[illegible]

subsidized imports and the effect of the subsidized imports on prices in the domestic market for like products[46] and (b) the consequent impact of these imports on the domestic producers of such products.

(*footnote original*)[46] Throughout this Agreement the term "like product" ("produit similaire") shall be interpreted to mean a product which is identical, i.e. alike in all respects to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration.

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

15.3 Where imports of a product from more than one country are simultaneously subject to countervailing duty investigations, the investigating authorities may cumulatively assess the effects of such imports only if they determine that (a) the amount of subsidization established in relation to the imports from each country is more than de minimis as defined in paragraph 9 of Article 11 and the volume of imports from each country is not negligible and (b) a cumulative assessment of the effects of the imports is appropriate in light of the conditions of competition between the imported products and the conditions of competition between the imported products and the like domestic product.

15.4 The examination of the impact of the subsidized imports on the domestic industry shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry, including actual and potential decline in output, sales, market share, profits, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments and, in the case of agriculture, whether there has been an increased burden on government support programmes. This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance.

15.5 It must be demonstrated that the subsidized imports are, through the effects[47] of subsidies, causing injury within the meaning of this Agreement. The demonstration of a causal relationship between the subsidized imports and the injury to the domestic industry shall be based on an examination of all relevant evidence before the authorities. The authorities shall also examine any known factors other than the subsidized imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the subsidized imports. Factors which may be relevant in this respect include, inter alia, the volumes and prices of non-subsidized imports of the product in question, contraction in demand or changes in the patterns of consumption, trade restrictive practices of and competition between the foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry.

(*footnote original*)[47] As set forth in paragraphs 2 and 4.

15.6 The effect of the subsidized imports shall be assessed in relation to the domestic production of the like product when available data permit the separate identification of that production on the basis of such criteria as the production process, producers' sales and profits. If such separate identification of that production is not possible, the effects of the subsidized imports shall be assessed by the examination of the production of the narrowest group or range of products, which includes the like product, for which the necessary information can be provided.

explained below, the interpretation of Articles 3.2 and 15.2 should be consistent with the role these provisions play in the overall framework of an injury determination under Articles 3 and 15."[1]

3. The Appellate Body in *US – Carbon Steel (India)* observed that "Article 15.1 is an overarching provision setting forth Members' fundamental substantive obligations in the context of a determination of injury and informing the more detailed obligations in the subsequent paragraphs of Article 15 concerning the determination of injury by an investigating authority."[2]

4. The Panel in *US – Countervailing Duty Investigation on DRAMs* noted the Appellate Body's interpretations of the equivalent Anti-Dumping Agreement provision in previous cases, and said that, given the parties' agreement, it would use these Appellate Body statements in determining in this case whether the ITC's injury determination was consistent with SCM Agreement Articles 15.2, 15.4 and 15.5.[3] In this context it was guided by the Appellate Body in *US – Hot-Rolled Steel*, which in paragraph 193 characterized "positive evidence" as evidence which is of an "affirmative, objective and verifiable character, and … [is] credible" and which described an "objective examination" as requiring that the domestic industry and the effects of imports be investigated in an unbiased manner, without favouring the interests of any interested party, or group of interested parties, in the investigation:

> "The term 'objective examination' aims at a different aspect of the investigating authorities' determination. While the term 'positive evidence' focuses on the facts underpinning and justifying the injury determination, the term 'objective examination' is concerned with the investigative process itself. The word 'examination' relates, in our view, to the way in which the evidence is gathered, inquired into and, subsequently, evaluated; that is, it relates to the conduct of the investigation generally. The word 'objective', which qualifies the word 'examination', indicates essentially that the 'examination' process must conform to the dictates of the basic principles of good faith and fundamental fairness.[4] In short, an 'objective examination' requires that the domestic industry, and the effects of dumped imports, be investigated in an unbiased manner, without favouring the interests of any interested party, or group of interested parties, in the investigation. The duty of the investigating authorities to conduct an 'objective examination' recognizes that the determination will be influenced by the objectivity, or any lack thereof, of the investigative process."[5][6]

5. Examining the nature of Article 15.1 of the SCM Agreement, the Panel in *EC – Countervailing Measures on DRAM Chips* noted that it is an overarching provision informing the other obligations contained in Article 15 of the SCM Agreement:

> "Article 15.1 of the *SCM Agreement* is an overarching provision which informs the more detailed obligations set forth in the remainder of Article 15 of the *SCM Agreement*. This implies that we can only reach a conclusion that the authority acted in a manner that is consistent with the specific obligations of, *inter alia*,

[1] Appellate Body Report, *China – GOES*, para. 128.
[2] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.580.
[3] Panel Report, *US – Countervailing Duty Investigation on DRAMs*, I.

