

1 ANNEX II ..... 1  
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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

Anti-Dumping Agreement requires that '[a]ll interested parties in an anti-dumping investigation shall be given notice of the information which the authorities require'. In contrast to Article 6.1, paragraph 1 of Annex II is more 'specific and detailed' and requires more than mere 'notice' being given to the interested parties. The context provided by paragraphs 5 and 7 of Annex II, as well as Article 6.13, suggests that 'cooperation' is, indeed, a two-way process involving joint effort' and, '[i]f the investigating authorities fail to 'take due account' of genuine 'difficulties' experienced by interested parties, and made known to the investigating authorities, then 'Wbbch' fault the interested parties concerned for a lack of cooperation'.

Further, an assessment of whether an investigating authority acted consistently with paragraph 1 of Annex II must be made in light of the specific facts and circumstances of the investigation at issue. In light of the applicable standard of review, an investigating authority would act consistently with paragraph 1 of Annex II if the record of the investigation shows that the investigating authority took all reasonable steps that might be expected from an authority to specify in



Anti-Dumping Agreement in order to provide a positive solution to the dispute before us."<sup>5</sup>

## 1.5 Paragraph 5 of Annex II

### 1.5.1 Criteria for using information that is "not ideal in all respects"

6. In *US – Anti-Dumping Measures on Imports of Certain Steel Products*, the Panel examined Korea's claim that the USDOC had acted inconsistently with paragraph 5 of Annex II, among other provisions, in resorting to the use of facts available in respect of an interested party's reporting of certain sales data.<sup>6</sup> The Panel considered that, notwithstanding the obligation set forth in paragraph 5, where an interested party supplies information that is not verifiable or does not meet the other criteria in paragraph 3, an investigating authority is not required to use this information, even where an interested party has acted to the best of its ability for purposes of paragraph 5:

"Taken together, paragraphs 3 and 5 establish an obligation for an investigating authority to ensure that information that is 'not ideal in all respects' must not be considered unverifiable because of its flaws, so long as the interested party submitting it has acted to the 'best of its ability'. However, this does not mean that information that is not verifiable (or does not meet the other criteria in paragraph 3) must nonetheless be used by an investigating authority if the interested party acted to the best of its ability. In this regard, we agree with the panel in *US – Anti-Dumping Measures on Imports of Certain Steel Products* that 'it [is] difficult to conclude that an investigating authority must use information which is, for example, not verifiable, or not submitted in a timely fashion, or regardless of the difficulties incumbent upon its use, merely because the party supplying it has acted to the best of its ability'. Having already found that the USDOC properly concluded that the information at issue was not verifiable – and even if Hyundai Steel is seen as having acted to the best of its ability – the USDOC was not required by paragraph 5 to use that information. Accordingly, in the circumstances of this case, we find that Korea has failed to establish that the USDOC acted inconsistently with paragraph 5 of Annex II in resorting to the use of facts available with respect to the Spec C sales at issue."<sup>7</sup>

## 1.6 Paragraph 6 of Annex II

### 1.6.1 "reasonable period, due account being taken of the time-limits of the investigation"

7. In *US – Anti-Dumping Measures on Imports of Certain Steel Products*, the Panel considered that the text of paragraph 6 of Annex II "makes clear that the obligation for an investigating authority to provide a reasonable period for the provision of further explanations is not open-ended or absolute. Rather, this obligation exists within the overall time constraints of the investigation". The Panel concluded that "in determining a 'reasonable period' an investigating authority must balance the need to provide an adequate period for the provision of the explanations referred to against the time constraints applicable to the various phases of the investigation and to the investigation as a whole".<sup>8</sup>

8. In *US – Anti-Dumping Measures on Imports of Certain Steel Products*, the Panel considered that the issue of whether the two-to-five day deadline fixed by the investigating authority was unreasonable "must be judged on the basis of the overall factual situation that existed at the time". In this case, the Panel considered whether the information requested was new information, whether any of the other respondents received a longer period in which to respond and what was the attitude of the respondents concerned, and concluded that the deadline in question was not unreasonable.<sup>9</sup>

9. In *US – Anti-Dumping Measures on Imports of Certain Steel Products*, the Panel considered that paragraph 6 of Annex II requires an investigating authority to inform an interested party why its submitted information had not been accepted:

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<sup>5</sup> Panel Report, *US – Anti-Dumping Measures on Imports of Certain Steel Products*, paras. 7.139-7.140.

