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## **1 ARTICLE 12**

### **1.1 Text of Article 12**

#### ***Article 12***

##### *Evidence*

12.1 Interested Members and all interested parties in a countervailing duty investigation shall be given notice of the information which the authorities require and ample opportunity to present in writing all evidence which they consider relevant in respect of the investigation in question.

12.1.1 Exporters, foreign producers or interested Members receiving questionnaires used in a countervailing duty investigation shall be given at least 30 days for reply.<sup>40</sup> Due consideration should be given to any request

for an extension of the 30-day period and, upon cause shown, such an extension should be granted whenever practicable.

*(footnote original)*<sup>40</sup> As a general rule, the time-limit for exporters shall be counted from the date of receipt of the questionnaire, which for this purpose shall be deemed to have been received one week from the date on which it was sent to the respondent or transmitted to the appropriate diplomatic representatives of the exporting Member or, in the case of a separate customs territory Member of the WTO, an official representative of the exporting territory.

12.1.2 Subject to the requirement to protect confidential information, evidence presented in writing by one interested Member or interested party shall be made available promptly to other interested Members or interested parties participating in the investigation.

12.1.3 As soon as an investigation has been initiated, the authorities shall provide the full text of the written application received under paragraph 1 of Article 11 to the known exporters<sup>41</sup> and to the authorities of the exporting Member and shall make it available, upon request, to other interested parties involved. Due regard shall be paid to the protection of confidential information, as provided for in paragraph 4.

*(footnote original)*<sup>41</sup> It being understood that where the number of exporters involved is particularly high, the full text of the application should instead be provided only to the authorities of the exporting Member or to the relevant trade association who then should forward copies to the exporters concerned.

12.2. Interested Members and interested parties also shall have the right, upon justification, to present information orally. Where such information is provided orally, the interested Members and interested parties subsequently shall be required to reduce such submissions to writing. Any decision of the investigating authorities can only be based on such information and arguments as were on the written record of this authority and which were available to interested Members and interested parties participating in the investigation, due account having been given to the need to protect confidential information.

12.3 The authorities shall whenever practicable provide timely opportunities for all interested Members and interested parties to see all information that is relevant to the presentation of their cases, that is not confidential as defined in paragraph 4, and that is used by the authorities in a countervailing duty investigation, and to prepare presentations on the basis of this information.

12.4 Any information which is by nature confidential (for example, because its disclosure would be of significant competitive advantage to a competitor or because its disclosure would have a significantly adverse effect upon a person supplying the information or upon a person from whom the supplier acquired the information), or which is provided on a confidential basis by parties to an investigation shall, upon good cause shown, be treated as such by the authorities. Such information shall not be disclosed without specific permission of the party submitting it.<sup>42</sup>

*(footnote original)*<sup>42</sup> Members are aware that in the territory of certain Members disclosure pursuant to a narrowly-drawn protective order may be required.

12.4.1 The authorities shall require interested Members or interested parties providing confidential information to furnish non-confidential summaries thereof. These summaries shall be in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence. In exceptional circumstances, such Members or parties may indicate that such information is not susceptible of summary. In such exceptional circumstances, a statement of the reasons why summarization is not possible must be provided.

- 12.4.2 If the authorities find that a request for confidentiality is not warranted and if the supplier of the information is either unwilling to make the information public or to authorize its disclosure in generalized or summary form, the authorities may disregard such information unless it can be demonstrated to their satisfaction from appropriate sources that the information is correct.<sup>43</sup>

*(footnote original)*<sup>43</sup> Members agree that requests for confidentiality should not be arbitrarily rejected. Members further agree that the investigating authority may request the waiving of confidentiality only regarding information relevant to the proceedings.

12.5 Except in circumstances provided for in paragraph 7, the authorities shall during the course of an investigation satisfy themselves as to the accuracy of the information supplied by interested Members or interested parties upon which their findings are based.

12.6 The investigating authorities may carry out investigations in the territory of other Members as required, provided that they have notified in good time the Member in question and unless that Member objects to the investigation. Further, the investigating authorities may carry out investigations on the premises of a firm and may examine the records of a firm if (a) the firm so agrees and (b) the Member in question is notified and does not object. The procedures set forth in Annex VI shall apply to investigations on the premises of a firm. Subject to the requirement to protect confidential information, the authorities shall make the results of any such investigations available, or shall provide disclosure thereof pursuant to paragraph 8, to the firms to which they pertain and may make such results available to the applicants.

12.7 In cases in which any interested Member or interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation, preliminary and final determinations, affirmative or negative, may be made on the basis of the facts available.

12.8 The authorities shall, before a final determination is made, inform all interested Members and interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures. Such disclosure should take place in sufficient time for the parties to defend their interests.

12.9 For the purposes of this Agreement, "interested parties" shall include:

- (i) an exporter or foreign producer or the importer of a product subject to investigation, or a trade or business association a majority of the members of which are producers, exporters or importers of such product; and
- (ii) a producer of the like product in the importing Member or a trade and business association a majority of the members of which produce the like product in the territory of the importing Member.

This list shall not preclude Members from allowing domestic or foreign parties other than those mentioned above to be included as interested parties.

12.10 The authorities shall provide opportunities for industrial users of the product under investigation, and for representative consumer organizations in cases where the product is commonly sold at the retail level, to provide information which is relevant to the investigation regarding subsidization, injury and causality.

12.11 The authorities shall take due account of any difficulties experienced by interested parties, in particular small companies, in supplying information requested, and shall provide any assistance practicable.

12.12 The procedures set out above are not intended to prevent the authorities of a Member from proceeding expeditiously with regard to initiating an investigation, reaching preliminary or final determinations, whether affirmative or negative, or from applying provisional or final measures, in accordance with relevant provisions of this Agreement.

## 1.2 General

1. The Panel in *Mexico – Olive Oil* noted that certain provisions of the SCM Agreement, including Article 12, 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."<sup>1</sup>

2. As the text of Article 12 of the SCM Agreement largely parallels the text of Article 6 of the Anti-Dumping Agreement, see also the Section on that Article of the Anti-Dumping Agreement.

## 1.3 Article 12.1

### 1.3.1 Scope of Article 12.1

3. The Panel in *EU – PET (Pakistan)* pointed out that "the SCM Agreement places strong emphasis on the provision of written information and the reduction of evidence given orally to writing, and also provides that '[a]ny decision of the investigating authorities can only be based on such information and arguments as were on the written record of this authority'."<sup>2</sup>

4. The Panel in *China – Broiler Products (Article 21.5 – US)* provided the following guidance regarding the nature, timing and form of the notice requirement under Article 12.1:

"First, Articles 6.1 and 12.1 require an investigating authority to actively provide something (in this instance 'notice of the information which the authorities require') to all interested parties. This obligation entails reaching out and making all interested parties aware of the information in question. Thus, it cannot be satisfied by merely providing access to something that conveys the required notice.

Second, Articles 6.1 and 12.1 do not set out a specific time-frame for the giving of notice, but they do link the notice requirement with the obligation to give 'ample opportunity' to present relevant written evidence. The timing of 'notice' must, therefore, be understood in that specific context: sufficiently 'in advance' that an interested parties will be able to prepare and present written evidence within the deadlines set by the investigating authority for submission of written evidence on, inter alia, the matters as to which information was sought.<sup>3</sup>

Third, Articles 6.1 and 12.1 do not set out specific requirements for the form of the notice or the modalities by which notice is to be given. Form and modalities remain within the discretion of the investigating authority. There might be any number of ways for an investigating authority to give notice. In this regard, we are conscious of the concerns raised in respect of the administrative burden associated with giving notice of the information required to all interested parties. However, our interpretation does not require that an investigating authority give that notice immediately, or in individual communications to all other interested parties in each instance. An investigating authority may choose a manner of giving the required notice that imposes less of an administrative burden."<sup>4</sup>

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<sup>1</sup> Panel Report, *Mexico – Olive Oil*, fn 63.

<sup>2</sup> Panel Report, *EU – PET (Pakistan)*, para. 7.174.

<sup>3</sup> (*footnote original*) In respect of the party from whom information is required, the notice of the information required is given through the information request itself. The notice to all other interested parties from whom information is not required might be given later, possibly even as late as after the information is received, if this is sufficiently early to allow other interested parties enough time to submit written evidence.

<sup>4</sup> Panel Report, *China – Broiler Products (Article 21.5 – US)*, paras. 7.229-7.231.

5. The Panel in *China – Broiler Products (Article 21.5 – US)* explained the content of the notice that is required under Article 12.1, as follows:

"The required content of the notice follows from the requirement that notice is to be given 'of the information which the authorities require', read in the light of the second half of the provision. The particular information that an investigating authority requires from interested parties thus will determine what the notice must convey, and will vary with the circumstances. At a minimum, a notice must convey an understanding of what information is required in order to enable all interested parties to prepare and submit relevant written evidence regarding the matters as to which information is sought.

The obligation is to give notice of the information required; it is not an obligation to disclose the information request itself. Thus, an outline or description of the information required may well suffice to give the requisite notice. If an investigating authority issues a questionnaire to a particular interested party, sending or making available (to the extent this is made known to all other interested parties) this questionnaire to all other interested parties would certainly be one way of giving notice of the information the investigating authority requires. It is not, however, what the provisions necessarily require: nothing in Articles 6.1 and 12.1 specifically requires an investigating authority to provide to all other interested parties the actual questions or requests issued to a particular interested party, although this might be effective and good practice in this context.

