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UNITED STATES-ANTI-DUMPING AND COUNTERVAILING MEASURES ON STEEL PLATE FROM INDIA

Report of the Panel
WT/DS206/R*

Adopted by the Dispute Settlement Body
on 29 July 2002

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I. INTRODUCTION

1.1 On 4 October 2000 India requested consultations with the United States pursuant to Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes(DSU), Article XXII of the General Agreement on Tariffs and Trade, 1994 (GATT 1994) and Article 17 of the Agreement on Implementation of Article VI of the GATT 1994 (AD Agreement) concerning, *inter alia*, the United States anti-dumping investigation on cut to length carbon quality steel plate.[1] The United States and India consulted on 21 November 2000, but failed to settle the dispute.

1.2 On 7 June 2001, India requested the Dispute Settlement Body (DSB) to establish a panel pursuant to Article XXIII:2 of the GATT 1994, Article s 4 and 6 of the DSU and Article 17 of the AD Agreement.[2]

1.3 At its meeting on 24 July 2001, the DSB established a panel in accordance with Article 6 of the DSU to examine the matter referred to the DSB by India in document WT/DS206/2. At that meeting, the parties to the dispute also agreed that the panel should have standard terms of reference. The terms of reference are, therefore, the following:

> "To examine, in the light of the relevant provisions of the covered Agreements cited by India in documents WT/DS206/2, the matter referred by India to the DSB in that document, and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those Agreements".

1.4 On 16 October 2001, India requested the Director-General to determine the composition of the panel, pursuant to paragraph 7 of Article 8 of the DSU. On 26 October 2001, the Director-General composed the Panel as follows:[3]

Chairman: H.E. Mr. Tim Groser

Members: Ms. Salmiah Ramli

Ms. Luz Elena Reyes de la Torre

1.5 Chile, the European Communities and Japan reserved their rights to participate in the panel proceedings as third parties.

1.6 The Panel met with the parties on 23-24 January 2002 and on 26 February 2002. It met with the third parties on 24 January 2002.

1.7 The Panel submitted its interim report to the parties on 3 May 2002.

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1 WT/DS206/1.
2 WT/DS206/2.
3 WT/DS206/3.

II. FACTUAL ASPECTS

2.1 This dispute concerns the imposition by the United States of anti-dumping measures on certain cut-to-length carbon steel plate (steel plate) from India.

2.2 Based on an application filed by the US Steel Group, Bethlehem Steel, Gulf States Steel, Ipsco Steel, Tuscaloosa Steel and the United Steel Workers of America, the United States Department of Commerce (USDOC) initiated an anti-dumping investigation of imports of certain cut-to-length carbon steel plate from, *inter alia*, India, on 8 March 1999. The sole Indian respondent was the Steel Authority of India, Ltd. (SAIL). The dumping portion of the investigation was conducted by USDOC under the US anti-dumping statute and related USDOC regulations.[4]

2.3 On 29 July 1999, USDOC issued a preliminary determination of dumped sales. USDOC made its determination regarding SAIL on the basis of facts available, relying on the average of the two margins estimated in the application, and assigned SAIL a preliminary margin of 58.50 per cent.

2.4 On 29 July 1999, SAIL, by letter to USDOC, proposed a possible suspension agreement covering cut-to-length plate from India. On 31 August 1999, a meeting was held with counsel for SAIL, USDOC's Assistant Secretary for Import Administration, and other officials, to discuss the proposal. No suspension agreement was entered into.

2.5 On 29 December 1999, USDOC issued a final determination of dumped sales. USDOC found that SAIL had failed to cooperate to the best of its ability in responding to requests for information, and that the errors and lack of information rendered all of the data submitted by SAIL unreliable. USDOC therefore rejected SAIL's data in its entirety, and relied entirely on facts available ("total facts available") to determine SAIL's dumping margin. Having found that adverse inferences were appropriate because of SAIL's failure to cooperate, USDOC assigned the highest margin alleged in the application, 72.49 per cent, to SAIL.

2.6 On 10 February 2000, the US International Trade Commission issued a determination of material injury by reason of imports of the subject product from, *inter alia*, India, that had been found by USDOC to be dumped. On the same day, USDOC amended its final determination (in ways not relevant to this dispute) and issued the anti-dumping order.

2.7 SAIL challenged USDOC's final determination in the United States Court of International Trade (USCIT). SAIL argued that USDOC's decision was based on an incorrect interpretation of the applicable statute and regulations. SAIL also

[4] The United States has a bifurcated system, under which different government agencies have responsibility for the dumping calculation and injury portions of the process. USDOC carries out the dumping calculations, and ultimately imposes any anti-dumping measures. The injury portion of the investigation is conducted by the United States International Trade Commission. Its investigation and the resulting determination of material injury in the steel plate case are not the subject of this dispute.

argued that USDOC erred in rejecting SAIL's data in its entirety and instead relying on total facts available, and in relying on adverse inferences. The USCIT upheld USDOC's interpretation of the applicable US statute and regulations as a "reasonable construction of the statute" and consistent with USDOC's "long standing practice of limiting the use of partial facts available". However, the case was remanded to USDOC for explanation of USDOC's decision that SAIL had failed to act to the best of its ability, which was the predicate for the decision to rely on adverse inferences in choosing the available facts on which SAIL's dumping margin was calculated.

2.8 On 27 September 2001, after the request for establishment in this dispute, USDOC issued its redetermination on remand, which is not at issue in this dispute. USDOC explained its decision that adverse inferences were appropriate in this case. USDOC explained that the use of some of the information supplied by SAIL, and partial facts available would allow a respondent to control the outcome of an anti-dumping investigation by selectively responding to questionnaires. The dumping margin of 72.49 per cent remained unaltered. The USCIT affirmed the redetermination on remand on 17 December 2001.

2.9 On 4 October 2000, India requested consultations with the United States pursuant to Article 4 of the DSU. Consultations were held on 21 November 2000, but the parties were unable to resolve the dispute. Subsequently, India requested the establishment of a panel on 7 June 2001.

III. PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

A. India

3.1 India requests that the Panel make the following findings:

(a) That the anti-dumping duty order issued by USDOC in *Certain Cut-To-Length Carbon-Quality Steel Plate Products from India* on 10 February 2000 is inconsistent with the US obligations under Articles 2.4, 6.8, 9.3, 15 and Annex II, paragraphs 3, 5 and 7 of the AD Agreement, and Articles VI:1 and VI:2 of GATT 1994.

(b) That sections 776(a), 782(d) and 782(e) of the Tariff Act of 1930 as amended (19 U.S.C. §§ 1677e(a), 1677m(d) and 1677m(e)) as such, and as interpreted by USDOC and the USCIT, are inconsistent with US obligations under Article 6.8 and Annex II, paragraph 3, 5 and 7 of the AD Agreement.

(c) That sections 776(a), 782(d) and 782(e) of the Tariff Act of 1930 as amended (19 U.S.C. §§ 1677e(a), 1677m(d) and 1677m(e)) as applied by USDOC in the investigation leading to the final actions referenced above are inconsistent with US obligations under Articles 2.4, 6.8, 9.3, 15 and Annex II, paragraphs 3, 5 and 7 of the AD Agreement, and Article VI:2 of GATT 1994.

3.2 India requests that the Panel recommend, pursuant to DSU Article 19.1, that the United States bring its anti-dumping duty order and the statutory provisions referred to above into conformity with the AD Agreement and Articles VI:1 and VI:2 of GATT 1994.

3.3 India further requests that the Panel exercise its discretion under DSU Article 19.1 to suggest ways in which the United States could implement the recommendations. In particular, India requests that the Panel suggest that the United States recalculate the dumping margins by taking into account SAIL' s verified, timely submitted and usable US sales data, and also, if appropriate, revoke the anti-dumping order.

B. United States

3.4 The United States requests the Panel to find that India's claims are without merit and reject them.

IV. ARGUMENTS OF THE PARTIES

4.1 The arguments of the parties are set out in their submissions to the Panel. The parties' submissions are attached to this Report as Annexes (see List of Annexes, page 2517).

V. ARGUMENTS OF THE THIRD PARTIES

5.1 The arguments of the third parties, Chile, the European Communities, and Japan are set out in their submissions to the Panel and are attached to this Report as Annexes (see List of Annexes, page 2517).

VI. INTERIM REVIEW

6.1 Only India submitted comments on the interim report, on 17 May 2002. As provided for in the working procedures, the United States subsequently responded to India's comments, on 24 May 2002. The bulk of India's comments concerned typographical or grammatical errors. In response to those comments, the Panel corrected typographical and other clerical errors throughout the Report, and also corrected such errors it had itself identified, consistent with WTO editorial standards.

6.2 In addition to the above, India's comments repeated a request it had earlier made in comments on the descriptive part of the report, which had been circulated to the parties on 22 March 2002. India asserts that, for the reasons set out in its comments on the descriptive part, the text of paragraph 3.1 describing the measures and claims at issue, "does not properly reflect either India's claims or the measures addressed and clarified by India during the course of the proceed-

ing". India proposes that the Panel incorporate the changes India had proposed in its comments on the descriptive part of the report.

6.3 The United States considers that the Panel was correct in rejecting India's earlier request, and that the Panel should reject this request as well. In the United States' view, India's suggested modifications to paragraph 3.1 misstate the legal claims that India had set forth in its request for establishment of this panel. The United States comments that the Panel appears to have drawn paragraph 3.1 verbatim from paragraph 179 of India's first written submission, and thus the United States sees no reason for India to assert that the paragraph is inaccurate.

6.4 We considered this matter earlier in connection with India's comments on the descriptive part, and concluded at that time to leave paragraph 3.1 as originally drafted. As the United States correctly points out, the text of paragraph 3.1 of the report is taken verbatim from India's first submission. There does not seem to be any basis at this juncture to change the text of the report. Thus, we consider that it accurately reflects the relief sought by India. While India's arguments evolved over the course of the proceeding, this does not affect the measures and/or the claims before the Panel as to which relief was requested. The revised text proposed by India in its comments on the descriptive part is an entirely new formulation of its request for relief, which does not appear in any of India's earlier submissions. We see no reason to provide an opportunity to refine the request for relief of the complaining party at the end of the proceeding. Changes to the request for relief at this late stage might give rise to misunderstandings concerning the scope of the matter before the Panel, which was defined by the terms of the request for establishment. We therefore have decided to maintain paragraph 3.1 as originally drafted.

6.5 India objects to the use of the terms "specifically object" and "specific objection" in paragraphs 7.25 and 7.26 of the report to describe the United States' response to India's intention to resurrect a claim it had explicitly abandoned in its first submission. India states that in its recollection, the United States raised no objection, specific or otherwise, to India's raising the abandoned claim, while the text as currently drafted implies that there was some "general" objection.

6.6 The United States believes the report need not be changed in this respect.

6.7 The Chairman, at the beginning of the first meeting of the Panel with the parties, invited the United States to express any views it might have on this matter. The representative of the United States commented as follows: "Mr. Chairman, we believe that the original decision on the part of India to abandon the claim speaks volumes about its importance and peripheral nature in this dispute. On the other hand, we don't deny that this is something which is in the terms of reference and that this is the first panel meeting and there are opportunities to present new evidence, so we do not oppose it on that basis".

6.8 This statement could be interpreted as raising no objection at all, as India asserts. At the time, however, we understood the United States' view to be that while it viewed India's action with disfavor, it did not consider that there was a legal objection to India's action – that is, that while the United States "objected"

to India's action in a general sense, it would not pursue any legal objection. As the report is based on, and reflects our understanding of, the arguments and positions of the parties, and the United States does not consider that our characterization of its position is incorrect, we have determined to make no change in this regard.

6.9 India made a series of comments regarding paragraphs 7.26 and 7.29 of the report. India notes its view that actual or theoretical prejudice to the due process rights of third parties appears to be a fundamental underpinning for the Panel's decision on the issue of the abandoned claim. In this regard, India considers that the interim report omits several facts regarding information (and due process) provided to the third parties by India. India request that the Panel take note that India provided certain information to the third parties in connection with India's intention to resurrect the abandoned claim, that neither the United States nor any third party objected to these procedures, and that the Panel did not seek the views of third parties in this context. In addition, India considers that paragraph 7.26 is misleading in that it gives the impression that the third parties addressed all the issues in this dispute, and would have addressed India's abandoned claim.

6.10 The United States objects to India's request that the Panel include information about the approach taken by India in its effort to resurrect the abandoned claim. As a general matter, the United States notes that the "facts" that India seeks to have added to the Panel's report are designed to create the impression that the third parties in this dispute were not prejudiced by India's actions – ignoring the broader systemic concern raised by the panel. Moreover, the United States notes that as India is raising this issue at the interim review stage, the third parties are not in a position to express any contrary views on the matter.

6.11 With respect to the "facts" themselves, the United States suggests that the relevant fact is that India failed to obtain agreement from all concerned that it could re-assert a claim that it had explicitly abandoned in its first submission. The United States asserts India cannot shift that burden to other parties by saying that they "failed to object" to procedures which India had invented out of whole cloth, and that any failure by the United States to object is therefore simply irrelevant.

6.12 Furthermore, the United States questions some of the factual assertions made by India. Finally, the United States disagrees with India that the Panel should modify the last sentence of paragraph 7.26. The United States believes the sentence is accurate and does not create the "misleading impression" that India asserts. The United States considers that the scope of the third parties' submissions is clear from the submissions themselves.

6.13 We accept as accurate the facts recited by India, although we have not undertaken to verify them ourselves. However, fundamentally, these facts do not affect our decision not to issue a ruling on India's abandoned claim. Our decision was not based on actual prejudice to any party or third party in this case, and thus is unaffected by any facts or argument as to efforts to avoid any prejudicial effect or the lack of any objection by other parties to the proceeding. Our concern,

which led to our ruling, is the desire to establish and maintain orderly procedures that avoid, insofar as possible, the possibility of prejudice to parties and third parties in all cases. We therefore have not changed the report to include the facts recited by India. In addition, we have not changed paragraph 7.26 of the report to specify that the third parties did not address most of the issues raised by India. Again, while this is true, it does not have any relevance to our ruling.

6.14 India suggests that the Panel include a reference in paragraph 7.56 of the report to Chile's third party submission, citing the Spanish text of paragraphs 3 and 5 of Annex II of the AD Agreement.

6.15 The United States objects to India's suggestion. The United States notes that the Panel based its findings on Article 6.8 itself, rather than on Annex II, which is the subject of Chile's arguments based on the Spanish text. Moreover, the United States considers that Chile's arguments misinterpreted the Spanish text, and misinterpreted the principle of interpretation cited, referring in this regard to the United States' Answers to Questions of the Panel – First meeting, question 2 to third parties, paragraphs 94-99. Given this situation, the United States considers that referencing Chile's submission in the report would not add anything useful to resolving the matters at issue in this dispute. Finally, the United States requests that if the Panel decides to reference Chile's arguments, the Panel also reference the U.S. discussions explaining why Chile's arguments were flawed.

6.16 As the United States correctly points out, our analysis and ruling in paragraph 7.56 is based on the text of Article 6.8 of the Agreement, which we found establishes that the provisions of Annex II are mandatory. The fact that Annex II uses conditional language is referred to, but is not relied upon in our analysis. As we did not rely on Chile's arguments concerning the Spanish text of Annex II in making our determination, to include a reference to those arguments might be misleading and result in a misunderstanding as to the basis of our conclusion. We therefore have not made any changes to the text of paragraph 7.56.

6.17 With respect to paragraph 7.59 of the report, India asserts that the second sentence does not accurately reflect India's argument. India asserts that it did not argue that a small piece of information that *met* all four requirements of Annex II, paragraph 3 (*i.e.*, including the "usable without undue difficulty" requirement) should not be used in calculating a dumping margin, and never argued that information which "satisfies paragraph 3 on its own" cannot and should not be used. Instead, India states that its argument was that a minor or small piece of information would *not* meet the requirement of Annex II, paragraph 3 that it could be used without undue difficulty (even if it did meet the other 3 conditions in that it is verifiable, submitted on time and in the appropriate computer format). Thus, India states, if an objective and non-biased investigating authority finds, after exercising the requisite degree of effort demanded by the "undue difficulty" standard, that such a "small" piece of information cannot be used because other information is not available, then that small piece of information would not "satisfy" the requirements of paragraph 3. India refers the Panel to its Answers to the Panel's Questions after the First Meeting, at paragraphs 54 and 60.

6.18 The United States had no comment in this regard.

6.19 It does seem that the text of paragraph 7.59 as drafted failed accurately to reflect the Indian argument in this respect. We have therefore modified that paragraph.

6.20 Finally, India suggests that the Panel amend the bracketed phrase "[preliminary and final determinations of dumping, subsidization, and material injury]" in the quotation of the text of section 782(e) in paragraph 7.91 of the report in order to make it more accurate.

6.21 India is correct that the bracketed text in the quotation of section 782(e) in paragraph 7.91 of the report as originally drafted did not fully reflect the substance of the provisions it is intended to summarize. We have therefore modified the text in this regard.

VII. FINDINGS

A. General Issues

1. Standard of Review

7.1 While the parties are generally in agreement that the Panel must apply the standard of review set forth in Article 17.6 of the AD Agreement, they do not agree as to what that standard entails for the Panel's review in this case. India considers that the Panel should conduct an "active review" of the facts before USDOC pursuant to Article 11 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (hereinafter "DSU") and AD Agreement Article 17.6(i). India refers in this regard to the Appellate Body's decision regarding the application of Article 11 in a case involving a decision by national administering authorities not under the AD Agreement, *US - Cotton Yarn*,[5] as well as the decision in *US – Hot-Rolled Steel*,[6] which specifically addressed Article 17.6 of the AD Agreement.

7.2 The United States criticises India's reference to the standard of review set out in Article 11 of the DSU. In the United States' view, India's position is based on an incorrect reading of the WTO Agreements, and represents an attempt to add to the obligations of investigating authorities. The United States notes that the AD Agreement is unique among WTO Agreements in that it contains a specified standard of review, which must be applied. Thus, the United States argues that the decision in *Cotton Yarn* is irrelevant. Moreover, the United States considers that India's reference to Article 11 attempts to add to the obligations of investigating authorities.

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[5] Appellate Body Report, *United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan* ("*US – Cotton Yarn*"), WT/DS192/AB/R, adopted 5 November 2001, DSR2001:XII, 6027

[6] Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan* ("*US – Hot-Rolled Steel*"), WT/DS184/AB/R, adopted 23 August 2001, DSR 2001:X, 4769.

7.3 There is no question in this dispute but that we must apply the standard of review set out in Article 17.6 of the AD Agreement, which sets forth the special standard of review applicable to anti-dumping disputes. With regard to factual issues, Article 17.6(i) provides:

> "(i) in its assessment of the facts of the matter, the panel shall determine whether the **authorities' establishment of the facts was proper** and whether their **evaluation of those facts was unbiased and objective**. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned;" (emphasis added)

7.4 With respect to questions of the interpretation of the AD Agreement, Article 17.6(ii) provides:

> "(ii) the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the **Agreement admits of more than one permissible interpretation**, the panel shall find the authorities' measure to be in **conformity with the Agreement if it rests upon one of those permissible interpretations**." (emphasis added)

7.5 The Appellate Body, in *US – Hot-Rolled Steel*, considered the relationship between Article 17.6(i) of the AD Agreement and Article 11 of the DSU, and concluded specifically that, with respect to the obligation of panels to make an objective assessment of the facts of the matter before them, there is no conflict between the two.[7] With respect to Article 17.6(ii), the Appellate Body observed that, while it imposed obligations not found in the DSU on panels in anti-dumping disputes, it supplemented Article 11 of the DSU in this regard.[8]

7.6 Thus, we do not consider that India's reference to Article 11 of the DSU constitutes an argument that we apply some other or different standard of review in considering the factual aspects of this dispute than that set out in Article 17.6 of the AD Agreement, which India recognizes is applicable in all anti-dumping disputes. That standard requires us to assess the facts to determine whether the investigating authorities' own establishment of facts was proper, and to assess the investigating authorities' own evaluation of those facts to determine if it was unbiased and objective. What is clear from this is that we are precluded from establishing facts and evaluating them for ourselves – that is, we may not engage in *de novo* review. However, this does not limit our examination of the matters in dispute, but only the manner in which we conduct that examination. In this regard, we keep in mind that Article 17.5(ii) of the AD Agreement establishes that we are to examine the matter based upon "the facts made available in conformity with appropriate domestic procedures to the authorities of the importing Member."

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[7] Appellate Body Report, *US – Hot-Rolled Steel*, at para. 55

[8] *Ibid.*, at para 62.

7.7 With respect to questions of the interpretation of the AD Agreement, we consider that Article 17.6(ii) requires us to apply the customary rules of interpretation of treaties, which are reflected in Articles 31-32 of the Vienna Convention on the Law of Treaties. Article 31 of the Vienna Convention provides that a treaty shall be interpreted in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose. Again, this is no different from the task of all panels in interpreting the text of the WTO Agreements. What Article 17.6 (ii) of the AD Agreement adds is an instruction that, if this process of treaty interpretation leads us to the conclusion that the interpretation of the provision in question put forward by the defending party is permissible, we shall find the measure in conformity if it is based on that permissible interpretation.

2. Burden of Proof

7.8 Although the question of "burden of proof" does not appear to play a central role in the arguments of the parties to this dispute, we have kept in mind that the burden of proof in WTO dispute settlement proceedings rests with the party that asserts the affirmative of a particular claim or defence.[9] It implies that the complaining party will be required to make a *prima facie* case of violation of the relevant provisions of the WTO AD Agreement, which is for the defendant, in this case the United States, to refute.[10] The role of the Panel is not to make the case for either party, but it may pose questions to the parties "in order to clarify and distil the legal arguments".[11]

B. Preliminary Issues

7.9 While the United States did not request any preliminary rulings, it raised two issues which may be considered "preliminary" in the sense that it is useful to resolve them before we address the resolution of India's claims.

7.10 First, the United States argued that we should disregard the affidavits of Mr. Albert Hayes, submitted by India as exhibits in this dispute. The United States notes that Mr. Hayes is an employee of the law firm that is representing

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[9] Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R and Corr.1, adopted 23 May 1997, p.14, DSR 1997:I, 323, at 335.

[10] We note statement of the Appellate Body in *Korea – Dairy* that: "We find no provision in the DSU or in the Agreement on Safeguards that requires a Panel to make an explicit ruling on whether the complainant has established a prima facie case of violation before a panel may proceed to examine the respondent's defence and evidence." Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, adopted 12 January 2000, DSR 2000:I, 3, para. 145. The Appellate Body confirmed this view in *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland* ("*Thailand – H-Beams*"), WT/DS122/AB/R, adopted 5 April 2001, DSR 2001:VII, 2701, para. 134: "In our view a panel is not required to make a separate and specific finding in each and every instance that a party has met its burden of proof in respect of a particular claim, or that a party has rebutted a prima facie case."

[11] Appellate Body Report, *Thailand – H-Beams*, at para. 136.

the Indian Government in this dispute, that his affidavits were prepared especially for purposes of supporting India's arguments in this case, more than two years after USDOC issued its final determination, and that the firm to which he belongs did not represent SAIL in the underlying AD investigation. The United States argues that the information in Mr. Hayes' affidavit was never made available to USDOC during the underlying AD investigation. Consequently, the United States argues that the Hayes affidavits and the information therein are not part of the "facts made available in conformity with appropriate domestic procedures to the authorities of the importing Member" and therefore should not be considered by the Panel, under Article 17.5 of the Agreement.

7.11 Regarding this issue, we note, as mentioned above, that a panel is obligated by Article 11 of the DSU to conduct "an objective assessment of the matter before it". In this case, we also consider the implications of Article 17.5(ii) of the AD Agreement as the basis for which evidence may be considered. That Article provides:

> "The DSB shall, at the request of the complaining party, establish a panel to examine the matter based upon: …
>
> (ii) the facts made available in conformity with appropriate domestic procedures to the authorities of the importing Member".

The Panel in the *US - Hot-Rolled Steel* dispute considered it clear that,

> "under this provision, a panel may not, when examining a claim of violation of the AD Agreement[22] in a particular determination, consider facts or evidence presented to it by a party in an attempt to demonstrate error in the determination concerning questions that were investigated and decided by the authorities, unless they had been made available in conformity with the appropriate domestic procedures to the authorities of the investigating country during the investigation.
>
> [22] We note that there is no claim under Article VI of GATT 1994 in this case, so we need not consider whether Article 17.5(ii) has implications for the evidence a panel may consider in that context."[12]

In this case, although there is a claim under Article VI of GATT 1994, India relies on the Hayes affidavits principally in connection with its specific claims under the AD Agreement.

7.12 The basis of much of India's argument is the assertion that the US sales price information submitted by SAIL was not "unusable". India argues that the errors in that information submitted by SAIL could have been corrected by a simple change in the computer program used in calculating margins. The Hayes

[12] Panel Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, ("*US – Hot-Rolled Steel*"), WT/DS184/R, adopted 23 August 2001 as modified by the Appellate Body Report, DSR 2001:X, 4769, para. 7.6.

affidavits describe the errors in the information (which are undisputed), and describe changes in the USDOC computer program (which is available to parties) which would, in Mr. Hayes' opinion, have corrected it. The affidavits also set out Mr. Hayes' opinion, as a former USDOC investigator, that this sort of change was within the normal bounds of USDOC actions in anti-dumping cases. The affidavits also sort the US sales price information submitted by SAIL with reference to different criteria to support the argument that it could have been used as the basis for the export price side of the dumping margin calculation.

7.13 In our view, the Hayes affidavits do not introduce new "evidence" relevant to the determinations made by USDOC. Rather, we consider that India, in submitting them, is seeking to offer something in the nature of "expert opinion" in support of elements of India's argument. All the data on which the Hayes affidavits are based was before the USDOC at the time of its determinations. What the affidavits do is present the information submitted in a different manner than originally submitted, and adjust and sort it in various ways. In our view, this is an aspect of India's **argument** that is based on the information originally submitted, and is not itself new information that was not before the investigating authority. Indeed, India's arguments based on the Hayes affidavits can be understood without reference to the affidavits themselves or the information therein. Thus, we decline to exclude the Hayes affidavits from this proceeding. We note however that we have not, in fact, found it necessary to rely on the Hayes affidavits in reaching our conclusions in this dispute, and thus need not decide the weight, if any, to place on these affidavits.

7.14 Second, the United States argues that India's claim regarding US "practice" in the application of total facts available is not properly before the Panel. The United States argues that the "practice" referred to is nothing more than individual instances of the application of the relevant statutory and regulatory provisions. The United States notes that, under US law, an agency such as USDOC may depart from established "practice" if it gives a reasoned explanation for doing so. The United States relies on the Panel's decision in *United States - Measures Treating Exports Restraints as Subsidies* for the proposition that its total facts available practice does not have "independent operational status", *i.e.*, that it is not a "measure." Consequently, the United States argues, US "practice" cannot be the subject of a claim. Moreover, the United States argues that even if such "practice" could be the subject of a claim, the challenged practice would still not be properly before this Panel, as India did not identify this "practice" in its consultation request. The United States notes that it raised this point in the DSB in response to India's request for the establishment of a Panel. Accordingly, the United States maintains that India's claim fails to conform to Articles 4.7 and 6.2 of the DSU and must be rejected for that reason alone.

7.15 India argues that a "practice" becomes a "measure" through repeated similar responses to the same situation, and that therefore the US practice it challenges is properly before the Panel. India asserts that USDOC always applies total facts available in particular factual circumstances, and has done so consistently since 1995. Parties to a USDOC investigation can predict that USDOC

will apply this "practice". In India's view, where such a practice is established over a long period of time, it takes on the character of a measure, because a similar response to similar circumstances can be predicted (or threatened) in the future. India considers that the point at which a pattern of similar conduct takes on the character of a measure is to be determined on the facts and circumstances of each case. But in India's view, the label of "practice", as opposed to administrative procedure, regulation or law, coupled with the assertion that it can be changed at any time, does not render the "practice" in question immune to challenge. To accept this possibility would, India asserts, open the door for potential abuse of the obligations imposed by the AD and other WTO Agreements.

7.16 India also maintains that the fact that a "practice" can be changed relatively quickly does not make it a "non-measure." India points out that administrative procedures, regulations or even laws can be changed just as easily and quickly. Moreover, in India's view, USDOC's total facts available practice constitutes an "administrative procedure" as that term is used in Article 18.4 of the AD Agreement. It is an "administrative" action because it is taken by an agency of the US government. It is a "procedure" because it details what procedure will be used for the calculation of dumping margins in the event that one "essential" component of information is not provided by an interested foreign party. The fact that this "administrative procedure" is established in the decisions of USDOC and the USCIT in individual cases does not, India maintains, make it any less a "procedure." To find otherwise would be to elevate form over substance. India considers that the facts in the *US – Export Restraints* decision distinguish it from this case. Specifically, India point out that the "practice" in the *US – Export Restraints* case, that of treating export restraints as countervailable subsidies, had not been applied following the entry into force of the WTO Agreements. The panel concluded that Canada had not "identified concretely what US 'practice' is", and that the term "practice in the sense used by Canada cannot require any particular treatment of export restraints in US CVD investigations."[13] In India's view, the "practice" at issue in this dispute is far different from the non-practice at issue in *US – Export Restraints*, because USDOC *always* applies total facts available when one of the components of information USDOC considers to be "essential" cannot be used. USDOC itself stated in the Final Determination that its consistent practice is to apply "total facts available".

7.17 In considering this second issue, we note that our mandate in this dispute is to consider the claims that are within our terms of reference, which are established by the request for establishment. The United States argues that the Indian claim regarding "practice" is not properly before us because it was not identified in the request for consultations, and not actually consulted about. Similar arguments have been considered by previous panels and the Appellate Body. For instance, in the *Brazil-Aircraft* dispute, the Panel considered an argument that certain measures were not properly before the Panel because they were not en-

[13] Panel Report, *United States – Measures Treating Exports Restraints as Subsidies* ("*US – Export Restraints*"), WT/DS194/R and Corr.2, adopted 23 August 2001, DSR2001:XI, 5767, para. 8.129.

acted until after the consultations were held, and therefore were not the subject of consultations and could not be considered by the Panel. The Panel found that the measures in question were part of the overall scheme of export subsidization which was the subject-matter of the dispute, and that scheme had clearly been the subject of the consultations.[14] The Panel went on to observe that its terms of reference were based upon the request for establishment, which governed the parameters for the panel's work. The Panel concluded further that "Nothing in the text of the DSU…provides that the scope of a panel's work is governed by the scope of prior consultations. Nor do we consider that we should seek to somehow imply such a requirement into the WTO Agreement."[15] On appeal, the Appellate Body upheld the Panel's conclusion, stating "We do not believe, however, that Articles 4 and 6 of the DSU, …, require a *precise and exact identity* between the specific measures that were the subject of consultations and the specific measures identified in the request for the establishment of a panel."[16]

7.18 In this case, the request for consultations clearly identified the USDOC determination regarding application of facts available in the challenged determination, and identified the provisions of US law governing application of facts available as measures in dispute. Thus, in our view, the application of facts available in the US anti-dumping system, both in general (based on the statutory provision), and as actually applied in this case, were the subject of the dispute about which consultations were requested. The request for establishment specifically identifies the US practice in applying facts available as a measure in dispute. This does not, in our view, change the subject matter of the dispute before us in any significant respect from that which was consulted. Accordingly, we consider the US objection based on failure to identify the US practice as a measure in dispute in the request for consultations to be without merit in this case.

7.19 We turn now to the question whether the US practice in the application of total facts available is a measure at issue in this dispute. Article 6.2 of the DSU provides that the request for the establishment of a panel "shall provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly". In this case, the claim regarding USDOC's practice in applying "total facts available" is clearly identified in tiret (d) of the request for establishment as a measure in dispute. Moreover, paragraph 3 of the request for establishment identifies the legal basis of the claim regarding that measure. Thus, unless we conclude that a "practice" is not a measure that can be the subject of a claim in dispute settlement under the AD Agreement, it would seem that the US objection must fail. This question was alluded to, but not decided, by the Panel in the *US - Hot-Rolled Steel* dispute.

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[14] Panel Report, *Brazil – Export Financing Programme for Aircraft* ("*Brazil – Aircraft*"), WT/DS46/R, adopted 20 August 1999, as modified by the Appellate Body Report, DSR 1999:III, 1161, at para. 7.8.

[15] *Ibid.*, at para. 7.9.

[16] Appellate Body Report, *Brazil – Aircraft*, WT/DS46/AB/R, adopted 20 August 1999, DSR 1999:III, 1161., at para. 132-133.

7.20 A ruling on "practice" standing alone would raise a number of questions, particularly if that practice is based on a statute that is found to be not inconsistent with the AD Agreement. In *US – Section 301 Trade Act* the Panel, in considering whether certain statutory provisions were or were not consistent with the relevant WTO obligations, considered it necessary to consider the internal criteria or administrative procedures of the agency administering the law, *i.e.*, "practice" to reach a conclusion.[17] However, this is different from a conclusion that a particular "general practice" can be the subject of a claim in a dispute challenging an anti-dumping measure simply because that measure was adopted based in part on the application of that practice. Moreover, a number of panels have concluded that a statute can be found inconsistent on its face with a Member's WTO obligations only if it is mandatory and requires WTO inconsistent action or prohibits WTO consistent action.[18] If the United States is correctly representing US law, as appears to be the case, and a "practice" can be changed by the administering agency, then such a practice would not be mandatory. It would be particularly anomalous to rule that a non-mandatory "practice" is inconsistent with relevant WTO obligations when a non-mandatory statute allowing the practice would not be found inconsistent. The relevant practice could be changed as necessary, in any case, to conform to the WTO norms identified by the panel in ruling that the statute was not inconsistent with those norms.

7.21 We note that the Appellate Body, in *Guatemala-Cement I*, concluded that Article 17.4 of the AD Agreement, read together with Article 6.2 of the DSU, requires a panel request in a dispute under the AD Agreement to identify as the specific measure at issue, either a definitive anti-dumping duty, the acceptance of a price undertaking, or a provisional measure.[19] Clearly, the challenged "practice" is not one of these three types of measure. Subsequently, the Appellate Body clarified, in *US – 1916 Act*, that nothing in its decision in *Guatemala-Cement I* suggested that Article 17.4 precluded review of anti-dumping legislation as such.[20] It went on to note that Article 18.4 supported the conclusion that AD legislation could be examined, as such, by a panel.[21] Article 18.4 requires each Member to bring into conformity with its obligations under the AD Agreement, its "laws, regulations, and administrative procedures". It is thus clear to us that, in addition to the specific measures set out in Article 17.4 of the AD Agreement, a request for establishment of a panel to examine a matter under

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[17] Panel Report, *United States – Sections 301-310 of the Trade Act of 1974* ("*US – Section 301 Trade Act*"), WT/DS152/R, adopted 27 January 2000, DSR 2000:II, 815, paras. 7.24 – 7.27,

[18] This principle was well-established in GATT jurisprudence. Under the WTO, as noted, a number of panels have maintained this principle. For instance, the Panel in *United States – Section 301* recognized the "classical test in the pre-existing jurisprudence that only legislation mandating a WTO inconsistency or precluding WTO consistency, could, as such, violate WTO provisions". Panel Report, *US – Section 301 Trade Act*, at para. 7.54.

[19] Appellate Body Report, *Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico* ("*Guatemala – Cement I*"), WT/DS60/AB/R, adopted 25 November 1998, DSR 1998:IX, 3767, at para. 79.

[20] Appellate Body Report, *United States – Anti-Dumping Act of 1916* ("*US – 1916 Act*"), WT/DS136/AB/R, WT/DS162/AB/R, adopted 26 September 2000, DSR 2000:X, 4593, para. 72.

[21] *Ibid.*, at paras. 76-79.

the AD Agreement may raise, as measures in dispute, a Member's laws, regulations, and administrative procedures as such.

7.22 The "practice" India has challenged is not, on its face, within the scope of the measures that may be challenged under Article 18.4 of the AD Agreement. In particular, we do not agree with the notion that the practice is an "administrative procedure" in the sense of Article 18.4 of the Agreement. It is not a pre-established rule for the conduct of anti-dumping investigations. Rather, as India suggests[22] a practice is a repeated pattern of similar responses to a set of circumstances – that is, it is the past decisions of the USDOC. We note in this regard that the USDOC decisions on application of facts available turn on the particular facts of each case, and the outcome may be the application of total facts available or partial facts available, depending on those facts. India argues that at some point, repetition turns the practice into a "procedure", and hence into a measure. We do not agree. That a particular response to a particular set of circumstances has been repeated, and may be predicted to be repeated in the future, does not, in our view transform it into a measure. Such a conclusion would leave the question of what is a measure vague and subject to dispute itself, which we consider an unacceptable outcome. Moreover, we do not consider that merely by repetition, a Member becomes obligated to follow its past practice. If a Member were obligated to abide by its practice, it might be possible to deem that practice a measure. The United States, however, has asserted that under its governing laws, the USDOC may change a practice provided it explains its decision.[23]

7.23 In this context, we note particularly the decision of the Panel in *US – Export Restraints*.[24] In that case, the Panel faced the question whether the measures identified by Canada, including US practice, with respect to the treatment of export restraints as subsidies, **required** the USDOC to treat export restraints in a certain way. The Panel addressed the question whether the measures identified could give rise to a violation of WTO obligations by considering whether each measure constituted "an instrument with a functional life of its own, i.e., that it would have to *do* something concrete, independently of any other instruments, for it to be able to give rise independently to a violation of WTO obligations."[25] In answering this question, the Panel considered the status, under US law, of each measure identified, including the challenged US practice. With respect to that practice, the Panel observed that USDOC could depart from it, so long as it explained its reasons for doing so, and concluded that this fact "prevents such practice from achieving independent operational status in the sense of *doing* something or *requiring* some particular action…US "practice" therefore does not appear to have independent operational status such that it could independently give rise to a WTO violation as alleged by Canada".[26] The challenged practice in

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[22] Answers of India to Questions of the Panel - First Meeting, questions 35 & 36, at para. 74.
[23] Answers of the United States to Questions of the Panel - First Meeting, question 34, at paras. 83-84 and fns. 54 & 55 and cases cited therein.
[24] *US – Export Restraints.*
[25] *Ibid.*, at para. 8.85.
[26] *Ibid.*, at para 8.126.

this case is, in our view, no different from that considered in the *US – Export Restraints* case. It can be departed from so long as a reasoned explanation is given. It therefore lacks independent operational status, as it cannot require USDOC to do something, or refrain from doing something.

7.24 Thus, we conclude that the challenged US practice concerning the application of total facts available is not a separate measure which can independently give rise to a WTO violation, and we will therefore not rule on the consistency of that practice, as such, with the United States' obligations under the AD Agreement.

C. Abandoned Claim

7.25 In footnote 12 of its first written submission, India explicitly abandoned several claims that had been set out in the request for establishment of this Panel. India stated that, *inter alia*, "India is no longer pursuing the following claims set forth in its request for establishment of the panel:…claims under AD Agreement Articles 6.6 and 6.8 and Annex II, paragraph 7 regarding failure to exercise special circumspection in using information supplied in the petition".[27] By letter dated 16 January 2002, India stated its intention to pursue one of these claims with arguments to the Panel at its first meeting with the parties and in its rebuttal submission. India noted that it had included footnote 12 in its first submission in an effort to limit the burden on the Panel and the United States regarding those claims not supported by clear information in the record. However, India stated that, in preparing for the first meeting of the Panel with the parties, it "discovered" information in the confidential version of the record of this dispute that supports this abandoned claim. The United States did not specifically object to India's stated intention to pursue this claim, noting that it was within the Panel's terms of reference. We made a ruling on this issue at our first meeting with the parties, in order to clarify the scope of the issues and arguments in this dispute. Our reasons and ruling are set out below.

7.26 Despite the lack of specific objection by the United States, we believe that India's stated intention to pursue this claim requires careful consideration. While it is true that the claim in question was set out in the request for establishment, and is therefore within our terms of reference, we are not persuaded that fact alone requires us to rule on it. We note in particular that the claim was **explicitly abandoned** by India at the time of its first written submission. The United States as the defending Member, and third parties participating in this proceeding, were justified in relying on India's statement that it was not pursuing this claim. Indeed, neither the United States nor any third party addressed the claim in their respective written submissions.

7.27 This situation is not explicitly addressed in either the DSU or any previous panel or Appellate Body report. We do note, however, the ruling of the Ap-

[27] First Written Submission of India, at fn. 12. India did not seek to reinstate any of the other claims it abandoned.

pellate Body in *Bananas* to the effect that a claim may not be raised for the first time in a first written submission, if it was not in the request for establishment.[28] One element of the Appellate Body's decision in that regard was the notice aspect of the request for establishment. The request for establishment is relied upon by Members in deciding whether to participate in the dispute as third parties. To allow a claim to be introduced in a first written submission would deprive Members who did not choose to participate as third parties from presenting their views with respect to such a new claim.

7.28 The situation here is, in our view, analogous. That is, to allow a party to resurrect a claim it had explicitly stated, in its first written submission, that it would not pursue would, in the absence of significant adjustments in the Panel's procedures, deprive other Members participating in the dispute settlement proceeding of their full opportunities to defend their interest with respect to that claim. Paragraphs 4 and 7 of Appendix 3 to the DSU provide that parties shall "present the facts of the case and their arguments" in the first written submission, and that written rebuttals shall be submitted prior to the second meeting. These procedures, in our view, envision that initial arguments regarding a claim should be presented for the first time in the first written submission, and not at the meeting of the panel with the parties or in rebuttal submissions.

7.29 With respect to the interests of third parties, the unfairness of allowing a claim to be argued for the first time at the meeting of the panel with the parties, or in rebuttal submissions, is even more pronounced. In such a circumstance, third parties would be entirely precluded from responding to arguments with respect to such a resurrected claim, as they would not have access to those arguments under the normal panel procedures set out in paragraph 6 of Appendix 3 to the DSU. Further, India has identified no extenuating circumstances to justify the reversal of its abandonment of this claim.[29] Thus, in our view, it would be inappropriate in these circumstances to allow India to resurrect its claim in this manner. Therefore, we will not rule on India's claim under AD Agreement Articles 6.6 and 6.8 and Annex II, paragraph 7 regarding failure to exercise special circumspection in using information supplied in the petition.[30]

7.30 Of course, this does not affect the scope of India's arguments in support of its other claims. Therefore, India may present arguments involving Articles 6.6 and 6.8 and Annex II paragraph 7 in the context of its arguments in support of those claims, concerning violations of other provisions of the AD Agreement, which it did not abandon.

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[28] Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas* ("*EC – Bananas III*"), WT/DS27/AB/R, adopted 25 September 1997, DSR 1997:II, 591, at para. 143.

[29] This is **not**, for example, a case where a complainant obtained, through the dispute settlement process, information in support of a claim to which it did not otherwise have access.

[30] We note that, since we do not reach India's alternative claims in this dispute, as discussed below in para. 7.80, we also would not have reached this claim in any event.

D. Claims and Arguments

1. Overview

7.31 The core question in this dispute concerns the meaning of Article 6.8 of the AD Agreement, and paragraphs 3 and 5 of Annex II of the Agreement. Article 6.8 and Annex II together govern the application of "facts available" in anti-dumping investigations. India has challenged the US statutory provisions implementing these rules into US municipal law as being inconsistent on their face with the AD Agreement. India has also challenged the application of those provisions in the USDOC investigation at issue. In this case, USDOC rejected all of SAIL's reported information, and made its final determination on the basis of facts available. This is identified by India as a decision based on the application of USDOC's "total facts available" practice. In India's view, USDOC impermissibly rejected SAIL's US sales price information and resorted to total facts available based on conclusions that other information submitted was unusable, and that certain information requested was not submitted, such that USDOC lacked sufficient reliable information on which to base determinations. India also considers that USDOC impermissibly concluded that SAIL had failed to cooperate to the best of its ability, justifying an adverse inference, and consequently based its final dumping margin for SAIL on the highest dumping margin alleged in the application.

7.32 India argues that USDOC should not have rejected **all** of SAIL's reported information because of problems with **some** of that information. Specifically, India argues that USDOC was required by the AD Agreement, in particular Article 6.8 and paragraph 3 of Annex II, to use the US sales price information reported by SAIL. India maintains that USDOC could have, and should have, determined export price from that information, and should have resorted to facts available only with respect to the particular categories of information which were either flawed or not available.[31] India asserts that the USDOC decision to reject all of SAIL's information and rely instead on facts available was required under US law, and that therefore US law is inconsistent on its face with the provisions of the AD Agreement governing reliance on facts available. India also submits that SAIL acted to the best of its ability to supply complete responses to USDOC, but that difficulties in compiling information prevented it from complying any more fully. Thus, in India's view, USDOC erred in applying adverse inferences. India has raised additional claims asserting that, as a result of improper application of facts available, the US final anti-dumping measure is in violation of Articles 2.2 and 2.4 of the AD Agreement, because it is based on an improper calculation of normal value and an unfair comparison in the calculation of dumping margins, and is in violation of Article 9.3 of the AD Agreement and Articles VI:1 and 2 of GATT 1994, because it imposes a duty that is based on an improper calculation and comparison.

[31] India appears to accept USDOC's decision to reject other information submitted, and rely instead on facts available.

7.33 India also claims that the United States violated Article 15 of the AD Agreement by failing to give special regard to India's status as a developing country when considering the application of AD duties, and failing to explore the possibilities of constructive remedies before applying duties.

2. Whether USDOC Acted Inconsistently with Article 6.8 and Annex II of the AD Agreement in Resorting to Use of Facts Available in the AD Investigation in Question

7.34 India asserts that USDOC violated Article 6.8 and paragraph 3 of Annex II of the AD Agreement by rejecting verifiable, timely, and appropriately submitted information concerning US sales prices provided by SAIL in response to questionnaires during the course of the investigation. In India's view, an unbiased and objective investigating authority evaluating the evidence concerning the US sales price information submitted by SAIL could not have concluded that SAIL had failed to provide necessary information within a reasonable period. Therefore, in India's view, the necessary predicate for resort to facts available with respect to US sales price information was missing. India acknowledges that **other** information requested by USDOC was not submitted, and does not here challenge USDOC's resort to facts available with respect to such other information. However, India maintains that the US sales price information fully satisfied the requirements of paragraph 3 of Annex II, and that therefore, USDOC was required to take that information into account in the calculation of dumping margin.

7.35 India also raises two alternative claims. India argues that, assuming, *arguendo*, that the US sales price information was not ideal in all respects, an unbiased and objective investigating authority could not have concluded that SAIL did not act to the best of its ability in providing that information, and therefore USDOC violated paragraph 5 of Annex II in rejecting that information. India urges the Panel to decide this alternative claim regardless of the disposition of India's principal claim under Article 6.8 and paragraph 3 of Annex II.[32] India also claims, in the alternative, that assuming the Panel concludes that USDOC did not act inconsistently in rejecting the US sales price information submitted by SAIL, the Panel should find that USDOC acted inconsistently with paragraph 7 of Annex II of the AD Agreement in concluding that SAIL had "failed to cooperate" and therefore applying "adverse" facts available.

7.36 The United States does not dispute the essential facts as presented by India, but it defends the USDOC decision rejecting all of the information submitted by SAIL, including the information on US sales prices, and basing its determination on facts available instead. The United States asserts that USDOC gave notice of the information that would be required for the dumping determination and identified deficiencies in the information provided in SAIL's questionnaire responses, both the original questionnaire and subsequent requests for information,

[32] First Written Submission of India at para. 116.

on at least five occasions. The United States maintains that USDOC accepted additions, corrections, and modifications to the information submitted, and granted several requests for additional time to provide information, in an effort to assist SAIL and obtain usable information necessary for the dumping determination.

7.37 The United States asserts that SAIL never indicated that it **could not** provide the requested information, but merely indicated repeatedly that it needed additional time due to difficulties in gathering and submitting the information. Ultimately, USDOC concluded that some of the information requested was never submitted in a usable format, and thus USDOC was unable to satisfy itself regarding the accuracy of the information that was submitted. USDOC concluded that there were fatal gaps in the necessary information, which precluded the determination of a dumping margin based on the information that had been submitted, and necessitated resort to facts available with respect to the entire determination. In the US view, it is clear that SAIL had the ability to provide the requested information, but failed to do so. Therefore, the United States considers that USDOC was justified in ultimately concluding that SAIL had failed to act to the best of its ability in gathering and submitting the information, and applying adverse facts available.

7.38 We consider first the question whether USDOC acted inconsistently with the United States' obligations under Article 6.8 and paragraph 3 of Annex II of the AD Agreement in finding that SAIL had failed to provide necessary information, and basing its final determination on facts available. We consider that this issue is properly evaluated by considering whether the USDOC decisions in this context were such as could be reached by an unbiased and objective investigating authority on the basis of the facts before it and were based on a permissible interpretation of the AD Agreement.

7.39 As noted above, there is no dispute between the parties as to the events that transpired during the steel plate investigation. The dispute is with the interpretation of those events and the consequences with regard to the use of facts available. In order to set the background of our analysis, a summary of the relevant facts, and the conclusions reached by USDOC, is set out below.