a of A Tc 0 (gano52 0 Td[(E)5 (S)]TJTTd(9254 0 Td(.006 (o013 Tw 0.985 0 Td32)7.9 (p)ot)13.3 (h)-1 -f-0.0t 1 T59BBox [71rii)-0.6 (a)-2.1

> purchasers of the physical characteristics of the cars being purchased. Although it is possible that products that are physically very different can be put to the same uses, differences in uses generally arise out of, and assist in assessing the importance of, different physical characteristics of products. Similarly, the extent to which products are substitutable may also be determined in substantial part by their physical characteristics. Price differences also may (but will not necessarily) reflect physical differences in products. An analysis of tariff classification principles may be useful because it provides guidance as to which physical distinctions between products were considered significant by Customs experts. However, we do not see that the SCM Agreement precludes us from looking at criteria other than physical characteristics, where relevant to the like product analysis. The term 'characteristics closely resembling' in its ordinary meaning includes but is not limited to physical characteristics, and we see nothing in the context or object and purpose of the SCM Agreement that would dictate a different conclusion.
>
> Although we are required in this dispute to interpret the term 'like product' in conformity with the specific definition provided in the SCM Agreement, we believe that useful guidance can nevertheless be derived from prior analysis of 'like product' issues under other provisions of the WTO Agreement. Thus, we note the statement of the Appellate Body in *Alcoholic Beverages (1996)* that, in this context as in any other, the issue of 'like product' must be considered on a case-by-case basis, that in applying relevant criteria panels can only use their best judgment regarding whether in fact products are like, and that this will always involve an unavoidable element of individual, discretionary judgement."[10]

9. Further in its "like products" analysis under footnote 46, the Panel in *Indonesia – Autos* rejected the argument that it "must consider all passenger cars to be 'like' because any effort to differentiate between passenger cars with a multitude of differing characteristics would inevitably result in arbitrary divisions"[11]:

> "We are aware that there are innumerable differences among passenger cars and that the identification of appropriate deciding lines between them may not be a simple task. However, this does not in our view justify limping all such products together where the differences among the products are so dramatic. … We must endeavour to find some reasonable way to assess the relative importance of the various differences in the minds of consumers and to devise some sensible means to categorize passenger cars."[12]

10. The Panel in *Indonesia – Autos* decided that "[o]ne reasonable way … to approach the 'like product' issue is to look at the manner in which the automotive industry itself has analysed market segmentation."[13] The Panel opted for an anoo11 (du)-3 (t)6.3 ()2 (anwn)10.3 teanrsivTd[(s)5 (egt14.3P)10 (ac
o k o f 0 4 T
t

> the Indonesian market were to render the Timor 'unlike' other models which are similar in physical characteristics to the Timor but priced higher, the result would be that, in cases where the subsidization and resulting price undercutting were sufficiently high, price undercutting claims under Article 6 could never prevail. Thus, we do not consider that the Timor's lower price is a basis to conclude that it is unlike the models alleged by the complainants to be 'like' the Timor."[15]

12. Considering whether "the difference between a product assembled and unassembled is sufficiently important that the unassembled product does not 'closely resemble' the assembled product"[16]

investigating authority to c

"[T]here may be multiple causes of injury suffered by a domestic industry. Thus, the fact that non-subject imports may have had negative price effects does not preclude a finding that subject imports also had negative effects on prices. Even if Korea's arguments regarding the role of non-subject imports were correct, therefore, Korea's arguments do not necessarily mean that the ITC could not properly have found, nevertheless, that "the effect of [] subject imports [] depressed prices to a significant degree."[29]

22.	Di	s	c	3	0	3

different levels of trade, the authority must apply appropriate adjustments to render them comparable in terms of the pricing components that they include."[46]

29. The Panel in *China – Broiler Products* held that, in the framework of price undercutting, the investigating authority must ensure that the "like products" compared are sufficiently similar:

"Another fundamental determining factor of the price is the physical characteristics of the product. Articles 3.1/15.1 and 3.2/15.2 mandate an analysis of the effects of prices on the domestic market of the 'like product'. Yet, in our view, ensuring that the products being compared are 'like products' will not always suffice to ensure price comparability. W3.3 ( )0.7 (t)1 (ha)21.30.004 T7 (r0.7 (ill)]T0.004 w-ea50/TT1 1 Tf3d[k6 (a)m)-2 (h)-3

"The central element of Article 15.3 is the provision that 'investigating authorities may cumulatively assess' the effects of 'such imports'. The term 'such imports' refers to the first clause of Article 15.3, which describes a situation '[w]here imports of a product from more than one country are simultaneously subject to countervailing duty investigations'. The last clause of Article15.3 stipulates the conditions that must be fulfilled in order for such cumulative assessment to be permitted. In particular, investigating authorities may engage in such cumulative assessment only if: '(a) the amount of subsidization established in relation to the imports from each country is more than *de minimis* and the volume of imports from each country is not negligible'; and '(b) a cumulative assessment of the effects of the imports is appropriate in the light of the conditions of competition between the imported products and the like domestic product.'

