FACTS AVAILABLE, LIMITED COOPERATION, AND EU ANTI-SUBSIDY INVESTIGATIONS

The CHINESE BEVs CASE and BEYOND

LEONARDO BORLINI, DANIEL GROS

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Executive Summary

This paper examines a practical problem that has become central to contemporary countervailing duty investigations: what an investigating authority may do when the firms and public bodies holding the most relevant information do not cooperate. The immediate context is the European Union's anti-subsidy practice, particularly the investigation concerning battery electric vehicles from China. The broader legal question concerns the operation of the WTO Agreement on Subsidies and Countervailing Measures and, in EU law, Article 28 of Regulation (EU) 2016/1037.

The paper argues that so-called facts available should be understood neither as a punitive shortcut nor as a merely technical evidentiary rule. Rather, they are a structured substitute mechanism that allows investigations to continue despite informational asymmetry, while remaining subject to strict requirements of accuracy, reasoned explanation, and procedural fairness. The Chinese BEVs investigation, together with the earlier glass fibre cases, shows both why this mechanism matters and where its limits lie.

The central issue is straightforward. In anti-subsidy investigations, the European Commission often needs detailed information that only the investigated companies, their affiliates, or the foreign government can provide. When that information is withheld, delayed, or produced in an unusable form, the Commission must decide whether the investigation can still proceed and, if so, on what evidentiary basis.

That question has become particularly visible in investigations involving Chinese firms and the Government of China, including the recent case on battery electric vehicles (BEVs). The policy problem, therefore, is not abstract: it concerns the Commission's ability to establish the existence and amount of subsidisation when the most probative evidence is not fully available.

The legal answer lies in the mechanism of facts available. At the multilateral level, Article 12.7 of the WTO Agreement on Subsidies and Countervailing Measures (ASCM) permits determinations on the basis of available facts when an interested Member or party refuses access to necessary information, fails to provide it within a reasonable period, or significantly impedes the investigation.

In EU law, Article 28 of the Basic Anti-Subsidy Regulation performs the same function but in more operational terms. It allows the Commission to move forward, while also requiring notice of the consequences of non-cooperation, acceptance of imperfect yet usable information where appropriate, and cross-checking of complaint-based material where practicable.

The article develops three claims. First, the Chinese BEVs case is best understood as a particularly visible example of a recurring institutional problem rather than as a unique anomaly. Earlier EU cases involving glass fibre rovings and glass fibre fabrics already showed that the Commission may rely on prior findings and other independent material when Chinese exporters or the Government of China do not cooperate.

Secondly, WTO jurisprudence makes clear that facts available are lawful only if they reasonably replace the missing information and are supported by a reasoned explanation. The mechanism is therefore facilitative, but not unbounded.

Thirdly, the underlying issue is not confined to trade defence. Similar information asymmetries arise, albeit under different legal regimes, in other forms of EU enforcement, including investigations directed at large digital platforms. The specific legal tools differ, but the institutional dilemma is similar: how should a regulator act when essential information remains in the hands of the investigated party?

For that reason, the article begins with the concrete policy problem and only then turns to the legal architecture and the case law. The conclusion offers a limited set of policy recommendations: the Commission should preserve facts available as a substitute mechanism rather than a punitive device; develop a disciplined hierarchy of substitute evidence; strengthen confidentiality and structured disclosure; and distinguish more clearly between genuine legal impediments to disclosure and strategic non-cooperation.

1. Introduction

The real difficulty in current EU anti-subsidy investigations is not simply whether subsidisation exists, but whether the Commission can prove it when the firms and public authorities holding the relevant evidence do not fully cooperate. In cases such as the investigation on battery electric vehicles originating in China, the Commission needs granular information on financing, land-use rights, fiscal advantages, upstream inputs, government programmes, and corporate structure. When Chinese producers, affiliated entities, or the Government of China limit their responses, invoke confidentiality concerns, or provide information that cannot be fully verified, the Commission faces a concrete policy dilemma: either the investigation stalls, or the Commission must reconstruct the missing elements by relying on substitute evidence.

This dilemma explains why the law on facts available matters. Article 12.7 of the WTO Agreement on Subsidies and Countervailing Measures and Article 28 of the EU Basic Anti-Subsidy Regulation are the legal provisions that allow the Commission to continue an investigation despite incomplete cooperation. They do not remove the need for evidence; nor do they authorise arbitrary decision-making. Their function is narrower and more practical: they permit the authority to replace missing necessary information with other material that can reasonably support a determination.