Articles 6.1 and 12.1 require notice of the information required by the investigating authority to enable interested parties to prepare and submit relevant written evidence. For this reason, a notice that informs other interested parties of the information actually submitted by the responding interested party(ies) does not, without more, constitute notice within the meaning of these provisions."<sup>5</sup>

6. The Panel in *China – Broiler Products (Article 21.5 – US)* noted that Article 12.1 does not specify the means that investigating authorities must use to give the required notice. According to the Panel:

"An investigating authority may give notice to all interested parties either individually in each instance that information is required or through more generalized means; properly worded and transmitted, a notice of initiation or verification letters might, singly or together, constitute 'notice' within the meaning of Article 6.1 of the Anti-Dumping Agreement and Article 12.1 of the SCM Agreement."<sup>6</sup>

7. Turning to the investigation at issue, the Panel in *China – Broiler Products (Article 21.5 – US)* found that the fact that MOFCOM mentioned, in the notice of initiation, that public information about the investigation would be made available at a particular location, and subsequently made available at that location a document that purported to specify the information required, did not suffice to satisfy the notice requirement of Article 12.1. The Panel reasoned:

"MOFCOM did not inform interested parties of the placing of the document allegedly conveying the notice of the information required in the public reading room. Rather, interested parties were expected 'to avail themselves of the public reading room to review themselves the public record' and thus to identify on their own the fact that a notice of the information required of Chinese producers had been given. However, under Articles 6.1 and 12.1 it is for MOFCOM to 'give' the interested parties notice – an obligation to give notice cannot be satisfied by expecting the interested parties to monitor the investigating authority to ensure they remain informed when the interested parties are not informed that that is the mechanism by which such notice will be given to them. China's position reduces the notice requirement to an obligation to make a general statement that interested parties may consult information in the public information room. The notice requirement would be stripped of its link to the information required; it would no longer be 'of the information which authorities

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<sup>5</sup> Panel Report, *China – Broiler Products (Article 21.5 – US)*, paras. 7.232-7.234.

<sup>6</sup> Panel Report, *China – Broiler Products (Article 21.5 – US)*, para. 7.251.

require'. Such 'notice' would fall short of the due process function of Articles 6.1 and 12.1. A panel may not adopt an interpretation that would render a treaty provision, or part of it, ineffective, and we do not do so in this instance."<sup>7</sup>

### **1.3.2 "information which the authorities require"**

8. In *US – Anti-Dumping and Countervailing Duties (China)*, the Panel rejected a claim under Article 12.1 because it was not convinced that the investigating authority "required" the information at issue.<sup>8</sup> The Panel further stated that:

"While it is certainly desirable that investigating authorities adopt clear positions on certain legal issues that have the potential to arise in the investigations they conduct, we are not convinced that Article 12.1 of the SCM Agreement requires them to do so with respect to any and all such issues."<sup>9</sup>

9. In *US – Anti-Dumping and Countervailing Duties (China)*, the Panel also provided the following observations on Article 12.1:

"Article 12, entitled 'Evidence', contains a series of evidentiary rules, including as to the requesting, receipt and handling of evidence by investigating authorities, the particular subject of Article 12.1 of the SCM Agreement. In this regard, the chapeau of Article 12.1 establishes two overarching requirements: that interested Members and parties be given (i) 'notice' of the information required of them by the authorities; and (ii) 'ample opportunity to present in writing all evidence which they consider relevant'. Neither of these requirements is circumscribed in any way, in terms of form or time period. In particular, the notice requirement places no limits on how, precisely, an investigating authority must request the information it requires, and thus seems to envisage different possible types of information requests. The ample opportunity requirement also contains no specific limits, and indeed extends beyond responses to requests from investigating authorities, to encompass the provision of information by an interested Member or party at its own initiative. Where an information request from an investigating authority is concerned, in our view the word 'ample' must be understood to mean 'ample' in the light of the specific nature and scope of that request, something that by its very nature can only be determined on a case-by-case basis."<sup>10</sup>

### **1.3.3 Article 12.1.1: 30-day deadline for questionnaire replies**

10. In *Mexico – Anti-Dumping Measures on Rice*, the Appellate Body addressed the scope of the obligation in Article 6.1.1 of the Anti-Dumping Agreement and 12.1.1 of the SCM Agreement:

"[T]he due process rights in Article 6 of the Anti-Dumping Agreement—which include the right to 30 days for reply to a questionnaire—'cannot extend indefinitely' but, instead, are limited by the investigating authority's need 'to "control the conduct" of its inquiry and to "carry out the multiple steps" required to reach a timely completion' of the proceeding. As such, the time-limits for completing an investigation serve to circumscribe the obligation in Article 6.1.1 to provide all interested parties 30 days to reply to a questionnaire."<sup>11</sup>

11. In *US – Anti-Dumping and Countervailing Duties (China)*, the Panel concluded that the term "questionnaires" in Article 12.1.1 refers to the initial comprehensive questionnaire (or set of questionnaires) issued by an investigating authority at or following the initiation of a countervailing

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<sup>7</sup> Panel Report, *China – Broiler Products (Article 21.5 – US)*, para. 7.252.

<sup>8</sup> Panel Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 14.146.

<sup>9</sup> Panel Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 14.147.

<sup>10</sup> Panel Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 15.23.

<sup>11</sup> Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 282. See also Appellate Body Reports, *US – Oil Country Tubular Goods Sunset Reviews*, paras. 241 and 242, and *US – Hot-Rolled Steel*, para. 73.

duty investigation, and that the 30-day deadline to respond to questionnaires stipulated in Article 12.1.1 does not apply to responses to supplemental questionnaires.<sup>12</sup>

#### 1.4 Article 12.3

12. The Panel in *China – Broiler Products (Article 21.5 – US)* underlined the interlinkage between the two obligations found in Article 12.3:

"The two obligations in Articles 6.4 and 12.3 are distinct, yet related. In particular, the second obligation concerns providing opportunities to prepare presentations 'on the basis of this information' – that is, the information that interested parties must be given timely opportunities to see. Where an investigating authority has not provided any opportunity to see relevant and non-confidential information that is used by it, it perforce cannot provide any opportunity to prepare presentations on the basis of this information. However, where an opportunity to see information is provided, it may be found to be insufficient if it is not provided in sufficient time to allow the interested parties seeing the information to prepare presentations based on it."<sup>13</sup>

13. The Panel in *China – Broiler Products (Article 21.5 – US)* rejected China's argument that unless interested parties request to see information, Article 12.3 does not impose any obligation on the interested parties:

"The fact that the 'relevance' of the information must be assessed from the perspective of the interested party does not detract from our understanding that investigating authorities must provide opportunities irrespective of a request to see the information being made. Interested parties that are not aware of the existence of certain information before the investigating authority obviously cannot make a request to see that information. Such interested parties may well be most in need of the due process protection afforded by Articles 6.4 and 12.3. Yet, a requirement for a request would render void their right to have an opportunity to see information of which they are unaware. Attributing such a meaning to a treaty provision would lead to an unreasonable result."<sup>14</sup>

14. However, the Panel also referred to evidentiary difficulties in proving a violation of Article 12.3, and stated:

"The failure to provide opportunities to see certain information is a violation by omission. There are evidentiary challenges associated with a claim based on an alleged omission. It may be difficult to prove the absence of an opportunity to see information. From an evidentiary perspective, it is therefore useful if a complainant can demonstrate, by reference to record evidence, that an interested party requested to see information that the investigating authority then failed to make available. But the absence of a request by an interested party in itself does not, as a matter of law or fact, mean that an investigating authority has satisfied its obligation to provide timely opportunities to see information under Articles 6.4 and 12.3. Viewed in context, the quotation from *EC – Fasteners (China)* relied on by China does not support its position to the contrary. The panel in that case had already observed that Article 6.4 did not require an investigating authority to 'actively disclose' information, and was addressing China's argument that 'the investigating authorities were under the obligation to provide' information even in the absence of a request. The panel rejected the view that there was any obligation to actively disclose information under Article 6.4. In this context, the statement that a 'violation of Article 6.4 would normally require a showing that the investigating authorities denied an interested party's request to see information' in our view reflects that one way of demonstrating a violation of Article 6.4 would be to show that a request to see information was

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<sup>12</sup> Panel Report, *US – Anti-Dumping and Countervailing Duties (China)*, paras. 15.15-15.49.

<sup>13</sup> Panel Report, *China – Broiler Products (Article 21.5 – US)*, para. 7.287.

<sup>14</sup> Panel Report, *China – Broiler Products (Article 21.5 – US)*, para. 7.291.

denied. This does not, however, mean that such a request (and denial) are necessary in order to demonstrate a violation of Articles 6.4 and 12.3."<sup>15</sup>

15. Regarding the scope of the obligation set forth in Article 12.3, the Panel in *China – Broiler Products (Article 21.5 – US)* stated that:

"[I]nformation 'used' within the meaning of Articles 6.4 of the Anti-Dumping Agreement and 12.3 of the SCM Agreement can be broader than facts or data relating to issues which the investigating authority is required to consider, or which it does, in fact, consider in the course of an anti-dumping or countervailing duty investigation. Whether a particular item of information is one that is 'used' by the authorities in a broader sense will depend on the facts and circumstances of each case."<sup>16</sup>

16. The Panel in *China – Broiler Products (Article 21.5 – US)* noted that Article 12.3 does not prescribe a particular method for providing timely opportunities to see all information, and pointed out that "[a]n investigating authority may proceed in any number of ways, including by making available the information in a physical or electronic reading room."<sup>17</sup>

## **1.5 Article 12.4**

17. In *US – Carbon Steel (India)*, the Panel declined to "interpret Article 14(d) [of the SCM Agreement] in a manner that would require an investigating authority to breach the confidentiality obligation provided for in Article 12.4 of the SCM Agreement."<sup>18</sup>

### **1.5.1 Article 12.4.1**

#### **1.5.1.1 General**

18. The Panel in *China – Broiler Products* underlined the significance of compliance with Article 6.5.1 of the Anti-Dumping Agreement and Article 12.4.1 of the SCM Agreement:

"The fact that there was no non-confidential summary that provided a reasonable understanding of the contents of the confidential exhibits to the Petition may have affected the respondents' ability to defend their interests before MOFCOM and the United States' ability to make claims with respect to China's compliance with its WTO obligations. This further highlights the importance of compliance with Article 6.5.1 of the Anti-Dumping Agreement and Article 12.4.1 of the SCM Agreement."<sup>19</sup>

19. The Panel in *China – GOES* noted that Article 12.4.1 of the SCM Agreement serves in ensuring transparency and allowing interested parties to gain a reasonable understanding of the essence of the confidential information:

"Although not expressly stipulated in Article 12.4.1 of the SCM Agreement ..., the Panel notes the important contribution to transparency, and to assisting parties in gaining a reasonable understanding of the substance of the confidential information, that labelling non-confidential summaries as such provides."<sup>20</sup>

20. The Panel in *China – GOES* pointed out that the standard set forth in Article 12.4.1 regarding the contents of a non-confidential summary has to be met regardless of whether an interested party contests this issue during the investigation.<sup>21</sup>

21. The Panel in *China – GOES* rejected China's argument that "the adequacy of the non-confidential summaries should be assessed in the light of the 'exceptional circumstance' that there were only two Chinese producers of GOES, making it difficult for summaries of

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<sup>15</sup> Panel Report, *China – Broiler Products (Article 21.5 – US)*, para. 7.292.

