

1 ARTICLE 12	1
1.1 Text of Article 12.....	1
1.2 Article 12.....	3
1.2.1 Agreement on Subsidies and Countervailing Measures (SCM Agreement).....	3
1.3 Article 12.1.....	3
1.3.1 General	3
1.3.2 Obligation to notify "interested parties known to the investigating parties to have an interest" in the investigation	3
1.3.3 Article 12.1.1	4
1.3.3.1 General	4
1.3.3.2 Article 12.1.1(iv): "a summary of the factors on which the allegation of injury is based".....	4
1.4 Article 12.2.....	5
1.4.1 General	5
1.4.2 Article 12.2.1	5
1.4.3 Article 12.2.2	5
1.5 Relationship with other provisions.....	10
1.5.1 General	10
1.5.2 Article 3	10
1.5.3 Article 5	11
1.5.4 Article 6	11
1.5.5 Article 15.....	11
1.5.6 Article 17.....	11
1.5.7 Article 1, 9, and 18 of the Anti-Dumping Agreement and Article VI:1 of the GATT 1994	11

1 ARTICLE 12

1.1 Text of Article 12

Article 12

Public Notice and Explanation of Determinations

12.1 When the authorities are satisfied that there is sufficient evidence to justify the initiation of an anti-dumping investigation pursuant to Article 5, the Member or Members the products of which are subject to such investigation and other interested parties known to the investigating authorities to have an interest therein shall be notified and a public notice shall be given.

12.1.1 A public notice of the initiation of an investigation shall contain, or otherwise make available through a separate report²³, adequate information on the following:

*(footnote original)*²³ Where authorities provide information and explanations under the provisions of this Article in a separate report, they shall ensure that such report is readily available to the public.

- (i) the name of the exporting country or countries and the product involved;
- (ii) the date of initiation of the investigation;
- (iii) the basis on which dumping is alleged in the application;
- (iv) a summary of the factors on which the allegation of injury is based;
- (v) the address to which representations by interested parties should be directed;
- (vi) the time-limits allowed to interested parties for making their views known.

12.2 Public notice shall be given of any preliminary or final determination, whether affirmative or negative, of any decision to accept an undertaking pursuant to Article 8, of the termination of such an undertaking, and of the termination of a definitive anti-dumping duty. Each such notice shall set forth, or otherwise make available through a separate report, in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities. All such notices and reports shall be forwarded to the Member or Members the products of which are subject to such determination or undertaking and to other interested parties known to have an interest therein.

12.2.1 A public notice of the imposition of provisional measures shall set forth, or otherwise make available through a separate report, sufficiently detailed explanations for the preliminary determinations on dumping and injury and shall refer to the matters of fact and law which have led to arguments being accepted or rejected. Such a notice or report shall, due regard being paid to the requirement for the protection of confidential information, contain in particular:

- (i) the names of the suppliers, or when this is impracticable, the supplying countries involved;
- (ii) a description of the product which is sufficient for customs purposes;
- (iii) the margins of dumping established and a full explanation of the reasons for the methodology used in the establishment and comparison of the export price and the normal value under Article 2;
- (iv) considerations relevant to the injury determination as set out in Article 3;
- (v) the main reasons leading to the determination.

12.2.2 A public notice of conclusion or suspension of an investigation in the case of an affirmative determination providing for the imposition of a definitive duty or the acceptance of a price undertaking shall contain, or otherwise make available through a separate report, all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures or the acceptance of a price undertaking, due regard being paid to the requirement for the protection of confidential information. In particular, the notice or report shall contain the information described in subparagraph 2.1, as well as the reasons for the acceptance or rejection of relevant arguments or claims made by the exporters and importers, and the basis for any decision made under subparagraph 10.2 of Article 6.

12.2.3 A public notice of the termination or suspension of an investigation following the acceptance of an undertaking pursuant to Article 8 shall include, or otherwise make available through a separate report, the non-confidential part of this undertaking.

12.3 The provisions of this Article shall apply *mutatis mutandis* to the initiation and completion of reviews pursuant to Article 11 and to decisions under Article 10 to apply duties retroactively.