The Chinese BEVs case is an obvious contemporary illustration, but it is not the first. Earlier EU investigations in the glass fibre sector show the same structural problem. In Commission Implementing Regulation (EU) 2021/328 on glass fibre rovings from China, the Commission expressly recorded that it had received no questionnaire replies from the Chinese exporting producers and no reply from the Government of China, and that it therefore relied on Article 28 and on findings from an earlier investigation concerning glass fibre fabrics.[1] That example is important because it shows how non-cooperation can lead the Commission to draw on a wider evidentiary reservoir built across adjacent cases. At the WTO level, the same problem has surfaced both in jurisprudence concerning the use of facts available and, more recently, in China's challenge to the EU's BEV measures in DS630.[2]

The issue also has a broader significance. Although this paper focuses on subsidies and trade defence, the underlying institutional problem is not unique to that field. EU regulators increasingly operate in settings in which the key evidence is controlled by the regulated party itself. Similar tensions arise, under different legislation and with different remedies, in enforcement against major digital platforms. The point is not that trade defence and digital regulation are doctrinally identical. They are not. It is rather that both areas reveal the same governance challenge: the regulator must act under conditions of asymmetrical access to information.

Against that background, the article proceeds in four steps. Section 2 sets out the policy problem in concrete terms and explains why it has become especially acute in investigations involving China. Section 3 analyses the governing legal framework in WTO and EU law. Section 4 then turns to

[1] Commission Implementing regulation (EU) 2021/328 of 24 February 2021 imposing a definitive countervailing duty on imports of continuous filament glass fibre products originating in the People's Republic of China following an expiry review pursuant to Article 18 of the Regulation (EU) 2016/1037 of the European Parliament and of the Council, OJ L 65/1, 25 February 2021.
[2] G/L/1544 ; G/SCM/D140/1 ; WT/DS630/1, European Union - Definitive countervailing duties on new battery electric vehicles from China - Request for consultations by China, 6 June 2024.

practice, beginning with the BEV case and expanding the discussion of the glass fibre investigations and the WTO disputes that frame the legality of substitute evidence. Section 5 offers a strategic assessment of whether reduced cooperation in fact makes investigations easier for the Commission, and at what cost. Section 6 concludes with policy recommendations.

2. The Policy Problem: Non-Cooperation and Evidentiary Substitution

Countervailing duty investigations are unusually dependent on information held by others. In anti-dumping cases, the authority often needs company-specific information about export prices, domestic prices, costs, and adjustments. In subsidy cases, the informational burden is even wider. The authority may need access not only to company accounts but also to government programmes, administrative rules, financial flows through state-owned banks, land-allocation decisions, preferential tax treatment, and the pricing of strategic inputs. The relevant facts are therefore frequently dispersed across firms, affiliates, state-owned entities, and public authorities.

That structure makes subsidy investigations especially vulnerable to non-cooperation. The investigated party may refuse access altogether, may respond late, may provide information in a non-verifiable form, or may invoke confidentiality or domestic legal restrictions. Governments may be even less willing than firms to disclose programme design, lending criteria, or administrative records. The problem is not simply that the authority has less evidence than it would prefer. The problem is that the missing evidence often concerns precisely those facts that are most central to determining whether a financial contribution exists, whether it confers a benefit, whether it is specific, and how the amount of subsidisation should be quantified.

The immediate question, then, is not whether non-cooperation is desirable. It plainly is not. The real question is what the Commission may lawfully do to compensate for the absence of information. That is the point at which the law of facts available becomes central. It is designed to prevent investigations from collapsing. At the same time, it must be applied in a way that preserves the accuracy and legitimacy of the final determination.

The same logic also helps explain why the issue resonates beyond trade law. In digital-market and platform enforcement, too, regulators often rely on data, internal processes, or technical documentation that only the investigated undertaking controls. The legal framework there is different, and this article does not suggest that trade-defence doctrines can simply be transplanted into that field. The comparison is relevant for a narrower reason: it shows that the tension between effective enforcement and incomplete cooperation is a broader problem of contemporary regulation. Trade defence offers a particularly developed legal vocabulary for dealing with it because Article 12.7 ASCM and Article 28 of the EU Basic Anti-Subsidy Regulation address the problem explicitly.

Article 12.7 ASCM recognises this asymmetry and offers a pragmatic solution: it allows determinations to be made on the basis of “facts available” if an interested Member or party refuses access to, or does not provide, necessary information within a reasonable period, or significantly

impedes the investigation[3]. The EU's corresponding rule—Article 28 of Regulation (EU) 2016/1037—adopts similar language but goes further. It includes (i) an explicit duty to warn interested parties of the consequences of non-cooperation; (ii) a protective "best of its ability" rule preventing authorities from discarding non-ideal information when the party has acted diligently; and (iii) an express acknowledgment that non-cooperation can justify less favourable outcomes[4].

The legal and strategic significance of "facts available" has intensified in the EU context for at least three reasons.

First, the EU has increasingly launched complex, system-wide subsidy investigations in sectors deeply shaped by state industrial policy. The Commission's definitive countervailing duty regulation on battery electric vehicles (BEVs) originating in China describes extensive reliance on "various independent sources" of market information and the existence of evidence "tending to show the existence of subsidisation" in a strategically sensitive sector[5]. This kind of investigation is structurally more reliant on cooperation from both firms and governments; it is also structurally more likely to confront resistance.

