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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 since the imposition of the definitive countervailing duty, upon request by any 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 subsidization, 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 countervailing duty is no longer warranted, it shall be terminated immediately.

21.3 Notwithstanding the provisions of paragraphs 1 and 2, any definitive countervailing 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 subsidization 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 subsidization and injury.⁵² The duty may remain in force pending the outcome of such a review.

(*footnote original*)⁵² When the amount of the countervailing duty is assessed 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.

21.4 The provisions of Article 12 regarding evidence and procedure shall apply to any review carried out under this Article. Any such review shall be carried out expeditiously and shall normally be concluded within 12 months of the date of initiation of the review.

21.5 The provisions of this Article shall apply mutatis mutandis to undertakings accepted under Article 18.

1.1 Anti-Dumping Agreement

1. As the text of Article 21 of the SCM Agreement largely parallels the text of Article 11 of the Anti-Dumping Agreement, see also the Section on that Article of the Anti-Dumping Agreement.

1.2 Article 21.1

1.2.1 Temporal application

2. The Appellate Body found in *US – Carbon Steel* that Article 21.1 sets forth a "general rule that, after the imposition of a countervailing duty, the continued application of that duty is subject to certain disciplines".¹ The Appellate Body analysed these disciplines:

"These disciplines relate to the *duration* of the countervailing duty ('only as long as ... necessary'), its *magnitude* ('only ... to the extent necessary'), and its *purpose* ('to counteract subsidization which is causing injury')."²

3. The Panel in *Japan – DRAMs (Korea)* found that Article 21.1 only applies once countervailing duties have been imposed. The Panel rejected Korea's argument that Article 21.1 also governed duty imposition *per se*:

"At the outset, we reject Korea's claim insofar as it is based on Article 21.1 of the *SCM Agreement*. In our view, this provision applies once countervailing duties have been imposed. It does not govern duty imposition *per se*. Consistent with the title of Article 21, which reads '*Duration and Review of Countervailing Duties and Undertakings*', Article 21.1 concerns the duration of countervailing measures, ensuring that they 'remain in force' only as long as, and to the extent, necessary. The focus, therefore, is on the amount of time that a duty may *remain* in force, rather than the circumstances under which that duty initially *entered into* force. We therefore agree with the Appellate Body's analysis of this provision as imposing disciplines regarding

¹ Appellate Body Report, *US – Carbon Steel*, para. 70.

² Appellate Body Report, *US – Carbon Steel*, para. 70.

the 'continued application' of countervailing duties, which apply 'after 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 examined in the original investigation."⁴ However, the Appellate Body clarified 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 countervailing 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 the continued imposition of the duty is necessary to offset subsidization. These provisions expressly link the subsidization to the original countervailing duty imposed. This suggests that the only 'new subsidies' that may be examined as part of the 'subsidization' in an administrative review are those that have a sufficiently close link to the subsidies that resulted in the imposition of the original countervailing duty. Moreover, Article 21.2 requires the investigating authority to assess whether 'the injury would be likely to continue or recur if the duty were removed or varied, or both.' Hence, only the new subsidies that would inform this enquiry may properly be considered by an investigating authority in the conduct of an administrative review. The use of the words 'continue' and 'recur', in particular, indicate that there must be a sufficiently close link or similarity between the injury resulting from the original subsidization and the new subsidies being proposed for examination in the administrative review."⁵

1.3 Article 21.2

1.3.1 General

4. In *Brazil – Desiccated Coconut*, the Panel found that by virtue of Article 32.3, the investigation at issue was not covered by the SCM Agreement or Article VI of the GATT 1994. However, the Panel opined that even measures to which the WTO Agreement is not "immediately applicable" will fall under the SCM Agreement through reviews pursuant to Article 21.2:

"We recognize that these provisions regarding review are not comparable in effect to the immediate application of the WTO Agreement to all countervailing measures. The effect of reviews regarding the continued need for imposition of countervailing measures will likely be prospective and, depending on the date of imposition of the measure and the circumstances subsequent to its imposition, the exporting country Member may or may not be entitled to an immediate review. Nevertheless, it is clear from this provision that measures to which the WTO Agreement is not immediately applicable will nevertheless be brought under WTO disciplines over time pursuant to reviews under Article 21.2 of the SCM Agreement."⁶

1.3.2 Types of review under Article 21.2

5. The Panel in *US – Softwood Lumber III* noted that Article 21.2 provides for different kinds of reviews but is silent on administrative reviews:

"Article 21.2 SCM Agreement deals with different kinds of review mechanisms, requiring the authority to provide for the right of interested parties to request the

³ Panel Report, *Japan – DRAMs (Korea)*, para. 7.350.