<sup>16</sup> Panel Report, *China – Broiler Products (Article 21.5 – US)*, para. 7.286.

<sup>17</sup> Panel Report, *China – Broiler Products (Article 21.5 – US)*, para. 7.278.

<sup>18</sup> Panel Report, *US – Carbon Steel (India)*, para. 7.171.

<sup>19</sup> Panel Report, *China – Broiler Products*, fn 668.

<sup>20</sup> Panel Report, *China – GOES*, footnote 231 to para. 7.224.

<sup>21</sup> Panel Report, *China – GOES*, para. 7.191. See also Panel Report, *China – Autos (US)*, para. 7.30.



aggregate data adequately to protect the confidentiality of the information".<sup>22</sup> The Panel held that, regardless of this fact, it would assess the adequacy of the non-confidential summaries by reference to the standard set forth in Article 12.4.1:

"In considering China's argument in this regard, we note that Article 12.4.1 of the SCM Agreement ... explicitly establish[es] the standard by which the sufficiency of non-confidential summaries is to be assessed, namely by reference to whether the summaries 'permit a reasonable understanding of the substance of the information submitted in confidence'. If the information is not susceptible of summary, for example because it would not be possible to summarize the information while still preserving its confidentiality, the provisions allow for an exemption to the requirement to furnish a non-confidential summary. However, if this 'exceptional circumstance' exemption is not invoked, as in this case, there is no basis to conclude that purported 'exceptional circumstances' alter the standard that applies under Articles 12.4.1 and 6.5.1. Therefore, the Panel will assess the adequacy of the non-confidential summaries by reference to whether they 'permit a reasonable understanding of the information submitted in confidence'. If they do not, the fact that there were only two Chinese producers of GOES will not alter the conclusion that China acted inconsistently with Articles 12.4.1 and 6.5.1."<sup>23</sup>

22. The Panel in *China – GOES* rejected China's argument that Article 12.4.1 would be satisfied if a non-confidential summary revealed the main point of the underlying confidential information:

"At the outset, we note certain problems with some of the summaries relied upon by China. In particular, in some instances, China's position is that a non-confidential summary has been furnished within the meaning of Articles 12.4.1 of the SCM Agreement and 6.5.1 of the Anti-Dumping Agreement when it is possible to infer the 'main point' of the confidential information from the context surrounding the redaction. In our view, this is not what is envisaged as a non-confidential summary under the SCM and Anti-Dumping Agreements. Articles 12.4.1 and 6.5.1 explicitly require the interested party furnishing the confidential information to provide a summary thereof, rather than requiring other interested parties to infer, derive and piece together a possible summary of the confidential information."<sup>24</sup>

23. The Panel in *China – GOES* stressed the importance to the interested parties' due process rights of coherence in the preparation of non-confidential summaries:

"On the one hand, the Panel notes that Articles 12.4.1 of the SCM Agreement and 6.5.1 of the Anti-Dumping Agreement do not include any requirements regarding the form a non-confidential summary must take. However, on the other hand, given the lack of cross-referencing and the mismatch between the redacted information and the purported non-confidential summaries, a respondent may be confused regarding whether the summary information is based on the same data source as the redacted information and thus represents the 'non-confidential' summary. In this sense, the due process objective of Articles 12.4.1 and 6.5.1 may be undermined, as an interested party may not be aware that the redacted information has in fact been summarized and can be contested."<sup>25</sup>

24. The Panel in *China – GOES* rejected the argument that based on the figures disclosed in a non-confidential summary, interested parties could derive much of the missing data:

"However, in relation to China's argument that, based on the formulas and numbers disclosed, interested parties could derive much of the missing data, the Panel feels it necessary to comment that this kind of process is not what is envisaged by Article 12.4.1 of the SCM Agreement ... The Articles explicitly require parties to furnish non-

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<sup>22</sup> Panel Report, *China – GOES*, para. 7.192.

<sup>23</sup> Panel Report, *China – GOES*, para. 7.193.

<sup>24</sup> Panel Report, *China – GOES*, para. 7.202.

<sup>25</sup> Panel Report, *China – GOES*, para. 7.213.

confidential summaries of any information submitted in confidence. Where other interested parties are required to derive their own summary and make educated guesses about the substance of the redacted information, the requirements of Articl[e] ... 12.4.1 are not met."<sup>26</sup>

25. In the investigation at issue in *China – Broiler Products*, the non-confidential summaries provided by the petitioning industry association had redacted the individual production figures of the petitioning companies. The Panel concluded that the conclusory statement that the standing requirement had been met fell short of replacing the underlying confidential information because it did not provide interested parties with the means to challenge whether that confidential information indeed supported such a conclusion.<sup>27</sup>

26. The Panel in *China – Broiler Products* found that the non-confidential version of the information provided in the petition for certain injury factors did not provide a reasonable understanding of the underlying confidential information "because providing year-over-year changes in percentage terms without a non-confidential summary of what constitutes the baseline does not allow a reasonable understanding of the magnitude of the change."<sup>28</sup>

#### **1.5.1.2 Summaries shall be in sufficient detail to permit a reasonable understanding of substance of confidential information**

27. The Panel in *Mexico – Olive Oil* applied Article 12.4.1 in the context of an investigation where, instead of providing non-confidential summaries of the confidential information in its submissions, a party prepared public versions thereof by simply redacting the confidential information. The Panel found:

"Where confidentiality is claimed with respect to a specific document, we consider that the provision of a public version of that document, from which confidential information has simply been removed, *may* not necessarily satisfy the requirements of Article 12.4.1. This is because what is required to be summarized pursuant to Article 12.4.1 is the confidential information. The remaining non-confidential parts of the document may not, by themselves, be sufficient to convey a 'reasonable understanding' of the substance of the confidential information that has been removed so as to constitute an adequate summarization of that information.

There may be circumstances in which the information remaining in the public version of a document may be sufficient, in itself, to provide the required summary of the confidential information. In such circumstances, no additional summary would be required. Such circumstances are likely to be limited, however, given that what the *SCM Agreement* requires is that the summary conveys a reasonable understanding of the substance of the confidential information."<sup>29</sup>

28. The Panel in *Mexico – Olive Oil* also addressed Mexico's argument that non-confidential summaries need not be provided if representatives of interested parties were provided access to the totality of the confidential information. The Panel found no textual support for Mexico's argument in Article 12.4.1 of the SCM Agreement. The Panel therefore rejected Mexico's argument, invoking the reasoning applied by a previous panel in the context of Article 6.5 of the Anti-Dumping Agreement.<sup>30</sup>

29. The Panel in *China – Autos* recalled that "prior panels have found that neither general statements unsupported by evidence, nor the possibility for interested parties to infer the 'main point' of the confidential information from the context surrounding redaction, suffice for the purposes of conforming to Articl[e] ... 12.4.1 [of the SCM Agreement]."<sup>31</sup> The Panel further explained:

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<sup>26</sup> Panel Report, *China – GOES*, para. 7.222.

<sup>27</sup> Panel Report, *China – Broiler Products*, paras. 7.55-7.57.

<sup>28</sup> Panel Report, *China – Broiler Products*, paras. 7.62-7.63.

<sup>29</sup> Panel Report, *Mexico – Olive Oil*, paras. 7.87-7.88.

<sup>30</sup> Panel Report, *Mexico – Olive Oil*, para. 7.94.

<sup>31</sup> Panel Report, *China – Autos*, para. 7.26.

"In this respect, panels have considered that an IA does not discharge its obligation to require adequate non-confidential summaries where the non-confidential version of the petition requires interested parties to 'infer, derive and piece together a possible summary of the confidential information.' Further, data gaps in non-confidential summaries may deprive respondents of a 'reasonable understanding' of the substance of the confidential information at issue."<sup>32</sup>

#### **1.5.1.3 Statement of the reasons why summarization is not possible**

30. The Panel in *Mexico – Olive Oil* found that, although the obligation to provide a statement of reasons is imposed on the interested party claiming confidentiality, Article 12.4.1 also imposes an obligation on the investigating authority to require that such a statement be provided. The Panel noted that this is consistent with the findings of various panels that have considered the equivalent provision in the Anti-Dumping Agreement (Article 6.5.1).<sup>33</sup>

31. The Panel in *Mexico – Olive Oil* also noted that a statement of reasons may only substitute for a non-confidential summary in "exceptional" circumstances. According to the Panel:

"The use of the word 'exceptional' signifies that the drafters considered that confidential information should usually be capable of being summarized. In fact, summarization of confidential information is expected to be the norm, as it is only in 'exceptional circumstances' that summarization of the confidential information will not be possible."<sup>34</sup>

32. Regarding the obligations of an investigating authority in assessing an assertion that summarization is not possible, the Panel in *Mexico – Olive Oil* found that:

"[W]hile Article 12.4.1 does not set out any specific mechanism by which an investigating authority shall evaluate an assertion that summarization is not possible, the text of Article 12.4.1 nonetheless provides a clear indication of the basis of this evaluation: the investigating authority should examine the reasons given for not summarizing the confidential information and determine whether, indeed, these reasons constitute "exceptional" circumstances. By considering the extent to which an interested Member or party has shown exceptional circumstances, an investigating authority can determine whether the interested Member or party has substantiated that summarization is not possible."<sup>35</sup>

### **1.6 Article 12.6**

#### **1.6.1 Verification meetings**

33. The Panel in *US – Countervailing Duty Investigation on DRAMs* considered the scope of application of Article 12.6, which gives Members the right to object to any verification meeting taking place within the territory of that Member. In particular, the Panel considered whether a Korean objection to the format of the verification (not to the verification itself) meant that the USDOC was precluded by Article 12.6 from carrying out the verification. According to the Panel, Article 12.6 establishes two conditions for investigating authorities to carry out investigations in the territory of other Members: "(1) the intention to carry out the investigations is notified in good time to the Member in question; and (2) that Member does not object to the investigation."<sup>36</sup> Thus, Korea's claim related to the second condition. On this issue the Panel agreed with the United States and concluded that:

"In our view, Article 12.6 establishes two conditions for investigating authorities to carry out investigations in the territory of other Members: (1) the intention to carry out the investigations is notified in good time to the Member in question; and (2) that Member does not object to the investigation. As far as the first condition is

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<sup>32</sup> Panel Report, *China – Autos*, para. 7.26.

