

## ANNEX B

### Third Parties' Submissions

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## ANNEX B-1

### THIRD PARTY SUBMISSION OF JAPAN

(17 December 2001)

1. India claims that the US Investigating Authority should not have used “total facts available” when it could have used “partial facts available” and respondent’s actual data on its US sales.<sup>1</sup> This claim is governed by Article 6.8 of the Agreement on Implementation of Article VI of GATT 1947 (the “Agreement”), which establishes the exclusive conditions in which an investigating authority may use “facts available.” The Panel in *Argentina – Ceramic Tiles from Italy* noted the exclusive nature of Article 6.8:

[A]n investigating authority may disregard the primary source information and resort to the facts available *only* under the specific conditions of Article 6.8 and Annex II of the AD Agreement. Thus, an investigating authority may resort to the facts available *only* where a party: (i) refuses access to necessary information; (ii) otherwise fails to provide necessary information within a reasonable period; or (iii) significantly impedes the investigation.<sup>2</sup>

Pursuant to Article 6.8, Annex II of the Agreement elaborates on the circumstances in which an investigating authority may use facts available.

2. Japan takes no position on the ultimate conclusion whether the Investigating Authority’s use of facts available, in the specific circumstances of this case, is consistent with the Agreement. Japan notes, however, that in the course of defending its anti-dumping measures the United States has raised several troubling legal arguments. In the interests of the sound interpretation of the Agreement, Japan respectfully submits the following comments about the construction of Annex II of the Agreement.

A. INVESTIGATING AUTHORITIES MUST CONSIDER DATA SUBMITTED BY A RESPONDENT WHENEVER SUCH DATA CONFORMS WITH ANNEX II, PARAGRAPH 3

3. Paragraph 3 of Annex II provides that “[a]ll information” that meets four conditions “should be taken into account.” The United States argues this paragraph is not mandatory. According to the United States, an investigating authority is free to disregard actual data submitted by a respondent in favour of allegations made in the petition or other “facts available,” even when the data submitted meets all four conditions of Paragraph 3.<sup>3</sup> Japan respectfully submits that this view is incorrect for several reasons.

4. *First*, this view assumes that the word “should” is hortatory, not mandatory. However, the word “should” is often used in a mandatory sense. For example, the Appellate Body found the word

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<sup>1</sup> See Indian Submission, para. 1.

<sup>2</sup> *Argentina – Definitive Anti-Dumping Measures on Imports of Ceramic Floor Tiles from Italy*, Report of the Panel, WT/DS189/R, at para. 6.20 (emphasis added; internal footnote omitted).

<sup>3</sup> See US Submission, paras. 103-07.

“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 “directed” to use data submitted by a respondent that satisfies Paragraph 3 of Annex II: “In our view, it follows that if these conditions are met, investigating authorities are *not* entitled to reject information submitted, when making a determination.”<sup>6</sup> Thus, the Appellate Body has considered the exact provision at issue and found it to be mandatory.

#### B. INVESTIGATING AUTHORITIES ARE PROHIBITED FROM DISREGARDING INFORMATION SUBMITTED BY A RESPONDENT THAT IS COOPERATING TO THE BEST OF ITS ABILITY

7. Paragraph 5 of Annex II provides, “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.” Once again, the United States claims that the word “should” in this context is not mandatory.<sup>7</sup> That is, the United States asserts that investigating authorities *may* disregard information submitted even when the respondent “has acted to the best of its ability.”

8. However, as mentioned, contrary to the US view, the word “should” may be mandatory and often is mandatory as used in Annex II of the Agreement. The US view is also inconsistent with the statement of the Appellate Body that “paragraph 5 of Annex II *prohibits* investigating authorities from

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<sup>4</sup> *Canada – Measures Affecting the Export of Civilian Aircraft*, Report of the Appellate Body, WT/DS70/AB/R, AB-1999-2, para. 187; *accord United States – Tax Treatment for Foreign Sales Corporations*, Report of the Appellate Body, WT/DS108/AB/R, AB-1999-9, para. 111 n. 124 (“In our view, many binding legal texts employ the word ‘should’ and, depending on the context, the word may imply either an exhortation or express an obligation.”).

<sup>5</sup> *See Guatemala – Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico II*, Report of the Panel, WT/DS156/R, para. 8.196 n. 854. The Panel stated:

Paragraph 2 of Annex I provides that exporting Members “should” be informed of the inclusion of non-governmental experts in a verification team. It does not provide that exporting Members “shall” be so informed. Although the word “should” is often used colloquially to imply an exhortation, it can also be used “to express a duty [or] obligation” (See *The Concise Oxford English Dictionary*, Clarendon Press, 1995, page 1283). Since Article 6.7 provides in relevant part that the provisions of Annex I “shall” apply, we see no reason why Annex I (2) should not be interpreted in the mandatory sense. In our view, a hortatory interpretation of the provisions of Annex I would be inconsistent with Article 6.7. Furthermore, Guatemala has not argued that paragraph 2 of Annex I is merely hortatory. Accordingly, we proceed on the basis that paragraph 2 of Annex I should be interpreted in a mandatory sense.

*See also Ceramic Tiles*, at 6.21, 6.50, 6.74, 6.79 (concluding, without specific analysis of the word “should,” that Argentina violated Annex II, Paragraph 6 of the Anti-Dumping Agreement).

<sup>6</sup> *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, Report of the Appellate Body, WT/DS184/AB/R, AB-2001-2, para. 81 (emphasis in original).