1.2 Article 12

1.2.1 Agreement on Subsidies and Countervailing Measures (SCM Agreement)

1. As the text of Article 22 of the SCM Agreement parallels the text of Article 12 of the Anti-Dumping Agreement, see also the Section on that Article of the SCM Agreement.

1.3 Article 12.1

1.3.1 General

2. In *Guatemala – Cement II*, Mexico argued that Guatemala had acted inconsistently with the requirements of Article 12.1 by failing to publish a notice of initiation and notify Mexico and its exporter when the Guatemalan authority was satisfied that there was sufficient evidence to justify the initiation of an investigation. The Panel clarified the meaning of Article 12.1:

"[T]his provision can most reasonably be read to require notification and public notice once a Member has decided to initiate an investigation. This interpretation is confirmed by the fact that the public notice to be provided is a 'notice of initiation of an investigation'. We can conceive of no logical reason why the *AD Agreement* would require a Member to publish a notice of the initiation of an investigation *before* the decision had been taken that such an investigation should be initiated."¹

3. The Panel further rejected Mexico's argument that Guatemala was in violation of Article 12.1 by failing to satisfy itself as to the sufficiency of the evidence before giving notice of initiation, stating:

"Given the function and context of Article 12.1 in the *AD Agreement*, we interpret this provision as imposing a procedural obligation on the investigating agency to publish a notice and notify interested parties after it has taken a decision that there is sufficient evidence to proceed with an initiation. The Panel is of the view that Article 12.1 is not concerned with the substance of the decision to initiate an investigation, which is dealt with in Article 5.3. By issuing a public notice of initiation in the case before us, the Guatemalan authorities complied with their procedural obligation under Article 12.1 to notify known interested parties and publish a public notice after they had decided to initiate an investigation. Whether or not Guatemala was justified in initiating an investigation on the basis of the evidence before it is an issue governed by Article 5.3."²

4. The Panel in *Argentina – Poultry Anti-Dumping Duties* rejected the argument that by fulfilling the requirement to publish a notice of initiation of an investigation, a Member has fulfilled the obligation to notify. According to the Panel, Article 12.1 clearly imposes two separate obligations, one to notify and another to give public notice, and it considered that these separate obligations "must both be fulfilled in any given investigation".³

1.3.2 Obligation to notify "interested parties known to the investigating parties to have an interest" in the investigation

5. The Panel in *Argentina – Poultry Anti-Dumping Duties* considered that, by definition, "interested parties" necessarily have an interest in the investigation and should therefore be notified if they are known to the investigating authorities. The Panel rejected the argument that

¹ Panel Report, *Guatemala – Cement II*, para. 8.87.

² Panel Report, *Guatemala – Cement II*, para. 8.89.

³ Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.133.

absence of contact details for such interested parties implied that the authority was not able to comply with its notification obligation:

"We accept that there may be circumstances in which an investigating authority may not have sufficient information to allow it to notify all interested parties known to have an interest in an investigation. In this sense, the fact that an exporter is 'known' by the investigating authority to have an interest in an investigation does not necessarily mean that sufficient details concerning the exporter are 'known' to the investigating authority such that it may make the Article 12.1 notification. In other words, knowledge of an exporter's interest in an investigation does not necessarily imply knowledge of contact details regarding that exporter. In such circumstances, however, we consider that the nature of the Article 12.1 notification obligation is such that the investigating authority should make all reasonable efforts to obtain the requisite contact details. Sending a letter with only a very general request for assistance, without specifying the exporters for which contact details are required, does not satisfy the need to make all reasonable efforts"⁴

1.3.3 Article 12.1.1

1.3.3.1 General

6. In *Guatemala – Cement II*, Guatemala argued that even if a public notice itself is insufficient, a separate report can satisfy the requirements of Article 12.1.1. The Panel disagreed on the basis of the following analysis:

"There is no reference to a separate report in the public notice of initiation. Under Article 12.1.1, it is the 'public notice', and not the Member, that must 'make available through a separate report', certain information. We take this to mean that the public notice must at a minimum refer to a separate report. This conclusion is logical in that the separate report is a substitute for certain elements of the public notice and thus should perform a notice function comparable to that of the public notice itself. If there were no reference to a separate report in the public notice, how would the public and the interested parties concerned become aware of its existence? If the public and interested parties do not know of the existence of the report, how can it be considered that the required information was properly made available to them?