<sup>33</sup> Panel Report, *Mexico – Olive Oil*, para. 7.89.

<sup>34</sup> Panel Report, *Mexico – Olive Oil*, para. 7.90.

<sup>35</sup> Panel Report, *Mexico – Olive Oil*, para. 7.92.

<sup>36</sup> Panel Report, *US – Countervailing Duty Investigation on DRAMs*, para. 7.404.

concerned, Korea does not question the fact that the US notified Korea of its intention to carry out an investigation in the territory of Korea. The issue at hand has to do with the second condition, *i.e.* whether Korea objected to the investigation – or whether Korea had the right to object to the format of the investigation, not to the investigation in itself.

... Korea could have prevented the investigation in its territory from taking place, but it chose not to do so. In its letter of response to the US, Korea does not object to the meetings, nor to the discretion of the DOC to meet "with whomever it wants." Since Korea did not object to the DOC's on-site investigation, the DOC's decision to proceed with that investigation is not inconsistent with Article 12.6 of the *SCM Agreement*.<sup>37</sup>

#### 1.6.2 "results"

34. The Panel in *EU – PET (Pakistan)* highlighted that if an investigating authority conducts a verification visit at a firm during a CVD investigation then the investigating authority shall provide the "results" of verification visits to the investigated firm:

"If an investigating authority conducts a verification visit at a firm during a CVD investigation, Article 12.6, in relevant part, indicates that the authority 'shall' do one of two things: (a) make the results of the verification visit available to the firm concerned; or (b) disclose such results pursuant to Article 12.8 to the firm concerned. Both options, therefore, require the provision of the 'results' of verification visits to the investigated firm."<sup>38</sup>

35. The Panel in *EU – PET (Pakistan)* continued by giving the definition of the term "results":

"Neither Article 12 of the SCM Agreement nor any other provision of the *SCM Agreement* defines the 'results' of verification visits. Moreover, this term is not defined in a relevant manner in any other covered agreement (e.g. the *Anti-Dumping Agreement*) and has not yet been extensively defined in any adopted panel or Appellate Body report. A 'result' is defined, however, as '[a] consequence, effect, or conclusion', '[t]hat which is achieved, brought about, or obtained, esp. by purposeful action', and '[t]he effect, consequence ... or outcome of some action, process, or design'. We therefore interpret the results of verification visits, for purposes of Article 12.6, as referring to what the 'outcomes' of verification visits are, *i.e.* what is achieved, brought about, or obtained via the visit. Because such outcomes are achieved particularly through 'purposeful action' and through some 'process or design', we further interpret the term 'results' as used in Article 12.6 in light of the purpose of verification visits."<sup>39</sup>

36. The Panel in *EU – PET (Pakistan)* interpreted the term "results" by virtue of the purpose of verification visits:

"Regarding that purpose, it will be recalled that Article 12.6 of the SCM Agreement indicates that '[t]he procedures set forth in Annex VI shall apply to' verification visits. Annex VI is entitled 'Procedures for on-the-spot Investigations pursuant to Paragraph 6 of Article 12'. Paragraph 7 explains that 'the main purpose of the on-the-spot investigation is to verify information provided or to obtain further details'. It further explains that 'it should be standard practice prior to the visit to advise the firms concerned of the general nature of the information to be verified and of any further information which needs to be provided, though this should not preclude requests to be made on the spot for further details to be provided in the light of information obtained.' The word 'verify' is defined as '[t]o prove to be true; to confirm or establish the truth or truthfulness of; to authenticate', '[s]how to be true by demonstration or evidence; confirm the truth or authenticity of; substantiate', and '[a]scertain or test the accuracy or correctness of, esp. by examination or comparison of data ...

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<sup>37</sup> Panel Report, *US – Countervailing Duty Investigation on DRAMs*, para. 7.405.

<sup>38</sup> Panel Report, *EU – PET (Pakistan)*, para. 7.167.

<sup>39</sup> Panel Report, *EU – PET (Pakistan)*, para. 7.168.

check or establish by investigation'. The main purpose of verification is, therefore, to enable investigating authorities to confirm the accuracy of information supplied. It follows, therefore, that the 'results' of a verification visit should reflect the extent to which information supplied was ascertained to be accurate.

Other provisions of the SCM Agreement provide contextual support for this interpretation. In particular, Article 12.5 of the *SCM Agreement*, which immediately precedes Article 12.6, provides that 'the authorities shall during the course of an investigation satisfy themselves as to the accuracy of the information supplied by interested Members or interested parties upon which their findings are based.' Verification visits appear a means by which to accomplish this general obligation vis-à-vis the information supplied. We conclude, therefore, that the 'results' of a verification visit should reflect the 'outcomes' of the process of verifying information supplied. The most notable such information in the case of verification visits to an investigated firm will, in our view, be information contained in its questionnaire response."<sup>40</sup>

### **1.6.3 Disclosure of results of on-the-spot verifications**

37. The Panel in *EU – PET (Pakistan)* identified in Article 12.6 of the SCM Agreement a minimum standard of the content of the disclosures provided to the interested parties:

"Our analysis indicates a minimum standard under Article 12.6 encompassing the provision of specific enough disclosures as to allow the interested parties to discern:

- a. the information in the questionnaire response or other information supplied for which supporting evidence was requested, and whether such evidence was provided;
- b. whether the investigating authority requested further information at the verification visit, and whether such information was provided;
- c. whether the investigating authority collected requested documents, and if so what documents; and
- d. whether the investigating authorities verified the information for which supporting evidence was requested. This is not to say, however, that the results of the verification visit must necessarily include conclusions as to the ultimate suitability of the data checked for use in a final determination in the investigation."<sup>41</sup>

### **1.6.4 Relationship with Article 12.8**

38. The Panel in *EU – PET (Pakistan)* rejected the European Union's argument that because Article 12.6 allows communication of results of verification visits "pursuant to" Article 12.8, Article 12.8 should substantively bear on what constitutes disclosure of "results" under Article 12.6:

"We consider that, contrary to the European Union's position, the cross-reference to Article 12.8 in Article 12.6 does not reflect a substantive relationship of this nature between the two provisions for four main reasons:

- a. First, the SCM Agreement contains the obligation to communicate results of verification visits, on the one hand, and disclose essential facts, on the other hand, in different and non-sequential provisions (i.e. Article 12.6 and Article 12.8, respectively). This indicates the two provisions are substantively distinct.

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<sup>40</sup> Panel Report, *EU – PET (Pakistan)*, para. 7.169-7.170.

<sup>41</sup> Panel Report, *EU – PET (Pakistan)*, para. 7.175.

b. Second, only the second of the two communication options in Article 12.6 cross-references Article 12.8, but both options require the provision of the same thing, i.e. the 'results' of verification visits. It thus appears unreasonable to us to interpret Article 12.8 as substantively modifying the term 'results' in the manner proposed by the European Union under either both options, as only one refers to Article 12.8, or only under the second option, in which case the concept of a disclosed 'result' would fundamentally differ in the two instances. We believe, rather, the more reasonable position is that the term 'result' should be interpreted consistently in Article 12.6.

c. Third, the only limitation on the scope of 'results' in Article 12.6 is that the information pertains to a verification visit. In contrast, the scope of disclosure under Article 12.8 is limited to 'essential facts under consideration which form the basis for the decision whether to apply definitive measures'. This indicates that the results of verification visits are neither limited to the 'essential' result of such investigations nor limited to facts that form the basis of the decision to impose definitive CVDs.

d. Fourth, it will be recalled that Article 12.6 provides that the investigating authority 'may make such results available to the applicants.' The 'essential facts', however, must be disclosed to all interested parties, which include the applicants. It would appear odd, therefore, for Article 12.6 to broach the possibility of providing 'results' of verification visits to applicants if the applicants would receive disclosure thereof upon receipt of the 'essential facts'. This further indicates the substantive separateness of the two provisions."<sup>42</sup>

39. Similarly, the Appellate Body in *EU – Fatty Alcohols (Indonesia)* rejected the argument that the reference to Article 12.8 of the SCM Agreement, in Article 12.6 of the SCM Agreement, limited the scope of the disclosure obligation under Article 12.8:

"Like the Panel, we disagree with the European Union that the reference to Article [12.6] in Article [12.8] suggests that the scope of the 'results' of on-the-spot investigations to be disclosed is limited to results that are 'essential'. Article [12.8] identifies two ways in which investigating authorities may communicate the results of an on-the-spot investigation to the firms to which they pertain. The authorities shall either make the results of the investigation available, or they shall provide disclosure thereof to the firms to which they pertain pursuant to Article [12.6]. In the latter case, the results of the on-the-spot investigation are disclosed to the firms to which they pertain along with the 'essential facts' under consideration, which form the basis for the imposition of the anti-dumping measure. Article [12.8] and Article [12.6] contain distinct obligations, each of which applies regardless of whether the 'results' of the on-the-spot investigations are disclosed around the same time as the 'essential facts' or separately. The fact that the 'results' of an on-the-spot investigation may be disclosed at the same time as the 'essential facts' has no bearing on the scope of the 'results' of the on-the-spot investigation to be disclosed."<sup>43</sup>

## **1.7 Article 12.7**

### **1.7.1 Function of Article 12.7**

40. The Panel in *EC – Countervailing Measures on DRAM Chips* noted that Article 12.7 identifies the circumstances in which investigating authorities may overcome a lack of information, in the response of the interested parties, by using "facts" which are otherwise "available" to the investigating authority:

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<sup>42</sup> Panel Report, *EU – PET (Pakistan)*, para. 7.172.

<sup>43</sup> Appellate Body Report, *EU – Fatty Alcohols (Indonesia)*, para. 5.150.

