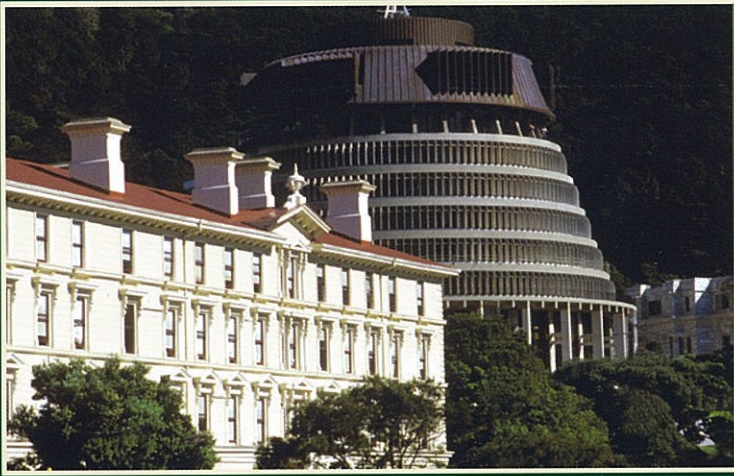


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Judge Peter Boshier

Michael Andrews

Amelia Evans

Arla Kerr

Natalie Pierce

Victoria

UNIVERSITY OF WELLINGTON

*Te Whare Wānanga
o te Upoko o te Ika a Māui*



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The Student Editor
New Zealand Journal of Public and International Law
Faculty of Law
Victoria University of Wellington
PO Box 600
Wellington
New Zealand
e-mail nzjpil-editor@vuw.ac.nz
fax +64 4 463 6365

THE FACTS AVAILABLE ON "FACTS AVAILABLE": AN ANALYSIS OF ARTICLE 6.8 AND ANNEX II OF THE WTO ANTI-DUMPING AGREEMENT

*Michael Andrews**

Article 6.8 and Annex II of the World Trade Organization (WTO) Anti-Dumping Agreement entitle an investigating authority, when conducting a dumping investigation, to use the "facts available" in order to make certain conclusions with respect to the activities of interested parties when those interested parties do not provide the information themselves. This article analyses these "facts available" provisions of the Anti-Dumping Agreement and assesses a number of changes to the provisions proposed by certain WTO member countries. The changes proposed by these members are assessed in relation to the wording of the 2001 Doha Ministerial Declaration, current practices of member countries, relevant WTO dispute settlement Panel and Appellate Body decisions and a draft text of the Anti-Dumping Agreement recently released by the Chair of the WTO Negotiating Group on Rules. This article contends that substantial changes to the "facts available" provisions of the Anti-Dumping Agreement are not needed, and if any changes to these provisions are made, they should reflect "best practice" guidelines based on current practices of a select number of WTO members as well as relevant WTO case law interpreting article 6.8 and the rules contained in Annex II.

I INTRODUCTION

Dumping is, in general, a situation of international price discrimination, where the price of a product when sold to the importing country is less than cost or less than the price of the same

* Michael Andrews is a Senior Analyst in the Trade Rules, Remedies and Tariffs Group of the New Zealand Ministry of Economic Development (MED) having previously also worked for the South African and Egyptian trade remedies authorities. The author wrote this paper as part of a LLM from the Victoria University of Wellington Law School. The views presented in this paper are those of the author alone in his personal capacity, as are any errors or oversights. The author acknowledges the assistance of Meredith Kolsky Lewis who reviewed the work in her role as a supervisor and Bruce Cullen, Team Leader, Trade Rules, MED, who provided a valuable insight into the workings of the WTO Rules Negotiating Group and the Committee on Anti-Dumping Practices.

product when sold in the market of the exporting country.¹ Article VI of the General Agreement on Tariffs and Trade (the GATT)² and the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (the Anti-Dumping Agreement)³ allow the country in which a product is dumped to take protective action in the form of anti-dumping measures if it can establish that the product was dumped and thereby causes or threatens to cause material injury to the domestic industry of that product.⁴ Anti-dumping policy has been one of the most controversial aspects of the post-war multilateral trading system and remains one of the few (but the most frequently used) forms by which countries can impose new trade restrictions in accordance with multilateral rules.⁵

Before a World Trade Organization (WTO) member country can impose anti-dumping duties, an investigation must be conducted by that member in accordance with the provisions of the Anti-Dumping Agreement.⁶ The Anti-Dumping Agreement contains detailed procedural rules that must be observed when conducting investigations, as well as substantive rules regarding how to calculate the margin of dumping, determine whether injury exists and establish whether a causal link exists between the dumping and the injury.⁷ One of the procedural rules is regarding the use of "facts available" when interested parties do not provide information sought by the investigating authorities. Under article 6.8 and Annex II of the Anti-Dumping Agreement, investigating authorities are able to use information not actually provided by interested parties to that investigation.

This article analyses the "facts available" provisions of the Anti-Dumping Agreement and assesses a number of changes to the provisions proposed by certain WTO member countries. The

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- 1 Judith Czako, Johann Human and Jorge Miranda *A Handbook on Anti-Dumping Investigations* (Cambridge University Press, Cambridge, 2003) 1. The extent to which there is a difference in these two prices is termed the "margin of dumping".
 - 2 General Agreement on Tariffs and Trade (30 October 1947) 55 UNTS 194, art VI [GATT]. The article contains the basic provisions relating to anti-dumping action.
 - 3 Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (15 April 1994) 33 ILM 1125 [Anti-Dumping Agreement]. The Anti-Dumping Agreement was enacted during the Uruguay Round of trade negotiations: Marrakesh Agreement Establishing the World Trade Centre (15 April 1994) 1867 UNTS 3, Annex 1A Multilateral Agreements on Trade in Goods [Marrakesh Agreement]. Its purpose is to clarify and amplify the provisions of article VI of the GATT.
 - 4 Edwin Vermulst *The WTO Anti-Dumping Agreement: A Commentary* (Oxford University Press, Oxford, 2005) 2.
 - 5 Michael O Moore "Antidumping Reform in the WTO: A Pessimistic Appraisal" (2007) 12 *Pacific Economic Review* 357, 357 ["Antidumping Reform in the WTO"]. The multilateral rules referred to are article VI of the GATT and the Anti-Dumping Agreement. These two legal instruments are to be read together.
 - 6 Czako, Human and Miranda, above n 1, 1.
 - 7 *Ibid*, 3.

changes proposed by these members are assessed in relation to the wording of the *Doha WTO Ministerial Declaration (Doha Ministerial Declaration)*,⁸ current practices of member countries, relevant WTO dispute settlement Panel and Appellate Body decisions and a draft text of the Anti-Dumping Agreement recently released by the Chair of the WTO Negotiating Group on Rules. The thesis of this article is that substantial changes to the "facts available" provisions of the Anti-Dumping Agreement are not needed and if any changes to these provisions are made, they should reflect "best practice" guidelines based on current practices of a select number of WTO members as well as relevant WTO case law interpreting article 6.8 and the rules contained in Annex II.

This article proceeds as follows. Part II of this article begins by explaining the "facts available" provisions of the Anti-Dumping Agreement and why members resort to the use of "facts available" when conducting dumping investigations. Part II then looks at the way in which "facts available" were applied by WTO member countries prior to the adoption of the Anti-Dumping Agreement in 1994 as well as how the adoption of the Anti-Dumping Agreement and the introduction of article 6.8 and Annex II have changed the way in which WTO members now use "facts available". Part III examines why some WTO members consider there needs to be a change to the "facts available" provisions of the Anti-Dumping Agreement and to what extent any changes are likely to be permissible in view of the need to maintain the "basic concepts, principles and effectiveness" of the Anti-Dumping Agreement, as expressed in the 2001 *Doha Ministerial Declaration*. Part IV of this article introduces a particular group of WTO members who are in favour of changing the "facts available" provisions of the Anti-Dumping Agreement while Part V analyses and critiques a number of proposals these members have put forward on suggested changes to article 6.8 and Annex II of the Anti-Dumping Agreement. Part VI looks at ways in which problems identified with the "facts available" provisions could be solved. Part VII concludes that substantial changes to the "facts available" provisions of the Anti-Dumping Agreement are not needed.

II THE USE OF "FACTS AVAILABLE" UNDER THE ANTI-DUMPING AGREEMENT

A Introduction

Article 6.8 of the Anti-Dumping Agreement provides that:

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

⁸ WTO *Doha WTO Ministerial Declaration* (14 November 2001) WT/MIN(01)/DEC/1 [*Doha Ministerial Declaration*]. The *Doha Ministerial Declaration* is the agreement that initiated the current round of WTO negotiations and is commonly referred to as the "Doha Development Round" because of its emphasis on improving market access conditions for developing and least-developed members. The round began in 2001 and is still ongoing.