7.40 The investigation was initiated on 8 March 1999, and on 17 March 1999, USDOC issued the basic questionnaires to the foreign producers and exporters, including SAIL. The questionnaires consisted of multiple parts, each requesting different information. Between 12 April and 10 May 1999, SAIL submitted responses to all parts of the questionnaire, and on 11 May 1999 submitted sales and cost information on computer disk. On 27 May 1999, USDOC issued a first supplemental questionnaire. On 11 June 1999, SAIL submitted its response to the supplemental questionnaire, and on the same day, USDOC issued a second supplemental questionnaire. On 16 June 1999, SAIL filed its initial response to the second supplemental questionnaire and revised US sales computer database, and on 18 June 1999, SAIL submitted information further supplementing previous submissions. On 29 June 1999, SAIL made three submissions, two in response to USDOC's third deficiency questionnaire issued on 18 June 1999, and

one in response to USDOC's first supplemental questionnaire. On 12 July 1999, USDOC sent a letter to SAIL providing it with a final opportunity to submit a reliable electronic database and information on product-specific costs. On 16 July 1999, SAIL submitted another version of the US sales database, revising information previously submitted. As outlined in the parties' submissions, the principal areas in which problems arose involved SAIL's home market sales prices and cost of production information. USDOC also had concerns with the electronic databases submitted, and that some of SAIL's submissions were made past the applicable deadlines.

7.41 USDOC issued a preliminary dumping determination based on facts available on 19 July 1999, but did not apply adverse facts available. On 16 August 1999, USDOC granted SAIL's request for an additional extension to reply to the fourth and fifth deficiency letters, which had been issued on 2 and 3 August 1999, respectively. On 12 and 23 August, USDOC provided SAIL with outlines of the agenda and procedures to be followed during the separate on-site sales and cost verification trips to India. On 17 August 1999, SAIL made further changes to the computer tape containing US sales information. On 1 September 1999, the first day of verification, SAIL submitted a "final" version of the computer database containing US sales information. On 3 November 1999, USDOC issued its sales verification report.[33]

7.42 In the sales verification report, USDOC recorded extensive problems with the reported information on home market sales and prices. The situation was markedly different with respect to the reported information on US sales and prices. USDOC noted that SAIL had provided a complete listing of its US sales transactions during the period of investigation, that USDOC did not discover any unreported sales that should have been included, and that with respect to completeness and "Quantity and Value" the verification team "noted no discrepancies."[34] The report did specify one error in SAIL's US sales information in the "Summary of Significant Findings" section, the incorrect reporting of product width on all US sales of plate 96 inches wide.[35] The verification report indicated that the error was investigated, and that it "appeared to be limited exclusively to products that had a width of 96 inches and to the US database."[36] USDOC obtained a list of all the affected sales transactions from SAIL.[37] Other errors with respect to the US sales price information discovered during the verification were not reported in the "Summary of Significant Findings" section of the verification report, although they were detailed elsewhere in the report.[38]

7.43 On 13 December 1999, USDOC issued a memorandum concerning "Determination of Verification Failure", listing deficiencies in information submitted

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[33] USDOC conducted separate verifications of sales and cost information, and issued separate reports.
[34] Exhibit India-13 at 8, 9, 13, 14.
[35] *Ibid.*, at 5.
[36] *Ibid.*
[37] *Ibid.*
[38] *Ibid.*, at 8, 12-13,15, 29-33.

by SAIL.[39] This memorandum sets out fourteen specific deficiencies in the information submitted. The only one which concerned the US sales information was the error involving product width noted above.[40] The memorandum, in the "Analysis" section, states with respect to the information concerning U.S. sales:

> "As detailed in the Sales Verification Report, several errors were described in the U.S. sales database. While these errors, in isolation, are susceptible to correction, when combined with other pervasive flaws in SAIL's data, these errors support our conclusion that SAIL's data on the whole is unreliable. The fact that limited errors where [sic] found must not be viewed as testimony to the underlying reliability of the SAIL's reporting, particularly when viewed in context the widespread problems encountered with all the other data in the questionnaire response.[41]

The memorandum recommends that USDOC conclude that SAIL "failed verification".

7.44 On 29 December 1999, USDOC issued its final determination of sales at less than fair value. USDOC rejected all of the information submitted by SAIL as "unusable"[42], and instead based its determination on facts available. Concerning its decision, USDOC stated that:

> "at verification the Department discovered that SAIL failed to report a significant number of home market sales; was unable to verify the total quantity and value of home market sales; and failed to provide reliable cost or constructed value data for the products. See Home Market and United States Sales Verification Report (``Sales Report''), dated November 3, 1999; see also Cost of Production and Constructed Value Verification Report (``Cost Report''), dated November 3, 1999. … SAIL was provided with numerous opportunities and extensions of time to fully respond to the Department's original and supplemental questionnaires, as well as ample time to prepare for verification. However, even with numerous opportunities to remedy problems, SAIL failed to provide reliable data to the Department in the form and manner requested. … as a result of the widespread problems encountered at verification, SAIL's questionnaire responses could not be verified. See Sales Report and Cost Report. See Memorandum to the File: Determination of Verification Failure (``Verification Memo''), dated December 13, 1999…. subsequent to the preliminary determination we issued two additional questionnaires and further extensions to SAIL presenting it yet additional opportunities to submit a complete and accurate electronic database. Nevertheless, the Department found

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39 Exhibit India-16.
40 *Ibid.*, at 3.
41 *Ibid.*, at 5.
42 64 Fed. Reg. 73126, 73131 (29 December 1999), Exhibit India-17.

> at verification that the final submission was again substantially deficient (see the Department's Position below; see Verification Memo; and see Sales Report and Cost Report). Therefore the Department may ``disregard all or part of the original and subsequent responses,'' subject to subsection (e) of section 782…. In the instant investigation, record evidence supports the following findings: … as stated in the Preliminary Determination and the sales and cost verification reports, SAIL was given numerous extensions to submit accurate data which it failed to do. In fact the last submission of cost data filed on August 18, 1999, was a database which contained unreadable electronic versions of SAIL's cost of production which did not include any constructed value information.
>
> Second, with respect to section 782(e)(2), we were not able to verify SAIL's questionnaire response due to the fact that essential components of the response (i.e., the home market and cost databases) contained significant errors.
>
> Third, with respect to section 782(e)(3), the fact that essential components of SAIL's response could not be verified resulted in information that was incomplete and unreliable as a basis for determining the accurate margin of dumping.
>
> Fourth, with respect to section 782(e)(4), SAIL, as stated in the home market sales verification report, did not sufficiently verify the accuracy and reliability of its own data prior to submitting the information to the Department, thereby indicating that it did not act to the best of its ability to provide accurate and reliable data to the Department.
>
> Finally, with respect to section 782 (e)(5), **the U.S. sales database contained errors that, while in isolation were susceptible to correction, however when combined with the other pervasive flaws in SAIL's data lead us to conclude that SAIL's data on the whole is unreliable.** As a result, the Department does not have an adequate basis upon which to conduct its analysis to determine the dumping margin and must resort to facts available pursuant to section 776(a)(2) of the Act.'' (emphasis added)[43]

7.45 India argues that the ordinary meaning of Article 6.8 and paragraph 3 of Annex II of the AD Agreement requires an investigating authority to use, in its calculation of dumping margins, any information submitted by a company in response to questionnaire requests that meets the conditions set out in paragraph 3. India maintains that those conditions are that (1) the information must be verifiable, that is, capable of being verified, (2) "appropriately" submitted, that is, at a time, in a format, and in a manner that makes it capable of being used

[43] *Ibid.*, at 73127.

by investigating authorities without undue difficulties, (3), submitted in a timely fashion, and (4) submitted in a medium or computer language requested by the authorities. In India's view, any **category**[44] of information which satisfies these requirements must be used by the investigating authorities, even if information in some other category fails to satisfy the conditions, and with respect to which resort is had to facts available. India submits that paragraph 5 of Annex II acts as an "additional safeguard" to ensure that investigating authorities attempt to use a particular category of information submitted even if it is not perfect, so long as the supplier acted to the best of its ability in providing that information.

7.46 India maintains that Articles 15 and 6.13 of the AD Agreement provide contextual support for India's interpretation. India asserts that Article 15 suggests that the "best efforts" of a developing country exporter must be evaluated with "special regard", and that Article 6.13 suggests that the authorities must take due account of the difficulties of companies, especially small companies, in responding, and must provide "any assistance practicable". Thus, India argues, investigating authorities must adapt themselves to the needs of the respondent, and must assist them in responding. India also asserts that the object and purpose of the AD Agreement support India's interpretation of the Article 6.8. In India's view, one of the key principles governing anti-dumping investigations is the "goal of ensuring objective decision-making based on facts".[45] Thus, India argues that the purpose of allowing resort to "facts available" is to provide a tool to complete the investigation, and not a means to punish respondents who cannot provide information, which would be unjustifiable in any event. India maintains that Article 6.8 and the provisions of Annex II must be read to require cooperation by the investigating authorities, and to not allow them to resort to facts available unless no other way is possible, and even then only with "special circumspection".

7.47 The United States disagrees with the interpretation of "information" which underlies the Indian position regarding Article 6.8 and paragraphs 3 and 5 of Annex II. The United States submits that Article 6.8 refers to the "necessary information" to which the investigating authority has to have access. In the US view, this refers to **all** the necessary information for purposes of reaching a dumping determination, not to "categories" of information that can be evaluated separately. Thus, the United States considers that Article 6.8 and Annex II permit an investigating authority to resort to facts available for **all** aspects of its determination, if **some** necessary information is not provided, without considering the information actually submitted. The United States argues that India's interpretation would allow responding parties to selectively provide information and require the investigating authority to use that information, even in the absence of other information which, in the US view, is necessary. The United States maintains that this would defeat the underlying purpose of objective decision-making

[44] India subsequently referred to a "component/category/set" of information.

[45] First Written Submission of India at para. 87, citing the Panel Report in *US-Hot-Rolled Steel*, at para. 7.55

based on facts. It adds that India's interpretation effectively adds language, such as "categories of information", to the AD Agreement provisions at issue.

7.48 The United States maintains that even if certain portions or categories of information submitted appear acceptable in isolation, substantial deficiencies may be detected in the information, which can call into question the reliability of the entire body of information submitted. The United States points out that Article 6.8 allows investigating authorities to make preliminary or final determinations based on facts available. In the US view, India ignores this in focussing on categories of information.

7.49 The United States also notes that paragraph 3 of Annex II provides that if the conditions are met, the information *should* be taken into account. In the US view, India is incorrect in arguing that this means that the investigating authorities **must** use a **category** of information that satisfies the four conditions. The United States asserts that "should" is not mandatory. Thus, the United States submits that paragraph 3 of Annex II **urges** the investigating authorities to take into account (or not disregard information) information which satisfies the criteria of those provisions, but does not **require** investigating authorities to utilise that information in the calculation of the dumping margin.

7.50 Regarding the phrase "provided the interested party has acted to the best of its ability", the United States recognizes that perfection is not the standard, and that information that "may not be ideal in all respects" should not be disregarded where the respondent has acted to the best of its ability. However, in the US view paragraph 5 of Annex II is not mandatory, as it uses the verb "should", and recognizes that there will be situations in which the investigating authority would be justified in disregarding information submitted. In the US view, if a party has failed to act to the best of its ability, an investigating authority would be justified in rejecting information which is not perfect in all respects.

7.51 Article 6.8 and paragraph 3 of Annex II of the AD Agreement, provide:

> "6.8 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.
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> *****
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> ANNEX II
>
> BEST INFORMATION AVAILABLE IN TERMS OF PARAGRAPH 8 OF ARTICLE 6
>
> 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 de-

> terminations 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.

Paragraph 5 of Annex II is also relevant to the issue in dispute. It provides:

> 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."

7.52 In examining this matter, we note that, as the Appellate Body has repeatedly stated, panels are to consider the interpretation of the WTO Agreements, including the AD Agreement, in accordance with the principles set out in the Vienna Convention on the Law of Treaties (the "Vienna Convention"). Those principles establish that a panel is to look to the ordinary meaning of the provision in question, in its context, and in light of its object and purpose. Finally, we may consider the preparatory work (the negotiating history) of the provision, should this be necessary or appropriate in light of the conclusions reached based on the text of the provision. If we conclude that the challenged US determination is based on an interpretation that is "permissible" under the customary rules of interpretation of international law, we should allow that interpretation to stand, pursuant to Article 17.6(ii) of the AD Agreement.[46]

7.53 Turning first to the text of Article 6.8, we note that the word "information" is defined as "knowledge or facts communicated about a particular subject, event, etc."[47] "Necessary" is defined as "That cannot be dispensed with or done without; requisite, essential, needful".[48] Thus, Article 6.8 provides that if essential knowledge or facts, which cannot be done without, are not provided to the investigating authority by an interested party, the investigating authority may make preliminary or final determinations on the basis of facts available. However, this conclusion does not significantly elucidate the question of the degree to which facts available may be used in a case in which some necessary information is submitted, and some is not.

7.54 On this point, the parties have divergent views. The United States argues that if any necessary information is not provided, the investigating authority may conclude that necessary information has not been provided in terms of Article 6.8, and may instead base its entire determination on facts available. India, on the other hand, considers that the "necessary" information can be considered to fall into discrete categories or sets, grouped around the basic elements of the anti-dumping calculation – information relating to the normal value and export price calculations, and information regarding cost of production and constructed

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[46] The same principles apply to our consideration of India's challenge to the US statute on its face, discussed below.

[47] New Shorter Oxford English Dictionary, Clarendon Press, Oxford, 1993.

[48] *Ibid.*

normal value in some cases. India appears to consider these categories as essentially discrete elements of an anti-dumping investigation. India considers that a failure to provide information regarding one element of the overall determination does not justify resort to facts available for all aspects of the calculation of the dumping margin.[49]

7.55 In our view, the failure to provide necessary information, that is information which is requested by the investigating authority and which is relevant to the determination to be made,[50] triggers the authority granted by Article 6.8 to make determinations on the basis of facts available. The provisions of Annex II, which set out conditions on the use of facts available, inform the question of whether necessary information has not been provided, by establishing considerations for when information submitted must be used by the investigating authority. Thus, the provisions of Annex II inform an investigating authority's evaluation whether necessary information, in the sense of Article 6.8, has been provided, and whether resort to facts available with respect to that element of information is justified. If, after considering the provisions of Annex II, and in particular the criteria of paragraph 3, the conclusion is that information provided satisfies the conditions therein, the investigating authority must use that information in its determinations, and may not resort to facts available with respect to that element of information. That is, the investigating authority may not conclude, with respect to that information, that "necessary information" has not been provided.

7.56 We note that there is disagreement between the parties as to whether the provisions of Annex II, which are largely phrased in the conditional tense ("should") are mandatory. We consider that Article 6.8 itself answers this question. Article 6.8. explicitly provides that "The provisions of Annex II **shall** be observed in the application of this paragraph" (emphasis added). In our view, the use of the word "shall" in this context establishes that the provisions of Annex II are mandatory. Indeed, this would seem a necessary conclusion. The alternative reading would mean that investigating authorities are required ("shall") to apply provisions which are not themselves required, an interpretation that makes no sense.[51] Moreover, the provisions of Annex II, while worded in the conditional, give specific guidance to investigating authorities regarding certain aspects of their determinations which, without more, clearly establish the operational requirements. Thus, we consider that that the provisions of Annex II are manda-

[49] India stated, in response to a question from the Panel, that "barring unusual circumstances, the four so-called "essential components" are indeed separate and distinct categories of information" Answers of India to Questions of the Panel - First Meeting, question 28, at para. 50.

[50] We are not dealing here with the possibility that the investigating authority might request irrelevant information. Obviously, such information would not be "necessary" in the sense of Article 6.8. However, there is no suggestion in this case that the investigating authority requested information beyond that which was necessary to the determinations it had to make.

[51] We note that the Panel in, *Argentina – Definitive Anti-Dumping Measures on Imports of Ceramic Floor Tiles from Italy* ("*Argentina – Ceramic Tiles*"), WT/DS189/R, adopted 5 November 2001, DSR 2001:XII, 6241, treated the provisions of Annex II as obligations in its analysis and findings.

tory, not because of the wording of those provisions themselves, but because of the obligation to observe them set out in Article 6.8.[52]

7.57 The specific provisions of Annex II with which we are concerned in this dispute are paragraphs 3 and 5.[53] Paragraph 3 states that all information provided that satisfies the criteria set out in that paragraph is to be taken into account when determinations are made. We consider in this regard that the use of the final connector "and" in the list of criteria makes it clear to us that an investigating authority, when making determinations, is only **required** to take into account information which satisfies all of the applicable criteria of paragraph 3.[54] In order to assess the limitations this provision puts on the right of an investigating authority to reject information submitted and instead resort to facts available,[55] we look to the ordinary meaning of the text, in its context and in light of its object and purpose. Paragraph 3 starts with the phrase "all information". "All" means "the whole amount, quantity, extent or compass of" and "the entire number of, the individual constituents of, without exception…every".[56] To "take into account" is defined as "take into consideration, notice".[57] Thus, a straightforward reading of paragraph 3 leads to the understanding that it requires that every element of information submitted which satisfies the criteria set out therein must be considered by the investigating authority when making its determinations. If information must be considered under paragraph 3, an investigating authority may not conclude, with respect to that information, that necessary information has not been provided, in the sense of Article 6.8. Consequently, we do not accept the United States' position that "information" in Article 6.8 means all information,

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[52] We note in this regard the Appellate Body's statement that "Article 6.8 requires that the provisions of Annex II of the *Anti-Dumping Agreement* be observed in the use of facts available." Appellate Body Report, *US – Hot-Rolled Steel*, at para 78. The Appellate Body appears to have treated the provisions of Annex II which are phrased in the conditional as mandatory, but did not specifically address the question, which was not raised before it, or indeed before the *Hot-Rolled Steel* Panel.

[53] Paragraph 1 of Annex II principally concerns notice to interested parties of what information will be required, that is, the necessary information, and the potential for resort to facts available if the information is not supplied. Paragraph 2 authorizes the investigating authority to request information in a particular medium or computer language, but establishes limits on the right to insist upon provision of information in the requested format. Paragraph 4 is in a sense the obverse of paragraph 2, allowing the authority to decline to accept information in a medium that cannot be processed. Paragraph 6 requires the investigating authority to inform a party if submitted information is not accepted and provide an opportunity for further explanations and ultimately, if the explanations are rejected, requires that an explanation of the rejection be given in any published determinations. Finally, paragraph 7 sets out rules and conditions for the use of particular information as facts available, including the possibility of less favorable results for a party in the event of non-cooperation.

[54] The Appellate Body has stated explicitly that:

> "according 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."

Appellate Body Report, *US – Hot-Rolled Steel*, at para 81.

[55] We note in this context the statement of the Appellate Body that paragraph 3 of Annex II bears on the issue of "when the investigating authorities are entitled to *reject* information submitted by interested parties." Appellate Body Report, *US – Hot-Rolled Steel*, at para 80.

[56] New Shorter Oxford English Dictionary, Clarendon Press, Oxford, 1993.

[57] *Ibid*.

such that Members have an unlimited right to reject all information submitted in a case where some necessary information is not provided.

7.58 Of course, we do not mean to suggest that the investigating authority must, in every case, scrutinize each item of information submitted in order explicitly to determine whether it satisfies the criteria of paragraph 3 of Annex II before it uses it in its determination. Clearly, if the authority is satisfied with the information submitted, and concludes that an interested party has fully complied with the requests for information, there is no need to undertake any separate analysis under paragraph 3 of Annex II. However, to the extent the authority is not satisfied with the information submitted, it must examine those elements of information with which it is **not** satisfied, in light of the criteria of paragraph 3.

7.59 That said, however, we also do not accept India's view that each category of information submitted must be judged separately. India recognizes that there may be cases where a piece of information submitted which otherwise satisfies paragraph 3 is so minor an element of the information necessary to make determinations that it cannot be used in the investigation without undue difficulties, and that it is possible that so much of the information submitted in a particular "category" fails to satisfy the criteria of paragraph 3, for instance, cannot be verified, that the entire category of information cannot be used without undue difficulty.[58]

7.60 We consider in addition that the various elements, or categories, of information necessary to an anti-dumping determination are often interconnected, and a failure to provide certain information may have ramifications beyond the category into which it falls. For instance, a failure to provide cost of production information would leave the investigating authority unable to determine whether sales were in the ordinary course of trade, and further unable to calculate a constructed normal value. Thus, a failure to provide cost of production information might justify resort to facts available with respect to elements of the determination beyond just the calculation of cost of production. Moreover, without considering any particular "categories" of information, it seems clear to us that if certain information is not submitted, and facts available are used instead, this may affect the relative ease or difficulty of using the information that has been submitted and which might, in isolation, satisfy the requirements of paragraph 3 of Annex II. However, to accept that view does not necessarily require the further conclusion, espoused by the United States, that in a case in which any "essential" element of requested information is not provided in a timely fashion, the investigating authority may disregard all the information submitted and base its determination exclusively on facts available. To conclude otherwise would fly in the face of one of the fundamental goals of the AD Agreement as a whole, that of ensuring that objective determinations are made, based to the extent possible on facts.[59]

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[58] Answers of India to Questions of the Panel - First Meeting, questions 28 & 29, at paras. 54 & 60.
[59] See Panel Report, *US – Hot-Rolled Steel*, at para. 7.55.

7.61 The answer, in our opinion, lies between the two extremes of the positions taken by the parties. That is, when there is a question whether necessary information has been submitted, the investigating authority must, with reference to the guidance given in paragraph 3 of Annex II, consider whether the information that has been submitted satisfies the criteria therein. If yes, it must be taken into account in making determinations. If not, it may be rejected and facts available used instead. In a case in which some information is rejected and facts available used instead, the further question may arise whether the fact that some information submitted was rejected has consequences for the remainder of the information submitted. In particular, the investigating authority may need to consider whether the fact that some information is rejected results in other information failing to satisfy the criteria of paragraph 3. In this context, we consider to be critical the question of whether information which itself may satisfy the criteria of paragraph 3 can be used without undue difficulties in light of its relationship to rejected information.[60]

7.62 In sum, we consider that paragraph 3 of Annex II establishes specific criteria which an investigating authority must apply before rejecting information submitted and relying instead on facts available. Clearly, with respect to the specific item of information in question, if it fails to satisfy the criteria of paragraph 3, it may be rejected and resort may be had to facts available. This is not in dispute, and is the basis of the United States' not-infrequent resort to "partial facts available" or "gap-filling".[61] The more difficult question, presented in this dispute, is whether a conclusion that some information submitted fails to satisfy the criteria of paragraph 3, and thus may be rejected, can in any case justify a decision to reject other information submitted which, if considered in isolation, would satisfy the criteria of paragraph 3. We consider that the answer to this question is yes, in some cases, but that the result in any given case will depend on the specific facts and circumstances of the investigation at hand.

7.63 Finally, we note that India has argued that even if information submitted fails to satisfy the criteria of paragraph 3 to some degree, if the party submitting that information acted to the best of its ability, the investigating authority is required under paragraph 5 of Annex II to make "more concerted efforts" to use it.[62]

7.64 Paragraph 5 establishes that information provided which is not ideal is not to be disregarded if the party submitting it has acted to the best of its ability. As the Appellate Body found in *US – Hot-Rolled Steel*, the degree of effort de-

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[60] In addition, as discussed below, the explanation of such findings is vital.

[61] See, e.g. *Notice of Final Determination of Sales at Less Than Fair Value: Hot-Rolled Flat-Rolled Carbon-Quality Steel Products From Japan*, 64 Fed. Reg. 24329, 24370 (6 May 1999); *Stainless Steel Bar From India: Final Results of Anti-dumping Duty Administrative Review and New Shipper Review and Partial Rescission of Administrative Review*, 65 Fed. Reg. 48965, 48966 (10 August 2000) (Exhibit India-35); *Notice of Final Determination of Sales at Less Than Fair Value: Hot-Rolled Flat-Rolled Carbon-Quality Steel Products From the Russian Federation*, 64 Fed. Reg. 38626, 38629-30 (19 July 1999) (Exhibit India-35).

[62] First Written Submission of India at para. 52.

manded of interested parties by this provision is significant.[63] We are somewhat troubled by the implications of India's view of this provision, which might be understood to require that information which fails to satisfy the criteria of paragraph 3, and therefore need not be taken into account when determinations are made, must nonetheless "not be disregarded" if the party submitting it has acted to the best of its ability. We find it 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. This would seem to undermine the recognition that the investigating authority must be able to complete its investigation and must make determinations based to the extent possible on facts, the accuracy of which has been established to the authority's satisfaction.

7.65 However, if we understand paragraph 5 to emphasize the obligation on the investigating authority to cooperate with interested parties, and particularly to actively make efforts to use information submitted if the interested party has acted to the best of its ability, we believe that it does not undo the framework for use of information submitted and resort to facts available set out in the AD Agreement overall. Similarly, paragraph 5 can be understood to highlight that information that satisfies the requirements of paragraph 3, but which is not perfect, must nonetheless not be disregarded.

7.66 Applying these principles to this case, we consider that merely because USDOC concluded that certain of the information submitted by SAIL could be disregarded does not, without more, establish that USDOC was entitled to reject the US sales price information.

7.67 As discussed above, it may indeed be the case that a failure to provide one element of information undermines the usability of information that is submitted, making it unduly difficult to use the information submitted in making determinations. Critical to such a determination is the explanation by the investigating authority of its conclusion in this regard. A panel reviewing such a decision must be able to conclude that the investigating authority considered the relationship between the missing information and the information submitted, and concluded that in light of that relationship, the fact that one element of information was not submitted justified the conclusion that information submitted did not satisfy the criteria of paragraph 3 of Annex II.[64] There is no indication on the face of USDOC's determination, or the other information from the record submitted to us, to indicate how the problems with other data submitted, which led to its rejection, affected the US sales price information such that it failed to satisfy the criteria of paragraph 3.

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[63] Appellate Body Report, *US – Hot-Rolled Steel*, at para. 102.

[64] As there is no claim in this dispute regarding the adequacy of public notice under Article 12, we do not address that question. Rather, we are concerned here with the ability of a panel to discern the facts and rationale underlying the investigating authority's determination, in order to assess its consistency with the relevant obligations.

7.68 Before us, United States asserts that the US sales price information itself could not be verified or used without undue difficulties because part of the necessary data requested, concerning cost information for the product sold in the United states, was not submitted. The United States argues that in the absence of such information it would not be possible to ensure "apples to apples" comparisons in determining a dumping margin or to make adjustments for physical differences between the product sold in the home market and that sold for export to the United States. As a consequence, the United States argues that it would be unduly difficult to use the submitted US price information

7.69 It appears from the record information submitted that this aspect of cost information for the product sold in the United States is indeed missing from the questionnaire response submitted by SAIL. However, there is no indication at any point in the USDOC's determination, or in the other record information submitted to us, to suggest that the lack of this cost information was considered in assessing whether the US sales price information could be verified or used in the investigation without undue difficulty. The lack of cost of manufacture information for exported product is not even mentioned in the verification report, the determination of failure of verification, or in the final determination, as a problem with respect to the US sales price information.[65] Indeed, this appears to us to be a *post hoc* explanation, perhaps triggered by our own questions to the parties. Even assuming we were persuaded by the United States' arguments before us that USDOC could have made the decision posited, there is nothing in the record to indicate to us that it **did** make such a decision in this case.

7.70 The United States also argues that the US sales price information was properly rejected by USDOC because that information itself failed to satisfy the criteria of paragraph 3. Again, we do not see any evidence in the determination or in the record information submitted to us to indicate that such a determination was made by USDOC at the time.

7.71 The first criterion which must be satisfied for information to be taken into account under paragraph 3 is that the information is "verifiable". "Verifiable" is defined as "able to be verified or proved to be true."[66] To us, and the parties do not disagree, it seems clear that this entails that the accuracy and reliability of the information can be assessed by an objective process of examination.[67] Certainly,

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[65] It is undisputed that the cost information as a whole was problematic, but there is no indication of any direct linkage to the US sales price information.

[66] New Shorter Oxford English Dictionary, Clarendon Press, Oxford, 1993.

[67] While the parties have addressed this concept in terms of the "on the spot" verification process provided for in Article 6.7 and Annex I of the Agreement, we note that such verification is not in fact required by the AD Agreement. Thus, the use of the term in paragraph 3 of Annex II is somewhat unclear. However, Article 6.6 establishes a general requirement that, unless they are proceeding under Article 6.8 by relying on facts available, the authorities shall "satisfy themselves as to the accuracy supplied by interested parties upon which their findings are based". "Verify" is defined as "ascertain or test the accuracy or correctness of, esp. by examination of by comparison of data etc; check or establish by investigation". New Shorter Oxford English Dictionary, Clarendon Press, Oxford, 1993. Thus, even in the absence of on-the-spot verification, the authorities are, in a more general sense of assessing the accuracy of information relied upon, required to base their decisions on information which is "verified".

the US sales price information was capable of being verified. Indeed, the Verification Report itself suggests that, for the most part, the information as submitted was verified.[68] In this respect, we recall that, in line with paragraph 5 of Annex II, perfection is not the standard. Even USDOC indicated that the errors in the information were susceptible of correction. It was only "when combined with other pervasive flaws in SAIL's data", that USDOC considered these errors significant. Even then, the conclusion drawn was that "these errors support our conclusion that SAIL's data on the whole is unreliable.". USDOC considered that the fact that limited errors were found in the US sales price information did not indicate "underlying reliability of the SAIL's reporting, particularly when viewed in context the widespread problems encountered with all the other data in the questionnaire response."[69]

7.72 The second criterion of paragraph 3 requires that the information be "appropriately submitted so that it can be used in the investigation without undue difficulties." In our view, "appropriately" in this context has the sense of "suitable for, proper, fitting".[70] That is, the information is suitable for the use of the investigating authority in terms of its form, is submitted to the correct authorities, etc. More difficult is the requirement that the information can be "used without undue difficulties". "Undue" is defined as "going beyond what is warranted or natural, excessive, disproportionate".[71] Thus, "undue difficulties" are difficulties beyond what is otherwise the norm in an anti-dumping investigation. This recognizes that difficulties in using the information submitted in an anti-dumping investigation are not, in fact, unusual. This conclusion is hardly surprising, given that enterprises that become interested parties in an anti-dumping investigation and are asked to provide information are not likely to maintain their internal books and records in exactly the format and with precisely the items of information that are eventually requested in the course of an anti-dumping investigation. Thus, it is frequently necessary for parties submitting information to collect and organize raw data in a form that responds to the information request of the investigating authorities. Similarly, it is frequently necessary for the investigating authority to make adjustments of its own in order to be able to take into account information that does not fully comply with its request. This is part of the obligation on both sides to cooperate, recognized by the Appellate Body in the *US – Hot-Rolled Steel* case.

7.73 In discussing the obligation on interested parties to cooperate in the information gathering aspect of the investigation, the Appellate Body in *US – Hot-Rolled Steel*, noted that cooperation is a process, commenting that paragraphs 2 and 5 of Annex II of the AD Agreement reflect "a careful balance between the interest 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"

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[68] See Exhibit India-13.
[69] Determination of Verification Failure, Exhibit India-16, at 5.
[70] New Shorter Oxford English Dictionary, Clarendon Press, Oxford, 1993.
[71] *Ibid.*

However, the Appellate Body further commented that "cooperation is indeed a two-way process involving joint effort."[72] Thus, it seems clear to us that investigating authorities must undertake a degree of effort – some degree of "difficulty" – if needed to be able to use information submitted by an interested party. However, the investigating authorities are not required to undertake extreme measures – that is "undue" difficulties - in order to use information submitted, any more than the interested parties are required to undertake extreme measures to provide requested information.

7.74 In our view, it is not possible to determine in the abstract what "undue difficulties" might attach to an effort to use information submitted. We consider the question of whether information submitted can be used in the investigation "without undue difficulties" is a highly fact-specific issue. Thus, we consider that it is imperative that the investigating authority explain, as required by paragraph 6 of Annex II, the basis of a conclusion that information which is verifiable and timely submitted cannot be used in the investigation without undue difficulties.

7.75 In this context, we note that there is no explanation on the face of the USDOC determination to suggest that it was even considered, much less decided, whether the US sales price information could be used without undue difficulties to determine an export price. In this regard, India has submitted the affidavits of Mr. Albert Hayes in support of its view that the information submitted could have been corrected and sorted so as to make possible a determination of export price and allow an appropriate comparison of export price so determined, and normal value based on facts available (*i.e.,* the information in the application), without undue difficulty. It is undisputed that the US sales price information submitted by SAIL was not ideal. Some suggestions regarding how to correct the information submitted and alternative possibilities for calculating the dumping margin were proposed to USDOC, although not in precisely the manner suggested here. [73] The United States now argues that it would have required undue efforts to make the necessary corrections to the US sales price information submitted and even then there might not have been transactions that could serve as an appropriate match to the normal value information that was used. However, USDOC made absolutely no effort to try to use that information in making its determination of dumping margin. There is nothing in the record brought to our attention to suggest that USDOC even considered such a course of action. In the absence of any decision in this regard by USDOC, we consider it would be inappropriate for us to make our own judgement whether the methodologies proposed by India could have enabled USDOC to use the information submitted without undue difficulties in this investigation.

7.76 The third criterion of paragraph 3 requires that the information be supplied in a timely fashion. This requirement relates back to Article 6.8, which establishes that an investigating authority may resort to facts available if infor-

[72] Appellate Body Report, *US – Hot-Rolled Steel*, at paras. 102 and 104.
[73] First Written Submission of the United States at para. 170 and fn. 160.

mation is not provided "within a reasonable period".[74] That is, the "within a reasonable period" requirement of Article 6.8 and the "in a timely fashion" requirement of paragraph 3 of Annex II in our view are essentially the same. As a previous panel and the Appellate Body have recognized, anti-dumping investigations are subject to an overall time-limit, which necessitates that the investigating authority cannot be expected to continue to accept information indefinitely. What is a "within a reasonable period" or "in a timely fashion" will depend in each case on the facts and circumstances of that case. It is clear, however, that investigating authorities may not arbitrarily stick to pre-established deadlines as the basis of rejecting information as untimely.[75] There is no indication in the USDOC determination that the US sales price information was not submitted in a timely fashion.

7.77 The final criterion set out in paragraph 3 is that, where applicable, the information must be supplied in a medium or computer language requested by the authorities. This provision seems straightforward, and as it not in dispute in this case, we will not consider it further. We do note, however, that there is no reference in the final determination, or in other record evidence submitted to us, to suggest that USDOC concluded that, because of the technical problems with SAIL's electronic database of US sales price information, the information submitted failed to comply with this criterion of paragraph 3.

7.78 In our view, USDOC's final determination clearly demonstrates that certain of the information submitted by SAIL was found to be unverifiable, or not timely submitted, or to have other flaws which made it unduly difficult to use. However, no such conclusions are set forth with respect to the US sales price information. Indeed, throughout the investigation, it appears that the principal problems were with the information concerning SAIL's home market transactions and cost of production. The references to problems with respect to the US sales price information, to the extent they are mentioned, are treated as minor. Thus, it seems clear to us that USDOC did not in fact reject the US sales information based on the application of the criteria of paragraph 3 to that information, but rather on the basis of problems associated with other information submitted.

7.79 Thus, on the basis of the facts and explanations on the record before us, we consider that USDOC's decision rejecting the US sales price information submitted by SAIL lacked a valid basis under paragraph 3 of Annex II of the AD Agreement.. Therefore, we conclude that USDOC acted inconsistently with Article 6.8 and paragraph 3 of Annex II of the AD Agreement in concluding, with respect to US sales price information, that necessary information was not provided and relying entirely on facts available in determining the dumping margin applicable to SAIL.

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[74] See Appellate Body Report, *US – Hot-Rolled Steel*, at para. 83.

[75] Panel Report, *US – Hot-Rolled Steel*, at paras. 7.54-7.55, Appellate Body Report, *US – Hot-Rolled Steel*, at. paras. 73-74.

7.80 Having concluded that USDOC's decision to rely entirely on facts available was inconsistent with its obligations under the AD Agreement, we do not consider it necessary to address India's alternative claims.

3. Whether Sections 776(a), 782(d) and 782(e) of the Tariff Act of 1930, as Amended, are Inconsistent on their Face with Article 6.8 and Annex II of the AD Agreement

7.81 The next question we must consider is whether US law governing resort to facts available is on its face inconsistent with the requirements of the AD Agreement as we understand them. In this respect, India argues that US law requires resort to facts available in circumstances in which Article 6.8 and paragraph 3 of Annex II do not permit information submitted to be disregarded and determinations based on facts available instead. The United States, focusing on the use of the word "may" in the statue, maintains that US law does not oblige USDOC to act inconsistently with the United States' obligation under the AD Agreement.

7.82 India argues that the statutory provisions governing the USDOC's consideration of facts available, specifically sections 776(a), 782(d) and 782(e) of the Tariff Act of 1930, as amended, are inconsistent with the AD Agreement on their face. India asserts that sections 776(a) and 782(e) are mandatory provisions that when read together mandate a violation of GATT/WTO obligations and prohibit WTO-consistent treatment of information submitted during an AD investigation.

7.83 India asserts that Sections 782(e) and 776(a), in combination, **require** USDOC to reject verified, timely submitted information that can be used without undue difficulties, **unless**, pursuant to section 782(e)(3), USDOC finds that the information is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination, **and**, pursuant to section 782(e)(4), that the interested party has acted to the best of its ability in providing the information. India submits that neither of these latter two conditions is found in paragraph 3 of Annex II of the AD Agreement. In India's view, paragraph 3 of Annex II establishes an exclusive set of conditions for determining whether information submitted by interested parties may be rejected by investigating authorities. If those conditions of paragraph 3 of Annex II are satisfied for a particular category or set of information, then, India argues, that category or set of information must be accepted by the investigating authority and used in the calculation of the dumping margin.

7.84 India argues that the US statutory provisions impermissibly merge the requirements of paragraphs 3 and 5 of Annex II by requiring the rejection of a category of information which satisfies the criteria of paragraph 3 based on a finding that the respondent has failed to act to the best of its ability in providing some **other** information in some other category. India also criticises Section 782(d), which India asserts mandates the use of facts available if USDOC finds that some other or supplemental submission is not satisfactory, or if the submis-

sion was not made by the deadline set for it, and in addition permits USDOC to disregard all or part of the original response.

7.85 The United States argues that India's claims are based on a misunderstanding of the relevant provisions of US law. The United States argues that, as interpreted by the USDOC and the US courts, section 776(a) only requires the use of facts available in circumstances where it is permissible to do so under Article 6.8. The United States further argues that the conditions in section 782(e) do not expand the extent to which USDOC must, or even may, use facts available, beyond what is authorized by Article 6.8.

7.86 The United States asserts that section 776(a) of the Act does not mandate WTO inconsistent action because it only requires the use of facts available in circumstances that Article 6.8 permits. Moreover, the United States asserts that section 782(d) provides discretion to reject information submitted, subject to the consideration of the requirements of section 782(e). The United States argues that there is nothing in the latter provision that requires the rejection of information provided by an interested party. Thus, in the US view, it cannot be viewed as mandating action that would be inconsistent with Article 6.8 and Annex II. The United States asserts that the use of the discretionary "may" throughout the USDOC regulations implementing section 776(a), 782(d), 782(e) of the Act supports the conclusion that the statutory provisions are not mandatory in nature and thus do not violate the United States' WTO obligations.

7.87 The United States submits that merely because the third condition of section 782(e), that the information not be "so incomplete that it cannot serve as a reliable basis for reaching the applicable determination," does not appear in paragraph 3 of Annex II does not mean that section 782(e) mandates WTO inconsistent action. The United States maintains that section 782(e) directs the USDOC to exercise the discretion provided for in paragraphs 3 and 5 of Annex II in a particular way, and **not** reject information if it meets the criterion set out in section 782(e). The United States asserts that GATT and WTO jurisprudence establish that a statutory provision will only be found to violate the Member's obligations on its face if the legislation **mandates** actions inconsistent with the Member's obligations or precludes actions that are consistent with those obligations. The United States adds that if the legislation provides discretion to administrative authorities to act in a WTO-consistent manner, the legislation as such does not violate a member's WTO obligations.

7.88 Before considering the consistency of US law with the AD Agreement, we consider it important to address an underlying question. A number of Panels have held that a municipal statute will be found to be inconsistent on its face with a Member's WTO obligations only if it is mandatory and requires WTO inconsistent action or prohibits WTO consistent action.[76] This was consistently

[76] For example, the Panel, in *US – Section 301 Trade Act*, recognized the "classical test in the pre-existing jurisprudence that only legislation mandating a WTO inconsistency or precluding WTO consistency, could, as such, violate WTO provisions". Panel Report, *US – Section 301 Trade Act*, at para. 7.54

the finding of Panels under the GATT 1947, and has been followed by WTO panels. The Appellate Body has recognized the distinction, but has not specifically ruled that it is determinative in consideration of whether a statute is inconsistent with relevant WTO obligations. However, it did recently state, in *United States – Anti-Dumping Act of 1916* :

> "88. As indicated above, the concept of mandatory as distinguished from discretionary legislation was developed by a number of GATT panels as a threshold consideration in determining when legislation as such – rather than a specific application of that legislation – was inconsistent with a Contracting Party's GATT 1947 obligations. The practice of GATT panels was summed up in *United States – Tobacco* as follows:
>
> > … panels had consistently ruled that legislation which mandated action inconsistent with the General Agreement could be challenged as such, whereas legislation which merely gave the discretion to the *executive authority* of a contracting party to act inconsistently with the General Agreement could not be challenged as such; only the actual application of such legislation inconsistent with the General Agreement could be subject to challenge. (emphasis added)
>
> 89. Thus, the relevant discretion, for purposes of distinguishing between mandatory and discretionary legislation, is a discretion vested in the *executive branch* of government". (footnotes omitted)[77]

7.89 We therefore consider that the question before us is whether the US statutory provisions in question **require** USDOC to take action which contravenes the US obligations under the WTO AD Agreement. Indeed, the parties do not disagree with this formulation of the issue.[78]

7.90 In this regard, we keep in mind that it is a well accepted principle of international law that for the purposes of international adjudication national law is to be considered as a fact.[79] Our analysis of the consistency of the US statute with the AD Agreement takes into account, therefore, the principles of statutory interpretation applied by the administering agency and judicial authorities of the United States.

7.91 The provisions of US law challenged by India are set out below:

> "Section 776 - DETERMINATIONS ON THE BASIS OF THE FACTS AVAILABLE.

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[77] Appellate Body Report, *US – 1916 Act*, at paras. 88 - 89.

[78] First Written Submission of India at para. 141; First Written Submission of the United States at paras. 116-118.

[79] *Certain German Interests in Polish Upper Silesia*, 1926, PCIJ Rep., Series A, No. 7, p.19; See also Panel Report, *US – Section 301 Trade Act*, at para. 7.18.

(a) IN GENERAL. - If -

(1) necessary information is not available on the record, or

(2) an interested party or any other person-

(A) withholds information that has been requested by the administering authority or the Commission under this title,

(B) fails to provide such information by the deadlines for submission of the information or in the form and manner requested, subject to subsections (c)(1) and (e) of Section 782,

(C) significantly impedes a proceeding under this title, or

(D) provides such information but the information cannot be verified as provided in Section 782(i),

the administering authority and the Commission shall, subject to Section 782(d), use the facts otherwise available in reaching the applicable determination under this title."

Subsections (b) and (c) of section 776, which are not at issue in this dispute, provide respectively for the application of adverse inferences, and for the corroboration of secondary information.

"Section 782 - CONDUCT OF INVESTIGATIONS AND ADMINISTRATIVE REVIEWS.

(d) DEFICIENT SUBMISSIONS. - If the administering authority or the Commission determines that a response to a request for information under this title does not comply with the request, the administering authority or the Commission (as the case may be) shall promptly inform the person submitting the response of the nature of the deficiency and shall, to the extent practicable provide that person with an opportunity to remedy or explain the deficiency in light of the time-limits established for the completion of the investigations or reviews under this title. If that person submits further information in response to such deficiency and either -

(1) the administering authority or the Commission (as the case may be) finds that such response is not satisfactory, or

(2) such response is not submitted within the applicable time limits,

then the administering authority or the Commission (as the case may be) may, subject to subsection (e), disregard all or part of the original and subsequent responses.

> (e) USE OF CERTAIN INFORMATION. - In reaching a determination under Section 703, 705, 733, 735, 751, or 753 [preliminary and final determinations, administrative review of determinations, and special rules for injury investigations for certain section 303 countervailing duty orders and investigations] the administering authority and the Commission shall not decline to consider information that is submitted by an interested party and is necessary to the determination but does not meet all the applicable requirements established by the administering authority or the Commission, if -
>
> (1) the information is submitted by the deadline established for its submission,
>
> (2) the information can be verified,
>
> (3) the information is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination,
>
> (4) the interested party has demonstrated that it acted to the best of its ability in providing the information and meeting the requirements established by the administering authority or the Commission with respect to the information, and
>
> (5) the information can be used without undue difficulties."

Subsections (a), (b), (c), (f), (g), (h), and (i) of Section 782 are not at issue in this dispute. Those provisions govern the treatment of voluntary responses, certification of submissions, difficulties in meeting requirements, non-acceptance of submissions, public comment on information, and termination of investigation for lack of interest, respectively.

7.92 In resolving the issue of the consistency of the above provisions with the requirements of the AD Agreement, we consider whether they require resort to facts available in circumstances other than the circumstances in which Article 6.8 and paragraph 3 of Annex II permit resort to facts available. In this regard, we must consider whether, as India asserts, USDOC is **required** to reject information that is provided, consistent with Article 6.8 and paragraph 3 of Annex II, because other necessary information is not provided. An important aspect of our evaluation is the fact that India itself acknowledges that the relevant US statutory provisions **could** be interpreted to allow consideration of "categories" of information submitted by a party in a situation where other information submitted by that party is rejected and facts available are used instead.[80] Indeed, there seems to be no dispute that US law allows for use of "partial" facts available.[81] India ar-

[80] First Written Submission of India at para 140.

[81] USDOC frequently relies on facts available with respect to some element of information that is not submitted by a party. See, e.g., cases cited at note 61. For instance, in the investigation underlying *US - Hot-Rolled Steel*, the missing information was a conversion factor necessary to allow calcu-

gues, however, that USDOC and the US courts have consistently interpreted the statutory provisions to require resort to total facts available in circumstances where India considers that, under paragraph 3 of Annex II, the information submitted must be accepted, and thus resort to facts available is precluded.

7.93 A straightforward reading of the US statutory provisions at issue leads us to conclude that US law is not mandatory in the sense that India posits. Our reading of US law, in light of the decisions of USDOC and the US courts that have been submitted to us, leads us to conclude that while US law **permits** a decision on the application of facts available that is inconsistent with the United States' obligations under Article 6.8 and paragraph 3 of Annex II of the AD Agreement, it does not **require** such a decision in any case.[82] Therefore we consider that US law is not inconsistent on its face with Article 6.8 and paragraph 3 of Annex II of the AD Agreement.

7.94 Section 776(a) of the US statute requires USDOC to resort to facts available "subject to section 782(d)" in certain circumstances. Those circumstances track the conditions for resort to facts available set out in Article 6.8 and Annex II –indeed, India does not appear to consider otherwise, as it does not argue that section 776(a) mandates inconsistent action standing alone. Thus, section 776(a) of the statute does not requires USDOC to resort to facts available in a manner inconsistent with Article 6.8.

7.95 India argues, however, that when section 776(a) is read in combination with sections 782(d) and (e), the result is to require USDOC to reject information in an manner inconsistent with paragraph 3, because the statute requires criteria additional to those in paragraph 3 to be satisfied before information can be considered by USDOC. Looking at section 782(d), we note first that it provides that, in certain circumstances, the USDOC **may** resort to facts available. Thus, on its face, this provision is discretionary, and does not require the US authorities to reject information and resort to facts available in any circumstances, and certainly not in a manner inconsistent with Article 6.8. Finally, section 782(e) requires the US authorities to consider information, submitted by a party, that might otherwise be rejected under section 776(a), if the conditions in section 782(e) are satisfied with respect to that information. Contrary to India's argument, we do not understand this provision to require the US authorities to reject information that does not satisfy the conditions of section 782(e). Rather, we understand section 782(e) to **limit** the US authorities' discretion to reject information under section 782(d). That is, our reading of these provisions, taken together, is that if information does not satisfy the conditions of section 782(e), then the US authorities may, **but are not required to**, disregard that information under section 782(d). Thus, the issue is not one of the US law requiring action

lation of dumping margins on a consistent weight basis. The failure of some parties to submit such a conversion factor led USDOC to rely on facts available only with respect to the calculation of a dumping margin for those sales affected by the conversion factor – for other aspects of the calculation, the information actually submitted was used.

[82] Indeed, we have found above that the USDOC decision in this case was in fact inconsistent with the requirements of Article 6.8 and Annex II.

inconsistent with the AD Agreement, but whether the application of that law in a particular case results in a decision inconsistent with the AD Agreement. A decision in a particular case to exercise the discretion afforded by the statute and disregard information, basing determinations instead on facts available, may, or may not, be consistent with Article 6.8 of the AD Agreement.