Second, Chinese enterprises and public authorities operate within an evolving domestic legal environment governing data provision, confidentiality, and compliance with foreign measures. China's Data Security Law, for example, contains a rule (Article 36) linked to constraints on providing data to overseas judicial or law-enforcement bodies without approval, and it foresees penalties for violations[6]. Even if the precise legal mapping of trade defence authorities to "judicial or law enforcement" bodies is contested, the perceived compliance risk can influence corporate behaviour.

Third, the EU's own regulatory design gives "facts available" a dual character: it is not only a mechanism to avoid investigatory paralysis; it is also a behavioural incentive. Article 28(6) makes explicit what practitioners have long understood implicitly: withholding relevant information may worsen the outcome. That feature—combined with increased recourse to ex officio initiation and to public/secondary sources—creates a strategic environment in which the level of cooperation can shape both the evidentiary record and the margin ultimately imposed.

[3] WTO, Agreement on Subsidies and Countervailing Measures (SCM Agreement), art. 12.7; Wolfgang Mueller, WTO Agreement on Subsidies and Countervailing Measures: A Commentary (Cambridge University Press, 2017), commentary on art. 12; Peter Van den Bossche and Werner Zdouc, The Law and Policy of the World Trade Organization, 5th ed. (Cambridge University Press, 2021), ch. 10; Mitsuo Matsushita, Thomas J. Schoenbaum, Petros C. Mavroidis and Michael Hahn, The World Trade Organization: Law, Practice, and Policy, 3rd ed. (Oxford University Press, 2015), ch. 10.

[4] Regulation (EU) 2016/1037, art. 28(1)-(6); Van Bael & Bellis, EU Anti-Dumping and Other Trade Defence Instruments, 6th ed. (Kluwer Law International, 2019), esp. sections on non-cooperation and rights of interested parties; Patricia Trapp, The European Union's Trade Defence Modernisation Package (Springer, 2022).

[5] Commission Implementing Regulation (EU) 2024/2754 of 29 October 2024, imposing a definitive countervailing duty on imports of new battery electric vehicles designed for the transport of persons originating in the People's Republic of China; European Commission, "EU imposes duties on unfairly subsidised electric vehicles from China" (Press Release, 29 October 2024).

[6] Data Security Law of the People's Republic of China (2021), art. 36; MOFCOM Order No. 1 of 2021, Rules on Counteracting Unjustified Extra-territorial Application of Foreign Legislation and Other Measures; Law of the People's Republic of China on Countering Foreign Sanctions (2021); Provisions on the Implementation of the Anti-Foreign Sanctions Law of the People's Republic of China (2025); Alexandr Svetlicinii, "China's Defense against Secondary Sanctions: Lessons from the EU Blocking Statute" (2022) 21 Journal of International Trade Law and Policy 217.

3. Detailed Legal Analysis: WTO and EU Law

3.1. Trigger conditions: refusal, non-provision, and impediment

Article 12.7 ASCM activates when an interested Member or party (i) refuses access, (ii) "otherwise does not provide" necessary information "within a reasonable period," or (iii) "significantly impedes" the investigation. Each element raises interpretative questions.

"Refuses access" is naturally read to include denial of verification visits, denial of access to records, or obstruction of the authority's ability to test data. In subsidy cases—where evidence may involve government programmes and state-owned financial institutions—"access" may relate not only to corporate documents but also to programme design, implementing regulations, administrative records, and allocation methodologies.

"Does not provide necessary information within a reasonable period" establishes that the obligation is not unlimited: it concerns necessary information and is subject to reasonableness in time. The ASCM also sets default procedural baselines. Exporters and other recipients of questionnaires "shall be given at least 30 days for reply," and extensions should be granted "upon cause shown, whenever practicable."

Those provisions frame what is "reasonable" in practice, especially when investigations cover complex subsidy schemes and multiple affiliates. With regards to the "necessity" requirement, information is "necessary" insofar as it is required to make a legally relevant determination—existence of subsidy, benefit, specificity, injury and causation, and the appropriate duty rate. In principle, the authority must identify what it needs and why; a blanket claim that "more data is always necessary" would sit uneasily with the due process balance embedded in Article 12 as a whole.

The final trigger - significant impediment - covers conduct that obstructs verification or undermines the authority's ability to test the reliability of data. That may include refusal to allow verification visits, refusal to provide source documents, or manipulation of records. But here too, context matters: in subsidy investigations, certain relevant information may be held by governments, financial institutions, or input suppliers not fully controlled by the exporter. The legal system therefore must distinguish between genuine inability and strategic refusal - without creating an easy escape route for parties seeking to frustrate investigations.

Importantly, Article 12.7 permits both affirmative and negative determinations based on facts available. This textual symmetry underscores a central point: "facts available" is not inherently pro-authority or pro-complainant. It is a mechanism to keep the investigation operable when the evidentiary record is incomplete.