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

Annex II provides a number of rules which investigating authorities must follow in applying article 6.8 of the Anti-Dumping Agreement. The Appendix to this article contains Annex II of the Anti-Dumping Agreement.

In a dumping investigation, investigating authorities will request information from interested parties in order to assist them in making certain calculations, and in making a final determination in the investigation. The interested parties will include foreign producers and exporters from the country where the allegedly dumped goods originate, and importers and domestic producers in the country that has initiated the investigation. For instance, in order that the authorities can calculate each exporter's individual dumping margin, information will be sought from these exporters on their domestic sales and costs and their export prices.

In many cases the authorities may not be able to obtain all the information necessary to make these calculations but nevertheless must undertake this process and complete it within the specific timeframes outlined in the Anti-Dumping Agreement. As explained by the Panel in *United States – Hot-Rolled Steel from Japan*, the objective of using "facts available" is to balance the need to complete the dumping calculations for each exporter and foreign producer with the need to complete the anti-dumping investigation within the timeframes prescribed in the Anti-Dumping Agreement.⁹

The "facts available" could include information provided by other parties to the proceedings or other information to which the authorities have access. However, it is common practice for investigating authorities to treat as "facts available" under article 6.8 the information submitted in the domestic industry's application, including the information on which the allegation of dumping is based.¹⁰ In simple terms, if exporters do not cooperate, the authorities will often conclude that their dumping margins are at least as high as those alleged by the domestic industry in the application.¹¹ The rationale for investigating authorities not to use information submitted by other foreign exporters as "facts available" is because doing so might provide an incentive for foreign exporters or producers not to provide the investigating authority with their own information if they consider that doing so might yield a more advantageous result, that is, a lower dumping margin.¹²

⁹ *United States – Anti-Dumping Duties on Certain Hot-Rolled Steel Products from Japan* (28 February 2001) WT/DS184/R, para 7.51 (Panel, WTO).

¹⁰ Czako, Human and Miranda, above n 1, 17.

¹¹ Vermulst, above n 4, 147.

¹² Czako, Human and Miranda, above n 1, 17.

The problem of non-cooperation in dumping investigations is exacerbated by the authorities often requesting parties to submit massive amounts of information within a relatively short period of time. It is seldom that these parties will be able to submit all the requested information within the time limits. The facts available may then become a powerful weapon for the authorities which can easily be abused because in this situation the authorities may then decide to treat this as partial, or even full, non-cooperation.¹³

B Use of "Facts Available" Prior to the Adoption of the Anti-Dumping Agreement

Prior to the adoption of the Anti-Dumping Agreement in 1994 there was no "facts available" provision under article VI of the GATT. The United States Department of Commerce used the term "best information available" to denote information other than that supplied by the respondents. Critics of the pre-WTO United States system note that the average dumping margin when "best information available" was used was much higher than the calculated rates.¹⁴ Baldwin and Moore estimate that between 1980 to 1990, in cases where the United States Department of Commerce resorted to "facts available", exporters had dumping margins 38 percentage points higher than when it relied only on respondents' data.¹⁵ In another study by Moore, using the pre-WTO period between 1980 and 1994, average calculated dumping margins were 22 per cent for foreign firms that cooperated with the United States Department of Commerce, compared to 70 per cent for those facing "facts available" procedures.¹⁶

One of the main problems in the pre-WTO United States system was that the United States Department of Commerce made compliance very difficult and costly for foreign producers and exporters. Such difficulties included 200-page questionnaires, tight deadlines, requirements to report data using United States-style accounting techniques, and on-site investigations by United States investigators of all records held by foreign producers and exporters from which information had

13 Vermulst, above n 4, 147.

14 Michael O Moore "Facts Available' Dumping Allegations: When Will Foreign Firms Cooperate in Antidumping Petitions?" (2005) 21 *European Journal of Political Economy* 185, 186 ["Facts Available' Dumping Allegations"].

15 Michael O Moore "US 'Facts Available' Antidumping Decisions: An Empirical Analysis" (2006) 22 *European Journal of Political Economy* 639, 640 ["US 'Facts Available' Antidumping Decisions"]. In this study, the average final dumping margin using "best information available" was 67 per cent (36 cases) while the average anti-dumping duty based on actual information provided by the foreign firms was 28 per cent (188 cases).

16 Michael O Moore and Alan Fox "Why Don't Foreign Firms Cooperate in US Antidumping Investigations?: An Empirical Analysis" (Working Paper, George Washington University, 2006) www.ssrn.com/abstract=958531 (accessed 19 December 2008).

been sourced for the purpose of the investigation.¹⁷ Furthermore, if foreign producers and exporters were found by the United States Department of Commerce to be only "partially" cooperative, all information provided by the firms could be thrown out, with "best information available" used in its place.¹⁸

Many critics of this system saw the "best information available" approach as a means by which domestic firms could use the system, not to elicit truthfulness about foreign firms' costs and prices, but instead as an excuse to impose anti-dumping duties on foreign firms far in excess of the true dumping margin that would have been calculated if its actual costs and prices had been used in the calculations.¹⁹ On the other hand, supporters of this system argued that this approach was needed in order to achieve compliance from the foreign firms in providing the information required by the United States authorities in order to determine the true extent of any dumping. The supporters also noted that it is unfair to allege that dumping margins determined through the use of "best information available" was not simply a means to force high tariffs onto innocent foreign firms because the evidence suggested that the United States Department of Commerce does not always use "best information available".²⁰

C Use of "Facts Available" after the Adoption of the Anti-Dumping Agreement

Complaints about the "best information available" United States system led to reform of the system in the 1986-1994 Uruguay round of multilateral trade negotiations and the eventual adoption of article 6.8 and Annex II in the Anti-Dumping Agreement. One notable change was that investigating authorities must use reasonable attempts to use the information provided by the exporting firms even though it may not be ideal in all respects.²¹ However, investigating authorities are still able to use information provided by the petitioner to calculate dumping margins.²² In addition the United States Department of Commerce's new anti-dumping regulations made it clear

17 Moore "Facts Available' Dumping Allegations", above n 14, 186. For further discussion of these and other problems with the United States system prior to the introduction of the Anti-Dumping Agreement, see T Murray "The Administration of the Antidumping Duty Law by the Department of Commerce" in R Boltuck and R E Litan (eds) *Down in the Dumps: Administration of the Unfair Trade Laws* (Brookings, Washington DC, 1991) 23; David Palmetier "The Antidumping Law: A Legal and Administrative Non-Tariff Barrier" in Boltuck and Litan (eds), above n 17, 64; J M Finger and Nellie T Artis *Antidumping: How it Works and Who Gets Hurt* (University of Michigan Press, Ann Arbor, 1993).

18 Moore "Facts Available' Dumping Allegations", above n 14, 187.

19 Ibid.

20 Ibid. Information collected by Baldwin and Moore showed that only 16 per cent of final dumping margins assessed during the 1980's in the United States used "best information available": *ibid*, 187.

21 Anti-Dumping Agreement, above n 3, Annex II, para 5.

22 Ibid, Annex II, para 7.

that the use of "adverse inferences" could be justified if the foreign firms were considered by the United States Department of Commerce to be deliberately uncooperative.²³

Even in view of the stricter "facts available" provisions being adopted in the Anti-Dumping Agreement, one important question is whether the use of "facts available" by WTO members increased or decreased after the introduction of article 6.8 and Annex II in the Anti-Dumping Agreement in 1994. The answer to this question will provide insight into whether these provisions of the Anti-Dumping Agreement have been successful in coercing foreign firms to provide more and better information in a dumping investigation and prevented investigating authorities from continuing to unnecessarily and unjustifiably disregard information submitted by these firms.

A 2005 study by Blonigen found that increased use of "facts available" has been an important contributor to higher dumping margins found by the United States Department of Commerce from 1980 to 2000.²⁴ Moore researched whether or not overall "facts available" use has declined in the post-WTO period.²⁵ This was in order to establish if the addition of article 6.8 of the Anti-Dumping Agreement had made it less likely that the Department of Commerce would use information provided by self-interested domestic producers, and more likely that incomplete, but nonetheless reliable information furnished to the authorities would not be discounted.

Moore's analysis provided few indications that "facts available" use has improved after 1994 in terms of the number of times "facts available" are used by the United States Department of Commerce in United States anti-dumping cases. The results of his research showed that the number of United States anti-dumping cases subject to "facts available" procedures had actually risen since 1994 and that average dumping margins calculated by the Department of Commerce in cases involving "facts available" had increased.²⁶ Moore also found that Japanese firms, which historically are familiar with Department of Commerce procedures, appeared to be withholding information and are facing "adverse facts available" techniques in the post-WTO Uruguay Round period, indicating that these firms have little faith that cooperating with the Department of Commerce will help their situation.²⁷ However, Moore did find strong evidence that there were more instances of the United States Department of Commerce accepting incomplete but accurate

23 Moore "'Facts Available' Dumping Allegations", above n 14, 187.

24 Bruce A Blonigen "Evolving Discretionary Practices of US Anti-dumping Activity" (2006) 39 Canadian Journal of Economics 874. In particular, Blonigen found that the use of facts available increased anti-dumping margins by about 63 percentage points and that firms deemed uncooperative almost certainly faced prohibitive anti-dumping duties.