7.96 India however points to US practice as demonstrating that the US statute mandates decisions by the US authorities on whether to rely on facts available that are inconsistent with Article 6.8. India notes that USDOC decisions applying "total facts available" state that US law "requires" that result, and that the USCIT has affirmed such decisions. However, our review of the cases submitted by both parties on this point indicates that US "practice" is not determinative, or even particularly useful, in assisting our understanding of the requirements of US law. The USDOC has certainly in a number of cases resorted to "total facts available", stating that it is "required" to do so under US law. However, it appears to us that these decisions reflect the exercise of the discretion afforded the US authorities by section 782(d) of the statute. That is, in some cases, USDOC has concluded that the information submitted does not satisfy the criteria of section 782(e), and rejected it, while in others it has concluded that the information submitted met the criteria of section 782(e), and used it in making its determination. It is true that in no case cited to us has USDOC exercised the discretion afforded by section 782(d) to consider information that fails to satisfy the criteria of section 782(e). That USDOC has not done so does not alter our the conclusion that the terms of the statute itself authorize it to do so, by using the word "may" in section 782(d). It merely indicates that USDOC has not chosen to exercise the full range of its discretion.

7.97 Similarly, the fact the US courts have on numerous occasions (including on review of the USDOC decision challenged here) affirmed the decision of the USDOC to resort to facts available as based on a "reasonable construction of the statute" and "supported by substantial evidence" in our view reflects the degree of deference afforded USDOC under the standard of review applicable in US judicial review of determinations in anti-dumping investigations. Indeed, India notes that "The result of the litigation was largely dictated by the standard of review imposed by U.S. law on CIT reviews of determinations by USDOC".[83] Thus, it appears to us the US courts have approved, as "reasonable" under the governing statute, USDOC's decisions not exercise the full range of its discretion to accept information submitted by parties. We do not read these cases, however, as concluding that US law requires USDOC to reject information in circumstances where it might, in the exercise of the full range of its discretion, have decided to accept information. That is, while the US courts have interpreted US law as permitting USDOC's policy of applying total facts available in certain circumstances, our view is that they have not concluded that such an interpretation and the resulting policy are required.

[83] First Written Submission of India at para. 43.

7.98 In the appeal of USDOC's decision in this case, SAIL raised arguments concerning the interpretation of US law similar to the arguments made before us concerning Article 6.8 regarding the requirement to accept "categories" of information which satisfy the criteria of paragraph 3 of Annex II. Specifically, SAIL argued in the US Court of International Trade that section 782(e) required USDOC to consider "categories" of information that satisfied the criteria of that provision. The USCIT found that section 782(e)'s reference to "information submitted"

> "does not indicate whether the term "information submitted" refers to a specific category of information, as argued by SAIL, or all the information submitted by the interested party, as argued by the Department. Moreover, neither the legislative history of the statute nor the Statement of Administrative Action ("SAA") accompanying the Uruguay Round Agreements Act further clarifies Congress's intent regarding "information submitted." As a result, there is no clear statutory directive as to when the Department must use partial facts available. *See Heveafil Sdn. Bhd v. United States*, 25 CIT ___, ___, slip-op. 01-22 at 9 (Feb. 27, 2001). The statute is, therefore ambiguous on this issue.
>
> As the statute is unclear, the question for the court is whether the agency's interpretation of the statute is "reasonable in light of the language, policies and legislative history of the Statute." *Corning Glass Works vs. United States Int'l Trade Comm'n*, 799 F2d 1559, 1565 (Fed. Cir. 1986)(emphasis omitted)(discussing general statutory interpretation)."[84]

The Court went on to conclude that USDOC's interpretation of the statute was reasonable. To us, this is very different from the Court concluding that the statute must be interpreted as USDOC did.

7.99 The other cases cited lead us to the same conclusion. Thus, it seems clear that the USCIT has approved the USDOC's interpretation of its governing law, and the exercise of its discretion under that law, in particular cases. However, in none of the cases cited to us did the USCIT conclude that USDOC was required under US law to apply total facts available and therefore reject information submitted. To us, a decision by the US court approving an action of USDOC as not inconsistent with US law is significantly different from a decision that US law required the particular action. In the first case, the action approved of under US law may or may not be consistent with US obligations under the WTO Agreement. However, even if in a particular case the action is found inconsistent with US obligations, this does not entail, *ipso facto*, that the statute on which that action was based is itself inconsistent with the WTO Agreement in question.

7.100 Based on the foregoing discussion, we conclude that sections 776(a), 782(d), and 782(e), of the Tariff Act of 1930, as amended, are not, on their face,

[84] *Steel Authority of India, Ltd. v. United States*, Slip Op. 01-60, US Court of International Trade, 22 May 2001, at pp. 10-11, Exhibit India-20.

inconsistent with the United States' obligations under Articles 6.8 and paragraph 3 of Annex II of the AD Agreement.

4. Whether the Final Measure is Inconsistent with Articles 2.2, 2.4, and 9.3 of the AD Agreement and Articles VI:1 and VI:2 of GATT 1994

7.101 India argues that because USDOC did not use the US sales price information submitted by SAIL, the final dumping margin was not based on a fair comparison between SAIL's export price and normal value as required by Article 2.4 of the AD Agreement. India goes on to assert that because the anti-dumping margin was determined incorrectly, in violation of Article 2.4, USDOC also violated Article 9.3, which provides that "the amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2." Finally, India asserts that this failure to perform a fair comparison also constituted a violation of Article VI:1 of the GATT 1994, and consequently a violation of Article VI:2 of GATT 1994, which provides that a Member may only "levy on any dumped product an anti-dumping duty not greater in amount than the margin of dumping in respect of such product" and defines the margin of dumping as the price difference determined in accordance with Article VI:1.

7.102 The United States argues that these allegations are dependent upon India succeeding on its primary argument that USDOC acted inconsistently with the AD Agreement in relying on facts available. In the United States view, as India's claims based on Article 6.8 and Annex II of the AD Agreement are misplaced, accordingly India's claims under Articles 2.2, 2.4, and 9.3 of the AD Agreement, and Article VI:1 and 2 of GATT 1994 must likewise fail.

7.103 We have concluded above that USDOC acted inconsistently with Article 6.8 in conjunction with paragraph 3 of Annex II of the AD Agreement, in rejecting the US sales price information submitted by SAIL and instead basing its determination entirely on facts available in this case. We consider it unnecessary to determine, in addition, whether the circumstances of the violation of Article 6.8 also constitute a violation of Article 2.4, Article 9.3, and Articles VI:1 and 2 of GATT 1994. Findings on these claims would serve no useful purpose, as they would neither assist the Member found to be in violation of its obligations to implement the ruling of the Panel, nor would they add to the overall understanding of the obligations found to have been violated. We therefore decline to rule on India's claims under Articles 2.2, 2.4, and 9.3 of the AD Agreement, and Article VI:1 and 2 of GATT.

5. Whether USDOC Acted Inconsistently with Article 15 of the AD Agreement

7.104 India argues that USDOC violated the first sentence of Article 15 of the AD Agreement by failing to give special regard to India's status as a developing country when considering the application of AD duties. India considers that the nature of the "special regard" will vary from case to case, but must at least in-

volve some extra consideration of the arguments of respondents in developing countries. In this case, India maintains that USDOC should have given "special regard" to the special situation of SAIL as a developing country respondent when making choices in connection with calculating the final dumping margin, rather than treating SAIL the same as any other exporter. India also maintains that Article 15 requires an investigating authority to articulate in its final determination how special regard was exercised.

7.105 India asserts that the United States violated the second sentence of Article 15 of the AD Agreement by failing to explore the possibilities of constructive remedies provided for the Agreement before applying the duties in this case. India asserts that SAIL filed a proposal for a suspension agreement (the equivalent in US practice of a price undertaking) with USDOC on 30 July 1999, and that USDOC made no written response to this proposal. India asserts that USDOC officials orally stated that they would not discuss a suspension agreement because the US steel industry and US Congress would oppose any such agreement. India maintains that SAIL was treated no differently than developed country exporters would have been in this regard.

7.106 The United States argues that the first sentence of Article 15 does not impose any specific legal obligations on developed country Members. It does not create an obligation to impose undertakings in lieu of final anti-dumping measures, and it does not require developed country Members to impose anti-dumping duties less than the margin of dumping. It also does not create an obligation to use different calculation methodologies for determining dumping margins depending on whether the imports at issue originate in a developed country Member or a developing country Member.

7.107 The United States considers that the second sentence of Article 15 obligates a developed country Members to explore the possibilities of constructive remedies under the AD Agreement before applying a final anti-dumping duty. However, the United States maintains that there is no obligation to **accept** any such remedies in lieu of imposing a final anti-dumping measure. The United States also considers that the obligation is only to explore possible **remedies** other than the imposition of a final anti-dumping measure – it does not require the consideration of alternative methodologies for calculating dumping margins. Finally, the United States considers that the obligation to explore constructive remedies only arises in a particular case if the application of an AD duty "would affect the essential interests" of developing country Member at issue. In the United States' view, the developing country Member seeking the application of Article 15 must first demonstrate that some essential interest is implicated in the case that would be affected by the application of an anti-dumping measure. The United States asserts that there is no indication that SAIL or India ever suggested that applying an anti-dumping measure would affect India's essential interests. In the absence of any demonstration that India's essential interests would be affected by the application of AD duties, the USDOC was under no obligation to even explore the possibilities of constructive remedies.

7.108 Notwithstanding its position that the developing country concerned must first demonstrate that application of an anti-dumping duty would affect its essential interests, the United States maintains that USDOC did, in fact, explore the possibilities of constructive remedies in this case. The United States refers to the letter from SAIL proposing a suspension agreement, and notes that SAIL was invited to attend, and did attend, a meeting with USDOC officials to discuss the possibility. According to the United States,[85] while USDOC indicated at that meeting that SAIL's proposal would be considered, USDOC officials also pointed out that suspension agreements are rare, and require special circumstances that might not exist in this instance. The United States considers that this satisfied the obligation to explore possibilities of constructive remedies, and demonstrates that USDOC did not have a closed mind on the possibility, but simply rejected the proposed suspension agreement, as it was entitled to do. The United States maintains that there is no obligation under Article 15 to provide a written response to the suggestion of a suspension agreement

7.109 Article 15 provides:

> "It is recognized that special regard must be given by developed country Members to the special situation of developing country Members when considering the application of anti-dumping measures under this Agreement. Possibilities of constructive remedies provided for by this Agreement shall be explored before applying anti-dumping duties where they would affect the essential interests of developing country Members."

7.110 With respect to the first sentence of Article 15, we note that India acknowledges that "there are no specific legal requirements for specific action set out in the first sentence of Article 15." However, India considers that "this mandatory provision does create a general obligation, the precise parameters of which are to be determined based on the facts and circumstances of the particular case."[86] We agree with India that there are no specific requirements for specific actions to be taken set out in the first sentence of Article 15. In light of this, we cannot agree with India's conclusion that nonetheless, some general obligation to act exists, but what action will satisfy the obligation can only be determined based on the facts and circumstances of a particular case. Members cannot be expected to comply with an obligation whose parameters are entirely undefined. In our view, the first sentence of Article 15 imposes no specific or general obligation on Members to undertake any particular action.[87]

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[85] Exhibit US-21, memorandum to file regarding meeting with SAIL representatives on 31 August 1999.

[86] Answers of India to Questions of the Panel - First Meeting, question 25, at para 36.

[87] In this regard, we note the decision of the GATT Panel that considered similar arguments in the *EEC-Cotton Yarn* dispute. That Panel, in considering Article 13 of the Tokyo Round Agreement, which is substantively identical to it successor, Article 15 of the AD Agreement, stated:

> "582. … The Panel was of the view that Article 13 should be interpreted as a whole. In the view of the Panel, assuming *arguendo* that an obligation was imposed by the first sentence of Article 13, **its wording contained no operative language delineating the extent of the obligation**. Such language was only to be found in

7.111 Moreover, India's arguments as to when and to whom this "special regard" must be given disregard the text of Article 15 itself. Thus, the suggestion that special regard must be given throughout the course of the investigation, for instance in deciding whether to apply facts available, ignores that Article 15 only requires special regard "when considering the application of anti-dumping measures under this Agreement". In our view, the phrase "when considering the application of anti-dumping measures under this Agreement" refers to the final decision whether to apply a final measure, and not intermediate decisions concerning such matters as investigative procedures and choices of methodology during the course of the investigation. Finally, India's argument focuses on the exporter, arguing that special regard must be given in considering aspects of the investigation relevant to developing country exporters involved in the case. However, Article 15 requires that special regard must be given "to the special situation of developing country **Members**". We do not read this as referring to the situation of companies operating in developing countries. Simply because a company is operating in a developing country does not mean that it somehow shares the "special situation" of the developing country Member.

7.112 With respect to the second sentence of Article 15, we note that it requires exploration of possibilities of "constructive remedies" provided for by the AD Agreement.[88] The Panel in *EC – Bed Linen*,[89] considered this language in the following terms:

> ""Remedy" is defined as, *inter alia*, "a means of counteracting or removing something undesirable; redress, relief".[86] "Constructive" is defined as "tending to construct or build up something non-material; contributing helpfully, not destructive".[87] The term "constructive remedies" might consequently be understood as helpful means of counteracting the effect of injurious dumping. However, the term as used in Article 15 is limited to constructive remedies "provided for under this Agreement". … In our view, Article 15 refers to "remedies" in respect of injurious dumping."

[86] The New Shorter Oxford English Dictionary, Clarendon Press, Oxford, 1993.

[87] Id.

> the second sentence of Article 13 whereby it is stipulated that "possibilities of constructive remedies provided for by this Code shall be explored before applying anti-dumping duties where they would affect the essential interests of developing countries"."

Panel Report, *European Economic Community – Imposition of Anti-Dumping Duties on Imports of Cotton Yarn from Brazil* ("*EEC – Cotton Yarn*"), adopted 30 October 1995, BISD 42S/17, para. 582 (emphasis added).

[88] Interestingly, while the first sentence of Article 15 imposes an obligation on developed countries to give "special regard" to the situation of developing country Members, the second sentence of Article 15 is not so limited.

[89] Panel Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India* ("*EC – Bed Linen*"), WT/DS141/R, adopted 12 March 2001, as modified in other respects by the Appellate Body Report, DSR 2001:VI, 2077, para. 6.228.

We agree with this understanding. Applying it in the circumstances of this case, we consider that the possibility of applying different choices of methodology is not a "remedy" of any sort under the AD Agreement. Consequently, we do not consider that Article 15 imposes any obligation to consider different choices of methodology for the investigation and calculation of anti-dumping margins in the case of developing country Members.

7.113 We turn next to the question of what is meant by the requirement to "explore" possibilities of constructive remedies. India argues that this obligation entails a requirement to "articulate the basis for the decision made regarding the offered suspension agreement." We cannot agree. As the *EC - Bed Linen* Panel noted, the term "explore" "is defined, inter alia, as "investigate; examine, scrutinise"".[90] While it would be useful to have a written record of the result of the "exploration", we see nothing in Article 15 to require such a record. In this regard, we note that India made no claim under Article 12 of the AD Agreement, concerning the adequacy of the USDOC notice of its final determination. Similarly, there is no claim under Article 8.3 of the AD Agreement, which requires that the investigating authorities must "provide to the exporter the reasons which have led them to consider acceptance of an undertaking as inappropriate". Moreover, we note that there is, in the file, a document which memorialises the meeting held between SAIL representatives and officials of USDOC at which the possibility of a suspension agreement was raised. As there is no claim here under Articles 8.3 or 12, we do not here consider whether the internal memorandum of USDOC would satisfy the requirements of those provisions. We merely note that the document, the accuracy of which is unchallenged, supports the United States' position that consideration was given to the undertaking proposed by SAIL.

7.114 In our view, the concept of "explore" cannot be understood to require any particular outcome, either with respect to the substantive decision that results from the exploration, or with respect to any record of that exploration of the resulting decision. We note in this regard the statement of the *Bed Linen* Panel that "the concept of "explore" clearly does not imply any particular outcome." The *Bed Linen* Panel went on to state:

> "Article 15 does not require that "constructive remedies" must be explored, but rather that the "possibilities" of such remedies must be explored, which further suggests that the exploration may conclude that no possibilities exist, or that no constructive remedies are possible, in the particular circumstances of a given case. Taken in its context, however, and in light of the object and purpose of Article 15, we do consider that the "exploration" of possibilities must be actively undertaken by the developed country authorities with a willingness to reach a positive outcome. Thus, in our view, Article 15 imposes no obligation to actually provide or accept any constructive remedy that may be identified and/or offered.[92] It does, however, impose an obligation to actively consider, with an

[90] The New Shorter Oxford English Dictionary, Clarendon Press, Oxford, 1993.

open mind, the possibility of such a remedy prior to imposition of an anti-dumping measure that would affect the essential interests of a developing country.

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[92] We note that our interpretation of Article 15 in this regard is consistent with that of a GATT Panel which considered the predecessor of that provision, Article 13 of the Tokyo Round Anti-Dumping Code, which provision is substantively identical to present Article 15. That Panel found:

> "The Panel noted that if the application of anti-dumping measures "would affect the essential interests of developing countries", the obligation that then arose was to explore the "possibilities" of "constructive remedies". **It was clear from the words "[p]ossibilities" and "explored" that the investigating authorities were not required to adopt constructive remedies merely because they were proposed.**" *EC - Imposition of Anti-Dumping Duties on Imports of Cotton Yarn from Brazil*, Panel Report, ADP/137, adopted 30 October 1995, para. 584 (emphasis added)."

7.115 In this case, it is clear to us that possibilities of constructive remedies were in fact explored, but that no constructive remedy was applied. The United States asserts, and India acknowledges, that a meeting was held at which SAIL's proposal of a suspension agreement was discussed, and that US officials indicated at that meeting that it was unlikely that a suspension agreement would be accepted. In the end, there were no further discussions of a suspension agreement, and no such agreement was entered into. In our view, while this is a clearly unsatisfactory result from SAIL's, and India's, point of view, this course of action by USDOC was sufficient to satisfy the requirements of the second sentence of Article 15.

7.116 India suggests that the USDOC should have considered applying a lesser duty in this case, despite the fact that US law does not provide for application of a lesser duty in any case. We note that consideration and application of a lesser duty is deemed desirable by Article 9.1 of the AD Agreement, but is not mandatory. Therefore, a Member is not obligated to have the possibility of a lesser duty in its domestic legislation. We do not consider that the second sentence of Article 15 can be understood to require a Member to consider an action that is not required by the WTO Agreement and is not provided for under its own municipal law.

7.117 On the basis of the foregoing discussion, we conclude that the United States did not act inconsistently with Article 15 of the AD Agreement.

7.118 We note, incidentally, the Ministerial Decision on Implementation-Related Concerns, which states, at paragraph 7.2, that Ministers recognize

> "that, while Article 15 of the Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 is

> a mandatory provision, the modalities for its application would benefit from clarification. Accordingly, the Committee on Anti-Dumping Practices is instructed, through its working group on Implementation, to examine this issue and to draw up appropriate recommendations within twelve months on how to operationalize this provision."[91]

Members of the WTO are at present engaged in a process of discussions in response to this Ministerial Decision.

VIII. CONCLUSIONS AND RECOMMENDATION

8.1 In light of the findings above, we conclude that the United States acted inconsistently with Article 6.8 and paragraph 3 of Annex II of the AD Agreement in refusing to take into account US sales price information submitted by SAIL without a legally sufficient justification and making its determination regarding the dumping margin for SAIL entirely on the basis of facts available in the anti-dumping investigation at issue in this dispute.

8.2 In light of the findings above, we further conclude:

(a) that the United States statutory provisions governing the use of facts available, sections 776(a) and 782(d) and (e) of the Tariff Act of 1930, as amended, are not inconsistent with Articles 6.8 and paragraphs 3, 5, and 7 of Annex II of the AD Agreement.

(b) that the United States did not act inconsistently with Article 15 of the AD Agreement with respect to India in the anti-dumping investigation underlying this dispute.

8.3 We have also concluded that the "practice" of the USDOC concerning the application of "total facts available" is not a measure which can give rise to an independent claim of violation of the AD Agreement, and have therefore not ruled on India's claim in this regard.

8.4 With respect to those of India's claims not addressed above we have concluded that:

(a) we will not rule on India's abandoned claim; and

(b) in light of considerations of judicial economy, it is neither necessary nor appropriate to make findings with respect to the remainder of India's claims.

8.5 Under Article 3.8 of the DSU, in cases where there is infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment of benefits under that agreement. Accordingly, we conclude that to the extent the United States has acted inconsistently with the provisions of the AD Agreement, it has nullified or impaired benefits accruing to India under that Agreement.

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[91] Decision of 14 November 2001, WT/MIN(01)/17 (20 November 2001).

8.6 We therefore recommend that the Dispute Settlement Body request the United States to bring its measure into conformity with its obligations under the AD Agreement.

8.7 India requests that we exercise our discretion under Article 19.1 of the DSU to suggest ways in which the United States could implement our recommendation. Specifically, India considers that we should "suggest that the United States recalculate the dumping margins by taking into account SAIL's verified, timely submitted and usable U.S. sales data, and also, if appropriate, revoke the final anti-dumping order".[92]

8.8 Article 19.1 of the DSU provides that:

> "In addition to its recommendations, the panel or Appellate Body may suggest ways in which the Member concerned could implement the recommendations".

While we are free to suggest ways in which we believe the United States could appropriately implement our recommendation, we decide not to do so in this case. We have found that the United States failed to act consistently with the requirements of the AD Agreement in refusing to take into account US sales price information submitted by SAIL without a legally sufficient justification and basing its determination of a dumping margin for SAIL in this case on total facts available, and have recommended that the United States bring its measure into conformity with its obligations. In this regard, we note Article 21.3 of the DSU, which provides:

> "At a DSB meeting held within 30 days after the date of adoption of the panel or Appellate Body report, the Member concerned shall inform the DSB of its intentions in respect of implementation of the recommendations and rulings of the DSB". (footnote omitted).

Thus, while a panel may suggest ways of implementing its recommendation, the choice of means of implementation is decided, in the first instance, by the Member concerned. In this case, we see no particular need to suggest a means of implementation, and therefore decline to do so.

[92] First Written Submission of India at para 181.

ANNEX A
First Submissions by the Parties

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ANNEX A-1
FIRST WRITTEN SUBMISSION OF INDIA
(19 November 2001)

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

1. On 16 March 1999, the United States Department of Commerce (USDOC) initiated anti-dumping proceedings against imports of cut-to-length carbon-quality steel plate (cut-to-length plate) from India. USDOC followed this initiation with an anti-dumping investigation, culminating in a final anti-dumping determination and an anti-dumping order published on 10 February 2000. The only Indian respondent was the Steel Authority of India, Ltd. (SAIL).

During the investigation, SAIL made strenuous efforts to comply with the documentary and informational demands of USDOC, in particular with respect to data on SAIL's US sales. SAIL's US sales data[1] were timely, verifiable and appropriately submitted, but nevertheless were rejected by USDOC. Reacting to problems found with separately submitted information relating to other facts (SAIL's home market sales and cost of production), USDOC unilaterally decided that SAIL had failed to cooperate. It then decided to reject *all* information submitted by SAIL and instead have recourse to "total facts available"– thus arbitrarily assigning to SAIL the highest dumping margin alleged by the petitioner, 72.49 per cent.

2. The result was predictable. In a rebuff to India's attempts to make use of market access opportunities provided by the Uruguay Round, these anti-dumping duties have effectively eliminated the largest export market for Indian cut-to-length plate in the world. Indian exports of cut-to-length plate to the US market have entirely ceased.

3. The arbitrary and unfair character of this US anti-dumping investigation, described at greater length below, will be obvious to the Panel. India has brought this complaint because the application of facts available in this case, as well as the statutory provisions that provided for this application of facts available, violated the rights of India under the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade* ("AD Agreement"), Article VI of GATT 1994, and the WTO Agreement.

4. The purpose of an anti-dumping investigation is "ensuring objective decision-making based on facts."[2] This purpose means that dumping margins must be determined– not created. It requires a fair measurement made in good faith. The investigating authority and the respondent must cooperate to gather the facts necessary to measure the margin of dumping as defined by the AD Agreement. As the Appellate Body recently found in its decision on *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*,[3] such cooperation is "a two-way process involving joint effort."[4] In this process, the investigating authorities must "strike a balance between the effort that they can expect interested parties to make in responding to questionnaires, and the practical ability of those interested parties to comply fully with all demands made of

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[1] As used herein, the phrase "US sales data" refers to data regarding the individual transactions by which the foreign manufacturer/exporter (in this case, SAIL) exported the subject merchandise to the United States during the relevant time period (the "period of investigation"). These data are used to calculate the "export price of the product exported from one country to another," in the sense of AD Agreement Article 2.1. A print-out of SAIL's final 1 September computer tabulation of its US sales data is set forth in Ex. IND-8.

[2] *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS/184/R (28 February 2001, adopted 23 August 2001) ("*Japan Hot-Rolled Panel Report*"), DSR 2001:X,4769,para. 7.55.

[3] WT/DS184/AB/R, AB-2001-2, circulated 24 July 2001, adopted 23 August 2001 (*Japan Hot-Rolled AB Report)*, DSR 2001:X, 4697.

[4] *Ibid*., para. 104.

them by the investigating authorities."[5] Guided by the legal principle of good faith, the investigating authorities must not impose on exporters burdens which, in the circumstances, are not reasonable. And they may not reject information submitted in good faith by a foreign respondent– information that is verifiable, timely submitted, in the requested computer format, and usable without undue difficulties– simply because other categories of information have been deemed inadequate. Arbitrary action of this nature is excluded by the text, context, object and purpose of the AD Agreement, and interpretations of that agreement by panels and the Appellate Body.

5. USDOC's refusal to use SAIL's verified, timely produced and usable US sales information when it calculated the final anti-dumping margin was an illegal, market-closing penalty that violated, *inter alia*, Article 6.8 and Annex II, paragraph 3 of the AD Agreement. The facts show that SAIL's US sales data were timely submitted within USDOC's deadlines; provided requested information in all categories requested by USDOC for all US sales; were in a computer format requested by USDOC; and were verified by USDOC. While verification revealed minor errors in certain characteristics of SAIL's cut-to-length plate, USDOC acknowledged in the verification report and in its final determination that these errors were "in isolation susceptible to correction."[6] Thus, between the time USDOC verified SAIL's US sales data in September 2000, and three months later when it issued the final determination on 29 December in which it refused to use the data, it had on the record complete, verified, and usable US sales data. These record data showed that SAIL's US prices were far higher than the US prices alleged in the petition.

6. In its final determination, USDOC ignored the verified information on the record in favour of a punitive "facts available" margin from the petition. Using the facts available as the basis for determining SAIL's US sales increased SAIL's final anti-dumping margin to 72.49 per cent. This action nullified and impaired India's rights under AD Articles 2.4, 6.8, 9.3; paragraphs 3, 5 and 7 of AD Annex II; and GATT Article VI:2.

7. USDOC also failed to make any determination whether SAIL had failed to act to the best of its ability in producing the US sales data. Instead, USDOC made only a conclusory statement related to SAIL's overall data production. This failure to focus the analysis of SAIL's "best efforts" on particular categories of evidence such as SAIL's US sales data is a violation of Annex II, paragraph 5. Even beyond these errors by USDOC, no unbiased and objective investigating authority could have concluded that SAIL failed to act to the best of its ability in producing US sales data that was verified, timely produced, in the computer format requested by USDOC, and which even USDOC admitted "was susceptible to correction" and which could be "usable" with "some revisions and corrections."

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[5] *Ibid.*, para. 101.

[6] Final Determination, 64 Fed.Reg. 73126, 29 December 1999, India Exhibit 17 ("Ex. IND-17"), at 73127.

8. USDOC rejected SAIL's US sales data because sections 776(a), 782(d) and 782(e) of the Tariff Act of 1930 as amended (codified at 19 U.S.C. §§1677e(a),1677m(d) and 1677m(e), respectively), as interpreted by the authoritative Statement of Administrative Action, USDOC, and the United States Court of International Trade (CIT), required USDOC to substitute use of the "facts available" for *all* information actually submitted by a respondent, if a substantial portion of that information is determined not to be verifiable, timely submitted or usable. This practice of substituting "facts available" for *all* information submitted in an investigation, and assigning a margin based on petitioner information, is commonly known as "total facts available." When SAIL sought judicial review of this determination, the CIT affirmed the use of "total facts available" by USDOC in this case, and supported USDOC in rejecting the US sales data because of problems with other data.[7]

9. Sections 776(a) and 782(d) and (e) as such (*per se*) violate Article 6.8 and Annex II, paragraph 3 of the AD Agreement. In combination they require the rejection of information submitted by a foreign respondent that is verified, timely submitted and can be used without undue difficulty, unless USDOC finds that "the information is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination,"[8] and that the interested party has "acted to the best of its ability in providing the information"[9] These latter two conditions are impermissibly added to those found in Annex II, paragraph 3 of the AD Agreement.

10. USDOC and the CIT have interpreted the phrase "so incomplete that it cannot serve as a reliable basis for reaching an applicable determination" in section 782(e)(3) as mandating rejection of verified, timely submitted and otherwise usable information. They reject such information where the foreign respondent has not provided sufficient information on all of what USDOC terms the "essential components of a respondent's data: US sales; home market sales; cost of production for the home market models; and constructed value for the US models."[10] USDOC also rejects verified, timely submitted and otherwise usable information unless the "interested party has demonstrated that it acted to the best of its ability in providing the information and meeting the requirements established by [USDOC] with respect to the information."[11] This proviso in section 782(e)(4) is applied over and above the four factors listed in Annex II, paragraph 3. While a "best efforts" requirement is found in different form in Annex II, paragraph 5, the United States violates Annex II, paragraph 3 by merging the requirements of paragraphs 3 and 5 together. Moreover, USDOC (affirmed by the CIT) has interpreted this phrase as applying to a respondent's conduct throughout the *entire* investigation, not in relation to particular categories of in-

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[7] *Steel Authority of India, Ltd., v. United States*, CIT Slip. Op. 01-60 (22 May 2001) ("*SAIL v. United States*"), Ex. IND-20, at 14.
[8] Section 782(e)(3), Ex. IND-26.
[9] Section 782(e)(4), Ex. IND-26.
[10] Final Determination, Ex. IND-17, at 73130.
[11] Section 782(e)(4), Ex. IND-26.

formation. The result of this improper interpretation is the mandatory rejection of some verified, timely submitted and usable information because the respondent has failed to demonstrate to USDOC's satisfaction that it acted to the best of its ability in providing *other* information.

11. Finally, USDOC violated AD Article 15 by failing to give special regard to SAIL's status as a developing country producer, and by levying final anti-dumping duties without exploring the possibility of an alternative constructive remedy such as a price undertaking or a lesser duty. SAIL submitted a written proposal to USDOC on 30 July 1999 for an undertaking (termed a "suspension agreement" in US law). But there is nothing in the record indicating that USDOC ever responded. Nor is there any evidence that USDOC explored with SAIL any possibilities of other constructive remedies.

12. To sum up, USDOC's application of "total facts available"– rejecting the facts of SAIL's US sales and substituting fiction in their place– distorted the measurement of dumping in this case and made a huge difference in the final dumping margin. Even using facts available from the petition for SAIL's home market sales, cost of production for home market sales, and constructed value, the use of *actual* verified US sales data would have resulted in a much lower dumping margin. Yet USDOC decided, at the insistence of the US domestic industry petitioners, to use "facts available" instead of SAIL's US sales data. The resulting margin of 72.49 per cent was fundamentally unfair and inconsistent with United States' duty to interpret and apply its WTO obligations in good faith.

II. KEY ISSUES IN THIS DISPUTE

1. Whether a permissible interpretation of Article 6.8 and Annex II, paragraph 3 of the AD Agreement allows investigating authorities, in calculating dumping margins, to reject verifiable and timely submitted information produced by foreign respondents that is in the requested computer format and is usable without undue difficulties.

2. Whether an objective and non-biased investigating authority could have concluded that the US sales data submitted by SAIL to USDOC did not meet the four conditions of Annex II, paragraph 3 of the AD Agreement.

3. Whether an objective and non-biased investigating authority could have concluded that SAIL did not act to the best of its ability, as set forth in Annex II, paragraph 5 of the AD Agreement, in submitting US sales data to USDOC.

4. Whether it is a violation of Article 6.8 of the AD Agreement read together with Annex II, paragraphs 3 and 5 for sections 776(a), 782(d) and 782(e) of the Tariff Act of 1930 to require USDOC to reject information otherwise acceptable under paragraphs 3 and 5 where a foreign respondent does not provide *other* usable information requested by USDOC.

5. Whether USDOC violated Article 15 of the AD Agreement by failing to explore the possibility of constructive remedies before levying final anti-dumping duties on imports of cut-to-length plate from SAIL.[12]

III. STATEMENT OF FACTS

A. Procedural History

13. USDOC initiated the dumping margin calculation phase of the investigation of cut-to-length plate from India by publishing a notice of initiation on 16 March 1999 in the US Federal Register.[13] The investigation was conducted under the US anti-dumping statute[14] and the related regulations of the US Department of Commerce.[15] On 29 December 1999, USDOC published its final anti-dumping determination on cut-to-length plate from, *inter alia*, India.[16] Final anti-dumping duties were imposed pursuant to an anti-dumping order published in the Federal Register on 10 February 2000.[17]

14. On 4 October 2000 India requested consultations with the United States pursuant to Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Article XXII of the GATT 1994 and Article 17 of the AD Agreement, concerning, *inter alia*, the United States anti-dumping investigation on cut-to-length plate from India and the levying of anti-dumping duties on that product.[18] Consultations took place in Geneva on 21 November 2000. Since the consultations failed to settle the dispute, India, pursuant to Article XXIII:2 of GATT 1994, Article 6 of the DSU, and Article 17.4 of the AD Agreement, requested the establishment of a panel on 7 June 2001. The panel was established on 20 July 2001 and was composed on 26 October 2001.[19] Its organizational meeting took place on 5 November 2001.

B. USDOC'S Investigation of Cut-to-Length Plate from India

15. On 16 February 1999, the US Steel Group, Bethlehem Steel, Gulf States Steel, Ipsco Steel, Tuscaloosa Steel and the United Steel Workers of America submitted a petition for imposition of anti-dumping duties on certain cut-to-length carbon steel plate from India.[20] The petition alleged a dumping margin of

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[12] India is no longer pursuing the following claims set forth in its request for establishment of the panel: claims under AD Agreement Article 6.13; and claims under AD Agreement Articles 6.6 and 6.8 and Annex II, para. 7 regarding failure to exercise special circumspection in using information supplied in the petition.

[13] Notice attached as Ex. IND-2.

[14] Title VII of the Tariff Act of 1930, as amended; codified in US Code at 19 U.S.C. §1673 *et seq;* relevant sections attached as Ex. IND-26.

[15] Title 19 of the Code of Federal Regulations (19 CFR), sections 351-357.

[16] Ex. IND-17.

[17] Ex. IND-18.

[18] WT/DS206/1, 9 October 2000, attached as Ex. IND-22.

[19] WT/DS206/3, 31 October 2001.

[20] Excerpts from public (non-confidential) version of the petition attached as Ex. IND-1.

44.51 per cent, based on a comparison between the US price of the product and the home market price for a similar product. The US price was based on a single offer from an unrelated trading company, for plate produced by SAIL; the alleged home market price was based on a market research report, and was a single average figure.[21] The petition also presented a single alleged cost of production figure for all types of Indian cut-to-length plate regardless of thickness or width, calculated by adjusting the production costs of a US producer of plate for known differences between the US and Indian production costs. The petition alleged that Indian home market prices were below cost, based on a comparison of the market research report home market price with the calculated cost of production.[22] The petition then presented a constructed value for Indian plate, calculated by applying a profit figure to the cost of production figure. It alleged a dumping margin of 72.49 per cent based on a comparison of that constructed value with the same single offer of sale to the United States. On this basis, the petition requested a cost of production investigation of all Indian steelmakers who exported cut-to-length plate to the United States.

16. USDOC initiated its anti-dumping investigation of cut-to-length steel plate from India on 16 March 1999.[23] On the next day, USDOC issued its questionnaire to SAIL.[24] The first required response was to the so-called "mini-Section A", in which USDOC requested basic corporate information and data regarding SAIL's aggregate sales of the subject merchandise to the United States and home market. SAIL responded to the mini-Section A questionnaire on 12 April 1999.[25] On 26 April 1999, SAIL timely provided its full (735-page) response to Section A of the questionnaire, which covered topics such as corporate organization and affiliations, merchandise produced, and sales and distribution processes for customers in the United States and home market.[26]

17. SAIL produces the plate subject to the investigation in three quasi-independent plants, and has six regional sales offices and 42 local sales offices.[27] At the time of the investigation, the plants each had different accounting systems, calculated standard costs differently, and tracked costs differently.[28] Telephone problems in India meant that the three plants were sometimes inaccessible by phone, fax or email for days on end. Computers and photocopiers were, of course, in short supply.[29] Despite these handicaps, SAIL cooperated fully with the USDOC dumping investigation, submitting thousands of pages of docu-

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21 Ex. IND-1, at 9 and 14-15.
22 Ex. IND-1, Exhibit 17, p. 15, item 7.
23 Notice attached as Ex. IND-2.
24 Excerpts from USDOC questionnaire to SAIL attached as Ex. IND-3.
25 See SAIL case brief to USDOC at 4 (12 Nov. 1999), Ex. IND-14; SAIL moving brief to USCIT in *SAIL v. United States*, at 11 (15 Sept. 2000), Ex. IND-19.
26 *Ibid.*
27 See Ex. IND-6 at 2; Ex. IND-19 at 34.
28 See Ex. IND-15 at 33-34.
29 *Ibid.*; Ex. IND-21 at 8.

ments, opening its doors for verification and investing substantial resources in responding to USDOC data demands on a tight time schedule.[30]

18. On 10 May 1999, SAIL filed its (341-page) response to the remaining sections of the questionnaire, consisting of Section B (home market sales), Section C (US sales), and Section D (cost of production and constructed value).[31] At that time, SAIL also notified USDOC that, because its records were maintained in many locations throughout India, it was still in the process of compiling some of the requested data.[32] None of these data-collection issues identified by SAIL, however, concerned its US sales data or that portion of its questionnaire response.[33] On 11 May, SAIL submitted a computer disk containing its sales and cost data, accompanied by sample computer printouts.[34] On 20 May, SAIL supplemented its Section A response with a 57-page filing.

19. Section C of the questionnaire issued by USDOC on 17 March 1999 focused exclusively on SAIL's US sales, and asked SAIL to provide computer data (in database format) and a narrative discussion regarding each of certain specified aspects of those sales.[35] The "Computer File of US Sales" was to contain each transaction involving the subject merchandise made during the period of investigation (calendar year 1998).[36] For each invoice line item (each unique product included in an invoice), SAIL was required to provide a corresponding "record" in the computer database.[37] Each record was to include many "fields," each of which would contain a specific information item concerning such matters as the physical characteristics of the product sold, the terms of the sale, and the selling expenses incurred.

20. The questionnaire listed 76 different "fields" or items of information to be provided for each reported transaction as relevant.[38] SAIL's first computer tape on May 11 had information concerning 23 of USDOC's 76 possible fields that SAIL indicated to USDOC that it believed were relevant to SAIL's US sales.[39] SAIL's questionnaire response and the electronic database SAIL provided at that time included information responding to these 23 fields for *all* its US transactions.

21. On 27 May 1999, USDOC issued its first supplemental questionnaire to SAIL, noting concerns regarding the completeness of SAIL's response and the methodology used by SAIL to report its product-specific costs of production.[40] Only a very few questions in this supplemental questionnaire addressed SAIL's US sales database or its response to Section C of the questionnaire. On 2 and 8

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30 USDOC hearing transcript, Ex. IND-16, at 33-34.
31 Copy of SAIL Section C questionnaire response attached as Ex. IND-4.
32 Ex. IND-4, cover letter from John Greenwald to Robert S. LaRussa, 11 May 1999, at 2.
33 *Ibid*.
34 Ex. IND-4 at C-53.
35 Ex. IND-3 at C-2-C-40.
36 *Ibid*. at C-1.
37 *Ibid*.
38 *Ibid*. at C-2-C-40.
39 EX. IND-4 at C-2-C-53.
40 Ex. IND-5.

June 1999, SAIL filed a letter[41] and a lengthy submission, respectively, describing the logistical problems it faced in compiling some of the information requested by USDOC (regarding costs of production and home market sales), and the manner in which SAIL normally maintained its cost data. None of the problems pointed out in the letter or submission concerned SAIL's US sales data.

22. On USDOC's deadline of 11 June 1999, SAIL submitted its (306-page) response to the supplemental questionnaire – including its response to the small number of questions addressing US sales.[42] USDOC issued a second supplemental questionnaire on the same day, 11 June 1999. This questionnaire contained no questions addressing specifically SAIL's US sales database, but only cost of production, home market sales, and product classification and coding issues.[43] SAIL filed its initial response to this supplemental questionnaire on 16 June 1999 and on the same day also filed a revised US sales computer database containing information on an additional field for a total of 24 fields.

23. SAIL submitted another version of the US Sales database on 16 July, adding four additional fields at the request of USDOC, for a total of 28 fields, and also revising some of the data previously submitted. On August 17 it made further small changes to the US sales computer tape but added no additional fields. SAIL submitted a final version of the US sales database including some additional revisions, on 1 September, the first day of verification, along with the correction of "minor errors" routinely requested by USDOC at the commencement of its verifications.

24. The data on all of SAIL's US sales computer tapes showed that there were only nine contracts covering SAIL's sales of the subject merchandise to the United States during the time period of the investigation (calendar year 1998).[44] Each of those nine contracts was fulfilled through multiple shipments/invoices, and each shipment may have included one or more "products" as defined by USDOC – i.e., a quantity of cut-to-length plate with specific physical dimensions, quality, grade, etc. As noted above, USDOC required SAIL to report each of those shipments of each product in a separate line (or "observation") in the computer database.[45] SAIL complied with this request, with the result that SAIL's US sales database consisted of 1284 observations. Thus, the information "matrix" that SAIL ultimately was required by USDOC to complete and which SAIL in fact did complete in its computer databases submitted from July through September consisted of 28 columns (or fields) for 1284 line items (or observations).[46]

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41 Ex. IND-6.

42 Copy of 11 June response by SAIL to questions concerning its US sales attached as Ex. IND-7. On 29 June 1999, SAIL supplemented this response with a 61-page submission on issues other than US sales, which USDOC rejected as untimely; see Ex. IND-9 and Preliminary Determination, Ex. IND-11, at p. 41203.

43 See Ex. IND-14 at 6.

44 *Ibid.* at 6-7; Ex. IND-13 at 13.

45 Ex. IND-13 at 12-15.

46 Ex. IND-2; Ex. IND-4; Ex. IND-13, at 13.

25. SAIL's US sales computer database included the following categories of information that were ultimately verified for each of SAIL's 1284 US sales during the period of investigation:

- Product code and control number
- Specifications and grade
- Quality
- Various physical characteristics such as nominal thickness and nominal width
- Customer code
- Sale invoice date
- Sale invoice number
- Date of shipment
- Date of receipt of payment
- Quantity (weight) of merchandise sold
- Gross unit price
- Inland freight from plant to port of exportation
- Brokerage and handling expense in India
- Destination
- Duty drawback
- Credit expenses
- Indirect selling expenses in India
- Inventory carrying costs in India
- Packing costs
- Variable cost of manufacturing
- Total cost of manufacturing[47]

26. USDOC issued four more supplemental questionnaires to SAIL in June, July, and August 1999. None of these questionnaires included any questions addressing SAIL's US sales database or its Section C response.

27. Meanwhile, on 29 July 1999, USDOC issued its preliminary determination of sales at less than fair value.[48] In that determination, USDOC concluded that it could not use any of SAIL's submitted data, and it therefore based its dumping margin determination on total facts available.[49] USDOC made no specific determination regarding SAIL's US sales database in the preliminary determination. Complaining about SAIL's failure to supply a consolidated electronic database for home market sales, USDOC found that SAIL did not act to the best

[47] *See* Ex. IND-3 at C-2-C-40.
[48] Preliminary Determination, 64 Fed.Reg. 41202 (29 July 1999), Ex. IND-11.
[49] *Ibid.* at 41204.

of its ability to provide the information requested, and USDOC determined to employ adverse inferences in selecting the facts available to determine SAIL's margin.[50] However, recognizing SAIL's attempts to respond to the information requests, USDOC assigned SAIL the average of the two estimated margins included in the petition, which was 58.50 per cent.[51]

28. In September 1999, USDOC conducted a 21-day verification of SAIL's questionnaire responses – nine days of cost verification and twelve days of sales verification – at several of SAIL's plants and office locations.[52] SAIL made additional submissions on 1 September on the first day of verification consisting of a revised US sales computer tape[53] and a 30-page submission of minor corrections on 1 September 1999, the first day of the sales verification. SAIL also provided a 13-page submission of minor corrections on the first day of the cost verification.[54] These submissions were in response to USDOC's request (which it routinely makes in all AD investigations) that the respondent commence verifications with a presentation of "minor errors" that were discovered in its submitted data.[55] Finally, on 22 September 1999, after the verifications were completed, SAIL submitted a copy of all the documents collected by USDOC during the verifications, amounting to a total of 3345 pages.[56]

29. On 3 November 1999, USDOC issued its Sales Verification Report.[57] This verification report confirms that SAIL's US sales database provided a complete listing of its US sales transactions during the period of investigation – i.e., that the transactions listed in SAIL's computer database, pursuant to the nine contracts, were the entire universe of shipments of the subject merchandise to the United States in that time period.[58] The USDOC verifiers included documentation for all those contracts in Verification Exhibit S-8.[59] The report reflects that USDOC did not discover any unreported sales that should have been included in the database. Specifically, USDOC repeatedly stated in the "Completeness" and "Quantity and Value" sections of the US sales verification report that "We noted no discrepancies."[60]

30. The only error in SAIL's US database that USDOC identified in its Sales Verification Report as one of its "significant findings" related to SAIL's incorrect reporting of one of the 28 fields of information—namely the reported width of plate that was 96 inches wide.[61] USDOC requested respondents to report

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50 *Ibid*.
51 *Ibid*.
52 Ex. IND-13 at 1.
53 The printout of this computer database is attached as Ex. IND-8. SAIL's US sales computer databases filed on 16 July, 17 August, and 1 September all had 28 fields of information.
54 See Ex. IND-14 at 6.
55 See USDOC sales verification outline, attached as Ex. IND-12, at 8, requesting SAIL to present "minor changes, if any, to the responses resulting from verification preparation."
56 See Ex. IND-14 at 7.
57 Ex. IND-13.
58 *Ibid.* at 12-15.
59 Included in Ex. IND-13.
60 *Ibid.* at 8, 9, 13, 14.
61 *Ibid.* at 5.

width for individual transactions according to ranges of widths in inches. For example, if a particular transaction involved cut-to-length plate with a width less than or equal to 36 inches, "A" would be reported in the PLWIDTHU field. Likewise, if the merchandise in a given transaction was of a width greater than 36 inches but less than or equal to 72 inches, "B" would be reported in that field. In its series of width categories, the boundary between categories "C" and "D" is 96 inches.[62] SAIL's error consisted of the fact that it coded all sales with a width equal to 96 inches under category "D", but USDOC's definition of the categories provided that "C" should be reported in the PLWIDTHU field for merchandise with a width greater than 72 inches but less than or equal to 96 inches; "D" should have been reported only for sales of merchandise with a width greater than 96 inches.[63] Because of the popularity in the United States of steel plate with a width of exactly 96 inches, a large proportion of SAIL's reported US sales transactions were affected– 984 of a total of 1284 observations were reported with a "D" in the PLWIDTHU field, but should have had a "C".[64] The verification report of 3 November indicates that USDOC verifiers thoroughly investigated the width reporting error once it was discovered, and determined its scope.[65] They "checked multiple instances of this coding error," and concluded that it "appeared to be limited exclusively to products that had a width of 96 inches and to the US database."[66] They also obtained a list of all the affected observations from SAIL.[67] This width coding error could have been easily corrected, using data in the record for this investigation, through methods routinely adopted by USDOC, such as the submission of a corrected database by the respondent company, or the insertion of a few lines of programming code in the appropriate place in USDOC's margin calculation programme.[68]

31. The few remaining errors discovered in SAIL's US sales database by USDOC during the verification were so insignificant that USDOC itself did not even mention them in the "Summary of Significant Findings" at the beginning of the verification report. These errors consisted of:

(1) Over-reporting of the freight expense incurred in shipping the merchandise from the plant to the port of export (Vizag).[69] This er-

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62 *Ibid.* at 12; Ex. IND-3 at C-10.

63 *Ibid*.

64 Ex. IND-13 at 5, 12. The reason for the coding error is discussed in detail at pp. 20-21 of the USDOC hearing transcript, Ex. IND-15. SAIL's home market records were rounded off in millimetres, recording a 96-inch-wide plate as a 2,438 mm plate. However, SAIL's US records were kept in tenths of millimetres, recording a 96-inch-wide plate as a 2,438.4 mm plate. When the data were converted to the computer database for the purposes of submission to USDOC, a uniform cutoff point of 2,438 mm was used for the database distinction between width categories C and D. 96-inch plate was coded correctly as C for the home market but the additional 0.4 mm in the US sales records put 96-inch plate into the D category in the US sales database.

