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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.

## 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.

**[Parties' arguments in Section IV deleted from this version]**

## 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.

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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.

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.

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

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<sup>466</sup> 62 Fed. Reg. 39809 (24 July 1997).

<sup>467</sup> 58 Fed. Reg. 27520 (10 May 1993).

<sup>468</sup> WT/DS99/1.

<sup>469</sup> WT/DS99/2.

<sup>470</sup> WT/DS99/3.

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.

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

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<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*.

<sup>475</sup> See para.4.43, *supra*.

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 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.

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<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).

<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*.)

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:

(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

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<sup>480</sup> 62 Fed. Reg. 39809 (24 July 1997), at 39809.

<sup>481</sup> 19 C.F.R. §353.25(a)(2) (1997).

<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*).

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:

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>

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<sup>483</sup> *Gasoline*, WT/DS2/AB/R, adopted 20 May 1996, p. 17.

<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,

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 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."

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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.

\* 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 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>

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<sup>486</sup> Emphasis supplied.

<sup>487</sup> *Gasoline*, WT/DS2/AB/R, adopted 20 May 1996, p. 23.

<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.

**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 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

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<sup>490</sup> 62 Fed. Reg. 39809 (24 July 1997), at 39819.

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, 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,

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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*.

<sup>493</sup> See para. 4.124 *supra*.

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 whether, in turn, the "likely" standard is itself consistent with the terms of Article 11.2 of the AD Agreement.<sup>494</sup>

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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

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 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>

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an injury review. There is nothing in the text of Article 11 which suggests there should be some fundamental bifurcation of the applicable standard for dumping review contingent on whether there is also an Article 11.2 injury review being undertaken.

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

<sup>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

(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.

### 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>

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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*.

<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.

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".

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

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<sup>500</sup> See para. 4.303, *supra*.

<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.

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 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

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<sup>502</sup> See para. 4.317, *supra*.

<sup>503</sup> See para. 4.390, *supra*.

<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".

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 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

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<sup>505</sup> 62 Fed. Reg. 39809 (24 July 1997), at 39818.

<sup>506</sup> *EC Measures Concerning Meat and Meat Products*, WT/DS26/AB/R, adopted 13 February 1998, para. 98.

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 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

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<sup>507</sup> 62 Fed. Reg. 39809 (24 July 1997), at 39818.

<sup>508</sup> 62 Fed. Reg. 39809 (24 July 1997), at 39818.

<sup>509</sup> See para. 4.397, *supra*.

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.

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

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<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.

<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.

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 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

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<sup>514</sup> See para. 4.436, *supra*.

<sup>515</sup> See para. 4.436, *supra*.

<sup>516</sup> See para. 4.438, *supra*.

<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*.

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 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.

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<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.

<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).

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 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".

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<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.

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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