25 Moore "US 'Facts Available' Antidumping Decisions", above n 15, 639–652.

26 Ibid, 650.

27 Ibid, 651.

information provided by foreign firms in a manner which reformers had hoped for.²⁸ In any event, such use of "partial" facts available was tempered by indications that such cases have resulted in higher average dumping margins (50 per cent) than average margins in similar cases before the 1994 Uruguay reforms. This led Moore to conclude that the United States Department of Commerce has not implemented the post-Uruguay round changes in the Anti-Dumping Agreement regarding the use of "facts available" in a way that has led to a fundamentally improved situation for foreign exporters. Moore suggested that negotiators considering anti-dumping reforms in future WTO rounds should be extremely vigilant about spelling out required legislative and regulatory changes otherwise liberalization efforts may be thwarted through half-hearted implementation by domestic administering authorities.²⁹

III WHY SOME MEMBERS CONSIDER THAT ARTICLE 6.8 SHOULD BE AMENDED

A Introduction

A number of WTO members consider that there are serious flaws in the current rules for conducting anti-dumping investigations which need to be addressed. These members consider that article 6.8 of the Anti-Dumping Agreement and the rules contained in Annex II are not particularly clear as to the exact circumstances under which the "facts available" may be applied. They are concerned that investigating authorities are deliberately resorting to the use of "facts available" in order to inflate the dumping margins for individual exporters.

These members consider that significant changes in these rules are needed, not to weaken national laws, but to improve them by closing the yawning gap between what the laws are supposed to do and what they actually do.³⁰ They consider that the present round of trade negotiations is the chance to close this gap.

B Paragraph 28 of the Doha Ministerial Declaration

When proposing changes to the Anti-Dumping Agreement it is important that the actual purpose and scope of any post-Doha Round negotiations under the WTO should not be overlooked. Paragraph 28 of the *Doha Ministerial Declaration* reads as follows:³¹

28 Ibid.

29 Ibid.

30 Brink Lindsey and Dan Ikenson *Trade Policy Analysis no 21: Reforming the Anti-Dumping Agreement: A Road Map for WTO Negotiations* (Cato Institute Centre for Trade Policy Studies, Washington DC, 2002) 3.

31 *Doha Ministerial Declaration*, above n 8, para 28. Paragraph 28 is titled "WTO Rules".

In the light of experience and of the increasing application of these instruments by members, we agree to negotiations aimed at clarifying and improving disciplines under the Agreements on Implementation of article VI of the GATT 1994 and on Subsidies and Countervailing Measures, while preserving the basic concepts, principles and effectiveness of these Agreements and their instruments and objectives, and taking into account the needs of developing and least-developed participants.

The commitment to preserve the "basic concepts, principles and effectiveness" of the Anti-Dumping Agreement and its "instruments and objectives" was inserted into the *Doha Ministerial Declaration* after an effort by the United States to limit the scope of permissible changes to anti-dumping rules.³² Paragraph 28 recognises that some members want to change things – improve disciplines – while other members want to keep things the same and preserve the effectiveness of the instruments. Delegates on each side will insist that they are the true defenders of the basic concepts and principles.³³

C Defining the Basic Concepts, Principles and Objectives of the Anti-Dumping Agreement

Although the United States government attempted to limit the scope of the Doha negotiations through restrictive language in the *Doha Ministerial Declaration*, a proper reading of that language still allows for significant changes in the anti-dumping rules and should be considered a good starting point to negotiate any changes to the Anti-Dumping Agreement.³⁴ Any WTO anti-dumping negotiations should begin by attempting to define the basic concepts, principles, effectiveness and objectives of the Anti-Dumping Agreement and its instruments and objectives. This is in order not only to ensure that negotiations do not exceed the scope of the limiting language of the *Doha Ministerial Declaration* but to help avoid a deadlock in the negotiations that might wreck the current round of negotiations itself.³⁵

The Anti-Dumping Agreement is silent on its basic concepts, principles, effectiveness and objectives. It simply establishes the standards by which dumping investigations should be completed and remedies imposed. Therefore, rather than defining the problem which anti-dumping duties are needed to solve, it simply outlines the solution to the problem. Guidance to understanding the problem that the Anti-Dumping Agreement supposedly solves and therefore the rationale or the basic concepts, principles and objectives behind the Anti-Dumping Agreement and its instruments and objectives can be obtained from a position paper released by the United States government on

32 Lindsey and Ikenson, above n 30, 2.

33 J Michael Finger and Andrei Zlate "Anti-Dumping: Prospects for Discipline from the Doha Negotiations" (2005) 6 *Journal of World Investment and Trade* 2.

34 Lindsey and Ikenson, above n 30, 3.

35 *Ibid*, 4.

the basic concepts and principles of the trade remedy rules.³⁶ The Bush administration's position paper adopts what has become the standard refrain of anti-dumping supporters in the United States: that anti-dumping measures are needed to offset artificial competitive advantages created by market-distorting government policies.³⁷

According to the position paper, "[e]ffective trade remedy instruments are important to respond to and discourage trade-distorting government policies and the market imperfections that result."³⁸ Such government policies can create artificial competitive advantages that may be distinguished from the real competitive advantages that arise in normal market competition. According to the paper anti-dumping measures are needed to help domestic producers and workers combat the artificial anti-market policies of foreign governments and restore the "level playing field" among producers across different countries.³⁹

This philosophy appears to be very narrow, however, because companies will dump their products into foreign markets for a number of reasons other than to take advantage of artificial competitive advantages caused by the anti-market policies of their government. Matsushita considers that firms will export their products at dumped prices for the following reasons:⁴⁰ companies will "predatory" price their product in another market to drive out competition in that market; companies will export their products at below costs of production for a certain time knowing that the costs of production will sharply decline as the product is mass-produced and sold, leading to profits over the longer term; companies will price discriminate by taking advantage of export markets which have significant differences in price elasticity than the home market.

Each of these reasons may have nothing to do with anti-market policies of foreign governments. They are simply means by which firms attempt to maximise profits by selling into foreign markets. Exporting firms can charge different prices in different markets for perfectly valid commercial reasons having nothing to do with government interventionism. Likewise, sales below cost often indicate the presence of vigorous competition, rather than any kind of market distortion.⁴¹

36 Communication from the United States to the Negotiating Group on Rules (22 October 2002) TN/RL/W/27.

37 Lindsey and Ikenson, above n 30, 6.

38 Communication from the United States to the Negotiating Group on Rules, above n 36, 3.

39 Ibid, 4.

40 Mitsuo Matsushita, Thomas J Schoenbaum and Mavroidis Petros *The World Trade Organization: Law, Practice and Policy* (Oxford University Press, Oxford, 2003) 303–305.

41 Lindsey and Ikenson, above n 30, 12.

D Conclusion

Anti-dumping measures are needed to prevent or remedy the types of discriminatory, below-cost and predatory pricing behaviour mentioned above because such pricing behaviours are considered "unfair" on the domestic producers of like products in the importing country. Article VI of the GATT 1994 recognises that dumping should be condemned under certain circumstances and provides the basis for imposing anti-dumping measures, if those circumstances have been met. On the basis that the Anti-Dumping Agreement is intended to clarify and amplify the provisions of Article VI of the GATT 1994, it follows that the objective or goal of the Anti-Dumping Agreement and its instruments and objectives is surely to offset or prevent these types of "unfair" pricing behaviours in order to "level the playing field" for the benefit of the domestic producers. If so, for any reform of the Anti-Dumping Agreement to be warranted, the proposed reform should help reduce the gap between the objective or goal of the Anti-Dumping Agreement and its instruments of preventing discriminatory, below-cost and predatory pricing behaviour and the Agreement's actual practice. Any proposed reform needs to enable the Anti-Dumping Agreement to better reflect these basic objectives or goals of the Anti-Dumping Agreement and to therefore restore the so-called "level playing field". Any proposed reforms should be analysed in light of these principles and objectives, which will determine whether the reforms are warranted or not.

