

## **ANNEX B**

### **Third Parties' Submissions**

---

**Contents**

**Page**



“should” in Article 13.1 of the Dispute Settlement Understanding to be “used in a normative, rather than a merely exhortative, sense” such that it creates “a duty and an obligation” on Members.<sup>4</sup>

5. *Second*, this view disregards the context of Annex II, Paragraph 3. The Annex arises out of Article 6.8, which provides in relevant part, “The provisions of Annex II *shall* be observed in the application of this paragraph.” The mandatory language in Article 6.8 supports a mandatory construction of Annex II, Paragraph 3. Indeed, based on this reasoning, another Panel concluded that the use of the word “shall” in Article 6.7 of the Agreement warranted a mandatory construction of the word “should” in Annex I.<sup>5</sup>

6. *Finally*, this view is inconsistent with the decision of the Appellate Body in *United States – Hot-Rolled Steel from Japan*. The Appellate Body emphasized that investigating authorities are



**ANNEX B-2**

**THIRD PARTY SUBMISSION OF THE EUROPEAN COMMUNITIES**

(17 December 2001)

authorities are not entitled to insist upon *absolute* standards or impose *unreasonable* burdens upon those exporters.<sup>1</sup>

6. The *Anti-Dumping Agreement* therefore, in aiming to ensure determinations are based upon as accurate information as possible, attempts to prevent investigating authorities unreasonably refusing to use data from the respondent firms but at the same time, is not designed to be manipulated by exporters (or other interested parties) in order to arrive at the best possible result. The obligation of

absolute au

TD

e Body's jhe bely tTD -0-operation a612 TD -c60g Tj.25 4ter Tj 137in  
au100.32875 5 Tc 0.2687 Tw (The ) Tj25. n 0 TD /F138 113.2, a2-26

select the information provided, and an investigating authority obliged to accept only such selected information, this provision would be rendered a nullity.

11. The *Anti-Dumping Agreement* establishes this balance between the need for accurate and complete information and encouraging co-operation in both Article 6.8 and paragraph 3 of Annex II. Paragraph 3 provides that information must be accepted which can be used without “undue difficulties”. Investigating authorities might find it “unduly difficult” to use data when other related sets of data have not also been provided, making it necessary to reject data which would otherwise be acceptable according to paragraph 3. Article 6.8, read in conjunction with the final sentence of paragraph 7 of Annex II, provide the means by which a Member may apply facts available where there has been no, or only limited, cooperation.

### **3. INTERPRETATION OF ARTICLE 15 OF THE ANTI-DUMPING AGREEMENT**

12. India argues that the United States should have explored constructive remedies with it as a developing country.<sup>6</sup> While the European Communities is not in a position to comment on the particular facts in dispute, it would like to recall that one of the conditions of the application of Article 15 is that anti-dumping duties “affect the essential interests of developing country Members”. India does not explain, in its submission, which essential interests were at issue, and the manner in which they were raised with the US authorities. Absent such an explanation, Article 15 cannot apply.

### **4. CONCLUSION**

13. The European Communities thus consider that Article 6.8 and paragraph 3 of Annex II, when read together, do not provide authority for a Member to automatically reject all data where some of the data provided by that exporter has been rejected. On the other hand, it might be questionable depending on the circumstances of the case and taking into account the specific character of the relevant information, whether all the conditions of paragraph 3 have been met where an exporter provides some information, but not related information. Where co-operation has been insufficient, Article 6.8 allows the use of facts available. Finally, Article 15 only applies where the developing country Member demonstrates that its “essential interests” are at issue.

---

<sup>6</sup> First Submission of India, 19 November 2001, para. 175.