"Article 12.7 thus allows an authority to make determinations on the basis of the facts available in case certain necessary information is not provided within a reasonable period, or if access to such information is refused, or in case an interested party or interested Member significantly impedes the investigation. Article 12.7 thus enables an authority to continue with the investigation and make determinations based on the facts that are available in case the information necessary to make such determinations is not provided by the interested parties, or, for example, verification of the accuracy of the information submitted is not allowed by an interested party, thereby significantly impeding the investigation. In other words, Article 12.7 identifies the circumstances in which investigating authorities may overcome a lack of information, in the response of the interested parties, by using 'facts' which are otherwise 'available' to the investigating authority.<sup>44</sup><sup>45</sup>

41. The Panel in *EC – Countervailing Measures on DRAM Chips* discussed the use by an investigating authority of information from secondary sources, such as press reports for the purposes of making a subsidy determination in the context of Article 12.7 of the SCM Agreement. The Panel concluded that "[t]he weighing of the information and the evidence before it, is part of the discretionary authority of the investigating authority... There is no rule in the SCM Agreement that stops the investigating authority from taking into account information from all sources, including press reports."<sup>46</sup>

42. In *Mexico – Anti-Dumping Measures on Rice*, the Appellate Body observed that there are textual differences between the SCM Agreement and the Anti-Dumping Agreement, namely, "the absence in the *SCM Agreement* of an equivalent to Annex II to the *Anti-Dumping Agreement*".<sup>47</sup> The Appellate Body then made the following observations concerning the interpretation of Article 12.7:

"Like Article 6.8 of the *Anti-Dumping Agreement*, Article 12.7 of the *SCM Agreement* permits an investigating authority, under certain circumstances, to fill in gaps in the information necessary to arrive at a conclusion as to subsidization (or dumping) and injury. As in the *Anti-Dumping Agreement*, Article 12.7 prescribes the information that may be used for such purposes as the 'facts available'. Unlike the *Anti-Dumping Agreement*, the *SCM Agreement* does not expressly set out in an annex the conditions for determining precisely which 'facts' might be 'available' for an agency to use when a respondent fails to provide necessary information. This does not mean, however, that no such conditions exist in the *SCM Agreement*.

Turning to the context of Article 12.7, we are of the view that, like Article 6 of the *Anti-Dumping Agreement*, Article 12 of the *SCM Agreement* as a whole 'set[s] out evidentiary rules that apply *throughout* the course of the ... investigation, and provide[s] also for due process rights that are enjoyed by 'interested parties' *throughout* ... an investigation'.<sup>48</sup> In this respect, Article 12.1 provides:

Interested Members and all interested parties in a countervailing duty investigation shall be given notice of the information which the authorities require and ample opportunity to present in writing all evidence which they consider relevant in respect of the investigation in question.

This due process obligation—that an interested party be permitted to present all the evidence it considers relevant—concomitantly requires the investigating authority,

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<sup>44</sup> (footnote original) We note that the Appellate Body was also of this view, when examining Article 6.8 of the *AD Agreement* dealing with facts available in the context of anti-dumping investigations. (Appellate Body Report, *US – Hot-Rolled Steel*, para. 77).

<sup>45</sup> Panel Report, *EC – Countervailing Measures on DRAM Chips*, para. 7.245.

<sup>46</sup> Panel Report, *EC – Countervailing Measures on DRAM Chips*, para. 7.249.

<sup>47</sup> Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 290.

<sup>48</sup> (footnote original) Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 138 (quoting Appellate Body Report, *EC – Bed Linen (Article 21.5 - India)*, para. 136). (emphasis added in *EC – Tube or Pipe Fittings*)

where appropriate, to take into account the information submitted by an interested party.<sup>49</sup><sup>50</sup>

43. The Appellate Body in *Mexico – Anti-Dumping Measures on Rice* also clarified the purpose of Article 12.7 and the limitations on the investigating authorities' use of "facts available":

"Moreover, we note that Article 12.7 is intended to ensure that the failure of an interested party to provide necessary information does not hinder an agency's investigation. Thus, the provision permits the use of facts on record solely for the purpose of replacing information that may be missing, in order to arrive at an accurate subsidization or injury determination.

In view of the above, we understand that recourse to facts available does not permit an investigating authority to use any information in whatever way it chooses. First, such recourse is not a licence to rely on only part of the evidence provided. To the extent possible, an investigating authority using the 'facts available' in a countervailing duty investigation must take into account all the substantiated facts provided by an interested party, even if those facts may not constitute the complete information requested of that party. Secondly, the 'facts available' to the agency are generally limited to those that may reasonably replace the information that an interested party failed to provide. In certain circumstances, this may include information from secondary sources.

This understanding of the limitations on an investigating authority's use of 'facts available' in countervailing duty investigations is further supported by the similar, limited recourse to 'facts available' permitted under Annex II to the *Anti-Dumping Agreement*. Indeed, in our view, it would be anomalous if Article 12.7 of the *SCM Agreement* were to permit the use of 'facts available' in countervailing duty investigations in a manner markedly different from that in anti-dumping investigations."<sup>51</sup>

44. The Panel in *US – Supercalendered Paper*, in considering the steps undertaken by the USDOC in applying Article 12.7, emphasized the importance of the due process rights enshrined in the WTO Agreements, as follows:

"The fact that it would have been inconvenient or impractical for the USDOC to take further steps to confirm the basic nature of the discovered information cannot outweigh the due process rights enshrined in the WTO Agreements. This is all the more applicable where an investigating authority elects to add subsidy programmes to an ongoing investigation, rather than investigating only the subsidies identified in its notice of initiation".<sup>52</sup>

45. In *US – Supercalendered Paper*, the Appellate Body assessed whether the USDOC's conduct was inconsistent with Article 12.7, as found by the Panel, and whether it formed part of the alleged "ongoing conduct" measure. The Appellate Body upheld the Panel's findings and stated:

"[T]he Panel found the following conduct to be inconsistent with Article 12.7:

an investigating authority may not simply *infer* that a respondent's failure to respond fully to the [OFA] question resulted in a failure to provide information necessary to establish the existence of additional subsidization of the product under investigation.

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<sup>49</sup> (footnote original) We note that the Appellate Body has found that the obligation in Article 6.1 of the *Anti-Dumping Agreement*—the counterpart to Article 12.1 of the *SCM Agreement*—is not satisfied where the investigating authority "disregard[s]" information submitted by an interested party. (Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 246)

<sup>50</sup> Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, paras. 291-292.

<sup>51</sup> Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, paras. 293-295.

<sup>52</sup> Panel Report, *US – Supercalendered Paper*, para. 7.177.



We understand the Panel to have faulted the USDOC for mechanically concluding, without any further steps, that necessary information had not been provided and that the discovered assistance amounted to a countervailable subsidy, when the USDOC discovers unreported assistance during verifications. The USDOC's conclusion extends beyond an assessment as to whether a respondent 'refuses access to, or otherwise does not provide, necessary information' under Article 12.7 ... The inference that the information is necessary to 'establish the existence of additional subsidization' refers to the conclusion by the USDOC in the final stage of the OFA-AFA measure that the discovered assistance amounts to a countervailable subsidy. This is confirmed by the next sentence ... where the Panel refers to due process rights ... Furthermore, the Panel continued ... that this is 'all the more applicable where an investigating authority elects to add subsidy programmes to an ongoing investigation'. These two subsequent sentences in paragraph 7.333 concern the USDOC's conclusion that the discovered assistance is a countervailable subsidy to be included in the investigation.

Thus, in paragraph 7.333, the Panel ties the discovery of the unreported assistance to the USDOC's application of AFA to conclude that the discovered assistance amounts to a countervailable subsidy. This is because the USDOC treats the failure to respond fully to the OFA question as a sufficient basis to mechanically conclude that a party failed to provide 'necessary information' and that, as AFA, the discovered assistance is a countervailable subsidy. As this process reflects the precise content of the OFA-AFA measure, we consider the conduct examined by the Panel in paragraph 7.333 to be part of the OFA-AFA measure."<sup>53</sup>

46. The Appellate Body in *US – Supercalendered Paper* provided two further reasons for upholding the Panel's conclusion that the USDOC's mechanical response to the discovery of unreported assistance during verification was inconsistent with Article 12.7:

"First, the USDOC uses 'facts available', on the basis of a failure to provide 'necessary information', without taking any additional steps to clarify the nature of the unreported assistance and whether the missing information is 'necessary' under Article 12.7 of the SCM Agreement. The United States refers to the panel's view in *EC – Countervailing Measures on DRAM Chips* that information is 'necessary' if an investigating authority 'reasonably consider[s]' it so. We consider, however, that the use of 'reasonably' by the panel itself indicates that an investigating authority is not entirely unconstrained in its identification of 'necessary information'. Indeed, in our view, the investigating authority must make a reasonable assessment based on evidence and cannot simply infer, without further clarification, that the missing information is 'necessary' within the meaning of Article 12.7. We agree with the Panel that the fact that it would have been inconvenient or impractical for the USDOC to take further steps to confirm the basic nature of the discovered information cannot outweigh the due process rights in the WTO Agreements.

Second, the USDOC concludes, as AFA, that the unreported assistance amounts to a countervailable subsidy... We consider, however, that procedural circumstances and any resulting inferences may not alone form the basis of a determination. This is because, pursuant to Article 12.7 of the SCM Agreement, determinations must be made on the basis of 'facts' available, and not 'on the basis of non-factual assumptions or speculation'. For these reasons, we agree with the Panel that the USDOC cannot simply reach conclusions without further analysis and regard to the facts available on the record and the due process rights of interested parties. To be clear, in arriving at this conclusion, we make no finding about the manner in which the USDOC should have selected facts available in the circumstances of this case. We simply note that determinations must be made on the basis of 'facts' available, and in the circumstances of the OFA-AFA measure the USDOC instead relies on non-factual assumptions or speculation."<sup>54</sup>

47. In *US – Anti-Dumping Methodologies (China)*, the Appellate Body considered that "[g]iven the similarities between the text of Article 12.7 of the Agreement in Subsidies and Countervailing

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<sup>53</sup> Appellate Body Report, *US – Supercalendered Paper*, paras. 5.77-5.79.

<sup>54</sup> Appellate Body Report, *US – Supercalendered Paper*, paras. 5.81-5.82.

