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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 M 7.1.3 (or)6.3 81TJ -0.00gaom -4.4 (n)-9r cut6(u).



## **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

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

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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. "7

**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. In *US – Anti-Dumping and Countervailing Duties (China)*, WT/DS379/AB/R, para. 7.1034 (2016).

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

<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





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 Article[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."

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 Article[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. 7.22.

<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.

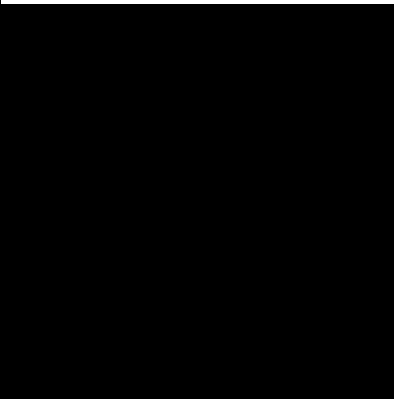
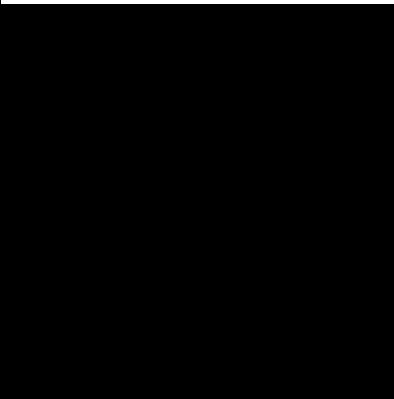




check or establish by investigation'. The main purpose of verification is, therefore, to enable investigating authorities to confirm the accuracy of information supplied. It follows, therefore, that the 'results' of a verification visit should reflect the extent to which information supplied was ascertained 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 12.4, states that 'the results of a verification visit shall reflect the extent to which information supplied was ascertained to be accurate'.

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



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 verification.

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. "55

48. In EU – PET (Pakistan)



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 Article 12.7 of the SCM Agreement requires investigating authorities to select those facts available that constitute reasonable replacements for the missing 'necessary' information, it does not require them to conduct a 'comparative evaluation' of all of the information that is available to them. 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:

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. "



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 response to the information submitted within a reasonable period."<sup>75</sup>





mean t hat other forms o f interest should be e xcluded from th e category of 'interest ed parties '. One cannot deriv e from a selection (in s ub-paragraphs (i) and (ii)) of the most obvious exa mples of ' interes ted party ' that less obvious examp les should not also be treated as ' inter ested parties '. We are therefore unable to accept Korea's

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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 paragraph 3 (s6)irhe prrhr