⁴ Appellate Body Report, *US – Carbon Steel (India)*, para. 4.538.

⁵ Appellate Body Report, *US – Carbon Steel (India)*, para. 4.541.

⁶ Panel Report, *Brazil – Desiccated Coconut*, para. 277.

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 11 of the SCM Agreement would not apply to administrative reviews conducted pursuant to Article 21.2 of the SCM Agreement."⁹

1.3.5 "necessary to offset subsidization"

9. The Appellate Body in *US – Lead and Bismuth II* agreed with the Panel that "while an investigating authority may presume, in the context of an administrative review under Article 21.1, that a 'benefit' continues to flow from an untied, non-recurring 'financial contribution', this presumption can never be 'irrebuttable'.¹⁰

10. The Appellate Body in *US – Lead and Bismuth II* rejected the view that "in the context of an administrative review under Article 21.2, an investigating authority must *always* establish the existence of a 'benefit' during the period of review *in the same way as* an investigating authority must establish a 'benefit' in an original investigation". The Appellate Body stated:

"We believe that it is important to distinguish between the original investigation leading to the imposition of countervailing duties and the administrative review. In an original investigation, the investigating authority must establish that *all* conditions set

⁷ Panel Report *US – Softwood Lumber III*, para. 7.151.

⁸ Panel Report *US – Softwood Lumber III*, para. 7.157.

⁹ Appellate Body Report, *US – Carbon Steel (India)*, para. 4.530.

¹⁰ Appellate Body Report, *US – Lead and Bismuth II*, para. 62, referring to the Panel Report, *US – Lead and Bismuth II*, para. 6.71.

out in the *SCM Agreement* for the imposition of countervailing duties are fulfilled. In an administrative review, however, the investigating authority must address those issues which have been raised before it by the interested parties or, in the case of an investigation conducted on its own initiative, those issues which warranted the examination."¹¹

1.3.6 Exhaustiveness of the conditions listed

11. In *Mexico – Anti-Dumping Measures on Rice*, the Appellate Body held that the conditions to carry out duty assessment reviews and changed circumstances reviews listed in Articles 9.3.2 and 11.2 of the Anti-Dumping Agreement and Article 21.2 of the SCM Agreement are exhaustive, and do not include a requirement to condition a review on a showing of representative volume of exports:

"[T]he above provisions ... require an investigating authority to undertake duty assessment reviews and changed circumstances reviews once the conditions set out in those provisions have been satisfied. In our view, these conditions are exhaustive; thus, if an agency seeks to impose additional conditions on a respondent's right to a review, this would be inconsistent with those provisions".¹²

12. In *Mexico – Anti-Dumping Measures on Rice*, the Appellate Body also confirmed that the completion of judicial proceedings as a condition for carrying out duty assessment and changed circumstances reviews is not provided for in Articles 9.3.2 of the Anti-Dumping Agreement and 11.2 and Article 21.2 of the SCM Agreement.¹³

1.4 Article 21.3

1.4.1 Self-initiation of sunset reviews

1.4.1.1 General

13. The Appellate Body in *US – Carbon Steel* agreed with the Panel that Article 21.3 of the SCM Agreement does not prohibit the automatic self-initiation of sunset reviews by investigating authorities:

"[O]ur review of the context of Article 21.3 of the *SCM Agreement* reveals no indication that the ability of authorities to self-initiate a sunset review under that provision is conditioned on compliance with the evidentiary standards set forth in Article 11 of the *SCM Agreement* relating to initiation of investigations. Nor do we consider that any other evidentiary standard is prescribed for the self-initiation of a sunset review under Article 21.3.

This is not to say that authorities may continue the countervailing duties after five years in the absence of evidence that the expiry of the duty would be likely to lead to continuation or recurrence of subsidization and injury. Article 21.3 prohibits the continuation of countervailing duties unless a review is undertaken and the prescribed determination, based on adequate evidence, is made.

For all of these reasons, we agree with the Panel that Article 21.3 of the *SCM Agreement* does not prohibit the automatic self-initiation of sunset reviews by investigating authorities.¹⁴¹⁵

¹¹ Appellate Body Report, *US – Lead and Bismuth II*, para. 63.

