WORLD TRADE ORGANIZATION

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Negotiating Group on Rules Original: English

COMMENTS BY AUSTRALIA ON THE PROPOSAL BY VARIOUS MEMBERS ON FACTS AVAILABLE (DOCUMENT TN/RL/W/93)

The following communication, dated 13 June 2003, has been received from the Permanent Mission of Australia.

Australia thanks the proponents for the proposal suggesting solutions to problems identified in relation to recourse to facts available. Australia has indicated in its general concepts paper (TN/RL/W/86) that it considers that the issue of facts available is an area which requires greater clarity and predictability and agrees that there are currently a number of ambiguities in the application of facts available. The proposal contains a number of aspects on which Australia has some preliminary comments and questions.

Australia agrees on the importance of advising respondents of any recourse to facts available by the investigating authorities at any point during the investigation process and a clear explanation on the basis for such recourse.

Australia also agrees that it may be useful to examine the concept of "significant impediment", as proposed under Element one of the paper, and how Members have applied this.

Australia also considers that it is important to note the interrelationship between the provisions in the WTO Anti-Dumping Agreement relating to facts available and other provisions such as the timeframe for an exporter to respond to questionnaires and any follow-up information sought from the investigating authorities. Clearly, investigating authorities will always be mindful of the balance which is required in relation to timeframes: that there is a fair and due process assured to exporters, as well as the need to take timely remedial action in response to injurious dumping. Investigating authorities must be able to make a determination or calculation of the dumping margin within the overall investigation timeframes.

Australia noted in an earlier comments paper (TN/RL/W/22) the helpful guidance provided by WTO jurisprudence in the *US – Hot-Rolled Steel* case [1] in regard to whether information had been submitted "within a reasonable time". The Appellate Body suggested that investigating authorities should consider the following factors:

(i) the nature and quality of the information submitted
(ii) the difficulties encountered by an investigating exporter obtaining the information
(iii) the verifiability of the information and ease with which it can be used
(iv) whether other interested parties would be prejudiced if the information is used

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[1] *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products*, Appellate Body Report (WT/DS184/AB/R), 24 July 2001 (hereafter *US –Hot-Rolled Steel*).

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(v) whether the acceptance of the information would compromise the ability of the investigating authorities to conduct the investigation expeditiously and
(vi) the number of days by which the investigated exporter missed the applicable time limit.

As a general observation based on Australian exporters' experiences, complications appear to arise in circumstances where additional information is sought following the on-the-spot investigation. Australia notes that paragraph 7 of Annex I provides that "it should be standard practice prior to the visit to advise the firms concerned of the general nature of the information to be verified and of any further information which needs to be provided, though this should not preclude requests to be made on the spot for further details to be provided in the light of information obtained".

We would agree that where a firm refuses verification of necessary information, in most cases this provides a basis for recourse to facts available. Jurisprudence has confirmed that the last sentence of Annex II.7 is intended to be a penalty to firms that do not cooperate. Investigating authorities need to be able to calculate a dumping margin accurately and in a timely fashion and need to be able to address situations where there may be incentives for exporters to provide selective or inaccurate information.

However, claims of cooperation or non-cooperation are not always so clear-cut. Rather, the ambiguity may lie not in situations where a firm decides *not* to cooperate, but where information provided is incomplete or inaccurate or unable to be verified. Annex II.5 provides some guidance in the sense that not all information may be rejected if it is not "ideal in all respects". However, ambiguity remains as to the extent of an interested party acting "to the best of its ability".

- Australia would appreciate clarification of the proposed amendments to Article 6.6. Is it the intention of the proponents that by removal of the exception clause at the beginning of Article 6.6, information supplied through recourse to facts available would be required to be verified? Australia considers that this may be impracticable in application.

- In relation to the "Method of Applying Facts Available", the proponents refer to rejecting submitted and verified data where all requested information had not been provided. Reference is made to Annex II.3 and the terms "all information". Australia considers that Annex II.5 provides some guidance in this regard?

Australia is concerned that the proposal would mandate authorities use of all submitted information not proven to be inaccurate. Australia considers that the party submitting the information should be required to prove the accuracy of that information, particularly where it relates to its own operations.