3.2. Due process constraints surrounding Article 12.7

The structure of Article 12 SCM matters because it embeds facts available within a broader due process framework. Article 12.1.1 provides exporters and producers receiving questionnaires at least 30 days to reply, with due consideration for extension requests. Article 12.3 requires authorities, whenever practicable, to provide timely opportunities for interested parties to see all relevant information that is not confidential and that is used in the investigation. Article 12.4 then establishes confidentiality rules (including non-confidential summaries) and allows authorities to disregard information if confidentiality claims are unwarranted and parties refuse summarisation. Article 12.8 requires disclosure of "essential facts" before final determination to allow parties to defend their interests.

Taken together, these provisions suggest that Article 12.7 is not meant to lower procedural guarantees; rather, it is meant to preserve the functionality of investigations while maintaining accuracy and fairness. In other words, it is a substitute mechanism, not a sanction mechanism.

3.3. WTO jurisprudence: accuracy, reasonableness, and the limits of adverse approaches

3.3.1. The core principle: facts available must reasonably replace missing information

WTO case law has repeatedly emphasised that the use of facts available is bounded by a substantive requirement: the chosen facts must be reasonable substitutes for the missing data, with a view to accurate determinations. This is explicit in the Appellate Body's articulation that Article 12.7 "imposes the obligation on an investigating authority to use those 'facts available' that reasonably replace the information that an interested party failed to provide, with a view to arriving at an accurate determination."[7]

This formulation is crucial. It does not require the authority to be "lenient" toward non-cooperation, but it rejects the idea that Article 12.7 is a punitive device. The benchmark is reasonableness in substituting missing information, oriented toward accuracy. The practical implication is that an authority may not select any facts it likes simply because a party did not cooperate; it must select facts that are capable of serving as a rational proxy for what is missing.

3.3.2. The obligation of reasoned explanation and record-based justification

The Appellate Body has also linked the legality of facts available to the quality of the authority's reasoning. In the context of disputes about "adverse facts available," it stressed that panels may need to scrutinise whether the authority's explanation is "reasoned and adequate" to show that determinations were actually based on facts, not assertion.[8]

For subsidy investigations, this has at least two implications. First, authorities must create a record that shows the logical bridge between missing information and the facts selected as substitutes. Second, authorities should be prepared to justify why less favourable facts were chosen if multiple possible proxies existed. In other words, "facts available" determinations must be defensible as a matter of inference and evidence, not merely asserted as a consequence of non-cooperation.

[7] Appellate Body Report, United States - Countervailing Duty Measures on Certain Products from China, WT/DS437/AB/R, paras. 4.25 and 4.178; see also Appellate Body Report, Mexico - Anti-Dumping Measures on Rice, WT/DS295/AB/R, para. 293; Wolfgang Mueller, commentary on art. 12. See also Kyounghwa Kim and Jaeyoun Roh, "US Anti-Dumping Practices Evolving against Market Economies", 21 World Trade Review (2022) 479 – 496.

[8] Appellate Body Report, United States - Countervailing Duty Measures on Certain Products from China, WT/DS437/AB/R, paras. 4.187-4.204; see also Appellate Body Report, United States - Countervailing Duty Investigation on DRAMS, WT/DS296/AB/R; and Appellate Body Report, United States - Softwood Lumber VI (Article 21.5 - Canada), WT/DS264/AB/RW, on the requirement of a reasoned and adequate explanation.

3.3.3. The Annex II gap and the analogy to anti-dumping

Unlike the Anti-Dumping Agreement (ADA), the SCM Agreement does not contain an annex with detailed conditions governing facts available (ADA Annex II). Yet WTO adjudicators have rejected the view that this absence creates a regulatory vacuum. A panel in *US – Facts Available* (a dispute involving claims under Article 12.7 SCM) observed that its interpretative analysis of "necessary information" in ADA Article 6.8 remained relevant to Article 12.7 SCM, and that Article 12.7 requires authorities to select "reasonable replacements" for missing necessary information.[9] The same panel highlighted that, while the SCM Agreement lacks an annex like Annex II, this "does not mean… that no such conditions exist" and it would be "anomalous" if facts available under Article 12.7 could be used in a markedly different way from anti-dumping investigations.[10]

3.4. EU implementation: Article 28 as both evidentiary rule and compliance incentive

3.4.1. Structural features of Article 28

Article 28(1) of the Basic Anti-Subsidy Regulation tracks the ASCM logic but is more operationally prescriptive when interested parties refuse access, fail to provide necessary information within time limits, or impede investigation, provisional or final findings may be made on the basis of the facts available. The EU formulation is therefore stricter in its temporal trigger—"time limits" rather than a flexible "reasonable period"—though, in practice, time limits are themselves managed through extensions and procedural discretion.

