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Choosing Facts Available to replace missing facts in Anti-Dumping determinations: What are the WTO rules?

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One of the significant issues that frequently arises in anti-dumping cases is whether an anti-dumping authority is justified in finding that the parties have failed to submit adequate information so as to justify the anti-dumping authority resorting to facts available. In any case where the authority does find it can resort to facts available, then the question arises as to which of the available facts the authority can choose as a replacement for the allegedly missing information and how the authorities are supposed to make that decision about which facts available to use. For example, in the two WTO complaints made by Australia against anti-dumping duties and countervailing duties imposed by China on, respectively, barley[i] and bottled wine[ii], the panels would have had to consider both of these issues.

WTO rules (in Article 6.8 of the WTO *Anti-Dumping Agreement* and Article 12.7 of the WTO *Subsidies and Countervailing Measures Agreement*) discipline resort to facts available in two ways. The first issue relates to when it is permissible for trade remedies authorities to resort to facts available; and, the second is, if it is permissible to resort to facts available, what facts can authorities choose to rely on as replacements for the allegedly missing information. This note concentrates on the second issue: after an anti-dumping authority has validly decided that it can resort to facts available, how do WTO rules constrain the choice of facts available to be used in the determination.

The WTO provisions

The relevant WTO rules are contained in similar provisions in Article 6.8 of the Anti-Dumping Agreement and Article 12.7 of the Subsidies and Countervailing Measures Agreement.

ADA Article 6.8 provides:

> "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, preliminary and final determinations, affirmative or

negative, may be made on the basis of facts available. The provisions of Annex II shall be observed in the application of this paragraph."

Article 12.7 of the SCM Agreement provides:

"In cases in which any interested Member or interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation, preliminary and final determinations, affirmative or negative may be made on the basis of facts available."

Annex II to the ADA is headed "Best Information Available in Terms of Paragraph 8 of Article 6". It contains 7 paragraphs. The first six relate to when it is permissible to draw on facts available and only the 7th paragraph deals with the how authorities may use facts available. The first two sentences of paragraph 7 of Annex II of the ADA provide:

"If authorities do 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. In such cases, the authorities should, where practicable, check the information from other independent sources at their disposal, such as published price lists, official import statistics and customs returns and from information obtained from other interested parties during the investigation."

While Article 6.8 is supplemented by and expressly incorporates the terms of Annex II of the ADA, there is no equivalent Annex in the SCM Agreement. However, panel and AB reports have treated Article 12.7 of the SCM as involving obligations like those expressly set out in Annex II and the second sentence of Article 6.8 of the ADA.

What have WTO panels and the Appellate Body said about the Choice of Facts Available ?

The fact that the heading to Annex II refers to the "Best Information Available" has been interpreted by several panel and Appellate Body reports to mean that the authorities must choose the best information available. The WTO Appellate Body has on several occasions approved of the explanation of the process of reasoning and evaluation made by the panel in *Mexico – Anti-Dumping measures on Rice* in 2005:

"The use of the term "*best* information" means that information has to be not simply correct or useful *per se*, but the most fitting or "most appropriate" information available in the case at hand. Determining that something is "best" inevitably requires, in our view, an evaluative, comparative assessment as the term "best" can only be properly applied where an unambiguously superlative status obtains. It means that, for the conditions of Article 6.8 of the AD Agreement and Annex II to be complied with, there can be no better information available to be used in the particular circumstances. Clearly, an investigating authority can only be in a position to make that judgement correctly if it has made an inherently comparative evaluation of the "evidence available". (original emphasis; footnote omitted)[iii]

In the cases, there has been just a little step back from saying that in every single case a comparative evaluation of the evidence available is required. Though, in certain exceptional cases, it may not be possible to engage in a comparative evaluation, it remains true that, in all but those exceptional cases, a comparative evaluation of the evidence available is required in order to choose which facts available to use.[iv]

In addition, the line of authorities in very clear on a number of points:

The purpose of allowing resort to facts available is to overcome the absence of information which is necessary to complete a determination so the choice of facts available involves identifying replacement information that is necessary but is missing from the record.[v]

The authority must choose facts available that "reasonably replace" the information which the interested party failed to provide.[vi]

In order to choose which 'facts available" reasonably replace the missing "necessary information', the authority must engage in a process of reasoning and evaluation.[vii]

The process of reasoning and evaluation by the authority may vary from determination to determination.[viii]

The process of reasoning and evaluation must take into account all substantiated facts that are on the record[ix] and "properly available to it".[x] This includes the information that the respondent did provide even it was incomplete. As the Appellate Body said in *Mexico AD on Beef and Rice,* "an agency must generally use, in the first instance, the information the respondent did provide, if any".[xi]

The process of reasoning and evaluation must have been done in a way that enables a panel to assess whether the facts available used by the investigating authority are reasonable replacements for the missing "necessary information". [xii]

A failure to follow these rules constitutes a violation of Article 6.8.