<sup>6</sup> Panel Report, *US – Anti-Dumping Measures on Imports of Certain Steel Products*, para. 7.161.

<sup>7</sup> Panel Report, *US – Anti-Dumping Measures on Imports of Certain Steel Products*, para. 7.180.

<sup>8</sup> Panel Report, *US – Anti-Dumping Measures on Imports of Certain Steel Products*, para. 7.282.

<sup>9</sup> Panel Report, *US – Anti-Dumping Measures on Imports of Certain Steel Products*, paras. 7.289-7.295.

"Paragraph 6 of Annex II requires that the interested party be informed of the reasons why submitted information is not accepted by an investigating authority irrespective of the reasons for the non-acceptance or the accuracy of the interested party's reporting. The USDOC rejected the information relating to service-related revenues that it had originally accepted in its final determination for POR2. The discussion above reveals that the USDOC did not inform HHI 'forthwith' of the reasons for such rejection."<sup>10</sup>

10. The Panel subsequently examined Korea's claim that the USDOC had acted inconsistently with paragraph 6 of Annex II, among other provisions, in resorting to facts available in respect of a certain company's reporting of its sales documentation.<sup>11</sup> The Panel considered that the first sentence of paragraph 6 requires that a supplying party be informed of the reasons why an investigating authority has not accepted its evidence or information. The first sentence of paragraph 6 also requires that the supplying party have an opportunity to provide further explanations within a reasonable period. The Panel noted that the time-limits of an investigation cannot be used to deprive the interested party of the opportunity to provide further explanations:

"The first sentence of paragraph 6 of Annex II requires that '[i]f 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'. The text of the provision thus envisages 'due account being taken of the time-limits' for determining what constitutes a 'reasonable period' for purposes of providing further explanations. That said, the time-limits of an investigation cannot be used to deprive an interested party of the opportunity to provide further explanations within the meaning of paragraph 6 of Annex II, provided that all other conditions under that provision are satisfied."<sup>12</sup>

11. The Panel ultimately found that the USDOC was required to, and did not, provide the interested party with an opportunity to submit further explanations within a reasonable period. The Panel also considered that the petitioner's submission, which had alleged certain deficiencies in the information submitted by the interested party, could not substitute for the conduct required by the USDOC under paragraph 6 of Annex II:

"[I]t is clear that information that was requested by the USDOC in its supplemental questionnaire and provided by HHI was ultimately not accepted by the USDOC in its final determination. In such circumstances, paragraph 6 of Annex II required the USDOC to give an opportunity to HHI to provide further explanations within a reasonable period, due account being taken of the time-limits of the investigation. However, the USDOC never provided such an opportunity to HHI. We also note that although the petitioner, in its case brief submitted before the final determination, alleged certain deficiencies in the information submitted by HHI – that were addressed by HHI in its rebuttal brief – the petitioner's submission cannot substitute the conduct required on the part of the USDOC under paragraph 6 of Annex II.

Accordingly, in these circumstances, we find that the USDOC acted inconsistently with paragraph 6 of Annex II in resorting to facts available because – having 'not accepted' the information provided by HHI – the USDOC subsequently failed to give an opportunity to HHI to 'provide further explanations within a reasonable period'. Given that paragraph 6 of Annex II serves as a precondition for an investigating authority's proper resort to facts available under Article 6.8 of the Anti-Dumping Agreement, we find that the USDOC also acted inconsistently with that provision in resorting to facts available. In light of our findings of WTO-inconsistency, we do not consider it necessary to rule upon Korea's claims under paragraphs 3 and 5 of Annex II to the Anti-Dumping Agreement in order to provide a positive solution to the dispute before us."<sup>13</sup>

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<sup>10</sup> Panel Report,

<sup>11</sup> Panel Report,

<sup>12</sup> Panel Report,

<sup>13</sup> Panel Report,

, para. 7.406.

, para. 7.467.

, para. 7.470.

, paras. 7.471-7.472.