In support of its proposition that in order to fulfil the requirements of Article 12.1.1, the public notice must, at a minimum, refer to a separate report, the Panel referred to footnote 23 of the *Anti-Dumping Agreement*, and stated that "[i]t cannot be said that the separate report was 'readily available' to the public, if the public is not informed about where, when and how to have access to this report, leave alone if they were not even publicly informed of its existence."⁵

7. In *Guatemala – Cement II*, the Panel rejected Guatemala's argument that the alleged violations of Articles 5.5, 12.1.1 and 6.1.3, even if found to be violations, had not affected the course of the investigation, and thus: (a) the alleged violations were not harmful according to the principle of harmless error; (b) Mexico "convalidated" the alleged violations by not objecting immediately after their occurrence; and (c) the alleged violations did not cause nullification or impairment of benefits accruing to Mexico under the Anti-Dumping Agreement. See the Sections on Articles 5 and 6 of the Anti-Dumping Agreement.

1.3.3.2 Article 12.1.1(iv): "a summary of the factors on which the allegation of injury is based"

8. The Panel in *Mexico – Corn Syrup* rejected the argument that the notice of initiation of an investigation must set forth the investigating authority's conclusion regarding the relevant domestic industry, and the bases on which that conclusion was reached. The Panel stated:

⁴ Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.132.

⁵ Panel Report, *Guatemala – Cement II*, paras. 8.95-8.96.

"Article 12.1.1(iv) merely requires that the notice of initiation contain 'a *summary* of the factors on which the *allegation* of injury is based' (emphasis added). It does not require a summary of the *conclusion* of the investigating authority regarding the definition of the relevant domestic industry. Nor does it require a summary of the factors and analysis on which the investigating authority based that conclusion. Still less does it require a summary of the factors and analysis on which the investigating authority based its conclusion regarding exclusion of some producers from consideration as the relevant domestic industry. In other words, in our view, Article 12.1.1 cannot reasonably be read to require that the notice of initiation contain an explanation of the factors underlying, or the investigating authority's conclusion regarding, the definition of the relevant domestic industry."⁶

9. The Panel in *Mexico – Corn Syrup* noted that:

"[A] notice of preliminary or final determination must set forth explanations for *all* material elements of the determination. A notice of initiation, on the other hand, pursuant to Article 12.1, must set forth specific information regarding certain factors, but need not contain explanations of, or reasons for, the resolution of *all* questions of fact underlying the determination that there is sufficient evidence to justify initiation."⁷

1.4 Article 12.2

1.4.1 General

10. The Panel in *EC – Salmon (Norway)*, drawing on *EC – Bed Linen*, found that where there was a substantive inconsistency with the Anti-Dumping Agreement, it was not necessary to consider whether notice was "sufficient" under Article 12:

"We consider that, where there is a substantive inconsistency with the provisions of the AD Agreement, it is neither necessary nor appropriate to consider whether there is a violation of Article 12, as the question of whether the notice is 'sufficient' under Articles 12.2 and 12.2.2 is immaterial."⁸

1.4.2 Article 12.2.1

11. In *Guatemala – Cement II*, Article 12.2.1 was referred to as part of the context of Article 6.1. See the Section on Article 6 of the Anti-Dumping Agreement.

1.4.3 Article 12.2.2

12. Rejecting the view that Article 12.2.2 requires explanations relating to initiation of the investigation to be set out in the notice of final determination, the Panel in *EC – Bed Linen* stated:

"There is no reference to the initiation decision among the elements to be addressed in notices under Article 12.2. Moreover, in our view, it would be anomalous to interpret Article 12.2 as also requiring, in addition to the detailed information concerning the decisions of which notice is being given, explanations concerning the initiation of the investigation, of which notice has previously been given under Article 12.1. This is particularly the case with respect to elements which are not within the scope of the information to be disclosed in the notice of initiation itself."⁹

⁶ Panel Report, *Mexico – Corn Syrup*, para. 7.87.

