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1 ANNEX II

1.1 Text of Annex II

ANNEX II

BEST INFORMATION AVAILABLE IN TERMS OF PARAGRAPH 8 OF ARTICLE 6

1. As soon as possible after the initiation of the investigation, the investigating authorities should specify in detail the information required from any interested party, and the manner in which that information should be structured by the interested party in its response. The authorities should also ensure that the party is aware that if information is not supplied within a reasonable time, the authorities will be free to make determinations on the basis of the facts available, including those contained in the application for the initiation of the investigation by the domestic industry.

2. The authorities may also request that an interested party provide its response in a particular medium (e.g. computer tape) or computer language. Where such a request is made, the authorities should consider the reasonable ability of the interested party to respond in the preferred medium or computer language, and should not request the party to use for its response a computer system other than that used by the party. The authority should not maintain a request for a computerized response if the interested party does not maintain computerized accounts and if presenting the response as requested would result in an unreasonable extra burden on the interested party, e.g. it would entail unreasonable additional cost and trouble. The authorities should not maintain a request for a response in a particular medium or computer language if the interested party does not maintain its computerized accounts in such medium or computer language and if presenting the response as requested would result in an unreasonable extra burden on the interested party, e.g. it would entail unreasonable additional cost and trouble.

3. All information which is verifiable, which is appropriately submitted so that it can be used in the investigation without undue difficulties, which is supplied in a timely fashion, and, where applicable, which is supplied in a medium or computer language requested by the authorities, should be taken into account when determinations are made. If a party does not respond in the preferred medium or computer language but the authorities find that the

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 explanations within a reasonable period, due account being taken of the time-limits of the investigation. If the explanations are considered by the authorities as not being satisfactory, the reasons for the rejection of such evidence or information should be given in any published determinations.

7. If the authorities have to base their findings, including those with respect to normal value, on information from a secondary source, including the information supplied in the application for the initiation of the investigation, they should do so with special circumspection. In such cases, the authorities should, where practicable, check the information from other independent sources at their disposal, such as published price lists, official import statistics and customs returns, and from the information obtained from other interested parties during the investigation. It is clear, however, that if an interested party does not cooperate and thus relevant information is being withheld from the authorities, this situation could lead to a result which is less favourable to the party than if the party did cooperate.

1.2 Title of Annex II

1.2.1 "best information available"

1. With respect to Annex II and recourse to "best information available" pursuant to Article 6.8, see the Section on Article 6 of the Anti-Dumping Agreement.

1.3 Paragraph 1 of Annex II

1.3.1 "specify in detail"

2. In *US – Anti-Dumping and Countervailing Duties (Korea)*¹, the Panel examined Korea's argument that the US Department of Commerce (USDOC) had acted inconsistently with paragraph 1 of Annex II by failing to "specify in detail" the information required from interested parties and the manner in which that information was to be structured.¹ The Panel considered that, if investigating authorities were to fail to take account of genuine difficulties that interested parties had experienced and had made known to the investigating authorities, the investigating authorities could not then fault the interested parties for their alleged lack of cooperation. The Panel added, however, that an investigating authority would act consistently with paragraph 1 of Annex II if the investigative record were to show that the authority had taken all reasonable steps that might be expected from an *objective and unbiased* authority to specify in detail the information requested and the manner in which it should be structured:

"Paragraph 1 of Annex II requires, *inter alia*, that an investigating authority must 'specify in detail' the information required from any interested party, and the manner in which that information should be structured by the interested party in its response'. Although Article 6.8 and paragraph 1 of Annex II do not provide any guidance as to how an investigating authority is to 'specify in detail' the information it requires, we note that the general evidentiary rule contained in Article 6.1 of

¹ Panel Report, *US – Anti-Dumping and Countervailing Duties (Korea)*, para. 7.72.

the 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, they cannot ... 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 *objective and unbiased* authority to specify in detail the information requested, and the manner in which it is to be structured, as soon as possible after initiation."²