65 Ex.IND-13 at 12.

66 *Ibid*.

67 *Ibid*.

68 The correction of the width miscoding through a simple revision of the USDOC computer programme is discussed in detail in the affidavit of Albert Hayes, Ex. IND-24 ("Hayes Affidavit").

69 Verification report, Ex. IND-13, at 30 (citing Verification Exhibit S-15).

ror not only was easily corrected by using data gathered by USDOC at verification, but in any event only hurt SAIL, by increasing the dumping margins that would be calculated on the basis of this data.

(2) A small overstatement of the duty drawback earned by SAIL on the reported exports to the United States (less than 0.4 percentage points as calculated by the verifiers) because SAIL had erroneously included the entire amount of the drawback earned on the one contract that included shipments to Canada.[70] Again, this error would be easily corrected through the submission of a corrected database, or the insertion of a line of programming code in the appropriate place in the margin programme.[71]

(3) An overstatement of the estimated number of days that merchandise shipped to the United States spent in inventory.[72] Thus, SAIL's error was to overstate the time in inventory (45 days as compared to 30 days). However, this error not only was easily corrected by using the 30-day figure identified by the USDOC verifiers, but also would have been irrelevant for the calculation of SAIL's dumping margins. The US sales in this case were so-called "export price" transactions (in which the foreign manufacturer/exporter sells directly to an unaffiliated party before importation into the United States), and when USDOC calculates dumping margins for export price transactions, it does not deduct inventory carrying expenses incurred in the country of export from US price.[73]

(4) An understatement of the administrative charges incurred in the total labour cost per metric ton for gas slitting. Since this item was an administrative charge, it is an indirect selling expense. However, the US price in this case would have been calculated on the basis of the export price, not a constructed export price, and so indirect selling expenses of any sort were irrelevant.[74]

32. On 13 December 1999, USDOC issued a memorandum entitled "Determination of Verification Failure".[75] This Memorandum reviews six "deficiencies" in SAIL's sales data and eight in its cost data. Of these 14 "deficiencies," only one concerned the US sales database: SAIL's miscoding of transactions in-

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[70] *Ibid*. at 31-32.
[71] Ex. IND-24 at para. 8.
[72] *Ibid*. at 32. USDOC's sales verification report states that SAIL claimed that "the most conservative date in inventory [was] 45 days," and then goes on to state that the verifiers noted that the number of days in inventory appeared to be closer to the same number (45). This is an error on the part of USDOC's report; the actual figure identified by the USDOC verifiers was 30 days, not 45, as can be seen from the verification exhibits (S-15 and S-16) cited at this point in the verification report.
[73] Ex. IND-24 at para. 8.
[74] *Ibid*.
[75] Ex. IND-16.

volving merchandise with a width of 96 inches under category "D", rather than "C".[76]

33. The "Analysis" section of the Memorandum indicated that "while these [US sales data] errors, in isolation, are susceptible to correction, when combined with other pervasive flaws in SAIL's data, these errors support our conclusion that SAIL's data on the whole is unreliable."[77] It concluded, "The fact that limited errors where [sic; were] found must not be viewed as testimony to the underlying reliability of the [sic] SAIL's reporting, particularly when viewed in context the [sic] widespread problems encountered with all the other data in the questionnaire response."[78]

34. On 29 December 1999, USDOC issued its final determination of sales at less than fair value.[79] In the determination, USDOC again rejected SAIL's submitted data in its entirety, and applied total facts available.[80] USDOC applied section 776(a) of the Tariff Act of 1930 as amended (19 U.S.C.§1677e(a)). As discussed below, section 776(a) mandates the use of "facts available" instead of information actually submitted, if certain conditions are met; the only exception to this mandate is if the respondent meets all five of the conditions enumerated in section 782(e) of the Tariff Act.[81]

35. The record shows that SAIL acted to the best of its ability in its efforts to prepare its home market sales and cost databases, despite the difficulties it encountered and USDOC's complaints regarding the quality of the company's data. SAIL faced enormous logistical problems in working to develop responses to the voluminous data requests in USDOC's questionnaires, partly due to the obvious fact that the company is located in a developing country with unreliable communications and other severe infrastructure limitations.[82] These problems are compounded by the fact that SAIL has numerous sales and production facilities located throughout India, and the computer systems in the various locations are not interconnected.[83] Many of its production records are maintained only in handwritten records, requiring that, before submission to USDOC, they had to be converted to computerized format.[84] Nonetheless, SAIL undertook very significant efforts to submit data in the formats demanded by USDOC (which do not coincide with the manner in which it maintains records in the normal course of business), and, to the extent possible, within USDOC's tight deadlines.[85]

36. USDOC issued a number of supplemental questionnaires to SAIL regarding the company's home market sales and cost of production data, in May through August 1999. Although at times SAIL missed those deadlines, it repeat-

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[76] *Ibid*. at 3.
[77] *Ibid*. at 5.
[78] *Ibid*.
[79] Ex. IND-17.
[80] *Ibid*.
[81] Text of statutory provisions attached in Ex. IND-26.
[82] Ex. IND-14, Case brief, at 4-9; Ex. IND-15, Hearing transcript, at 33-34.
[83] Ex. IND-13 at 1.
[84] Ex. IND-14, Case brief at 4-9.
[85] See generally Ex. IND-4, 6, 7, 8, 13, 14, 15, 19.

edly informed USDOC that it was striving to submit the demanded information as promptly as possible, and explained in detail the logistical difficulties that it confronted.[86] Indeed, SAIL apprised USDOC of the problems it faced as early as 2 April 1999, when it was still struggling with the response to the initial questionnaire, and it repeated those concerns in submissions to USDOC on 10 May and 2 June.[87] Moreover, USDOC personnel were made very aware of SAIL's problems with equipment, resources, and infrastructure during the on-site verifications in September 1999, during which they visited several of SAIL's facilities in India.[88] Despite these problems, SAIL submitted thousands of pages of information and documents in response to USDOC's multiple supplemental questionnaires, as well as repeated resubmissions of its electronic databases.[89]

37. In its case and reply briefs filed with USDOC on 12 and 17 November**,** SAIL admitted that there were difficulties in verifying the accuracy of its home market sales and cost of production data, but argued that its US sales data were verified without significant problems and should be used as a basis for calculating the final anti-dumping duty margin.[90] SAIL argued that USDOC verified the underlying accuracy of SAIL's books and records and also verified plant-specific average costs.[91] Therefore, USDOC had a reliable basis from which to determine the relevant costs of the products sold to the United States; extrapolating from this reliable information, USDOC could determine that SAIL's margin would be in the range of zero to 1 per cent (i.e. *de minimis*).[92] SAIL proposed that the Department compare its US sales data to the average of the normal value and constructed value alleged in the petition.[93] Using the verified US sales data with partial facts available for the missing data would ensure the most accurate measurement of the actual dumping margin.[94] SAIL invoked paragraph 5 of Annex II of the AD Agreement, which provide that where a party acts to the best of its ability, its information should not be disregarded even though the information is not ideal in all respects.[95]

38. The USDOC final determination nevertheless determined that the information collected was "unusable"[96] and that section 776(a) mandated use of "facts available" because:

- computer and other problems with SAIL's home market sales and cost of production databases meant that SAIL had withheld information requested by USDOC;

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86 *Ibid.* at 7; Ex. IND-19, SAIL moving brief to USCIT in *SAIL v. United States*, at 31-34.
87 Ex. IND-14, Case brief at 8; Ex. IND-6, SAIL letter to USDOC.
88 Ex. IND-13 at 1-2.
89 Ex. IND-14, Case brief at 6-8.
90 *Ibid.*, Case brief at 17.
91 *Ibid.*, Case brief at 8-9.
92 *Ibid.*, Case brief at 13-14.
93 *Ibid.*, Case brief at 14.
94 *Ibid.*, Case brief at 9-14.
95 *Ibid.*, Case brief at 21.
96 Ex. IND-17 at 73131.

- SAIL's problems assembling the home market sales and cost data demonstrated that SAIL had failed to provide information by the deadlines or in the form or manner requested; and
- the problems found at the sales verification (all of which related to the home market sales database, except for the width coding error discussed above) meant that information that had been provided could not be verified.[97]

USDOC went on to find that the exceptions in section 782(e) to the use of "facts available" did not apply, because:

- SAIL had not met USDOC questionnaire response deadlines, in particular for SAIL's home market cost of production data;
- USDOC was not able to verify SAIL's questionnaire responses because the home market and cost databases contained significant errors;
- the fact that SAIL's home market sales and cost databases could not be verified meant that there was no basis for determining a dumping margin;
- problems with SAIL's home market sales data indicated that SAIL had not acted to the best of its ability to provide accurate and reliable data to USDOC; and
- "the US sales database contained errors that, while in isolation were susceptible to correction, however when combined with the other pervasive flaws in SAIL's data lead us to conclude that SAIL's data on the whole is unreliable. As a result, the Department does not have an adequate basis upon which to conduct its analysis to determine the dumping margin and must resort to facts available pursuant to section 776(a)(2) of the Act."[98]

39. The notice stated that "[i]t is the Department's long-standing practice to reject a respondent's questionnaire response *in toto* when essential elements of the response are so riddled with errors and inaccuracies as to be unreliable."[99] Thus, USDOC refused even to consider using the US sales data, merely because of problems (including computer formatting) that had occurred in SAIL's other data on home market sales and costs of production. USDOC stated: "The Department's long-standing practice of filling in gaps or correcting inaccuracies in the information reported in a questionnaire response, often based on verification findings, is appropriate only in cases where the questionnaire response is otherwise substantially complete and useable.... To properly conduct an anti-dumping analysis which includes a sales-below-cost allegation, the Department must analyze four essential components of a respondent's data: US sales; home market sales; cost of production for the home market models; and constructed value for

[97] *Ibid.* at 73127.
[98] *Ibid.*
[99] *Ibid.* at 73130.

the US models. Yet SAIL has not provided a useable home market sales database, cost of production database, or constructed value database."[100]

40. USDOC went on to determine that SAIL "did not cooperate to the best of its ability," because of the problems with SAIL's data and computer tapes. It decided to use an "adverse inference" under section 776(b), and assigned a margin rate of 72.49 per cent, the highest of the margins alleged in the petition, as facts available.[101]

C. Post-Determination Proceedings

41. On 10 February 2000, the US International Trade Commission issued a notice of its determination of material injury by reason of imports of CTL plate from India and other countries (France, Indonesia, Italy, Japan and Korea) that had been found by USDOC to be sold in the United States at less than fair value.[102] On the same day USDOC amended its final determination and issued the anti-dumping order.[103]

42. SAIL then appealed the final determination to the US Court of International Trade.[104] SAIL argued that USDOC should not have used facts available in place of its reported US sales data.[105] Instead of total facts available, USDOC should have used facts available only with regard to the information other than the US sales data.[106] SAIL argued that section 782(e), which requires consideration of "information that is submitted" if it satisfies certain requirements, applies to particular categories of information (such as the US sales data), as separate and distinct submissions of information.[107] SAIL also argued that its inability to supply complete responses to the USDOC questionnaires was due to difficulties in compiling data, that it had in fact acted to the best of its ability, and that USDOC therefore erred in applying adverse inferences under section 776(b).[108] USDOC argued in response that it had a "long standing practice" of using total facts available when "essential components of the response" are inaccurate or unreliable, and that it had "disregarded all the responses in order to calculate what it considered a more accurate dumping margin."[109] USDOC also argued that SAIL's failure to fully comply itself merited application of adverse inferences, and that the term "information" in section 782(e) meant *all* submitted responses by an interested party, not just a category within the responses.[110]

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[100] *Ibid*.
[101] *Ibid*. at 73131.
[102] 65 Fed. Reg. 6624 (USITC 10 February 2000). See *Certain Cut-to-Length Carbon Steel Plate from France, India, Indonesia, Italy, Japan, and Korea*, Inv. Nos. 701-TA-387-391 (Final), USITC Pub. No. 3273 (Jan. 2000), *ftp://ftp.usitc.gov/pub/reports/opinions/PUB3273.PDF*.
[103] 65 Fed. Reg. 6585 (USDOC 10 February 2000), Ex. IND-18.
[104] Ex. IND-19.
[105] *Ibid*. at 23-28.
[106] *Ibid*.
[107] *Ibid*. at 16-23.
[108] *Ibid*. at 10, 29-34.
[109] *SAIL v. United States*, Ex. IND-20, at 7.
[110] *Ibid*., at 9.

43. The result of the litigation was largely dictated by the standard of review imposed by US law on CIT reviews of determinations by USDOC. The court determined that section 782(e) did not provide any guidance on the meaning of "information," and upheld USDOC's interpretation as a "reasonable construction of the statute" and consistent with USDOC's "long standing practice of limiting the use of partial facts available."[111] The court upheld the decision to apply "total facts available" as supported by "substantial evidence in the record," on the basis of USDOC assertions that there were deficiencies which "cut across all aspects of SAIL's data," and because SAIL had not met USDOC deadlines.[112] However, the court found that if a respondent, like SAIL, claimed an inability to comply with USDOC information demands, in order to apply adverse inferences USDOC could not simply conclude that mere failure to supply the information constituted a failure to act "to the best of its ability."[113] Rather, USDOC had to conclude that the exporter actually had the ability to comply with the request for information, but did not do so. USDOC had made no finding that SAIL refused to cooperate or could have provided the information requested but did not.[114] The issue was remanded to USDOC so that it could make specific findings or otherwise reconsider its decision to apply an adverse inference in choosing the basis on which to calculate a dumping margin.[115]

44. On 27 September 2001, USDOC issued its redetermination responding to the remand.[116] USDOC again determined that adverse inferences were appropriate, but revised the basis for the determination. USDOC found that during the investigation, SAIL had assured USDOC that it could correct the problems in its data submissions, and again pointed to late submission of the data on home market sales and problems with the home market sales and cost databases.[117] USDOC argued that SAIL is a large company with audited financial statements, owned by the Indian Government, which could comply with the information requests.[118] USDOC found that using partial facts available would allow a respondent to control the outcome of an anti-dumping investigation by selectively responding to questionnaires.[119]

45. The dumping margin of 72.49 per cent remains unaltered. Exports by India of cut-to-length plate continue to be foreclosed from the US market.

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111 *Ibid.*, at 11-13.
112 *Ibid.* at 13-14, quoting USDOC.
113 *Ibid.* at 18-19.
114 *Ibid.*
115 *Ibid.* at 15-19.
116 Ex. IND-21.
117 *Ibid.* at 10-12.
118 *Ibid.* at 4-5.
119 *Ibid.* at 12.

IV. STANDARD OF REVIEW

46. The Panel's task in this dispute will require application of the standard of review for disputes involving facts and legal interpretations by anti-dumping authorities, under the AD Agreement. Essential guidance for such disputes has been provided by the Appellate Body in its *Japan Hot-Rolled* decision.[120] In that decision, the Appellate Body found that both Article 17.6(i) of the AD Agreement and Article 11 of the DSU are applicable in such disputes. Finding that both provisions require panels to "assess" the facts, the Appellate Body said this "clearly necessitates an active review or examination of the pertinent facts." Noting the requirement in Article 11 for an "objective" assessment of the facts, the Appellate Body stated that it is "inconceivable that Article 17.6(i) should require anything other than that panels make an *objective* 'assessment of the facts of the matter'."[121] Thus, the Appellate Body concluded, "panels must assess if the establishment of the facts by those authorities was *proper* and if the evaluation of those facts by those authorities was *unbiased and objective*."[122]

47. In its recent decision in *United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan*, the Appellate Body provided the following summary of the standard for the panel's review under Article 11 of the DSU in assessing whether competent authorities complied with their obligations in making their determination:

> This standard may be summarized as follows: panels must examine whether the competent authority has evaluated all relevant factors; they must assess whether the competent authority has examined all the pertinent facts and assessed whether an adequate explanation has been provided as to how those facts support the determination; and they must also consider whether the competent authority's explanation addresses fully the nature and complexities of the data and responds to other plausible interpretations of the data. However, panels must not conduct a *de novo* review of the evidence nor substitute their judgement for that of the competent authority.[123]

48. With respect to panel examination of interpretations of the AD Agreement, the Appellate Body examined the criteria of Article 17.6(ii) and DSU Article 11 and found that both must be applied. The Appellate Body concluded that "[n]othing in Article 17.6(ii) of the AD Agreement suggests that panels examining claims under that Agreement should not conduct an 'objective assessment' of the legal provisions of the Agreement, their applicability to the dispute, and the conformity of the measures at issue with the Agreement."[124] It found that under

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[120] Japan Hot-Rolled AB Report, paras. 55-62.
[121] *Ibid.*, at para. 55.
[122] *Ibid.*, at para. 56 (emphasis added).
[123] WT/DS192/AB/R, 8 October 2001 (*Pakistan Cotton AB Report)* WT DSR 2001:XII, 6027,para. 74.
[124] *Japan Hot-Rolled AB Report*, para. 62.

Article 17.6(ii) "panels are obliged to determine whether a measure rests upon an interpretation of the relevant provisions of the Anti-Dumping Agreement which is *permissible under the rules of treaty interpretation* in Articles 31 and 32 of the *Vienna Convention*," and "a permissible interpretation is one which is found to be appropriate *after* application of the pertinent rules of the *Vienna Convention*."[125] According to the Appellate Body, "Article 17.6(ii) simply adds that a panel shall find that a measure is in conformity with the AD Agreement if it rests on one permissible interpretation of that Agreement."[126]

49. This Panel should conduct an active review of the facts before USDOC pursuant to Article 11 of the DSU and AD Agreement Article 17.6(i). In particular, it should examine in detail the facts regarding SAIL's US sales data and the extent to which the data met the four conditions of Annex II, paragraph 3, and, if it deems necessary, the facts regarding SAIL's best efforts and cooperation in supplying the US sales information during the investigation. The Panel should also determine whether USDOC's interpretation of Article 6.8 and Annex II, paragraphs 3, 5, and 7 is permissible under the customary rules of treaty interpretation, consistent with the Appellate Body's ruling in *Japan Hot-Rolled.*

V. ANALYSIS OF ARTICLE 6.8, ANNEX II, PARAGRAPH 3 AND ANNEX II, PARAGRAPH 5

50. The core legal issues in this dispute involve the interpretation of Article 6.8, Annex II, paragraph 3 and Annex II, paragraph 5 of the AD Agreement. These provisions determine whether the measures involved in this dispute– the final anti-dumping order and sections 776(a), 782(d) and 782(e) of the Tariff Act of 1930 as amended–are WTO-compatible or not. India submits that the proper way to interpret Article 6.8 and Annex II, paragraph 3 is that any category of information submitted by a respondent that is verifiable, timely submitted, in the requested computer format, and can be used without undue difficulty *must* be used by the investigating authorities in calculating an anti-dumping margin.

51. Contrary to USDOC's practice of applying so-called "total facts available," Annex II, paragraph 3 mandates that *any* category of information which is submitted by a foreign respondent and which meets this four-part test must be used by investigating authorities without regard to whether the foreign respondent has submitted *other* categories of information that are not verifiable, not timely submitted, not in the appropriate computer format, or not capable of being used without undue difficulties. Nor can categories of information meeting the four conditions of Annex II, paragraph 3 be rejected because of the actions of a foreign respondent in respect of *other* requested categories of information – that is, on the basis that the respondent failed to act to the best of its ability, or did not cooperate with the investigating authorities, in respect of *other* requested categories of information. This interpretation is supported by the ordinary meaning of

[125] *Ibid.*, para. 60.
[126] *Ibid.*, para. 62.

the text of Article 6.8 and Annex II, paragraph 3, the context of other anti-dumping provisions, the object and purpose of the AD Agreement, and past interpretations by panels and the Appellate Body.

52. Annex II, paragraph 5 applies if a particular category of information is not submitted within a reasonable period, or is not completely verifiable, or is usable only if the investigating authorities must spend days and weeks of additional work. In such cases, if a respondent acted to the best of its ability the investigating authorities would be required to make more concerted efforts to make use of the information provided by respondents. The phrase "best of its ability" necessarily requires a case-by-case analysis by investigating authorities to judge the ability of particular respondents to provide particular category of information within the required time and format.

A. The Ordinary Meaning of Article 6.8 and Annex II, Paragraph 3, when Read in the Context of Other AD Provisions, Requires Investigating Authorities to Use any Information Submitted by a Responding Company that Meets the Conditions of Annex II, Paragraph 3, First Sentence

53. The ordinary meaning of Article 6.8 and Annex II, paragraph 3 supports an interpretation that any verifiable and timely submitted categories of information that are usable without undue difficulty must be used by investigating authorities. Article 6.8 provides as follows:

> 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 facts available. The provisions of Annex II shall be observed in the application of this paragraph.

54. As a panel recently found in the dispute on *Argentina – Definitive Anti-dumping Measures on Imports of Floor Tiles from Italy*, "an 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: (1) refuses access to necessary information; (ii) otherwise fails to provide necessary information within a reasonable period; or (iii) significantly impedes the investigation."[127] Article 6.8 ensures that an investigating authority will be able to fill in gaps in an investigation and make determinations under the AD Agreement on the basis of facts available even in the event that an interested party is unable or unwilling to provide particular necessary information within a reasonable period.[128] However, as the Appellate Body has found, if verifiable information that can be used without undue difficulties is supplied

[127] DS189/R, circulated on 28 September 2001, para. 6.20.
[128] *Japan Hot-Rolled Panel Report*, para. 7.51.

"within a reasonable period", "the investigating authorities *cannot* use facts available, but must use the information submitted by the interested party."[129]

55. The text of Article 6.8 links to Annex II of the AD Agreement, stating that "[t]he provisions of Annex II shall be observed in the application of this paragraph." Paragraph 3 of Annex II, a key provision regarding use of facts submitted, provides in relevant part:

> 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 authorities, should be taken into account when determinations are made.

56. The text of this paragraph provides that investigating authorities should take into account information supplied by respondents if three, and, in some circumstances, four, conditions are satisfied. Investigating authorities such as USDOC must use any– and all– categories of information that meet these conditions. The Appellate Body held in *Japan Hot-Rolled* that "if these conditions are met, investigating authorities are *not* entitled to reject information submitted, when making a determination."[130] Examined below are the four relevant conditions of Annex II, paragraph 3.

1. "All information that is verifiable"

57. The term "verifiable" means "the fact of being capable of verification." "Verification" is the "action of establishing or testing the accuracy or correctness of something, esp. by investigation or by comparison of data."[131] Article 6.7 of the AD Agreement permits investigating authorities to "verify information provided" by interested parties and Annex I of the Agreement provides for procedures for conducting such verifications. The use of the term "verifiable" in Annex II, paragraph 3 signifies that information must be *capable* of being verified – not actually verified by the investigating authorities. Yet in this case, SAIL's US sales of cut-to-length plate were not only verifiable but actually verified by USDOC, as detailed in section III above.

58. In two instances, panels have found that information was verifiable even though the investigating authorities refused to accept or verify the information during the investigation. In *Guatemala Cement II*, the investigating authorities were not able to verify information because Mexican respondents refused to permit access to their confidential information by verification teams that included advisors connected with the Guatemalan cement industry. The panel

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[129] *Japan Hot-Rolled AB Report*, para. 77.
[130] *Ibid.*, para. 81.
[131] New Shorter Oxford English Dictionary, Clarendon Press, 1993. USDOC in Ex. IND-21 at 11, n. 4, quoted the USCIT in *Bomont Indus. v. United States*, defining verification as follows: "Verification is like an audit, the purpose of which is to test information provided by a party for accuracy and completeness..."

found that this refusal was justified because of the existence of a conflict of interest on the part of those advisors.[132] After examining the evidence, the panel found that even though the information in question was not verified, it was "verifiable" and should have been used instead of facts available.[133]

59. Similarly, in *Japan Hot-Rolled*, the panel found that USDOC improperly rejected the theoretical-to-nominal weight-conversion data submitted by NKK, one of the Japanese respondents, which was not verified but was capable of being verified. The Panel found that USDOC improperly rejected information that was submitted in "sufficient time to allow its verification and use in the calculation of NKK's dumping margin."[134] Accordingly, the panel (as affirmed by the Appellate Body) held that USDOC had improperly applied facts available under AD Article 6.8 because the conditions listed in Annex II, paragraph 3 had been met.[135]

60. The ordinary meaning of the term "all information" in Annex II, paragraph 3 is that all information submitted by interested parties meeting the conditions of Annex II, paragraph 3 must be accepted and used by investigating authorities. The use of the expression "all information *which*" implies there may be some *other* information provided by respondents that may *not* meet the conditions listed in Annex II, paragraph 3. But there is nothing in the text of Article 6.8 or Annex II, paragraph 3 to suggest that any category of information that meets those listed conditions can legally be rejected– as USDOC did in this and many other cases since the WTO Agreement entered into force for the United States in 1995– because *other* submitted or non-submitted information does not meet those conditions.

61. As the Appellate Body indicated in *Japan Hot-Rolled*, the AD Agreement must be interpreted taking into consideration the principle of good faith. This "organic principle of good faith" can, in particular context, "restrain investigating authorities from imposing on exporters burdens which, in the circumstances, are not reasonable."[136] An interpretation of Annex II, paragraph 3 that would permit rejection of a category of verified, timely submitted and usable information would *not* be consistent with the principle of good faith because it would impose a significant penalty on respondents that did in fact supply the information. The violation of this good faith principle becomes even clearer in light of AD Article 15 when the usable, verified and timely submitted information that is rejected has been provided by developing country respondents.

62. The context of Annex II, paragraph 3 also supports the interpretation that categories of information meeting the criteria of that paragraph should be used

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[132] *Guatemala – Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico*, WT/DS/156/R, 17 November 2000 [*Guatemala Cement II Panel Report*], DSR 2000:XI, 5295, para. 2.273.

[133] *Ibid.*, at para. 2.274.

[134] *Japan Hot-Rolled Panel Report*, para. 7.59.

[135] *Ibid.*, at para. 7.59.

[136] *Japan Hot-Rolled AB Report*, para. 101 (applying principle of good faith in interpreting Annex II, para. 7 of the AD Agreement)

by investigating authorities without regard to the condition of other submitted or non-submitted information. For example, Annex II, paragraph 6 provides that "if evidence or information is not accepted ...the reasons for the rejection of *such* evidence or information should be given in any published determinations." This provision contemplates the rejection of *some* information submitted– not the rejection of *all* information. Significantly, neither paragraph 6 nor any other provision of the AD Agreement authorizes the rejection of categories of information meeting the conditions of Annex II, paragraph 3 simply because other information did not meet those conditions.

63. Similarly, AD Article 6.7 anticipates that "information" can be verified by on-the-spot investigation. Read in light of Annex II, paragraph 3, the fact that the authorities will seek to verify all information submitted means that some of the information submitted may fail verification. Annex II, paragraph 3 sets out the criteria for determining which information must be used by investigating authorities and which can be rejected in favour of facts available. However, if some categories of information fail verification, that fact cannot logically or textually mandate the rejection of other categories of verified, timely submitted and usable information.

64. Annex II, paragraph 7 is also useful context for interpreting Article 6.8 and Annex II, paragraph 3. Annex II, paragraph 7 focuses on *some* of the information submitted– not the entire mass of information provided (or not provided) by the responding company during the investigation. The first sentence indicates that authorities may have to base their findings "on information from a secondary source," and "must check the information from other independent sources." The immediate context for Annex II, paragraph 7 is paragraph 6 which provides that "if *information* is not accepted, the supplying party" should be informed of the reasons and "the reasons for the rejection of *such evidence or information* should be given in any published determinations."

65. The panel decision in *Japan Hot-Rolled* supports this interpretation. In that case, the United States argued that the application of adverse facts available to a part of the sales of KSC, another Japanese respondent, "was permitted under the AD Agreement, since KSC failed to act to the best of its ability with regard to submitting the requested data concerning its sales through CSI, its US affiliate."[137] The panel rejected this argument, finding that KSC had cooperated with the investigation. This United States argument implicitly acknowledged that cooperation can be evaluated with respect to a particular category of evidence submitted without regard to how the respondent cooperated with respect to other evidence submitted. The same principle should apply here. Article 6.8 and Annex II, paragraph 3 should be interpreted so as to mandate the use of individual categories of information without regard to other categories of information.

66. Decisions of earlier panels applying Article 6.8 and Annex II, paragraph 3 support the mandatory acceptance by investigating authorities of verified, timely submitted, and usable information. Both the *Guatemala II* and *Japan Hot-Rolled*

[137] *Japan Hot-Rolled Panel Report*, para. 7.65.

panels focused on individual categories of information submitted by foreign respondents – not the entire body of information submitted or requested. In *Guatemala Cement II*, the panel found that Guatemalan investigating authorities improperly relied on facts available for home market cost data for the entire period of investigation. The panel found that cost data submitted by Mexican respondents met the conditions of Annex II, paragraph 3 for the period of the investigation and part of the extended period of investigation ("POI"). The fact that Mexican respondents did not provide any information on one period of the extended POI did not mean that Guatemala could reject submitted information for other periods. Guatemalan investigating authorities were only entitled to use facts available for that period of the extended POI for which the Mexican respondent submitted no cost data.[138]

67. Similarly, in *Japan Hot-Rolled*, the panel focused on narrow, individual categories of information submitted by NKK concerning weight conversion factors. The panel did not examine the totality of the information submitted in the investigation before deciding whether to apply Annex II, paragraph 3; neither did the Appellate Body when it reviewed and affirmed the panel's conclusions. Instead, both the panel and the Appellate Body found that USDOC had violated Article 6.8 and Annex II, paragraph 3 by failing to accept information submitted by NKK on weight conversion factors.

2. "Appropriately submitted so that it can be used in the investigation without undue difficulties"

68. The ordinary meaning of the second condition of Annex II, paragraph 3 is that the information must be provided at a time, in a format, and in a manner that makes it capable of being used by investigating authorities without undue difficulties. There are many types of information that could be "usable" to calculate dumping margins in an anti-dumping investigation: for instance, the prices obtained for sales of the subject merchandise, selling expenses; freight and transportation expenses; conditions of sale; relevant differences in physical characteristics of products sold in different markets; input costs; interest, credit and inventory carrying expenses; profit amounts; and discounts, rebates and other price adjustments.

69. It should be presumed that the phrase "appropriately submitted" is satisfied if the information is provided in a manner or according to a methodology consistent with the basic questionnaire format set forth by the investigating officials. For example, if a questionnaire asked for a respondent to provide data for all of its US sales organized in a particular format, and the respondent provided data in that format, the data must be presumed to have been "appropriately submitted." The questionnaire instructions in the investigation of cut-to-length plate from India requested construction of a database coded with specific labels: for instance, a field labelled INLFPWU reporting the expense of the US inland

[138] *Guatemala Cement II Panel Report*, para. 2.277.

freight from port to warehouse, for each US transaction. SAIL's inland freight data were presented in accordance with the instructions and must be presumed to have been "appropriately submitted."

70. The phrase "used in the investigation without undue difficulties" indicates that the information provided may not be exactly in the format or be complete or accurate in all respects. The term "undue" is defined as "going beyond what is warranted or natural, excessive, disproportionate."[139] This definition indicates that it is not enough for investigating authorities to conclude simply that individual categories of submitted information contain errors or require some effort on the part of the authorities in order to be usable to calculate the dumping margins. Rather, the authorities must make particular efforts to attempt to use the information by correcting it, and only if its use presents "undue" difficulties may they reject it. The "undue difficulty" language, and Article 6.8 itself, presume that information from responding exporters is to be preferred over alternative sources. Article 6.8 and Annex II, paragraph 3 require investigating authorities to make a case-by-case assessment for each category of information to determine if they can use the information or make necessary corrections without unduly delaying or complicating the investigation and their determination.

71. India submits that the panel should consider the following types of factors in determining whether a particular categories of information submitted can be used without "undue difficulties:" (1) the timeliness of the information submitted, (2) the extent to which the information submitted has been verified or is verifiable; (3) the volume of the information, (4) the amount of time and effort required by the investigating authorities to make any corrections to information submitted to make it usable to assist in calculating margins; and (5) whether other interested parties are likely to be prejudiced if the information is used or corrected.

72. The fact that information has been provided in the format requested by the investigating authorities and in a timely fashion, and has been verified, creates a strong likelihood that it can also be used without undue difficulties. The "undue difficulty" element is relevant in situations where information may be submitted at a later time such as during or immediately after verification; when information is submitted to replace earlier submitted information that contained errors; or where the information submitted contains errors that must be corrected by the investigating authorities.

73. Where there is a need for corrections discovered prior to or during verification, then the issue becomes whether authorities should accept corrected information. This was one of the issues in *Japan Hot-Rolled*. In other situations, investigating authorities may be able to correct the data themselves through changing coding in the computer programme for calculating margins, or by other manipulations of the database. It would be important for the authorities (and panels reviewing their decisions) to make an assessment of how much time and effort is required to correct the data. Much information submitted by respondents

[139] New Shorter Oxford English Dictionary, Clarendon Press 1993.

to USDOC comes in the form of data submitted pursuant to agreed-upon methodologies and formats. Where corrections could be made by simply changing a line of computer code and calculating margins on the basis of the corrected data within a matter of minutes or even several hours, then it would be hard to imagine how an investigating authority could claim the information was not usable without undue difficulties.

74. The two panels that have examined this element of the Annex II, paragraph 3 requirements did not focus to any great extent on undue difficulties by the investigating authorities in using the information. In *Japan Hot-Rolled*, the Japanese respondents NKK and NSC offered information shortly before verification, to correct earlier submitted information on weight conversion factors.[140] The panel appears to have found (or assumed) that these could be used without undue difficulties, since it noted that (1) the new information did not concern such matters as prices, costs, or adjustments that had never previously been provided and which would require extensive verification, and (2) it was presented within sufficient time so as to not impede the ability of the investigating authorities to complete the investigation.[141]

75. In *Guatemala Cement*, the panel found that the Guatemalan authorities did not demonstrate that the cost information provided by the Mexican respondent could not be used without undue difficulties, noting that "there is no such explanation in the Ministry's January 1997 resolution."[142]

3. "submitted in a timely fashion"

76. The ordinary meaning of this third condition of Annex II, paragraph 3 was considered in the Appellate Body's decision in *Japan Hot-Rolled.* The Appellate Body concluded that this element should be interpreted case by case, and stated as follows:

> In sum, a "reasonable period" must be interpreted consistently with the notions of flexibility and balance that are inherent in the concept of "reasonableness", and in a manner that allows for account to be taken of the particular circumstances of each case. In considering whether information is submitted within a reasonable period of time, investigating authorities should consider, in the context of a particular case, factors such as (1) the nature and quantity of the information submitted; (ii) the difficulties encountered by an investigated exporter in obtaining the information; (iii) the verifiability of the information and the ease with which it can be used by the

[140] *Japan Hot-Rolled Panel Report*, first submission of Japan paras. 98-99, panel findings paras. 7.33-7.34.

[141] *Ibid.*, para. 7.55. While the panel mentioned these elements, it was not entirely clear whether it was addressing the "timely fashion" or the "undue difficulty" factor and the Appellate Body noted that "USDOC was not entitled to reject this information *for the sole reason* that it was submitted beyond the deadlines for responses to the questionnaires." *Japan Hot-Rolled AB Report*, para. 89.

[142] *Guatemala Cement II Panel Report*, para. 2.277.

> investigating authorities in making their determination; (iv) whether other interested parties are likely to be prejudiced if the information is used; (v) whether acceptance of the information would compromise the ability of the investigating authorities to conduct the investigation expeditiously; and (vi) the numbers of days by which the investigated exporter missed the applicable time-limit.[143]

4. "supplied in a medium or computer language requested by the authorities"

77. The ordinary meaning of this phrase is that the information must be provided in the physical medium (e.g. electronic files, computer tape, or floppy diskettes) specified by the authorities, or in a computer language requested by the authorities. For instance, an anti-dumping authority could specify that information be provided in a specified format required by database software it uses to calculate margins. However, paragraph 3 goes on to provide that "[I]f a party does not respond in the preferred medium or computer language but the authorities find that the circumstances set out in paragraph 2 are satisfied, the failure to respond in the preferred medium or computer language should not be considered to significantly impede the investigation."

78. Paragraph 2 of Annex II provides more detail on the limits of the ability of anti-dumping authorities to insist that responses be submitted in a specified computer medium or format. Whenever the authorities make such a request, they must consider the reasonable ability of the respondent to respond in the preferred medium or computer language and may not request a respondent to use for its response a computer system other than that it otherwise uses. The authorities may not maintain a request for a computerized response if the respondent does not maintain computerized accounts and if presenting the response as requested would result in unreasonable extra burden on the respondent, such as unreasonable additional cost and trouble. The authorities also may not maintain a request for a computerized response in a particular medium or computer language if the respondent does not maintain its computerized accounts in that medium or in that computer language, and if presenting the response as requested would result in unreasonable extra burden on the respondent, such as unreasonable additional cost and trouble.

79. Thus, if a respondent does not maintain its accounts in a specified computer language, and presenting a response in that language would result in unreasonable additional cost and trouble, the anti-dumping authorities may not insist that the respondent do so. In that situation, the anti-dumping authorities also may not have recourse to facts available under Article 6.8 by finding that the respondent has significantly impeded the investigation by failing to respond in the preferred medium or computer language. Read in context with the provisions of

[143] *Japan Hot-Rolled AB Report*, para. 85.

Article 15, paragraphs 3 and 2 require investigating authorities to pay particular attention to the difficulties presented to firms from developing countries in responding in a particular computer medium or format. However, whenever information *has* been presented in the requested computer medium or format, and is verifiable, timely submitted and otherwise usable without undue difficulty, it must be taken into account in the investigation.

5. Annex II, Paragraph 5

80. Annex II, paragraph 5 states as follows:

> 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.

81. The meaning of Annex II paragraph 5 must be examined in light of the immediate context of Annex II, paragraph 3. Paragraph 5 functions as an additional safeguard to ensure that investigating authorities attempt to use a particular category of information submitted by respondents before resorting to facts available. Paragraph 5 only becomes applicable *if* a particular category of information submitted does not meet the requirements specified in paragraph 3. Thus, if information is not submitted within a reasonable period, or is not completely verifiable, or is usable only if the investigating authorities must spend days and weeks of additional work, then paragraph 5 becomes applicable.

82. This sequenced approach to paragraphs 3 and 5 of Annex II is consistent with the decisions of the two panels and the Appellate Body in interpreting Annex II, paragraph 3. The *Guatemala Cement* and *Japan Hot-Rolled* panels did not find that information that met the conditions of paragraph 3 must *also* meet the "best of its ability" requirements of paragraph 5. Instead, as the Appellate Body held in the *Japan-Hot-Rolled* dispute, "according to paragraph 3 of Annex II, investigating authorities are directed to use information if three, and, in some circumstances four conditions are satisfied" and "if these conditions are met, investigating authorities are *not* entitled to reject information submitted, when making a determination."[144]

83. The ordinary meaning of the phrase "may not be ideal in all respects" is that there may be a particular category of information submitted by respondents that has flaws and imperfections but that it must still be accepted if the respondent has used its best efforts in preparing and submitting that information. Because paragraph 5 only applies if information does not meet the conditions specified in paragraph 3, flaws that would make a category of information "not ideal" would include those creating "undue difficulties" in paragraph 3. For example, if certain information were missing within a particular category of information, it may not be possible to use the available information within that category without some difficulty. The effort required to use such data may well rise above the level of the fairly easy corrections that would take minutes or even a few hours

[144] *Japan Hot-Rolled AB Report*, para. 81.

to accomplish. In such cases, if a respondent acted to the best of its ability the investigating authorities would be required to make more concerted efforts to make use of the information provided by respondents.

84. The phrase "best of its ability" necessarily requires a case-by-case analysis by investigating authorities to judge the ability of particular respondents to provide particular category of information within the required time and format. A "best" effort by one respondent may not be a "best" effort by another. In this connection, the panel may wish to consider the following types of factors in making this determination: (1) whether the company operates in a developing country; (2) the extent of experience of the company in earlier investigations; (3) the level and extent of company personnel's expertise in handling anti-dumping investigations; (4) the number of plants and facilities involved; (5) the type and extent of pre-existing computerization of documents and data; and (6) the extent to which the responding company has been responsive to requests for information by the investigating authorities during the course of the investigation.

85. Articles 15 and 6.13 of the AD Agreement provide useful context for interpreting USDOC's obligations under Annex II, paragraph 5. Article 15 provides that "special regard must be given by developed country Members when considering the application of anti-dumping measures under this Agreement." It suggests that the "best efforts" of developing country exporting respondents must be evaluated with "special regard" by a developed country Member's investigating authorities. Article 15 further demonstrates that USDOC must be flexible in assessing whether SAIL used its "best efforts" in supplying the US sales data. Article 6.13 requires the authorities to "take due account of any difficulties experienced by interested parties, in particular small companies, in supplying information requested" and requires the authorities to "provide any assistance practicable." Both of these provisions are premised on the concept that, as the Appellate Body has recognized, cooperation is a two-way street. The authorities must adapt themselves to the needs of the respondent too, and help the respondent respond. The authorities are required to evaluate the "best efforts" of each respondent, taking that respondent's particular circumstances into account, and if a respondent has acted to the best of its ability, its data must be taken into account even if imperfect.

86. The object and purpose of Annex II, paragraph 5 as suggested by its text and context are to ensure that investigating authorities take every possible effort to use actual facts submitted by respondents before resorting to "facts available." It is consistent with this object and purpose to apply paragraphs 3 and 5 of Annex II sequentially, and to require authorities to accept information even if it can only be used with difficulty and take a flexible approach to assessing whether a respondent has acted "to the best of its ability."

B. The Object and Purpose of the AD Agreement Support India's Interpretation

87. One of the key principles governing anti-dumping investigations which emerges from the whole of the AD Agreement is the "goal of ensuring objective decision-making based on facts."[145] Any interpretation of the AD Agreement that requires or even permits investigating authorities to reject the use of verified and timely submitted facts that can be used without undue difficulty is inconsistent with such an object and purpose. This fundamental fact-gathering aspect of anti-dumping procedures supports the correct interpretation of the provisions of Annex II, paragraph 3 described above.

88. The object and purpose of the provisions of the AD Agreement on use of "facts available" are to provide an investigative tool to find reliable information to fill essential gaps. It is not to punish respondents who cannot provide the information requested; indeed, such punishment would be inappropriate and unjustifiable.[146] This cooperative fact-gathering objective– rather than punishment, deterrence, or policing– is reflected in Annex II of the Agreement. Annex II, paragraph 3 provides that facts available (*i.e.,* facts not provided by the responding foreign company) may only be used if the information provided is not verifiable, is not timely presented, and/or cannot be used without undue difficulty. But even if particular evidence does not meet the requirements of Annex II, paragraph 3, an investigating authority may not use facts available unless it makes a further finding consistent with Annex II, paragraph 5 that the interested party has not acted to the best of its ability in providing less than ideal information. Only at that point may investigating authorities have recourse to second-best information not supplied by the responding companies.

89. Paragraph 7 of Annex II similarly requires investigating authorities to focus on reliable fact gathering, not punishment. The entire thrust of the paragraph is that the authority must take special care in choosing the facts available – in other words, to find and use the information that will most closely reflect the amount of dumping that actually exists or not. This is why paragraph 7 calls on the authority to use "special circumspection" in choosing facts available, and to "check the information from other independent sources."

90. The final sentence of paragraph 7 does not change this overriding purpose. The sentence merely contemplates that if a party does not cooperate and withholds information, then a less favourable result might occur than if the party had cooperated and did not withhold information. The language of Paragraph 7 obviously draws a line between the party that withholds and the party that does not. But in all cases, the overriding purpose behind making such inferences is fact-driven: in other words, upon applying special circumspection and checking the information against other information (as required by paragraph 7), the authority may decide that the most reasonable and logical manner in which to deal

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[145] *Japan Hot-Rolled Panel Report*, para. 7.55

[146] *See United States—Transitional Safeguard Measures on Combed Cotton Yarn from Pakistan*, WT/DS192/AB/R (8 October 2001), DSR 2001:XII,6027, para. 120.

with the absence of information is to use facts which might turn out to be less favourable to the respondent. The purpose of paragraph 7 is to prevent, not to authorize, anti-dumping authorities' use of anti-dumping laws to reach out and punish respondents for not providing information.

VI. ARGUMENT

A. The Final AD Order Levying Anti-Dumping Margins of 72.49 per cent on Sail's Exports of Cut-to-Length Plate Violates Articles 6.6, 6.8, 2.2, 2.4, 9.3 and Annex II, Paragraphs 3, 5 and 7 of the AD Agreement

91. In this section of its First Submission, India sets forth the arguments relating to its claims regarding the US AD order levying anti-dumping duties of 72.49 per cent against SAIL. These various claims all involve the same information supplied by SAIL during the investigation – the information relating to SAIL's US sales. These claims also all involve USDOC's application of its "total facts available" practice, with the result that USDOC disregarded SAIL's US sales data in favour of information set forth in the petition.

1. USDOC Improperly Applied Facts Available in Violation of AD Agreement Article 6.8 and Annex II, Paragraph 3 by Rejecting Timely, Verifiable, and Appropriately Submitted US Sales Data Provided by SAIL

92. India's first claim relates to a violation of Article 6.8 and Annex II, paragraph 3 through USDOC's decision to apply its long-standing practice of "total facts available" to reject SAIL's US sales data. As set forth above, an investigating authority such as USDOC is required to accept any piece of information – such as SAIL's US sales data – if it is verifiable, submitted in a timely fashion, in the requested computer format, and capable of being used without undue difficulties by USDOC. The facts set forth show that all of these conditions were met with respect to SAIL's US sales data. Based on the evidence made available to USDOC during the investigation, this Panel should find that an unbiased and objective investigating authority evaluating that evidence could not have reached the conclusion that SAIL had failed to provide necessary information on its US Sales within a reasonable period. The Panel should further find that USDOC acted inconsistently with Article 6.8 and Annex II, paragraph 3 in applying facts available in calculating SAIL's dumping margin.

(a) SAIL's US Sales Database Was Timely Submitted

93. As discussed above in paragraphs 18-25, SAIL's US sales database, its responses to USDOC's questions on its US sales, and the corrections it provided to that data at the request of USDOC during verification were "supplied in a

timely fashion," as required by Annex II, paragraph 3 of the AD Agreement. For example, USDOC issued its first "supplemental questionnaire" to SAIL on 27 May 1999.[147] Only a few minor questions in this questionnaire concerned SAIL's US sales database and questionnaire response; its primary focus was on SAIL's reported home market sales and cost of production data.[148] SAIL filed its response to the supplemental questionnaire by the 11 June deadline.[149] From June through August 1999 USDOC issued five more supplemental questionnaires, but none of these raised any questions concerning SAIL's US sales or its US sales database. Thus, USDOC's actions reasonably led SAIL to believe USDOC was satisfied with the US sales information as of 11 June, and the US sales database submitted on 16 June.

94. Nothing in the record suggests that USDOC ever determined that SAIL's US sales data was not timely submitted. USDOC did return some of SAIL's *other* submissions of data as untimely filed, and in the Final Determination USDOC referred to the untimeliness of some of SAIL's submissions.[150] But none of the issues mentioned by USDOC regarding SAIL's untimeliness had anything to do with SAIL's US sales submissions. Instead, USDOC focused exclusively on SAIL's data regarding home market sales and cost of production. In addition, during the verification that was held in India between 30 August and 14 September 1999, USDOC reviewed SAIL's US sales data, and requested that SAIL provide additional information "corroborating" its submitted data. SAIL promptly supplied the requested information. These actions further indicated that even USDOC considered that the US sales data were timely submitted.

(b) SAIL's US Sales Data Were both Verifiable and Verified by USDOC

95. SAIL's US sales database was not only "verifiable" within the meaning of that term in Annex II, paragraph 3 of the AD Agreement, but it in fact was verified by USDOC with little difficulty. On 11 May 1999, SAIL submitted its initial US sales database in response to the questionnaire issued by USDOC on 17 March 1999.[151] As discussed above at paragraph 22, SAIL submitted another database on 16 June 1999.[152] USDOC later asked SAIL to provide information on four additional fields, and SAIL complied by filing a revised US sales database on 16 July 1999. Thereafter, USDOC accepted SAIL's 28-field database as complete.

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147 Ex. IND-5.
148 *Ibid.*
149 Ex. IND-7. Prior to this deadline, SAIL had also filed lengthy submissions with USDOC, detailing difficulties it was having in gathering the necessary cost and home market sales data and organizing the data into the format required by USDOC. However, none of the problems discussed by SAIL in those submissions concerned the reporting of the US sales data. Ex. IND-6.
150 Ex. IND-9; Ex. IND-17 at 73127, 73128.
151 Ex. IND-4.
152 Ex. IND-7.