⁷ Panel Report, *Mexico – Corn Syrup*, para. 7.103.

⁸ Panel Report, *EC – Salmon (Norway)*, para. 7.834.

⁹ Panel Report, *EC – Bed Linen*, para. 6.260.

13. The Panel in *EC – Bed Linen* concluded that "[w]e do not believe that Article 12.2.2 requires a Member to explain, in the notice of final determination, aspects of its decision to initiate the investigation in the first place."¹⁰

14. The Panel in *US – Softwood Lumber VI* saw no point in finding violations of Article 12.2.2 of the Anti-Dumping Agreement or Article 22.5 of the SCM Agreement:

"Article 22.5 of the SCM Agreement, and Article 22.4 referred to therein, are similar, and the minor textual differences are not relevant to this dispute.

As with its other overarching claims, Canada does not make specific arguments with respect to these claims. Rather, as Canada clarified in response to the Panel's questions, Canada's claims under these provisions are procedural, dealing with the content of the notices, and not with the substantive elements of the underlying USITC determination. Canada specified that the asserted requirement for a 'reasoned and adequate explanations' of the USITC's determination, which it alleges was not provided in this case, did not derive from Articles 12.2.2 and 22.5, but rather from the substantive obligations of Article 3 of the AD Agreement and Article 15 of the SCM Agreement. In our view, Canada's claims under Articles 12.2.2 of the AD Agreement and 22.5 of the SCM Agreement are thus dependent on the disposition of the specific claims of violation.

In evaluating these claims, we note that our conclusions with respect to each of the alleged substantive violations asserted by Canada rest on our examination of the USITC's published determination, which constitutes the notices provided by the United States under Article 12.2.2 of the AD Agreement and Article 22.5 of the SCM Agreement with respect to the injury determination in this case. No additional materials have been cited to us with respect to the determination for consideration in determining whether or not the USITC's determination are consistent with the relevant provisions of the Agreements. Thus, if we find no violation with respect to a particular specific claim, such a conclusion must rest on the USITC's published determination. In this circumstance, it is clear to us that no violation of Articles 12.2.2 and 22.5 could be found to exist in this case, where it is not disputed that the USITC determination accurately reflects the analysis and determination in the investigations. On the other hand, if we find a violation of a specific substantive requirement, the question of whether the notice of the determination is 'sufficient' under Article 12.2.2 of the AD Agreement or Article 22.5 of the SCM Agreement is, in our view, immaterial.

As was pointed out by the Panel in *EC – Bed Linen*:

'A notice may adequately explain the determination that was made, but if the determination was substantively inconsistent with the relevant legal obligations, the adequacy of the notice is meaningless. Further, in our view, it is meaningless to consider whether the notice of a decision that is substantively inconsistent with the requirements of the AD Agreement is, as a separate matter, insufficient under Article 12.2. A finding that the notice of an inconsistent action is inadequate does not add anything to the finding of violation, the resolution of the dispute before us, or to the understanding of the obligations imposed by the AD Agreement'.

We share the views of the *EC – Bed Linen* Panel in this respect, and adopt them as our own. In this regard, we note Canada's statement that 'as a practical matter, Canada recognizes that it would be unusual for an injury determination to either satisfy the obligations in Articles 3 and 15 but not Articles 12.2.2 and 22.5 or *vice versa*'. Canada has made no arguments to suggest that this is such an unusual case. Therefore, we will make no findings with respect to the alleged violations of Article 12.2.2 of the AD Agreement and Article 22.5 of the SCM Agreement."¹¹

¹⁰ Panel Report, *EC – Bed Linen*, para. 6.260.

¹¹ Panel Report, *US – Softwood Lumber VI*, paras. 7.39-7.42.

