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## **1 ARTICLE 22**

### **1.1 Text of Article 22**

#### **Article 22**

##### *Public Notice and Explanation of Determinations*

22.1 When the authorities are satisfied that there is sufficient evidence to justify the initiation of an investigation pursuant to Article 11, the Member or Members the products of which are subject to such investigation and other interested parties known to the investigating authorities to have an interest therein shall be notified and a public notice shall be given.

22.2 A public notice of the initiation of an investigation shall contain, or otherwise make available through a separate report<sup>53</sup>, adequate information on the following:

(footnote original)<sup>53</sup> Where authorities provide information and explanations under the provisions of this Article in a separate report, they shall ensure that such report is readily available to the public.

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

22.3 Public notice shall be given of any preliminary or final determination, whether affirmative or negative, of any decision to accept an undertaking pursuant to Article 18, of the termination of such an undertaking, and of the termination of a definitive countervailing

duty. Each such notice shall set forth, or otherwise make available through a separate report, in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities. All such notices and reports shall be forwarded to the Member or Members the products of which are subject to such determination or undertaking and to other interested parties known to have an interest therein.

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

- (i) the names of the suppliers or, when this is impracticable, the supplying countries involved;
- (ii) a description of the product which is sufficient for customs purposes;
- (iii) the amount of subsidy established and the basis on which the existence of a subsidy has been determined;
- (iv) considerations relevant to the injury determination as set out in Article 15;
- (v) the main reasons leading to the determination.

22.5 A public notice of conclusion or suspension of an investigation in the case of an affirmative determination providing for the imposition of a definitive duty or the acceptance of an undertaking shall contain, or otherwise make available through a separate report, all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures or the acceptance of an undertaking, due regard being paid to the requirement for the protection of confidential information. In particular, the notice or report shall contain the information described in paragraph 4, as well as the reasons for the acceptance or rejection of relevant arguments or claims made by interested Members and by the exporters and importers.

22.6 A public notice of the termination or suspension of an investigation following the acceptance of an undertaking pursuant to Article 18 shall include, or otherwise make available through a separate report, the non-confidential part of this undertaking.

22.7 The provisions of this Article shall apply mutatis mutandis to the initiation and completion of reviews pursuant to Article 21 and to decisions under Article 20 to apply duties retroactively.

## **1.2 General**

### **1.2.1 Anti-Dumping Agreement**

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

### **1.2.2 The provisions of Article 22 contemplate a logical progression of inquiry**

2. In *China – Broiler Products*, the Panel referred to the interrelation between the respective provisions of Article 22 of the SCM Agreement:

"We find it relevant that the obligations set forth under the different sub-paragraphs of Articles 12.2 of the Anti-Dumping Agreement (including 12.2.1 and 12.2.2) and Article 22 of the SCM Agreement (including 22.3 and 22.5), respectively, are not independent of one another. Rather, much like the various sub-paragraphs of Article 3 of the Anti-Dumping Agreement and Article 15 of the SCM Agreement which present more detailed obligations as part of an overarching fundamental obligation with respect to an injury determination, the

sub-paragraphs of Article 12.2 of the Anti-Dumping Agreement and Article 22 of the SCM Agreement provide more detailed obligations of the overarching fundamental obligation to notify interested parties of the reasoning behind anti-dumping and countervailing duty determinations. The provisions are inter-related, such that compliance with Article 12.2 is in part determined by compliance with Article 12.2.1 or 12.2.2 and compliance with Article 22.3 is in part determined by compliance with Articles 22.4 or 22.5."<sup>1</sup>

### 1.3 Article 22.1

#### 1.3.1 Relationship with Article 22.7

3. In *US – Carbon Steel*, the Appellate Body noted that Articles 22.1 and 22.7, imposing notification and public notice obligations upon Members in the context of investigations or reviews, do not contain any evidentiary requirements *per se*.