Article 15.3 refers to imports 'simultaneously subject to countervailing duty investigations'. The provision that investigating authorities may, if the conditions set out in the last clause of Article 15.3 are fulfilled, cumulatively assess the effects of 'such' imports thus requires that the imports be 'subject to countervailing duty investigations'. Conversely, the effects of imports other than such subsidized imports must not be incorporated in a cumulative assessment pursuant to Article 15.3. The

> domestic industry was not examined; and (2) that the question of evaluation was raised during the investigation."[56]

37. The Appellate Body in *China – GOES* rejected China's argument that "if Articles 3.2 and 15.2 are interpreted as requiring a consideration of the relationship between subject imports and domestic prices, Articles 3.4 and 15.4 must also be interpreted as requiring an examination of the link between subject imports, on the one hand, and each of the economic factors listed in Articles 3.4 and 15.4, on the other hand."[57] Since, according to the Appellate Body, "such a result would lead to a duplicative analysis of causation at each step of an investigating authority's examination under Articles 3 and 15, and grafts onto Articles 3.2 and 15.2, as well as Articles 3.4 and 15.4, an obligation that exists under Articles 3.5 and 15.5."[58] The Appellate Body explained that:

> "[A]rticles 3.4 and 15.4 require an investigating authority to examine the impact of subject imports on the domestic industry on the basis of "all relevant economic factors and indices having a bearing on the state of the industry". Articles 3.4 and 15.4 thus do not merely require an examination of the state of the domestic industry, but contemplate that an investigating aut87 (ll -0.006tc 0.018a006 Tc0.907 0 Td(A)Tj, a)5 (-2 (h)-3c 0

"Korea would have to challenge the ITC's definition of the domestic industry, and its treatment of assembly/casing as a domestic production operation, by filing a claim under Article 16

factors are not attributed to the subsidized imports. The third sentence of Article 15.5 does not envisage the kind of additional enquiry implied in Korea's arguments.

We are therefore of the view that, if an investigating authority carries out the examination required under Articles 15.2, 15.4, and 15.5, such examination suffices to demonstrate that 'subsidized imports are, through the effects of subsidies, causing injury' within the meaning of the *SCM Agreement*."[64]

48. The Panel in EU-PET (Pakistan) concluded that 'although there may be circumstances in which a collective assessment is warranted, the simple existence of other known factors that are found to have contributed to the injury to the domestic industry at the same time as subject imports does not on its own amount to such circumstances."[72]

49. The Appellate Body in *EU – PET (Pakistan)* recognized that there are different approaches to assessing causation while accounting for the injurious effects of other known factors, such as a two-step analysis or a single step analysis. A single step analysis would first examine the existence and extent of a causal link between the subsidized imports and the injury suffered by the domestic industry through an assessment of the "effects" of the subsidized imports, and then conduct an assessment of the injurious effects of other known factors. In a single-step "counterfactual" causation analysis, the investigating authority would assess whether and to what extent the state of the domestic industry would have been better off in the absence of the effects of the subsidized imports while the effects of other known factors remain. This "unitary" analysis directly evaluates the significance of the impact of the subsidized imports alone and, thus, there is no need for a separate non-attribution analysis.[73]

50. The Appellate Body in *EU – PET (Pakistan)* noted that in any event the core question in reviewing the appropriateness of an investigating authority's causation analysis is whether the authority has objectively determined that the subsidized imports qualify as a "genuine and substantial cause of the injury suffered by the domestic industry having taken into consideration the injurious effects of other known factors" and that this question must be answered on a case-specific basis.

merely afterward when final decisions whether to apply a measure are taken'.[78] Faced with the question of what is entailed by this obligation to act with an enhanced degree of attention, so as to demonstrate compliance with the 'special care' obligation, the Panel made the following finding: 'The Agreements require, as noted above, an objective evaluation based on positive evidence in making any injury determination, including one based on threat of material injury. Canada has not asserted any specific legal requirements with respect to special care – it has made no arguments as to what it considers might constitute the special care required by the Agreements in threat cases. It is not clear to us whhuh40.987 -1.213 Td0.7 (h)-14.6 ()]TJ0.001 Tc a (sp)-4. (car)-0.a8 (m)-1.3
gan3 42.bj(l)-0.7(pec)5 (t)-2 (i)-2 (v)9.3 0e evgatuaine 18s 03 11.3 (n)-3 ( )]TJ.001 Tc .001 re69i
t ganl3 11.3 (n)-5 (l)-y
iv(e)7 (r)6.3ot cu5ri (e)13.ono uvu(e)g 3 42.((e)d)2tr9 tv7sesve