IV FRIENDS OF ANTI-DUMPING NEGOTIATIONS

On 14 September 2004 a group of mostly developing WTO members calling themselves Friends of Anti-Dumping Negotiations (FANs) proposed a number of solutions to what it considered was the misuse of the "facts available" provisions of the Anti-Dumping Agreement, an issue which it considered was becoming a major problem in anti-dumping.⁴² FANs was formed at the time of the Doha Development Round as a result of mounting international concern on expanding trade remedy activity in general and about anti-dumping in particular.⁴³ The group believes that any new framework for negotiations should include talks on improving WTO trade remedy rules.⁴⁴ The group consists of the most active participants for anti-dumping reform in the Doha Development Round and favours narrowly defined acceptable rules.⁴⁵

42 This is an informal group consisting of Brazil, Chile, Colombia, Costa Rica, Hong Kong, Israel, Japan, Republic of Korea, Mexico, Norway, Singapore, Switzerland, Chinese Taipei, Thailand and Turkey. The group has tabled proposals for tightening disciplines on the conduct of anti-dumping investigations to counter what they consider to be an abuse of the way anti-dumping measures can be applied.

43 See above n 8.

44 United States Congressional Research Service *CRS Report for Congress – WTO: Antidumping Issues in the Doha Development Agenda* (Library of Congress, Washington DC, 2006) 9.

45 Moore "Antidumping Reform in the WTO", above n 5, 364.

In February 2005 FANs released a statement which provides some useful information about their goals and concerns of the anti-dumping negotiations under the Doha agenda.⁴⁶ In this submission FANs expressed its concern that anti-dumping measures continue to be used for protectionist purposes. FANs considers that anti-dumping measures often serve as a substitute for the trade barriers that have been eliminated through painstaking negotiations under the WTO and that non-compliance with rulings under the Understanding of Rules and Procedures Governing the Settlement of Disputes (Dispute Settlement Understanding)⁴⁷ has, in several cases, become a serious problem. The group considers that the Doha Development Agenda negotiations are about improving rules that will nurture economic development throughout the globe and that substantial results in anti-dumping negotiations are essential to ensure that the benefits gained from overall market access liberalization, especially for developing countries, would not be taken away through the backdoor. FANs presented its proposed solutions to its perceived misuse of the "facts available" provisions of the Anti-Dumping Agreement to the WTO Negotiating Group on Rules, in a paper titled "Proposal on Facts Available".⁴⁸ In a later submission, FANs attached a revised article 6.8 and Annex II of the Anti-Dumping Agreement which the FANs group considered built on and took into account the amendments proposed in its previous paper.⁴⁹

This group of members considers that the current rules under article 6.8 and Annex II of the Anti-Dumping Agreement are 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.⁵⁰ The group considers that there is considerable scope for improvement of the rules for the purpose of preventing abuse of facts available, which would include strictly limiting the application of facts available.⁵¹

46 Communication from FANs to the Negotiating Group on Rules "Senior Officials' Statement to the Negotiating Group on Rules" (15 February 2005) TN/RL/W/171. The Negotiating Group on Rules was established by the Trade Negotiations Committee of the World Trade Organization in February 2002 as part of the Doha Ministerial Declaration in order to clarify and improve disciplines and rules relating to: anti-dumping; subsidies and countervailing measures, including fisheries subsidies; and regional trade agreements.

47 Marrakesh Agreement, above n 3, Annex 2.

48 Communication from FANs to the Negotiating Group on Rules "Proposal on Facts Available" (14 September 2005) JOB(04)/126, TN/RL/W/93, TN/RL/GEN/20.

49 Communication from FANs to the Negotiating Group on Rules "Further Submissions on Facts Available" (16 September 2005) TN/RL/GEN/64.

50 Communication from FANs to the Negotiating Group on Rules "Proposal on Facts Available", above n 48, para 2.

51 Ibid.

V FANs' PROPOSED CHANGES TO ARTICLE 6.8

A Introduction

This section of the article outlines, analyses and then critiques the suggested amendments by FANs to the "facts available" provisions of the Anti-Dumping Agreement in light of paragraph 28 of the *Doha Ministerial Declaration*, current practices of member countries, relevant WTO case law and a draft text of the Anti-Dumping Agreement which was released by the Chair of the WTO Negotiating Group on Rules on 1 November 2007.⁵² The Chair of the Negotiating Group issued the draft text as part of the first step for members to negotiate changes to the Anti-Dumping Agreement under the mandate in paragraph 28 of the *Doha Ministerial Declaration*, through intensive, technical and focussed discussion.

The analysis below is intended to determine if the proposals by FANs "improve and clarify" the current "facts available" provisions of the Anti-Dumping Agreement. Further, the analysis considers whether and if they enable the Anti-Dumping Agreement to better reflect the basic concepts, principles and objectives of the Anti-Dumping Agreement and its instruments, which as concluded above are to neutralise the effect of foreign firms' discriminatory, below-cost and predatory pricing in order to restore the so-called "level playing field". This assessment will determine whether the reforms are warranted or not.

The results of this analysis suggest that it is doubtful that most of the proposals submitted by FANs would either "clarify or improve" the facts available provisions or enable the Anti-Dumping Agreement to better reflect the "basic principles and objectives" of the Anti-Dumping Agreement and its instruments. The analysis suggests that article 6.8 and the rules contained in Annex II of the Anti-Dumping Agreement already reflect many of the proposed changes while the other proposed changes are reflected in the relevant WTO case law interpreting article 6.8 and the rules contained in Annex II. In cases where certain changes to the "facts available" provisions of the Anti-Dumping Agreement are considered to be warranted, these changes have been proposed and the reasons outlined.

B FANs' Proposals

1 FANs' first proposal

FANs proposes to amend the current text of article 6.8 to explicitly state that facts available are only to be used to the extent necessary to substitute missing or rejected information. The current text

52 WTO Chair of the Negotiating Group on Rules *Draft Consolidated Chair Texts of the Anti-Dumping and Subsidies and Countervailing Measures Agreement* (TN/RL/W/213, Geneva, 2007). The draft text was released by the Chair of the Negotiating Group on Rules, Ambassador Guillermo Vallés Galmes of Uruguay, as part of a consolidated package of draft texts on anti-dumping, subsidies and countervailing measures, including fisheries.

of article 6.8 allows an investigating authority to resort to using facts available when an interested party refuses the investigating authority access to necessary information or does not provide the necessary information within a certain time.

FANs considers that this proposal will clarify the current provisions of article 6.8 in that facts available should only be used to substitute certain information which the interested parties did not submit or which it submitted but which was subsequently rejected by the authorities because it was considered unreliable. In other words FANs considers this proposal will ensure that the authorities must use submitted information if it is accurate and submitted within a reasonable timeframe.

It is difficult to see how FANs' first proposal would improve and clarify the current "facts available" provisions of the Anti-Dumping Agreement. Article 6.8 states that facts available can be used only when an interested party "refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation". This wording clearly obliges the authorities to use information submitted if it is accurate and submitted within a reasonable timeframe.

This obligation is reiterated in paragraphs 3 and 5 of Annex II. Paragraph 3 states that:

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 ... should be taken into account when determinations are made.

Paragraph 5 obliges the authorities not to disregard information provided even though it may not be ideal in all respects and provided the interested party has acted to the best of its ability in submitting the information.

The Chair of the Negotiating Group suggested no amendments to article 6.8 in his draft text of the Anti-Dumping Agreement.

2 FANs' second proposal

FANs considers that an addition needs to be made to the current text of Annex II(1) to provide that authorities may not resort to facts available unless they have made all reasonable efforts to obtain necessary information from the respondents. The current text of Annex II(1) provides that once an investigation is initiated, the authorities shall specify the information required from the interested parties, the manner in which that information should be structured and ensure that the interested parties are aware that if the necessary information is not supplied within a reasonable time, the authorities will be free to make determinations on the basis of using facts available.

FANs proposes that the authorities must advise the firm in detail of the information which was initially rejected by them and provide the firm with an additional opportunity to provide the required information within a reasonable timeframe from the time the company was advised that its information was rejected.

It is unclear in what way this proposal will improve and clarify the "facts available" provisions of the Anti-Dumping Agreement. Currently, under article 6.8, the authorities are unable to resort to "facts available" unless they have made reasonable efforts to obtain the necessary information from the firms. Paragraph 1 of Annex II states that "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". Furthermore, under paragraph 6 of Annex II the authorities are obliged to provide the firm with an explanation of why their information has been rejected and then give the firm an opportunity to provide further explanation as to why the information should be accepted.

This requirement was clarified in *Argentina – Definitive Anti-Dumping Measures on Imports of Ceramic Floor Tiles from Italy*,⁵³ and in *Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil*.⁵⁴ In *Argentina – Definitive Anti-Dumping Measures on Imports of Ceramic Floor Tiles from Italy*, the Panel determined that the authorities may not resort to facts available unless they inform the respondents of exactly what they need and if this is not provided, inform the respondents of the specific information which was insufficient and give them an opportunity to provide further information.⁵⁵

In *Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil*, the Panel determined that Argentina was in breach of article 6.8 because it had rejected information supplied by three companies but no record could be found in the investigating file as to the reasons why the information was rejected.⁵⁶

In light of the obligations under Annex II, paragraph 6, it is the practice of many investigating authorities to send out "deficiency" letters informing the exporting firms of the information that has been rejected by the authorities and why it has been rejected. The exporters are then provided with a further opportunity to supply the information, including documentation, requested by the authorities. Currently, there is no requirement to send a "deficiency" letter under the Anti-Dumping Agreement. One worthwhile proposal could be to formalise this accepted practice by codifying it into Annex II, paragraph 6. A suggested amendment to paragraph 6 would be to replace the first sentence of paragraph 6 with the following:

53 *Argentina – Definitive Anti-Dumping Measures on Imports of Ceramic Floor Tiles from Italy* (28 September 2001) WT/DS189/R (Panel, WTO).