Measures (SCM Agreement) and Article 6.8 of the Anti-Dumping Agreement and that both provisions permit an investigating authority, under certain circumstances, to fill in gaps in the information necessary to arrive at a conclusion as to dumping or subsidization and injury, ... the interpretation of Article 12.7 of the SCM Agreement developed by the Appellate Body in *Mexico – Anti-Dumping Measures on Rice* and *US – Carbon Steel (India)* is relevant to the understanding of the legal standard applied under Article 6.8 and paragraph 7 of Annex II to the Anti-Dumping Agreement."<sup>55</sup>

48. In *EU – PET (Pakistan)* the Panel noted that "in order to determine whether an investigating authority's decision to resort to the use of facts available under Article 12.7 is consistent with Article 12.7, it must be evident from the record of the investigation the extent to which the strictures of Annex II of the Anti-Dumping Agreement were adhered."<sup>56</sup>

49. In *Japan – DRAMs (Korea)*, the Panel and the Appellate Body rejected Korea's argument that the investigating authority acted inconsistently with Article 12.7 by designating certain entities as "interested parties", and then having recourse to facts available when those entities failed to provide requested information. See the Section on Article 12.9 below.

50. In *US – Supercalendered Paper*, the Panel agreed with the distinction drawn by the panel in *Egypt – Steel Rebar*, and pointed out that only a request for "necessary" information could justify resorting to facts available, not a request for any information.<sup>57</sup>

51. In *US – Supercalendered Paper*, the Panel further clarified that, for the purpose of Article 12.7, information pertaining to the existence of subsidy programmes discovered only during an investigation is necessary information within the meaning of Article 12.7 of the SCM Agreement:

"The parties to these proceedings are in agreement that new programmes may be added to an investigation when they are discovered during that investigation.<sup>58</sup> As this point is not contested by the parties to these proceedings, it is not addressed by the Panel in this Report. Assuming that new programmes may be added to an investigation, it is logical to postulate that information pertaining to the existence of as-of-yet unidentified subsidy programmes benefiting the product under investigation is necessary information within the meaning of Article 12.7 of the SCM Agreement – that is information necessary to complete a determination on as-of-yet unidentified subsidization of the product under investigation. In order to justify recourse to facts available on the grounds that such necessary information was refused access to or was otherwise not provided, the USDOC first needed to establish that the information discovered was information necessary to complete a determination on subsidization of the product under investigation."<sup>59</sup>

40. In *US – Anti-Dumping and Countervailing Duties (China)*, the Panel found that the United States acted inconsistently with Article 12.7 because the investigating authority never requested the information at issue from the investigated producers. The Panel stated that:

"[P]ursuant to the plain language of Article 12.7 of the SCM Agreement, recourse to facts available is permissible only under the limited circumstances where an interested Member or interested party: (i) refuses access to necessary information within a reasonable period; (ii) otherwise fails to provide such information within a reasonable period; or (iii) significantly impedes the investigation. Both parties agree with our

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<sup>55</sup> Appellate Body Report, *US – Anti-Dumping Methodologies (China)*, footnote 502 to para. 5.172.

<sup>56</sup> Panel Report, *EU – PET (Pakistan)*, footnote 386 to para. 7.174.

<sup>57</sup> Panel Report, *US – Supercalendered Paper*, para. 7.174.

<sup>58</sup> (*footnote original*) This is the case notwithstanding the parties' disagreement on the procedural steps required to add such programmes to an investigation. Canada argues that for programmes not listed in the petition to be added to an investigation, they would need to meet the self-initiation threshold, consistent with Article 11.6 of the SCM Agreement. (Canada's response to Panel question No. 94, para. 34). The United States rejects Canada's position on the basis that the discovered programmes in this case were already included within the scope of the investigation which concerned *the subsidization* of SC Paper. (United States' comments on Canada's response to Panel question No. 94, paras. 22-29).

<sup>59</sup> Panel Report, *US – Supercalendered Paper*, para. 7.175.

reading of Article 12.7 of the SCM Agreement. Our interpretation is also consistent with that of prior panels and Appellate Body that have considered this provision.<sup>60</sup>

...

We have determined above that Article 12.7 of the SCM Agreement limits the circumstances under which an investigating authority may resort to facts available to those where an interested party 'refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation'. The SCM Agreement contemplates no other possibilities; for instance, where an investigating authority, until a very late stage of the investigation, learns the need for information which it did not request during the course of the investigation and that is necessary to its final subsidization or injury determinations. As the USDOC's reliance on facts available in the present instance does not fall within the situations contemplated in Article 12.7, we find that the USDOC's use of facts available in the CWP and LWR investigations was inconsistent with Article 12.7 of the SCM Agreement."<sup>61</sup>

40. The Panel in *US – Pipes and Tubes (Turkey)* stated that recourse to Article 12.7 is "for the purpose of replacing necessary information that may be missing, to allow the investigating authority to make an accurate subsidization determination" and should not be "to punish non-cooperating parties by intentionally drawing an adverse inference. The use of inferences to select adverse facts to punish non-cooperating parties would result in an inaccurate subsidization determination".<sup>62</sup>

41. Furthermore, the Panel in *US – Pipes and Tubes (Turkey)* pointed out that an objective and unbiased investigating authority would have "to engage in a process of reasoning and evaluation regarding the whole range of transactional prices on the record, including in particular the date, seller, purchase quantity associated with these transactions, as well as any reasons for fluctuations in prices" including a degree of comparison in order to find a reasonable replacement for the information in consistence with Article 12.7. Moreover, "an investigating authority cannot exclude other substantiated facts from the pool from which it will select a reasonable replacement. If an investigating authority simply chooses the lowest price without a process of reasoning and evaluation of all the prices, it risks excluding *a priori* the rest of the prices arbitrarily".<sup>63</sup>

42. In *US – Anti-Dumping and Countervailing Duties (Korea)*, the Panel considered its interpretation of Article 6.8 of the Anti-Dumping Agreement to be relevant to its interpretation of Article 12.7 of the SCM Agreement. On this basis, the Panel concluded that Article 12.7 of the SCM Agreement, like Article 6.8 of the Anti-Dumping Agreement, requires investigating authorities to select *reasonable replacements* for missing "necessary" information that an interested party may not have provided. The Panel also considered that, despite textual differences between Article 6.8 of the Anti-Dumping Agreement and Article 12.7 of the SCM Agreement, similar parameters apply in both provisions with respect to an investigating authority's use of facts available:

"Article 12.7 of the SCM Agreement shares many textual similarities with the first sentence of Article 6.8 of the Anti-Dumping Agreement, but we note that the term 'interested Member or' does not appear in the latter provision. These provisions share a common aim, namely, 'permit[ing] an investigating authority, under certain circumstances, to fill in gaps in the information necessary to arrive at a conclusion as to subsidization (or dumping) and injury'. Article 12.7 allows recourse to facts available in similar situations to those contemplated in Article 6.8 of the Anti-Dumping Agreement. Moreover, both provisions form part of the disciplines on the identification and collection of evidence and use the term 'facts available' to denote replacements for the missing 'necessary' information. Our interpretative analysis of the text of the first sentence of Article 6.8 of the Anti-Dumping Agreement,

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<sup>60</sup> (footnote original) Appellate Body Reports on *Japan – DRAMs (Korea)*, para. 235 and *Mexico – Anti-Dumping Measures on Rice*, para. 291; Panel Reports on *Japan – DRAMs (Korea)*, para. 7.383 and *EC – Countervailing Measures on DRAM Chips*, para. 7.245.

<sup>61</sup> Panel Report, *US – Anti-Dumping and Countervailing Duties (China)*, paras. 16.9 and 16.16.

<sup>62</sup> Panel Report, *US – Pipes and Tubes (Turkey)*, para. 7.190.

<sup>63</sup> Panel Report, *US – Pipes and Tubes (Turkey)*, paras. 7.213-7.214.

therefore, remains equally relevant to our interpretation of Article 12.7 of the SCM Agreement. For reasons explained above, Article 12.7 requires investigating authorities to select *reasonable replacements* for the missing 'necessary' information.

We note that, unlike the Anti-Dumping Agreement, the SCM Agreement does not set out in an annex the precise parameters that are applicable to an investigating authority's use of facts available. We agree with the Appellate Body that '[t]his does not mean, however, that no such conditions exist in the SCM Agreement'. Several provisions of the SCM Agreement provide additional context for interpreting Article 12.7. Article 12.1 supports the understanding that investigating authorities are required to take into account all facts that are properly available to them in selecting reasonable replacements for the missing information under Article 12.7. The context provided by Articles 12.4 and 12.11 'suggest[s] that the manner or procedural circumstances in which information is missing can be relevant to an investigating authority's use of 'facts available' under Article 12.7'."<sup>64</sup>

43. Thus, the Panel considered that Article 12.7 of the SCM Agreement, like Article 6.8 of the Anti-Dumping Agreement, requires investigating authorities to select those facts available that constitute *reasonable replacements* for the missing "necessary" information:

"Thus, like Article 6.8 of the Anti-Dumping Agreement, Article 12.7 of the SCM Agreement requires investigating authorities to select those facts available that constitute *reasonable replacements* for the missing 'necessary' information in the specific facts and circumstances of a given case. In selecting *reasonable replacements*, investigating authorities must take into account all facts that are properly available to them. While investigating authorities may take into account the procedural circumstances in which information is missing in their selection of the replacement facts, Article 12.7 does not allow such selection for the purpose of punishing the non-cooperating party."<sup>65</sup>

40. The Panel also addressed the parties' disagreement on whether an investigating authority must conduct a "comparative evaluation" of all of the information that is available to it to ensure that it is using the "best information available".<sup>66</sup> The Panel considered that investigating authorities remain under an obligation to take into account all information that is properly before them with a view to selecting *reasonable replacements* for missing necessary information. The Panel also considered, however, that investigating authorities enjoy certain discretion in deciding how to discharge this obligation in the light of the specific facts and circumstances before them:

"To the extent that Korea suggests that investigating authorities are always under an obligation to undertake a 'comparative evaluation' in all circumstances, we recall that the Appellate Body rejected a similar argument under Article 12.7 of the SCM Agreement in *US – Carbon Steel (India)*. Rejecting 'India's argument that Article 12.7 of the SCM Agreement requires a comparative evaluation of the 'facts available' in every case', the Appellate Body explained that 'the extent to which an 'evaluation' of the 'facts available' is required under Article 12.7, and the form it should take, depend on the particular circumstances of a given case, including the quantity and quality of the available facts on the record, and the types of determinations to be made in a given investigation'. Disagreeing with India's 'proposition that a 'comparative evaluation' is a necessary pre-requisite to making a determination in every instance in which an investigating authority has recourse to the 'facts available'', the Appellate Body explained that '[c]onceivably, there may be circumstances where the kind of 'comparative evaluation' envisaged by India is not practicable'.

