

WORLD TRADE ORGANIZATION

TN/RL/W/93
2 May 2003

(03-2360)

Negotiating Group on Rules

Original: English

PROPOSAL ON FACTS AVAILABLE

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

The following communication, dated 1 May 2003, has been received from the delegations of Brazil; Chile; Colombia; Costa Rica; Hong Kong, China; Israel; Japan; Korea; Norway; Singapore; Switzerland; the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; and Thailand.

This proposal concerns Facts Available. As it will be recalled, this issue has been identified in document TN/RL/W/6. Another Member has referred to this issue in document TN/RL/W/26.

This proposal indicates one way to overcome or resolve the problem of arbitrary investigation using information from secondary sources known as "Facts Available." The discussions in the Negotiating Group may assist in improving this proposal. Consequently, we reserve our right to modify or complement the proposal as appropriate.

In preparing and/or analyzing specific provisions, it is clear that amendment of the existing text may have an impact on other Articles of the AD Agreement, which have so far not been explicitly addressed. These links cannot be fully addressed until we have seen a comprehensive overview of proposed amendments. Consequently, we also reserve the right to make proposals on provisions which may not have been explicitly addressed so far for clarification or improvement.

Issue: Facts Available

Relevant Provision: Article 6.6, 6.8 and Annex II (Article 6.1, 6.2 are also relevant)

Relevant Issues to Be Discussed Separately:

- Affiliated party transactions (definition will be identified in a separate proposal.)

Description of 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 affirmative determinations are made on the basis of “facts available” in spite of the fact that respondents have acted to the best of their ability and been cooperative. Furthermore, in many cases excessively high dumping margins are calculated based on “facts available” which are adverse to the respondents’ interest, so-called “adverse facts available”. 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 adverse facts available. In view of this, we put forward the following six 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.

Elements of a Solution:

1. Purpose of Using “Facts Available”

- Clarify that “facts available” can only be used to substitute for missing or rejected information.

Proposal:

Amend the current text of Article 6.8 to explicitly state that “facts available” are to be used only for the purpose of substituting missing or rejected information. Examine how the concept of “significant impediment”, 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:

- This proposal intends to clarify the current provision of Article 6.8 that facts available should be used only to substitute for information that the responding party did not submit or information that the responding party did submit but the authorities rejected. 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 use facts available where actual accurate data are available.
- We should examine whether it is necessary and appropriate to maintain the concept of “significant impediment”, 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 by authorities as a catch all excuse to use facts available to penalize responding parties, even where there are no real difficulties for the authorities to use the submitted information.

- 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”.

2. Situation in which “Facts Available” Can Be Applied

- Clarify the situations in which “facts available” can be applied by requiring the authorities to make all reasonable efforts to obtain the necessary information from respondents.

Proposal:

- (i) Amend 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 fulfill the reasonable effort requirement, the authority must notify the respondent in detail of information which was insufficient in the response to the authorities’ questionnaire. The authority must also permit the respondent to submit the required information within a reasonable period of time. 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:

- This proposal intends to codify implicit rules in the current AD Agreement, which the panel in *Argentina- Ceramic Tiles*¹ clarified. 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 reasonable efforts have been made to further clarify the requested information.
- We will also discuss factors to consider when determining whether a responding party prepared and submitted the information within “a reasonable time.”
- This proposal is intended to make an addition to the current text of Annex II.1.

3. Method of Applying “Facts Available”

- Require the authorities to use any and all necessary information submitted by respondents, provided that the information is verifiable and appropriately submitted, as recommended in the *United States – Steel Plate*.

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.

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)

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 "shall 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.
- Require the authorities to choose as "facts available" information from a secondary source that appropriately represent the situation of the prevailing state of the industry or the relevant market.

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 the 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 Article 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, so-called "adverse facts available".
- 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."

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

- Clarify the situation in which a party can be deemed to have been non-cooperative to the extent that use of “facts available” less favorable to that party is permitted.

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 fulfill 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 whether a respondent is “cooperative” and thus whether or not to apply “adverse facts available”. 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 favorable.
- Ensure proper application of “facts available” by providing adequate and timely disclosure of the basis of the decision to use “facts available.”

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 may use, and in fact have used in certain circumstances, one set of facts in the preliminary decision and another set of facts, or “facts available” of some kind, in the final decision with little or no warning or disclosure to interested parties. Interested parties are, and have been, deprived of opportunity to comment on the change in information.
 - 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.
 - This proposal is intended to amend Annex II.6.
-