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1 ARTICLE 11

1.1 Text of Article 11

Article 11

11.1 Except as provided in paragraph 6, an investigation to determine the existence, degree and effect of any alleged subsidy shall be initiated upon a written application by or

y this Agreement, and (c) a causal link between
d injury. Simple assertion, unsubstantiated by
ed sufficient to meet the requirements of this
such information as is reasonably available to the

- (i) the identity of the applicant and a description of the volume and value of

course of the investigation, starting on a date not later than the earliest date on which in accordance with the provisions of this Agreement provisional measures may be applied.

11.8 In cases where products are not imported directly from the country of origin but are exported to the importing Member from an intermediate country, the provisions of this Agreement shall be fully applicable and the transaction or transactions shall, for the purposes of this Agreement, be regarded as having taken place between the country of origin and the importing Member.

11.9 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 subsidization or of injury to justify proceeding with the case. There shall be immediate termination in cases where the amount of a subsidy is de minimis, or where the volume of subsidized imports, actual or potential, or the injury, is negligible. For the purpose of this paragraph

1.3.2 "sufficient evidence"

3. The Panel in _____ rejected China's argument that a lower evidentiary standard applies to Article 11.2 of the SCM Agreement because that provision does not directly reference "specificity". Rather, the Panel held "the same standard of 'sufficient evidence' applies regardless of whether the evidence relates to the existence of a financial contribution, benefit or specificity." The Panel explained:

"In relation to whether evidence of specificity is required in an application, the Panel concurs with the parties that the reference to evidence of the 'nature of the subsidy' includes evidence regarding whether the subsidy is specific. Article 11 is found within Part V of the SCM Agreement. Further, Article 1.2 provides that a subsidy will be subject to Part V only if it is specific within the meaning of Article 2. Therefore, in our view, it is reasonable to conclude that evidence of the 'nature of the subsidy' includes evidence regarding whether the subsidy is specific. The alternative would be that the initiation of an investigation would be justified under Article 11.3, even though it may be clear at the time of initiation that the alleged subsidy is not subject to the disciplines of Part V of the SCM Agreement because it is broadly available in a given jurisdiction. This would not be effective in filtering those applications that are 'frivolous or unfounded'.

The Panel acknowledges that the term 'nature' is used in a number of sections of the SCM Agreement, and that it may not necessarily refer to 'specificity' in each instance. For example, the reference to 'nature' in Article 4.5 of the SCM Agreement appears to refer to whether or not a subsidy is prohibited. However, in the Panel's view, and as both parties agree, a consideration of the context in which a term is used can result in different meanings across different provisions. As outlined in the previous paragraph, the context in which Articles 11.2 and 11.3 are found supports the parties' view that the 'nature' of a subsidy under Article 11.2 (iii) includes evidence of whether or not an alleged subsidy is specific."²

- a. The Panel also found that Article 11.2(iii) "requires evidence of the 'nature', namely the specificity, 'of the subsidy in question' ... [which] requires evidence of the nature of each alleged subsidy program." It rejected China's argument that pervasive government support to an industry, discernible from application, constituted sufficient evidence of specificity. The Panel concluded that "[g]eneral information about government policy, with no direct connection to the program at issue, is not 'sufficient evidence' of specificity."³

1.4 Article 11.3

1.4.1 Standard of *revut goran*

decision to initiate is submitted to an investigating authority ... an unbiased and objective investigating authority would weigh this evidence in its assessment."⁵

6. In _____, the Panel undertook a fact-intensive analysis to determine whether an unbiased, objective investigating authority would have found information provided in industry petitions to be "'adequate evidence tending to prove or indicate' that the Government of China provides a financial contribution by directing a private body to carry out the function of providing goods to domestic producers". The Panel did not find "any information" in the petitions that demonstrated how the Government of China "gives responsibility to" or "exercises authori

1.5 A

1.6 Article 11.6

1.6.1 Non-application of self-initiation standard to sunset reviews under Article 21.3

14. The Appellate Body in _____ confirmed the Panel's finding in relation to the self-initiation of sunset reviews that "nothing in the text of Article 11.6 provides for its evidentiary standards to be implied in Article 21.3" in relation.¹⁶ The Appellate Body in commented:

"Before leaving our analysis of the _____ of Article 21.3 of the _____, we, lastly note that the provision contains no explicit cross-reference to evidentiary rules relating to initiation, such as those contained in Article 11.6. We believe the absence of any such cross-reference to be of some consequence given that, as we have seen, the drafters of the _____ have made active use of cross-references, _____, to apply obligations relating to _____ to review proceedings. In our view, the omission of any express cross-reference thus serves as a further indication that the negotiators of the _____ did not intend the evidentiary standards applicable to the self-initiation of _____ under Article 11 to apply to the self-initiation of _____ under Article 21. o006 T011olgnC Span #CID 90 BDC -0.004 Tw 0.347 0 T

establishment of such an industry and shall be interpreted in accordance with the provisions of [Article 15].

In defining the concept of injury, footnote 45 does not make any reference to the amount of subsidy involved."²⁷

22. The Appellate Body in _____ also highlighted that:

"Article 1 of the SCM Agreement sets out a definition of 'subsidy' that applies to the whole of that Agreement. This definition includes all such subsidies, regardless of their amount. None of the provisions in the _____ that uses the term 'subsidization' confines the meaning of 'subsidization' to subsidization at a rate equal to or in excess of 1 percent _____, or to any other de minimis threshold. 28 It is also worth noting that, under Part II of the SCM Agreement, prohibited subsidies are prohibited regardless of the amount of the subsidy.

[I]n our view, the terms 'subsidization' and 'injury' each have an independent meaning in the _____ which is not derived by reference to the other. It is unlikely that very low levels of subsidization could be demonstrated to cause 'material' injury. Yet such a possibility is not, per se, precluded by the Agreement itself, as injury is not defined in the SCM Agreement in relation to any specific level of subsidization."²⁹

23. The Appellate Body in _____ then considered the negotiating history of the SCM Agreement and confirmed its view on the meaning of Article 21.3:

"[R]ecourse to the negotiating history of the _____ tends to confirm our view as to the meaning of Article 21.3. We note that the two issues, namely the application of a specific _____ standard in investigations, and the introduction of a time-bound limitation on the maintenance of countervailing duties, were considered to be highly important and were the subject of protracted negotiations. ... The final texts of Article 11.9 and of Article 21.3 were the result of a carefully negotiated compromise that drew from a number of different proposals, reflecting divergent interests and views. We further note in this respect that none of the participants in this appeal pointed to any document indicating that the inclusion of a _____ threshold was ever considered in the negotiations on sunset review provisions leading to the text of Article 21.3."³⁰

1.7.2