15. The Panel in *EC – Tube or Pipe Fittings* considered that the findings and conclusions on issues of fact and law which are to be included in the public notices, or separate report, are those considered "material" by the investigating authority:

"We understand a 'material' issue to be an issue that has arisen in the course of the investigation that must necessarily be resolved in order for the investigating authorities to be able to reach their determination. We observe that the list of topics in Article 12.2.1 is limited to matters associated with the determinations of dumping and injury, while Article 12.2.2 is more generally phrased ('all relevant information on matters of fact and law and reasons which have led to the imposition of final measures, or the acceptance of a price undertaking'). Nevertheless, the phrase 'have led to', implies those matters on which a factual or legal determination must necessarily be made in connection with the decision to impose a definitive anti-dumping duty. While it would certainly be desirable for an investigating authority to set out steps it has taken with a view to exploring possibilities of constructive remedies, such exploration is not a matter on which a factual or legal determination must necessarily be made since, at most, it might lead to the imposition of remedies other than anti-dumping duties."¹²

16. The Panel in *EC – Fasteners (China)* opined that "the nature and content of the explanation given may well differ depending on the nature of the determination or decision in question. We do not exclude that, in a situation where a relevant provision establishes detailed requirements for factual criteria that must be satisfied in order to justify a particular decision, an explanation that the party in question satisfied the relevant criteria may be sufficient under Article 12.2.2."¹³

17. The Panel in *EU – Footwear (China)* rejected the argument that the contents of the notice given under Article 12.2.2 should be judged from the perspective of the interested parties:

"The chapeau of Article 12.2.2, Article 12.2, requires the publication of 'findings and conclusions on all issues of fact and law considered material *by the investigating authorities*' (emphasis added). In our view, this is relevant context for a proper understanding of Article 12.2.2, and thus informs our understanding of what must be included in a public notice under that provision. China suggests that whether information and reasons for the acceptance or rejection of arguments must be provided in such a notice should be judged from the perspective of the interested parties. We do not agree. We consider that while an investigating authority must make innumerable decisions during the course of an anti-dumping investigation, with respect to procedural matters, investigating methods, factual considerations, and legal analysis, which may be of importance to individual interested parties, not all of these are 'material' within the meaning of Article 12.2.2. In our view, what is 'material' in this respect refers to an issue which must be resolved in the course of the investigation in order for the investigating authority to reach its determination whether to impose a definitive anti-dumping duty ... In our view, the notions of 'material' and 'relevant' in Article 12.2.2 must be judged primarily from the perspective of the actual final determination of which notice is being given, and not the entirety of the investigative process. Other provisions of the AD Agreement, notably Articles 6.1.2, 6.2, 6.4, and 6.9 address the obligations of the investigating authority to make information available to parties, disclose information, and provide opportunities for parties to defend their interests. In our view, Article 12.2.2 does not replicate these provisions, but rather, requires the investigating authority to explain its final determination, providing sufficient background and reasons for that determination, such that its reasons for concluding as it did can be discerned and are understood."¹⁴

18. The Panel in *EU – Footwear (China)* pointed out that there was no need to assess claims of violation of Article 12 of the Anti-Dumping Agreement in cases where violations of substantive provisions of that Agreement were found:

¹² Panel Report, *EC – Tube or Pipe Fittings*, para. 7.424.

¹³ Panel Report, *EC – Fasteners (China)*, para. 7.547.

¹⁴ Panel Report, *EU – Footwear (China)*, para. 7.844.

"[W]here there is a substantive inconsistency with the provisions of the AD Agreement, it is neither necessary nor appropriate to consider whether there is a violation of Article 12, as the question of whether the notice of a decision that is inconsistent with a substantive requirement of the AD Agreement is 'sufficient' under Article 12.2.2 is, in our view, immaterial."¹⁵

19. In *China – GOES*, the Appellate Body stated that the scope of the public notice obligation under Article 12.2.2 should be determined in light of the substantive determinations that an investigating authority has to make in order to impose a definitive anti-dumping measure:

"Relevant to this dispute is the requirement in Articles 12.2.2 and 22.5 that a public notice contain 'all relevant information' on 'matters of fact' 'which have led to the imposition of final measures'. With regard to 'matters of fact', these provisions do not require authorities to disclose *all* the factual information that is before them, but rather those facts that allow an understanding of the factual basis that led to the imposition of final measures. The inclusion of this information should therefore give a reasoned account of the factual support for an authority's decision to impose final measures. Moreover, we note that the obligations under Articles 12.2.2 and 22.5 come at a later stage in the process than the requirement to disclose the essential facts pursuant to Articles 6.9 and 12.8. While the disclosure of essential facts must take place 'before a final determination is made', the obligation to give public notice of the conclusion of an investigation within the meaning of Articles 12.2.2 and 22.5 is triggered once there is an affirmative determination providing for the imposition of definitive duties.