96. USDOC's acceptance of the US sales database as verifiable is evidenced in the USDOC memorandum on "Determination of Verification Failure," issued shortly before the Final Determination in December 1999.[153] This Memorandum reviews six "deficiencies" in SAIL's sales data and eight in its cost data.[154] Of all those "deficiencies," only one concerned the US sales database– the miscoding issue affecting sales of 96-inch plate discussed at paragraph 30 above.[155] The "Analysis" section of this Memorandum in particular describes how insignificant the miscoding of 96-inch plate was. Nevertheless USDOC demonstrated its hostility toward the possibility of accepting data that in themselves may be usable in a situation where other submitted data are not. The Memorandum stated that "several errors were described in the US sales database. *While these errors, in isolation, are susceptible to correction*, when combined with other pervasive flaws in SAIL's data, *these errors support our conclusion that SAIL's data on the whole is unreliable*."[156] It concluded, "The fact that limited errors where [sic; were] found must not be viewed as testimony to the underlying reliability of the [sic] SAIL's reporting, *particularly when viewed in context the [sic] widespread problems encountered with all the other data* in the questionnaire response."[157]

97. In other words, regardless of the ease with which SAIL's submitted US sales data could have been corrected and used, USDOC considered the US sales data to be tarnished by "other pervasive flaws in SAIL's data" and "widespread problems" – i.e., flaws and problems in the home market sales and cost databases, not in the US sales database.[158] Thus, the problems with SAIL's home market sales and cost databases were imputed to its US sales database, allowing USDOC to conclude with a broad brush that "SAIL's data on the whole is unreliable." Insofar as it is intended to apply to SAIL's US sales database, however, this conclusion is belied by the findings of USDOC itself – in the small number of errors described in the verification report regarding SAIL's US sales database, the ease with which that data could have been corrected and used (as discussed further below), and USDOC's own acknowledgement that the errors in the US database "are susceptible to correction."[159]

98. Indeed, the best evidence of the completeness and verifiability of SAIL's US sales database is the verification report issued by USDOC after the completion of the verification.[160] First, and most importantly from USDOC's perspective, the sales verification report confirms that SAIL's US sales database was a complete listing of its US sales transactions during the period of investigation – i.e., the 1284 transactions listed in SAIL's computer database, pursuant to the nine contracts, comprised the entire universe of shipments of the subject mer-

153 Ex. IND-16.
154 *Ibid.*
155 *Ibid.*
156 *Ibid.* at 5 (emphasis added).
157 *Ibid.* (emphasis added).
158 *Ibid.*
159 *Ibid.*
160 Ex. IND-13.

chandise to the United States in that time period, and USDOC did not discover any unreported sales that should have been included in the database.

99. Specifically, USDOC repeatedly stated in the "Completeness" and "Quantity and Value" sections of the verification report that "We noted no discrepancies" on the critical issue.[161] USDOC described the process by which SAIL identified the relevant contracts for its sales to the United States during the period of investigation on the basis of information maintained by the company in the normal course of business – an important element of verification in USDOC's eyes.[162] As noted above, there were only nine such contracts, and USDOC's verifiers included documentation for all those contracts in Verification Exhibit S-8.[163] In fact, USDOC's discussion reveals the care with which SAIL handled the reporting of its US sales, in that a portion of the merchandise shipped under one of its US export contracts was in fact exported to Canada. SAIL properly excluded the quantity and value of the merchandise shipped to Canada from its reported US sales transactions.[164] USDOC further examined the "completeness" of SAIL's reported US sales data by comparing the universe of reported sales against SAIL's financial documents.[165] USDOC concluded that "Testing confirmed that all US sales contracts not reported were either outside the POI or not of subject merchandise," and it also noted that

> We found no unreported or incorrectly reported sales in the US sales listing [i.e., database] while performing the completeness tests described above.... In addition, during our review of detailed invoices covered by the contracts listed above, we found no unreported sales and found that all sales of subject merchandise covered by those contracts were within the POI and were reported correctly.[166]

100. Turning to the information reported by SAIL in the individual "fields" in its US sales computer database (i.e., the contents of the "matrix"), USDOC thoroughly reviewed the contents of all of those fields at verification. It did so by comparing the reported data to records maintained by SAIL or its vendors in the normal course of trade, to ensure that the reported data accurately and completely reflected the expenses actually incurred.[167] It also selected several individual transactions whose reported data was reviewed with particular care.[168]

101. The end result of this thorough review was that USDOC found very few problems with SAIL's US sales database. In addition to finding that this database

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[161] *Ibid.* at 12-15.
[162] *Ibid.* at 14-15.
[163] *Ibid.* at 13.
[164] *Ibid.* at 13 ("The appropriate amount of Canadian sales within contract number 6159 was deducted from the total quantity and value for the nine contracts ...to reconcile SAIL's records and the sales reported to the Department.") (citation omitted).
[165] *Ibid.* at 12.
[166] *Ibid.* at 15 (citing Verification Exhibit S-8).
[167] *Ibid.* at 8-9, 14-15, 29-33.
[168] *Ibid.* at 14 (citing Verification Exhibit S-7, which consists of documentation for the "preselected" US sales that the USDOC verifiers chose for thorough review).

was complete, USDOC found no problems whatever for the great majority of the individual product characteristics and expense items reported in the 28 "fields" for SAIL's US sales transactions.[169] Thus, of the items listed above, the verification report either stated that the verification team had "noted no discrepancies"[170] or implied as much through its silence regarding the following:

- Quantity (weight) of merchandise shipped
- Specifications and grade
- Quality
- Thickness
- Date of sale
- Invoice number
- Date of shipment
- Date of receipt of payment
- Gross unit price
- Credit expenses
- Warranty expenses
- Indirect selling expenses incurred in India for export sales
- Packing costs

102. Thus, for almost all of the information reported by SAIL in the large matrix of data that comprised its US sales database, consisting of 28 fields for each of its 1284 observations, the information was complete, verifiable – indeed, verified – and ready for use in calculation of SAIL's dumping margins.

103. The only significant issue noted by the verification team was the miscoding of product width discussed above at paragraph 30. The team thoroughly investigated this minor error once it was discovered, and determined its scope; they "checked multiple instances of this coding error," and concluded that it "appear[ed] to be limited exclusively to products that had a width of 96 inches and to the US database."[171] They also obtained a list of all the affected observations from SAIL, included in verification exhibit S-8.[172] Thus, the exact extent of the miscoding was known and was on the record in this proceeding. The other minor issues found at verification[173] were so minor that they were not even mentioned in the "Summary of Significant Findings" at the beginning of the verification report. These items cannot seriously be considered as undermining the conclusion that SAIL's complete submitted US sales database was verifiable.

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[169] *Ibid.* at 12-15.

[170] This phrase – "We noted no discrepancies" - is the standard means by which USDOC communicates its conclusion that the verification of a particular item was successful. This has been a standard practice at USDOC for many years.

[171] Verification report, Ex. IND-14, at 12.

[172] *Ibid.*; this portion of Exhibit S-8 attached as part of Ex. IND-14.

[173] See para. 28 above.

(c) SAIL Appropriately Submitted its US Sales Data so that it could "be used in the investigation without undue difficulties"

104. SAIL's timely submitted and verified US sales data was capable of being used by USDOC as part of the calculation of SAIL's dumping margins "without undue difficulty." Indeed, the fact that SAIL's US sales data was both timely submitted and verified is evidence that USDOC could have used it without undue difficulties.

105. USDOC itself recognized that the data was complete early in the investigation process. It stopped asking SAIL about the US sales data after a few minor questions in the first supplemental questionnaire in May 1999, to which SAIL timely responded on June 11.[174] Also in June 1999, well within the time period that USDOC required for calculating SAIL's dumping margins, SAIL submitted its revised US sales computer database to USDOC.[175] That database contained detailed information requested by USDOC on the relevant characteristics of SAIL's individual US sales transactions.[176]

106. Moreover, USDOC's thorough verification of SAIL's questionnaire responses revealed that the submitted US sales database could be used without difficulty in the calculation of SAIL's dumping margins. The simple width miscoding described above in paragraph 30 was quickly delineated, and the verifiers collected and entered into the verification record the information necessary to fix it.[177]

107. This coding error did not render SAIL's reported US sales data "unusable." It was easily correctable by USDOC, and with that correction the US sales data could have been used to calculate SAIL's dumping margins. As explained in the attached affidavit by Mr. Albert Hayes[178], the correction could have been implemented by a simple and routine addition of programming language in the computer programme by which SAIL's margins were calculated. To demonstrate the simplicity of this correction, we have also attached a copy of the public version of the computer programme used by USDOC to calculate the dumping margins for one of the respondents in one of the concurrent investigations of cut-to-length plate from another country (Japan).[179] The correction of the width coding error would require merely insertion of the following twelve lines of programming language after line number 182 of the programme:

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[174] Ex. IND-5; Ex. IND-7.
[175] Ex. IND-7; revised version in Ex. IND-8.
[176] Ex. IND-8.
[177] Verification report, Ex. IND-13, at 12.
[178] Ex. IND-24.
[179] Because USDOC applied total facts available in determining SAIL's dumping margins, there is no computer programme by which SAIL's margins were calculated, so it is not possible to use a "SAIL-specific" computer programme for this example. However, as noted above, USDOC typically uses a standard computer programme for calculating dumping margins in concurrent investigations, and revises that standard programme to address the specific circumstances of the individual respondents. In this respect, the correction of the width coding error for SAIL could be viewed as simply a respondent-specific adjustment for SAIL of the standard programme.

```
182   USOBS =_N_;
183   RUN;
184
185   PROC SORT DATA = USDATA;
186   BY USOBS;
187
188   PROC SORT DATA = COMPANY.SAIL4X (RENAME = (OBS
      = USOBS))
189   OUT = VERFIX;     /* WIDTH CORRECTION FROM
      VERIFICATION */
190   BY USOBS;
191
192   DATA USDATA;
193   MERGE USDATA (IN = IN_US) VERFIX (IN = IN_FX);
194   BY USOBS;
195   IF IN_US;
196   IF IN_US AND IN_FX THEN PLWIDTHU = 'C';
```
180

108. This revision would require no more than a few minutes of time by one of the experienced analysts employed by USDOC.[181]

109. Another reason that SAIL's US sales data could have been "used without undue difficulties" is that it was sufficiently complete and accurate to provide a basis for the US sales side of the calculation of SAIL's dumping margins. India does not argue that USDOC should have used all of SAIL's non-US sales data to calculate the dumping margin. Indeed, SAIL acknowledged to USDOC that USDOC would be justified in resorting to other information and methods to calculate SAIL's normal value.[182]

110. The affidavit of Albert Hayes[183] provides three alternative methods that USDOC could have used to calculate SAIL's dumping margin using SAIL's US sales data. These alternatives are offered to the Panel as evidence that the US sales data were indeed "usable without undue difficulties." USDOC could have calculated SAIL's dumping margin by organizing the US sales data into the same categories of merchandise used in the petition, and calculating average net US prices for those categories using its standard methodology. Those net US prices could then be compared to the petition's "normal value" data. As the affidavit

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[180] Ex. IND-24.
[181] *Ibid.*
[182] SAIL case brief before USDOC, Ex. IND-14, at 13-14. During the investigation, SAIL offered three alternatives to demonstrate to USDOC that it could use the US sales data as well as data on home market sales and costs in the petition to calculate a final dumping margin. *Ibid.* at 14.
[183] Ex. IND-24.

states, USDOC could derive normal values for comparison to SAIL's US transactions in three different ways:

- The average price of home market sales identified in the market research report submitted as Exhibit 15 of the petition for a group of products with a specified range of grades, widths, and thicknesses could be compared to the prices of the same and similar products in SAIL's US sales database, as the petition did.
- The constructed-value price that was calculated for a specific cut-to-length plate product in the petition could be compared to the prices of a narrow group of comparable US sales, and the prices of the remaining US sales comparable to the merchandise in the market research report could be compared to the average price of home market sales identified in that report.
- An average of the price in the market research report and the constructed-value price from the petition could be compared to the prices of the comparable US merchandise.

111. The arithmetic required to calculate the final margins using any of these three alternatives is straightforward. Yet USDOC refused to accept SAIL's verified and timely US sales data using these or any other formula. USDOC argued to the CIT that it could not– consistent with US statutes and its own "long-standing practice"– calculate a final anti-dumping margin using only one part of the formula supplied by the respondent and one or several parts of the formula from other sources, including the petition.[184] According to these interpretations of the US statutes and its own practice, USDOC believed it was required to use either *all* data from the respondent (subject only to the minor "filling of gaps" by USDOC) or *all* data from other non-respondent sources including the petition. USDOC's interpretation of the AD Agreement allowed no middle ground. India submits that USDOC incorrectly interprets the requirements of the AD Agreement and that it could have used, without any difficulty– let alone undue difficulty– the US sales data provided by SAIL in calculating the dumping margins in this investigation.

(d) SAIL's US Sales Database was "supplied in a medium or computer language requested by the authorities"

112. There is no question that SAIL's US sales database satisfied the requirement in Annex II, paragraph 3 that it be "supplied in a medium or computer language requested by the authorities". SAIL submitted its US sales database on 11 May 1999, and a revised US sales database on 16 June 1999, in the format requested by USDOC. USDOC raised no further questions regarding either the format or the readability of that database. USDOC's apparent contentment with

[184] Ex. IND-20 at 11-12.

the US sales database contrasts to its months of active questioning of SAIL's home market sales and cost of production databases.

113. Because SAIL was able to submit its US sales database in the computer medium requested by USDOC, SAIL did not need to invoke paragraph 2 of Annex II. SAIL did not seek to have USDOC "not maintain" its request for a computerized response on US sales data, because SAIL determined that it was able to satisfy USDOC's demands regarding the US sales data without "unreasonable cost and trouble". SAIL's submission of its US sales database in the computer medium requested by USDOC, in the requested format and fully readable, demonstrates the lengths to which the company went to cooperate with USDOC in this investigation.

(e) An Unbiased and Objective Investigating Authority Evaluating the Evidence could not Have Reached the Conclusion that SAIL Failed to Provide Necessary US Sales Data within a Reasonable Period

114. Applying the appropriate standard of review under DSU Article 11 and AD Agreement Article 17.6, this Panel should find that an unbiased and objective investigating authority could not have reached the conclusion that SAIL refused access to, or otherwise failed to provide, necessary information relating to SAIL's *US* sales data within a reasonable period. In particular, the Panel should find that an unbiased and objective investigating authority would have reached the conclusion that SAIL's US sales data complied with all of the conditions of AD Agreement Annex II, paragraph 3, first sentence. Because USDOC did not use SAIL's US sales data in calculating the dumping margin but instead used facts available from the petition, the Panel should find that the final AD order dated 10 February 2000 is inconsistent with the United States' obligations under Article 6.8 and Annex II, paragraph 3 of the AD Agreement.

2. Assuming arguendo that SAIL's US Sales Data were not "ideal in all respects," USDOC Violated Annex II, Paragraph 5 by Rejecting the Data Because SAIL Acted to the Best of its Ability in Providing the Data

115. India sets forth below an alternative claim under Annex II, paragraph 5 of the AD Agreement. Based on the evidence in the record, the Panel should find that an unbiased and objective investigating authority evaluating that evidence could not have reached the conclusion that SAIL did not act to the best of its ability in providing the US sales data.

116. India urges the Panel to decide this claim and not exercise judicial economy. No WTO Member, and particularly no developing country Member, should be compelled to initiate new WTO proceedings because the exercise of judicial economy has left lacunae that prevent a complete resolution of the dispute. Ac-

cordingly, India requests that the Panel make findings with respect to this claim in the alternative.

117. The quality and timeliness of SAIL's US sales data submissions, and the effort required to provide that data, demonstrate that SAIL acted to the best of its abilities in providing US sales data to USDOC. Even if the Panel finds that SAIL's US sales data were not "ideal in all respects," they were of a very high quality. The absence of any complaints or followup by USDOC after receiving the data signalled its satisfaction that SAIL had done a good enough job for USDOC to be able to use these data as part of the equation for calculating SAIL's anti-dumping margins. The verification of the US database found it to be complete; for almost all of the data USDOC found "no discrepancies," and found only one significant error, the easily correctable width miscoding discussed above.[185]

118. In a project as large and complex as the preparation and submission of a dumping database, errors are inevitable, especially considering the short deadlines involved. If one error in a large database can trigger a finding that the respondent has failed to act to the best of its ability, Article 6.8 will be invoked in every investigation and the exception of "facts available" will swallow the rule of measuring dumping through actual data wherever possible. The Agreement cannot establish a standard of conduct that no respondent in the world could realistically satisfy; such a reading of its text would be contrary to the principle of good faith in treaty interpretation recognized by the Appellate Body.

119. In this case, no external evidence contradicts the conclusion that SAIL acted to the best of its ability, nor does any evidence raise concerns that SAIL applied anything less than its best efforts in preparing its US sales database. The Government of India submits that no objective and unbiased administering authority could reach a conclusion otherwise. In the domestic litigation concerning the final AD determination in this investigation, the CIT reversed USDOC's conclusion that SAIL had not acted to the best of its ability, and remanded the case to USDOC to reconsider that conclusion. Predictably, on remand USDOC came to the same conclusion as before, but even with this opportunity for reflection, USDOC did not base its conclusion on any problems with the US sales database.[186]

3. USDOC's Application of Adverse Facts Available in Accepting the Data in the Petition for US Sales Violated Annex II, Paragraph 7 Because SAIL did not Fail to Cooperate with USDOC or Otherwise Withhold Information Related to its US Sales

120. Assuming *arguendo* that the Panel does not find that SAIL's US sales data should have been accepted by USDOC pursuant to Annex II, paragraphs 3 or 5,

[185] See paras. 25-28 above.
[186] Remand redetermination, Ex. IND-21.

India presents an additional alternative claim that USDOC violated Annex II, paragraph 7. This claim is based on the fact that USDOC improperly applied "total" facts available and then "adverse" facts available against SAIL in concluding that SAIL had "failed to cooperate" in providing, *inter alia*, its US sales data. USDOC's conclusion could not have been based on a proper, unbiased and objective evaluation of the facts.

(a) Interpretation of Annex II, Paragraph 7

121. The last sentence of Annex II, paragraph 7 provides 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.

122. The Appellate Body in *Japan Hot-Rolled* analyzed the meaning of the word "cooperate" in Annex II, paragraph 7. It emphasized that the term means a "process, involving joint effort, whereby parties work together towards a common goal."[187] The Appellate Body stressed that "investigating authorities are not entitled to insist upon *absolute* standards or impose *unreasonable* burdens upon" exporters who are required to perform to a "very significant degree of effort – to the best of their abilities."[188] The Appellate Body faulted USDOC's definition of "cooperation" because that definition did not provide for USDOC to cooperate with respondents in finding the relevant and necessary information.[189]

123. Article 15 of the AD Agreement once again provides a necessary context for the Panel to determine the extent to which USDOC should have cooperated with SAIL in finding ways to utilize SAIL's US sales data. Article 15 requires USDOC to give "special regard" to the special situation of India as a developing country "when considering the application of anti-dumping measures under this Agreement." There is no indication that USDOC enhanced the level of its cooperation with SAIL or made any particular efforts to remedy any minor problems that may have existed with SAIL's US sales data in an effort to comply with the mandate of the first sentence of Article 15 of the AD Agreement.

124. Paragraph 7 also provides for investigating authorities to examine whether a respondent cooperated in providing particular categories of information. Annex II, paragraph 7 focuses on *particular* information – not the totality of the information provided (or not provided) by the responding company. The first sentence indicates that authorities may have to base their findings "on information from a secondary source", and "must check the information from other independent sources." The immediate context for Annex II, paragraph 7 is paragraph 6 which provides that "if *information* is not accepted, the supplying party"

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[187] *Japan Hot-Rolled AB Report*, para. 99.
[188] *Ibid.*, para. 102.
[189] *Ibid.* para. 106 ("USDOC took no steps to assist KSC to overcome these difficulties, or to make allowances for the resulting deficiencies in the information supplied").

should be informed of the reasons, and "the reasons for the rejection of *such evidence or information* should be given in any published determinations."

125. There is no textual basis for any investigating authority to apply adverse facts available in place of a particular category of information, where the respondent cooperated to the best of its ability in seeking to provide that particular information. If the respondent cooperates with respect to a particular category of information, and does not act to the best of its ability in seeking to provide *another* category of information, an investigating authority is *not* thereby justified in rejecting the former to punish the respondent for its failures with respect to the latter.

(b) SAIL Cooperated Fully with USDOC in Providing its US Sales Information

126. In the present case, USDOC concluded that SAIL "did not cooperate to the best of its ability during the course of this investigation" and consequently "used an adverse inference in selecting a margin as facts available."[190] USDOC made no finding regarding whether SAIL cooperated regarding its US sales data *alone*. Nothing in the record supports such a finding, even if USDOC had focused its cooperation analysis on SAIL's US sales data - which it did not.

127. SAIL fully "cooperate[d]" with, and did not "withhold" any information from, USDOC regarding its US sales. SAIL's cooperation regarding the preparation and submission of its US sales database is demonstrated by the same facts as those that lead to the conclusion that the company "acted to the best of its ability". The fact that SAIL did not withhold any information is revealed by the fact that USDOC itself noted in its verification report that SAIL's US sales database was complete, and by the fact that all the information requested by USDOC – almost 1300 transactions with 28 fields of data for each - was included in that database. To extent that errors in the US sales data were identified during verification, SAIL immediately provided additional information at USDOC's request. No more cooperation could have been possible or was necessary. Indeed, USDOC itself recognized that any errors in the US sales database "were susceptible of correction."

128. If there was any lack of cooperation regarding US sales data, it was a unilateral lack of cooperation on the part of USDOC. USDOC had an obligation to cooperate in good faith with SAIL. USDOC's refusal to use SAIL's actual US sales data in calculating SAIL's final dumping margin constituted a failure to cooperate. USDOC displayed a similar lack of cooperation in the investigation in the *Japan Hot-Rolled* case, when USDOC refused to use fully verified, timely submitted and usable information to calculate a dumping margin. The panel and Appellate Body quite correctly found that no objective and unbiased investigating official could have refused to use this information.

[190] Final Determination, Ex. IND-17, at 73127-73128.

129. In view of the above, this Panel should find that an unbiased and objective investigating authority that had received and evaluated SAIL's US sales data, and evaluated SAIL's efforts in connection with the US sales data, could not have reached the conclusion that SAIL had failed to cooperate. Accordingly, the Panel should find that USDOC acted contrary to Annex II, paragraph 7 in using "adverse" facts available with respect to the US sales data.

B. Sections 776(a), 782(d) and 782(e) of the Tariff Act of 1930 Violate Article 6.8 and Annex II, Paragraph 3 of the AD Agreement

1. Introduction

130. Section 782(e) and Section 776(a) of the Tariff Act of 1930 as such (*per se*) violate Article 6.8 and Annex II, paragraph 3 of the AD Agreement because in combination they require the rejection of information submitted by a foreign respondent that is verified, timely submitted and can be used without undue difficulty, unless USDOC finds that "the information is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination,"[191] and that the interested party has "acted to the best of its ability in providing the information."[192] Neither of these latter two conditions is found in Annex II, paragraph 3 of the AD Agreement.

131. As discussed in section V above, Annex II, paragraph 3 provides a closed, all-inclusive list of four conditions for determining whether information submitted by interested parties must be accepted by investigating authorities. These four items do not include any requirement that the respondent make its "best efforts," nor do they require an analysis of whether the information is "so incomplete that it cannot serve as a reliable basis for reaching an applicable determination."

132. USDOC and the CIT have interpreted the phrase "so incomplete that it cannot serve as a reliable basis for reaching an applicable determination" in section 782(e)(3) as mandating rejection of verified, timely submitted and otherwise usable information. They will reject such information where the foreign respondent has not provided sufficient information on what USDOC terms the "essential components of a respondent's data: US sales; home market sales; cost of production for the home market models; and constructed value for the US models."[193] Thus, in this case, because USDOC concluded that SAIL had not provided usable, verifiable or timely submitted information concerning SAIL's home market sales, cost of production for home market models, or constructed value for the US models, it refused to accept SAIL's US sales data at all. Its reasoning for doing so was based on a conclusion under section 782(e)(3), that SAIL's US sales data, standing alone, was so incomplete that it could not even

[191] Section 782(e)(3), Ex. IND-26.
[192] Section 782(e)(4), Ex. IND-26.
[193] Final Determination, Ex. IND-17, at 73130.

serve as part of the basis for calculating a final dumping margin. USDOC describes such an action as the application of "total facts available."

133. USDOC will also reject verified, timely submitted and otherwise usable information unless the "interested party has demonstrated that it acted to the best of its ability in providing the information and meeting the requirements established by [USDOC] with respect to the information." This proviso, which appears in section 782(e)(4) of the US statute, is also applied over and above the four factors listed in Annex II, paragraph 3. While a "best efforts" requirement is found in different form in Annex II, paragraph 5, the United States violates Annex II, paragraph 3 by merging the requirements of paragraphs 3 and 5 together. Moreover, USDOC (affirmed by the CIT) has interpreted this phrase as applying to a respondent's best efforts throughout the *entire* investigation, not only with respect to particular categories of information. The result of this improper interpretation is the mandated rejection of some verified, timely submitted and usable information because the respondent has failed to demonstrate to USDOC's satisfaction that it acted to the best of its ability in providing *other* information.

2. Operation of the US Statutory Scheme Regarding "facts available"

134. The statutory provisions relevant to how US authorities treat "facts available" are found in sections 776(a), 782(d) and 782(e) of the Tariff Act of 1930 as amended. Section 776(a) provides in general:

> If–
>
> (1) necessary information is not available on the record, or
>
> (2) an interested party or any other person–
>
> (A) withholds information that has been requested by the administering authority ...under this subtitle,
>
> (B) fails to provide such information by the deadlines for submission of the information or in the form and manner requested, subject to subsections (c)(1) and (e) of section 782,
>
> (C) significantly impedes a proceeding under this title, or
>
> (D) provides such information but the information cannot be verified as provided in section 782(i),
>
> the administering authority ...*shall*, subject to section 782(d), use the facts otherwise available in reaching the applicable determination under this title.[194]

135. The four conditions provided in section 776(a)(2) are specified (with "or") in the alternative. For example, even if no information has been withheld, and

[194] Section 776(a) (emphasis added), Ex. IND-26.

the investigation has not been impeded, and the information has been fully verified, the Commerce Department nonetheless *must* ("shall") use "facts available" if the information was submitted later than an arbitrarily-set deadline. Thus, if any one of these four conditions applies, USDOC must use facts available.

136. Section 782(d) provides as follows:

> (d) Deficient Submissions.– If the administering authority... determines that a response to a request for information under this title does not comply with the request, the administering authority... shall promptly inform the person submitting the response of the nature of the deficiency and shall, to the extent practicable, provide that person with an opportunity to remedy or explain the deficiency in light of the time limits established for the completion of investigations or reviews under this title. If that person submits further information in response to such deficiency and either
>
> > (1) the administering authority ...finds that such response is not satisfactory, or
> >
> > (2) such response is not submitted within the applicable time limits,
>
> then the administering authority ...may, subject to subsection (e), disregard all or part of the original and subsequent responses.[195]

137. While section 782(d) requires USDOC to give notice to a respondent if a submission is deficient, it does not modify the basic mandate in section 776(a) requiring use of the "facts available." Under section 782(d), if USDOC finds that such an additional submission is "not satisfactory," or if the submission was not made by the deadline arbitrarily set for it, USDOC may disregard not just the additional submission but all or part of the original response as well. This was the statutory basis for USDOC's decision to reject *all* of the information submitted by SAIL, and instead base its final determination in the cut-to-length plate case on mere conjecture– the highest dumping margins alleged by the petitioner.

138. Section 782(e) limits Commerce's ability to disregard actual information submitted, but only if *every one* of five listed conditions is fulfilled:

> (e) Use of Certain Information.– In reaching a determination under section ...733, 735, 751, or 753 [in anti-dumping investigations or reviews] the administering authority ...shall not decline to consider information that is submitted by an interested party and is necessary to the determination but does not meet all the applicable requirements established by the administering authority . . ., if–
>
> > (1) the information is submitted by the deadline established for its submission,
> >
> > (2) the information can be verified,

[195] Section 782(d), Ex. IND-26.

> (3) the information is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination,
>
> (4) the interested party has demonstrated that it acted to the best of its ability in providing the information and meeting the requirements established by the administering authority or the Commission with respect to the information, *and*
>
> (5) the information can be used without undue difficulties.[196]

139. If any one of these five factors is *not* fulfilled, then the mandatory requirement in section 776(a) that USDOC reject the information and use "facts otherwise available" is activated. Thus, USDOC is required to use the "facts available" if a questionnaire response was not submitted by an arbitrarily-set deadline, even if the response was complete, verifiable (and was verified), was usable and was provided in good faith.

140. Although the text of Sections 776(a) and 782(e) could be interpreted as applying to individual categories of information, USDOC and the CIT have not interpreted these provisions in that way. Instead, Section 776(a) has been interpreted as mandating the rejection of usable, verified, timely submitted information where the respondent "withholds [other] information that has been requested by the administrating authority" or "fails to provide such [other] information by the deadlines for submission of the information or in the form and manner requested."[197]

3. Sections 776(a) and 782(e) are Mandatory Provisions

141. It is established GATT/WTO practice that the consistency of a law on its face may be challenged even independently from any application thereof if the law is mandatory in nature. In other words, if a law mandates WTO-inconsistent action or prohibits WTO-consistent action, it can be challenged on its face in a dispute settlement proceeding.[198]

142. Sections 776(a) and 782(e), read together, mandate a violation of GATT/WTO obligations and prohibit WTO-consistent treatment of information submitted during an anti-dumping investigation. They must therefore be found as such to be inconsistent with those obligations.[199] As discussed immediately preceding, section 776(a) *mandates* use of the "facts otherwise available" whenever one of the four situations enumerated therein exists. While section 782(e) permits information to be nevertheless taken into account, section 782(e) requires

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[196] Section 782(e) (emphasis added), Ex. IND-26.
[197] Section 776(a)(2)(A) and (b), Ex. IND-26.
[198] Japan Hot-Rolled Panel Report, para. 7.192.
[199] See *United States – Anti-Dumping Act of 1916*, Appellate Body Report, WT/DS136/AB/R-WT/DS162/AB/R, adopted 26 September 2000, DSR 2000:X, 4793, para. 88.

the submitting party (*i.e.,* the foreign respondent) to prove that *all* five of the listed conditions are fulfilled. If it can only demonstrate four out of five, then USDOC cannot take the information into account. Thus, sections 776(a) and 782(e), read together, mandate use of "facts available" when the respondent has failed to provide information by the deadlines for submission of the information or in the form and manner requested. They are measures that will necessarily result in action inconsistent with GATT/WTO obligations.

143. The Statement of Administrative Action for the Uruguay Round Agreements Act (SAA) reinforces the mandatory nature of sections 776(a) and 782(e). The SAA provides that Section 776(a) "*requires* Commerce ...to make determinations on the basis of the facts available where requested information is missing from the record or cannot be used because, for example, it has not been provided, it was provided late, or Commerce could not verify the information."[200]

144. The SAA constitutes a definitive interpretation of the statute as most recently amended in 1994. It comprises an exegesis of the WTO Agreement and the agreements annexed to it, a description of the changes made in US law and regulations to implement them, and a definitive policy statement of how the US authorities would administer the US law and regulations as thus changed.[201] The SAA describes itself as "an authoritative expression by the Administration concerning its views regarding the interpretation and application of the Uruguay Round agreements, both for purposes of US international obligations and domestic law" and states that "it is the expectation of Congress that future Administrations will observe and apply the interpretations and commitments set out in this Statement."[202] As the panel found in *United States - Sections 301 - 310 of the Trade Act of 1974*, the "SAA thus contains the view of the Administration, submitted by the President to Congress and receiving its imprimatur, concerning both interpretation and application and containing commitments, to be followed also by future Administrations, *on which domestic as well as international actors can rely*."[203]

145. USDOC and the CIT have treated sections 776(a) and 782(e) as mandating the use of facts available whenever the circumstances provided for in section 776(a) exist and any one of the conditions listed in section 782(e) is not met. Many USDOC determinations have described Section 776(a) as "requiring"

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[200] SAA p. 869, Ex. IND-27 (emphasis added).

[201] The contents and phrasing of the Statement of Administrative Action were negotiated between the US Administration and the US Congress (with extensive input at times from interested private sector groups such as the industries most heavily utilizing anti-dumping remedies). The final text of the Statement of Administrative Action was then formally submitted to the US Congress together with the Uruguay Round package of international agreements and implementing legislation; it was expressly approved by Congress in section 101(a) of the Uruguay Round Agreements Act (codified at 19 U.S.C. 3511(a)). Section 102(d) of the same Act (19 U.S.C. 3521(d)) provides that "The statement of administrative action approved by Congress under section 101(a) shall be regarded as an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round agreements and this Act in any judicial proceeding in which a question arises concerning such interpretation or application."

[202] SAA p.1, quoted in *Japan Hot-Rolled Panel Report*, para. 7.198.

[203] WT/DS152/R, adopted 27 January 2000, DSR 2000:II, 815, para. 7.111 (emphasis added).

USDOC to resort to facts available.[204] The CIT has held that "[Section 776(a)] sets forth four situations, any one of which *requires* Commerce to resort to 'facts otherwise available.'"[205] The CIT has also held that all five criteria enumerated in section 782(e) must be met before its provisions apply; if any one of the criteria is not fulfilled, analysis of the others is unnecessary.[206] USDOC's final determination on *Pasta from Italy*, describing the treatment of information submitted by the pasta exporter De Cecco, neatly describes USDOC's view of the relationship between section 776(a) and section 782(e):

> Because section 782(e) did not prevent the Department from declining to consider De Cecco's COP [cost of production] information, and 782(d) allowed the Department to disregard De Cecco's original deficient COP response and its unsatisfactory responses to the Department's subsequent request, the Department determined that De Cecco failed to provide its COP information by the deadlines established or in the form and manner requested. Section 776(a) thus *required* the Department to use the facts available in making its determination as to De Cecco.[207]

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[204] See, e.g., *Notice of Final Determination of Sales at Less than Fair Value: Certain Pasta from Italy*, 61 Fed.Reg. 30326, 14 June 1996 ("*Pasta from Italy"); Final Determination of Sales at Less than Fair Value: Certain Pasta from Turkey*, 61 Fed.Reg. 30309, 30311, 14 June 1996 ("*Pasta from Turkey"); Certain Cut-To-Length Carbon Steel Plate from Sweden: Preliminary Results of Antidumping Duty Administrative Review*, 61 Fed.Reg. 51898, 51899, 4 Oct. 1996 ("*Plate from Sweden*") ("the Department has determined that, insofar as SSAB's cost data could not be verified, section 776(a) of the Act requires the Department to use the facts available with respect to this data"). See also *Roller Chain, Other than Bicycle from Japan: Preliminary Results and Partial Rescission of Anti-dumping Duty Administrative Review*, 63 Fed.Reg. 25450, 8 May 1998 ("section 776(a) mandates that the Department use facts available in making its determination vis-à-vis Pulton"). These determinations are attached in Ex. IND-28.

[205] *Allegheny-Ludlum Corp. v. United States*, USCIT Slip Op 2000-170 (28 December 2000), at 42-43 (emphasis added), attached in Ex. IND-29.

[206] *Acciai Speciali Terni v. United States*, USCIT Slip Op. 2001-36 (30 March 2001), at 42, attached in Ex. IND-29.

[207] *Pasta from Italy*, *supra* n. 204, at 30328-29 (emphasis added). See also *Roller Chain, Other than Bicycle from Japan: Final Results and Partial Rescission of Anti-dumping Duty Administrative Review*, 63 Fed.Reg. 63671, 63673, 16 November 1998, attached in Ex. IND-28 ("*Roller Chain from Japan - Final*") ("Given that Kaga failed to provide the necessary information in the form and manner requested, even after being provided several opportunities to cure these deficiencies, the Department is required, under section 782(d), to apply, subject to section 782(e), facts otherwise available. We further determine that Kaga failed to satisfy several of the requirements enunciated by section 782(e) of the Act.... For the reasons stated above, the application of section 782(e) of the Act does not overcome section 776(a)'s direction to use facts otherwise available for Kaga's submissions. Thus, the use of facts available is warranted in this case.")

4. The Two Additional Conditions for Acceptance of Information Imposed by Sections 782(e)(3) and 782(e)(4), Read Together with Section 776(a), are Inconsistent with AD Article 6.8 and Annex II, Paragraph 3

146. In section V above, India has argued that the list in Annex II, paragraph 3 is an exhaustive list, and that it is legally impermissible for an administering authority to superimpose any additional conditions that will prevent it from taking into account verifiable, timely, usable and appropriately submitted information.

147. Sections 782(e) and 776(a), read together, violate Article 6.8 and Annex II, paragraph 3 by establishing two additional conditions not found or mandated in Annex II, paragraph 3, which expand the extent to which USDOC can and must use "facts available" instead of information actually submitted.

148. The first new condition is that the information must not be "so incomplete that it cannot serve as a reliable basis for reaching the applicable determination." There is simply no reference in Annex II, paragraph 3 to a quantum of information that is necessary in order for information to be used. None was imposed by the panels or the AB in earlier reports addressing Article 6.8 and Annex II, paragraph 3.

149. Moreover, in the final determination on cut-to-length plate from India – as well as in other investigations - USDOC read the word "information" as comprising *all* the information requested or submitted during an investigation. Thus, if one large category of information, such as cost of production data, is not verifiable, complete, or timely submitted, this reading of Sections 782(e) and 776(a) permits USDOC to reject all of the information submitted and to substitute total facts available and a petition-based dumping margin.

150. The second condition added by section 782(e) is that an interested party must demonstrate that it has acted to the "best of its ability" in providing the information and complying with the requirements established by USDOC "with respect to the information." We have set forth in detail the analysis of Annex II, paragraph 3 and 5 in Sections V and VI.A.2(a) above that compels the finding that paragraphs 3 and 5 consist of separate obligations for investigating authorities. The "best of its ability" provision of Section 782(e) turns around the sense of the reference to the same phrase in paragraph 5 of Annex II of the AD Agreement. If information satisfies the criteria of paragraph 3, it must be used, regardless of whether a party has acted to the "best of its ability." Conversely, under paragraph 5, investigating authorities must use even less-than-ideal information that does not meet the requirements of paragraph 3, as long as the party concerned has acted to the best of its ability.

151. In addition, under Article 2.4 of the AD Agreement, the obligation to carry out a fair comparison lies on the investigating authorities, not on the exporters. The investigating authorities already require interested parties to produce information; to refuse to use the information unless an interested party demon-

strates it acted to the "best of its ability" is to impermissibly limit rights and impose new obligations inconsistent with the Agreement.[208]

152. In sum, by conflating the separate concepts found in paragraphs 3 and 5, section 782(e) reflects an impermissible interpretation of the AD Agreement that limits the circumstances in which information submitted by an interested party will be used.

5. Section 776(a) and 782(e), as Interpreted by USDOC and the CIT, Require USDOC to Reject Timely Submitted, Verified and Usable Information if Other *Information is Withheld or not Submitted in the Time, form or Manner Requested, and therefore Violate Article 6.8 and Annex II, Paragraph 3*

153. As discussed above, sections 776(a) and 782(e), read together, are mandatory measures. Section 776 mandates use of the "facts otherwise available" whenever the respondent has failed "to provide information by the deadlines for submission of the information or in the form and manner requested."[209] While the text of Section 776(a) could be interpreted as applying to individual categories of information, USDOC and the CIT have not interpreted these provisions in that way. Rather, they have interpreted sections 776(a) and 782(e) to require the rejection of timely submitted, verifiable, and usable information, because other submitted information proved imperfect. As discussed in section V above, such actions are inconsistent with paragraphs 3 and 5 of Annex II.

154. USDOC and the CIT have interpreted section 782(e)(3) as requiring that verified, timely submitted information must nevertheless be rejected where other information is missing. They have often interpreted the phrase "so incomplete that it cannot serve as a reliable basis for reaching an applicable determination" in section 782(e)(3) as mandating rejection of verified, timely submitted and otherwise usable information. A typical scenario involves an anti-dumping investigation where (as often happens) the petitioner alleges that home market sales were made at prices below the cost of production. If USDOC initiates an investigation of below-cost sales, then it demands that the respondent produce not just data on home market sales and US sales, but data on costs of production of products sold in the home market and constructed value of products sold in the US market– magnifying the likelihood that there will be flaws in one or more of the data sets.

155. For instance, in the case of *Pasta from Italy*, the petitioner alleged sales below cost, and USDOC requested data on cost of production and constructed

[208] Under section 776(b), if USDOC determines that an interested party has failed to cooperate by not acting "to the best of its ability" to comply with a USDOC request for information, then USDOC may not just use "facts available" but may use "adverse inferences," including information from the petition, or (in an administrative review) prior reviews. Section 782(e) also refers to "best of its ability."

[209] Section 776(a)(2)(B), Ex. IND-26.

value. During the investigation, the respondent De Cecco tried and failed to develop a cost-accounting system that would meet USDOC's standards. Six days before verification, De Cecco submitted a reconciliation of its submitted data to the records maintained in the normal course of business, then two days later USDOC decided that it was required to resort to facts available for De Cecco's cost data. USDOC then found that as a consequence, De Cecco's home market sales data were unusable because these sales could not be tested to determine whether they were above the cost of production. De Cecco's constructed value data could not be used either, because they were part of the rejected cost data. USDOC then went to total facts available and assigned a margin from the petition.[210] Indeed, USDOC has stated repeatedly that "The Department's prior practice has been to reject a respondent's submitted information in toto when flawed and unreliable cost data renders any price-to-price comparison impossible."[211] The final determination in the investigation of cut-to-length plate from India similarly stated: "It is the Department's long-standing practice to reject a respondent's questionnaire response in toto when essential components of the response are so riddled with errors and inaccuracies as to be unreliable."[212]

156. Thus, in this case, because USDOC concluded that SAIL had not provided usable, verifiable or timely submitted information concerning SAIL's home market sales, cost of production for home market models, or constructed value for the US models, it refused to accept SAIL's US sales data. Its reasoning for doing so was based on Section 782(e)(3).

157. USDOC and the USCIT have also interpreted section 782(e)(4) to mandate rejection of verified, timely submitted information where USDOC has found that a respondent has not demonstrated that it has acted to the best of its ability in providing the information and meeting the requirements established by USDOC with respect to the information. A finding of this nature can be based on the mere fact of missing data, such as cost information.[213] Even an attempt to correct ear-

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[210] *Pasta from Italy*, *supra* n. 204, at 30327, attached in Ex. IND-28.

[211] *Elemental Sulphur from Canada: Preliminary Results of Antidumping Duty Administrative Review*, 62 Fed.Reg. 969, 970 (7 January 1997) attached in Ex. IND-28, citing *inter alia Pasta from Italy* at 30329 and *Pasta from Turkey* at 30311. See also *Plate from Sweden*, *supra* n. 204, at 51899 and *Certain Cut-To-Length Carbon Steel Plate from Mexico: Preliminary Results of Antidumping Duty Administrative Review*, 63 Fed.Reg. 48181, 48182 (9 September 1998), attached in Ex. IND-28.

[212] Final Determination, Ex. IND-17 at 73130.

[213] *Plate from Sweden*, *supra* n. 204, at 51899; *Certain Cut-to-Length Carbon Steel Plate from Sweden*: *Final Results of Antidumping Duty Administrative Review*, 62 Fed.Reg. 18396, 18401 (15 April 1997), attached in Ex. IND-28 ("The Department's bases for relying on total facts available were: SSAB's inability to demonstrate that the costs submitted to the Department were reflective of actual costs accrued to produce the subject merchandise and reconcilable to information recorded in the normal books and records; and our inability to use partial facts available to fill in for the unverified information.") See also *Pasta from Italy*, *supra* n. 204, at 30328: "De Cecco had not demonstrated that it acted to the best of its ability in providing the requested information because De Cecco had failed to respond in a satisfactory manner to the Department's supplemental request for information and had provided completely new COP responses in February 1996, long after the Department's 27 November 1995, deadline for such a response."

lier mistakes can trigger a finding under section 782(e)(4).[214] If some data were missing or corrected, then, by triggering sections 782(e) and 776(a), this fact will lead to rejection of the other data that were submitted and even verified, in favour of total facts available and petition-based margins.

158. As the Appellate Body has interpreted Annex II, paragraph 3 of the AD Agreement, if information submitted is "verifiable," is "appropriately submitted so that it can be used in the investigation without undue difficulties," is "supplied in a timely fashion," and (where applicable) "supplied in a medium or computer language requested by the authorities," it cannot be rejected and it must be used.[215] Sections 782(e) and 776(a) as interpreted by USDOC and the CIT contradict this direction from the Appellate Body. Suppose that a respondent submits flawless databases of its US and home market sales, which are verifiable, are verified, are usable and are timely submitted. If that respondent's cost of production data are not also usable, under Section 782(e)(3) and (4) and USDOC "long-standing practice"[216] its flawless sales data will be rejected. USDOC will refuse to use "partial facts available," will be required to use total facts available under section 776(a), and will assign a margin from the petition. Thus, sections 776(a), 782(d) and 782(e) violate Annex II and Article 6.8 of the AD Agreement.

6. Conclusion

159. These statutory provisions are inconsistent with the AD Agreement. They have led to decision after decision in which USDOC has rejected timely submitted, verified and usable information generally in favour of allegations and partial information submitted by the petitioner. The damage caused to exporters by these actions, and its continuing threat to legitimate exports to the US market, are entirely uncompensated by the WTO system. Only a finding of illegality by the Panel will ensure that further damage to exporters is prevented, by ensuring that the United States brings not just one administrative decision but also its statutes into conformity with its WTO obligations.

C. Sections 776(a), 782(d) and 782(e) as Applied to the Anti-Dumping Investigation of Cut-to-Length Plate from India are Inconsistent with the AD Agreement

160. Section III above has laid out the sequence of events during the USDOC investigation of cut-to-length carbon steel plate from India. The following section discusses in more detail how USDOC and the USCIT applied sections

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[214] *Roller Chain from Japan – Final*, *supra* n. 207, at 63673: "Sugiyama did not demonstrate that it acted to the best of its ability in providing the necessary information. As explained above, and as detailed in the Sugiyama FA [facts available] Memorandum, after the November 17 deadline established for submission of new factual information in this review, Sugiyama continued to submit partial corrections to its timely submitted data and to the untimely submitted home market affiliated sales information that it provided to the Department for the first time on 27 January 1998."

[215] *Japan Hot-Rolled AB decision*, para. 83.

[216] See cases cited in footnote 211 above.

776(a), 782(e) and 782(d) to this investigation, and the inconsistency of that application with the AD Agreement.

161. As discussed above, SAIL responded on a timely basis in providing its US sales data. The US sales computer database submitted to USDOC on 16 June 1999 was complete and fully responsive, and was provided in the computer format requested by USDOC. USDOC requested that SAIL include four additional fields in its US sales database, which it did in its revised databases submitted in July through September, but otherwise USDOC raised no questions during the remaining course of the investigation regarding the readability or computer format of that US sales database, focusing its efforts instead on SAIL's data on home market sales and cost of production. In the preliminary anti-dumping determination of 29 July 1999, USDOC applied a dumping margin based on total facts available.[217] The only problems USDOC had cited at that point concerned SAIL's home market cost and price data.[218] USDOC decided to assign a margin to SAIL based on the petition, rejecting SAIL's US sales data out of hand solely because of the problems in the other data.

162. At verification in September 1999, the only problem with SAIL's US sales database considered significant was the simple, correctable coding error discussed at paragraph 30 above. But USDOC's Memorandum of Verification Failure concluded that "SAIL's data on the whole is unreliable."[219] The final determination of 29 December 1999 then rejected any use of the US sales database, and assigned an even higher margin on the basis of the petition.[220]

163. In statutory terms, USDOC made a positive determination to use facts available pursuant to section 776(a)(2)(A), (B) and (D). Section 776(a)(2)(A) is triggered when USDOC determines that an interested party or other person "withholds information that has been requested by the administering authority." Thus, USDOC found that the computer and other problems with SAIL's home market sales and cost of production databases meant that SAIL had withheld requested information. Similarly, with respect to section 776(a)(2)(B), USDOC found that SAIL's problems assembling the home market sales and cost data meant that SAIL had "fail[ed] to provide such information by the deadlines for the submission of the information or in the form or manner requested." With respect to section 776(a)(2)(D), USDOC found that the problems found at verification (which all related to the home market sales database, except for the coding errors for US sales) meant that SAIL had "provid[ed] such information but the information cannot be verified."[221] USDOC then went on to find that all of the five exceptions in section 782(e) to the use of "facts available" did not apply.[222]

164. To qualify for acceptance under section 782(e)(1), the "information" must be "submitted by the deadline established for its submission." USDOC found that

[217] Ex. IND-11 at 41204.
[218] *Ibid.* at 41203-04.
[219] Memorandum of Verification Failure, Ex. IND-16, at 5.
[220] Final Determination, Ex. IND-17, at 73127-28.
[221] *Ibid.* at 73127.
[222] *Ibid.* at 73127, 73131.

"SAIL was given numerous extensions to submit accurate data which it failed to do. In fact the last submission of cost data filed on August 18, 1999, was a database which contained unreadable electronic versions of SAIL's cost of production which did not include any constructed value information."[223] In other words, USDOC interpreted the word "information" as meaning *all* the information requested in the case, and decided not to take into account the US sales data because of problems in the home market sales and cost data.[224]

165. Second, section 782(e)(2) only operates as an exception to the mandate in section 776 if "the information can be verified." USDOC found that "with respect to section 782(e)(2), we were not able to verify SAIL's questionnaire response due to the fact that essential components of the response (i.e., the home market and cost databases) contained significant errors."[225] Again, USDOC equated "information" with *all* the information requested, and refused to take into account the US sales data which had been fully verified because of problems in verifying other categories of information.

