

FURTHER SUBMISSION ON FACTS AVAILABLE

Paper from the United States

The following communication, dated 2 March 2006, is being circulated at the request of the Delegation of the United States

The submitting delegation has requested that this paper, which was submitted to the Rules Negotiation Group as an informal document (JOB(06)/45), also be circulated as a formal document.

The United States and other Members have suggested that the rules concerning the application of facts available in antidumping and countervailing duty proceedings be clarified and improved.^{1, 2} Article 6.8 of the Anti-Dumping Agreement (ADA) provides that determinations may be made on the basis of facts available if any interested party significantly impedes an investigation or refuses access to, or otherwise does not provide, necessary information within a reasonable period of time. Annex II of the ADA provides further guidance as to when facts available should be applied. In particular, Annex II provides that submitted information should be taken into account as long as it is verifiable, submitted in a timely fashion, and can be used without undue difficulties. The ADA does not define “undue difficulty”, and the question of whether information submitted can be used in the investigation without undue difficulties is a highly fact-specific issue.

These provisions intentionally strike a careful but necessary balance between the responsibility of interested parties to provide all information that is required and necessary for an anti-dumping determination, and the affirmative duty of an investigating authority to make efforts to use such verifiable and timely submitted information, if the interested party has acted to the best of its ability. However, it may be appropriate to clarify that not all submitted information must be used in all circumstances. In particular, the balance of rights and obligations would be upset if a respondent party can pick and choose the pieces of information it submits, depending on whether or not it perceives the actual information to be beneficial to its interests. In such a situation, it is the view of the United States that the ADA should clarify that an investigating authority is not required to use information that otherwise satisfies the requirements of paragraph 3 of Annex II where the use of such information would be unduly difficult, particularly in light of the relationship of such information to the missing information.

¹ See *Three Issues Identified for Discussion by the Negotiating Group on Rules, Communication from the United States*, TN/RL/W/153 (26 April 2004).

² See *Further Submission on Facts Available, Paper from Chile; Hong Kong, China; Israel; Korea; Norway; the Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu; and Thailand*, TN/RL/GEN/64 (16 September 2005).

It is beyond dispute that various components of information necessary to an anti-dumping determination are interconnected, and a failure by an interested party to provide certain information may have ramifications for an investigating authority's ability to use other information submitted by that party.³ It should, therefore, be recognized that investigating authorities have both the authority and the responsibility to consider the relationship between the missing information and the information submitted and, in light of that relationship, assess whether the fact that a crucial element of information was not submitted by a party justifies the conclusion that other information which was submitted by that party nevertheless does not satisfy the criterion of usability contained in paragraph 3 of Annex II. In connection with the responsible exercise of such authority, however, it must be further recognized that an investigating authority may disregard submitted information where, based on an unbiased and objective evaluation of the facts, it concludes that it would be unduly difficult to use such information given the relationship of the submitted information to necessary information that was not submitted by the same party. Of course, such a conclusion must be accompanied and supported by a reasoned explanation by the authority.

Maintaining a balance of rights and obligations between importing and exporting Members that encourages responding parties of an exporting Member to provide all necessary information for the importing Member to conduct the investigation, and determine the rate of dumping, in the manner called for by the Agreement is important to the preservation of the effectiveness of the ADA. In order to maintain this balance, the United States proposes amending paragraph three of Annex II of the ADA⁴, as follows:

3. *All information which is verifiable, which is appropriately submitted so that it can be used in the investigation without undue difficulties²⁵, which is supplied in a timely fashion, and, where applicable, which is supplied in a medium or computer language requested by authorities, should be taken into account when determinations are made. It is recognized that the failure by an interested party to provide certain information necessary for the determination, or the submission by an interested party of such information that cannot be verified or is unusable, may cause an investigating authority to conclude that it is unduly difficult to use other information that is submitted by that party, and to disregard such submitted information, either entirely or in part. 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 considered to significantly impede the investigation.*

³ See, for example, Panel Report, *United States - Anti-Dumping and Countervailing Measures on Steel Plate from India*, WT/DS206/R (adopted 29 July 2002), at para. 7.62 *et seq.*

⁴ We note and agree with the view expressed by other Members (*e.g.*, in TN/RL/GEN/93) that the Agreement on Subsidies and Countervailing Measures would benefit from an annex similar to Annex II of the ADA, appropriately modified for use in countervailing duty proceedings.

²⁵ The question of whether information submitted can be used in the investigation without undue difficulties is a highly fact-specific issue.