"Article 22.1 imposes *notification and public notice obligations* upon Members that have decided, in accordance with all the requirements of Article 11, that the initiation of a countervailing duty investigation is justified. Article 22.1 does not itself establish any evidentiary rule, but only refers to a standard established in Article 11.9:

Article 22.7 applies the provisions of Article 22 '*mutatis mutandis* to the initiation and completion of reviews pursuant to Article 21'. To us, in the same way that Article 22.1 imposes notification and public notice requirements on investigating authorities that have decided, in accordance with the standards set out in Article 11, to initiate an *investigation*, Article 22.1 (by virtue of Article 22.7) also operates to impose notification and public notice requirements on investigating authorities that have decided, in accordance with Article 21, to initiate a *review*. Similarly, in the same way that Article 22.1 does *not* itself establish evidentiary standards applicable to the initiation of an *investigation*, it does *not* itself establish evidentiary standards applicable to the initiation of sunset reviews. Such standards, if they exist, must be found elsewhere."<sup>2</sup>

### 1.4 Article 22.3

#### 1.4.1 General

4. The Panel in *China – GOES* noted that Article 22.3 is procedural in character and requires an investigating authority to disclose in public notices and separate reports its actual reasoning rather than the findings that should reasonably have been reached under an objective standard:

"Article 22 of the SCM Agreement sets out a series of requirements regarding the public notices and separate reports that must be issued by investigating authorities. Article 22.3 of the SCM Agreement requires a public notice of a preliminary or final determination, or a separate report, to set forth 'in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities'. By way of contrast, Article 22.3, unlike Article 22.5, does not explicitly require public notice of 'all relevant information on matters of fact and law and reasons which have led to the imposition of final measures' or 'the reasons for the acceptance or rejection of relevant arguments or claims made by interested Members and by the exporters and importers'.

In the Panel's view, and as the parties agree, the obligation in Article 22.3 of the SCM Agreement is procedural in character, relating to the nature of the public notice an investigating authority must provide with respect to its substantive determinations. The text of Article 22.3 indicates that the disclosure required relates to the findings and conclusions actually reached by an investigating authority, rather than the findings and conclusions that should reasonably have been reached under an objective standard and by reference to the substantive obligations at issue. This is evident because the text of Article 22.3 refers to the 'findings and conclusions reached on all issues of fact and law', rather than the findings and

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<sup>1</sup> Panel Report, *China – Broiler Products*, para. 7.521.

<sup>2</sup> Appellate Body Report, *US – Carbon Steel*, paras. 111-112.

conclusions that should reasonably have been reached for a given substantive claim. Further, the obligation relates to the "issues of fact and law considered material by the investigating authorities". This indicates that the disclosure obligation relates to those issues that an investigating authority subjectively considers material. Therefore, in our view, Article 22.3 is a procedural provision that does not discipline the substantive adequacy of an investigating authority's reasoning. If this were not the case, claims under Article 22.3 may be difficult to distinguish from substantive claims relating to preliminary and final determinations."<sup>3</sup>

#### **1.4.2 Relationship with Articles 22.4 and 22.5**

5. The Panel in *China – Broiler Products* observed that "the provisions [of Article 22] are inter-related such that compliance with ... Article 22.3 is in part determined by compliance with Articles 22.4 or 22.5."<sup>4</sup>

6. The Panel in *China – Broiler Products* examined the relationship between Articles 22.3 and 22.5:

"Article 22.3 of the SCM Agreement requires that a public notice be given of any preliminary or final determination, which sets forth, or otherwise makes available through a separate report, in sufficient detail the findings and conclusions reached on all issues of fact and law considered material. Article 22.5 elaborates this requirement by establishing, *inter alia*, that the public notice must contain all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures."<sup>5</sup>

#### **1.5 Article 22.5**

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

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

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

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

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<sup>3</sup> Panel Report, *China – GOES*, paras. 7.355-7.356.

<sup>4</sup> Panel Report, *China – Broiler Products*, para. 7.521.

<sup>5</sup> Panel Report, *China – Broiler Products*, para. 7.365.

hand, if we find a violation of a specific substantive requirement, the question of whether the notice of the determination is 'sufficient' under Article 12.2.2 of the AD Agreement or Article 22.5 of the SCM Agreement is, in our view, immaterial.

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

'A notice may adequately explain the determination that was made, but if the determination was substantively inconsistent with the relevant legal obligations, the adequacy of the notice is meaningless. Further, in our view, it is meaningless to consider whether the notice of a decision that is substantively inconsistent with the requirements of the AD Agreement is, as a separate matter, insufficient under Article 12.2. A finding that the notice of an inconsistent action is inadequate does not add anything to the finding of violation, the resolution of the dispute before us, or to the understanding of the obligations imposed by the AD Agreement'.<sup>6</sup>

We share the views of the *EC – Bed Linen* Panel in this respect, and adopt them as our own. In this regard, we note Canada's statement that 'as a practical matter, Canada recognizes that it would be unusual for an injury determination to either satisfy the obligations in Articles 3 and 15 but not Articles 12.2.2 and 22.5 or *vice versa*'. Canada has made no arguments to suggest that this is such an unusual case. Therefore, we will make no findings with respect to the alleged violations of Article 12.2.2 of the AD Agreement and Article 22.5 of the SCM Agreement."<sup>7</sup>