166. Third, section 782(e)(3) requires that "the information" be "not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination." USDOC determined that "with respect to section 782(e)(3), the fact that essential components of SAIL's response could not be verified resulted in information that was incomplete and unreliable as a basis for determining the accurate margin of dumping."[226] This finding too interpreted "information" as *all* the information requested, and resulted in rejection of the verified US sales data because of problems in unrelated home market sales and cost of production data.

167. Fourth, section 782(e)(4) requires that an interested party have "demonstrated that it has acted to the best of its ability in providing the information and meeting the requirements established by the administering authority ...with respect to the information." USDOC determined that "with respect to section 782(e)(4), SAIL, as stated in the home market sales verification report, did not sufficiently verify the accuracy and reliability of its own data prior to submitting the information to the Department, thereby indicating that it did not act to the best of its ability to provide accurate and reliable data to the Department."[227] Again, USDOC interpreted "the information" to mean *all* information requested. It focused on the same problems in the home market sales and cost of production database as a justification for excluding *all* of the information submitted, including the US sales data, when it had earlier found the US sales data to be accurate and complete. USDOC interpreted SAIL's failure to accomplish total compliance with the complex USDOC questionnaire and to present totally correct answers to questions regarding all the categories of information as implying a failure by SAIL to check its data; this failure to check the data became a failure to "act to the best of its ability."

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[223] *Ibid.* at 73127.
[224] *Ibid.* at 73130.
[225] *Ibid.* at 73127.
[226] *Ibid.*
[227] *Ibid.*

168. Finally, section 782(e)(5) only operates as an exception to the mandate in section 776 if "the information can be used without undue difficulties." In this connection, USDOC determined that "the US sales database contained errors that, while in isolation were susceptible to correction, however when combined with the other pervasive flaws in SAIL's data lead us to conclude that SAIL's data on the whole is unreliable. As a result, the Department does not have an adequate basis upon which to conduct its analysis to determine the dumping margin and *must* resort to facts available pursuant to section 776(a)(2) of the Act."[228] Again, the problems with the home market cost and sales data led to rejection of the US sales database, even though the US sales data were accurate and complete, and the one identified computer coding error was simple to correct from information in the record of the investigation. Aside from USDOC's inflated and self-serving claim that flaws in other parts of SAIL's response caused it to suspect the reliability of the US sales data, there was no evidence in the record that would provide any link between those other flaws and the US sales data.

169. As a result, USDOC resorted to "total facts available" and refused to take into account the submitted information, as mandated under sections 776(a)(2) and 782(e) read together. The notice stated that "[i]t is the Department's longstanding practice to reject a respondent's questionnaire response *in toto* when essential elements of the response are so riddled with errors and inaccuracies as to be unreliable… . To properly conduct an anti-dumping analysis which includes a sales-below-cost allegation, the Department must analyze four essential components of a respondent's data: US sales; home market sales; cost of production for the home market models; and constructed value for the US models. Yet SAIL has not provided a useable home market sales database, cost of production database, or constructed value database."[229] Thus, USDOC read sections 776(a) and 782(e) as requiring rejection of the US sales data– which had been verified as accurate and complete and which could be used with a simple correction of an obvious coding error– because of the problems with home market sales and cost of production data. Indeed, as seen above, USDOC's actions in this case paralleled many other cases where problems in home market cost and/or sales data led to mechanical resort to facts available.

170. As discussed above, USDOC then assigned to SAIL a margin rate of 72.49 per cent from the petition.[230] After the US International Trade Commission's affirmative final injury determination, USDOC issued the anti-dumping order.[231]

171. When SAIL appealed the final determination to the CIT, SAIL argued that the word "information" in section 782(e) applies to particular categories of information (such as the US sales data), as separate and distinct submissions of

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[228] *Ibid.* (emphasis added).
[229] *Ibid.*
[230] *Ibid.* at 73127-28.
[231] Ex. IND-18.

information.[232] USDOC argued in response that it had a "long standing practice" of using total facts available when there are "essential components of the response" that are inaccurate or unreliable, and that it had "disregarded all the responses in order to calculate what it considered a more accurate dumping margin."[233] USDOC also argued that the term "information" in section 782(e) meant *all* submitted responses by an interested party, not just a category within the responses.[234] USDOC argued to the CIT that it could not– consistent with US statutes and its own "long-standing practice"– calculate a final anti-dumping margin using only one part of the formula supplied by the respondent and one or several parts of the formula from other sources, including the petition. According to this interpretation of the US statutes and its own practice, USDOC believed it was required to use either *all* data from the respondent (subject only to the minor "filling of gaps" by USDOC) or *all* data from other non-respondent sources including the petition. USDOC's interpretation of the AD Agreement allowed no middle ground.

172. The CIT upheld USDOC's interpretation as a "reasonable construction of the statute" and consistent with USDOC's "long standing practice of limiting the use of partial facts available."[235] The court affirmed USDOC's decision to apply "total facts available" as supported by "substantial evidence in the record," on the basis of USDOC assertions that there were deficiencies which "cut across all aspects of SAIL's data," and because SAIL had not met USDOC deadlines.[236] However, the court found that in these circumstances, before applying adverse inferences, USDOC should have determined whether SAIL refused to cooperate or could have provided the information requested but did not. The issue was remanded to USDOC so that it could make such findings or reconsider its decision to apply an adverse inference.[237] USDOC's redetermination on remand changed nothing in USDOC's treatment of SAIL's submitted information, and so the margin of 72.49 per cent remains unchanged.[238]

173. For the reasons set out above, the Panel should rule that the interpretation of these statutes by USDOC and the CIT is inconsistent with Article 6.8 and paragraph 3 of Annex II of the AD Agreement.

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[232] SAIL moving brief to the USCIT in *SAIL v. United States*, Ex. IND-19, at 15-23; *SAIL v. United States*, Ex. IND-20, at 4-6.
[233] *SAIL v. United States*, Ex. IND-20, at 7.
[234] *Ibid.* at. 9.
[235] *Ibid.* at 11-13.
[236] *Ibid.* at 13-14, quoting USDOC brief to the USCIT.
[237] *Ibid.* at 15-19.
[238] Ex. IND-21.

D. USDOC Violated AD Agreement Articles 2.2, 2.4, 9.3, and Article VI:1 and 2 of GATT 1994 by Applying Facts Available and Adverse Facts Available in Calculating and Levying Final Anti-Dumping Duties without Using Sail's Submitted US Sales Data

174. By failing to use SAIL's verified and timely produced US sales data, USDOC calculated and levied a final anti-dumping margin that failed to make a fair comparison between SAIL's export price and the normal value as required by AD Agreement Article 2.4. Because the incorrect anti-dumping margin was determined in violation of Article 2.4, USDOC also violated Article 9.3 which provides that "the amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2." This failure to perform a fair comparison also constituted a violation of Article VI:1 of the GATT 1994, and consequently a violation of Article VI:2 of GATT 1994, which provides that a Member may only "levy on any dumped product an anti-dumping duty not greater in amount than the margin of dumping in respect of such product" and defines the margin of dumping as the price difference determined in accordance with Article VI:1.

E. USDOC Violated AD Agreement Article 15 by Failing to Give Special Regard to the Situation of India as a Developing Country when it Applied Facts Available in Relation to Sail's US Sales Data

175. USDOC also violated AD Article 15 by failing to give special regard to India's status as a developing country when considering the application of anti-dumping duties. The second sentence of Article 15 of the AD Agreement required USDOC to "explore" the "possibilities of constructive remedies provided for" by the AD Agreement, "before applying anti-dumping duties" to exports from a developing country such as SAIL's exports in this case. Article 15 requires investigating authorities in developed countries to provide "notice or information" to respondents from developing country Members concerning the opportunities for exploring alternative remedies other than anti-dumping duties.[239] As the panel held in *India Bed Linens*, pure passivity by developed country investigating authorities is not sufficient to satisfy the obligation to "explore" possibilities of constructive remedies.[240] Rather, the "exploration of possibilities must be actively undertaken by the developed country authorities with a willingness to reach a positive outcome."[241] Article 15 imposes "an obligation to actively consider, with an open mind, the possibility of [a constructive remedy]

[239] *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/R (30 October 2000), DSR 2001:VI, 2077, para. 6.238.
[240] *Ibid.*
[241] *Ibid.*, para. 6.233.

prior to imposition of an anti-dumping measure that would affect the essential interests of a developing country."[242]

176. On 30 July 1999, SAIL filed a proposal with USDOC seeking a suspension agreement, stating as follows:

> SAIL is interested in discussing with the Department a possible "suspension agreement" that will resolve any problem associated with trade in CTL plate for the foreseeable future. In this connection, we propose for purposes of discussion the attached draft suspension Agreement that is based on the level of prices prevailing in the United States market.[243]

177. USDOC made no written response to this proposal, and none is in the record before this Panel. In contacts with SAIL's counsel, USDOC officials stated orally that they would not discuss a suspension agreement at all, because the US domestic steel industry and its supporters in the US Congress would oppose any suspension agreement. USDOC's conduct showed not an "open mind" but a closed one. Its actions were devoid of any "exploration of possibilities ...with a willingness to reach a positive outcome." Like the EC in *India Bed Linens*, USDOC did not treat SAIL any differently than respondents from developed countries when it issued final anti-dumping duties. It failed to provide notice to SAIL that it was willing to consider exploring the possibility of alternative remedies such as anti-dumping duties in a lesser amount or the acceptance of price undertakings. Asked about alternative remedies, it refused to discuss them.

178. Based on the foregoing, the Panel should find that the United States violated Article 15 in levying final anti-dumping duties on imports of cut-to-length plate from India without exploring the possibilities of constructive remedies.

VII. CONCLUSION AND REQUEST FOR RULINGS AND RECOMMENDATIONS

179. India requests that the Panel make the following findings:

1. That the anti-dumping duty order issued by USDOC in *Certain Cut-To-Length Carbon-Quality Steel Plate Products from India* on 10 February 2000 is inconsistent with the US obligations under Articles 2.4, 6.8, 9.3, 15 and Annex II, paragraphs 3, 5 and 7 of the AD Agreement, and Articles VI:1 and VI:2 of GATT 1994.
2. That sections 776(a), 782(d) and 782(e) of the Tariff Act of 1930 as amended (19 U.S.C. §§1677e(a), 1677m(d) and 1677m(e)) as such, and as interpreted by USDOC and the CIT, are inconsistent with US obligations under Article 6.8 and Annex II, paragraphs 3, 5 and 7 of the AD Agreement.

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[242] *Ibid.*

[243] Ex.IND-10, 30 July 1999 letter from John Greenwald, counsel for SAIL, to Robert S. La Russa, USDOC Assistant Secretary for Import Administration.

3. That sections 776(a), 782(d) and 782(e) of the Tariff Act of 1930 as amended (19 U.S.C. §§1677e(a), 1677m(d) and 1677m(e)) as applied by USDOC in the investigation leading to the final actions referenced above are inconsistent with US obligations under Articles 2.4, 6.8, 9.3, 15 and Annex II, paragraphs 3, 5 and 7 of the AD Agreement, and Article VI:2 of GATT 1994.

180. India requests that the Panel recommend, pursuant to DSU Article 19.1, that the United States bring its anti-dumping duty order and the statutory provisions referred to above into conformity with the AD Agreement and Articles VI:1 and VI:2 of GATT 1994.

181. India further requests that the Panel exercise its discretion under DSU Article 19.1 to suggest ways in which the United States could implement the recommendations. In particular, the Panel should suggest that the United States recalculate the dumping margins by taking into account SAIL's verified, timely submitted and usable US sales data, and also, if appropriate, revoke the final antidumping order. India reserves the right to request the Panel to suggest additional ways in which the United States could implement the recommendations.

ANNEX A-2

FIRST WRITTEN SUBMISSION OF THE UNITED STATES

(10 December 2001)

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US-3. *Cost Verification Report*, dated 4 November 1999.

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US-18. *USDOC Fifth Deficiency Questionnaire to SAIL*, dated 3 August 1999.

US-19. *Letter from USDOC to SAIL Re: Granting of Extension of Time*, dated 16 August 1999.

[1] All documents are either Public or Public Versions.

US-20. *Letter fro*m *DOC to SAIL Re: Final Request for Useable Database*, dated 12 July 1999.

US-21. *USDOC Memorandum to the File re: Ex-Parte Meeting with Counsel for SAIL Regarding Possible Suspension Agreement*, dated 31 August 1999.

US-22. Commerce Regulation 19 C.F.R. § 351.308.

US-23. Statement of Administrative Action pages 864 -865 and 868 -871.

US-24. *USDOC Addendum to Verification Report*, dated 10 November 1999.

US-25. *USDOC Determination of Verification Failure Memorandum*, dated 13 December 1999.

I. INTRODUCTION

1. In this proceeding, India has launched a broad-based challenge to the ability of an investigating authority – here, the US Department of Commerce ("Commerce") – to require complete and accurate information necessary to determine the existence of dumping. As we will demonstrate, this challenge is based, in the first instance, on India's fundamental misreading of the Antidumping Agreement ("AD Agreement") and India's efforts to read into that Agreement language and obligations which do not exist therein. In particular, India seeks this Panel's endorsement of its narrow and unsupported reading of Article 6.8 and Annex II of the AD Agreement – that the word "information" as used therein means, in fact, "categories of information" as further defined by India. There is no basis in the AD Agreement for India's interpretation.

2. Then, we will turn to the US statute implementing the obligations in the AD Agreement. India relies on a fundamental misinterpretation of the relevant US statutory provisions to claim that sections 776(a), 782(d) and 782(e) of the Tariff Act of 1930, as amended, ("the Act") constitute *per se* violations of Article 6.8 and Annex II of the AD Agreement. As we demonstrate in detail below, these provisions of US law are not susceptible to a claim of *per se* breach because they do not, as such, mandate a breach of any WTO obligation. Moreover, these provisions are substantively identical to Article 6.8 and Annex II of the AD Agreement.

3. The real issue in this dispute is whether Commerce's use of facts available with respect to the Steel Authority of India, Ltd. ("SAIL") was consistent with Article 6.8 and Annex II of the AD Agreement. Based on the text of the AD Agreement, the challenged determination was fully consistent with the United States' WTO obligations.

4. Finally, India attempts to broaden the obligation of Article 15 of the AD Agreement in a manner that cannot be justified by the text.

5. This first submission of the United States is filed in response to India's First Written Submission, dated 19 November 2001. This submission by the United States: (1) clarifies the applicable standard of review; (2) demonstrates that sections 776(a), 782(d) and 782(e) of the Act are fully consistent with Article 6.8 and Annex II of the AD Agreement; (3) demonstrates that nothing in Article 6.8 or Annex II of the AD Agreement precludes the rejection of a questionnaire response that is overwhelmingly deficient; (4) demonstrates that Commerce's facts available determination with regard to SAIL was consistent with Article 6.8 and Annex II of the AD Agreement; and (5) demonstrates that India's claims relating to obligations under Article 15 are baseless.

II. PROCEDURAL BACKGROUND

6. On 16 February 1999, Commerce received an antidumping petition from a group of domestic steel producers alleging that certain cut-to-length carbon-quality steel plate products ("steel plate") from India and other countries were being dumped in the United States, and were thereby injuring a US industry.[1] In addition to alleging injurious dumping, the petition provided information demonstrating reasonable grounds to believe or suspect that sales in India were made at prices below the cost of production ("COP").[2]

7. On 8 March 1999, Commerce initiated an investigation to determine whether imported steel plate from India and other countries was being sold at less than fair value.[3] In addition, Commerce initiated a country-wide cost investigation with respect to steel plate from India.[4] The period covered by this investigation was calendar year 1998.

8. Commerce published its Preliminary Determination of Sales at Less Than Fair Value ("*Preliminary Determination*") on 29 July 1999.[5] Because SAIL was unable to provide information necessary for the calculation of a dumping margin, Commerce resorted to information in the petition as facts available and assigned a margin for SAIL of 58.50 per cent.[6]

9. Petitioners and respondents both submitted case and rebuttal briefs on 12 and 17 November 1999, respectively, and a public hearing was held on 18 November 1999.[7]

10. On 29 December 1999, Commerce published its Final Determination of Sales at Less Than Fair Value ("*Final Determination*").[8] The dumping margin for SAIL in the *Final Determination* was 72.49 per cent.[9]

11. On 10 February 2000, the USITC published its final determination, finding that an industry in the United States was materially injured by reason of imports of the subject merchandise.[10]

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1 *Initiation of Antidumping Duty Investigations: Certain Cut-to-Length Carbon-Quality Steel Plate from the Czech Republic, France, India, Indonesia, Italy, Japan, the Republic of Korea, and the Former Yugoslav Republic of Macedonia* (*"Commerce Initiation Notice"*), 64 Fed. Reg. 12959 (16 March 1999) (Exh. IND-2).

2 *Ibid.* at 12969.

3 *Ibid.* at 12963.

4 *Ibid.* at 12965-66.

5 *Notice of Preliminary Determination of Sales at Less Than Fair Value: Certain Cut-to-Length Carbon-Quality Steel Plate from India* ("*Preliminary Determination*"), 64 Fed. Reg. 41202, 41202 (29 July 1999) (Exh. IN-11).

6 *Ibid.* at 41205.

7 Transcript of Hearing at USDOC, dated 18 November 1999 (Exh. IND-15).

8 *Notice of Final Determination of Sales at Less Than Fair Value: Certain Cut-to-Length Carbon-Quality Steel Plate from India* ("*Final Determination*"), 64 Fed. Reg. 73126, 73126 (29 December 1999) (Exh. IND-17)

9 *Ibid.* at 73131.

10 *Certain Cut-To-Length Steel Plate Products From France, India, Indonesia, Italy, Japan and Korea* ("*USITC Final Determination*"), 65 Fed. Reg. 6624, 6624 (10 February 2000).

12. On 10 February 2000, Commerce published its antidumping duty order in this case.[11]

13. On 13 March 2000, SAIL initiated proceedings before the US Court of International Trade ("CIT"), challenging Commerce's *Final Determination*.

14. On 4 October 2000, India requested consultations with the United States pursuant to Article 4 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"), Article 17 of the Agreement on Implementation of Article VI of the GATT 1994 ("AD Agreement"), Article 30 of the Agreement on Subsidies and Countervailing Measures ("*SCM Agreement*"), and Article XXII of the GATT 1994, with respect to, *inter alia*, the US Department of Commerce's final antidumping determination on cut-to-length steel plate from India.[12] The United States and India held consultations in Geneva on 21 November 2000, but were unable to resolve the dispute.

15. On 26 May 2001, the CIT issued a decision affirming Commerce's decision to use total facts available in determining an antidumping duty margin for SAIL. The CIT remanded the decision, however, for further explanation as to Commerce's basis for determining that SAIL had failed to act to the best of its ability to respond to Commerce's information request. Commerce filed its explanation with the CIT on 27 September 2001.[13]

16. On 7 June 2001, India requested the establishment of a panel pursuant to Article 6 of the *DSU*, Article 17.4 of the AD Agreement, and Article XXIII:2 of the GATT 1994. India's panel request alleged violations of Articles 2.2, 2.4, 6.6, 6.8, 6.13, 9.3, 15, 18.4 and Annex II of the AD Agreement, Article VI:1 and VI:2 of the GATT 1994, and Article XVI:4 of the WTO Agreement.[14]

17. The Dispute Settlement Body established a panel to review India's allegations on 24 July 2001.[15] Chile, the European Communities, and Japan reserved third party rights.

18. For the convenience of the Panel, further facts relating to the underlying antidumping investigation have been organized and set forth below in terms of the issues raised for review. In addition, each section of argument pertaining to each issue addresses the facts as necessary to the argument of that issue.

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[11] *Notice of Amendment of Final Determinations of Sales at Less Than Fair Value and Antidumping Duty Orders: Certain Cut-To-Length Carbon-Quality Steel Plate Products From France, India, Indonesia, Italy, Japan and the Republic of Korea ("Antidumping Duty Order")*, 65 Fed. Reg. 6585, 6585 (10 February 2000) (Exh. IND-18).

[12] WT/DS206/1, 9 October 2000.

[13] *USDOC Redetermination on Remand* (27 September 2001)(Exh. IND-21).

[14] WT/DS206/2, 8 June 2001.

[15] WT/DS206/3, 31October 2001.

III. FACTUAL BACKGROUND

A. Application of Facts Available with Regard to Sail

1. Major Deficiencies in SAIL's Questionnaire Response

19. At the outset of the investigation, Commerce issued a standard antidumping questionnaire to SAIL. This questionnaire requests the information that collectively is necessary for the investigating authority's antidumping analysis.[16] Commerce granted several extensions to SAIL for submitting its initial questionnaire response.[17]

20. From 12 April 12 through 11 May 1999, SAIL submitted responses to the questionnaire. SAIL's failure to submit necessary information began early in the proceeding. For example, SAIL filed its 11 May 1999 database submission – including its reported US sales – late because of what it described as a "breakdown" in the computer programme being used by its US counsel to prepare the computer disk.[18] SAIL also indicated in its narrative response that "some of the data requested by the Department is still being collected (because, *e.g.*, it is available only in handwritten form). As soon as these data are available we will submit them to the Department and revise the diskette accordingly."[19]

21. After reviewing SAIL's responses, Commerce identified numerous deficiencies and areas requiring clarification and issued a supplemental questionnaire on 27 May 1999, covering SAIL's entire initial questionnaire response.[20] SAIL's Section A response required further information and/or clarification in 13 areas.[21] Additionally, further information and/or clarification were required in 17 areas of SAIL's home market sales response and five aspects of its US sales response.[22] SAIL's cost of production information was the most seriously deficient, requiring significant further information and/or clarification in 33 areas.[23] In addition to identifying these specific deficiencies, Commerce notified SAIL that:

> there are two deficiencies which are major and need to be emphasized here. The first deficiency is that the response is substantially incomplete to the point where we may not be able to use the information contained therein to calculate a margin. Repeatedly

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[16] *USDOC Initial Antidumping Questionnaire to SAIL*, Sections A, B, C and D, dated 17 March 1999 (Exh. US-1). Section A of the questionnaire requested general information concerning the company's corporate structure and business practices, the merchandise under investigation that it sells, and the sales of that merchandise in all markets. Sections B and C of the questionnaire requested home market sales listings and US sales listings, respectively. Section D of the questionnaire requested information regarding the cost of production of the foreign like product and the constructed value of the merchandise under investigation.

[17] *Memoranda Granting Extensions*, dated 14, 16, and 30 April 1999, (Exh. US-5).

[18] *Letter from SAIL's Counsel to USDOC Re: Breakdown/Extension Request*, dated 11 May 1999 (Exh. US-6).

[19] *Letter from SAIL's Counsel to USDOC*, dated 11 May 1999 (Exh. US-7).

[20] *USDOC First Deficiency Questionnaire to SAIL*, dated 27 May 1999 (Exh. US-8).

[21] *Ibid.* at Attach. 1, pp. 1-4.

[22] *Ibid.* at pp. 4-10.

[23] *Ibid.* at pp. 10-15.

> throughout the questionnaire response you make the statement that certain data are unavailable and will be submitted later. For example, you only reported a subset of all your home market sales, and we cannot determine which sales have been reported. Because of your repeated failure to provide the information requested by the questionnaire, and incompleteness of your responses to other questions, we are unable to adequately analyze your company's selling practices. The questions in the attachment are limited accordingly. We anticipate having further questions once your questionnaire response is more complete.
>
> The second deficiency is that you failed to respond adequately to the entire section III of section D, which requires an explanation of the response methodology. Indeed, almost your entire response to this section is contained in Exhibits 9 and 10, which are not responsive to the questions in this section. Moreover, you have not provided product-specific cost information. This information is essential for an adequate analysis of your company's selling practices. After reviewing the attached questions that relate to section D of the questionnaire, please contact the official in charge of the investigation to discuss possible ways to provide more product-specific cost information.[24]

22. On 3 and 8 June 1999, SAIL submitted certain clarifications supplementing its questionnaire responses submitted on 26 April and 10 May 1999. On 11 June 1999, Commerce issued a second deficiency questionnaire covering Sections A-C of SAIL's questionnaire response.[25] Commerce requested that SAIL provide more specific information on variables reported in its home market, US sales and cost databases.[26] This *Second Deficiency Questionnaire* also identified inconsistencies between SAIL's narrative explanation and its reported databases, inaccurate control numbers ("CONNUMs"),[27] and other necessary information.[28] Commerce further granted SAIL's request for an extension to provide its response to this deficiency questionnaire.[29]

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[24] *Ibid.*at cover letter from DOC to SAIL.

[25] *USDOC Second Deficiency Questionnaire to SAIL*, dated 11 June 1999 (Exh. US-9) (*"Second Deficiency Questionnaire"*).

[26] *Ibid.* at Attach. I. India's Statement of Facts incorrectly suggests that this questionnaire contained no questions regarding SAIL's US sales database. *See* India's First Written Submission at para. 22. The deficiency questionnaire specifically identified product classification and coding errors related to SAIL's US sales database.

[27] CONNUMs are used by Commerce to identify each product sold by its unique characteristics. Identical products have identical CONNUMs; different products have different CONNUMs. The reporting of accurate CONNUMs is essential for purposes of determining the sales of merchandise that should be compared to calculate a company's dumping margin and for assigning a cost of production for each product.

[28] *USDOC Second Deficiency Questionnaire* at Attach. II.

[29] *Ibid.* at cover letter.

23. On 16 June 1999, SAIL submitted revised home market and US sales electronic databases.[30] SAIL assured Commerce that the "revised database includes all of the individual home market sales that were made during the period of investigation."[31] According to SAIL, "[s]ome gaps still remain in the database, but they are not significant and do not materially impact the dumping margin analysis."[32] On 18 June 1999, SAIL submitted certain data further supplementing its previous submissions.

2. Commerce's Actions to Assist SAIL

24. During this time, Commerce staff took action to assist SAIL in supplying information by working regularly with SAIL's counsel to identify deficiencies in the electronic database, including deficiencies in the reporting of US sales.[33] Among the specific deficiencies discussed were: 1) that SAIL provided no explanation in its response for why certain sales data were not reported; 2) that SAIL's home market and US sales databases did not correspond, preventing performance of the test to determine whether home market sales were made at less than the cost of production and precluding Commerce from assigning a constructed value to specific products; 3) that certain information was missing entirely from the home market database; and 4) that SAIL's US database was missing several fields needed to perform the necessary model match procedures to determine the proper comparisons of sales to be made to calculate the dumping margin.[34]

25. On 18 June 1999, Commerce issued its *Third Deficiency Questionnaire* – concerning SAIL's Section D response – which SAIL had supplemented on 8 June 1999.[35] Specifically, Commerce requested that SAIL provide supporting evidence for its reported "standard" cost of production.[36] SAIL's responses were due on 28 June 1999.

3. SAIL's Untimely Submissions

26. On 29 June 1999, SAIL made three submissions. The first two submissions were in response to Commerce's *Third Deficiency Questionnaire* and had been due the previous day, 28 June. SAIL's counsel explained that its courier had been unable to deliver the submissions to Commerce.[37] The third submission

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30 *Letter from SAIL to USDOC*, dated 16 June 1999 (Exh. US-10).
31 *Ibid.*
32 *Ibid.*
33 *USDOC Memorandum to File: Conversations with SAIL's Counsel*, dated 7 July 1999 (Exh. US-11).
34 *Ibid.* at Attachment.
35 *USDOC Third Deficiency Questionnaire to SAIL*, dated 18 June 1999 (Exh. US-12).
36 *Ibid.* at Attachment I.
37 *Letter from SAIL to USDOC Re: Late Filing* , dated 28 June 1999 (Exh. US-13). SAIL stated that:

Our messenger left our offices at 4:30pm on Monday, 28 June, to file the enclosed submissions. He returned at 5:30 p.m. saying that he arrived at the Commerce Department too late to gain entry.

responded to Commerce's *First Deficiency Questionnaire* and had been due 18 June 1999. SAIL did not provide any explanation for why this third submission was untimely filed. In accordance with its own regulations (19 C.F.R. § 351.302(d)), Commerce explained that it must return all three submissions to SAIL as untimely.[38] Commerce cautioned SAIL that:

> repeated throughout your submissions is the statement that certain data are unavailable and will be supplied later. These statements are not substitutes for extension requests under [section] 351.302 of the Department's regulations. If you submit these data after the deadline the Department has set for a response to its information requests, and the Department has not formally granted you an extension, these data also will be returned to you as late.[39]

27. In addition, Commerce notified SAIL that the company had yet to address the major deficiencies in its responses that had been identified one month previously:

> The first deficiency, which was raised to your attention in our letter of 27 May 1999, is that you still have not provided product-specific costs, nor adequately demonstrated that such costs cannot possibly be derived from SAIL's accounting records. Without product-specific costs it is impossible to determine whether home market sales are being made at prices below production costs, whether any adjustment for physical differences in merchandise is warranted, and, where appropriate, whether constructed value has been properly calculated.
>
> The second deficiency is that your electronic database submissions have proven seriously deficient and are currently unusable. We have made repeated requests and have yet to receive the supporting documentation that customarily accompanies electronic database submissions, including hard-copy examples of the database. Most troubling is that after devoting significant amounts of time and attention to your tapes, we have had to ask you to resubmit them on three separate occasions due to database flaws which prevent the files on these tapes from loading. Because such a large amount of data is reviewable only in electronic form, your repeated failure to provide usable electronic databases has prevented us from adequately evaluating SAIL's selling practices.[40]

28. On 6 July 1999, domestic producers submitted comments regarding deficiencies in SAIL's questionnaire responses. Domestic producers argued that

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The problem, as he described it, was a combination of traffic congestion and refusal by the police to allow him to park near the Commerce Department.

[38] *Letter from USDOC to SAIL Re: Return of Untimely Information*, dated 7 July 1999 (Exh. US-14).

[39] *Ibid.* at 2.

[40] *Ibid.* at 1.

SAIL should not be permitted to submit a new cost response and that any scheduled verification be cancelled.[41]

4. Continued Actions by Commerce to Assist SAIL

29. On 12 July 1999, Commerce issued a letter to SAIL providing it with a final opportunity to submit a reliable electronic database and information on product-specific costs:

> As discussed previously with you, and as identified in earlier supplemental questionnaires, these databases have been fraught with problems and are not yet useable. On 6 July[,] we described in a telephone conversation and in a memorandum to the file, the remaining database errors that, given the state of your tapes, we could identify as requiring attention and correction. You have until Friday 16 July, to submit revised tapes to the Department. After that date, any other electronic submissions that you make will be returned to you unless the Department has specifically requested further tape filings.[42]

30. On 16 July 1999, one business day before the agency's preliminary determination, SAIL filed a revised electronic database and proposed a product-specific cost methodology. Commerce accepted the submission, but, given the timing of the submission, there was no possibility that the revised data could be analyzed in time for the preliminary determination.

31. For purposes of the preliminary determination, Commerce calculated a margin for SAIL based entirely on facts available. In its *Preliminary Determination Facts Available Memorandum,* Commerce chronicled in detail the bases for its concerns regarding SAIL's timeliness and completeness of information and its problematic database submissions.[43] Commerce also outlined its concerns regarding SAIL's failure to submit product-specific costs.[44]

32. In its public notice, Commerce summarized its findings on this issue:

> We have determined that the use of facts available is appropriate for SAIL for purposes of this preliminary determination. Although SAIL filed a questionnaire response, it contained numerous errors. Moreover, because of the problems with the electronic databases that SAIL submitted, its questionnaire response cannot be used to calculate a reliable margin at this time. Section 776(a)(2)(B) of the Act provides that the administering authority shall use facts otherwise available when an interested party "fails to provide such in-

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[41] *Letters from Counsel for Domestic Producers to USDOC Re: Request Cancellation of Verification*, dated 6 July 1999 and 20 August 1999 (Exh. US-15).

[42] *Letter from DOC to SAIL Re: Final Request for Useable Database*, dated 12 July 1999 (Exh. US-20).

[43] *DOC Memorandum Re: Preliminary Determination Facts Available for SAIL*, dated 29 July 1999 (Exh. US-16), at Attach. I & II.

[44] *Ibid*. at Attach. I.

> formation by the deadlines for the submission of the information or in the form and manner requested." Therefore, the use of facts available is warranted in this case.[45]

33. Commerce also concluded that, despite numerous opportunities and extensions of time, "SAIL did not act to the best of its ability to provide the information requested."[46] Commerce identified the three inter-related problems with SAIL's questionnaire response: (1) technical errors in its electronic databases; (2) lateness and incompleteness of certain narrative portions of its questionnaire response; and (3) the lack of product-specific costs.[47]

34. Commerce also explained its decision to apply, as adverse facts available, the average of the margins alleged in the petition, rather than the highest margin alleged in the petition:

> For the preliminary determination, we assigned SAIL the average of the margins in the petition, which is 58.50 per cent. Although we find that SAIL did not fully cooperate to the best of its ability, SAIL tried to provide the Department with the data requested in the antidumping questionnaire. Recognizing SAIL's attempts to respond to the Department's information requests, and in light of its claimed difficulties, we do not believe that it is appropriate to assign the highest margin alleged in the petition at this time.[48]

5. Commerce's Final Efforts to Assist SAIL, Including the Decision to Proceed with Verification

35. Commerce continued to collect data that it hoped would be sufficient for verification and for use in the final determination. On August 2, 1999, Commerce issued its *Fourth Deficiency Questionnaire* that sought to resolve continuing deficiencies in SAIL's July 16, 1999 submission.[49] The next day, Commerce provided SAIL with its *Fifth Deficiency Questionnaire*, listing twelve areas that required further information or clarification in preparation for the verification scheduled for the following month.[50]

36. On 16 August 1999, Commerce granted SAIL's request for an additional extension due to logistical difficulties in collecting data and further revisions that its cost data required.[51] In addition to filing corrected data, SAIL detailed how it would reconcile these data during verification. At no time during this period did SAIL indicate that it could not provide the data necessary for a margin analysis.

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45 *Preliminary LTFV Determination* at 41203.
46 *Ibid.*
47 *Ibid.* at 41203-04.
48 *Ibid.* at 41204.
49 *USDOC Fourth Deficiency Questionnaire to SAIL*, dated 2 August 1999 (Exh. US-17).
50 *USDOC Fifth Deficiency Questionnaire to SAIL* , dated 3 August 1999 (Exh. US-18).
51 *Letter from USDOC to SAIL Re: Granting of Extension of Time*, dated 16 August 1999 (Exh. US-19).

37. On 12 and 23 August 1999, Commerce provided SAIL with outlines of the agenda and procedures to be followed during the on-site sales and cost verifications in India.[52] On 20 and 26 August 1999, domestic producers argued that SAIL "has again failed to provide product-specific costs as requested" and argued that Commerce should cancel verification.[53] Nevertheless, Commerce proceeded with the sales and cost verifications. These verifications were conducted during a 2½ week period, from August 30-September 15, 1999. On September 1 and 8, 1999, SAIL submitted corrections discovered during preparation for verification, including a revised computer disk for certain sales.[54] Notwithstanding these corrections, significant additional problems were discovered during the verification.

6. The Sales Verification

38. The sales verification report summarizes the findings made during the on-site verification. Commerce made the following findings:

> SAIL had under-reported home market prices for a significant percentage of sales.
>
> SAIL double-counted sales made by the Rourkela Steel Plant.
>
> SAIL was unable to demonstrate that the quantity and value of home market sales were properly reported.
>
> The reporting of plant sales was incorrect in nearly every possible way - quantity and value were under-reported, prices and adjustments were inaccurate, and sales of prime and non-prime merchandise were mixed up.[55]

Commerce also stated that it found "numerous coding errors in the home market database."[56]

39. Commerce also discovered errors in the US sales database. Commerce explained that "[w]hile testing US sales for model match purposes, we found an incorrectly reported model match criterion."[57] Commerce further noted that this error affected a preponderance of SAIL's export sales to the United States. Commerce also explained that SAIL had failed to report certain product control numbers in the cost of production database. According to Commerce, the missing control numbers were related to the primary type of steel plate exported by SAIL to the United States during the period of investigation. Commerce later explained that it was difficult for its verification team to evaluate whether the

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[52] *See, e.g., USDOC Verification Outline for SAIL*, dated 12 August 1999 (Exh. IND-12).

[53] *Letters from Counsel for Domestic Industry to USDOC Re: Cancellation Requests of Verification*, dated 6 July 1999 and 20 August 1999 (Exh. US-15).

[54] *SAIL Corrected US Sales Database, computer printout*, dated 1 September 1999 (Exh. IND-8).

[55] *Sales Verification Report*, dated 4 November 1999 (Exh. US-4) (public version) at 4-5.

[56] *Ibid.* at 5.

[57] *Ibid.* at 5, 12.

reporting of product specification/grade was accurate because SAIL had prepared no supporting verification exhibits.[58]

7. The Cost Verification

40. A separate cost verification report details the findings made during the on-site verification of SAIL's reported costs. Significant problems with SAIL's cost data were identified:

> Company officials stated that the total cost of manufacture (TCOM), and the variable COM (VCOM) on the COP tape submitted 17 August 1999, are incorrect. There is no way to establish a meaningful correlation between the TCOM and VCOM on the tape and the underlying cost data and sources documents. On the first day of verification, SAIL presented a completely revised COP tape, as part of the correction presented in exhibit C-3. It was not clear the extent to which this tape should be considered "new information". Accordingly, we did not accept it....
>
> Although the COP tape was incorrect, and a new revised COP tape was not accepted, we proceeded with verification because the {sic} cost information underlying the reported per-unit COP was still verifiable-that is the actual average cost for plates and normalized plates at each plant ... and the data underlying the indices developed by SAIL for calculating product-specific costs ....[59]

As detailed in the verification report, the COP information could not be verified. Commerce identified numerous other problems in SAIL's reported costs.[60]

8. Determination of Verification Failure

41. On 18 November 1999, Commerce held a public hearing was held to allow interested parties to comment in preparation for the final determination.[61]

42. After consideration of the facts, the parties' arguments, and the applicable statute, Commerce determined that SAIL had failed verification and that application of adverse facts available was required to determine the margin of dumping. The agency's *Determination of Verification Failure Memorandum* was issued on 13 December 1999, and outlined the significant findings at verification.[62] Commerce explained that:

> [w]henever serious problems arise at verification we must determine whether the problems can be isolated and perhaps dealt with

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58 *USDOC 10 November 1999 Addendum to Verification Report*, Exh. US-24 (public version) at 1.
59 *Cost Verification Report*, dated 4 November 1999 (Exh. US-3) (public version) at 2.
60 *Ibid*. at 2-3.
61 Transcript of Hearing at USDOC (18 November 1999) (Exh. IND-15).
62 *USDOC Determination of Verification Failure Memorandum*, dated 13 December 1999 (Exh. US-25).

> by the selective use of adverse inferences or are so significant as to undermine the integrity of the whole response.[63]

43. With respect to the home market sales portion of the questionnaire, Commerce explained that:

> [a]t verification one of the primary goals is to ensure that all home market sales were reported meaning that all sales are reported and that the prices and adjustments are reported correctly in the sales listing. An integral part of ensuring the proper reporting of sales is verifying the negative, *i.e.*, looking for unreported sales (or discounts). This requires reconciling the company's records for sales of subject merchandise to the reported quantity and value.
>
> As detailed in the Sales Verification Report, the problems encountered were such that we could not ensure that home market sales were properly reported. We have no way of knowing how many sales of subject merchandise may have been made in the home market. The fact that SAIL could not tie the reported quantity and value for sales of subject merchandise to the company's financial records and that prices were under-reported for a significant percentage of home market sales undermines the credibility of SAIL's records. Taken together these problems resulted in our inability to establish that home market sales were properly reported.[64]

Regarding SAIL's COP/CV data, Commerce stated that:

> [o]n the first day of verification SAIL company officials stated that the cost tape submitted was inaccurate and could not be tied to existing books and records. In addition, SAIL failed even to submit Constructed Value ("CV") data for US sales. Thus, there is no useable COP or CV data on the record. Despite the fact that the aggregate product-specific COP data were inaccurate, and there were no CV data at all, we nevertheless reviewed the [sic] underlying components of the aggregate costs. Here too we find widespread errors and inaccuracies.[65]

44. Finally, in describing several errors in the US sales database, Commerce explained that:

> [w]hile these errors, in isolation, are susceptible to correction, when combined with other pervasive flaws in SAIL's data, these errors support our conclusion that SAIL's data on the whole is unreliable.[66]

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63 *Ibid.* at 4.
64 *Ibid.* at 4-5.
65 *Ibid.* at 5.
66 *Ibid.*

9. The Final Determination

45. Commerce provided a comprehensive summary of these facts and its decision to base its margin calculation upon adverse facts available in the *Final Determination*:

> [T]he use of facts available is appropriate for SAIL for purposes of the final determination, pursuant to section 776(a)(2)(A), (B), and (D) of the Act. With respect to subsection (A), at verification the Department discovered that SAIL failed to report a significant number of home market sales; was unable to verify the total quantity and value of home market sales; and failed to provide reliable cost or constructed value data for the products. See Home Market and United States Sales Verification Report (``Sales Report''), dated 3 November 1999; see also Cost of Production and Constructed Value Verification Report (``Cost Report''), dated 3 November 1999. With regard to subsection (B), SAIL was provided with numerous opportunities and extensions of time to fully respond to the Department's original and supplemental questionnaires, as well as ample time to prepare for verification. However, even with numerous opportunities to remedy problems, SAIL failed to provide reliable data to the Department in the form and manner requested.
>
> With respect to section 776(a)(2)(D) of the Act, we note that as a result of the widespread problems encountered at verification, SAIL's questionnaire responses could not be verified. See Sales Report and Cost Report. See Memorandum to the File: Determination of Verification Failure (``Verification Memo''), dated 13 December 1999.[67]

46. In addition, Commerce addressed the statutory requirement that parties be advised of deficiencies in their submissions:

> With respect to section 782(d), we gave SAIL numerous opportunities and extensions to submit complete and accurate data. As stated in the Preliminary Determination, SAIL's questionnaire and deficiency questionnaire responses were found to be substantially deficient and untimely for purposes of calculating an accurate antidumping margin. See Preliminary Determination. However, subsequent to the preliminary determination we issued two additional questionnaires and further extensions to SAIL presenting it yet additional opportunities to submit a complete and accurate electronic database. Nevertheless, the Department found at verification that the final submission was again substantially deficient ....Therefore

[67] *Final Determination* at 73126-27.

> the Department may ``disregard all or part of the original and subsequent responses,'' subject to subsection (e) of section 782.[68]

47. In a separate section of the *Final Determination*, Commerce specifically addressed SAIL's comments that Commerce should determine that the company cooperated to the best of its ability:

> SAIL has consistently failed to provide reliable information throughout the course of this investigation. At the preliminary determination we relied on facts available because widespread and repeated problems in SAIL's questionnaire response rendered it unuseable for purposes of calculating a margin. These problems recurred despite our numerous and clear indications to SAIL of its response deficiencies. Even though we rejected use of SAIL's questionnaire response at the preliminary determination, because the company was seemingly attempting to cooperate, albeit in a flawed manner, we continued to collect data after the preliminary determination in an attempt to gather a sufficiently reliable database and narrative record for verification and for use in the final determination. The Department also rejected petitioners' request that verification be cancelled in light of the response deficiencies. However, as evidenced by the summary below, SAIL was unable to provide the Department with useable information to calculate and determine whether sales were made at less than fair value.[69]

48. Commerce then proceeded to summarize in detail the deficiencies in the previously-identified areas of completeness, timeliness, and workability of computer tapes and the fact that SAIL failed verification.[70]

49. Commerce disagreed with SAIL's characterization that its US sales were accurate, timely submitted, and verified:

> In fact, the US sale database contained certain errors, as revealed at verification. See Sales Report; see also Verification Memo. Moreover, we disagree with SAIL that we are required by the Act to use SAIL's reported US prices. SAIL cites to [judicial and administrative cases] as support for the contention that the Department does not resort to total facts available if there are deficiencies in the respondent's submitted information. It is the Department's long-standing practice to reject a respondent's questionnaire response in toto when essential components of the response are so riddled with errors and inaccuracies as to be unreliable. *See Steel Wire Rod from Germany*. SAIL's argument relies on a mischaracterization of our practice with respect to so-called ``gap-filler'' facts available. SAIL argues that the Department should fill in the record for home market sales, cost of production, and constructed

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[68] *Ibid.* at 73127.
[69] *Ibid.* at 73129-30.
[70] *Ibid.* at 73130.

> value as if there were a mere ``gap" in the response, as opposed to the entire record. Thus respondent's arguments and citations to these cases are inapposite. In each of the above-mentioned cases, the majority of the information on the record was verified and useable; there were only certain small areas of information which required the Department to {use} facts otherwise available to accurately calculate a dumping margin. The Department's long-standing practice of filling in gaps or correcting inaccuracies in the information reported in a questionnaire response, often based on verification findings, is appropriate only in cases where the questionnaire response is otherwise substantially complete and useable. In contrast, in this case, SAIL's questionnaire response is substantially incomplete and unuseable in that there are deficiencies concerning a significant portion of the information required to calculate a dumping margin. To properly conduct an antidumping analysis which includes a sales-below-cost allegation, the Department must analyze four essential components of a respondent's data: US sales; home market sales; cost of production for the home market models; and constructed value for the US models. Yet SAIL has not provided a useable home market sales database, cost of production database, or constructed value database. Moreover, the US sales database would require some revisions and corrections in order to be useable. As a result of the aggregate deficiencies (data problems and SAIL's responses), the Department was unable to adequately analyze SAIL's selling practices in a thorough manner for purposes of measuring the existence of sales at less than fair value for this final determination. *See Sales Report and Cost Report.*[71]

50. Finally, regarding SAIL's argument that US law, specifically section 782(e) of the Act, required Commerce to utilize SAIL's US sales data in calculating a dumping margin, Commerce explained that:

> Section 782(e) of the Act states that the Department shall not decline to consider information deemed "deficient" under section 782(d) provided that subsections (1), (2), (3), (4), and (5) of section 782(e) are met. In the instant investigation, record evidence supports the finding that SAIL did not meet these requirements .... With regard to each respective subsection of 782(e): (1) SAIL did not provide information in a timely manner; (2) the information submitted could not be verified; (3) essential components of the information (*e.g.*, home market sales and cost information) are so incomplete that it cannot be used as a reliable basis for reaching a determination; (4) SAIL did not act to the best of its ability in providing the information and meeting the requirements established

[71] *Ibid*.

> by the administering authority; and (5) the information cannot be used without undue difficulties. Accordingly, we are applying a margin based on total facts available to SAIL in the final determination.[72]

51. As a result, Commerce determined that SAIL's information was unusable and not a reliable basis upon which to calculate a margin. Moreover, because Commerce determined that SAIL did not act to the best of its ability, it used an adverse inference in selecting the highest margin alleged in the petition as facts available.

52. SAIL subsequently challenged the *Final Determination* at the CIT.

10. The Remand Determination

53. On 26 May 2001, the CIT affirmed Commerce's decision to reject SAIL's information as unusable and use facts available in determining an antidumping duty margin for SAIL. The CIT remanded the decision, however, for further explanation as to Commerce's basis for determining that SAIL had failed to act to the best of its ability. Contrary to India's contention, the CIT did not "reverse" Commerce's determination that SAIL had not acted to the best of its ability; it simply remanded the case for further explanation by Commerce on this point.

54. Commerce filed its explanation with the CIT on 27 September 2001.[73] In that determination, Commerce summarized the factual and legal basis for its finding that SAIL had failed to act to the best of its ability.

55. First, Commerce explained its finding that SAIL possessed the necessary information and that it had the ability to provide the information in compliance with Commerce's information requests. Commerce explained its information collection process as follows:

> Although responding to the antidumping questionnaire can be a demanding exercise, it is tailored so that it can be completed by companies that keep audited records of their sales and costs. Every year, Commerce sends essentially the same questionnaire to dozens of foreign producers, and the great majority of these respondent companies is able to provide the necessary information. Although Commerce modulates the level of detail and (importantly) the type of computerization required in order to accommodate each company's unique circumstances, in the main, Commerce solicits much the same type of information from each company. As a general matter, it is reasonable for Commerce to conclude that, if companies with fewer resources can respond fully and adequately to an antidumping questionnaire in a timely manner, a company with the resources and expertise of SAIL, that does not inform the

[72] *Ibid.* at 73130-31.
[73] *USDOC Redetermination on Remand* (September 27, 2001) (Exh. IND-21).