The treaty text does not require a comparative evaluation in all circumstances. As discussed, however, it does require investigating authorities to select reasonable replacements for the missing 'necessary' information. An examination of the 'reasonableness' of the replacement facts implies an evaluation and the exercise of

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<sup>64</sup> Panel Report, *US – Anti-Dumping and Countervailing Duties (Korea)*, paras. 7.38-7.39.

<sup>65</sup> Panel Report, *US – Anti-Dumping and Countervailing Duties (Korea)*, para. 7.41.

<sup>66</sup> Panel Report, *US – Anti-Dumping and Countervailing Duties (Korea)*, para. 7.45.

judgment by an investigating authority, taking into account – in an objective and unbiased manner – all facts that are properly before it as well as the procedural circumstances in which the information is missing. In certain situations, it may well be that such an evaluative exercise would need to be comparative in nature. There may be other circumstances, however, in which there is no need to engage in a comparative evaluation or where another approach may be better suited. Although investigating authorities remain at all times under an obligation to take into account all information that is properly before them with a view to selecting reasonable replacements for the missing information, they enjoy a certain discretion in their choice of the means for discharging this obligation in light of the specific facts and circumstances of the case before them."<sup>67</sup>

41. Later in its report, the Panel noted a situation in which an interested party may not provide certain information in response to a specific request, and the investigating authority would then determine whether an evidentiary gap would exist sufficient to warrant recourse to facts available. The Panel considered that, in deciding whether such an evidentiary gap exists, the authority may limit itself to examining only the information provided by the interested party in its direct response to the authority's specific request. Stated alternatively, the investigating authority would not be required to examine the entire record exhaustively before resorting to facts available:

"The use of the terms '*refuses access to, or otherwise does not provide*' in Article 12.7 implies a certain *response* – or a lack thereof – by an '*interested Member or interested party*' to a *request* for information by an investigating authority. In determining whether an evidentiary gap sufficient to warrant recourse to the facts available exists, an investigating authority may thus limit itself to the information provided by an '*interested Member or interested party*' in direct response(s) to the authority's specific request. There may be other information elsewhere on the record that would allow the filling of such a gap, but this does not require an investigating authority to examine exhaustively the entire record *before* resorting to the use of facts available. Rather, an investigating authority must examine all information provided by an '*interested Member or interested party*' in direct response to its specific request before resorting to facts available, and, subsequently, it must fully take into account any other information on the record as part of its selection of the reasonable replacement for the missing '*necessary*' information."<sup>68</sup>

42. Subsequently, the Panel was asked to examine Korea's claims that, as a result of certain violations of Article 12.7 of the SCM Agreement, the USDOC had imposed countervailing duties "in excess of the amount of the subsidy found to exist, in violation of Article 19.4", as well as in violation of Articles 10 and 32.1 of the SCM Agreement.<sup>69</sup> The Panel found that, because Korea had not presented any independent bases for the alleged breaches of the other provisions, and because the Panel had already found a violation of Article 12.7, it was unnecessary to rule on the other alleged breaches:

"Korea does not present any independent bases for the alleged breaches of Articles 10, 19.4, and 32.1 of the SCM Agreement; instead, its claims under these provisions are dependent entirely upon a finding that the United States acted inconsistently with Article 12.7 of the SCM Agreement. In these circumstances – and having already found that the United States acted inconsistently with Article 12.7 of the SCM Agreement – we do not consider it necessary to rule upon Korea's claims under Articles 10, 19.4, and 32.1 of the SCM Agreement in order to resolve the dispute before us."<sup>70</sup>

### **1.7.2 "within a reasonable period"**

43. In *US – Anti-Dumping and Countervailing Duties (Korea)*, the Panel addressed the issue of whether an interested party had submitted certain information within a "reasonable period" for

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<sup>67</sup> Panel Report, *US – Anti-Dumping and Countervailing Duties (Korea)*, paras. 7.46-7.47.

<sup>68</sup> Panel Report, *US – Anti-Dumping and Countervailing Duties (Korea)*, para. 7.270.

<sup>69</sup> Panel Report, *US – Anti-Dumping and Countervailing Duties (Korea)*, para. 7.316.

<sup>70</sup> Panel Report, *US – Anti-Dumping and Countervailing Duties (Korea)*, para. 7.318. See also *ibid.* para. 7.373.

purposes of Article 12.7 of the SCM Agreement. The interested party had attempted to submit information after the relevant deadline imposed by the USDOC, but before the verification stage.<sup>71</sup> The Panel began by noting that the term "reasonable" implies "a degree of flexibility that involves consideration of all of the circumstances of a particular case":

"Pursuant to Article 12.7 of the SCM Agreement, an investigating authority may only resort to facts available when an interested party 'refuses access to, or otherwise does not provide, necessary information within a reasonable period'. In the HRS CVD investigation, POSCO attempted to submit information in relation to each of the three issues after the relevant deadline imposed by the USDOC, but before verification. Therefore, the main issue before us is whether the information provided by POSCO was submitted within a 'reasonable period'. The SCM Agreement does not define what constitutes a 'reasonable period' for purposes of Article 12.7. Referring to the Appellate Body's discussion of Article 6.8 and Annex II of the Anti-Dumping Agreement in *US – Hot-Rolled Steel*, Korea identifies the factors that an investigating authority must consider in determining whether information was submitted within a 'reasonable period'. We do not consider it necessary to opine upon the relevance of the factors propounded by the Appellate Body in that dispute in the abstract. That said, for present purposes, we note that the use of the term 'reasonable' in Article 12.7 of the SCM Agreement implies 'a degree of *flexibility* that involves consideration of all of the circumstances of a particular case. What is 'reasonable' in one set of circumstances may prove to be less than 'reasonable' in different circumstances'."<sup>72</sup>

44. The Panel added that the mere fact that information is provided after the expiry of imposed time-limits does not, without more, establish that the information was not provided within a "reasonable period" under Article 12.7. The Panel considered that an investigating authority would be required to do more than merely establish that a deadline was exceeded, and that the factors that may be considered by the investigating authority (in addition to the expiry of the relevant deadline) remain a function of the specific facts and circumstances of a given case:

"Although the SCM Agreement envisages that investigating authorities can impose time-limits for responses, the mere fact that information is provided after the expiry of such time-limits does not, *without more*, establish that the information was not provided within a 'reasonable period' under Article 12.7. Article 12 – entitled 'Evidence' – uses both the terms 'time-limit' and 'reasonable period'. In our view, the drafters' careful choice of words also implies that they carry different meanings. This supports our understanding that a time-limit imposed by an investigating authority does not *ipso facto* constitute a 'reasonable period' in all circumstances. While it is proper for an investigating authority to attach importance to time-limits fixed for questionnaire responses, in determining whether information is submitted within a reasonable period of time, an investigating authority is required to do more than merely establish that a deadline was exceeded. In this sense, Article 12.7 strikes a balance between 'the rights of the investigating authorities to control and expedite the investigating process, and the legitimate interests of the parties to submit information and to have that information taken into account'. Exactly what factors may be considered by an investigating authority – in addition to the expiry of the relevant deadline – remains a function of the specific facts and circumstances of a given case. With this understanding, we turn to examine Korea's claims with respect to the USDOC's resort to facts available in relation to each of the three issues."<sup>73</sup>

45. Ultimately, the Panel found that the USDOC had acted inconsistently with Article 12.7 of the SCM Agreement because it had rejected certain information solely on the basis that it was provided after the time-limit that it had imposed without considering whether, in light of the

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<sup>71</sup> Panel Report, *US – Anti-Dumping and Countervailing Duties (Korea)*, para. 7.350.

<sup>72</sup> Panel Report, *US – Anti-Dumping and Countervailing Duties (Korea)*, para. 7.350.

<sup>73</sup> Panel Report, *US – Anti-Dumping and Countervailing Duties (Korea)*, para. 7.351.

specific facts and circumstances, the information was nonetheless submitted within a "reasonable period".<sup>74</sup>

### 1.8 Article 12.8

46. The Panel in *Mexico – Olive Oil* noted that, consistent with the wording of Article 12.8, the "essential facts" are "the particular facts that 'form the basis for the decision whether to apply definitive measures'." According to the Panel, "these are the specific facts that underlie the investigating authority's final findings and conclusions in respect of the three essential elements – subsidization, injury and causation – that must be present for application of definitive measures."<sup>75</sup>

47. In *China – GOES*, the Appellate Body clarified that "Articl[e] ... 12.8 [of the SCM Agreement] do[es] not require the disclosure of all the facts that are before an authority but, instead, those that are 'essential'."<sup>76</sup>

48. In *China – GOES*, the Appellate Body observed that "essential facts" are "first, those that 'form the basis for the decision to apply definitive measures' and, second, those that ensure the ability of interested parties to defend their interests."<sup>77</sup>

49. In *China – GOES*, the Appellate Body determined the term "essential" to be "a word that carries a connotation of significant, important, or salient."<sup>78</sup>

50. In *US – Supercalendered Paper*, the Panel found that an act of legislation is not a fact as it "is not a thing that is known to have occurred or to be true", not even when "taken as a whole and viewed in the abstract".<sup>79</sup>

51. In *China – GOES*, the Panel considered that "essential facts" refer to facts that were actually under consideration by the investigating authority rather than facts that should have been considered by the authority. The Panel explained:

"[T]he Panel interprets Articles 12.8 and 6.9 as requiring an investigating authority to disclose those facts that are actually under consideration by it (i.e. the body of facts before it). We find support for this in the text of the provisions, which state that the disclosure requirement applies to the 'essential facts under consideration', rather than the essential facts that should reasonably be considered in resolving a claim. If the standard were otherwise, claims under Articles 12.8 and 6.9 may be difficult to distinguish from substantive claims relating to the application of definitive measures. Finally, the purpose of the disclosure in Articles 12.8 and 6.9 is to allow parties to 'defend their interests'. In order for this to be meaningful, the actual facts under consideration are the relevant facts to be disclosed, so that omissions or the use of incorrect facts can be challenged."<sup>80</sup>

52. The Panel in *China – Broiler Products (Article 21.5 – US)* noted that:

"[A]rticle 12.8 of the SCM Agreement] does not set out rules or any guidance on how all interested parties are to be informed of the essential facts. In these circumstances, the investigating authority has a large margin of discretion."<sup>81</sup>

53. In *US – Ripe Olives from Spain*, while not excluding the possibility that an investigating authority's request for information in an initial questionnaire may satisfy the obligation set out in Article 12.8 of the SCM Agreement, the Panel underlined that this depends on the particular circumstances surrounding such request:

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<sup>74</sup> See Panel Report, *US – Anti-Dumping and Countervailing Duties (Korea)*, paras. 7.357, 7.363, and 7.369.

