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Negotiating Group on Rules

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PROPOSAL ON FACTS AVAILABLE

Communication from Brazil; Chile; Colombia; Costa Rica; Hong Kong, China;
Japan; Korea; Norway; Singapore; Switzerland; the Separate Customs
Territory of Taiwan, Penghu, Kinmen and Matsu; and Thailand

The following communication, dated 13 September 2004, is being circulated at the request of the Delegations of Brazil; Chile; Colombia; Costa Rica; Hong Kong, China; Japan; Korea; Norway; Singapore; Switzerland; the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; and Thailand.

The submitting delegations have requested that this paper, which was submitted to the Rules Negotiating Group as an informal document (JOB(04)/126), also be circulated as a formal document.

I. DESCRIPTION OF THE PROBLEM

The basic objective of AD measures is to offset dumping only to the extent necessary to address injury to a domestic industry. Important task for the investigating authorities is to determine the margin of dumping by appropriately reflecting the extent of the dumping by responding parties. The best source of information for an appropriate calculation of the margin of dumping is the actual sales and cost data of responding parties. In some cases, however, the authorities may not be able to obtain all necessary data, but must nonetheless complete the proceeding within the prescribed period. To address such situations, the AD Agreement allows authorities in certain situations to base their findings on information from secondary sources known as facts available. The basic objective of permitting use of facts available is, therefore, to balance the requirement to complete the appropriate calculation of the margins of dumping and the requirement to complete an AD proceeding within the time period prescribed.

Notwithstanding the limited objectives in using facts available, there are many cases where excessively high dumping margins are calculated based on facts available which are adverse to the respondents' interest in spite of the fact that respondents have acted to the best of their ability and been cooperative. Article 6.8 and Annex II of the AD Agreement provide some guidance on the application of facts available. These rules are, however, not clear enough either as to the circumstances under which facts available may be applied or the standard for the selection of the facts available which may be used. Given that the application of facts available is permitted to facilitate investigations, there is a considerable scope for improvement of the rules for the purpose of preventing abuse of facts available, as well as strictly limiting the application of facts available that "could lead to a result which is less favourable" to the respondents. In view of this, we put forward the following proposals to address the issues associated with the use of facts available.

Note: The conditions under which the authorities may request affiliated party information and the scope thereof will be discussed in a separate paper.

II. ELEMENTS OF A SOLUTION

1. Purpose of Using Facts Available

1.1 Proposal

Amend the current text of Article 6.8 to explicitly state that facts available are to be used only to the extent necessary to substitute missing or rejected information.

Explanation

- This proposal intends to clarify the current provision of Article 6.8 that facts available should be used only to substitute for necessary information that the responding party did not submit (“missing information”) or information that the responding party did submit but the authorities rejected (“rejected information”). As stated in the above section, the best source of information for accurate calculation of margins of dumping is the party’s actual data. The authorities must use the submitted information when the information germane to the investigation is accurate and is submitted within a reasonable period. There is no rationale to reject information submitted by the responding party and use facts available where such information is available as actual accurate data.

2. Situation in which Facts Available Can Be Applied

2.1 Proposal

Make an addition to the current text of Annex II.1 to provide that authorities may not resort to facts available in an investigation or review unless the authorities have made all reasonable efforts to obtain necessary information from respondents. To fulfil the reasonable effort requirement, the authority must inter alia notify the respondent in detail of information which was insufficient in the initial response to the authorities’ questionnaire. The authority must also permit the respondent to submit the required information within a reasonable period of time from such notification. In this connection, “a reasonable period of time” must be determined on a case-by-case basis in the light of the specific circumstances of each investigation.

Explanation

- The first proposal intends to clarify the requirements for authorities in applying facts available under current Article 6.8 and Annex II. Some cases, such as the panel report in *Argentina-Ceramic Tiles*¹ clarified these requirements. In *Argentina – Ceramic Tiles*, the authorities resorted to facts available without informing the respondents what information the authorities had needed. The panel determined that the authorities have the initial obligation of informing respondents in clear and specific terms of information that they need, and may not resort to facts available unless the authorities inform the respondents of the information which was insufficient in the initial response and give an opportunity to provide further explanations. In other cases, the condition of applying facts available to the respondent is different from that to the petitioner. Some authorities enforce deadlines of submission of data or response to the questionnaire for respondents in a strict manner and apply facts available to them, while such authorities seldom apply facts available even when the petitioners fail to meet deadlines and only provide the necessary information very late in the investigation.

¹ See the panel report in *Argentina - Definitive Anti-Dumping Measures on Imports of Ceramic Floor Tiles from Italy*, WT/DS189/R (28 September 2001).

- We will also discuss factors to consider when determining whether a responding party prepared and submitted the information “within a reasonable period of time.”

2.2 Proposal

Examine how the concept of “significant impediment” in Article 6.8, which may be a cause of misinterpretation due to its ambiguity, has been applied, and thus whether it is appropriate to maintain this concept in the Agreement, and instead to add the concept of “refusal of verification” to clarify that facts available can be used also in a situation where an interested party refuses verification of necessary information.