54 *Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil* (22 April 2003) WT/DS241/R (Panel, WTO).

55 *Argentina – Definitive Anti-Dumping Measures on Imports of Ceramic Floor Tiles from Italy*, above n 53, para 6.55 (Panel, WTO).

56 *Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil*, above n 54, paras 7.185–7.188 (Panel, WTO).

Within a reasonable time after receiving responses to the questionnaires, the authorities shall set out, in a letter addressed to the interested party concerned, any clarification of the information and evidence provided in the questionnaire or further information and evidence still outstanding from the interested parties concerned. If evidence or information is not accepted by the authorities, the supplying party shall be informed of the reasons therefore, and shall have the opportunity to provide further evidence or information or explanations within a reasonable period due account being taken of the time-limits of the investigation.

This amendment would also tidy up the current ambiguity under paragraph 6, where currently the supplying party has the opportunity to provide further "explanations" only, within a reasonable time period. The relevant case law has interpreted this paragraph to allow the supplying parties to provide further explanations *and information*; the amendment would codify and clarify this.

The Chair of the Negotiating Group suggested no amendments be made to Annex II(1) in his draft text of the Anti-Dumping Agreement. However, he proposed that the text be enhanced by requiring the authorities to make a preliminary analysis of the information supplied in response to a questionnaire and that the interested parties be notified in writing of any requests for clarification or additional information. Rather than insert this "deficiency letter" requirement under the "facts available" provisions of the text, the Chair recommended that a separate provision is inserted under article 6.1, following the requirement that exporters and foreign producers receiving questionnaires be given at least 30 days to reply.

It is considered that inserting a "deficiency" letter requirement under article 6.1 could give those trying to interpret the Anti-Dumping Agreement the impression that this particular requirement should apply only to exporters and foreign producers. Most investigating authorities also gather information in an investigation by sending out questionnaires to other interested parties such as importers, domestic producers, downstream users of the product and consumer and trade groups. These other interested parties' replies to such questionnaires often require clarification and further information in the same manner as is required from exporters and foreign producers, therefore the "deficiency letter" requirement should apply to these interested parties also. It is considered therefore that a more appropriate section of the draft text to insert a "deficiency" letter requirement is under Annex II and specifically under Annex II(6), as suggested above. The "facts available" provisions under Annex II apply to all interested parties and not only to exporters and foreign producers, therefore, inserting the "deficiency letter" requirement under Annex II would ensure that this requirement applies to all interested parties and lessen the likelihood of confusion as to whether this requirement applies to exporters and foreign producers only or to all interested parties.

3 *FANs' third proposal*

FANs recommends replacing the term "significantly impedes" in article 6.8 with the term "refusal of verification" to clarify that facts available can be used only in a situation where an

interested party refuses verification of its information. The current text of article 6.8 allows an investigating authority to resort to using facts available when an interested party "significantly impedes" the investigation.

FANs considers that the term "significantly impedes" is open to misinterpretation by members due to its ambiguity. It is too broad a concept and has been used by authorities to as a catch all excuse to use facts available to penalise responding parties.

The term "significantly impedes" is broad and could certainly include a number of instances which would give rise to the use of facts available. However, in *Guatemala – Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico*,⁵⁷ the Panel provided some guidance as to what represents a "significant impediment". It did not consider that a failure to cooperate necessarily constituted "significant impediment" of an investigation, because the Anti-Dumping Agreement does not require cooperation by interested parties at any cost. The Panel determined that although there are certain consequences under article 6.8 for interested parties if they fail to cooperate with an investigating authority, such consequences only arise if the investigating authority itself has acted in a reasonable, objective and impartial manner.⁵⁸

The drafters of the Anti-Dumping Agreement did not intend to limit the term "significantly impede" to a refusal to verify. If they had, they would have used this exact wording. Changing the wording of article 6.8 of the Anti-Dumping Agreement in the manner proposed by FANs would be altering the substance of the Anti-Dumping Agreement, rather than clarifying or improving its disciplines.

The Chair of the Negotiating Group suggested no amendments to article 6.8 in his draft text of the Anti-Dumping Agreement.

4 FANs' fourth proposal

FANs recommends amending Annex II(3) to make it mandatory that authorities use any and all submitted information that is verifiable, germane to the investigation and not proven to be inaccurate. The current text of Annex II(3) ensures that an investigating authority should take into account all information which is verifiable, appropriately submitted and supplied in a timely fashion.

FANs considers the current text of article II(3), especially the terms "all information" and "should be taken into account" are unclear. This proposal will not allow the authorities to disregard certain information supplied by exporting firms and which has been verified and considered

57 *Guatemala – Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico* (24 October 2000) WT/DS156/R (Panel, WTO).

58 *Ibid.*, paras 8.250–8.251 (Panel, WTO).

relevant, simply because the company did not submit *all* the information requested by the authorities.

It appears that FANs has proposed this amendment to Annex II(3) in view of the practice of the United States authority to disregard *all* information provided by an exporter if that exporter has not provided all of the information requested by it, or part of the information supplied is inaccurate. However, in *United States – Anti-Dumping and Countervailing Measures on Steel Plate from India*, the Panel determined that this practice was inconsistent with the Anti-Dumping Agreement.⁵⁹ The Panel determined that the United States had acted inconsistently with Annex II(3) because it had resorted entirely to using facts available when in fact the information which was provided by the exporter met all the criteria laid down in Annex II(3). The United States had no grounds for resorting to facts available.⁶⁰

Therefore, this proposal would not strengthen the current facts available provisions of the Anti-Dumping Agreement. The Panel in *United States – Anti-Dumping and Countervailing Measures on Steel Plate from India* clarified this particular anomaly of Annex II(3) by determining that if an interested party provides the necessary information, it must be taken into account by the authorities.

The Chair of the Negotiating Group suggested no amendments to Annex II(3) in his draft text of the Anti-Dumping Agreement in terms of FANs proposal. However, the Chair did suggest that the term "undue difficulty" in Annex II(3) of the Anti-Dumping Agreement is defined so that authorities can reject information if an assessment of that information " ... is dependent upon other information that has not been supplied or can not be verified".⁶¹

It is considered that this change to the text simply inserts an example of when an "undue difficulty" may arise in an investigation. Therefore, it would still allow the authorities to interpret the term "undue difficulty" with the discretion originally envisaged by the original drafters of the Anti-Dumping Agreement. The term "undue difficulty" was not defined by the drafters of the Anti-Dumping Agreement. This was no doubt in order to allow authorities to disregard information supplied in an investigation if the use of that information was unduly difficult for a particular reason, such as the time and cost needed to be incurred to establish that incomplete information is reliable and truthful. Leaving open the interpretation of the term "undue difficulty" is extremely important because dumping investigations must be completed within strict timeframes and if certain

59 *United States – Anti-Dumping and Countervailing Measures on Steel Plate from India* (28 June 2002) WT/DS206/R, para 7.54 (Panel, WTO).

60 *Ibid*, paras 7.55–7.67 (Panel, WTO).

61 *Draft Consolidated Chair Texts of the Anti-Dumping and Subsidies and Countervailing Measures Agreement*, above n 52, A-160, Annex A.

information provided by interested parties is unduly difficult to use, having to use it would burden the authorities and hinder their ability to complete the investigation on time.

5 *FANs' fifth proposal*

FANs suggests amending Annex II(7) to ensure that authorities shall choose, whenever they resort to facts available, 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 current text of Annex II(7) ensures that if an investigating authority resorts to using facts available, including relying on information from a secondary source, they should do so with special circumspection.

To this effect, FANs proposes that article 6.6 will also need to be amended so that the exception clause at the beginning of the first sentence and the words "supplied by interested parties" are deleted. Currently, article 6.6 states:

Except in circumstances provided for in paragraph 8, the authorities shall during the course of an investigation satisfy themselves as to the accuracy of the information supplied by interested parties upon which their findings are based.

The current text of Annex II(7) does not specify what sources the authorities should choose as facts available, which allows authorities to pick and choose and often results in prohibitively high dumping margins. FANs' proposal will ensure that when resorting to facts available, authorities will have to choose the appropriate information from a secondary source and examine the validity of the information they use in order to ensure that the information used properly reflects the state of the same industry or relevant market.

