

**IN THE WORLD TRADE ORGANIZATION**

**WT/DS539**

**United States — Anti-Dumping and Countervailing Duties on Certain  
Products and the Use of Facts Available**

**Third Party Submission**

**by**

**Norway**

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### Table of cases cited in this submission

Short Title	Full Case Title and Citation
<i>Egypt-Steel Rebar</i>	Panel Report, <i>Egypt – Definitive Anti-Dumping Measures on Steel Rebar from Turkey</i> , WT/DS211/R, adopted 1 October 2002.
<i>US-Hot-Rolled Steel</i>	Appellate Body Report, <i>United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan</i> . WT/DS184/AB/R, adopted 23 August 2001.
<i>US-Steel Plate</i>	Panel Report, <i>United States – Anti-Dumping and Countervailing Measures on Steel Plate from india</i> . WT/DS206/R and Corr.1, adopted 29 July 2002.
<i>US-Carbon Steel (India)</i>	Appellate Body Report, <i>United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India</i> . WT/DS436/AB/R, adopted 19 December 2014.

## **1. INTRODUCTION**

1. Norway welcomes this opportunity to present its views as a third party in this case concerning a disagreement between the Republic of Korea (Korea) and the United States of America (the US), regarding the conformity with the covered agreements of anti-dumping and countervailing duties imposed by the US on certain products and the use of facts available.
2. Norway will not address all the legal issues upon which there is disagreement between the parties to the dispute in this third party submission. As a starting point, Norway would like to reiterate that anti-dumping investigations involve a process whereby an authority makes a series of factual and legal determinations. These determinations can adversely affect the position of interested parties, including through the imposition of anti-dumping duties. In order to protect the interests of interested parties, the *Anti-Dumping Agreement (ADA)* requires the investigating authority to conduct its investigation, collect information and make its determinations in accordance with certain minimum standards of procedural justice and fairness. Norway attaches great importance to these procedural rules, as vital safeguard mechanisms for transparency and the rule of law.
3. One of the principles governing anti-dumping investigations is the goal of objective decision-making based on facts. Article 6.8 and Annex II aim to uphold that principle in the event that necessary information is not provided by the respondent company to an investigation. In this third party submission, Norway will comment on the interpretation of “necessary information” and the duty of cooperation in the ADA Article 6.8 and Annex II.

## **2. INTERPRETATION OF THE ADA ARTICLE 6.8 AND ANNEX II**

### **2.1 Introduction**

4. The ADA Article 6.8 reads:

“In cases in which any interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation, preliminary and final determinations, affirmative or negative, may be made on the basis of the facts available. The provisions of Annex II shall be observed in the application of this paragraph.”

5. The last sentence of paragraph 7 of Annex II states that:

“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.”

6. In its first written submission, Korea holds that a failure by a company to provide requested information to the investigating authority because it did not have control over a separate legal entity, does not in itself mean that the company failed to provide “necessary information” in the meaning of the ADA Article 6.8.<sup>1</sup> The US, on the other hand, claims that legal separation is not the issue, but rather whether two legally distinct companies are affiliated. The US refers to the companies in question as being “affiliated parties via control by a ‘group,’ which has the ability to directly or indirectly control its group members”.<sup>2</sup> Korea claims that the US has not explained how a *group member* has the ability to control other group members.<sup>3</sup>

7. Whilst not taking a stand in the dispute at hand, Norway would like to comment on the interpretation of “necessary information” and the duty of cooperation in the context of affiliated companies.

## 2.2 “Necessary information” and the duty of cooperation

8. Several panels and the Appellate Body have interpreted the term “necessary information” in the ADA. It is clear that “necessary information” refers to information which is relevant to the determination to be made by the investigating authority.<sup>4</sup> Moreover, it is, in the first instance, left to the discretion of the investigating authority to determine what information it deems necessary for the conduct of its investigation.<sup>5</sup> The provisions of Annex II “shall be observed” in the application of Article 6.8. They are mandatory.<sup>6</sup>

9. In Norway’s view, Annex II informs the interpretation of the obligation to provide “necessary information” in the context of affiliated companies. The Appellate Body

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<sup>1</sup> Korea’s First Written Submission, para. 263.