Article 28 adds three elements of particular strategic relevance:

First, it provides that where an interested party has supplied false or misleading information, that information shall be disregarded and facts available may be used. This is a direct anti-abuse provision. It also signals that the EU treats "quality of cooperation" as part of the cooperation spectrum: not only absence of information, but also unreliable information, can justify resort to facts available.

Second, the Regulation requires that interested parties "shall be made aware of the consequences of non-cooperation." This aligns with a due process logic: parties should know ex ante that non-cooperation can lead to less favourable outcomes, and should therefore be able to make informed strategic decisions about disclosure.

Finally, Article 28(6) makes explicit that partial or non-cooperation may lead to less favourable results. From a behavioural economics perspective, this is the EU's codified incentive mechanism: cooperation is "rewarded" with individualised (and potentially lower) rates grounded in verified data;

[9] Panel Report, United States - Anti-Dumping and Countervailing Duties on Certain Products and the Use of Facts Available, WT/DS539/R, paras. 7.195-7.198 and 7.440-7.446; see also Appellate Body Report, Mexico - Anti-Dumping Measures on Rice, WT/DS295/AB/R, paras. 291-294.

[10] Panel Report, United States - Anti-Dumping and Countervailing Duties on Certain Products and the Use of Facts Available, WT/DS539/R, paras. 7.195-7.204; Wolfgang Mueller, commentary on art. 12; Van Bael & Bellis, EU Anti-Dumping and Other Trade Defence Instruments, on the relationship between facts available, due process, and non-cooperation.

non-cooperation risks residual outcomes based on secondary evidence and conservative assumptions.

3.4.2. Built-in safeguards: non-computerised responses, rejection notices, and cross-checking

The most distinctive part of Article 28 is that it does not stop at authorising facts available. It sets out a set of fairness-oriented constraints that functionally resemble key aspects of ADA Annex II. These provisions deserve attention because they map directly onto common flashpoints in investigations involving Chinese firms.

- Digital format burdens: Article 28(2) states that failure to give a computerised response is not non-cooperation if presenting the response as requested would create an unreasonable extra burden or cost. This is not a minor technicality: the EU's questionnaires can be demanding in format and detail; disputes about "reasonable burden" can become proxy disputes about access to justice in administrative proceedings.
- Not ideal information: Article 28(3) provides that information "not ideal in all respects" shall not be disregarded if deficiencies do not cause undue difficulty in arriving at a reasonably accurate finding, and the information is submitted in good time, is verifiable, and the party acted to the best of its ability. This is, in effect, a legal instruction to accept imperfect cooperation rather than treat it as no cooperation. It is also a statutory embodiment of the WTO jurisprudential theme that facts available should be a substitute, not a punishment.
- Reasoned rejection and opportunity to explain: Article 28(4) requires that if evidence or information is not accepted, the supplier must be informed promptly of the reasons and given an opportunity to provide further explanations; if explanations are unsatisfactory, reasons must be disclosed in published findings. This clause helps police the boundary between legitimate reliance on facts available and arbitrary dismissal of submitted information.
- Cross-checking complaint data: Article 28(5) provides that if determinations are based on Article 28(1), including complaint information, that information should be checked—where practicable—against other independent sources (price lists, official import statistics, customs returns, or information from other parties). This is a crucial "accuracy" safeguard: it implies that facts available should not mean "complaint allegations accepted at face value." In subsidy investigations, complaint information may be detailed but also strategically framed; cross-checking is therefore essential to ensure that facts available can be defended as "reasonable replacements" rather than self-interested assertions.

These features provide the Commission with legal tools to proceed in non-cooperation scenarios, but also impose procedural disciplines that—if followed carefully—reduce the risk of annulment in EU judicial review or adverse findings in WTO litigation.

4. Practice: Chinese BEVs, Glass Fibre Cases, and WTO Review

4.1. Non-cooperation as a recurring empirical reality

A key premise of this article is that Chinese enterprises are "less and less willing to share information." Whether framed as a behavioural trend or as a case-specific strategic choice, EU practice demonstrates that non-cooperation by exporters and/or the Government of China (GOC) is

not hypothetical.

A salient example is Commission Implementing Regulation (EU) 2021/328 (glass fibre rovings), which records: “No questionnaire replies were received from any of the Chinese exporting producers,” and “The Commission did not receive a reply to the questionnaire sent to the GOC.” The regulation explicitly links that absence to Article 28: “in the absence of a questionnaire reply, the Commission used facts available under the terms of Article 28… as regards the information requested of the GOC.” It further explains that those facts available relied “mainly on the findings” of a previous investigation on glass fibre fabrics, treating those earlier findings as appropriate substitutes.

This illustrates a practical mechanism of institutional learning: the Commission can build an evidentiary “library” of subsidy findings, enabling it to proceed even when the immediate target industry refuses to cooperate.