Explanation

- We also should examine whether it is necessary and appropriate to maintain the concept of “significant impediment” in Article 6.8, since this standard is not necessarily relevant to the question of whether the submitted information is usable for accurate calculation of margins of dumping. Moreover, the term “significant impediment” is too broad a concept and has been used too broadly by authorities as a catch all excuse to use facts available to penalize responding parties.
- We also propose to add the concept of “refusal of verification”. This addition clarifies the situation in which the authorities can use facts available by explicitly stating that facts available can be used also in a situation where an interested party refuses verification of necessary information. Inclusion of this standard balances the effects of the possible deletion of the concept of “significant impediment”.

3. Method of Applying Facts Available

3.1 Proposal

Amend Annex II.3 to make it mandatory for authorities to use any and all submitted information that is verifiable, germane to the investigation and not proven to be inaccurate, as well as complying with the other requirements set out in Annex II. 3.

Explanation

- This proposal intends to clarify that authorities must use submitted information when certain conditions are met, even if all of the required information has not been submitted, as the panel in *United States--Steel Plate*² adjudicated. In this case, the authorities rejected the submitted data in its entirety, although the submitted data had been verified. The authorities contended that it may reject submitted and verified data where the respondent had not provided all the information that the authorities requested. The current text of Annex II.3, especially terms like “all information” and “should be taken into account,” lacks sufficient precision in this respect.
- In addition, we also propose to add the concept of “germane to the investigation, not proven to be inaccurate” to clarify that the authorities must use the submitted information which is appropriately connected with the investigation and has not proven to be inaccurate.

² See the panel report in *United States - Anti-dumping and Countervailing Measures on Steel Plate from India*, WT/DS206/R (28 June 2002).

3.2 Proposal

Amend Annex II.7 to provide that authorities shall choose, whenever authorities resort to facts available in accordance with this Agreement, information from a secondary source that properly represents the prevailing state of the industry or the relevant market with respect to the missing or rejected information. The information shall be chosen, where practicable, based on an objective examination of all information obtained by authorities during the course of an investigation/review in light of the requirements set out in Annex II.7.

In this connection, amend Article 6.6 so that the distinction between the authority's obligation with respect to an "Article 6.8 situation" and the other situation is eliminated. For this purpose, delete the exception clause at the beginning of Article 6.6 and the phrase "supplied by interested parties".

Explanation

- We propose that the above standard should replace the current standard as set forth in the first sentence of Annex II.7. The current text does not specify what sources the authorities should choose as facts available. The current absence of restrictions on the selection of information can result in prohibitively high margins of dumping.
- This proposal ensures that facts available are selected so that the information used properly reflects the state of the same industry as that covered by the anti-dumping proceeding (investigation or review).
- In this proposal, we propose that the authorities shall, even when resorting to facts available, choose the appropriate information from a secondary source by examining the validity of the information. The proposed amendment to Annex II.7 would impose on the authorities the same obligation as provided for in Article 6.6, even when applying facts available. Therefore, we propose to delete the exception clause in the beginning of Article 6.6 as well as the phrase "supplied by the interested parties." The proposal of deleting the exception clause of Article 6.6 does not require on-the-spot verification to the information supplied through recourse to facts available, although the authority must satisfy the accuracy of such information.

3.3 Proposal

Improve the last sentence of Annex II.7 by clarifying that a party shall be regarded as being cooperative, *inter alia*, if the party provided a substantial portion of the entire information requested by authorities and substantially all of that information could be verified, or if the party made reasonable efforts to submit the requested information in light of its ability to submit the information and its ability to fulfil the instructions provided by the authorities.

Explanation

- The current text of Annex II.7 does not provide any explicit guidance on situations in which a responding party should be regarded as cooperative. The lack of clarity in the term "cooperative" gives the authorities too much discretion in determining when a respondent is not "cooperative" and thus whether the "situation could lead to a result which is less favourable" to the respondent. To clarify the current rules, we propose a definition of "cooperative" party.
- Furthermore, in light of the purpose of the application of facts available, i.e., substituting missing or rejected information, the extent to which cooperative and non-cooperative respondents may be treated differently, should be limited. As such, the facts available

selection standard as proposed in the previous proposal is applicable even to the selection of facts available that are less favourable.

3.4 Proposal

Amend Annex II.6 to provide that when the authorities resort to facts available, they must either in the preliminary determination or in the disclosure pursuant to Article 6.9, provide a sufficient explanation of the reasons why the submitted information has been totally or partially rejected and specifically identify the information that the authorities intend to substitute for the rejected information. Due regard must be given to confidential information relating to the disclosure in accordance with Articles 6.4 and 6.5.

Explanation

- We propose a mechanism to guarantee the opportunity for interested parties to defend their interests with respect to the authorities' application and selection of facts available.
 - Article 6.2 requires authorities to provide interested parties ample opportunity to defend their interests. Under the current provisions of Annex II.6, however, the authorities in fact have used, in certain circumstances, facts available of some kind, in the final decision and applied a set of facts that had not been applied in the preliminary determination with little or no warning to interested parties. Interested parties are, and have been, deprived of opportunity to comment on the change in information applied to the final determination.
 - By requiring authorities to provide a sufficient explanation and identify the information to be used as facts available in the disclosure of essential facts under Article 6.9 at the latest, the interested party will be better able to defend its interests in accordance with Articles 6.9 and 6.2.
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