8. In *US – Countervailing Duty Investigation on DRAMS*, the Appellate Body concluded that "even assuming arguendo that Article 22.5 of the SCM Agreement could provide the basis for a panel's exclusion of evidence," there was no reason to exclude evidence that, although contained in the record of the investigation, had not been cited in the investigating authority's decision

9. In *US – Countervailing Duty Investigation on DRAMS*, the Appellate Body considered that, with regard to "matters of fact", Article 22.5 does not require authorities to disclose all the factual information before them, but rather those facts that allow an understanding of the factual basis that led to the imposition of final measures:

"Article 22.5 does not require the agency to cite or discuss every piece of supporting record evidence for each fact in the final determination."<sup>8</sup>

10. On this basis, the Appellate Body in *China – GOES* held that "[t]he inclusion of this information should therefore give a reasoned account of the factual support for an authority's decision to impose final measures."<sup>9</sup>

11. The Appellate Body in *China – GOES* also reasoned that the objective of the obligation of disclosure under Article 22.5 of the SCM Agreement, as a matter of due process, is to inform the interested parties of relevant issues of law and fact, such that they can decide whether to resort to judicial review against the determinations of the investigating authorities:

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

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<sup>6</sup> (footnote original) Panel Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India* ("*EC – Bed Linen*"), WT/DS141/R, adopted 12 March 2001, as modified by the Appellate Body Report, WT/DS141/AB/R, at para. 6.259.

<sup>7</sup> Panel Report, *US – Softwood Lumber VI*, paras. 7.39-7.42.

<sup>8</sup> Appellate Body Report, *US – Countervailing Investigations on DRAMS*, para. 164.

<sup>9</sup> Appellate Body Report, *China – GOES*, para. 256.

provided in Article 13 of the Anti-Dumping Agreement and Article 23 of the SCM Agreement."<sup>10</sup>

12. In *China – GOES*, the Panel considered that "when confidential information also forms part of the 'relevant information on matters of fact and law', within the meaning of Articles 22.5 and 12.2.2, an investigating authority can meet its dual obligations to disclose the relevant information while also protecting its confidentiality, by providing only a non-confidential summary of the confidential information in the public notice or separate report."<sup>11</sup>

### 1.5.1 Relationship with Article 12

13. In *China – GOES*, the Appellate Body distinguished between the requirement to disclose the "essential facts" "before a final determination is made" enshrined in Article 12.8 and the obligation to give public notice of the "conclusion or suspension of an investigation in the case of an affirmative determination providing for the imposition of a definite duty" within the meaning of Article 22.5:

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

As noted in our examination of Articles 6.9 and 12.8, the imposition of final anti-dumping or countervailing duties requires that an authority finds dumping or subsidization, injury, and a causal link between the dumping or subsidization and the injury to the domestic industry. What constitutes 'relevant information on the matters of fact' is therefore to be understood in the light of the content of the findings needed to satisfy the substantive requirements with respect to the imposition of final measures under the *Anti-Dumping Agreement* and the *SCM Agreement*, as well as the factual circumstances of each case."<sup>12</sup>

### 1.6 Article 22.7

14. The Appellate Body in *US – Carbon Steel (India)* interpreted the meaning of the phrase "*mutatis mutandis*" contained in Article 22.7:

"Article 22.7 indicates that the provisions of Article 22 are to apply *mutatis mutandis* to the initiation and completion of Article 21 reviews. The use of the term '*mutatis mutandis*' in Article 22.7 suggests to us that certain requirements set out in Articles 22.1 through 22.6 of the SCM Agreement, which are fully applicable to the initiation or completion of an Article 11 original investigation, may not be applicable in the same manner, or to the same extent, to Article 21 reviews."<sup>13</sup>

### 1.7 Relationship with other provisions

15. With respect to the relationship with Article 11 of the SCM Agreement, see the Section on that Article.

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<sup>10</sup> Appellate Body Report, *China – GOES*, para. 258.

<sup>11</sup> Panel Report, *China – GOES*, para. 7.589.

<sup>12</sup> Appellate Body Report, *China – GOES*, paras. 256-257.

<sup>13</sup> Appellate Body Report, *US – Carbon Steel (India)*, para. 4.535.

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