

**FURTHER PROPOSAL ON ISSUES RELATING TO
ARTICLE 6.9 OF THE ADA**

Paper from Norway

The following communication, dated 16 November 2005, is being circulated at the request of the Delegation of Norway.

The submitting delegation has requested that this paper, which was submitted to the Rules Negotiating Group as an informal document (JOB(05)/290), also be circulated as a formal document.

1. Introduction

Members had a preliminary discussion on the major aspects of the due process and transparency paper submitted by Norway in TN/RL/GEN/49 during the Rules-session of September 2005. This was followed in October 2005 by an updated paper TN/RL/GEN/49/Add.1, that included proposed changes to aspects of Article 6 based on comments and proposed changes from other Members. In the original paper TN/RL/GEN/49, Norway invited members to further discuss how the rules in Article 6.9 on disclosure in the ADA could be improved. In this paper, we propose a new text for Article 6.9 with an accompanying explanation.

The proposals for clarification and improvement to the ADA set out in this paper do not represent a final position.

2. Background on disclosure, Article 6.9 ADA

Article 6.9 currently provides that:

"The authorities shall, before a final determination is made, inform all interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures. Such disclosure should take place in sufficient time for the parties to defend their interests."

Disclosure under Article 6.9 is currently not subject to any explicit procedural requirements in respect of timing or content. There are also different views on how this paragraph is to be interpreted.

In its submission TN/RL/GEN/63, Turkey stated that the term "facts" in this provision covers all facts relating to the three core parameters of an investigation, i.e. the determinations of dumping, injury and the causal link. Turkey emphasized that the authorities should inform the interested parties of the factual considerations that form the basis for a decision. Norway agrees that the elements highlighted by Turkey are important. Taking these elements into account, Norway proposes further changes to Article 6.9 of the *Antidumping Agreement* in order to clarify and improve the rules on disclosure.

Norway's proposal does not rely on any particular interpretation of the current text of Article 6.9. Norway rather proposes to clarify the text of the disclosure requirements of Article 6.9 of

the *Antidumping Agreement*. The proposal seeks to enhance due process in preliminary and final determinations. Furthermore, it seeks to ensure that interested parties are given a full opportunity to defend their interests.

In this paper Norway proposes to include disclosure of essential facts prior to the imposition of any provisional measures. Secondly, Norway seeks to elaborate on the type and scope of essential facts and how the authorities have assessed them in a disclosure. Finally, Norway's proposes a 20-day period for interested parties to comment, after the disclosure in order for them to defend their interest in accordance with Article 6.2.

A. Disclosure of Essential Facts Prior to Imposition of Provisional Measures

As it currently provides, Article 6.9 contains a disclosure requirement that is explicitly applicable only prior to the issuance of a final antidumping determination. Preliminary determinations (*i.e.*, determinations made in connection with the imposition of provisional measures) are not explicitly covered by the provision. Norway submits that the due process rationale that requires disclosure in the context of final determinations applies equally to determinations justifying the imposition of provisional measures. These provisional measures are just as disruptive to the trade of importers and foreign producers as final antidumping measures. Moreover, they can remain in place for many months prior to the imposition of final antidumping measures. In the typical case, the provisional measures are simply the first stage in what becomes final antidumping determinations (although the amount of the duties can be different).

Norway sees no basis for such different due process requirements in these two closely-related phases of an anti-dumping investigation. Norway proposes to rectify this imbalance by including preliminary determinations in the scope of Article 6.9 of the *Antidumping Agreement*.

