



INTERNATIONAL
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Use of Facts Available

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Antidumping Calculations

*Approaches to the Use
of Facts Otherwise
Available*

- Section 776 of the Tariff Act, governs Commerce's practice of applying Facts Available

When to Use Facts Available?

- Necessary factual information is not on the record
- An interested party withholds information
- An interested party fails to provide information in a usable format
- An interested party “significantly impedes a proceeding”
- The information cannot be verified

When *Not* to Use Facts Available?

- When a respondent notifies Commerce that it is *unable* to submit the information.
- When the information submitted does not meet all our requirements, but:
 - The information was submitted on time
 - The information can be verified
 - The information can still serve as the basis for our calculations
 - The party acted to the best of its ability
 - Commerce can use the information “without undue difficulty.”

“Total” *versus* “Partial” Facts Available

“Total” Facts Available Used When

- No response at all
- A response that is so deficient it cannot serve as a basis for our calculations

“Partial” Facts Available Used When

- The response is, essentially, complete, but some data are missing
- These missing data must be filled using available information
- Gap-filling typically makes use of respondents’ own data

Use of Adverse Inferences

- Only used in cases where a respondent “fails to cooperate by not acting to the best of its ability” to provide requested information
- Intended to ensure a party does not benefit from its own lack of cooperation
- Goal is to induce future cooperation, not “punish” a respondent firm
- Must not rely on outdated or aberrational data

Examples of Sources for “Facts Otherwise Available”

- The respondent firm’s own data submitted in the proceeding;
- The original petition;
- A final determination in an investigation;
- Any previous administrative review;
- “Any other information placed on the record.”

Corroboration of “secondary information”

- “To the extent practicable”
- Use of independent sources
- Information must have “probative value,” that is, it must be both “reliable” and “relevant”
- Inability to corroborate information will not prevent Commerce from applying adverse inference as appropriate

Deciding to use facts available

- Necessary data are not on the record, are unusable, or cannot be verified
- Commerce must notify parties of deficiencies and permit them to correct information, or submit the missing information
- Typically, this entails multiple requests for information before Commerce resorts to facts available
- Facts available is a tool of last resort