As noted in our examination of Articles 6.9 and 12.8, the imposition of final anti-dumping or countervailing duties requires that an authority finds dumping or subsidization, injury, and a causal link between the dumping or subsidization and the injury to the domestic industry. What constitutes 'relevant information on the matters of fact' is therefore to be understood in the light of the content of the findings needed to satisfy the substantive requirements with respect to the imposition of final measures under the *Anti-Dumping Agreement* and the *SCM Agreement*, as well as the factual circumstances of each case."¹⁶

20. The Appellate Body in *China – GOES* also reasoned that the purpose of the disclosure obligation under Article 12.2.2 is to inform the interested parties of relevant issues of law and fact, such that they can decide whether to resort to judicial review against the determinations of the investigating authorities:

"Articles 12.2.2 and 22.5 capture the principle that those parties whose interests are affected by the imposition of final anti-dumping and countervailing duties are entitled to know, as a matter of fairness and due process, the facts, law and reasons that have led to the imposition of such duties. The obligation of disclosure under Articles 12.2.2 and 22.5 is framed by the requirement of 'relevance', which entails the disclosure of the matrix of facts, law and reasons that logically fit together to render the decision to impose final measures. By requiring the disclosure of 'all relevant information' regarding these categories of information, Articles 12.2.2 and 22.5 seek to guarantee that interested parties are able to pursue judicial review of a final determination as provided in Article 13 of the *Anti-Dumping Agreement* and Article 23 of the *SCM Agreement*."¹⁷

21. The Panel in *China – GOES* found that the investigating authority violated Article 12.2.2 by failing to include in its public notice information pertaining to the calculation of the "all others" dumping rate:

"The decision to resort to facts available to determine the existence and the margin of dumping in relation to 'all other' exporters is one step in the process leading to the imposition of a final measure, within the meaning of Article 12.2.2 of the Anti-

¹⁵ Panel Report, *EU – Footwear (China)*, para. 7.845.

¹⁶ Appellate Body Report, *China – GOES*, paras. 256-257.

¹⁷ Appellate Body Report, *China – GOES*, para. 258.

Dumping Agreement. In the Panel's view, the final determination did not set forth 'all relevant information on matters of fact' or the 'findings ... reached on all issues of fact' supporting the conclusion that unknown, indeed non-existent, exporters refused to provide necessary information or otherwise impeded the investigation.

Further, the final determination does not set forth the relevant matters of fact, or the findings and conclusions reached on all issues of fact, leading to the conclusion the 64.8% was the appropriate anti-dumping margin for 'all other' exporters. Although the final determination states that best information available was used, including information submitted by the responding companies, it is now clear that MOFCOM applied *adverse* facts available to calculate the dumping margin. However, there is no indication of this in the final determination and it still remains unclear exactly what factual findings MOFCOM made to support a dumping of margin of 64.8%, which differs markedly from the rate calculated for the two respondent companies.

Consequently, the Panel concludes that MOFCOM did not disclose in 'sufficient detail the findings and conclusions reached on all issues of fact' or 'all relevant information on matters of fact'. Therefore, we find that China acted inconsistently with Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement."¹⁸

22. In *China – GOES*, the Panel underlined the difference between the disclosure obligation under Article 6.9 and the notice obligation under Article 12.2.2, and pointed out that Article 12.2.2 did not require a second disclosure of the same facts that had been disclosed pursuant to the obligation under Article 6.9:

"However, in contrast to Articles 12.8 of the SCM Agreement and 6.9 of the Anti-Dumping Agreement, Articles 22.5 and 12.2.2 do not provide that they allow interested parties to 'defend their interests'. Rather, the title to Articles 22 of the SCM Agreement and 12 of the Anti-Dumping Agreement, indicate that they are directed at providing the public with notice of the outcome of an investigation and providing interested parties with an explanation for the outcome reached. Although the explanations may form the basis of a party's request for review of a determination, either in domestic judicial review proceedings or at the WTO, the Panel is not convinced that Articles 22.5 and 12.2.2 necessarily require a second disclosure, this time public, of the same detailed information, such as datasets, that may have required disclosure under Articles 12.8 of the SCM Agreement and 6.9 of the Anti-Dumping Agreement."¹⁹