The Commission’s definitive BEV countervailing duty regulation (2024/2754) provides another perspective. It describes the Commission’s collection of market information “from various independent sources” and notes that such information “tended to show the existence of subsidisation by the PRC.” It also contains a specific section titled “Application of the provisions of Article 28(1) of the basic Regulation” with respect to particular subsidy schemes, explaining that in the absence of information “not provided by the GOC,” the Commission was “entitled… to use available facts.” Finally, the Commission differentiated duty rates for sampled exporters, other cooperating companies, and “all other non-cooperating companies,” with the latter category facing the highest rate (35.3%).

Crucially, the BEV case also demonstrates that cooperation is not only company-level. Subsidy investigations require substantial governmental input (policy documents, programme details, bank information, land-use rights data). If government cooperation is partial, company cooperation may not be sufficient to avoid the use of facts available for key elements of the subsidy analysis.

4.2. Domestic legal constraints on data provision: the Chinese compliance environment

A final cluster—especially salient in the China context—concerns the domestic legal environment in which Chinese enterprises operate. The Data Security Law contains a provision (Article 36) linked to restrictions on providing data to overseas judicial or law-enforcement bodies without approval and to potential penalties for violations.

Beyond data law, China has developed a broader countermeasures toolkit. Commentaries discuss China’s “blocking” rules adopted by MOFCOM in January 2021 (often described as a “blocking statute”) as a framework to counteract what China regards as unjustified extraterritorial application of foreign measures. Moreover, analysis of the implementation regulations adopted in 2025 for China’s Anti-Foreign Sanctions Law indicates a further elaboration of enforcement mechanisms and countermeasures. Commentary from early 2026 also notes that amendments to China’s Foreign Trade Law may broaden the scenarios in which countermeasures can be initiated, potentially enabling more rapid reaction.

None of these instruments is a direct, categorical prohibition on cooperation with foreign trade defence investigations. But together they contribute to a compliance risk landscape in which disclosure to foreign authorities—especially disclosure of state-linked financing, industrial policy compliance, or data stored in China—may be seen as legally and politically sensitive. For corporate

counsel, the “safe” answer may be to limit disclosure, to insist on strict confidentiality, or to channel responses through collective industry associations. That behavioural trend, in turn, increases the practical relevance of Article 28’s non-cooperation logic for EU investigations.

4.3. Litigation feedback: DS630 and the contestation of facts available in EU-China relations

The strategic stakes of facts available are further underscored by WTO litigation. China’s request for consultations in DS630 (concerning EU definitive countervailing duties on BEVs) explicitly raises procedural grievances about the EU’s resort to facts available, alleging that the EU selected facts that did not reasonably replace allegedly missing information, contrary to SCM Articles 12.1 and 12.7. China also alleges failures regarding provision of non-confidential information relevant to the presentation of its case and denial of extension requests, invoking SCM Articles 12.1, 12.3, 12.4 and 12.11.

This shows, on the one hand, that facts available can be a litigation focal point. When determinations rely heavily on facts available, the risk profile shifts: disputes are more likely to attack procedure, access to information, and reason-giving. Second, it highlights that the “facts available” mechanism can become entangled with claims that the authority itself created the informational gap by imposing unreasonable deadlines, refusing extensions, or failing to provide adequate access to non-confidential information.

In DS630, China and the EU agreed to procedures for arbitration under Article 25 DSU for any appeal, reflecting the continuing Appellate Body impasse and the EU’s broader preference for appeal arbitration arrangements. The EU’s statement at the WTO Dispute Settlement Body in March 2025 records the EU’s position on panel establishment in DS630 and confirms the dispute’s escalation.

5. Does Reduced Cooperation Facilitate EU Investigations?

The claim that Chinese enterprises are “less and less” willing to share information should not be treated as a universal empirical fact; cooperation varies by sector, firm, and political environment. What can be said with greater confidence is that the legal and compliance environment for cross-border data transfer and disclosure in China has become more complex, potentially raising the cost of cooperation in foreign investigations. Public legal analyses note that China’s Data Security Law and Personal Information Protection Law, among other instruments, have created a stricter framework governing data processing and cross-border data transfer, which can affect how businesses respond to foreign authorities’ information requests.

For trade defence investigations, the strategic implication is not that non-cooperation will necessarily increase, but that it may become easier for firms to justify partial cooperation, broad confidentiality claims, or refusal to transmit certain datasets—especially where those datasets include personal information, sensitive supplier data, or information potentially characterised as “important data” under Chinese rules. Where such constraints exist, EU investigators face a dilemma: they must decide whether the inability to provide data is genuine (and thus should be accommodated under the “reasonable period” and “best of ability” logic) or strategic (and thus warrants facts available with potentially less favourable outcomes).

The proposition that reduced cooperation by Chinese enterprises might “facilitate” future EU AD/AS

investigations therefore capture a real dynamic: non-cooperation can lower the evidentiary burden for the authority in the sense that it can proceed using complaint information and other available sources, rather than verifying complex firm-specific data. Under the EU and WTO legal architectures, reduced cooperation can indeed facilitate investigations in at least four strategic senses—while generating offsetting risks.