> Department otherwise in a timely fashion, is also capable of doing so.[74]

56. Commerce also explained that the respondent ultimately controls the information necessary for an anti-dumping determination:

> It should be noted that Commerce has very limited knowledge of the actual extent of a respondent's ability to comply with requests for information. It is the respondent, not Commerce, that possesses the necessary information and knowledge of the company's operations and records. Therefore, it is incumbent on the respondent to demonstrate why it is incapable of providing requested information in a timely manner. Commerce cannot rely on mere assertions of vague "difficulties" or inability to comply as a basis for concluding that a respondent acted to the best of its ability.
>
> That is why the Department requires the reason why a party has failed to provide requested data. Without a specific, compelling explanation, Commerce generally has no means of discerning if a respondent is truly incapable of complying. If there was some circumstance beyond SAIL's control that prevented it from responding adequately and in a timely manner, it did not offer any such explanation. SAIL has not demonstrated that its failure to respond accurately is excused "because it was not able to obtain the requested information, did not properly understand the question asked, or simply overlooked a particular request." *Mannesmannrohren-Werke AG v. United States*, 77 F.Supp. 2d 1302, 1316 (CIT 2000) (*Mannesmann I*). The information that SAIL failed to provide was within its own control. Moreover, SAIL was provided with substantial guidance on the questions asked, and its failure was more comprehensive than the simple oversight of a particular request.[75]

57. Commerce again summarized the facts of its attempt to obtain necessary information from SAIL:

> During the underlying investigation, SAIL did advise Commerce that it was experiencing difficulties in gathering and submitting the requested information. Typically, however, these difficulties were offered to justify requests for additional time to submit information (which the Department repeatedly granted) and were often accompanied by assurances that the information would be forthcoming. For example, in its 11 May 1999, database submission - which was filed late due to a computer "breakdown" - SAIL indicated that "some of the data requested by [Commerce] is still being collected (because, e.g. it is available only in handwritten form). As soon as these data are available we will submit them to the Department and

[74] *Ibid.* at 2-3.
[75] *Ibid.* at 3.

> revise the diskette accordingly." Def. Ex. 5, C.R. 7. Thus, in the underlying proceeding, SAIL's reference to handwritten records was given as an example of why it needed additional time. SAIL did not indicate that it would be unable to provide a usable database; on the contrary, it promised that such a database would be forthcoming. As a result, we disagree with SAIL's suggestion, Pl.'s Mem. Supp. Mot. J. Agency R. at 32, that its identification of these logistical difficulties demonstrates that it could not comply with the information requests. In Commerce's view, the record demonstrates that SAIL could comply with the request for data, and SAIL never offered any valid explanation of circumstances that rendered it incapable of complying with those requests.
>
> In the underlying proceeding, the Department repeatedly requested that SAIL remedy deficiencies in its response and SAIL gave every indication that it would comply with the agency's information requests. Where information was not provided initially, SAIL indicated that it would be submitted as soon as it became available and that unuseable computer tapes would be revised accordingly. *See, e.g.*, Def. Ex. 5, C.R. 7; *see also* Def. Ex. 11, C.R. 17 (SAIL submitted revised computer tapes and stated that all home market sales made during the period were provided). At SAIL's behest, Commerce took the unusual step of permitting the submission of significant amounts of information *after* the preliminary determination; SAIL assured Commerce that this new data could be verified. Def. Ex. 25, C.R. 33. All of these representations suggest that SAIL itself believed it could comply with the requests for information. In such circumstances, it is reasonable for Commerce to conclude that SAIL had assessed its own operations and knew that it could fulfill its representations. This Court has held that it is "reasonable for Commerce to charge [a respondent] with knowledge of its own operations." *Mannesmannrohren-Werke AG v. United States*, Slip Op. 00-126 (CIT 5 October 2000) (*Mannesmann II*). Therefore, even accepting that SAIL's efforts were made in good faith "does not relieve its burden to respond to the best of its ability, and its 'ability' includes possessing knowledge of its business operations." *Id.*[76]

58. Finally, Commerce addressed SAIL's suggestion that it could not provide the necessary information:

> To conclude that SAIL tried its best but simply could not report accurate information about its home market sales or production costs is not credible. SAIL is one of the largest integrated steel producers in the world, with significant expertise in many areas and significant resources at its disposal. For example, SAIL has an

[76] *Ibid.* at 3-4 (footnotes omitted).

established accounting system and its books are audited annually by a large team of public accountants. *See, e.g.*, SAIL Section A Response, C.R. 5, at Exhibit A-9 (SAIL Annual Report). Moreover, because SAIL is predominantly owned by the Indian Government, SAIL is accountable for a variety of additional Government accounting requirements. Based on the information available to Commerce, we conclude that SAIL had the ability to comply with the information requests. In sum, SAIL is and should be accountable for the information recorded in its books and records. To conclude otherwise would allow respondents to provide only the most rudimentary information, without regard to the information actually required for an investigation. More importantly, to allow a respondent to select the information it will submit provides a major incentive for self-serving behaviour – supplying information that is generally favorable while claiming that it cannot supply information that might prove unfavourable to respondent ....

This investigation may have been SAIL's "first real brush with US antidumping law," [] but SAIL has provided us with no information that indicates it could not comply with the information requests made by Commerce. Thus, it is reasonable for Commerce to conclude that SAIL had the resources and ability to comply with Commerce's questionnaire but inexplicably failed to do so.[77]

B. Commerce's Consideration of Sail's Proposed Suspension Agreement

59. In a letter dated 29 July 1999, SAIL submitted a proposed agreement to suspend[78] the investigation to "address any problems that might be caused by imports of {cut-to-length} plate from India."[79] On 31 August 1999, a meeting was held with counsel for SAIL, Commerce's Assistant Secretary for Import Administration and other officials to discuss the antidumping suspension agreement proposal from India. [80] During the meeting, the Department stated that it "would consider the respondent's request, but noted that suspension agreements are rare and require special circumstances."[81] The Department also discussed the fact that "the requisite circumstances may not exist at the present time," and eventually denied the request.[82]

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[77] *Ibid*. at 4-5 (footnotes, citations omitted).
[78] Note that a suspension agreement is otherwise known as a price undertaking.
[79] *Letter from SAIL's Counsel to USDOC Re: Request for a Suspension Agreement*, dated 29 July 1999 (Exh. IND-10).
[80] *USDOC Memorandum to the File re: Ex-Parte Meeting with Counsel for SAIL Regarding Possible Suspension Agreement*, dated 31 August 1999 (Exh. US-21).
[81] *Ibid*.
[82] *Ibid*.

IV. STANDARD OF REVIEW

60. The AD Agreement is unique among the WTO agreements in providing its own standard for a WTO panel's review of an anti-dumping determination by an investigating authority. That standard is set forth in Article 17.6 in two parts: the first concerns review of questions of fact and the second concerns review of issues of law. In its submission, India acknowledges this concept.[83] However, India also claims that another standard, described in *United States - Transitional Safeguard Measure on Combed Cotton Yard from Pakistan*, also applies. As explained below, this is an incorrect reading of the WTO agreements. Furthermore, India states that Article 17.6 requires this Panel to effectively ignore the policies and procedures underlying US law and its application, thereby distorting the standard of review which this Panel is to apply. The proper standard is described below.

A. Review of an Authority's Establishment and Assessment of the Facts: Panels May Not Engage in de novo Review

61. Article 17.6(i) of the AD Agreement provides that:

> (i) in its assessment of the facts of the matter, the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned.

62. In other words, a panel may not conduct its own *de novo* evaluation of the facts if the authority's establishment of the facts is proper and its evaluation of the facts is unbiased and objective. As articulated by the Appellate Body in *United States - Antidumping Measures on Certain Hot-Rolled Steel Products from Japan ("Hot-Rolled AB Report"*), pursuant to Article 17.6(i) and Article 11 of the DSU, both of which require an "objective" assessment of the facts, "the task of panels is simply to review the investigating authorities' 'establishment' and 'evaluation' of the facts."[84]

63. In order to 'establish' and "evaluate' the facts, Article 17.6(i) notes that a panel must determine (1) if the establishment of the facts on the record was "proper," given the overall investigation or review under scrutiny by the panel and (2) if the investigating authority's determination, based upon the facts on the

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[83] First Submission of India at para. 49.

[84] *United States - Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan, Report of the Appellate*, WT/DS184/AB/R, adopted 23 August 2001, DSR 2001:X, 4697, para. 55 ("*Hot-Rolled AB Report"). See also Article 21.5 Recourse Decision, Mexico-Anti-Dumping Investigation of High Fructose Corn Syrup ("HFCS AB Report") From the United States*, WT/DS132/AB/RW, adopted 22 October 2001, WT/DS132/AB/RW, DSR 2001:XIII, 6675, para 130. Article 11 of the DSU imposes upon panels a comprehensive obligation to make an "objective assessment of the matter."

record, was unbiased and objective.[85] "Proper," as defined by the Oxford Standard Dictionary, means "suitable" or "appropriate."[86] Thus, a panel must review all of the facts on the record and determine if the investigating authority appropriately considered the facts of the record and applied those facts in an objective, unbiased manner in making its final determination.

64. Once a panel makes an objective assessment of the investigating authority's establishment of the facts, pursuant to17.6(i), it is well established that even if a panel disagrees with an agency's findings, as long as the investigating authority's findings are based upon properly-applied facts and its decision has been made in an objective, unbiased manner, then the panel may not substitute its judgment for that of the investigating authority.[87] This applies even if the panel – had it stood in the shoes of that authority originally– might have decided the matter differently.

65. Several panels have stressed that a panel review is not a substitute for proceedings conducted by national investigating authorities, and that the role of panels is not to conduct a *de novo* review of the factual findings of a national investigating authority. This standard of review has been articulated by both WTO panels and GATT panels:

> [T]he Panel was not to conduct a *de novo* review of the evidence relied upon by the United States authorities or otherwise to substitute its judgment as to the sufficiency of the particular evidence considered by the United States authorities.[88]

This concept is extremely important because, as noted in *Thailand - H-Beams from Poland*, "the aim of Article 17.6(i) is to prevent a panel from 'second-guessing' a determination of a national authority when the establishment of the facts is proper and the evaluation of those facts is unbiased and objective."[89]

66. In reviewing the facts of the record, WTO panels are directed to look to the entire administrative record of an investigation. India argues that the Panel is required to review SAIL's US sales data specifically, apply the four conditions of Annex II, paragraph 3 only to that data, and then to make its determination exclusively based upon that analysis. This is a misreading of the AD Agreement. Article 17.6(i), on its face, applies to all of the "facts of a matter," and does not affirmatively segregate between respondent-selected segments of submissions. Thus, this Panel must "examine whether the evidence relied upon by the [inves-

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85 *See Hot-Rolled AB Report*, para 55.

86 *The New Shorter Oxford English Dictionary*, Clarendon Press, Oxford (1993) (definition III).

87 *See Hot-Rolled AB Report*, para. 56.

88 *Mexico - Anti-Dumping Investigation of High Fructose Corn Syrup ("HFCS") from the United States*, WT/DS132/R (24 February 2000), DSR 2001:XIII, 6717, para. 7.56. The *HFCS* panel was citing from *Guatemala-Anti-Dumping Investigation Regarding Portland Cement From Mexico*, WT/DS60/R, adopted 25 November 1998, DSR 1998:IX, 3797. The language is actually taken from *United States - Measures Affecting Import of Softwood Lumber from Canada*, SCM/162BISD40S/358, adopted 27-28 October 1993, para. 335.

89 *Thailand - Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, Report of the Appellate Body, WT/DS122/AB/R, adopted 5 April 2001, DSR 2001:VII,2701, paras. 117-18 (*"Thailand H-Beams from Poland"*).

tigating authority] was sufficient, that is, whether an unbiased and objective investigating authority evaluating that evidence" could properly have reached its determination.[90]

B. Review of an Authority's Interpretation of the AD Agreement: Panels Must Respect Multiple, Permissible Interpretations

67. Article 17.6(ii) applies to the legal standard of review:

> (ii) the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.

68. In reviewing legal questions that turn on the proper meaning to be ascribed to the AD Agreement, subparagraph (ii) of Article 17.6 provides that, where a relevant provision of the AD Agreement is subject to more than one permissible interpretation, a WTO panel shall find the anti-dumping measure in question to be in conformity with the Agreement if it is based on any of those permissible interpretations.

69. Thus, Article 17.6(ii) reflects a deliberate choice by the negotiators to recognize the possibility of multiple interpretations. In this sense, Article 17.6(ii) constitutes an admonition to panels to take special care, as clearly stated in Articles 3.2 and 19.2 of the DSU, not to add to the obligations of Members.

70. In sum, Article 17.6(ii) instructs panels that, if the terms of the Agreement admit of multiple permissible interpretations, they must find an authority's action conforms with the AD Agreement if it conforms to one of those interpretations. Thus, the relevant question in every case is not whether the challenged determination rests upon the best or the "correct" interpretation of the AD Agreement, but whether it rests upon a "permissible interpretation" (of which there may be many).

71. India does not disagree with the above analysis, but by citing to *Transitional Safeguard Measure on Combed Cotton Yarn From Pakistan* ("*Yarn from Pakistan*"),[91] attempts to add to the obligations of investigating authorities, pursuant to Article 11 of the DSU, in determining if the investigating authority has "complied with their obligations." Article 1.2 of the DSU, however, provides that "special or additional rules and procedures on dispute settlement contained in covered agreements" shall prevail over the more general rules and procedures of the DSU to the extent of any differences. As explained previously, the AD

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[90] *HFCS*, para. 7.57.

[91] *WT/DS192/AB/R*, adopted 8 October 2001, DSR 2001:XII, 6027, para. 74 ("*Yarn from Pakistan*")

Agreement is unique among the WTO Agreements in that it contains a specified "standard of review." Therefore, the decision in *Yarn From Pakistan* is irrelevant, because the Panel in that case had no special standard of review provision to apply.

72. Thus, in applying the *Textiles Agreement* in *Yarn From Pakistan*, the Appellate Body was enunciating the standard pursuant to DSU Article 11 for an "objective" review of the facts. In the case at hand, however, Articles 17.6(i) and (ii) of the AD Agreement provide for the standard of review by which a panel should make its determination. The Appellate Body has never stated that in addition to the requirements of Article 17.6, a panel reviewing a measure under the AD Agreement must also implement the test articulated in *Yarn From Pakistan*.

73. In summary, this Panel should review the entire record and all of the facts contained therein. In that context, this Panel should assess whether Commerce's application of facts available in this investigation was conducted in an unbiased and objective manner. Furthermore, this Panel should determine, based upon the complete record, whether the United States' legal analysis is a permissible interpretation of its obligations under the AD Agreement.

V. LEGAL ARGUMENT

A. Introduction

74. Customary rules of interpretation of public international law, as reflected in Article 31(1) of the Vienna Convention, provide that a treaty "shall be interpreted in accordance with the ordinary meaning to be given to the terms of the treaty *in their context and in the light of its object and purpose*" (emphasis added). The purpose of treaty interpretation is, as stated in Article 31 of the Vienna Convention, to give effect to the intention of the parties to the treaty as expressed in their words read in context.

75. Article VI of the GATT 1994 ("Article VI") authorizes WTO Members to impose anti-dumping duties in order to remedy injurious dumping. The object and purpose of Article VI is to provide a remedy to Member countries that are faced with dumped imports that cause or threaten material injury. Article VI:1 states that "dumping . . .is to be condemned if it causes or threatens material injury to an established industry . . .or materially retards the establishment of a domestic industry." Given the object and purpose of Article VI and the AD Agreement, which authorizes a remedy for injurious dumping, the provisions of these agreements must be interpreted so as to allow investigating authorities to obtain and analyze all information necessary to the antidumping analysis.

76. Article VI and the AD Agreement require that a determination of dumping must be based on detailed information involving prices in the domestic market of the exporting country ("normal value") and export prices to the market of the investigating authority.[92] The dumping determination must include, where

[92] *See, e.g.*, Article VI:1 of GATT 1994; Article 2 of the AD Agreement.

alleged, an analysis of cost information to determine whether sales in the domestic market of the exporting country are below the cost of production("COP"). Only when all of this information is accurately provided can the administering authority perform an accurate calculation of a dumping margin. Based on these requirements, Commerce's questionnaire requests of information necessary for the dumping analysis, including general information concerning the company's corporate structure and business practices; the merchandise under investigation that it sells; the sales of that merchandise in all markets; the home market sales listings; the US sales listings; and information regarding the cost of production of the foreign like product and the constructed value of the merchandise under investigation. This information, which is necessary for any dumping determination, is normally within the control of the responding parties whose sales are the subject of the anti-dumping investigation.

77. Thus, in light of the object and purpose of Article VI and the AD Agreement, authorizing Members to remedy injurious dumping, the provisions at issue must be interpreted to allow investigating authorities to request, require and obtain the necessary information from interested parties. The interpretation advanced by India would give ultimate control to responding parties over what information investigating authorities may analyze.

78. The goal of an anti-dumping investigation is "ensuring objective decision-making based on facts."[93] In order for investigating authorities to *make* objective decisions based on facts, they must have *access* to those facts. An interpretation of the AD Agreement that would encourage parties to selectively provide necessary information would frustrate the goal of objective decision-making and nullify the effectiveness of the Article VI remedy. At some point, investigating authorities must have the discretion to reject questionnaire responses in their entirety when responding parties fail to provide critical information that authorities need to conduct antidumping investigations.

B. Textual Analysis of the AD Agreement

79. In this section of our submission, we analyze the provisions of the AD Agreement relevant to this dispute, that is, Article 6.8 and Annex II. As will be shown, the ordinary meaning of Article 6.8 and Annex II of the AD Agreement support the interpretation of the United States as reflected in its statutory provisions and its actions with respect to SAIL in the antidumping duty investigation at issue.

80. Article 6.8 of the AD Agreement permits the application of facts available when a party fails or refuses to provide necessary information in an anti-dumping investigation. Annex II of the AD Agreement then sets out the criteria which investigating authorities should take into account before applying facts available. As we demonstrate below, taken together, Article 6.8 and Annex II allow investigating authorities to make preliminary and final determinations, in

[93] *Hot-Rolled Panel Report*, para. 7.55.

whole or in part, on the basis of facts available, which could lead to a result which is less favorable to the party than if the party had cooperated and provided the necessary information. These provisions of the AD Agreement provide investigating authorities with a feasible method for calculating antidumping margins when information in control of responding parties is missing, untimely, or unreliable because a party either refuses access to it or otherwise does not timely provide it.

1. Article 6.8 of the AD Agreement

81. Article 6.8 of the AD Agreement provides as follows:

> 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 facts available. The provisions of Annex II shall be observed in the application of this paragraph.

(a) Information

82. A fundamental issue in this dispute is the proper interpretation of the term "information" as used in Article 6.8 and Annex II of the AD Agreement. The ordinary meaning of the term "information," which is not defined in the AD Agreement, is a "communication of the knowledge of some act or occurrence" and "knowledge or facts communicated about a particular subject, event, etc.; intelligence, news."[94]

83. Article 6.8 of the AD Agreement uses the term "necessary information." The ordinary meaning of the term "necessary" is "[t]hat cannot be dispensed with or done without; requisite; essential; needful."[95] The "necessary" or "requisite" or "essential" information for conducting an antidumping investigation includes prices of the subject merchandise in the domestic market of the exporting country, export prices of the subject merchandise, and, in appropriate circumstances, cost of production information and constructed value information. Because dumping is defined in Article 2.1 of the AD Agreement based on a comparison of the export price with the normal value, in the ordinary course of trade, all of this information constitutes "necessary" information for purposes of making a dumping determination.[96]

84. Throughout its First Written Submission, India claims that Commerce was wrong to examine the sufficiency of all of the information necessary for the

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[94] The New Shorter Oxford English Dictionary, Clarendon Press, Oxford, 1993.

[95] *Ibid*.

[96] Article 2.1 of the AD Agreement states:

> For the purpose of this Agreement, a product is to be considered as being dumped, ie. introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country.

conduct of its investigation. Instead, India argues that Commerce was obligated to focus on certain "categories of information" - a term which does not appear anywhere in the AD Agreement. Nothing in the AD Agreement requires an administering authority to evaluate distinct "categories" of information separately for purposes of determining whether it is permissible to use facts available for a dumping determination.

85. It is also relevant to consider the meaning of the term "information" in terms of the overall purpose of the AD Agreement. As stated by the *Hot Rolled* panel:

> One of the principal elements governing anti-dumping investigations that emerges from the whole of the AD Agreement is the goal of ensuring objective decision-making based on facts.[97]

To the extent that "objective decision-making based on facts" is accepted as a goal of the AD Agreement, the Agreement should be interpreted in a manner that would achieve that goal. The only way to achieve "objective decision-making based on facts" is to interpret the AD Agreement in a manner which encourages the parties in possession of the facts (in this case the responding interested parties) to provide that information to the investigating authorities in a timely and accurate manner. Conversely, an interpretation which would encourage responding interested parties to provide only partial information would be inconsistent with that goal and is not to be preferred.

86. The purpose of the objective standard for decision-making is to permit neutral determinations to be made without bias toward either the party that could be subject to duties or the party being injured by any dumping. When investigating authorities rely on facts available, it is not possible to determine whether those facts are advantageous to the responding party because the information necessary to determine or even estimate that party's actual margin of dumping is not available. Thus, an interpretation of the AD Agreement that would allow responding parties to selectively provide information and require investigating authorities to use that information could encourage such selective responses and thereby defeat the underlying purpose of "objective decision-making based on facts."

87. India's interpretation of the term "information" to mean "categories of information" cannot be squared with the goal of "objective decision-making based on facts." Under India's interpretation, responding interested parties would be able to select what information they want to supply to the investigating authorities. India's interpretation would, in fact, encourage responding interested parties to distinguish between helpful and harmful information and to provide only that select information which will not have negative consequences for them.

88. Moreover, India's interpretation would often lead to absurd results. For example, under India's interpretation of the AD Agreement, if a responding party submitted only its COP data, omitting home market and export sales information,

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[97] *Hot-Rolled Panel Report*, para. 7.55.

Commerce would be required to include that data in its calculations. Such information would be impossible to use, however, because in the absence of actual home market prices, it would be unknowable whether the actual home market sales were above cost and therefore appropriate for determining normal value (pursuant to Article 2.2.1 of the AD Agreement), or below cost, such that constructed value should be used to determine normal value (pursuant to Article 2.2 of the AD Agreement). Such an interpretation would be absurd and, as such, should be avoided.

89. Furthermore, India's interpretation adds language to the text that is not there. The Appellate Body has noted that panels must look to the ordinary meaning of the text of an Agreement in determining the obligations set forth by that provision: "The fundamental rule of treaty interpretation requires a treaty interpreter to read and interpret the words actually used by the agreement under examination, and not words which the interpreter may feel should have been used."[98] The Appellate Body has further noted, "[A] treaty interpreter is not entitled to assume that such usage [of particular terms] was merely inadvertent on the part of the Members who negotiated and wrote that Agreement."[99]

90. It is an investigating authority's ability to apply facts available in cases where responses are substantially incomplete which provides an incentive for responding parties to supply complete information. While the goal of antidumping proceedings is "ensuring objective decision-making based on facts,"[100] allowing the parties submitting information to control that decision-making by controlling the production of information would run counter to the object and purpose of the AD Agreement to encourage participation in antidumping proceedings in order to permit the calculation of accurate antidumping margins.

91. When a respondent provides grossly inadequate and unreliable information pertaining to the overall dumping margin calculation, Article 6.8 permits the investigating authority to use the facts available to determine the existence of dumping. Although certain portions of information may appear acceptable in isolation, when the nature and extent of deficiencies on the whole are substantial, it calls into question the reliability of the entire response. Article 6.8 provides that in such circumstances, the authority may rely on facts available.

92. Thus, consistent with the proper interpretation of "necessary information" in Article 6.8, it would be permissible for a fair and objective investigating authority to conclude that a party's failure to provide the necessary information for the calculation of accurate dumping margins would constitute the non-provision of necessary information such that, even with some limited data, it was necessary and appropriate to use facts available for the entire dumping determination.

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[98] *EC - Measures Concerning Meat and Meat Products* (*"EC-Hormones AB Report"*), WT/DS48/AB/R, adopted 13 Feb. 1998, DSR 1998:I, 135, para. 181("*EC-Hormones AB Report*").

[99] *Ibid.* at para. 164.

[100] *Hot-Rolled Panel Report*, para. 7.55.

(b) Preliminary and Final Determinations

93. Article 6.8 of the AD Agreement provides that, when certain conditions have been met, "*preliminary and final determinations*, affirmative or negative, may be made on the basis of facts available." (emphasis added). In its First Written Submission to this Panel, India has ignored this language of the AD Agreement which explicitly provides for the use of facts available as to the ultimate determination of dumping.

94. Throughout the AD Agreement, the text distinguishes between "preliminary and final determinations" and individual pieces of information which may need to be determined. For example, Article 12 of the AD Agreement provides for "Public Notice and Explanation of Determinations." Therein, Article 12.2 specifically addresses any "preliminary or final determination" and the required contents of such determinations. Further, Article 12.2.1 of the AD Agreement provides for a public notice of the imposition of provisional measures, including, in particular, "preliminary determinations on dumping and injury," distinguishing such preliminary determinations from the "matters of fact and law" and from the "methodology used in the establishment and comparison of the export price and the normal value" in subsection (iii) of Article 12.2.1.

95. Similar to subsection (iii) of Article 12.2.1, various subparts of Article 2 refer to the particular items which need to be determined in order to reach a preliminary or final determination:

Article 2.2	–	"the margin of dumping shall be determined"
Article 2.2.1	–	"if the authorities determine that such sales are made within an extended period of time"
Article 2.2.2	–	"the amounts {for administrative, selling and general costs and for profits} may be determined"
Article 2.3	–	under particular conditions, "export price may be constructed {...} on such reasonable basis as the authorities may determine."

96. The use of the term "preliminary and final determinations" in Article 6.8 should be given its ordinary meaning within the context of the AD Agreement. As used in the AD Agreement, the term "preliminary and final determinations" refers to the ultimate finding of dumping. Where the drafters of the AD Agreement wanted to refer to the particular items that may need to be determined in order to reach a preliminary or final determination, specific reference was made.

97. Notably, India ignores this language in Article 6.8 in its efforts to have the Panel interpret that Article as applying to "categories of information." Nevertheless, this plain language of Article 6.8 plainly permits the use of facts available as the basis for "preliminary and final determinations" when an interested party has failed to provide necessary information.

2. Annex II of the AD Agreement

98. With respect to Annex II of the AD Agreement, paragraphs 1, 3, and 5 are relevant to this dispute. We discuss each in turn.

(a) Paragraph 1

99. Paragraph 1 of Annex II to the AD Agreement provides:

> 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 facts available, including those contained in the application for the initiation of the investigation by the domestic industry.

100. Paragraph 1 of Annex II provides the basic guidance in the AD Agreement for obtaining the participation of responding interested parties. The first sentence provides that the authorities, as soon as possible, should contact the parties, advise them of the information required from them for the investigation, and advise them of the manner in which to submit that information. The second sentence then provides that the investigating authorities should advise the responding interested parties of the consequences of not providing the required information – that the investigating authorities *will be free* to make determinations on the basis of the facts available, including, in particular, those facts contained in the application for the initiation of the investigation.

(b) Paragraph 3

101. Annex II, paragraph 3 of the AD Agreement provides:

> All information which is verifiable, which is appropriately submitted so that it can be used in the investigation without undue difficulties and which is supplied in a timely fashion, and, where applicable, 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, this should not be considered to significantly impede the investigation.

102. Annex II, paragraph 3 contains a number of conditions which, if met, indicate that the authorities "should take that information into account." Those conditions are:

(i) the information is verifiable;

(ii) the information is appropriately submitted so that it can be used ...without undue difficulties;

(iii) the information is supplied in a timely fashion; and

(iv) the information, where applicable, is supplied in a medium or computer language requested by the authorities.

Only if all four of these conditions are met does the AD Agreement provide that the information should be taken into account. If the information fails to meet any one of these conditions, Annex II, paragraph 3 does not provide any obligation on the authorities to further consider, or otherwise take into account, the information.

(i) The Information "should be taken into account"

103. India claims that if the four conditions of Annex II, paragraph 3 are met, the investigating authorities must use the information to calculate the antidumping margin. Once again, India is reading language into the text.[101] In actuality, that provision simply states that, if the four conditions are met, then the information "should be taken into account." "Must use" and "should be taken into account" are not synonymous terms.

104. Annex II, paragraph 5 uses similar language, stating that even if information is not ideal in all respects, this fact alone "*should* not justify the authorities from disregarding it, providing the interested party has acted to the best of its ability." (emphasis added).

105. The ordinary meaning of the term "should" differs greatly from the terms "must" or "shall." The former word implies a suggested course of action, while the latter terms impose a mandatory obligation on Members.

106. As the panel recognized in *United States - Anti-dumping Measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip From Korea*,[102] the ordinary meaning of "should" does not impose mandatory obligations upon Member states. Therein, the Panel rejected the argument that the term "should" was the equivalent of the word "may," but agreed that in its ordinary meaning, it was a permissive rather than mandatory term.[103]

107. Thus, the language of Annex II, paragraphs 3 and 5, urges the investigating authority to take into account, or not disregard, information on the record which meets the criteria of those provisions; however, the ordinary meaning of both of these provisions does not require Members to utilize that information.

(c) Paragraph 5

108. Paragraph 5 of Annex II of the AD Agreement states that

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[101] *EC-Hormones AB Report*, para. 181.

[102] WT/DS179/R, adopted 1 February 2001, DSR 2001:IV, 1295, para. 6.93 ("*SSPC from Korea*").

[103] *SSPC from Korea* at para. 6.93 (footnote omitted). The Panel stated that the term "should" was not the equivalent of "may," because there would be no effective disciplines on the methodology selected. Thus, the Panel found that the term "should" provided an authorization for a specified, but non-mandatory, act. *See Ibid.* at para. 6.94 and accompanying notes.

> 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.

109. Paragraph 5 incorporates the principle that perfection is not the standard, that information with correctable errors should not be disregarded where the respondent has acted to the best of its ability.

110. The phrase "may not be ideal in all respects" is particularly relevant to this dispute. It implies that the information in question is either "ideal" in most respects or nearly ideal across the board. Nevertheless, paragraph 5 indicates that there will be situations in which the investigating authority would be justified in disregarding the information.

111. Again, the use of the term "should" in this paragraph, as indicated above, indicates that this is not a mandatory obligation in the AD Agreement.

112. The phrase "provided the interested party has acted to the best of its ability" is also particularly relevant. Where the interested party has acted to the best of its ability, the fact that they were unable to provide information which was ideal in all respects should not justify disregarding that information. On the other hand, where the conditions for making a determination based on the facts available otherwise apply, the clear implication of paragraph 5 is that an investigating authority would be justified in disregarding information that is not ideal in all respects if a party has failed to act to the best of its ability. Similarly, if the information is far from ideal in most respects, paragraph 5 would have no bearing, even if the interested party has acted to the best of its ability.

(d) Conclusion

113. In short, the AD Agreement provides that when a party refuses or otherwise does not supply necessary information (including the provision of incomplete, untimely or unreliable information), or significantly impedes the investigation, the investigating authority is free to use the facts available to make its determination. However, in such a case, where information was provided which is verifiable, appropriately submitted so that it can be used without undue difficulty, supplied in a timely fashion, and supplied in the requested medium, it should be taken into account, although it need not be used to calculate the margin. Additionally, even though information may not be ideal in all respects, the authorities should not disregard it if the interested party acted to the best of its ability. Conversely, if a party has failed to act to the best of its ability, then an investigating authority would be justified in disregarding information that is not ideal in all respects.

114. As we will demonstrate below, both the statute implementing the United States' WTO obligations and the final determination of the Department of Commerce with respect to SAIL are consistent with this interpretation of the AD Agreement.

C. The "facts available" Provisions of the US Statute do not Violate US WTO Obligations

115. India seeks to have this Panel find that sections 776(a), 782(d), and 782(e) of the Act "as such" violate Article 6.8 and Annex II, paragraph 3 of the AD Agreement.[104] Its entire argument is premised on a misinterpretation of both the obligations provided for in Article 6.8 and Annex II and those in US law. As we explain below, where the AD Agreement creates obligations pertaining to the use of the facts available, the US statute is consistent with those obligations. Where the AD Agreement leaves discretion with Members, the statute provides particular criteria that limit the Department's discretion to use the facts available in place of a respondent's submitted data. Since the US statute does not mandate WTO inconsistent action, there is no basis for the Panel to conclude that the statute violates the AD Agreement.

1. Under Established WTO Jurisprudence, the Legislation of a Member Violates That Member's WTO Obligations Only If the Legislation Mandates Action That Is Inconsistent With Those Obligations

116. It is well established under GATT and WTO jurisprudence that legislation of a Member violates that Member's WTO obligations only if the legislation *mandates* action that is inconsistent with those obligations or precludes action that is consistent with those obligations. If the legislation provides discretion to administrative authorities to act in a WTO-consistent manner, the legislation, as such, does not violate a Member's WTO obligations.

117. The Appellate Body has explained that "the concept of mandatory as distinguished from discretionary legislation was developed by a number of GATT panels as a threshold consideration in determining when legislation as such – rather than a specific application of that legislation – was inconsistent with a Contracting Party's GATT 1947 obligations."[105] This doctrine has continued under the WTO system, as panels and the Appellate Body have continued to apply the mandatory/discretionary distinction in considering whether a Member's legislation is WTO - consistent.

118. Most recently, the panel in the *Export Restraints* case applied the doctrine in concluding that certain provisions of the US countervailing duty law did not mandate action inconsistent with provisions of the *Agreement on Subsidies and Countervailing Measures*.[106] The Panel in *Export Restraints* described the man-

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[104] Although India cites to three provisions in the heading to section VI.B. of their First Written Submission, the text of that section challenges only the consistency of sections 776(a) and 782(c) with the AD Agreement. *See* India's First Written Submission at paras. 130-59. Nevertheless, we discuss all three provisions for purposes of completeness.

[105] *United States - Anti-Dumping Act of 1916*, WT/DS136/AB/R, WT/DS162/AB/R, Report of the Appellate Body adopted 26 September 2000, DSR 2000:X, 4831, para. 88 ("*US 1916 Act AB Report*").

[106] *United States – Measures Treating Export Restraints as Subsidies*, WT/DS194/R, adopted 23 August 2001, DSR 2001:XI, 5767, paras. 8.4 – 8.131.

datory/discretionary distinction as a "classical test" with longstanding historical support.[107]

2. Sections 776(a), 782(d), and 782(e) of the Act Do Not Mandate WTO Inconsistent Actions

(a) The Meaning of the Facts Available Provisions Is a Factual Question That Must Be Answered by Applying US Principles of Statutory Interpretation

119. A central question in this dispute is the following: Do sections 776(a), 782(d), and 782(e) of the Act mandate that Commerce reject submitted information in a manner inconsistent with Article 6.8 and Annex II of the AD Agreement? If they do not, then India's challenge to the *US* statute "as such" must fail.

120. It is an accepted principle that questions concerning the meaning of municipal law are questions of fact that must be proven.[108] Likewise, it is equally well-established that municipal law consists not only of the provisions being examined, but also domestic legal principles that govern the interpretation of those provisions.[109] While the Panel is not bound to accept the interpretation presented by the United States, the United States can reasonably expect that the Panel will give considerable deference to the United States' views on the meaning of its own law.[110]

121. For purposes of ascertaining the meaning of sections 776(a), 782(d), and 782(e) of the Act as a matter of US law, US courts and agencies must recognize the longstanding and elementary principle of US statutory construction that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." *Murray v. Schooner Charming Betsy*, 6 US (2 Cranch) 64, 118 (1804). While international obligations cannot override inconsistent requirements of domestic law, "ambiguous statutory provisions ...[should] be construed, where possible, to be consistent with international obligations of the United States."[111]

(b) Section 776(a) of the Act Does Not Mandate WTO- Inconsistent Action

122. A comparison of section 776(a) of the Act and Article 6.8 of the AD Agreement reveals that the two provisions are largely identical, and that section

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[107] *Ibid*. at para. 8.9.

[108] *See, e.g., India - Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/AB/R, adopted 16 January 1998, DSR 1998:I, 9, paras. 64, 73-74, and cases and authorities cited therein.

[109] *See, e.g., United States - Section 301-310 of the Trade Act of 1974*, WT/DS152/R, adopted 27 January 2000, DSR 2000:II, 815, DSR 2000:II, 815, para. 7.108 & n. 681 ("*US 301*").

[110] *US 301*, para. 7.19.

[111] *Restatement (Third) of the Foreign Relations Law of the United States*, § 114 (1987) (copy attached as US-13); and *US 301*, note 681, in which the panel recognized the existence of what is known in the United States as "the *Charming Betsy* doctrine".

776(a) does not mandate any action that is inconsistent with Article 6.8. Article 6.8 states that:

> 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.

Section 776(a) in turn reads as follows:

> If–
>
> (1) necessary information is not available on the record, or
>
> (2) an interested party or any other person–
>
> (A) withholds information that has been requested by the administering authority or the Commission under this title,
>
> (B) fails to provide such information by the deadlines for the submission of the information or in the form and manner requested subject to subsections (c)(1) and (e) of section 782,
>
> (C) significantly impedes a proceeding under this title, or
>
> (D) provides such information but the information cannot be verified as provided in section 782(i),
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> the administering authority and the Commission shall, subject to section 782(d), use the facts otherwise available in reaching the applicable determination under this title.[112]

123. As a side by side comparison of the two provisions demonstrates, the section 776(a)(2)(A) requirement to use the facts available if an interested party "withholds" information does not mandate WTO inconsistent action because Article 6.8 explicitly permits Members to use the facts available when an interested party "refuses access to" information.

124. Similarly, the fact that section 776(a)(2)(B) requires use of facts available if an interested party "fails to provide information" by the relevant deadline does not mandate WTO inconsistent action because Article 6.8 permits a Member to use the facts available if an interested party "does not provide" information within a reasonable period.

125. Moreover, the requirement in section 776(a)(2)(C) to use facts available if a party significantly impedes an authority's investigation does not mandate WTO inconsistent action because it is plainly permissible under Article 6.8 for a Member to resort to facts available in such situations.

[112] Section 776(a) (emphasis added) (Exh. IND-26).

126. Additionally, the requirement in section 776(a)(2)(D) to disregard information that cannot be verified and use the facts available does not mandate WTO inconsistent action because only "verifiable" information should be taken into account under Article 6.8 and paragraph 3 of Annex II of the AD Agreement.

127. Finally, section 776(a) makes the use of facts available, when any one of these conditions have been met, subject to section 782(d) of the Act. Thus, the reference here to section 782(d) does not mandate WTO inconsistent action because it limits the otherwise WTO-consistent ability to use the facts available.

128. In sum, section 776(a) of the Act only requires use of the facts available in circumstances that are consistent with Article 6.8, therefore, it does not *mandate* rejection of information in a manner inconsistent with Article 6.8 of the AD Agreement. This reading of section 776(a) is further confirmed by the Statement of Administrative Action, interpreting section 776(a).[113]

(c) Section 782(d) of the Act Does Not Mandate WTO Inconsistent Action

129. India claims (at para. 137) that section 782(d) of the Act does not modify the basic requirements in section 776(a) pertaining to the facts available. India's point is irrelevant because, as already discussed, section 776(a) does not mandate WTO inconsistent action. The same is true with respect to section 782(d) of the Act. Section 782(d) provides:

> (d) Deficient Submissions.-If the administering authority or the Commission determines that a response to a request for information under this title does not comply with the request, the administering authority ...shall promptly inform the person submitting the response of the nature of the deficiency and shall, to the extent practicable, provide that person with an opportunity to remedy or explain the deficiency in light of the time limits established for the completion of investigations or reviews under this title. If that person submits further information in response to such deficiency and either–
>
> (1) the administering authority ...finds that such response is not satisfactory, or

[113] With respect to section 776(a) of the Act, the SAA provides that:

New section 776(a) requires Commerce and the Commission to make determinations on the basis of the facts available where requested information is missing from the record or cannot be used because, for example, it has not been provided, it was provided late, or Commerce could not verify the information. Section 776(a) makes it possible for Commerce and the Commission to make their determinations within the applicable deadlines if relevant information is missing from the record. In such cases, Commerce and the Commission must make their determinations based on all evidence of record, weighing the record evidence to determine that which is most probative of the issue under consideration. The agencies will be required, consistent with new section 782(e), to consider information requested from interested parties that: (1) is on the record; (2) was filed within the applicable deadlines; and (3) can be verified.

> (2) such response is not submitted within the applicable time limits,
>
> then the administering authority ...*may*, subject to subsection (e), disregard all or part of the original and subsequent responses.[114]

130. The use of the word "may" alone demonstrates that section 782(d) of the Act is discretionary and does not *mandate* rejection of any information that would otherwise be acceptable pursuant to Article 6.8 and Annex II of the AD Agreement. As a discretionary provision, section 782(d) cannot violate US WTO obligations.[115] This reading of section 782(d) is confirmed by the Statement of Administrative Action, interpreting section 782(d) of the Act.[116]

(d) Section 782(e) of the Act Does Not Mandate WTO Inconsistent Action

131. Finally, nothing in section 782(e) of the Act mandates WTO inconsistent action. Under 782(e):

> (e) Use of Certain Information.-In reaching a determination under section 703, 705, 733, 735, 751, or 753 the administering authority ...*shall not decline to consider information that is submitted by an interested party* and is necessary to the determination but does not meet all the applicable requirements established by the administering authority or the Commission if–
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> (1) the information is submitted by the deadline established for its submission,

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[114] Section 782(d) (emphasis added) (Exh. IND-26).

[115] Moreover, the text of section 782(d) is substantively identical to paragraph 6 of Annex II, which states:

> If evidence or information is not accepted, the supplying party should be informed forthwith of the reasons thereof and 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 rejection of such evidence or information should be given in any published findings.

Nothing in this language mandates the rejection of information that is otherwise consistent with Article 6.8 and Annex II.

[116] With respect to section 782(d) of the Act, the SAA (Exh. US-23) provides (at 865) that:

> New section 782(d) requires Commerce and the Commission to notify a party submitting deficient information of the deficiency, and to give the submitter an opportunity to remedy or explain the deficiency. This requirement is not intended to override the time-limits for completing investigations or reviews, nor to allow parties to submit continual clarifications or corrections of information or to submit information that cannot be evaluated adequately within the applicable deadlines. If subsequent submissions remain deficient or are not submitted on a timely basis, Commerce and the Commission may decline to consider all or part of the original and subsequent submissions. Pursuant to new section 782(f), Commerce and the Commission will provide, to the extent practicable, a written explanation of the reasons for not accepting information.

Nothing in the interpretive language calls into question the obvious discretionary nature of section 782(d).

(2) the information can be verified,

(3) the information is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination,

(4) the interested party has demonstrated that it acted to the best of its ability in providing the information and meeting the requirements established by the administering authority or the Commission with respect to the information, and

(5) the information can be used without undue difficulties.[117]

132. The United States explained above that section 776(a) of the Act cannot mandate WTO inconsistent action because it only requires use of the facts available in circumstances that Article 6.8 permits. Section 782(e) further ensures this result by requiring the Department to consider information that would otherwise be rejected under section 776(a), if five conditions are met. In this way, section 782(e) serves to *reduce* the likelihood that the Department will resort to the facts available in a particular case; it does not *require* the Department to use the facts available in a WTO inconsistent manner. Moreover, as noted above, the discretionary provision of section 782(d) is made subject to section 782(e). Thus, even if the five requirements of section 782(e) are not met, the decision to disregard the information would remain discretionary pursuant to section 782(d). Therefore, since nothing in section 782(e) requires the Department to reject information submitted by an interested party, it cannot be viewed as *mandating* action that would be inconsistent with Article 6.8 and Annex II.

133. In addition, the factors identified in section 782(e), with one exception, are substantively identical to the factors contained in Annex II, paragraphs 3 and 5, of the AD Agreement. The first factor in section 782(e) refers to "information submitted by the deadline established for its submission;" paragraph 3 of Annex II refers to "information ...which is supplied in a timely fashion."

134. The second factor in section 782(e) refers to information that can be "verified;" Annex II, paragraph 3, refers to "information which is verifiable."

135. The fourth factor in section 782(e) refers to cases in which a party "has demonstrated that it acted to the best of its ability in providing the information and meeting the requirements established by the administering authority ...with respect to the information"; similarly, Annex II, paragraph 5 of the AD Agreement refers to an interested party that "has acted to the best of its ability."

136. The fifth factor of section 782(e) refers to information that "can be used without undue difficulties;" similarly, Annex II, paragraph 3 identifies information "which is appropriately submitted so that it can be used in the investigation without undue difficulties."

137. Only the third factor of 782(e) – that information is "not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination"

[117] Section 782(e) (emphasis added) (Exh. IND-26).

– has no identical analogue in the text of the AD Agreement, although it is plainly consistent with the goal of "objective decision-making based on facts."[118]

138. Moreover, the third factor of section 782(e) does not mandate WTO inconsistent action because paragraphs 3 and 5 of Annex II are permissive (*i.e.*, non-mandatory). Paragraph 3 is the primary analogue to section 782(e) and it provides a list of factors which, if met, lead to a permissive result (the information "should be taken into account"). Similarly, paragraph 5 provides a condition which, if met, also leads to a permissive result (the information "should not" be disregarded). With the inclusion of the third factor of section 782(e), the United States has simply clarified how it will exercise the discretion addressed in paragraphs 3 and 5. Specifically, the United States has clarified that if the conditions of paragraphs 3 and 5 have been met, along with one additional condition which is axiomatic in the AD Agreement, the United States will forego its discretion and it "*shall not decline*" to consider the information. On the other hand, if the conditions of section 782(e) have not been met then the consideration of the information will be determined pursuant to section 776(a), subject to the discretion of section 782(d), both of which, as discussed above, are WTO consistent.

139. In sum, in light of the plain language of section 782(e), which specifically *limits* Commerce's discretion to reject information submitted by an interested party and closely tracks the text of Annex II, there is no basis for the Panel to conclude that section 782(e) of the Act *mandates* rejection of information that would otherwise be acceptable pursuant to Article 6.8 and Annex II of the AD Agreement.[119]

(e) The Regulations Implementing Sections 776(a), 782(d), and 782(e) of the Act Confirm That These Provisions Do Not Mandate Rejection of

[118] *Hot-Rolled Panel Report*, para. 7.55; *see also* Article 6.6 (investigating authorities must satisfy themselves as to accuracy of submitted information.)

[119] With respect to Section 782(e) of the Act, the SAA provides (at 865):

> New section 782(e) directs Commerce and the Commission to consider deficient submissions if the following conditions are met: (1) the information is submitted within the established deadline; (2) the information is verifiable to the extent that verification is required; (3) the information is sufficiently complete to serve as a reliable basis for reaching a determination; (4) the party has acted to the best of its ability in supplying the information and meeting the requirements established by the agencies; and (5) the agencies can use the information without undue difficulties. Commerce and the Commission may take into account the circumstances of the party, including (but not limited to) the party's size, its accounting systems, and computer capabilities, as well as the prior success of the same firm, or other similar firms, in providing requested information in antidumping and countervailing duty proceedings. "Computer capabilities" relates to the ability to provide requested information in an automated format without incurring an unreasonable extra burden or expense.

Thus, the SAA confirms that section 782(e) of the Act does not mandate rejection of WTO-consistent information, but rather provides restraints on Commerce's ability to disregard insufficient submissions under certain circumstances.

Information In a Manner Inconsistent With Article 6.8 and Annex II of the AD Agreement

140. Finally, the text of the pertinent provision of Commerce' s regulations, 19 C.F.R. § 351.308, makes plain that application of facts available is a discretionary exercise, not a mandatory one. The relevant sections of the regulation provide as follows:

> (a) *Introduction.* The Secretary *may* make determinations on the basis of the facts available whenever necessary information is not available on the record, an interested party or any other person withholds or fails to provide information requested in a timely manner and in the form required or significantly impedes a proceeding, or the Secretary is unable to verify submitted information....
>
> (b) *In general.* The Secretary *may* make a determination under the Act and this Part based on the facts otherwise available in accordance with section 776(a) of the Act.
>
> [. . .]
>
> (e) *Use of certain information.* In reaching a determination under the Act and this Part, the Secretary *will not decline* to consider information that is submitted by an interested party and is necessary to the determination but does not meet all the applicable requirements established by the Secretary if the conditions listed under section 782(e) of the Act are met.[120]

The use of the discretionary "may" throughout the regulations implementing section 776(a), 782(d), and 782(e) of the Act supports the conclusion that the statutory provisions are not mandatory in nature and cannot violate US WTO obligations.

(f) India's Argument is Based on a Misinterpretation of Sections 776(a), 782(d), and 782(e) of the Act

141. In arguing that the US statutory provisions relating to the use of facts available violate the AD Agreement "as such," India misinterprets both Article 6.8 and Annex II and sections 776(a), 782(d), and 782(e) of the Act. The United States has already explained how India misinterprets Article 6.8 and Annex II (*e.g.*, by interpreting the term "information" to mean "categories of information" and "should take into account" as "must use"). Accordingly, this section of our submission will focus on India's misinterpretation of US law.

142. India claims that the interaction between sections 776(a) and 782(e) mandate WTO inconsistent action by "establishing two additional conditions" that allegedly "expand the extent to which USDOC can and must use 'facts available' instead of information actually submitted."[121] India's interpretation is flawed on

[120] 19 C.F.R. § 351.308 (2000), Exh. US-22.
[121] India's First Written Submission, para. 147.

several grounds. First, section 776(a) only requires the use of facts available where it is permissible to do so under Article 6.8. We explained this point in detail above.

