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1 ARTICLE 21

1.1 Text of Article 21

Article 21

Duration and Review of Countervailing Duties and Undertakings

21.1 A countervailing duty shall remain in force only as long as and to the extent necessary to counteract subsidization which is causing injury.

21.2 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

the 'continued application ' of countervailing duties, which apply 'a fter the imposition ' thereof." ³

1.2.2 New subsidy allegations in administrative reviews

3. The Appellate Body in US – Carbon Steel (India) noted that " Articles 21.1 and 21.2 do not confine the enquiry in an administrative review to the subsidies examine d in the original investigation. " ⁴ However, the Appel late Body clar ified that Articles 21.1 and 21.2 limit the type of new subsidy allegations that may be examined in an administrative review to subsidies that have a sufficiently close link to the subsidies that resulted in the imposition of the original cou ntervailing duty:

"Nevertheless, we consider that Articles 21.1 and 21.2 limit the type of new subsidy allegations that may be examined in an administrative review. As discussed above, Article 21.1 provides that a countervailing duty shall remain in force only as long as and to the extent necessary to counteract subsidization which is causing injury, while Article 21.2 grants interested parties the right to request an investigating authority to examine whether th e continued imposition of the duty is necessary to offset subsidization. These provisions expressly link the subsidization to the original countervailing duty imposed.(ion)-1 (s)7 (h3.4 (in)12a3.4 (in)8c.3 (g)28-1e)2 (s)7 e,f(in)8c.3.7 (a)7 ele s (g Tw 5.9 (in)12

authorities to examine whether the continued imposition of the duty is necessary to offset subsidization, whether the injury would be likely to continue or recur if the duty were removed or varied, or both. Thus, the first type of review addresses the question of whether subsidization is present at all, while the second type of review, by its very terms, has to do primarily with injury questions, that is, the effect on the domestic industry of changing or removing entirely the countervailing duty. This second type of review thus does not have to do with finalizing the rate of countervailing duty during a particular period for which estimated duties have been collected, but rather with the underlying need and rationale, from the standpoint of the affected domestic industry, for maintaining a countervailing duty. In short, Article 21.2 SCM Agreement is silent on the question of 'administrative reviews'.⁷

1.3.3 Reviews not yet requested

6. In *US – Softwood Lumber III*, the Panel considered that it was not appropriate to rule on a potential denial of a request for a review, where such a request had not been made:

"The WTO dispute settlement system allows a Member to challenge a law as such or its actual application in a particular case, but not its possible future application."⁸

1.3.4 Temporal application

8. The Appellate Body in *US – Carbon Steel (India)* considered that Article 21.2 calls for retrospective, present and prospective analyses of the imposed countervailing duty:

"Article 21.2 mandates authorities to 'review the need for the continued imposition of the duty' and, in particular, to examine 'whether the continued imposition of the duty is necessary to offset subsidization'. Article 21.2 also gives investigating authorities the power to determine 'whether the injury would be likely to continue or recur if the duty were removed or varied, or both'. Hence, Article 21.2 appears to call for a present and retrospective analysis as it relates to the necessity and impact of the duty prior to and during the administrative review, as well as a prospective analysis focusing on the likely future consequences of the maintenance, changing, or removal of the duty. This differs in scope from a review under Article 21.3, which is an exclusively prospective analysis that focuses on the future consequences of the removal of the duty. Both provisions, however, bear a similar prospective focus. To the extent that the prospective focus of a review under Article 21.2 is similar to that under Article 21.3, this would suggest that the requirements set out in Article 21.2 (13.4 (n)-1 3 (e)2 (a)7 (s

1.4.1.2 Evidentiary requirements for self-initiation of sunset reviews

14. The Appellate Body in US – Carbon Steel observed that Article 21.3 explicitly contemplates the termination of countervailing orders within five years, unless the prescribed determination is made in a review. It further considered that Article 21.3 requires initiation of such a review by the authorities ("on their own initiative") or based on "a duly substantiated request made by or on behalf of the domestic industry". The Appellate Body remarked that the terms "duly substantiated" are applicable to the authorization to initiate a review upon request, and not a self-initiation situation. Finally, the Appellate Body noted that Article 21.3 does not contain cross-references to evidentiary rules relating to self-initiation of an investigation, and considered that this omission means that Article 11 evidentiary standards are not applicable to the self-initiation of sunset reviews under Article 21.3. The Appellate Body considered:

"[W]e wish to underline the thrust of Article 21.3 of the SCM Agreement. An automatic time-bound termination of countervailing duties that have been in place for five years from the original investigation or a subsequent comprehensive review is at the heart of this provision. Termination of a countervailing duty is the rule and its continuation is the exception. The continuation of a countervailing duty must therefore be based on a properly conducted review and a positive determination that the revocation of the countervailing duty would 'be likely to lead to continuation or recurrence of subsidization and injury'. Where the level of subsidization at the time of the review is very low, there must be persuasive evidence that revocation of the duty would nevertheless lead to injury to the domestic industry. Mere reliance by the authorities on the injury determination made in the original investigation will not be sufficient. Rather, a fresh determination, based on credible evidence, will be necessary to establish that the continuation of the countervailing duty is warranted to remove the injury to the domestic industry.

...

Article 21.3 requires the termination of countervailing duties within five years unless the prescribed determination is made in a review. Article 21.3 contemplates initiation of this review in one of two alternative ways, as is made clear through the use of the word 'or'. Either the authorities may make their determination 'in a review initiated ... on their own initiative'; or, alternatively, the authorities may make the determination 'in a review initiated ... upon a duly substantiated request made by or on behalf of the domestic industry ...'. The words 'duly substantiated' qualify only the authorization to initiate a review upon request made by or on behalf of the domestic industry. No such language qualifies the first method for initiating a sunset review, namely self-initiation of a review by the authorities.

terminated unless the investigating authorities determine that there is a likelihood of
continuation or recurrence of subsidization and injury." ¹⁹

1.4.4 Relationship with other provisions of the SCM Agreement

1.4.4.1 Article 11

24. The Appellate Body in *US – Carbon Steel (India)* observed that "[w]hereas Articles 21.1 and 21.2 govern the conduct of administrative reviews, Article 11 sets out a number of evidentiary requirements that must be satisfied in order to initiate a countervailing duty investigation." ²⁶

1.4.4.2 Article 11.1

25. The Appellate Body in *US – Carbon Steel (India)* noted that "Articles 21.1 and 21.2 do not confine the enquiry in an administrative review to the subsidies examined in the original investigation." ²⁷ The Appellate Body based its reasoning on the broader meaning of the term "subsidization" in Article 21, rather than of the term "subsidy" in Article 11.1:

"We consider that the use of the word 'subsidization' in Article 21, as distinct from the word 'subsidy' in Article 11.1, allows for a broader scope of review than the precise subsidy or subsidies that were examined in the original investigation, and that resulted in the imposition of the countervailing duty subject of the review. We further consider that the focus of Article 21.2 on whether the injury resulting from such subsidization is likely to continue or recur if the duty were removed or varied, or both, suggests that an investigating authority may go beyond the particular subsidies examined in the original investigation in the conduct of an administrative review. As we discussed above, the fact that Article 21 calls, in part, for a prospective analysis implies that the investigating authority may also examine events or circumstances that have followed the imposition of the original countervailing duty. Indeed, Article 21.2 uses the word 'recur', which we understand as 'occur or appear again, periodically or repeatedly'. Hence, the injury resulting from subsidization, which is being addressed by the countervailing duty, may recur due to a new subsidy that is put in place after the imposition of the original countervailing duty. In this regard, we concur with the panel in *US – Carbon Steel* that, in assessing the likelihood of subsidization in the event of revocation of a countervailing duty, an investigating authority may well consider, *inter alia*, the original level of subsidization, any changes in the original subsidy programmes, and 'any new subsidy programmes introduced after the imposition of the original' countervailing duty.

Accordingly, we understand Articles 21.1 and 21.2 of the SCM Agreement to permit investigating authorities to examine new subsidy allegations in the conduct of an administrative review. Such examination, while subject, *mutatis mutandis*, to the public notice requirements set out in Article 22 of the SCM Agreement, would not be subject to the obligations set out in Articles 11 and 13 of the SCM Agreement. ²⁸

1.4.4.3 Article 11.6

26. The Appellate Body in *US – Carbon Steel* 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

applicable to the self -initiation of investigations under Article 11 to apply to the self -
initiation of reviews under Article 21.3." ³⁰

1.4.4.4 Article 11.9