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1.1 Text of Article 23

Article 23

Judicial Review

Each Member whose national legislation contains provisions on countervailing duty measures shall maintain judicial, arbitral or administrative tribunals or procedures for the purpose, inter alia, of the prompt review of administrative actions relating to final determinations and reviews of determinations within the meaning of Article 21. Such tribunals or procedures shall be independent of the authorities responsible for the determination or review in question, and shall provide all interested parties who participated in the administrative proceeding and are directly and individually affected by the administrative actions with access to review.

1.2 Anti-Dumping Agreement

1. As the text of Article 23 of the SCM Agreement largely parallels the text of Article 13 of the Anti-Dumping Agreement, see also the Section on that Article of the Anti-Dumping Agreement.

1.3 General

2. In *US – Countervailing and Anti-Dumping Measures (China)*, the Panel, in the process of interpreting and applying Article X:3(b) of the GATT 1994, stated that:

"Article 23 of the SCM Agreement explicitly guarantees access to judicial review to 'all interested parties who participated in the administrative proceeding and are directly and individually affected by the outcome'. The neutral wording of Article 23 confirms that such interested parties may well include domestic interested parties who would seek to challenge a decision by an administrative agency that is beneficial to the exporters in a particular case."¹

3. The Panel in *Mexico – Olive Oil* noted that certain provisions of the SCM Agreement leave considerable discretion to Members to define their own procedures:

"We also note that other provisions in the *SCM Agreement* leave considerable discretion to Members to define their own procedures; e.g. Articles 12, 14 and 23. This leads us to believe that, in general, unless a specific procedure is set forth in the *Agreement* the precise procedures for how investigating authorities will implement those obligations are left to the Members to decide."²

4. 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

¹ Panel Report, *US – Countervailing and Anti-Dumping Measures (China)*, fn 454.

² Panel Report, *Mexico – Olive Oil*, fn 63.

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."³

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³ Panel Report, *US – Carbon Steel (India)* (Article 21.5 - India), para. 7.437.