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*Consultations*

13.1 As soon as possible after an application under Article 11 is accepted, and in any event before the initiation of any investigation, Members the products of which may be subject to such investigation shall be invited for consultations with the aim of clarifying the situation as to the matters referred to in paragraph 2 of Article 11 and arriving at a mutually agreed solution.

13.2 Furthermore, throughout the period of investigation, Members the products of which are the subject of the investigation shall be afforded a reasonable opportunity to continue consultations, with a view to clarifying the factual situation and to arriving at a mutually agreed solution.<sup>44</sup>

*(footnote original)*<sup>44</sup> It is particularly important, in accordance with the provisions of this paragraph, that no affirmative determination whether preliminary or final be made without reasonable opportunity for consultations having been given. Such consultations may establish the basis for proceeding under the provisions of Part II, III or X.

13.3 Without prejudice to the obligation to afford reasonable opportunity for consultation, these provisions regarding consultations are not intended to prevent the authorities of a Member from proceeding expeditiously with regard to initiating the investigation, reaching preliminary or final determinations, whether affirmative or negative, or from applying provisional or final measures, in accordance with the provisions of this Agreement.

13.4 The Member which intends to initiate any investigation or is conducting such an investigation shall permit, upon request, the Member or Members the products of which are subject to such investigation access to non-confidential evidence, including the non-confidential summary of confidential data being used for initiating or conducting the investigation.

**1.2 Article 13.1**

1. The Appellate Body in *US – Carbon Steel (India)* clarified that the scope of Article 13.1 does not extend to administrative reviews under Article 21.2 of the SCM Agreement. The Appellate Body explained that:

"Article 13.1 refers expressly to the investigations conducted pursuant to Article 11 and makes it mandatory for an investigating authority to provide an opportunity for consultations with the Member whose products may be subject to the Article 11 investigation. Conversely, neither Article 13 nor Article 21 makes explicit reference to the other. Furthermore, the Appellate Body has emphasized that the use of the word 'investigation' in Article 11 is distinct from the use of the word 'review' in Article 21. In this regard, we observe that, not only does Article 13.1 use the word 'investigation' and make an explicit reference to Article 11, but it also makes no reference to the word 'review' or to Article 21. For these reasons, we consider that the requirements for carrying out consultations, prescribed in Article 13.1 of the SCM Agreement, do not apply to the conduct of administrative reviews, as governed by Article 21.2 of the SCM Agreement.

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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."<sup>1</sup>

2. In *Mexico – Olive Oil*, the European Communities argued that Mexico had acted inconsistently with Article 13.1 because it did not hold consultations between the date it sent the invitation to consult and the date of initiation of the investigation. The Panel rejected the European Communities' argument on the basis that Article 13.1 merely provides that the exporting Member "shall be invited for consultations". The Panel stated that "the provision makes no explicit reference to consultations being held, referring instead to an invitation to consult".<sup>2</sup> According to the Panel, "the ordinary meaning of the obligation on the importing Member that is considering initiating a countervailing duty investigation is to ask the Member, the products of which may be subject to that investigation (the exporting Member), to consultations. It then falls to the latter Member to decide whether or not to accept the invitation".<sup>3</sup> The Panel continued:

"We do not see a requirement in the text of Article 13.1 that the Members involved must actually *hold* the referenced consultations. Indeed, if under Article 13.1, the Member considering whether to initiate an investigation were obligated to *hold* consultations with the exporting Member before it could initiate an investigation, the exporting Member could effectively block initiation simply by declining to consult. ... We emphasize, however, that the invitation must be a *bona fides* one. That is, assuming that the exporting Member accepts the invitation, the Member considering whether to initiate an investigation cannot then refuse to participate in the consultations."<sup>4</sup>

3. In *Mexico – Olive Oil*, the Panel saw "no requirement that a sufficient interval must be allowed after issuance of the invitation and before initiation that consultations could be held. Rather, the requirement in that provision is that the invitation must be issued "in any event before" initiation, with no indication of any specific time interval."<sup>5</sup>

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Current as of: December 2022

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<sup>1</sup> Appellate Body Report, *US – Carbon Steel (India)*, paras. 4.532 and 4.540.

<sup>2</sup> Panel Report, *Mexico – Olive Oil*, para. 7.34.

<sup>3</sup> Panel Report, *Mexico – Olive Oil*, para. 7.34.

<sup>4</sup> Panel Report, *Mexico – Olive Oil*, para. 7.35.

<sup>5</sup> Panel Report, *Mexico – Olive Oil*, para. 7.39.