<sup>2</sup> US’ First Written Submission, para. 156.

<sup>3</sup> Korea’s First Written Submission, para.259.

<sup>4</sup> Panel Report, *US-Steel Plate*, para. 7.55, Appellate Body Report, *US-Carbon Steel (India)*, para. 4.416.

<sup>5</sup> Panel Report, *Egypt-Steel Rebar*, para.7.155.

<sup>6</sup> Panel report, *US-Steel Plate*, para.7.56

addressed this subject in its report in *US - Hot-Rolled Steel*. In this case, the Appellate Body assessed the situation where a company that was 50% owned by the respondent company, in a joint venture with a third company, did not provide the information the investigating authority asked for. In paragraph 99, the Appellate Body stated that:

“Paragraph 7 of Annex II indicates that a lack of ‘cooperation’ by an interested party may, by virtue of the use made of facts available, lead to a result that is ‘less favourable to the interested party than would have been the case had that interested party cooperated. We note that the Panel referred to the following dictionary meaning of ‘cooperate: to ‘work together for the same purpose or in the same task.’ This meaning suggests that cooperation is a *process*, involving joint effort, whereby parties work together towards a common goal. In that respect, we note that parties may very well ‘cooperate’ to a high degree, even though the requested information is, ultimately, not obtained. This is because the fact of ‘cooperating’ is in itself not determinative of the end result of the cooperation. Thus, investigating authorities should not arrive at a ‘less favourable’ outcome simply because an interested party fails to furnish requested information if, in fact, the interested party has ‘cooperated’ with the investigating authorities, within the meaning of paragraph 7 of Annex II of the *Anti-Dumping Agreement*”. (emphasis original, underlining added, footnotes omitted)

10. The Appellate Body further, in paragraph 102, underlined that:

“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.” (emphasis original, underlining added)

11. Thus, it is already established case law that the investigating authorities cannot insist on absolute standards or impose unreasonable burdens upon respondent companies.

This must, in Norway’s view, be taken into account by investigating authorities when they require information relating to affiliated companies.

12. There are a number of different ways that companies can be affiliated and company law may vary in the national law of WTO Members. Thus, whilst bearing in mind the very high standard of cooperation expected from respondent companies, the investigating authority must have a sensitivity to the fact that a respondent company may still not be able to provide every piece of information requested from an affiliated

company. An investigating authority may not demand that a respondent company has “exhausted all legal means at its disposal to compel [an affiliated company] to divulge the requested information, within the short time-limits of the investigation”.<sup>7</sup>

13. At the same time, it must be recalled that the investigating authority itself also has an obligation to cooperate with the respondent company. Cooperation is a two-way process involving a joint effort, cf. also the ADA Article 6.13, after which the investigating authority “shall take due account of any difficulties experienced” by respondent companies and “provide any assistance practicable”. Article 6.13 thus entails that an investigating authority cannot disregard difficulties that a respondent company has, e.g. in providing the requested information, and it also obliges the investigating authority to assist the respondent company. Moreover, there is nothing in the ADA preventing an investigating authority from asking an affiliated company of a respondent party directly for information.<sup>8</sup> The efforts of the investigating authority is to be taken into account, on a case by case basis, as a part of the circumstances under which the respondent company’s cooperation in the sense of paragraph 7 of Annex II is assessed.<sup>9</sup>

14. In sum, it is Norway’s view that if the standard of cooperation in paragraph 7 of Annex II is met, an investigating authority may not conclude that “necessary information” has not been provided,<sup>10</sup> even if, in the end, the requested information is not provided. Accordingly, the ADA Article 6.8 would not allow the investigating authority to make determinations on the basis of the facts available in such a situation.

### 3. CONCLUSION

15. Norway respectfully requests the Panel to take account of the considerations set out above in interpreting the relevant provisions of the covered agreements.

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<sup>7</sup> Appellate Body Report, *US-Hot-Rolled Steel*, para. 108.

<sup>8</sup> Appellate Body Report, *US-Hot-Rolled Steel*, para. 106.

<sup>9</sup> Appellate Body Report, *US-Hot-Rolled Steel*, para. 105-109.

<sup>10</sup> Panel Report, *US-Steel Plate*, para. 7.55.