Even if an anti-dumping authority has complied with the legal elements of Article 6.8, by identifying what information is missing, taking into account all of the information that was properly submitted, and has interpreted its task as one of finding reasonable replacement information through an evaluation of all available evidence in order to select the best available evidence, it is still possible that a panel could find that the authorities made an error on the question of fact as to what was the best replacement information to choose. However, Article 17.6(i) of the WTO *Agreement on Anti-Dumping* limits the circumstances in which a panel can find that an error on a question of fact is a breach of the Agreement. The way that the authorities establish the facts and make a decision of fact as to which is the best information to use as a replacement for the missing information cannot amount to a violation of Article 6.8 merely because a Panel reviewing the matter disagrees with the conclusion on the question of fact. A decision on the question of fact can only be regarded as a violation if the authorities did not properly establish the facts or if their evaluation of the facts was not unbiased and objective.

Appellate Body decisions indicate that in order to facilitate that assessment, authorities must provide a reasoned and adequate explanation of their conclusions.[xiii] A failure to provide a reasoned and adequate explanation of their conclusions on a particular matter subject to a provision of the ADA constitutes a breach of that provision of the ADA. Therefore, Article 6.8 not only obliges national anti-dumping authorities to engage in an adequate process of reasoning and evaluation in order to choose which facts are the best available information that can serve as a reasonable replacement for the missing necessary information, it also obliges those authorities to provide a reasoned and adequate explanation of the process of reasoning and evaluation that led them to their conclusion that particular facts available should be used to replace the missing information.

Questions and consultations welcome

If you wish to discuss these issues of resort to facts available in anti-dumping investigations, please do not hesitate to contact us by:

Using the Contact Box at: www.williamstradelaw.com/contact.html

Using Email: williams [at] williamstradelaw [dot] com

Next month's (June 2023) Williams Trade law Newsletter:

The Choice of Facts Available in *China - Anti-Dumping Duties on imports of Barley from Australia* WT/DDS598

This newsletter "Choosing Facts Available to replace missing facts in Anti-Dumping Determinations: What are the WTO rules?" was originally published on the website of Williams Trade law at: Williams Trade Law .

Endnotes

[i] *China – Anti-Dumping and Countervailing Duty Measures on Barley from Australia*, *Request for Establishment of a Panel by Australia*, WT/DS598/4, 16 March 2021.

[ii] *China – Anti-Dumping and Countervailing Duty Measures on Wine from Australia*, *Request for Establishment of a Panel by Australia*, WT/DS602/2, 17 September 2021.

[iii] At para 7.166 of the panel report: see *Mexico – Definitive Anti-Dumping Measures on Beef and Rice*, ('*Mexico – Measures on Rice*') Report of the Panel WT/DS295/R and report of the Appellate Body, WT/DS295/AB/R both adopted by the DSB on 20 December 2005.

[iv] *United States – Anti-Dumping and Countervailing Duties on Certain Products and the Use of Facts Available*, ('*US – Facts Available*'), unadopted panel report, WT/DS539, issued 21 January 2021 and appealed

[v] *United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India* ('*US Carbon Steel*') report of the Appellate Body, WT/DS436/AB/R, adopted by the DSB on 19 December 2014 at [4.416].

[vi] US - *Carbon Steel,* AB at [4.416]; *Mexico – AD Measures on Rice* AB at 294.

[vii] US - *Carbon Steel,* AB at [4.418].

[viii] US - *Carbon Steel,* AB at [4.421].

[ix] US - *Carbon Steel,* AB at [4.419].

[x] *US – Facts Available* Panel at [7.34]

[xi] *Mexico AD measures on Rice,* AB at [288].

[xii] *US Carbon Steel*, AB at 4.421.

[xiii] *United States – Facts Available* report of the Panel, WT/DS539/R at [7.16 – 7.18] including the quote from [97] of the AB report in United States – Investigation of the International Trade Commission in Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada, WT/DS277/AB/RW, adopted 9 May 2006 ('*US – Softwood Lumber VI (Article 21.5 – Canada)*, which in turn quotes from [193] of the AB report in *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R adopted 23 August 2001 ('*US – Hot-Rolled Steel')*