23. The Panel in *China – X-Ray Equipment* held that "public" within the meaning of Article 12.2.2 is a broad concept, and underlined the importance of the Article 12.2.2 public notice obligation to interested parties when they were deciding whether to challenge an investigating authority's determination through domestic judicial review mechanisms or WTO dispute settlement:

"The ability of the public to understand the findings and conclusions of the investigating authority is important, for the concept of 'public' is broad: it includes 'interested parties' within the meaning of Article 6.11 of the Anti-Dumping Agreement and, for example, consumer organizations that might be expected to have an interest in the imposition of anti-dumping measures. Article 13 of the Anti-Dumping Agreement provides for judicial review of the final determinations referred to in Article 12.2.2. In our view, the level of detail of the description of the authority's findings and conclusions must be sufficient to allow the abovementioned entities to assess the conformity of those findings and conclusions with domestic law, and avail themselves of the Article 13 judicial review mechanism where they consider it necessary. In a similar vein, we also consider that the level of detail should be sufficient to allow the relevant exporting Member to ascertain the conformity of the

¹⁸ Panel Report, *China – GOES*, paras. 7.424-7.426.

¹⁹ Panel Report, *China – GOES*, para. 7.672.

findings and conclusions with the provisions of the WTO Agreement, and to avail itself of the WTO dispute settlement procedures where it considers it necessary."²⁰

24. The Panel in *China – X-Ray Equipment* pointed out that Article 12.2.2 does not require that all "essential facts" underlying dumping calculations, or the calculations themselves, be included in the public notice.²¹

25. In terms of which arguments accepted or rejected by the investigating authority have to be identified in a public notice under Article 12.2.2, the Panel in *US – OCTG (Korea)* found as follows:

"However, we do not understand Article 12.2.2 to impose a formalistic obligation to identify each and every relevant argument and explicitly provide the reasons for accepting or rejecting each such argument. Instead, in our view, the obligation to provide reasons for rejecting or accepting arguments will be satisfied if the exporter or importer could clearly understand how its arguments were treated by the investigating authority from the explanations given by the investigating authority in resolving the issue to which they pertain. We now turn to the issue before us."²²

1.5 Relationship with other provisions

1.5.1 General

26. In *Guatemala – Cement II*, the Panel considered it unnecessary to examine Mexico's claim of a violation of Articles 12.2 and 12.2.2 because "the issue of Guatemala's compliance with the transparency obligations deriving from its decision to impose definitive anti-dumping measures on imports of cement from Mexico would only be relevant if the decision to impose the measure itself had been consistent with the *AD Agreement*."²³

27. The Panel in *US – Softwood Lumber VI* held a similar view, considering that if it were to find no violation with respect to a particular specific claim, such a conclusion would be based on the USITC's published determination which was then *ipso facto* sufficient. On the contrary, the Panel considered that if it did find a violation of a specific substantive requirement, the question of whether the notice of the determination was "sufficient" under Article 12.2.2 of the Anti-Dumping Agreement would be immaterial:

1.5.2 "In evaluating these claims, we note that our conclusions with respect to each of the alleged substantive violations asserted by Canada rest on our examination of the USITC's published determination, which constitutes the notices provided by the United States under Article 12.2.2 of the *AD Agreement* and Article 22.5 of the *SCM Agreement* with respect to the injury determination in this case. No additional materials have been cited to us with respect to the determination for consideration in determining whether or not the USITC's determination are consistent with the relevant provisions of the *Agreements*. Thus, if we find no violation with respect to a particular specific claim, such a conclusion must rest on the USITC's published determination. In this circumstance, it is clear to us that no violation of Articles 12.2.2 and 22.5 could be found to exist in this case, where it is not disputed that the USITC determination accurately reflects the analysis and determination in the investigations. On the other hand, if we find a violation of a specific substantive requirement, the question of whether the notice of the determination is 'sufficient' under Article 12.2.2 of the *AD Agreement* or Article 22.5 of the *SCM Agreement* is, in our view, immaterial."²⁴ **Article 3**

28. In *Thailand – H-Beams*, the Appellate Body referred to Article 12 in interpreting Article 3.1. See the Section on Article 3 of the Anti-Dumping Agreement.