The most basic facilitation is institutional: both Article 12.7 ASCM and Article 28 EU exist to prevent investigations from collapsing due to information withholding. The Commission's practice in 2021/328 shows that even when neither exporters nor the GOC reply to questionnaires, the Commission can proceed by using facts available and by importing findings from prior investigations.

From an enforcement perspective, this reduces the strategic value of non-cooperation as a blocking tactic. As long as the Commission can build an evidentiary record from secondary sources—public documents, prior cases, market data, customs statistics, and information from cooperating parties—investigations remain feasible.

Secondly, Article 28(6) institutionalises the notion of adverse consequence: a party that does not cooperate may face a less favourable result than if it had cooperated. In strategic terms, that creates a powerful negotiating shadow. Even where a company is reluctant to disclose sensitive information, the prospect of being assigned a higher residual rate can incentivise at least partial cooperation.

Reduced cooperation can therefore lead to a paradox: in the short term, some companies may resist, but the system's design means that resistance can accelerate the Commission's readiness to apply residual findings, shifting the cost of non-cooperation onto the exporter.

Thirdly, The Commission's reliance in 2021/328 on findings from the glass fibre fabrics investigation illustrates a deeper institutional dynamic: facts available can be supplied by the authority's own prior determinations, treated as relevant where there is product overlap or policy overlap. Similarly, in the BEV regulation, the Commission describes gathering information from independent sources and applying Article 28(1) where the GOC did not provide relevant and necessary information.

Over time, repeated non-cooperation may strengthen the Commission's capacity to proceed without case-specific cooperation by expanding its reservoir of cross-sectoral subsidy evidence and by refining benchmark methodologies. This can be understood as a form of administrative path-dependence: each investigation generates materials that can become "facts available" in the next.

Finally, the BEV investigation is notable also because it was initiated ex officio, and the regulation explicitly references the Commission's possession of "sufficient evidence" to proceed without a complaint. Where investigations are ex officio and rely on independent market information, the Commission may be less dependent on full corporate cooperation to justify initiation and to sustain findings—although cooperation remains important for accurate subsidy quantification and for individual rate determinations.

5.1. The countervailing risk: accuracy, proportionality, and legal vulnerability

However, the facilitation claim must be qualified by at least three constraints.

First, WTO law requires that facts available reasonably replace missing information with a view to accurate determinations. If the authority uses facts that are not plausible proxies—or if it relies too heavily on untested complaint allegations—its determinations become legally vulnerable. The request for consultations in DS630 illustrates precisely this kind of challenge: China alleges that the

EU's facts available did not reasonably replace missing information and lacked legal basis.

Second, the EU's own Article 28 constrains the Commission's ability to treat imperfect information as non-cooperation. It requires acceptance of non-ideal but verifiable data where it does not cause undue difficulty, and it requires cross-checking of complaint information where practicable. These internal constraints raise the administrative costs of relying on facts available: to make facts available determinations defensible, the Commission must do more work, not less, in validating proxies.

Third, the authority must maintain procedural fairness—especially disclosure. Both WTO and EU law require disclosure of essential facts in time for defence. Facts available determinations are inherently more contestable, and therefore require stronger disclosure and reasoning to be durable. (c) Escalation and systemic non-cooperation

Finally, if firms perceive that cooperation does not materially improve outcomes—or that confidentiality cannot be protected adequately—they may rationally choose non-cooperation as a political signal even if it leads to higher rates. In that scenario, the EU may "win" individual cases through residual rates but lose in the longer-term cooperative equilibrium: investigations become more adversarial, retaliation risk increases, and the informational quality of the system declines.

6. Conclusion and Policy Recommendations

"Facts available" is often presented as a technical evidentiary clause. In practice it is a structural instrument of trade defence governance: it manages information asymmetry, preserves the operability of investigations, and creates behavioural incentives for cooperation. Article 12.7 ASCM provides the WTO legal foundation, while Article 28 of the EU Basic Anti-Subsidy Regulation both operationalises and sharpens the mechanism by combining procedural safeguards (notice, acceptance of non-ideal information, cross-checking) with an explicit "less favourable" consequence for non-cooperation.

A pattern of reduced information-sharing by Chinese enterprises—and, in many cases, limited disclosure by Chinese authorities—may indeed "facilitate" EU investigations in the sense that it enlarges the Commission's practical ability to rely on secondary sources and to apply residual findings, as illustrated by Commission practice in 2021/328 and in the BEV regulation. But the same trend raises a strategic dilemma: the more the EU relies on facts available, the more it must invest in methodological discipline, reason-giving, and confidentiality management to avoid an outcome that is legally fragile or politically combustible.