3. The Panel subsequently found that the USDOC had not taken all reasonable steps that would be expected from an objective and unbiased authority to "specify in detail" the information requested and "the manner in which that information should be structured" within the meaning of paragraph 1 of Annex II to the Anti-Dumping Agreement. The Panel therefore found that the investigating authority had acted inconsistently with paragraph 1 of Annex II to the Anti-Dumping Agreement. The Panel then exercised judicial economy on the complainant's claims under paragraphs 3, 5, and 6 of Annex II to the Anti-Dumping Agreement:

"Based on the above, we find that the USDOC failed to engage with, and address, the reporting difficulties that had repeatedly been raised by Hyundai Steel and thus did not provide any meaningful guidance at the time it requested a Section E response. In these circumstances, we find that the USDOC did not take all reasonable steps that would be expected from an objective and unbiased authority to 'specify in detail' the information requested and 'the manner in which that information should be structured' within the meaning of paragraph 1 of Annex II to the Anti-Dumping Agreement. We therefore find that the USDOC acted inconsistently with paragraph 1 of Annex II to the Anti-Dumping Agreement. Given that paragraph 1 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 with respect to Hyundai Steel's reporting of information concerning further manufactured sales. In light of our findings of WTO-inconsistency, we do not consider it necessary to rule upon Korea's claims under paragraphs 3, 5, and 6 of Annex II to the Anti-Dumping Agreement in order to provide a positive solution to the dispute before us.

We have already found that the USDOC erred in resorting to facts available with respect to Hyundai Steel's reporting of information concerning further manufactured sales. In these circumstances, we do not consider that making further findings on Korea's claims concerning the USDOC's selection of the replacement facts on the basis of the record used for the USDOC's WTO-inconsistent findings would assist in providing a positive solution to the dispute before us."³

1.4 Paragraph 3 of Annex II

1.4.1 Criteria for the use of facts available

4. In *US – Anti-Dumping and Countervailing Duties (Korea)*, the Panel examined paragraph 3 of Annex II to determine whether an investigating authority must rely on the information submitted by respondents or may reject such information and resort to facts available. The Panel

² Panel Report, *US – Anti-Dumping and Countervailing Duties (Korea)*, paras. 7.75-7.76.

³ Panel Report, *US – Anti-Dumping and Countervailing Duties (Korea)*, paras. 7.83-7.84.

considered that an investigating authority must take into account information that an interested party provides in response to a direct request if that information satisfies the criteria under paragraph 3. The Panel added that only after reviewing all such information could an investigating authority find that information "necessary" for making a certain determination was "missing" or that an interested party had significantly impeded an investigation:

"Paragraph 3 provides key elements of the 'substantive basis' for an investigating authority to determine whether it can justify rejecting respondents' information and resorting to facts available in respect of some item, or items, of information, or whether instead it must rely on the information submitted by respondents 'when determinations are made'. If, in direct response to a request by an investigating authority, a respondent provides information that satisfies the criteria under paragraph 3, the authority must take such information 'into account' before resorting to facts available. This is because a finding that information 'necessary' for making a certain determination is 'missing', or that an interested party significantly impeded the investigation, can only properly be made after 'taking into account' all information that was, in fact, supplied by the interested party in response to an investigating authority's requests. An investigating authority's conclusion for purposes of Article 6.8 that 'necessary' information is missing or that a respondent significantly impeded the investigation would be tainted if the information that meets the criteria of paragraph 3 and that was supplied by an interested party directly in response to an investigating authority's request is not taken into account by the authority before resorting to facts."⁴

5. On the basis of its understanding of paragraph 3 of Annex II, the Panel found that the information provided by a particular interested party in response to the USDOC's queries had satisfied the criteria under paragraph 3. The Panel noted that the information at issue was supplied as part of questionnaire responses submitted within the requested deadlines or at verification. The information was also submitted within a "timely fashion" for purposes of paragraph 3, and the information appeared to have been verifiable:

"In our view, the information supplied by Hyundai Steel in response to the USDOC's queries satisfies the criteria under paragraph 3. All of the information identified above was provided either as part of Hyundai Steel's Sections B and C questionnaire responses that were submitted within the deadlines established by the USDOC, or upon the USDOC's request at verification. In the absence of any findings of delay by the USDOC, we agree with Korea that this information was supplied in a 'timely fashion' for purposes of paragraph 3. Moreover, there is nothing to suggest that the information was not verifiable. In fact, as Korea rightly points out, the USDOC appears to have successfully verified many pieces of the submitted information, including the total actual costs incurred by [[***]], as well as inland freight contracts between [[***]] and its unaffiliated subcontractor. Finally, the fact that some of this information – such as the [[***]] additional inland freight and warehousing contracts between [[***]] and its subcontractors – was provided in direct response to a specific request by the USDOC suggests that this information was considered relevant by the USDOC and – in the absence of any finding by the USDOC to the contrary – was appropriately submitted such that it could be used in the investigation without 'undue difficulties'.

For these reasons, we find that the USDOC acted inconsistently with the first sentence of paragraph 3 of Annex II to the Anti-Dumping Agreement by not 'tak[ing] into account' the information concerning affiliated party transactions that was submitted by Hyundai Steel in accordance with that provision. Given that paragraph 3 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 1, 5, and 6 of Annex II to

⁴ Panel Report, *US – Anti-Dumping and Countervailing Duties (Korea)*, para. 7.138.

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

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 and Countervailing Duties (Korea)*, 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.⁶ 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 – Steel Plate* 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."⁷

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 *Egypt – Steel Rebar*, 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."⁸

8. In *Egypt – Steel Rebar*, 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.⁹

9. In *US – Anti-Dumping and Countervailing Duties (Korea)*, 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:

⁵ Panel Report, *US – Anti-Dumping and Countervailing Duties (Korea)*, paras. 7.139-7.140.

⁶ Panel Report, *US – Anti-Dumping and Countervailing Duties (Korea)*, para. 7.161.

⁷ Panel Report, *US – Anti-Dumping and Countervailing Duties (Korea)*, para. 7.180.

⁸ Panel Report, *Egypt – Steel Rebar*, para. 7.282.

⁹ Panel Report, *Egypt – Steel Rebar*, 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."¹⁰

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.¹¹ 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."¹²

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."¹³

¹⁰ Panel Report, *US – Anti-Dumping and Countervailing Duties (Korea)*, para. 7.406.

¹¹ Panel Report, *US – Anti-Dumping and Countervailing Duties (Korea)*, para. 7.467.

¹² Panel Report, *US – Anti-Dumping and Countervailing Duties (Korea)*, para. 7.470.

¹³ Panel Report, *US – Anti-Dumping and Countervailing Duties (Korea)*, paras. 7.471-7.472.

1.7 Relationship with other provisions of the Anti-Dumping Agreement

1.7.1 Article 6.1

12. In *Egypt – Steel Rebar*, Turkey had claimed a violation of paragraph 1 of Annex II outside the context of Article 6.8. The Panel decided not to rule on whether paragraph 1 could be invoked separately from Article 6.8.¹⁴

1.7.2 Article 6.2

13. In *Egypt – Steel Rebar*, Turkey had made claims of violation of both paragraph 6 of Annex II and Article 6.2. The Panel, which did not take a position on whether paragraph 6 of Annex II can be invoked separately from Article 6.8, considered as follows.

"As for the claim of violation of the requirement in Annex II, paragraph 6 to provide a 'reasonable period', we recall that this provision forms part of the required procedural and substantive basis for a decision as to whether resort to facts available pursuant to Article 6.8. We further recall that we have found, *supra*, that the [investigating authority]'s decision to resort to facts available ... did not violate Article 6.8, based on considerations under Annex II, paragraphs 3 and 5. Thus, we would not necessarily need to address this aspect of this claim for its own sake. Nonetheless, a full analysis of Annex II, paragraph 6 as it pertains to the factual basis of this claim, appears necessary to evaluate the merits of the claimed violation of Article 6.2 resulting from the deadline for responses to the 23 September requests. In performing this analysis, however, we note that we again do not here take a position on whether Annex II, paragraph 6 can be invoked separately from Article 6.8. We would need to do so only if we find that as a factual matter, the deadline in question was unreasonable."¹⁵

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¹⁴ Panel Report, *Egypt – Steel Rebar*, para. 7.321.

¹⁵ Panel Report, *Egypt – Steel Rebar*, para. 7.288.