It is difficult to see how this proposal will clarify the Anti-Dumping Agreement. In fact, this proposal is aimed more at amending the rules and modifying the structure under which members conduct anti-dumping investigations. The drafters of the Anti-Dumping Agreement always intended that the authorities should have a certain amount of discretion when deciding the accuracy and adequacy of the information obtained under the provisions of article 6.8 of the Anti-Dumping Agreement. This includes information on normal values gathered from a secondary source, including the information supplied in the application for the initiation of an investigation, as provided for under Annex II(7). To change article 6.6 in the manner suggested by FANs would alter the substance of the Anti-Dumping Agreement, which was never intended under the *Doha Ministerial Declaration*.

Furthermore, Annex II(7) also states that "... the authorities should, where practicable, check the information from other independent sources at their disposal, such as ... the information obtained from other interested parties during the investigation". It is impractical that Annex II should specify what sources the authorities should choose as facts available. This should be left to the discretion of the investigating authority which should make the decision on a case-by-case basis.

Annex II(7) is clear, however, that when basing their findings on information from a secondary source, the authorities should do so with "special circumspection". In *Mexico – Definitive Anti-Dumping Measures on Rice from the United States*,⁶² the Panel found that the authorities had violated the facts available provisions of article 6.8 and Annex II(7) by using information provided by the applicant to determine dumping margins for an exporter which did not export to Mexico during the investigation period. The Panel found that the authority made no attempt to examine and evaluate the applicant's information to assess whether this information was the most fitting or appropriate for making determinations with regard to the exporter, nor did it use the information provided by the applicant with "special circumspection", as required by paragraph 7 of Annex II.⁶³

The Chair suggested no amendments to the "facts available" provisions in his draft text of the Anti-Dumping Agreement in terms of FANs proposal.

6 FANs' sixth proposal

FANs suggested improving the last sentence of Annex II(7) by clarifying that a party shall be regarded as being cooperative if that party provided a *substantial portion* of the information requested by the authorities or if the party made *reasonable efforts* to submit the information. The current text of Annex II(7) ensures 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.

FANs considers that 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. This lack of clarity gives the authorities too much discretion in determining that a respondent is non-cooperative and therefore in being able to use facts available

The last sentence of Annex II(7) provides some guidance as to when a company is being uncooperative. It states that: "It is clear, however, that if an interested party does not cooperate and thus *relevant information is being withheld from the authorities ...* ." Therefore, there is the condition that relevant information is being withheld from the authorities before they can determine that the company is being uncooperative.

62 *Mexico – Definitive Anti-Dumping Measures on Rice from the United States* (6 June 2005) WT/DS295/R (Panel, WTO).

63 *Ibid*, para 7.168 (Panel, WTO). This particular issue was appealed by Mexico on the basis that the Panel had exceeded its terms of reference in making its decision. The Appellate Body found that the Panel did not exceed its terms of reference in concluding that the Mexican authorities had calculated a margin of dumping on the basis of facts available for this exporter, in a manner inconsistent with article 6.8 read in the light of Annex II(7): *Mexico – Definitive Anti-Dumping Measures on Rice from the United States* (29 November 2005) WT/DS295/AB/R paras 230–233 (Appellate Body, WTO).

Furthermore, Annex II(5) prevents abuses by authorities when deciding whether or not an interested party has been uncooperative. Annex II(5) ensures that authorities should not disregard information supplied by interested parties, simply because the information may not be ideal in all respects, so long as the interested party has acted to the best of its ability. Therefore, this proposal will not improve and clarify the "facts available" provisions of the Anti-Dumping Agreement.

In its later submission on 16 September 2005,⁶⁴ FANs highlighted the need to give due regard to the difficulties faced by respondents, particularly small companies, in participating fully in the investigation due to their limited ability or resource constraints. Currently, there is no express requirement to do this under the Anti-Dumping Agreement. One worthwhile proposal could be to formalise this proposal by codifying it into Annex II, paragraph 5. A suggested amendment to the Anti-Dumping Agreement would be to add the following sentence at the end of paragraph 5:

Due regard should be given to the difficulties faced by the supplying party in providing information to the authorities, particularly if the party is a small company which has limited ability and resources with which to supply the information.

The Chair suggested no amendments to the "facts available" provisions in his draft text of the Anti-Dumping Agreement in terms of FANs' proposal.

7 FANs' seventh proposal

FANs suggests amending Annex II(6) to provide that when 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 why the information has been rejected and identify the information which the authorities intend to use in place of the rejected information. The current text of Annex II(6) ensures that if the authorities reject information supplied by an interested party, they should be informed of the reasons why and be provided with the opportunity to provide further explanations. Furthermore, if the further explanations are considered unsatisfactory by the authorities, the reasons why the explanations have been rejected should be given in any published determinations.

FANs considers that such an amendment to Annex II(6) would guarantee the interested parties a mechanism for them to defend their interests regarding the authorities use of facts available within ample time before a final determination is made.

The first part of this proposal is similar to the second proposal, in that it requires that the authorities provide a sufficient explanation why it has rejected certain information. This proposal will not clarify and improve the current facts available provisions of the Anti-Dumping Agreement. As mentioned above, the Panels under *Argentina – Definitive Anti-Dumping Measures on Imports of*

⁶⁴ Communication from FANs to the Negotiating Group on Rules "Further Submissions on Facts Available", above n 49.

*Ceramic Floor Tiles from Italy*⁶⁵ and *Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil*⁶⁶ determined that investigating authorities have a duty to provide exporters with sufficient explanation why they have rejected certain information supplied by the exporters.

This requirement was clarified in *Egypt – Definitive Anti-Dumping Measures on Steel Rebar from Turkey*.⁶⁷ The Panel found that with respect to two exporters, Egypt had violated article 6.8 and Annex II(6) because, having identified and received the requested information from those two exporters, it nevertheless concluded that the companies had failed to provide the "necessary information", did not inform the companies that their responses were being rejected nor did it give the companies an opportunity to provide further information or clarification.⁶⁸

In *United States – Hot-Rolled Steel from Japan* the Appellate Body went a step further. It upheld the Panel's finding that the United States acted inconsistently with article 6.8 and Annex II when it applied "adverse" facts available to a particular exporter despite the difficulties faced by that exporter in obtaining the requested information and the United States investigating authority's reluctance to take any step to assist it.⁶⁹ The Appellate Body concluded that under article 6.8 of the Anti-Dumping Agreement, the United States Department of Commerce was not entitled to reject the information supplied by the exporter for the sole reason that it was submitted beyond the deadlines for responses to its questionnaires.⁷⁰

In any event, it has been recommended above that Annex II(6) should be amended to codify the above case law and require that a "deficiency letter" be sent to the exporting firms informing them of what information has not been accepted, why it has not been accepted and providing them with a further opportunity to provide this information or an explanation of why they consider the information is adequate.

Article 6.9 of the Anti-Dumping Agreement ensures that the authorities must, before a final decision is made, "... inform all interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures". Article 6.9 also states that such disclosure should take place in sufficient time for the parties to defend their interests. It is the practice of many investigating authorities to include in the essential facts an explanation of the basis

65 *Argentina – Definitive Anti-Dumping Measures on Imports of Ceramic Floor Tiles from Italy*, above n 53.

66 *Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil*, above n 54.

67 *Egypt – Definitive Anti-Dumping Measures on Steel Rebar from Turkey* (8 August 2002) WT/DS211/R (Panel, WTO).

68 *Ibid*, para 7.266 (Panel, WTO).

69 *United States – Anti-Dumping Duties on Certain Hot-Rolled Steel Products from Japan* (24 July 2001) WT/DS184/AB/R paras 109–110 (Appellate Body, WTO).

70 *Ibid*, paras 86–89 (Appellate Body, WTO).

on which it made its decision regarding dumping pertaining to each exporter and the information it used in place of any rejected information. However, there is no express requirement to inform interested parties of the precise information and the source of that information which has been used in place of any rejected information. One worthwhile proposal could be to formalise the requirement for interested parties to disclose the normal value and export price information, including the source of that information, which they intend to use in their final determination in place of any rejected information, by codifying it into Annex II. This would increase transparency in the system and allow the exporting firms ample time before a final determination is made to defend their interests regarding the authorities use of "facts available". A worthwhile amendment to the Anti-Dumping Agreement would be to add the following paragraph to the end of Annex II:

Subject to the confidentiality requirements under this Agreement, when rejecting information supplied by interested parties, including information provided by exporting companies regarding their normal values and export prices and in substituting this information with other information obtained from a secondary source, the authorities shall disclose the information, including the source of that information, which they have used to base their findings. Such disclosure should be pursuant to Article 6, paragraph 9 of this Agreement and should take place in sufficient time for the parties to defend their interests.