¹² Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 315.

¹³ Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 350.

¹⁴ (footnote original) Panel Report on *US – Carbon Steel*, para 8.49.

¹⁵ Appellate Body Report, *US – Carbon Steel*, paras. 116-118.

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.

We believe the absence of any such cross-reference to be of some consequence given that, as we have seen, the drafters of the *SCM Agreement* have made active use of cross-references, *inter alia*, to apply obligations relating to *investigations* to review proceedings. In our view, the omission of any express cross-reference thus serves as a further indication that the negotiators of the *SCM Agreement* did not intend the evidentiary standards applicable to the self-initiation of *investigations* under Article 11 to apply to the self-initiation of *reviews* under Article 21.3."¹⁶

15. While recognizing that the lack of an explicit limitation is "not dispositive of whether any such limitation exists", the Appellate Body in *US – Carbon Steel* also took into account the context of Article 21.3. In particular, the Appellate Body noted that Article 21.4 explicitly states that the detailed evidentiary and procedural rules contained in Article 12 regarding the *conduct* of an investigation apply to Article 21.3 reviews. As a result, it stated that this explicit cross-reference to Article 12 suggests that evidentiary rules regarding the *initiation* of an investigation contained in Article 11 "are not incorporated by reference into Article 21.3." For the Appellate Body, the fact that the Article 11 rules governing these matters are not incorporated by reference into Article 21.3 suggests that they do not apply to sunset reviews:

¹⁶ Appellate Body Report, *US – Carbon Steel*, paras. 88, 103 and 105.

"Article 21.2 differs from Article 21.3 in that the former identifies certain circumstances in which the authorities are under an *obligation* to review ('shall review') whether the continued imposition of the countervailing duty is necessary. In contrast, the principal obligation in Article 21.3 is not, *per se*, to conduct a review, but rather to *terminate* a countervailing duty *unless* a specific determination is made in a review. We note that Article 21.2 sets down an explicit evidentiary standard for requests by interested parties for a review under that provision. In order to trigger the authorities' obligation to conduct a review, such requests must, *inter alia*, include 'positive information substantiating the need for review'. Article 21.2 does not, on its face, apply this same standard to the initiation by authorities 'on their own initiative' of a review carried out under that provision. Thus, Article 21.2 contemplates that, for reviews carried out pursuant to that provision, the self-initiation by the authorities of a review is not governed by the same standards that apply to initiation upon request by other parties.

As we have noted earlier, the fourth paragraph of Article 21 explicitly applies to Article 21.3 reviews the detailed rules set out in Article 12 of the *SCM Agreement* regarding evidence and procedure in the *conduct* of investigations. However, the rules on evidence and procedure contained in Article 12 do not relate to the *initiation* of such investigations. Rather, the rules relating to evidence needed to *initiate* an investigation are set out in Article 11, which is not referred to in Article 21.4. The fact that the rules in Article 11 governing such matters are not incorporated by reference into Article 21.3 suggests that they are not, *ipso facto*, applicable to sunset reviews."¹⁷

16. The Appellate Body in *US – Carbon Steel* concluded that there is no indication in the framework of Article 21.3 that the authorities' ability to self-initiate a sunset review is conditional upon compliance with evidentiary standards in Article 11 and that no other evidentiary standard is required for the self-initiation of a sunset review under Article 21.3.

"[O]ur review of the context of Article 21.3 of the *SCM Agreement* reveals no indication that the ability of authorities to self-initiate a sunset review under that provision is conditioned on compliance with the evidentiary standards set forth in Article 11 of the *SCM Agreement* relating to initiation of investigations. Nor do we consider that any other evidentiary standard is prescribed for the self-initiation of a sunset review under Article 21.3."¹⁸

1.4.1.3 De minimis standard

17. As regards the application of the *de minimis* standards to sunset reviews, see Section on Article 11 of the SCM Agreement

1.4.2 Determination of likelihood of continuation/recurrence of subsidization

1.4.2.1 General

18. The Panel in *US – Carbon Steel* referred to Article 21.1 and 21.2 of the SCM Agreement and highlighted that Article 21.3 of the SCM Agreement effectuates one of the purposes of the SCM Agreement, i.e. to regulate the imposition of countervailing duty measures:

"Article 21.3 reflects the application of the general rule set out in Article 21.1 – that a CVD shall remain in place only as long as necessary – in the specific instance where five years have elapsed since the imposition of a CVD. Article 21.2 reflects the same general rule in a different circumstance, when a reasonable period has elapsed since the imposition of the duty, and it is deemed necessary to review the need for the continued imposition of the duty. We also note that one of the principal objects of the SCM Agreement is to regulate the imposition of CVD measures. Article 21.3 effectuates that purpose by providing that after five years, a CVD should be

¹⁷ Appellate Body Report, *US – Carbon Steel*, paras. 108 and 109.

