that the text of Article 5.8, when read in its context, does not require that a Member apply the Article 5.8 *de minimis* test in an Article 9.3 duty assessment procedure.

6.91 In light of our conclusion that Article 5.8, second sentence, does not apply in the context of Article 9.3 duty assessment procedures, we reject Korea's claim that the United States violates Article 5.8 by applying a 0.5 percent *de minimis* standard in the context of Article 9.3 duty assessment procedures.

#### I. KOREA'S CLAIMS UNDER GATT 1994

6.92 We note that Korea has made a number of claims concerning the consistency of the application of section 353.25(a)(2)(ii) and (iii) of the DOC regulations, and the consistency of the *Final Results Third Review*, with Articles I and X of the GATT 1994. We note that a panel "need only address those claims which must be addressed in order to resolve the matter in issue in the dispute."<sup>522</sup> Since we have already found that section 353.25(a)(2)(ii) of the DOC regulations, and the *Final Results Third Review* based on that provision, are inconsistent with Article 11.2 of the AD

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<sup>520</sup> As stated by the Appellate Body in *Gasoline*, "[a]n interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility" (*Gasoline*, WT/DS2/AB/R, adopted 20 May 1996, p. 23).

<sup>521</sup> See para. 4.624, *supra*.

<sup>522</sup> *United States - Measures Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, adopted 23 May 1997, page 19.

Agreement, we do not consider it necessary to examine Korea's claims under Articles I and X of the GATT 1994.

## VII. CONCLUSIONS AND RECOMMENDATION

7.1 We conclude that, for the reasons outlined in this report, section 353.25(a)(2)(ii) of the DOC regulations, and the *Final Results Third Review* based on that provision, are inconsistent with the US obligations under Article 11.2 of the AD Agreement.

7.2 The Panel *recommends* that the Dispute Settlement Body request the United States to bring section 353.25(a)(2)(ii) of the DOC regulations, and the *Final Results Third Review*, into conformity with its obligations under Article 11.2 of the AD Agreement.

7.3 Korea has requested us to suggest that the United States (i) revoke *DRAMs from Korea* and (ii) eliminate the section 353.25(a)(2)(ii) "not likely" criterion. In this regard we note Article 19.1 of the DSU, which provides in relevant part that:

"In addition to its recommendations, the panel or Appellate Body may suggest ways in which the Member concerned could implement the recommendations".

7.4 By virtue of Article 19.1 of the DSU, therefore, the Panel has discretion to suggest ways in which it believes the United States could appropriately implement the above recommendation. However, in light of the range of possible ways in which we believe the United States could appropriately implement our recommendation, we decline to make any suggestion in the present case.

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