The Chair of the Negotiating Group suggests that a footnote is added to Annex II(7) of the Anti-Dumping Agreement stating that any independent sources of information consulted by the authorities in their findings should be identified in the disclosure of the essential facts of the investigation required under article 6.9 of the Anti-Dumping Agreement.

It is considered that the Chair's proposed footnote to Annex II(7) goes some way to addressing the concerns of FANs but that it does not go so far as to suggest that the authorities also provide a reason why information has been rejected. It has already been suggested that an additional paragraph is added to the end of Annex II to include the requirement that authorities must disclose any secondary information, including the source of that information, which they intend to use in their final determination.⁷¹ Like the Chair's proposal, this change would only go some way to addressing the concerns of FANs. However, it would go a step further than the Chair's proposal because not only will the authorities be required to identify the sources consulted in their disclosure of the essential facts, they will be required to disclose the actual information which they used to base their findings.

It is considered that this added requirement would strike a good balance between enabling interested parties to better defend their interests well before a final finding has been made and not imposing undue burdens on an investigating authority to explain why information has been rejected in any preliminary determination or disclosure pursuant to article 6.9. Investigations often involve

71 Ibid.

many interested parties. Explaining why certain information has been rejected for each of these parties in a preliminary determination or disclosure pursuant to article 6.9 is likely to be time-consuming and administratively burdensome. Instead, an explanation of why information has been rejected should be done in a "deficiency" letter addressed to the interested parties in response to their questionnaire replies so that they have ample opportunity to submit further evidence or information to the authorities well before a disclosure pursuant to article 6.9 is made.

C Conclusion

On the basis of the above analysis, it is doubtful that most of the proposals submitted by FANs would either "clarify or improve" the facts available provisions or enable the Anti-Dumping Agreement to better reflect the "basic principles and objectives" of the Anti-Dumping Agreement and its instruments which, as previously concluded, are to "level the playing field" by preventing predatory pricing, pricing below cost or price discrimination between markets. While a number of suggested changes by FANs may help to tighten up and improve the facts available provisions, the analysis has shown that article 6.8 and the rules contained in Annex II of the Anti-Dumping Agreement already reflect many of the proposed changes while the other proposed changes are reflected in the relevant WTO case law interpreting article 6.8 and the rules contained in Annex II. The Dispute Settlement Understanding makes it clear that any Panel or Appellate Body ruling is binding only on those members to whom the dispute relates. WTO members consider that changes to the Anti-Dumping Agreement should be made through the process of multilateral negotiation, rather than through the codification of Panel and Appellate Body rulings.

VI A SOLUTION TO THE PROBLEM?

A Introduction

No clear-cut solution to the problem of some member countries abusing the "facts available" provisions of the Anti-Dumping Agreement is apparent. The problem exists because the authorities in these member countries need certain information from exporting firms; however, these members generally have no subpoena power to demand that these firms supply the information. The authorities must usually rely on the voluntary cooperation of the investigated firms in providing the information but if these firms fail to do so, the authorities cannot simply give up otherwise the investigated firms will never provide the information if they consider that it may disadvantage their position.

Furthermore, so long as they act within the rules the authorities must have a certain amount of discretion to disregard incomplete submissions or questionnaire responses supplied by the investigated firms, otherwise these firms will supply only that information which supports their position. They will have no incentive to supply full submissions and again the authorities will be prevented from sourcing each exporting firms' full cost and pricing details in order that actual dumping margins can be calculated. In view of this, authorities must be allowed the discretion to

disregard respondents' cost and price information and where this is the case, have the discretion to choose the facts available that will substitute for the exporting firms' information when calculating individual dumping margins. Unfortunately, where there is discretion, there will also be the possibility of abuse of this discretion.

The Anti-Dumping Agreement allows the authorities to use the facts available, when exporters do not provide necessary information, when calculating individual dumping margins and making an injury determination based on the extent of these margins. The provisions of the Anti-Dumping Agreement already establish general standards concerning the selection of "facts available" for use in dumping calculations as well as laying down some very clear-cut rules regarding the circumstances under which resorting to "facts available" is justified. Article 6.8 states that facts available should only be used when an interested party "refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation ..." Annex II provides very specific rules and standards which investigating authorities must follow in applying article 6.8.

B A Change to the Text of the Anti-Dumping Investigation

The existing language of the Anti-Dumping Agreement relating to the "facts available" provisions could be tightened up and improved, and FANs do provide examples of this in its proposals. FANs considers that a change in the rules is necessary in order to increase predictability and transparency of the system and to decrease the discretion investigating authorities have in assessing information provided by interested parties in order to prevent some members from abusing the system and applying excessive anti-dumping duties to exporters when those exporters have acted to the best of their ability in providing the information sought by the investigating authorities.⁷²

Transparency is important in the context of the WTO. The WTO system in general encourages predictability and stability and one way to accomplish this is to make members' trade rules as clear and public ("transparent") as possible. With respect to anti-dumping practices, each member is expected to notify the WTO of their anti-dumping legislation (and changes to it) along with the number of anti-dumping actions taken. Regarding the actual conduct of dumping investigations, the Anti-Dumping Agreement contains specific provisions on transparency, ranging from the necessity of providing interested parties with the opportunity to see all information which is relevant to their cases (subject to confidentiality requirements) to having to disclose the essential facts of the investigation before a final determination is made (in order that interested parties can make submissions). The transparency rules in the Anti-Dumping Agreement are an important component in ensuring that members do not misuse or abuse the rules in the conduct of their investigations.

⁷² Communication from FANs to the Negotiating Group on Rules "Proposal on Facts Available", above n 48, para 2.

Providing too many detailed rules, however, would not necessarily solve the problem of members misusing or abusing the "facts available" provisions of the Anti-Dumping Agreement. The Chair of the WTO Negotiating Group on Rules indicated this in releasing a draft text of the Anti-Dumping Agreement which proposes minimal changes to the "facts available" provisions of the Agreement. As concluded above, the current rules are already very detailed and have been designed to limit the discretion investigating authorities have in selecting only that information which assists them. Furthermore, even if such changes are made, authorities will continue to have a reasonably broad discretion to disregard data submitted by interested parties and what to use in its place. This will not change, because if authorities wish to abuse the "facts available" provisions of the Anti-Dumping Agreement in order to achieve an outcome favourable to protecting their domestic industry, there will still be a wide enough scope within the rules to do so.

C The Adoption of "Best Practice" Guidelines

The problem appears not to be in the current rules, but in the fact that some members act in bad faith when applying the rules. A better way to approach the problem would be to look at what could be termed "best practice" guidelines for members to use in applying the rules.

Currently, "best practice" guidelines on conducting anti-dumping investigations along with interpretation issues relating to the provisions of the Anti-Dumping Agreement are dealt with by the Committee on Anti-Dumping Practices, through its Working Group on Implementation.⁷³ If members agree to bring to the table a particular aspect of an anti-dumping investigation in order to discuss the best approach to use in conducting that aspect of an investigation, the Working Group has the responsibility of discussing those approaches and then making a recommendation to the Committee on Anti-Dumping Practices on what approach should be adopted. The Committee will then decide whether or not to adopt the Working Group's recommendations. The problem, however, is that any recommendation adopted by the Committee can only be done through a consensus so that if one of the current 152 WTO members decides that the recommendation is not in its best interest, it is unlikely to be adopted by the Committee.

D The WTO Rules Division

Two options to solving this problem are apparent. The first option is for the WTO Rules Division to adopt tools and methods of conducting anti-dumping investigations based on the current practices of a select number of WTO members which are well-regarded in the way they carry out

⁷³ The Working Group on Implementation was set up under the auspices of the Committee on Anti-Dumping Practices which itself was established under article 16 of the Anti-Dumping Agreement. The Committee is comprised of representatives from each of the members and carries out responsibilities as assigned to it under the Anti-Dumping Agreement or by the members, as well as affording members the opportunity of consulting on any matter relating to the operation of the Anti-Dumping Agreement or the furtherance of its objectives.

investigations.⁷⁴ These tools and methods would in effect be "best practice" guidelines for applying the rules contained in the Anti-Dumping Agreement. Because the WTO Rules Division is part of the WTO Secretariat, it has no authority to issue or mandate "best practice" guidelines to WTO members to adopt. However, whenever the WTO Rules Division provides training assistance to WTO members it could use these tools and methods in its training modules and programs so that they will form the basis for establishing a set of "best practice" guidelines. This way it could encourage WTO members to adopt such "guidelines" in the way they conduct their anti-dumping investigations.

Such "guidelines" could start from the time a transparent non-confidential version of the domestic industry's application is sent to interested parties in an investigation along with the compilation of meaningful questionnaires for the different interested parties to complete. The guidelines could also include the sending of detailed "deficiency" letters outlining what parts of the submitted questionnaire response is incomplete and what further information is needed. They could finish with the release of comprehensive, detailed and transparent verification and provisional reports providing the interested parties with plenty of time to make comments on the information contained in them.

