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The provisions of Articles XXII and XXIII of GATT 1994 as elaborated and applied by the Dispute Settlement Understanding shall apply to consultations and the settlement of disputes under this Agreement, except as otherwise specifically provided herein.¹

1.2 Standard of review under the SCM Agreement

1. In *US – Lead and Bismuth II*, the United States claimed that under the SCM Agreement, the standards of review as set forth in Article 17.6 of the Anti-Dumping Agreement applied by virtue of a Ministerial Declaration which states that "[the] *Ministers recognize*, with respect to dispute settlement pursuant to the Agreement on Implementation of Article VI of GATT 1994 or Part V of the Agreement on Subsidies and Countervailing Measures, the need for the consistent resolution of disputes arising from anti-dumping and countervailing duty measures." Both the Panel and the Appellate Body rejected the United States' argument.² The Appellate Body opined that the Declaration is couched in hortatory language and does not specify any particular action to be taken or any particular standards of review to be applied. In its finding, the Appellate Body noted the provisions of Article 30 and concluded that the SCM Agreement does not "contain any 'special or additional rules' on the standard of review to be applied by panels."³

2. The Appellate Body in *US – Countervailing Duty Investigation on DRAMs* considered that, beyond SCM Agreement Article 12, which specifies in paragraph 2 that a decision of the investigating authority as to the existence of a subsidy "can only be based on" evidence on the record of that agency, it saw nothing in the SCM Agreement or the DSU which would impose upon an investigating authority a particular standard for the evidence supporting its entrustment or direction finding:

"Article 12 of the *SCM Agreement*, entitled 'Evidence', specifies in paragraph 2 that a decision of the investigating authority as to the existence of a subsidy 'can only be based on' evidence on the record of that agency; this applies equally to evidence used to support a finding of a financial contribution under Article 1.1(a)(1)(iv). Beyond this requirement, however, we see no basis in the *SCM Agreement* or in the DSU to impose upon an investigating authority a particular standard for the evidence supporting its finding of entrustment or direction."⁴

3. On this basis, the Appellate Body in *US – Countervailing Duty Investigation on DRAMs* found that the Panel properly examined whether the DOC's evidence "could support its conclusion" and that the Panel did not err in finding that "the evidence underlying the USDOC's finding of entrustment or direction must be 'probative and compelling,' to the extent the Panel understood these terms to require only that the evidence demonstrate entrustment or direction."⁵

¹ In Marrakesh, the Ministerial Conference adopted a Declaration on Dispute Settlement pursuant to the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 or Part V of the Agreement on Subsidies and Countervailing Measures.

² Panel Report, *US – Lead and Bismuth II*, paras. 6.17-6.19; Appellate Body Report, *US – Lead and Bismuth II*, paras. 49-51.

³ Appellate Body Report, *US – Lead and Bismuth II*, para. 45.

⁴ Appellate Body Report, *US – Countervailing Duty Investigation on DRAMs*, para. 138.

⁵ Appellate Body Report, *US – Countervailing Duty Investigation on DRAMs*, para. 140.

4. In light of such clarification from the Appellate Body, the Panel in *Japan – DRAMs (Korea)* stated:

"[W]e shall not be requiring the JIA's finding of entrustment or direction to have been based on a 'probative and compelling' standard of evidence. Rather, we shall consider whether or not the JIA's evidence could support its conclusion."⁶

5. At issue in *US – Carbon Steel (India) (Article 21.5 - India)* was a Section 129 Determination made by the USDOC following DSB findings in the original dispute settlement proceedings. One of India's arguments was that the USDOC had erred by not taking into account the CVD rates agreed to during domestic judicial review proceedings before the USCIT. In this regard, the Panel disagreed with India's argument that the USDOC's failure to take such previously agreed rates into account in its calculations in the Section 129 Determination created a conflict between domestic judicial review provided for under Article 23 of the SCM Agreement and the WTO dispute settlement proceedings referred to under its Article 30. The Panel stated:

"India's argument is that condoning the USDOC's approach would prevent Members from initiating WTO dispute settlement proceedings in parallel with legal actions taken by companies in domestic judicial proceedings. First, the newly determined rates do not impact the imports already liquidated based on the settled rates. In this regard, we recall again that the United States argues that it gave full effect to the *Amended Final Results* and that entries liquidated based on the settled rates are not affected by the newly determined rates. India does not contest this point, which we consider sufficient to safeguard the meaningfulness of domestic court proceedings under Article 23 of the SCM Agreement under the specific circumstances of this case. Second, we see the merits of the United States' argument that accepting India's interpretation would limit the ability of an investigating authority to fully implement DSB recommendations if it was required to modify the results of such implementation based on prior rates determined pursuant to negotiated settlements in domestic court proceedings. This result is unwarranted and would lead to absurd consequences in situations where the newly determined CVDs pursuant to the Section 129 redetermination are lower than the previously agreed rates in domestic proceedings. We further note that nothing would prevent interested parties from challenging the consistency of the duties levied pursuant to the Section 129 redetermination before domestic courts in the United States, if they believe that they are inconsistent with US law. Therefore, we fail to see how the approach followed by the USDOC in the Section 129 proceedings sets up a conflict between Articles 23 and 30 of the SCM Agreement."⁷

6. In *US – Anti-Dumping and Countervailing Duties (Korea)*, the Panel began by noting that the standard of review is the criterion by which a panel examines the consistency of a challenged measure with a Member's obligations under the WTO covered agreements.⁸ The Panel further referred to the importance of Articles 3.2 and 11 of the DSU in outlining a panel's standard of review:

"A panel's function under Article 11 to make an 'objective assessment' embraces both factual and legal aspects of a panel's examination of the 'matter'. We also note the clarification in Article 3.2 of the DSU that '[r]ecommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered Agreements'. "⁹

7. The Panel subsequently addressed the role of the special standard of review in Article 17.6(i) of the Anti-Dumping Agreement in defining when investigating authorities can be considered to have acted inconsistently with the Anti-Dumping Agreement. The Panel also noted that, as both the Anti-Dumping Agreement and the SCM Agreement envisage a review of measures in the form of agency action, panels under both agreements would be accorded a degree of deference in reviewing such actions:

⁶ Panel Report, *Japan – DRAMs (Korea)*, para. 7.78.

⁷ Panel Report, *US – Carbon Steel (India) (Article 21.5 - India)*, para. 7.437.

⁸ Panel Report, *US – Anti-Dumping and Countervailing Duties (Korea)*, para. 7.8.

⁹ Panel Report, *US – Anti-Dumping and Countervailing Duties (Korea)*, para. 7.10.

"Although the text of Article 17.6(i) is couched in terms of an obligation upon WTO panels, we consider that 'the provision, at the same time, *in effect* defines when investigating authorities can be considered to have acted inconsistently with the Anti-Dumping Agreement in the course of their 'establishment' and 'evaluation' of the relevant facts'. Only if an investigating authority's 'establishment of the facts' is 'proper' and its 'evaluation of those facts' is 'unbiased and objective' can it successfully withstand the scrutiny of a WTO panel under Article 17.6(i). These requirements are applicable to all aspects of an investigating authority's conduct and to all stages of an investigation.

While different provisions may apply to the examination of claims under the Anti-Dumping Agreement and the SCM Agreement, we note that both agreements envisage a review of measures in the form of agency action, i.e. determinations made by the competent authorities of WTO Members. In terms of the *degree of deference* to be accorded in reviewing agency determinations, our tasks under the two covered agreements are, therefore, not entirely dissimilar."¹⁰

8. In the Panel's view, the exact standard of review to be applied by a panel in examining agency determinations is a function of the substantive provisions of the covered agreements invoked in a particular dispute, as well as the specific claims raised by the complainant. The "objective assessment" to be made by a panel reviewing an investigating authority's determination is thus enabled and informed by the explanation provided by the authority:

"The obligation upon panels to make an 'objective assessment' of the 'matter' and to not engage in a *de novo* review has an important corollary. For purposes of review of their WTO-consistency, competent authorities must support their determinations with explanations establishing that they have discharged the specific obligations imposed by the provisions of the covered agreements that are alleged to be infringed. The 'objective assessment' to be made by a panel reviewing an investigating authority's determination is thus enabled and informed by the explanation provided by an authority.

Whether the explanation provided by a competent authority is sufficiently 'reasoned and adequate' for purposes of establishing compliance with the relevant WTO obligations will depend *inevitably* upon the specific facts and circumstances of a given case. Importantly, the exact standard of review to be applied by a panel in examining agency determinations is a 'function of the substantive provisions of the specific covered Agreements that are at issue in the dispute' as well as the 'specific claim(s) put forth by a complainant' in a given case."¹¹

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¹⁰ Panel Report, *US – Anti-Dumping and Countervailing Duties (Korea)*, paras. 7.13-7.14.

¹¹ Panel Report, *US – Anti-Dumping and Countervailing Duties (Korea)*, paras. 7.16-7.17.