²⁰ Panel Report, *China – X-Ray Equipment*, para. 7.459.

²¹ Panel Report, *China – X-Ray Equipment*, paras. 7.465-7.466.

²² Panel Report, *US – OCTG (Korea)*, para. 7.301.

²³ Panel Report, *Guatemala – Cement II*, para. 8.291. See also Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.207.

²⁴ Panel Report, *US – Softwood Lumber VI*, para. 7.41.

29. The Panel in *EC – Bed Linen*, after finding a violation of Article 3.4 by the European Communities, found it "neither necessary nor appropriate" to make a finding with respect to a claim of inadequate notice under Article 12.2.2. The Panel held that while a notice may adequately explain the determination that was made, the adequacy of the notice is nevertheless meaningless where the determination was substantively inconsistent with the relevant legal obligations. Furthermore, even if the notice itself was inconsistent with the Anti-Dumping Agreement, such a finding "does not add anything to the finding of violation, the resolution of the dispute before us, or to the understanding of the obligations imposed by the *AD Agreement*."²⁵

1.5.3 Article 5

30. The Panel in *Guatemala – Cement II* touched on the relationship between Articles 5.3 and 12.1. See paragraph 3 above.

31. The Panel in *Thailand – H-Beams* compared the notification requirements under Articles 5.5 and 12. See the Section on Article 5 of the Anti-Dumping Agreement.

1.5.4 Article 6

32. The Panel in *Argentina – Ceramic Tiles* referred to Articles 6.5 and Article 12 of the Anti-Dumping Agreement as support for its conclusion that an investigating authority may rely on confidential information in making determinations while respecting its obligation to protect the confidentiality of that information. See the Section on Article 6 of the Anti-Dumping Agreement.

1.5.5 Article 15

33. The Panel in *EC – Tube or Pipe Fittings* considered that while it would certainly be desirable for an investigating authority to set out the steps it has taken with a view to exploring the possibilities for constructive remedies, but that "such exploration is not a matter on which a factual or legal determination must necessarily be made since, at most, it might lead to the imposition of remedies other than anti-dumping duties".²⁶ The Panel concluded that the elements of Article 15 were not of a "material" nature and thus did not consider that "the European Communities erred by not treating these elements as "material " within the meaning of that term used in Article 12 and [we] thus do not view it as having erred by not having included these in its published final determination".²⁷

1.5.6 Article 17

34. In *Thailand – H-Beams*, the Appellate Body referred to Article 12 in interpreting Articles 17.5 and 17.6. See the Section on Article 3 of the Anti-Dumping Agreement.

1.5.7 Article 1, 9, and 18 of the Anti-Dumping Agreement and Article VI:1 of the GATT 1994

35. In *Guatemala – Cement II*, the Panel found that the subject anti-dumping duty order of Guatemala was inconsistent with several articles of the Anti-Dumping Agreement, including Article 12. The Panel then opined that that Mexico's claims under other articles of the Anti-Dumping Agreement and Article VI:1 of the GATT 1994 were "dependent claims, in the sense that they depend entirely on findings that Guatemala has violated other provisions of the *AD Agreement*."²⁸ In light of this dependent nature of Mexico's claim, the Panel considered it not necessary to address these claims.

Current as of: December 2023

²⁵ Panel Report, *EC – Bed Linen*, para. 6.259. See also Panel Reports, *Mexico – Corn Syrup* (Article 21.5 – US), para. 6.40; and *Argentina – Poultry Anti-Dumping Duties*, para. 7.293.

²⁶ Panel Report, *EC – Tube or Pipe Fittings*, para. 7.424.

²⁷ Panel Report, *EC – Tube or Pipe Fittings*, para. 7.425.

²⁸ Panel Report, *Guatemala – Cement II*, para. 8.296.