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FURTHER SUBMISSION ON FACTS AVAILABLE¹

Paper from Chile; Hong Kong, China; Israel; Korea, Rep. of; Norway;
the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; and Thailand

The following communication, dated 15 September 2005, is being circulated at the request of the Delegations of Chile; Hong Kong, China; Israel; Korea, Rep. of; Norway; and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; and Thailand

The submitting delegation has requested that this paper, which was submitted to the Rules Negotiating Group as an informal document (JOB(05)/187), also be circulated as a formal document.

A. Introduction

In JOB(04)/126², the Friends of Anti-Dumping Negotiations (“FANs”) discussed the problems with the current provisions on the use of facts available in the Anti-Dumping Agreement, and made several proposals to improve the Agreement.

This paper builds on our earlier paper and refines some of the ideas in that paper into proposed textual amendments to Article 6.8 and Annex II of the Anti-Dumping Agreement, as shown in the Annex to this paper.

B. Explanation of the amendments

Our proposed amendments are guided by the following main objectives:

1. Greater allowance given to respondents in the provision of information

Given the increasing complexity of anti-dumping investigations and tight timeframe given to respondents to provide information, it would greatly facilitate respondents’ participation in an investigation if respondents can be given greater flexibility to submit missing or supplementary information or clarification prior to the rejection of information and/or the application of facts available. Noting that it has been the practice of many authorities to send out deficiency letters to respondents, our proposal seeks to codify this practice (paragraph 6 of Annex II).

¹ The proposal contained in this document does not represent a final position and may be subject to further addition and/or modification in the course of the negotiations. Other provisions of the Anti-Dumping Agreement that may be affected by the proposal may be examined in the later stages of the negotiations when Members have a more comprehensive picture of the amended Agreement.

² Also circulated as TN/RL/W/93 and TN/RL/GEN/20

In assessing whether respondents have acted to their best ability, our proposal moreover highlights the need to give due regard to the difficulties faced by respondents, particularly small companies, in participating fully in the investigations due to their limited ability or resource constraints (paragraph 5 of Annex II).

2. Clearer guidance on the use of facts available

Our proposal seeks to clarify the following:

- that authorities shall make reasonable efforts to acquire information necessary for the investigation from the respondent (Article 6.8)³;
- that authorities shall not require the submission of information which is not reasonably needed for the purposes of the investigation (paragraph 1 of Annex II);
- that information actually verified as accurate by authorities, and which is germane to the investigation, must be used, and that authorities may reject information which they did not verify based on the results of sampling verification only if the results of the sampling verification indicate that the unverified information is highly likely to be inaccurate (minor inaccuracies excepted) (new footnote to paragraph 3 of Annex II);
- clarify one of the situations in which facts available may be used, by replacing the concept of “significant impediment” with “unreasonable refusal of verification”, and further clarify that facts available shall be used only to the extent necessary to substitute missing or rejected information (Article 6.8). Consequential amendment is made to the last sentence of paragraph 3 of Annex II;
- where facts available are used, how information from secondary source is to be chosen (paragraph 7 of Annex II).

3. Transparency with regard to the rejection of information and/or use of facts available

Our proposal seeks to ensure that where information submitted by a party is rejected and/or where facts available is used, the reason for the rejection, as well as details of the information being rejected (or found to be missing) and details of the secondary source information used to substitute the rejected or missing information, are disclosed pursuant to Article 6.9 and Article 12 (paragraph 6 of Annex II).

³ We note that in *Argentina – Ceramic Tiles* (DS189), for example, the Panel determined that authorities have initial obligation of informing respondents in clear and specific terms of the information that they need, and may not resort to facts available unless they have informed the respondents of the information which was insufficient in the initial response and have given them an opportunity to provide further information.

Annex

Proposed amendments to Article 6.8 and Annex II of the ADA

6.8 In cases in which any interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or ~~significantly impedes the investigation~~ unreasonably refuses verification of such information, and after the authorities have made reasonable efforts to acquire such information from the interested party in question, preliminary and final determinations, affirmative or negative, may be made on the basis of the facts available to the extent necessary to substitute missing or rejected information. The provisions of Annex II shall be observed in the application of this paragraph.