B. Clarification of Meaning of Essential Facts

The requirement to disclose essential facts in Article 6.9 exists to provide interested parties the opportunity to "defend their interests." Disclosure allows an interested party to see what evidence the authorities have examined, what information it will rely on and what information it will reject. Having access to these facts allows an interested party to address the factual basis of the authorities' likely decision. In this respect, WTO jurisprudence has established that authorities are required to "provide a reasoned and adequate explanation as to (i) how the evidence on the record supported its factual findings; and (ii) how those factual findings supported the overall subsidy determination."¹ Furthermore, this jurisprudence requires investigating authorities to address alternative explanations that could reasonably be drawn from the essential facts.²

The requirement to provide a reasoned and adequate explanation is directly related to the scope of the disclosure requirement of Article 6.9. Disclosure of essential facts must be at a time *prior* to a determination and in *sufficient time* to allow interested parties to fully defend their interests. The phrase "defend their interests" in Article 6.9 indicates that an interested party needs to appreciate how the authorities will likely use the facts and the likely outcome of the determination. Therefore, the scope of the disclosure must reflect the scope of the explanation requirement that applies in a determination. The proposal seeks to confirm the above mentioned requirements in the context of disclosure.

¹ Appellate Body Report, *US – DRAMS*, para. 186; Appellate Body Report, *US – Lamb*, para. 106. The particular findings were made in the context of the *SCM Agreement* and the *Safeguards Agreement* respectively. The same reasoning applies under the *Antidumping Agreement*.

² *Ibid.*

Norway therefore proposes to specify that “essential facts” in the sense of Article 6.9 of the *Antidumping Agreement* shall encompass “all facts in the record of the investigation that tend to support or cast doubt upon the authorities' determinations of dumping, injury and causation.” Second, the investigating authority would be required to specifically identify all facts it will rely upon, irrespective of how it will rely on them. Also, the authorities must disclose information that is contrary to its likely determination. Finally, Norway proposes to clarify that disclosure also includes the authorities' assessment of these facts. This confirms the interpretation panels already have given to this provision. In *Argentina – Poultry (AD)* the panel has found that Article 6.9 requires “positive action” and that “mere access to the file is not sufficient”.³ The panel in *Guatemala – Cement II* also found that mere access to the file is not sufficient unless the file contains a disclosure document specifically prepared by the authorities which clearly identifies the “essential facts”.⁴

C. 20-Day Period to File Comments on the disclosure

Norway suggests that a 20-day period for comments on the information disclosed according to Article 6.9 is both necessary and reasonable. Such a period also maintains a reasonable balance of conflicting interests. Given the volume of essential facts that exist in many investigations, it would normally take all interested parties at least this much time to digest the facts and assessments, and prepare comments and suggestions on how the investigating authorities should address the facts. A shorter period will deny interested parties the effective right to fully defend their interests in accordance with Article 6.2. However, a much longer period could interfere with the rights of the domestic industry that may be faced with dumped imports. The comments shall be taken into account by the authorities when issuing their determination, and shall be addressed in the reports published according to paragraph 2 of Article 12.

3. Conclusion

Norway is aware of the fact that Members' practices with regard to disclosure of information prior to an antidumping determination vary. The proposal takes these differences into account. It preserves the Members' possibility maintain their own disclosure procedures while establishing some minimum requirements for disclosure of information.

The Annex to this document contains a proposal on Article 6.9 of the *Antidumping Agreement* that takes these conceptual elements onboard.

³ Panel report, *Argentina – Poultry (AD)*, para. 7.220.

⁴ Panel report, *Guatemala – Cement*, para. 8.230.

ANNEX

Article 6.9 - Disclosure

6.9 The authorities shall, before a preliminary or final determination is made, inform all interested parties of the essential facts under consideration, including how the authorities will assess these facts which form the basis for ~~the~~ a decision whether to apply provisional or definitive measures¹. Such disclosure ~~shall~~ should take place in sufficient time for the parties to defend their interests².

¹The disclosure of essential facts requires the specific identification by the authorities of all facts in the record of the investigation that tend to support or cast doubt upon the determinations of dumping, injury and causation that will form the basis for a decision.

²The interested parties shall have full opportunity to defend their interests in accordance with Article 6.2, and shall be allowed no less than [20] days to comment.