Regarding the compilation of meaningful questionnaires for the different interested parties to complete, the WTO Rules Division could develop a set of standardised anti-dumping questionnaires, each one designed for a particular interested party, such as the domestic producers, importers and foreign exporters and producers. Currently, each WTO member is able to design its own questionnaires in a way which they feel best solicits the information they need from each interested party, although in many cases the format of the questionnaire must comply with a member's domestic legislation. In any event, this system is open to abuse because members are able to design questionnaires in such a way to make it very difficult and often impossible for the interested parties to provide the information in the format requested by the authorities.⁷⁵

A standardised questionnaire would help resolve this problem. The questionnaire would spell out exactly the type of information that the authorities would need from each interested party in order to assist them in the investigation. Once encouraged to adopt this questionnaire through the

74 The WTO Rules Division is run by the WTO Secretariat which is headed by a Director-General. The Rules Division is one of a number of divisions which comes directly under either the Director-General or one of his deputies.

75 An example of this would appear to be the way Egypt designed its exporters' questionnaires in its 1999 investigation into dumped rebar from Turkey. In the panel proceedings for this case, Egypt's questionnaire was described by the Turkish government as a "mail order verification" because of the large amount of pricing and costing information requested from the Turkish rebar exporters and the evidence, documentation and explanations also requested in the questionnaire to substantiate the price and costing information: *Egypt – Definitive Anti-Dumping Measures on Steel Rebar from Turkey*, above n 67, para 7.160.

WTO Rules Division's training programs, WTO members would have little room for designing an overly-complicated questionnaire in order to discourage respondents from responding. If a questionnaire response is received, the information will likely be provided in the necessary format so that the authorities will have little or no excuse for ignoring information that has not been provided in the correct format instead of "cherry picking" certain information less favourable to the foreign exporter in order to calculate a higher dumping margin. This in itself would increase the predictability and transparency of the system and also reduce the administration costs for the investigating authorities and the compliance costs for the interested parties (including foreign exporters).

E The Committee on Anti-Dumping Practices

The second option would be for the Committee on Anti-Dumping Practices to adopt a single recommendation from the Working Group on Implementation that all past and future WTO Panel and Appellate Body rulings be the basis of any "best practice" guidelines, if those rulings deal with the method or approach that investigating authorities should take in conducting anti-dumping investigations. This would especially be relevant if the rulings dealt with the way in which authorities are expected to use the "facts available" provisions of the Anti-Dumping Agreement. The Working Group would then formalise these Panel and Appellate Body rulings into "best practice" guidelines and all 152 WTO members would be expected to follow these guidelines when conducting their dumping investigations.

One possible criticism of this proposed solution is that it would give too large a role to Panel and Appellate Body rulings which would go against the aim of the dispute settlement system as securing a positive solution to a dispute, rather than "making" law. It is considered, however, that past and future Panel and Appellate Body rulings would not be "codified" into the Anti-Dumping Agreement, they would simply be compiled into a series of "best practice" guidelines which members would be encouraged to use when conducting dumping investigations. Therefore, rather than going against the aim of the dispute settlement system, it would ensure predictability and transparency in anti-dumping proceedings because all members would be required to follow the same "best practice" guidelines which would be based on Dispute Settlement Understanding rulings.

In any event, because the Committee on Anti-Dumping Practices would need to adopt such a Working Group recommendation by a consensus of all 152 WTO members, it is unlikely to gain approval and be adopted by the Committee. Therefore, instead of changing the rules by which members must use "facts available" in a dumping investigation, the best way to improve the current system would appear to be a change in the way in which members can work within the rules. This would hopefully lead to members relying less on the need to use "facts available" and also limiting their discretion in choosing what facts to use. However, as discussed above, there still continues to be the problem of "best practice" recommendations of the Working Group not being adopted by the Committee on Anti-Dumping Practices due to its consensus voting method, along with the further

problem of some members not adopting "best practice" guidelines even if they were used as the basis of the WTO Rules Division's training modules and programs.

F Conclusion – Codification by Negotiation

Therefore, in addition to encouraging WTO members to adopt "best practice" guidelines through the WTO Rules Division's training modules and programs, the best solution to the problem of some members acting in bad faith when applying the "facts available" provisions of the Anti-Dumping Agreement would appear to be codifying such "guidelines" into the Anti-Dumping Agreement in the manner which has been suggested above.⁷⁶ This would best be done through the negotiations currently being undertaken by the Negotiating Group on Rules under paragraph 28 of the 2001 *Doha Ministerial Declaration*. For instance, the requirement to send a "deficiency" letter and to disclose the basis on which substituted information has been used to calculate dumping margins in any preliminary determination could be worked into the current rules under Annex II of the Negotiating Group's proposed Anti-Dumping text.

It is also important to recognise that the WTO Dispute Settlement Mechanism, and the specific provisions relating to this mechanism outlined in article 17 of the Anti-Dumping Agreement, provide a process to ensure that WTO members do not misuse the Anti-Dumping Agreement. If one member feels that its rights under the WTO have been affected in the way another member has conducted an anti-dumping investigation (including the use of the "facts available" provisions), it has the right to request consultations with the other member. If these consultations are not successful in reaching a mutually agreed solution, the member is able to have a Panel established to examine the matter. The fact that members have successfully challenged the way other members have interpreted and used the "facts available" provisions of the Anti-Dumping Agreement is testament to the fact that the "facts available" provisions have been successful in persuading members to apply the rules correctly. Unfortunately, however, many developing and least-developed countries still consider the cost of bringing a dispute under the WTO Dispute System to be excessive and therefore a deterrent to do so.

VII CONCLUSION

In any negotiations to change the Anti-Dumping Agreement, negotiations that focus exclusively on specific changes to the Anti-Dumping Agreement are likely to fail. Instead negotiations should focus on clarifying exactly what are the basic concepts, principles, effectiveness and objectives of the Anti-Dumping Agreement and its instruments and objectives in accordance with paragraph 28 of the *Doha Ministerial Declaration*. Only when these principles and objectives have been established can negotiations aim to clarify and improve the Anti-Dumping Agreement so that it better reflects these objectives and principles.

⁷⁶ See Part V FANs' Proposed Changes to Article 6.8.

While the language of the *Doha Ministerial Declaration* is somewhat restrictive, a proper reading of that language still allows for significant changes in the anti-dumping rules and a number of WTO members have proposed changes to the Anti-Dumping Agreement to prevent what they consider have been abuses of the "facts available" provisions by other members' investigating authorities. However, the drafters of the Anti-Dumping Agreement were aware of the possibilities for abuse that article 6.8 could offer investigating authorities and to prevent this possible abuse attached a detailed set of obligations in Annex II which the authorities must comply with in their use of "facts available". Many of the changes proposed by these members are likely to change the nature of the Anti-Dumping Agreement and the structure under which members are able to conduct anti-dumping investigations. They go much further than "clarifying and improving" the disciplines under which WTO members conduct dumping investigations.

The terms "clarifying and improving" and "preserving the basic concepts, principles and effectiveness of these Agreements" in paragraph 28 of the *Doha Ministerial Declaration* make it clear that post-Doha Round trade negotiations should not aim to substantially change the Anti-Dumping Agreement by introducing new rules and provisions which would alter the present rights and obligations accepted by WTO members. The Anti-Dumping Agreement is complex and technical in nature and overly complex rules impose a burden on all WTO members, many of whom have limited resources for implementing the rules. Rather, the negotiations should be aimed at achieving simplification in those areas where problems have been encountered by investigating authorities in the application of article VI of the GATT and the provisions of the Anti-Dumping Agreement.

WTO members should first aim to achieve a common understanding of the current rules among members before engaging into any substantial revision of the Anti-Dumping Agreement. This could best be done through the WTO Rules Division establishing a set of "best practice" guidelines based on current practices of a select number of WTO members which it could encourage other members to adopt through the use of training modules and programs, which would be especially beneficial for "new users" of anti-dumping rules. Substantial changes to the "facts available" provisions of the Anti-Dumping Agreement are not needed, and if any changes to these provisions are made, they should be made under the mandate of paragraph 28 of the 2001 *Doha Ministerial Declaration* and reflect these "best practice" guidelines as well as relevant WTO case law interpreting article 6.8 and the rules contained in Annex II.

VIII APPENDIX

Annex II of the Anti-Dumping Agreement

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 make determinations on the basis of the facts available, including those contained in the application for the initiation of the investigation by the domestic industry.
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 made. 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.
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.

6. If evidence or information is not accepted, the supplying party should be informed forthwith of the reasons therefor, and should have an opportunity to provide further explanations within a reasonable period, due account being taken of the time-limits of the investigation. If the explanations are considered by the authorities as not being satisfactory, the reasons for the rejection of such evidence or information should be given in any published determinations.
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. 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 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.