Annex II – Best Information Available in Terms of Paragraph 8 of Article 6

1. As soon as possible after the initiation of the investigation, the investigating authorities should specify in detail the information required from any interested party, and the manner in which that information should be structured by the interested party in its response. The authorities should also ensure that the party is aware that if information is not supplied within a reasonable time, the authorities ~~will be free to~~ may make determinations on the basis of the facts available, including those contained in the submission by other interested parties. ~~application for the initiation of the investigation by the domestic industry.~~ Authorities shall not require the submission of information which is not reasonably needed for the purposes of the investigation⁴.

2. The authorities may also request that an interested party provide its response in a particular medium (e.g. computer tape) or computer language. Where such a request is made, the authorities should consider the reasonable ability of the interested party to respond in the preferred medium or computer language, and should not request the party to use for its response a computer system other than that used by the party. The authority should not maintain a request for a computerized response if the interested party does not maintain computerized accounts and if presenting the response as requested would result in an unreasonable extra burden on the interested party, e.g. it would entail unreasonable additional cost and trouble. The authorities should not maintain a request for a response in a particular medium or computer language if the interested party does not maintain its computerized accounts in such medium or computer language and if presenting the response as requested would result in an unreasonable extra burden on the interested party, e.g. it would entail unreasonable additional cost and trouble.

3. All information which is verifiable, which is appropriately submitted so that it can be used in the investigation without undue difficulties, which is supplied in a timely fashion, and, where applicable, which is supplied in a medium or computer language requested by the authorities, should be taken into account when determinations are made⁵. If a party does not respond in the preferred medium or computer language but the authorities find that the circumstances set out in paragraph 2 have been satisfied, the failure to respond in the preferred medium or computer language should not be a reason for rejecting the information ~~be considered to significantly impede the investigation.~~

⁴ New footnote: “This does not prevent interested parties from voluntarily submitting information additional to that requested by authorities.”

⁵ New footnote: “Information which has been verified as accurate and which is germane to the investigation must be used when determinations are made. Authorities may only reject information which they did not verify based on results of sampling verification of the same type of information submitted by the party concerned, if the results of the sampling verification indicate that the unverified information is highly likely to be inaccurate (minor inaccuracies excepted).”

4. Where the authorities do not have the ability to process information if provided in a particular medium (e.g. computer tape), the information should be supplied in the form of written material or any other form acceptable to the authorities.

5. Even though the information provided may not be ideal in all respects, this should not justify the authorities from disregarding it, provided the interested party has acted to the best of its ability, due regard to be given to the difficulties faced by respondents, particularly small companies, in providing information to authorities due to their limited ability and resources.

6. If any requested information is missing, or if any evidence or information is considered deficient not accepted, authorities shall not automatically reject the information or directly apply facts available. In such cases, the supplying party ~~should~~ shall be informed forthwith of the ~~details~~ reasons thereof, and ~~shall~~ should have an opportunity to provide the missing information and further explanations within a reasonable period, such period to be determined in light of due account being taken of the nature and amount of information in question, the party's ability to provide the information and the time-limits of the investigation. If the additional information and explanations are considered by the authorities as not being satisfactory, they shall give a reasoned and adequate explanation of the reasons for the rejection of such evidence or information, and shall disclose (subject to the requirement to protect confidential information under paragraph 5 of Article 6) the information which they use to substitute the rejected information or any missing information in the disclosure pursuant to paragraph 9 of Article 6, and ~~should be given~~ in any published determinations pursuant to Article 12.

7. If the authorities have to base their findings, including those with respect to normal value, on information from a secondary source, including the information supplied in the application for the initiation of the investigation, they should do so with special circumspection, ~~and shall in such cases, the authorities should, where practicable,~~ check the information from other independent sources⁶ at their disposal or which are reasonably accessible by them, such as published price lists, official import statistics and customs returns, and from the information obtained from other interested parties during the investigation. It is clear, however, that if an interested party does not cooperate and thus relevant information is being withheld from the authorities, this situation could lead to a result which is less favourable to the party than if the party did cooperate. In any case, the authorities shall, wherever possible, choose the information that most closely represents the prevailing state of the relevant industry and market to which the missing or rejected information relates, based on an objective examination of all information obtained by them in the course of the investigation.

⁶ New footnote: "The independent sources shall be identified in the disclosure pursuant to paragraph 9 of Article 6, and in any published determinations pursuant to Article 12."