The strategic task for the EU, therefore, is not simply to rely more on facts available, but to refine how it uses them: preserving incentives for cooperation, building robust proxy methodologies, managing confidentiality through meaningful summaries and structured disclosure, and producing reasoned determinations capable of withstanding WTO review. Only then can "facts available" serve its intended function—as a rule-of-law mechanism that keeps investigations workable without sacrificing accuracy and fairness.

6.1. Policy recommendations

1. Clarify, in operational terms, when Article 12.7 ASCM and Article 28 may be triggered.

Investigating authorities should adopt clearer internal guidance on what constitutes refusal of access, failure to provide necessary information, and significant impediment. Greater ex ante clarity would

reduce procedural disputes and strengthen the defensibility of facts-available determinations.

2. Preserve "facts available" as a tool of last resort, not a substitute for serious evidence-gathering.

Authorities should continue to treat facts available as an evidentiary replacement mechanism aimed at accuracy, rather than as a punitive shortcut. This requires a demonstrable effort to seek primary information before resorting to secondary proxies.

3. Create a transparent hierarchy of substitute evidence.

Where direct data is missing, authorities should explain why particular proxies were selected and why they constitute the most reasonable replacement available. A structured hierarchy—company data, verified sectoral data, prior findings, public sources, and complaint information—would improve consistency and judicial resilience.

4. Strengthen incentives for cooperation through procedural predictability.

If partial or non-cooperation may lead to less favourable outcomes, parties must receive timely, specific, and credible notice of that risk. Early warning letters, staged requests, and clear rejection notices would make the incentive structure more legitimate and more effective.

5. Expand robust confidentiality and data-handling mechanisms.

Because cross-border data restrictions and compliance risks increasingly shape corporate behaviour, the EU should refine mechanisms for confidential submissions, ring-fenced access, secure digital transmission, and treatment of sensitive business information. Better confidentiality protections may improve cooperation without weakening enforcement.

6. Accept imperfect but verifiable information wherever possible.

Authorities should avoid equating non-ideal submissions with non-cooperation. Consistent with Article 28, information that is incomplete yet verifiable and usable for a reasonably accurate finding should be incorporated rather than discarded.

7. Invest in a structured evidentiary "library," but discipline its use.

The Commission should continue building a cross-sectoral repository of verified subsidy findings, market benchmarks, and programme evidence. At the same time, prior findings should not be reused mechanically; authorities should explain why older or adjacent evidence remains probative in the new investigation.

8. Intensify cross-checking against independent sources.

Where complaint data or secondary material are used, corroboration should become routine rather than merely aspirational. The broader and more systematic the cross-checking, the lower the risk that facts available will appear speculative or overly adversarial.

9. Improve disclosure and reasoned explanation in facts-available determinations.

The strongest safeguard against WTO or judicial challenge is a decision that shows, step by step, the link between missing information, the authority's evidentiary choices, and the resulting finding. More detailed reasoning would improve both fairness and litigation resilience.

10. Develop a policy channel for cooperation problems generated by foreign law.

Where firms invoke domestic data, blocking, or anti-foreign-sanctions rules as constraints on disclosure, the EU should distinguish genuine legal impediments from strategic withholding. A

dedicated procedural track for such cases—requiring substantiation, proposing alternatives, and documenting accommodation attempts—would make the system both firmer and fairer.

11. Use Article 28 strategically, but not aggressively.

The long-term credibility of EU anti-subsidy enforcement depends on showing that non-cooperation does not paralyse investigations, but also that the Commission does not overreach when cooperation is limited. The objective should be disciplined enforcement, not maximalist inference.

12. Support multilateral clarification of "facts available" standards in subsidy cases.

At the systemic level, WTO Members should work toward more detailed guidance on the use of facts available in countervailing duty investigations, especially given the absence of an Annex II equivalent in the SCM Agreement. Greater multilateral clarification would reduce contestation and improve predictability.

Appendix A. Key Acronyms

ASCM = Agreement on Subsidies and Countervailing Measures.
BEVs = battery electric vehicles.
CVD = countervailing duty.
DS630 = WTO dispute concerning the EU's definitive countervailing duties on battery electric vehicles from China.
EU Basic Anti-Subsidy Regulation = Regulation (EU) 2016/1037.
GOC = Government of China.
MOFCOM = Ministry of Commerce of the People's Republic of China.

Appendix B. Short Background on the Chinese BEVs Investigation

The Commission initiated the BEV anti-subsidy investigation *ex officio*. The case concerned battery electric vehicles originating in China and culminated in definitive countervailing duties in 2024.

The investigation is important for present purposes because it illustrates three interconnected features of contemporary subsidy enforcement: first, the Commission's reliance on independent sources at the initiation stage; secondly, the central role of governmental cooperation in establishing subsidy programmes and benefits; and thirdly, the practical significance of Article 28 where the Government of China does not provide relevant information needed for the investigation.

IEP@BU does not express opinions of its own.

The opinions expressed in this publication are those of the authors.

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