<sup>75</sup> Panel Report, *Mexico – Olive Oil*, para. 7.110.

<sup>76</sup> Appellate Body Report, *China – GOES*, para. 240.

<sup>77</sup> Appellate Body Report, *China – GOES*, para. 240.

<sup>78</sup> Appellate Body Report, *China – GOES*, para. 240.

<sup>79</sup> Panel Report, *US – Supercalendered Paper*, para. 7.82.

<sup>80</sup> Panel Report, *China – GOES*, para. 7.653.

<sup>81</sup> Panel Report, *China – Broiler Products (Article 21.5 – US)*, para. 7.370.

"[T]he obligation in Article 12.8 requires an investigating authority to disclose the essential facts in such a way that permits an interested party to understand the basis for the decision that will be reached by the investigating authority and defend its interests. We do not exclude the possibility that an investigating authority's request for information in an initial questionnaire may serve this purpose. However, whether such a request will provide the requisite notice will depend on how the questionnaire is drafted and the particular circumstances in which it is issued. The fact that requested information may have been provided does not necessarily imply that an investigating authority has informed a party of the essential facts. Were this to be the case, the obligation in Article 12.8 would be arguably reduced to ensuring that an investigating authority did not rely on any fact that had not been solicited from a party during the investigation. In other words, Article 12.8 would not require any action on the part of an investigating authority other than simply requesting information."<sup>82</sup>

54. In *Mexico – Olive Oil*, the Panel addressed an argument by the European Communities that Mexico violated Article 12.8 because it failed to inform interested parties that the document containing the investigating authority's determination contained the "essential facts". In other words, the European Communities argued that interested parties had no opportunity to present their views in respect of that determination in the guise of a document disclosing the "essential facts" pursuant to Article 12.8. The Panel rejected the European Communities' argument, since the relevant determination had indicated that the facts stated therein were the basis for the determinations of subsidization, injury and causation.<sup>83</sup>

55. In *US – Anti-Dumping and Countervailing Duties (China)*, the Panel described Article 12.8 and concluded that this provision was not germane to China's claim in that case:

"Article 12.8 pertains to the disclosure that an investigating authority must make prior to the issuance of its final determination, in which it must set out the essential facts on which that determination is based. While China's treatment of its Article 12.8 claim in its submissions is too succinct to achieve any certainty in this respect, it seems that China's argument is not that the USDOC failed to disclose the evidence on which its determinations were based, but rather that it failed to indicate what evidence the USDOC would have accepted – if any – to establish the existence of a double remedy. Again, China seems to seek a finding that pertains to the legal framework that the USDOC would apply to the issue of double remedies, but does not explain how the terms of Article 12.8 of the SCM Agreement can accommodate such a claim."<sup>84</sup>

## **1.9 Article 12.9**

### **1.9.1 "interested party"**

56. In *Japan – DRAMs (Korea)*, Korea argued that an entity could only be treated as an "interested party" within the meaning of Article 12.9 if that entity had an interest in the outcome of the relevant countervailing duty investigation. The Panel rejected Korea's argument:

"We agree that an interested party must by definition have an 'interest' or 'involvement' in something in order to be an 'interested party'. However, we do not believe that 'something' must, by definition, be the outcome of the investigation. We consider that a party may be an interested party when it was engaged, or involved, in the matter under investigation to such an extent that it has an interest in that matter. It is entirely plausible, therefore, that the 'something' might instead be the alleged subsidies at issue in a countervailing duty investigation, in the sense that a party was involved in the provision of such subsidies.

... We do not think that Articles 12.9(i) and (ii) are an exclusive list of parties who can be taken to be 'interested parties'. In our view, the fact that sub-paragraphs (i) and (ii) identify the most obvious instances where parties will be 'interested' does not

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<sup>82</sup> Panel Report, *US – Ripe Olives from Spain*, para. 7.390.

<sup>83</sup> Panel Report, *Mexico – Olive Oil*, para. 7.113.

<sup>84</sup> Panel Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 14.148.



mean that other forms of interest should be excluded from the category of 'interested parties'. One cannot derive from a selection (in sub-paragraphs (i) and (ii)) of the most obvious examples of 'interested party' that less obvious examples should not also be treated as 'interested parties'. We are therefore unable to accept Korea's argument that Article 12.9(i) and (ii) give rise to the necessary implication that 'interested parties' must by definition have an interest in the outcome of an investigation."<sup>85</sup>

57. The Panel's finding was upheld by the Appellate Body in *Japan – DRAMs (Korea)*:

"We observe that Article 12.9 of the *SCM Agreement* does not, by its explicit terms, require that an investigating authority must establish that a party has 'an interest in the outcome of [a] proceeding'. Nor do we see any provision of the *SCM Agreement* that defines the nature of the interest required for an entity to be included as an interested party.

Korea argues that the parties listed in subparagraphs (i) and (ii) of Article 12.9, which are required to be included by an investigating authority as interested parties—that is, exporters, importers, foreign producers, domestic producers, and their associations—all have a clear and direct interest in the outcome of a countervailing duty investigation. For Korea, the types of entities included in the list provide a 'strong indication' that an entity cannot be an interested party if it does not have such an interest. We agree that the entities specified in subparagraphs (i) and (ii)—which are all involved in the production, export, or import of the product under investigation, or in the production of the like product in the importing country—are likely to 'have an interest in the outcome of the proceeding', but we find nothing in Article 12.9 to suggest that interested parties are restricted to entities of this kind under the residual clause of Article 12.9. Although the term 'interested party' by definition suggests that the party must have an interest related to the investigation, the mere fact that the lists in subparagraphs (i) and (ii) comprise entities that may be directly interested in the outcome of the investigation does not imply that parties that may have other forms of interest pertinent to the investigation are excluded."<sup>86</sup>

### **1.9.2 "allowing domestic or foreign parties other than those mentioned above to be included as interested parties"**

58. In *Japan – DRAMs (Korea)*, Korea argued that the use of the word "allowing" in the second sentence of Article 12.9 implies that there must be a request from a party before it can be included as an "interested party". The Panel rejected Korea's argument thus:

"The term 'allowing' in the second sentence of Article 12.9 could be understood as referring to a Member allowing, through national legislation or implementing regulations, certain parties to participate in investigations as interested parties. The term 'allowing' could equally be understood as referring to an investigating authority allowing such entities to be included as interested parties following a request or suggestion to that effect from an applicant. In addition, as Japan noted in response to the same question from the Panel, there are a variety of provisions in the *SCM Agreement* which include the phrase 'upon request,' and given that the drafters of the *SCM Agreement* explicitly used the phrase 'upon request' where a request is required or contemplated, the lack of the use of this phrase in Article 12.9 supports the interpretation that the inclusion of a party as an interested party is not predicated on a request."<sup>87</sup>

59. The Panel's reasoning in *Japan – DRAMs (Korea)* was upheld by the Appellate Body:

"We agree with the Panel's interpretation of the term 'allowing' in Article 12.9. While a response to a request is certainly one way by which an investigating authority may allow an entity to be recognized as an interested party, we do not believe this is the

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<sup>85</sup> Panel Report, *Japan – DRAMs (Korea)*, paras. 7.387-7.388.

<sup>86</sup> Appellate Body Report, *Japan – DRAMs (Korea)*, paras. 237-238.

<sup>87</sup> Panel Report, *Japan – DRAMs (Korea)*, para. 7.390.

only way for a party to be included. In our view, the term 'allowing' in the residual clause connotes the power or authority given to a Member to include other parties as interested parties, rather than a restriction on such power of inclusion to those parties that make a request."<sup>88</sup>

### **1.9.3 Relationship with Article 12.7 of the SCM Agreement**

60. In *Japan – DRAMs (Korea)*, Korea argued that an entity could only be treated as an "interested party" within the meaning of Article 12.9 if that entity had an interest in the outcome of the relevant countervailing duty investigation. In interpreting that provision, and rejecting Korea's argument, the Panel referred to Members' rights under Article 12.7:

"Moreover, we believe that prior Appellate Body and panel reports relating to Article 12.7, the provision of the *SCM Agreement* governing the use of facts available, undermine rather than support Korea's contention that only parties with an interest in the outcome of the investigation may be included as 'interested parties'. In *Mexico – Anti-Dumping Measures on Rice*, the Appellate Body explained that Article 12.7 'is intended to ensure that the failure of an interested party to provide necessary information does not hinder an agency's investigation.' In *EC – Countervailing Measures on DRAM Chips*, the panel observed that 'Article 12.7 of the *SCM Agreement* is an essential part of the limited investigative powers of an investigating authority in obtaining the *necessary information to make proper determinations*.' Thus, previous Appellate Body and panel reports have underscored the important role that Article 12.7 serves in ensuring that investigating authorities are able to obtain the information necessary to make proper determinations. Requiring an investigating authority to establish that a party has an interest in the outcome of an investigation as a precondition for treating that party as an 'interested party' could preclude investigating authorities from making proper determinations. In our view, the scope of the right of investigating authorities to include parties as 'interested parties' in investigations must be interpreted with a view to ensuring that investigating authorities are able to obtain the 'necessary information' needed to arrive at a determination. Therefore, we do not believe that Article 12.7 gives rise to the necessary implication that an investigating authority must establish that a party has an interest in the outcome of an investigation in order to include that party as an 'interested party' in the investigation."<sup>89</sup>

Current as of: December 2023

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<sup>88</sup> Appellate Body Report, *Japan – DRAMs (Korea)*, para. 240.

<sup>89</sup> Panel Report, *Japan – DRAMs (Korea)*, para. 7.392.