¹⁸ Appellate Body Report, *US – Carbon Steel*, para. 116.

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

1.4.2.2 Sufficient factual basis for the non-determination

19. The Panel in *US – Carbon Steel* considered that any determination made by an investigating authority under the SCM Agreement must be properly substantiated even if there is no specific language in this regard in the Agreement itself. The Panel referred to the similarity with safeguards and anti-dumping investigations, and concluded that a determination of likelihood under Article 21.3 of the SCM Agreement must rest on a sufficient factual basis:

"In our opinion, although there is no specific language in the SCM Agreement to that effect, it goes without saying that any determination made by investigating authorities under the SCM Agreement must be properly substantiated in order for that determination to be legally justified. In this regard, the Appellate Body has stated in *US – Lamb*:

'[C]ompetent authorities must have a sufficient factual basis to allow them to draw reasoned and adequate conclusions concerning the situation of the "domestic industry"'.²⁰

We recognise that the Appellate Body's statement refers to the basis of an injury determination in a safeguard investigation. Yet, as far as the adequacy of the factual basis for a determination is concerned, we see no reason to distinguish between injury determinations in a safeguard investigation and a determination of the likelihood of continuation or recurrence of subsidization in a CVD sunset review.

We also note the decision of the Panel in *US – DRAMS* in which the Panel stated:

'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.'²¹

Although the decision of the Panel was made as part of a review under Article 11.2 of the AD Agreement we believe this excerpt provides helpful guidance for our case relative to the adequacy of the factual basis for a determination.

Based on the two foregoing decisions, we consider that a determination of likelihood under Article 21.3 must rest on a sufficient factual basis.

An investigating authority's determination of the likelihood of continuation or recurrence of subsidization should rest on the evaluation of the evidence that it has gathered during the original investigation, the intervening reviews and finally the sunset review. In our view, a likelihood analysis based on this evidentiary framework would be consistent with the requirements of Article 21.3."²²

20. In *US – Carbon Steel*, the Panel further considered that one of the components of the likelihood analysis was the assessment of the likely rate of subsidization:

¹⁹ Panel Report, *US – Carbon Steel*, para. 8.91.

²⁰ (footnote original) Appellate Body Report on *US – Lamb*, para. 131.

²¹ (footnote original) Panel Report on *US – DRAMS*, para. 6.42.

²² Panel Report, *US – Carbon Steel*, paras. 8.92-8.95.

"In our view, one of the components of the likelihood analysis in a sunset review under Article 21.3 is an assessment of the likely rate of subsidization. We do not consider, however, that an investigating authority must, in a sunset review, use the same calculation of the rate of subsidization as in an original investigation. What the investigating authority must do under Article 21.3 is to assess whether subsidization is likely to continue or recur should the CVD be revoked. This is, obviously, an inherently prospective analysis. Nonetheless, it must itself have an adequate basis in fact. The facts necessary to assess the likelihood of subsidization in the event of revocation may well be different from those which must be taken into account in an original investigation. Thus, in assessing the likelihood of subsidization in the event of revocation of the CVD, an investigating authority in a sunset review may well consider, *inter alia*, the original level of subsidization, any changes in the original subsidy programmes, any new subsidy programmes introduced after the imposition of the original CVD, any changes in government policy, and any changes in relevant socio-economic and political circumstances."²³

1.4.3 Relationship with other paragraphs of Article 21

1.4.3.1 Articles 21.2 and 21.4

21. In *US – Carbon Steel*, the Panel discussed the relationship between paragraphs 1, 2 and 3 of Article 21, see paragraph 18 above.