<sup>7</sup> *See* US Submission, paras. 104-11.

discarding information that is ‘not ideal in all respects’ if the interested party that supplied the information has, nevertheless, acted ‘to the best of its ability’.” The use of the word “prohibits” indicates that the Appellate Body clearly regards paragraph 5 as establishing a mandatory legal duty.<sup>8</sup>

#### CONCLUSION

9. Japan respectfully urges the Panel to analyze the issues raised by India in light of the legal reasoning set forth above. Specifically, India’s claim concerning the use of facts available should be examined under the strict rule that facts available can *only* be used where the conditions of Article 6.8 and Annex II are fully satisfied.

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<sup>8</sup> *Hot-Rolled Steel from Japan*, para. 100.

## ANNEX B-2

### THIRD PARTY SUBMISSION OF THE EUROPEAN COMMUNITIES

(17 December 2001)

#### 1. INTRODUCTION

1. The European Communities welcomes this opportunity to present its views in this proceeding brought by India against the United States' imposition of anti-dumping and countervailing measures on Steel Plate from India. India argues that in imposing such measures, the United States has acted inconsistently with the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade* (hereinafter the "*Anti-Dumping Agreement*").

2. India has alleged that the United States has acted inconsistently with *inter alia* Article 6.8 and Annex II of the *Anti-Dumping Agreement*. While the European Communities is not in a position to assess the factual circumstances surrounding the imposition of measures in the present dispute, it does have a systemic concern in the interpretation of the *Anti-Dumping Agreement*. Accordingly, the European Communities will concentrate its submission on the interpretation of Article 6.8 and Annex II of the *Anti-Dumping Agreement*. It shall also briefly address the interpretation of Article 15 of the *Anti-Dumping Agreement*.

#### 2. APPLICATION OF "FACTS AVAILABLE"

3. India challenges the United States' practice of refusing to take account of all data supplied by an exporter where part of the data supplied is rejected as being inadequate. India challenges the United States' application of this practice in its anti-dumping measures on steel plate from India, and the relevant sections of the US Tariff Act of 1930 which allegedly make provision for the rejection complained of. India alleges that the specific actions of the United States and its legislation are inconsistent with Article 6.8 of the *Anti-Dumping Agreement* and Annex II thereof.

4. While the European Communities will not comment upon the application of Article 6.8 and Annex II to the particular circumstances of this dispute, the question of whether these provisions permit an investigating authority to refuse to take account of all data where part of the data has been rejected as inadequate raises important systemic issues.

5. The *Anti-Dumping Agreement* establishes a balance between the right of importing WTO Members to apply anti-dumping measures and the interests of exporting WTO Members not to have measures applied in an arbitrary or unreasonable manner in any particular case. The *Anti-Dumping Agreement* aims at ensuring that anti-dumping measures are based on as accurate information as possible. The Appellate Body has recently had occasion to underline the importance of this equilibrium, specifically in the context of Article 6.8 and Annex II:

We, therefore, see paragraphs 2 and 5 of Annex II of the *Anti-Dumping Agreement* as reflecting a careful balance between the interests of investigating authorities and exporters. In order to complete their investigations, investigating authorities are entitled to expect a very significant degree of effort – to the "best of their abilities" – from investigated exporters. At the same time, however, the investigating

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 co-operation and good faith flows in both directions.

7. The European Communities consider that neither of the interpretations posited by the main parties reflect this equilibrium. In other words, Article 6.8 and Annex II do not allow an investigating authority to establish a practice whereby all information provided can be automatically disregarded where some of the information supplied is inadequate, but neither, on the other hand, do they necessarily permit an exporter to have all data supplied taken into account<sup>2</sup>, when some of the data supplied is inadequate.

8. Paragraph 3 of Annex II sets out a number of conditions which, as interpreted by the Appellate Body, when fulfilled, obligate the investigating authority to take data into account. The Appellate Body has thus stated:

[A]ccording to paragraph 3 of Annex II, investigating authorities are directed to use information if three, and, in some circumstances, four, conditions are satisfied. In our view, it follows that if these conditions are met, investigating authorities are *not* entitled to reject information submitted, when making a determination.<sup>3</sup>

9. The use of the word “all” in paragraph 3 of Annex II, implies that any information which does meet the conditions set out therein should be taken into account. The Appellate Body’s interpretation confirms that an investigating authority’s ability to reject data supplied is circumscribed.

10. However, the data requested in an anti-dumping investigation, and which is necessary for a determination, cannot be seen as isolated pieces of information. Much of the data supplied is vital for determining the treatment of other information supplied and consequently the ultimate determination. Thus, for instance, it cannot be determined whether sales on the domestic market are “in the ordinary course of trade” in the sense of Article 2.2 without data on cost of production and administrative, selling and general costs.<sup>4</sup> It cannot be contemplated that a Member is required to take into account domestic sales data, when it is unable to verify that such sales have been made in the ordinary course of trade. Moreover, the duty of co-operation on the part of exporters cannot be atomised, or broken down into individual categories of information. Otherwise, an exporter might submit only the information which was favourable to its interests, and refuse to co-operate with respect to data which was unfavourable.<sup>5</sup> In such a situation, the final sentence of paragraph 7 of Annex II contemplates that non-co-operation, which leads to “relevant information” being withheld, can result in a determination which is less favourable than had co-operation occurred. Were an exporter able to

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<sup>1</sup> Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, adopted 23 August 2001, para.102.

<sup>2</sup> Which meets the requirements of paragraph 3 of Annex II

<sup>3</sup> Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, adopted 23 August 2001, para. 81.

<sup>4</sup> The United States make the same point, see, First Submission of the United States, 10 December 2001, para. 77.

<sup>5</sup> This scenario is also contemplated by the United States see First Submission of the United States, 10 December 2001, para. 75 and 76.

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.

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