22. The Appellate Body in *US – Carbon Steel* noted the difference between paragraphs 2 and 3 of Article 21 as follows:

"Article 21.2 differs from Article 21.3 in that the former identifies certain circumstances in which the authorities are under an *obligation* to review ('shall review') whether the continued imposition of the countervailing duty is necessary. In contrast, the principal obligation in Article 21.3 is not, *per se*, to conduct a review, but rather to *terminate* a countervailing duty *unless* a specific determination is made in a review. We note that Article 21.2 sets down an explicit evidentiary standard for requests by interested parties for a review under that provision. In order to trigger the authorities' obligation to conduct a review, such requests must, *inter alia*, include 'positive information substantiating the need for review'. Article 21.2 does not, on its face, apply this same standard to the initiation by authorities 'on their own initiative' of a review carried out under that provision. Thus, Article 21.2 contemplates that, for reviews carried out pursuant to that provision, the self-initiation by the authorities of a review is not governed by the same standards that apply to initiation upon request by other parties."²⁴

23. In *US – Carbon Steel*, the Appellate Body further noted the differing scope of Article 21.3 and 21.4:

"As we have noted earlier, the fourth paragraph of Article 21 explicitly applies to Article 21.3 reviews the detailed rules set out in Article 12 of the *SCM Agreement* regarding evidence and procedure in the *conduct* of investigations. However, the rules on evidence and procedure contained in Article 12 do not relate to the *initiation* of such investigations. Rather, the rules relating to evidence needed to *initiate* an investigation are set out in Article 11, which is not referred to in Article 21.4. The fact that the rules in Article 11 governing such matters are not incorporated by reference into Article 21.3 suggests that they are not, *ipso facto*, applicable to sunset reviews."²⁵

²³ Panel Report, *US – Carbon Steel*, para. 8.96.

²⁴ Appellate Body Report, *US – Carbon Steel*, para. 108.

²⁵ Appellate Body Report, *US – Carbon Steel*, para. 109.

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 standards to be implied in Article 21.3".²⁹ The Appellate Body in *US – Carbon Steel* commented:

"Before leaving our analysis of the *text* of Article 21.3 of the *SCM Agreement*, 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 *SCM Agreement* have made active use of cross-references, *inter alia*, to apply obligations relating to *investigations* to review proceedings. In our view, the omission of any express cross-reference thus serves as a further indication that the negotiators of the *SCM Agreement* did not intend the evidentiary standards

²⁶ Appellate Body Report, *US – Carbon Steel (India)*, para. 4.526.

²⁷ Appellate Body Report, *US – Carbon Steel (India)*, para. 4.538.

²⁸ Appellate Body Report, *US – Carbon Steel (India)*, paras. 4.539-4.540.

²⁹ Panel Report, *US – Carbon Steel*, para. 8.19.

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

27. The Appellate Body in *US – Carbon Steel* reversed the Panel's finding that the *de minimis* standard of Article 11.9 is implied in Article 21.3 and the Panel's finding of violations of the SCM Agreement.³¹ The Appellate Body noted:

"[T]he text of Article 21.3 does not mention any *de minimis* standard to be applied in sunset reviews. Nor does it make any express reference to the *de minimis* standard set forth in Article 11.9 of the *SCM Agreement*.

[T]he lack of any indication, in the text of Article 21.3, that a *de minimis* standard must be applied in sunset reviews serves, at least at first blush, as an indication that no such requirement exists. However, as the Panel itself observed, the task of ascertaining the meaning of a treaty provision with respect to a specific requirement does not end once it has been determined that the text is silent on that requirement.³² Such silence does not exclude the possibility that the requirement was intended to be included by implication."³³

28. However, ultimately, the Appellate Body concluded:

"[A] finding on our part that the *de minimis* standard of Article 11.9 is implied in sunset reviews under Article 21.3 would upset the delicate balance of rights and obligations attained by the parties to the negotiations, as embodied in the final text of Article 21.3. Such a finding would be contrary to the requirement of Article 3.2, repeated in Article 19.2 of the DSU, that our findings and recommendations 'cannot add to or diminish the rights and obligations provided in the covered agreements'."³⁴

1.4.5 Relationship with other WTO Agreements

29. In *US – Carbon Steel*, the Panel considered that it saw no reason to differentiate between injury determination in a safeguard investigation and a determination of a likelihood of continuation or recurrence of subsidization. See paragraph 19 above.

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³⁰ Appellate Body Report, *US – Carbon Steel*, para. 105.

³¹ Appellate Body Report, *US – Carbon Steel*, paras. 92-97.

³² (footnote original) Panel Report, paras. 8.27-8.30.

³³ Appellate Body Report, *US – Carbon Steel*, paras. 64-65.

³⁴ Appellate Body Report, *US – Carbon Steel*, para. 91.