143. Second, the conditions in section 782(e) do not expand the extent to which the Department must, or even may, use the facts available. India's entire argument on this point (at paras. 146 - 152) is based on a false premise. Contrary to India's assertion, section 782(e) *contracts* the Department's ability to use the facts available by *requiring* it to consider information that meets the five statutory criteria ("shall not decline to consider").[122] By requiring the Department to consider submitted information, section 782(e) makes mandatory the permissive obligation to consider information as found in paragraph 3 of Annex II (information "should be taken into account"). Thus, to the extent that section 782(e) is "mandatory" at all, it is mandatory in a way that exceeds WTO obligations.

144. Third, India claims that the third condition of section 782(e) – that the information not be "so incomplete that it cannot serve as a reliable basis for reaching the applicable determination" – does not appear in paragraph 3 of Annex II and has not been imposed by earlier panel and Appellate Body reports. Neither point indicates that section 782(e) mandates WTO inconsistent action. The absence of the third condition from paragraph 3 of Annex II simply reflects that the provision accomplishes a different purpose than section 782(e): paragraph 3 of Annex II only establishes what an authority "should" do, while section 782(e) establishes what the Department "shall" do. The absence of any panel or Appellate Body decisions on this point is easily explained by the fact that previous "facts available" cases have involved only minor gaps in a respondent's submitted information. This is the first time a panel has been faced with a situation where a respondent has failed to provide the overwhelming majority of information needed to calculate an antidumping margin.

145. Finally, India admits that "the text of Sections 776(a) and 782(e) could be interpreted as applying to individual categories of information."[123] We have discussed at length why India is wrong to interpret "information" to mean "categories of information," and we have explained why adopting such an interpretation would undermine the goal of "objective decision-making based on facts." Nonetheless, if it is possible to interpret the statute in such a manner, then there is no basis to conclude that the statute mandates WTO inconsistent action.

3. The Panel Should Reject India's Attempt to Challenge the Department's Application of Section 776(a), 782(d), and 782(e) Based on USDOC "Practice"

146. Finally, in addition to challenging sections 776(a), 782(d) and 782(e) of the Act "as such," India also seeks to challenge the provisions based on USDOC

[122] India misrepresents section 782(e) when it claims that the provision merely "permits" the Department to take information into account. *See* India's First Written Submission at para. 142.
[123] India's First Written Submission at para. 140.

"practice."[124] This attempted challenge to US "practice" consists of nothing more than individual applications of the US "facts available" provisions. As the panel noted in *Export Restraints*, administrative agencies are free under US law to depart from past "practice" if a reasoned explanation is given for doing so,[125] and US "practice" therefore does not have "independent operational status" that can independently give rise to a WTO violation.[126] Given India's admission that "the text of Sections 776(a) and 782(e) could be interpreted as applying to individual categories of information,"[127] there is no basis for its argument that sections 776(a), 782(d) and 782(e) "as interpreted" violate Article 6.8 and Annex II, paragraph 3.

147. Furthermore, even if "practice" could be considered as a measure, India's claims regarding US facts available "practice" still would not be properly before this Panel. As the United States noted before the DSB in response to India's first and second requests for a panel, India did not identify US facts available "practice" in its consultation request and the United States and India did not consult with respect to US "practice."[128] Accordingly, India's claim fails to conform to Articles 4.7 and 6.2 of the DSU and must be rejected for that reason alone.

D. The Department's Facts Available Determination with Regard to Sail was Consistent with Article 6.8 and Annex II of the AD Agreement

148. In its first submission to the Panel, India has selectively portrayed the factual record relevant to Commerce's use of facts available. As demonstrated below, the full record evidence shows that Commerce's reliance on facts available for SAIL was consistent with Article 6.8 and Annex II of the AD Agreement.

1. Commerce Gave SAIL Notice of the Information Required at the Outset of the Investigation, Consistent with Article 6.1 of the AD Agreement

149. In order to collect the information necessary for an anti-dumping investigation, Commerce issued its standard antidumping questionnaire to SAIL.[129] In this questionnaire, Commerce requested general information concerning SAIL's corporate structure, business practices, and the merchandise under investigation (cut-to-length steel plate) that it sells. Commerce also requested listings of its sales in India and in the United States. Because the petition contained reasonable

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[124] India's First Written Submission at paras. 153-159.
[125] *United States – Measures Treating Export Restraints as Subsidies*, WT/DS194/R, 29 June 2001, DSR 2001:XI, 5767, para. 8.126.
[126] *See Ibid.*
[127] India's First Written Submission at para. 140.
[128] *See* WT/DSB/M/106, 17 July 2001, para. 50; WT/DSB/M/107, 11 September 2001, para. 126.
[129] *USDOC Initial Antidumping Questionnaire to SAIL*, Sections A, B, C and D, dated 17 March 1999 (Exh. US-1)(excerpts).

grounds to believe or suspect that SAIL had sold steel plate below its cost of production in the home market, it was necessary for Commerce to request information regarding the cost of production of the foreign like product and the constructed value of the merchandise under investigation. Consistent with Article 6.1.1 of the AD Agreement, Commerce gave SAIL more than 30 days for reply to the questionnaire.

2. Commerce Identified Deficiencies in SAIL's Response and Gave Multiple Opportunities to Cure, Consistent with Article 6.1 of the AD Agreement

150. Throughout the course of the investigation, Commerce identified deficiencies in SAIL's questionnaire responses and gave SAIL multiple opportunities to cure the deficiencies. For example, after careful review of SAIL's initial questionnaire responses, Commerce promptly notified SAIL that "there are two deficiencies which are major and need to be emphasized here."[130] First, Commerce noted that SAIL's failure to provide necessary information meant that its responses could not be used to calculate an antidumping margin:

> The first deficiency is that the response is substantially incomplete to the point where we may not be able to use the information contained therein to calculate a margin. Repeatedly throughout the questionnaire response you make the statement that certain data are unavailable and will be submitted later. For example, you only reported a subset of all your home market sales, and we cannot determine which sales have been reported. Because of your repeated failure to provide the information requested by the questionnaire, and incompleteness of your responses to other questions, we are unable to adequately analyze your company's selling practices.

As a result, Commerce explained that its *First Deficiency Questionnaire* was necessarily limited by SAIL's incomplete submissions and that further questions would be required once SAIL's questionnaire response became more complete.[131]

151. In addition to the general overall incompleteness of SAIL's responses, Commerce noted a second major deficiency: that SAIL's section D response, in which its was required to provide Cost of production data, was overwhelmingly incomplete.[132] Commerce stated that SAIL failed to provide any explanation of its response methodology and did not provide product-specific cost information.[133] In addition to these major discrepancies, Commerce notified SAIL of numerous deficiencies and areas requiring clarification in sections A-D of its questionnaire response.[134]

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130 *USDOC First Deficiency Questionnaire to SAIL*, dated 27 May 1999 (Exh. US-8).
131 *Ibid.*
132 *Ibid.*
133 *Ibid.* This information was requested in Section D of the initial questionnaire.
134 *Ibid.*

152. The information SAIL provided in response to these questions continued to be deficient. Commerce's 11 June 1999, *Second Deficiency Questionnaire* identified omissions in the information necessary for its investigation.[135] Commerce requested that SAIL provide more specific information on variables reported in its home market, US sales and cost databases. Commerce's request also identified inconsistencies between SAIL's narrative explanation and its reported databases, inaccurate product control numbers necessary for product matching, and other necessary information.[136]

153. On 18 June 1999, Commerce issued a *Third Deficiency Questionnaire* which focused on SAIL's failure to provide product-specific costs.[137] Subsequent to the *Third Deficiency Questionnaire*, Commerce orally advised SAIL's counsel of additional deficiencies, and memorialized these requests in writing.[138]

154. In response to SAIL's cost data submission that was filed just prior to the preliminary determination, Commerce issued a *Fourth Deficiency Questionnaire* on 2 August 1999, that identified continued deficiencies in those costs.[139] In its 3 August 1999, *Fifth Deficiency Questionnaire*, Commerce advised SAIL that there continued to be deficiencies in the section A, B, and C responses.[140] In fact, there was necessary information that was asked in the original questionnaire that SAIL had yet to provide. *See, e.g.*, Question 4: "As requested by the original questionnaire issued on 17 March 1999, please respond to Question 1-h of Section A."[141]

155. In all, Commerce issued at least five major supplemental requests for information, on 27 May, 11 June, 18 June, 2 August, and 3 August 1999; in addition, there were oral requests (memorialized in writing) made during Commerce's attempts to assist SAIL. Nevertheless, by late August 1999, as Commerce was preparing for on-site verification of SAIL's information, SAIL had still not provided significant information necessary for the Department's antidumping analysis. For example, SAIL had not provided product-specific cost information, despite having been asked for such information five months previously in the initial questionnaire.[142] To a large extent, Commerce's efforts to identify deficiencies and give SAIL an opportunity to fix them were to no avail.

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135 *USDOC Second Deficiency Questionnaire to SAIL*, dated 11 June 1999 (Exh. US-9).
136 *Ibid*. at Attach. II.
137 *USDOC Third Deficiency Questionnaire to SAIL*, dated 18 June 1999 (Exh. US-12).
138 *USDOC Memorandum to File: Conversations with SAIL's Counsel*, dated 7 July 1999 (Exh. US-11).
139 *USDOC Fourth Deficiency Questionnaire to SAIL*, dated 2 August 1999 at Attachment I (Exh. US-17).
140 *USDOC Fifth Deficiency Questionnaire to SAIL*, dated 3 August 1999 (Exh. US-18).
141 *Ibid*.
142 *USDOC First Deficiency Questionnaire to SAIL*, dated 27 May 1999 (Exh. US-8).

3. Commerce Made Significant Efforts to Provide SAIL with Sufficient Time to Provide Necessary Information

156. Acting in good faith, Commerce made significant efforts to provide SAIL with sufficient time to provide the necessary information. Commerce granted SAIL's requests for information on the initial questionnaire response.[143] In addition, SAIL requested – and was granted – multiple extensions for its supplemental questionnaire responses, the effect of which was to grant significant additional time for SAIL to respond to the initial request for necessary information.[144]

157. In addition to the extensions of time that SAIL actually requested, it also unilaterally granted itself extensions. For example, on 29 June 1999, SAIL filed a response to Commerce's *First Deficiency Questionnaire* that had been due more than two weeks earlier. In rejecting the submission as untimely, Commerce warned SAIL that

> repeated throughout your submissions is the statement that certain data are unavailable and will be supplied later. These statements are not substitutes for extension requests under 352.302 of the Department's regulations.[145]

158. During the investigations, SAIL never claimed that it could not provide the information. While it advised Commerce that it was experiencing difficulties in gathering and submitting the requested information, these difficulties were typically offered to justify additional time to submit information (which the Department repeatedly granted) and were often accompanied by assurances that the information would be forthcoming. For example, in its 11 May 1999, database submission, SAIL represented that

> some of the data requested by [Commerce] is still being collected (because, e.g. it is available only in handwritten form). As soon as these data are available we will submit them to the Department and revise the diskette accordingly.

159. SAIL never indicated that it would be unable to provide a usable database; on the contrary, it promised that such a database would be forthcoming. Yet much of this information still had not been provided by the time of the preliminary determination.[146]

160. Another example of Commerce's significant efforts to assist SAIL was its decision to accept major submissions of information after the preliminary determination. For example, Commerce issued its *Fourth Deficiency Questionnaire*

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[143] *See Memoranda Granting Extensions*, dated 14, 16, and 30 April 1999 (Exh. US-5)

[144] *See, e.g., Letter from USDOC to SAIL Re: Granting of Extension of Time*, dated 16 August 1999 (Exh. US-19).

[145] *Letter from USDOC to SAIL Re: Return of Untimely Information*, dated 7 July 1999 (Exh. US-14).

[146] *DOC Memorandum Re: Preliminary Determination Facts Available for SAIL*, dated 29 July 1999, at Attach. I & II (Exh. US-16).

on 2 August 1999, two weeks after the preliminary determination.[147] This action arguably disadvantaged other interested parties who rely on the preliminary determination to identify issues that will be raised in subsequent briefing.

4. Commerce Was Unable to Satisfy Itself as to the Accuracy of SAIL's Information

161. At no point during the investigation process was Commerce fully able to satisfy itself that SAIL's information was accurate. A significant part of the problem was that SAIL's databases remained unusable throughout the proceeding; SAIL even attempted to provide a final workable computer tape during the on-site verification – too late to be used, because Commerce officials would have had no opportunity to analyze the tape prior to conducting verification.

162. More significantly, however, was that SAIL was unable to demonstrate the accuracy of its own information. At the on-site sales verification, Commerce discovered, *inter alia*, that SAIL failed to report a significant number of home market sales and failed to report accurate gross unit prices.[148] Commerce was unable to verify the total quantity and value of home market sales. During the on-site cost verification, SAIL was unable to reconcile costs of production to its audited financial statements.[149] It also became clear that SAIL had failed to provide constructed value information on the costs of products produced and sold to the United States.[150] SAIL's US sales database also contained errors; Commerce found that "[w]hile these errors, in isolation, are susceptible to correction, when combined with other pervasive flaws in SAIL's data, these errors support our conclusion that SAIL's data on the whole is unreliable."[151]

5. Commerce did not Have Necessary Information to Make its Final Dumping Determination

163. At the time of the *Final Determination*, when Commerce should have had all the information necessary to conduct a definitive anti-dumping analysis, SAIL's information was filled with fatal gaps and could not be verified. Its home market sales database remained seriously deficient, as SAIL had failed to report all of its home market sales and gross unit prices. No workable cost of production or constructed value database was ever provided. SAIL made relatively few export sales to the United States, and yet even this data contained errors. At no point did SAIL indicate that the missing information was not in its control or possession. In fact, SAIL had repeatedly indicated that it would be able to provide the information and that it could be verified. In the end, however, SAIL was able to do neither.

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147 *USDOC Fourth Deficiency Questionnaire to SAIL*, dated 2 August 1999 (Exh. US-17).
148 *Sales Verification Report*, dated 4 November 1999 (Exh. US-4) (public version) .
149 *Cost Verification Report*, dated 4 November 1999 (Exh. US-3) (public version).
150 *Ibid*.
151 *USDOC Determination of Verification Failure Memorandum*, dated 13 December 1999 (Exh. IND-16).

6. Commerce's Determination that SAIL had not Acted to the Best of its Ability Prior to Disregarding SAIL's Information was Unbiased and Objective

164. The facts of the record indicate that SAIL had the ability to provide the necessary information but failed to do so. SAIL is one of the largest integrated steel producers in the world, and its records reflect that it has an established accounting system that is audited annually.[152] All of SAIL's representations during the anti-dumping proceeding suggest that SAIL itself believed it could comply with the requests for information. Given the facts on the record, an unbiased and objective investigating authority would be justified in concluding that SAIL had failed to act to the best of its ability in providing the information requested.

7. The Affidavit of Albert Hayes Constitutes Extra-Record Evidence that was Never Presented to the Department and thus is not Properly within the Scope of the Panel's Review

165. In its first written submission, India seeks to support its arguments using extra-record evidence that SAIL did not make available to Commerce during the antidumping investigation at issue.[153] Under the standard of review which applies to a panel's review of an investigating authority's final dumping determination, this extra-record evidence is not properly part of the factual record before the Panel. For this reason, the affidavit of Albert Hayes is not properly part of the record of this proceeding. The Panel should disregard both the affidavit and the arguments that India makes on the basis of the affidavit.[154]

(a) Under Article 17.5 of the AD Agreement, a Panel's Review of an Investigating Authority's Final Dumping Determination is Limited to the Facts Presented to the Investigating Authority

166. Article 17.6 of the AD Agreement establishes a special standard of review that applies when panels examine final dumping determinations for conformity with WTO rules. Under Article 17.6(i), the role of a panel with respect to the facts in such matters is to determine "whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective." The "facts" of the matter referred to in Article 17.6(i) are "the facts made available in conformity with the appropriate domestic procedures to the authorities of the importing Member" under Article 17.5(ii).[155] The Appellate

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[152] *USDOC Redetermination on Remand* (September 27, 2001) (Exh. IND-21).

[153] India's First Written Submission, paras. 30 & n. 68, 110-111, and Exh. IND-24.

[154] Specifically, paras. 107, 108, 110, and 111.

[155] The administrative record is the information presented during the investigation, in accordance with Article 17.5(ii) of the AD Agreement. The "appropriate domestic procedures" of the United States investigating authorities – the Department and the United States International Trade Commission - are detailed in 19 U.S.C. § 1516a(b)(2)(A), which states that the record consists of all informa-

Body has noted the "clear connection" between these two provisions and observed that "Articles 17.5 and 17.6(ii) require a panel to examine the facts made available to the investigating authority of the importing Member."[156]

167. Given the plain language of these provisions, it would not be proper for a panel to review an antidumping determination on the basis of evidence that was not made available to the investigating authority during the underlying investigation. The *United States - Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan* ("*Hot-Rolled Panel Report*") Panel discussed this point in detail:

> It seems clear to us that, under this provision, a panel may not, when examining a claim of violation of the AD Agreement in a particular determination, consider facts or evidence presented to it by a party in an attempt to demonstrate error in the determination concerning questions that were investigated and decided by the authorities, unless they have been made available in conformity with the appropriate domestic procedures to the authorities of the investigating country during the investigation.... [Article 17.5(ii)] is a specific provision directing a panel's decision as to what evidence it will consider in examining a claim under the AD Agreement. Moreover, it effectuates the general principle that panels reviewing the determinations of investigating authorities in anti-dumping cases are not to engage in *de novo* review.[157]

As the panel noted, it is "not the panel's role to collect new data or to consider evidence which could have been presented to the decision maker but was not."[158]

(b) The Panel Must Disregard the Affidavit of Albert M. Hayes

168. The Hayes affidavit is an especially good example of the reasons why the AD Agreement does not permit panels to review determinations using evidence that was never presented to the investigating authority. Mr. Hayes is an employee of the law firm that is representing the government of India in this matter. His affidavit was prepared especially for purposes of supporting India's arguments in this case, more than two years after Commerce issued its final determination. His views, therefore, are neither timely nor objective.

169. Furthermore, the law firm representing India in this case did not represent SAIL in Commerce's antidumping investigation. As a result, Mr. Hayes was not

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tion "presented to or obtained by ...the administering authority ...during the course of the administrative proceedings, . . .; and a copy of the determination, all transcripts or records of conferences or hearings, and all notices published in the Federal Register."

[156] *Thailand - H-Beams from Poland* at paras. 117-18.

[157] *United States - Anti-Dumping Measures on Certain Hot-Rolled Steel Products From Japan*, WT/DS184/R, adopted 23 August 2001, DSR 2001:X, 4769, para. 7.6 ("*Hot-Rolled Panel Report*").

[158] *Hot-Rolled Panel Report*, para. 7.7, citing *United States-Definitive Safeguard Measures on Importation of Wheat Gluten from the European Communities*, WT/DS166/R, adopted 19 January 2001, DSR 2001:III, 779, para. 8.6 ("*United States - Wheat Gluten*").

involved in the investigation itself, and he has no first-hand experience with the issues that arose during the investigation. He did not testify before Commerce, and he did not otherwise provide his "professional opinion" during the antidumping investigation. SAIL never submitted his methodologies to the Department, and the methodologies themselves were not subject to scrutiny by the Department or other interested parties.

170. Although SAIL did assert in its administrative brief to the agency that Commerce could modify its programming language to addresses SAIL's failure to provide accurate information on the record, it did not explain how that "correction" could be made.[159] The suggestions offered by Mr. Hayes now, as well as his three proposed "alternative" margin calculations, were never on the record of the investigation and Commerce did not have the opportunity to consider this information during the proceeding.[160]

171. Neither Mr. Hayes' affidavit nor the evidence contained therein was part of "the facts made available in conformity with the appropriate domestic procedures to the authorities of the importing Member" during the Department's antidumping investigation. As such, it would not be permissible under Articles 17.5(ii) and 17.6(i) for the Panel to take them into account when it reviews the Department's determination.

8. Conclusion

172. Based on the facts as presented to the agency, Commerce met all of its obligations under the AD Agreement prior to relying on total facts available. Commerce notified SAIL of the required information and granted it ample opportunity to present that information as provided in Article 6.1, a fact that India does not dispute.

173. Commerce also informed SAIL of the reasons that its supplied information could not be accepted, with at least five deficiency questionnaires, and additional oral requests for data that were memorialized in writing. Pursuant to those questionnaires, SAIL was provided multiple opportunities to revise, correct, and complete that information. Finally, SAIL was afforded a further opportunity to explain its position in written briefs to Commerce and participated in a public hearing. All of these actions by Commerce are consistent with Annex II, paragraph 6, a point not in dispute by India.

174. Commerce's efforts to verify the accuracy of the information supplied by SAIL prior to basing its findings on that information were consistent with Articles 6.6, 6.7 and Annex I of the AD Agreement. India never disputed that Commerce's verification procedures were proper.

175. Commerce's decision to rely on facts available was consistent with Article 6.8 of the AD Agreement. When all of the facts of record are examined here, as

[159] Exh. IND-14 at 2.

[160] SAIL did propose three "alternative" calculations in its administrative brief to the agency, but none of those proposed calculations are the same calculations as those now described by Mr. Hayes.

set forth above, it is clear that SAIL did not provide necessary information within a reasonable period. The absence of this necessary information substantially hindered Commerce's ability to conduct an antidumping duty investigation. Thus, Commerce's determination to apply facts available was consistent with Article 6.8 of the AD Agreement.

176. Commerce's determination not to rely on SAIL's information was consistent with paragraph 3 of Annex II. Paragraph 3 of Annex II requires that information "should be taken into account" if it is verifiable, can be used without undue difficulties, is supplied in a timely fashion, and, where applicable, is supplied in a medium or computer language requested by the authorities. None of these conditions applied here. First, as described above, SAIL's information could not be verified.[161] Second, SAIL's information could not be used without undue difficulty.[162] Third, SAIL's information was untimely.[163] Finally, despite indicating that it could submit workable electronic databases, SAIL was unable to do so.[164] Therefore, there was no obligation on the part of Commerce to take SAIL's information into account.

177. Commerce's determination not to rely on SAIL's information was also consistent with paragraph 5 of Annex II. Paragraph 5 of Annex II states that even though information "may not be ideal in all respects," it should not be disregarded provided that the submitting party acted to the best of its ability. SAIL's information certainly was not ideal in any respect. Nevertheless, because it failed to act to the best of its ability, there was no bar to Commerce's decision to disregard the information.

178. In sum, the full record evidence shows that Commerce's reliance on facts available for SAIL in this investigation was consistent with Article 6.8 and Annex II of the AD Agreement.

E. The Department's Facts Available Determination with Regard to Sail did not Violate AD Agreement Articles 2.2, 2.4, 9.3, and Article V:1 and 2 of GATT 1994

179. According to India, Commerce's failure to use SAIL's US sales data resulted in the levying of an antidumping margin that violated various provisions of the AD Agreement and GATT 1994 related to making a fair comparison and imposing a duty not to exceed the margin of dumping.[165] These allegations are dependent upon India succeeding on its primary argument that Commerce acted

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[161] *See USDOC Determination of Verification Failure Memorandum*, dated 13 December 1999 (Exh. IND-16).

[162] *Final Determination* at 73130 (SAIL's cost submission "was not only incomplete, but also riddled with inaccuracies to the point where SAIL's data remains unuseable") (Exh. IND-17).

[163] *See, e.g., Cost Verification Report*, dated 4 November 1999 (Untimely cost database not accepted) (Exh. US-3) (public version).

[164] *Final Determination* at 73130 ("Regarding computer tapes, repeated technical problems with the submitted data resulted in our inability to load, run, and analyze the data, despite a significant amount of time and attention from the Department") (Exh. IND-17).

[165] India's First Written Submission at para. 174.

inconsistently with its WTO obligations when it based its determination on the facts available when SAIL had failed to provide a substantial amount of the necessary information for that determination. Because India's claims based on Article 6.8 and Annex II of the AD Agreement are misplaced, India's reliance on Articles 2.2, 2.4, 9.3 and Article VI:1 and 2 of GATT 1994 likewise must fail.[166]

F. India has Failed to Establish that the Department's Conduct of its Antidumping Investigation Violated Article 15 of the AD Agreement

180. In addition to its broad challenge to the Department's use of the facts available, India claims (at paragraphs 175-178) that the Department violated Article 15 of the AD Agreement by allegedly failing to give "special regard" to India's status as a developing country Member when it applied the facts available in calculating an antidumping margin for SAIL. India's argument misinterprets the requirements of Article 15 and misstates the facts of the case as they pertain to this issue. Accordingly, there is no basis for the Panel to find that India has established a *prima facie* case of violation of Article 15.

1. Textual Analysis of Article 15 of the AD Agreement

181. Article 15 of the AD Agreement is composed of two sentences. The first sentence states that:

> It is recognized that special regard must be given by developed country Members to the special situation of developing country Members when considering the application of anti-dumping measures under this Agreement.

182. As India argued to the panel in the *Bed-Linens* case, the first sentence of Article 15 does not impose any specific legal obligation on developed country Members.[167] It does not create an obligation to elect undertakings in lieu of antidumping duties, and it does not require developed country Members to impose such duties at less than the full extent of dumping. It also does not create an obligation to use different antidumping calculation methodologies based on whether the imports at issue originate in a developed country Member or a developing country Member. By its plain terms, the first sentence of Article 15 applies solely to the *application* of antidumping *measures*, not to the *calculation* of anti-

[166] India's claim that SAIL's margin was overstated is particularly specious. It is not possible to know what SAIL's actual dumping margin was because SAIL failed to provide the information necessary to calculate SAIL's margin. Moreover, para. 7 of Annex II of the AD Agreement expressly provides that if an interested party does not cooperate and thus relevant information is being withheld, this situation could lead to a result which is less favorable to the party than if the party did cooperate.

[167] *See European Communities - Antidumping Duties on Imports of Cotton-type Bed Linens from India*, WT/DS141/R, adopted 30 October 2000, DSR 2001:VI, 2077, para. 6.220 ("*Bed-Linens*"). The panel itself offered no views on the matter, observing that "[t]he parties are in agreement that the first sentence of Article 15 imposes no legal obligations on developed country Members." *Ibid.* at n. 85.

dumping *margins*. Since India focuses its argument on the second sentence of Article 15, we will not discuss the first sentence further.

183. The second sentence of Article 15 states that:

> Possibilities of constructive remedies provided for by this Agreement shall be explored before applying anti-dumping duties when they would affect the essential interests of developing country Members.

There are three aspects of the second sentence of Article 15 that govern the substantive obligation contained therein. First, the obligation itself is limited to "exploring" the "possibility" of constructive remedies before applying antidumping duties. Nothing in the provision requires Members to *accept* such remedies in lieu of applying antidumping duties.[168]

184. Second, the obligation in the second sentence of Article 15 pertains solely to a developed country Member's consideration of *remedies* other than the application of antidumping duties. There is no basis in the text of the provision for an interpretation that would require a Member to consider alternative *methodologies* for calculating antidumping margins.[169] As the *Bed-Linens* panel concluded when it rejected India's argument that a Member must explore constructive remedies before imposing provisional measures, the term "anti-dumping duties" in Article 15 "refers to the imposition of definitive anti-dumping measures *at the end of the investigative process*."[170]

185. Finally, the obligation to explore constructive remedies arises only when the application of antidumping duties in a particular case "would affect the essential interests" of the developing country Member at issue. This conclusion is inescapable in light of the explicit language of the provision. To read the language otherwise – for example, by interpreting it to require Members to explore the possibility of constructive remedies in *all* investigations involving developing country Members – would ignore the strict limiting clause and thus violate the principle of interpretation known as the principle of treaty effectiveness (whereby an interpreter is not to assume that terms in a text are purely redundant

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[168] *See Bed-Linens*, para. 6.233 (noting that "the concept of 'explore' clearly does not imply any particular outcome.... Article 15 imposes no obligation to actually provide or accept any constructive remedy that may be identified and/or offered."); *see also EC-Imposition of Anti-Dumping Duties on Imports of Cotton Yarn from Brazil*, ADP/137, 4 July 1995 (hereinafter "*Cotton Yarn*"), in which a GATT panel interpreting the second sentence of Article 13 of the GATT Antidumping Code (Article 15's historical predecessor), concluded that:

> If the application of anti-dumping measures "would affect the essential interests of developing countries," the obligation that then arose was to explore the "possibilities" of "constructive remedies." *It was clear from the words "possibilities" and "explored" that the investigating authorities were not required to adopt the constructive remedies merely because they were proposed.*

Cotton Yarn, para. 584 (emphasis added). The panel also found that "there was no obligation to enter into the constructive remedies, merely to consider the possibility of entering into constructive remedies." *Ibid.*, para. 589.

[169] *See Bed-Linens*, para. 6.228 (noting that "Article 15 refers to 'remedies' in respect of injurious dumping.").

[170] *Bed-Linens*, para. 6.231 (emphasis added).

and have no meaning).[171] The inclusion of the limiting clause is a critical part of the negotiated balance of rights and obligations underlying Article 15 that cannot be ignored.

186. Accordingly, when a developing country Member seeks the application of Article 15 in an antidumping investigation, it must first demonstrate to the investigating authority that there *are* "essential interests" implicated in the case that *would* be affected by the application of antidumping duties.[172] If it fails to do so, the obligation in the second sentence is not triggered, and the Member conducting the investigation is under no obligation to explore alternatives to the imposition of antidumping duties.

2. There is No Basis to Conclude that the Department Violated Article 15 because India Never Claimed that Applying Antidumping Duties to SAIL Would Affect Its Essential Interests

187. India claims (at paras. 175-178) that the Department violated Article 15 by allegedly failing to consider exploring the possibility of applying a price undertaking or other alternative remedy to SAIL in lieu of applying antidumping duties. As the record of the Department's investigation demonstrates, however, neither SAIL nor India ever suggested to the Department that applying antidumping duties to SAIL would affect India's essential interests. For that matter, neither party ever suggested that India had essential interests that were implicated by the investigation. SAIL's letter to the Department raising the possibility of entering into a suspension agreement also makes no reference to India's (or its own) essential interests.[173] Accordingly, there is no legal basis for the Panel to conclude that the Department has acted inconsistently with Article 15 by applying antidumping duties to SAIL.

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[171] As the Appellate Body has noted, "one of the corollaries of the 'general rule of interpretation' in the Vienna Convention is that interpretation must give meaning and effect to all terms of the treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility." *United States - - Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996, at 21, DSR 1996, 3, at 21.

[172] The term "essential" implies a very high standard for the level of national interest which the developing country Member must demonstrate would be affected by the application of antidumping duties. For example, since the payment of antidumping duties will always have *some* negative effect on one or more producer/exporters in a Member country, a situation which would affect the "essential" interests of the Member itself must mean something significantly more than that.

[173] *Letter from SAIL's Counsel to USDOC Re: Request for a Suspension Agreement*, dated 29 July 1999 (Exh. IND-10).

3. Notwithstanding India's Failure to Demonstrate that Applying Antidumping Duties to SAIL Would Affect India's Essential Interests, the Department Did Explore the Possibility of Constructive Remedies

188. In spite of its failure to demonstrate that applying antidumping duties to SAIL would affect its essential interests, India argues (at para. 176) that the Department violated the second sentence of Article 15 by failing to explore the possibility of a suspension agreement (undertaking) in lieu of applying antidumping duties to SAIL. Even if the Department *was* obliged to make such an exploration in the present case, the factual record of the investigation demonstrates that it did so.

189. As we explain in the Factual Background section of this submission, SAIL's outside legal counsel filed a letter with the Department on 30 July 1999 that raised the possibility of entering into a suspension agreement. The Department then invited SAIL to meet with Department officials to discuss the matter. On 31 August 1999, SAIL's outside legal counsel met with the Assistant Secretary for Import Administration – the ultimate decision maker in the case – and expressed their views. The Assistant Secretary noted that Commerce would consider the request. He also noted that suspension agreements are rare and require special circumstances – circumstances which he believed might not exist at the present time in the case. Although India fails to note that the meeting took place, the Department memorialized its contents in an 31 August 2001 *ex parte* memorandum to the file. A copy of that memorandum is attached to this submission.[174]

190. As the complainant on this matter, India has the burden of establishing a *prima facie* case of violation of Article 15. It has failed to do so. Its claim (at para. 177) that the Department's mind was "closed" to the possibility of a suspension agreement is contradicted by record evidence demonstrating that the Department met with SAIL to discuss its suspension agreement proposal and that the Department stated it "would consider" the proposal. Its claim that the Department was unwilling to consider an agreement because of opposition from the domestic industry and the US Congress is not supported by the administrative record, and SAIL did not suggest during the investigation that the *ex parte* memorandum was in any way inaccurate or incomplete. Its claim that the Department "did not treat SAIL any differently ...when it issued final anti-dumping duties" is irrelevant because Article 15 "imposes no obligation" on developed country Members to accept "constructive remedies" even if they are identified or offered.[175] Finally, its suggestion that the Department was required to make a written response to SAIL's proposal finds no support in the text of Article 15.[176]

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[174] *USDOC Memorandum to the File re: Ex-Parte Meeting with Counsel for SAIL Regarding Possible Suspension Agreement*, dated 31 August 1999 (Exh. US-22).

[175] *Bed-Linens*, para. 6.233.

[176] India also suggests that the Department should have raised the possibility of applying a "lesser duty" to SAIL. United States law has no "lesser duty rule," and the AD Agreement does not require Members to offer such a remedy if they decide against accepting a suspension agreement. *See* Arti-

191. For all of these reasons, there is no factual or legal basis to find that the Department has acted inconsistently with Article 15.

V. CONCLUSION

192. For the foregoing reasons, the United States respectfully submits that India's claims are without merit and the Panel should reject them.

cle 9.1 of the AD Agreement (stating that the amount of an antidumping duty is to be left to the authorities of importing Members).

ANNEX B

Third Parties' Submissions

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.[1] 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.[2]

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,

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[1] *See* Indian Submission, para. 1.

[2] *Argentina – Definitive Anti-Dumping Measures on Imports of Ceramic Floor Tiles from Italy*, Report of the Panel, WT/DS189/R,DSR 2001:XII, 6241, para. 6.20 (emphasis added; internal footnote omitted).

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.[3] 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 "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.[4]

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.[5]

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

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[3] *See* US Submission, paras. 103-07.

[4] *Canada – Measures Affecting the Export of Civilian Aircraft*, Report of the Appellate Body, WT/DS70/AB/R, AB-1999-2,DSR 1999:III, 1377, para. 187; *accord United States – Tax Treatment for Foreign Sales Corporations*, Report of the Appellate Body, WT/DS108/AB/R, AB-1999-9, DSR 2000:III, 1619, 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.").

[5] *See Guatemala – Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico II*, Report of the Panel, WT/DS156/R, DSR 2000:XI, 5295, 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, para. 6 of the Anti-Dumping Agreement).

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."[6] 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.[7] 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 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.[8]

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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6 *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, DSR 2001:X, 4697, para. 81 (emphasis in original).

7 *See* US Submission, paras. 104-11.

8 *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 asses 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 State's 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.[1]

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[2], 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.[3]

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.

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[1] 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.

[2] Which meets the requirements of paragraph 3 of Annex II

[3] Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, adopted 23 August 2001, DSR 2001:X, 4697, para. 81.

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.[4] 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.[5] 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 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.[6] 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.

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[4] The United States make the same point, see, First Submission of the United States, 10 December 2001, para. 77.

[5] This scenario is also contemplated by the United States see First Submission of the United States, 10 December 2001, para. 75 and 76.

[6] First Submission of India, 19 November 2001, para. 175.

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.

ANNEX C

Second Submissions by the Parties

ANNEX C-1

SECOND WRITTEN SUBMISSION OF INDIA

(12 February 2002)

TABLE OF CONTENTS

I. INTRODUCTION

1. The record at this stage of the proceeding shows with increasing clarity that USDOC's final determination on cut-to-length plate from India, discarding SAIL's verified, timely produced and usable US sales data, violated India's rights under the Anti-dumping Agreement. That final determination adopted wholesale the worst-case calculation offered by the petitioning domestic industry - based primarily on an export price of $251 per ton[1] that was contradicted by the very evidence claimed as corroboration by USDOC. USDOC's adoption of the petitioners' calculation using the unsupported US price did not provide a fair comparison between the export price and the normal value as required by Article 2.4, first sentence. Nor did USDOC's rejection of SAIL's US sales data comply with the facts available provisions of Article 6.8 and Annex II, paragraph 3. The record shows that the US sales data were timely produced, were in the requested computer format, were exhaustively verified and thus were "verifiable". Most importantly, they could have been used in a number of methods together with normal value information in the petition to calculate - without any difficulty - a final dumping margin.

[1] Ex. IND-1, at figure 5, page 000040 (public version).

2. India will focus on several key issues in its rebuttal submission. First, India responds to US arguments concerning the standard of review. Second, India addresses US arguments that the text of Article 6.8 permits anti-dumping authorities to apply total facts available. Third, India discusses the important question of "undue difficulty," as follows:

- First, India discusses the meaning of the phrase "can be used without undue difficulty," responding to the Panel's questions during the First Meeting, written questions 33 and 34, and arguments raised by the United States during that meeting.
- Second, India raises a fundamental procedural objection under AD Agreement Article 17.6 to the United States' newly asserted evaluation of the facts regarding the usability of SAIL's US sales data, which differs from the evaluation it made in the Final Determination.
- Third, India points out that the novel US assertion regarding SAIL's US sales database– that the lack of cost data from which "difference in merchandise" (or "difmer") adjustment could be calculated rendered SAIL's database unusable– is inconsistent with the United States' own anti-dumping law. In fact, "difmer" adjustments under the US anti-dumping statute are applied only to normal value (NV)– never to US price– so the lack of data to calculate the "difmer" adjustment for SAIL cannot undermine the validity of its US sales database.
- Fourth, even accepting the relevance of the US argument, India further points out that USDOC routinely fills in gaps in respondents' submitted databases, including expressly accepting a respondent's database from which DIFMER data was absent. USDOC recently used the submitted data in a way that limited the importance of the missing information, just as India has proposed in this case.
- Fifth, even accepting for purposes of argument that the cost issue is relevant to the usability of SAIL's US sales data, India sets out a number of different methods by which the margins could be calculated "without undue difficulty," using NV and cost data from the petition.

3. In Section V of this submission, India addresses the issue of the meaning of the terms "verified" and "verifiable." India discusses how SAIL's US sales data was actually verif*ied* during the intensive, multi-week verification process in India. Using USDOC's own description of that process, India demonstrates how SAIL's US sales data met the criterion of being "verifiable" in Annex II, paragraph 3.

4. Finally, in sections VI India responds to US arguments that a respondent who does not act to the best of its ability under Annex II, paragraph 5 necessarily "does not cooperate" within the meaning of Annex II, paragraph 7, and in Sec-

tion VII to arguments that USDOC properly drew adverse inferences in its Final Determination. India summarizes the key measures and claims at issue in this dispute in Section VIII in the Conclusion.

5. India has provided extensive answers to the Panel's questions in a separate document. These answers set forth, *inter alia*, evidence, argument and discussion related to many of India's claims. India will not repeat that discussion in this submission. Among the claims addressed in the Answers include the following:

- Article 2.4 - USDOC's failure to make a fair comparison between export price and normal value (Answer to Question 20).
- Article 15, first sentence - USDOC's failure to adhere to its obligation to give special regard to SAIL (Answer to Question 25).
- Article 6.8, Annex II, paragraph 3 - "as applied" claim relating to USDOC's practice of applying total facts available in this case (Answer to Questions 35-36).

6. India will respond at the Second Meeting of the Panel to any comments made regarding these and other claims in the United States submission of 18 February addressing India's answers to the Panel's questions.

II. STANDARD OF REVIEW

7. The United States suggests in paragraph 66 of its First Submission that the Panel may not focus on only particular facts in the investigative record, but instead "are directed to look to the entire administrative record of an investigation." India disagrees with this suggestion. The entire investigative record in this case is enormous, as it is in many anti-dumping investigations. The Panel's "objective assessment of the facts of the *matter*" under AD Agreement Article 17.6(i) (as well as DSU Article 11) necessarily involves the relevant and pertinent facts related to the measures and legal claims at issue. Any other standard of review would be unworkable. Because this dispute focuses on particular facts in an anti-dumping investigation, the Panel must make, in the words of the Appellate Body, "an active review or examination of the *pertinent* facts."[2]

8. Applying this "active review" of "pertinent facts" standard under Article 17.6(i), the Panel should determine that USDOC's establishment of certain facts was not proper, and USDOC's evaluation of the facts was not unbiased and objective. The following are some of the key factual evaluations that could not have been made by an unbiased and objective investigating authority:

- USDOC's determination to use a $251 per ton offer price in the petition as the export price in calculating a final dumping margin, when the allegedly corroborating evidence in the petition showed an average unit price of $354 per ton[3] during the period of investi-

[2] *Japan Hot-Rolled*, WT/DS184/AB/R at para 55 (emphasis added).
[3] Ex. IND-31; figure based on publicly available data from US Customs Service.

gation, and SAIL's own verifiable data showed an average price of $346 per ton[4] during the period of investigation;

- USDOC's finding that SAIL's US sales data "failed verification" because of the unreliability of information in *other* categories of information, and without regard for the fact that the information had actually been verified, as reflected in USDOC's own verification report; and
- USDOC's determination not to use SAIL's US sales database in the calculation of a final dumping margin, despite its own statement that the data were "useable" if errors "susceptible to correction" were corrected, and despite the fact that SAIL provided USDOC with a variety of methods to use the data, and that the methods could have been used without undue difficulty.

III. INTERPRETATION OF THE PHRASE IN ARTICLE 6.8 "PRELIMINARY AND FINAL DETERMINATIONS ...MAY BE MADE ON THE BASIS OF THE FACTS AVAILABLE"

9. The United States argues at paragraphs 93-97 of its First Submission that the phrase, "preliminary and final determinations may be made on the basis of the facts available" in AD Article 6.8 means that investigating authorities have the authority to make such determinations using total facts available without any limits. This argument, like the US argument concerning "information" at paragraphs 82-92 of the US First Submission, totally ignores the mandate in the AD Agreement that Annex II, paragraph 3 must be observed in the application of Article 6.8. As India has repeatedly argued[5], the last sentence of Article 6.8 makes it clear that Article 6.8 cannot be read in a vacuum. The terms of Article 6.8 can *only* be understood and applied in light of Annex II. And the phrase "all information which" meets the four conditions of Annex II, paragraph 3 has been interpreted by the Appellate Body to require the use of such information.

10. Nor does the text of Article 6.8 authorize the application of "total facts available", *i.e. rejection* of all of the information submitted by respondent. The text does not say that the final or preliminary determination may be made on the basis of "total," "all" or "only" facts from the petition or adverse facts. Rather, the text uses the expression "may be made on the basis of *the* facts available" (emphasis added). This phrase does not mean that any information provided by the respondent which meets the requirements of Annex II, paragraph 3 can be rejected if other information submitted by a respondent does not meet these requirements. Read in the context of Annex II, paragraph 3, the pool of "facts available" that can be used to make a preliminary or final determination in Article 6.8 is limited to filling the gap for the piece or component of necessary information that the respondent has not been able to supply consistent with Annex

[4] Ex. IND-32.
[5] India First Submission at paras. 50-79; India First Oral Statement paras. 25-43.

II, paragraphs 3 and 5. For that particular information, the pool of "available" facts would include facts from the petition or from other available sources.

IV. USDOC COULD HAVE USED SAIL'S SUBMITTED US SALES DATA WITHOUT UNDUE DIFFICULTY IN COMBINATION WITH INFORMATION IN THE PETITION

A. Proper Interpretation of the Term "undue difficulty"

11. One of the key issues in this case is the proper interpretation of the phrase "can be used without undue difficulty" in Annex II, paragraph 3. A key word in this phrase is "used." The ordinary meaning of the term "used," in the context of the AD Agreement, is that the data are "used" to establish a dumping margin.[6] The entire purpose of collecting the necessary information (and, indeed, in conducting a dumping investigation) from both the domestic industry and the interested foreign parties is to "use" the information to determine if the product investigated is "introduced into the commerce of another country at less than its normal value."[7] In the dumping phase of an investigation, there is simply no other reason to collect the information, and no other "use" for the information.[8]

12. The term "difficulty" suggests that the information at issue in an Annex II, paragraph 3 situation may not be perfect. If perfection were the requirement, then the text would not have included the element of "difficulty." So, it can be presumed that if this criterion is at issue, there are some difficulties in using the data that must be overcome through efforts of the investigating authorities before it becomes "usable" for the purpose of calculating the dumping margins. These difficulties could include gaps in the information submitted by the respondent - for example, missing data on freight expenses, missing product characteristics, missing cost data, incorrect customer information, etc. These gaps in the submitted information are those that USDOC regularly "fills" through the application of its "filling the gap" doctrine. Another issue that may require some effort on the part of the investigating authorities before the information is "usable" would be to account for errors or revisions to data encountered at verification. For example, the documents reviewed at verification may reveal that a particular freight expense amount is different from that reported in the respondent's questionnaire response. Or it may be discovered that certain customers were identified with an incorrect level of trade. Or it may be determined that certain general expenses

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[6] The information need only "contribute" to the calculation of a dumping margin because the entire thrust of Annex II, para. 3 relates to "all information which" can be used to calculate a dumping margin - not all information requested by investigating authorities (as argued incorrectly by the United States). *See* India First Submission at paras. 56-67, India Oral Statement at the First Meeting of the Panel with the Parties ("First Oral Statement") at XX.

[7] AD Agreement Article 2.1.

[8] The United States argues at paragraph 113 of its First Submission that information meeting the requirement of Annex II, para. 3 "should be taken into account, although it need not be used to calculate a margin." India finds it difficult to understand how information can be used in the sense of being "taken into account" but then not used for the purpose of calculating a margin.

were incorrectly allocated among home market, **US**, and third country sales. These items can generally be handled by the investigating authority through revisions to, or the insertion of additional lines in, the computer programme used to calculate the respondent's margins.

13. Another key qualifier is the term "undue." The ordinary meaning of this term is "going beyond what is warranted or natural, excessive, disproportionate."[9] The importance of this word can be seen by considering the text *without* it. If the text simply read "can be used without difficulty", the text would require investigating authorities to take efforts to use the verifiable and timely produced information but to stop trying if any difficulty arose in their efforts to use the information. But with the addition of the word "undue", the text suggests an even higher degree of effort is required on the part of investigating authorities to use the verified (or verifiable) and timely produced information. This includes, as discussed below, the requirement to use information that may not be perfect, or information that may have to be combined with other data to become usable. This interpretation is consistent with the disciplines in the AD Agreement: on the one hand, the Agreement sets minimum standards for the information required in an application, and on the other hand, the Agreement limits the investigating authorities' ability to use that information to calculate dumping margins if respondents have provided verified and timely produced information.[10]

14. India offers the following suggestions for criteria to be used in interpreting the meaning of the phrase "can be used without undue difficulty". Not all of these criteria may be applicable in every case, but these criteria could be used to assess whether information that is already timely produced, verified (or verifiable) and in the required computer format, can be used "without undue difficulty" to contribute to the calculation of a dumping margin. These criteria are as follows:

(a) The extent to which the component/category/set of information requested is complete;

(b) The extent and ease with which gaps in the information can be filled with other available information in the record;

(c) The amount of information that is available to be used;

(d) The amount of time and effort required from the authorities to use the data in calculating a dumping margin;

(e) The accuracy and reliability of alternative information that would be used if the respondent's information were discarded.

15. We discuss each of these suggested criteria below.

16. (*a) Completeness of component/category/set of information:* Investigating authorities (including USDOC) request information from interested foreign parties in components and sections. The largest components are entire data sets for home market sales, export sales, cost of production, and constructed value. How-

[9] New Shorter Oxford English Dictionary, Clarendon Press 1993.
[10] *See* India First Oral Statement, paras. 48-54.

ever, data is frequently requested and provided in much smaller groupings. One consideration in assessing "undue difficulty" is the completeness of the information requested. The more complete the information, the easier it will be to use in connection with other information to calculate the respondent's margins. For example, SAIL's US sales database was complete except for the VCOMU and TCOMU data used to calculate the "difmer" adjustment, which in any event, as noted below, does not affect the calculation of US price. The US sales database contained complete information on all 1284 of SAIL's US sales into the US market during the period of investigation, including information regarding 26 different characteristics of SAIL's US sales, including quantity shipped, prices, physical characteristics, movement expenses, credit expense, etc. As described in section IV.E below, this US sales database was easily capable of being used to contribute to the calculation of a dumping margin.

17. (*b) Extent the information can be used with other information:* Another important consideration is the extent to which the particular information can be combined with other information to calculate a dumping margin. No particular piece or category of information collected in an investigation, standing alone, can be used to calculate a dumping margin. Rather, a dumping margin can only be calculated by using this information in conjunction with *other* information provided either by the respondent or from other sources, including the petition. SAIL's US database can be used when combined with the NV data supplied in the petition – either the petition's estimated home market prices (from a market research report submitted by petitioners) or its estimated constructed value. Margins could easily be calculated from the combination of these sources of information, as described in Mr. Hayes' first affidavit and as he described further during the First Meeting. If USDOC were to insist (unnecessarily, in India's view) that a "difmer" adjustment must be made to the NV before the NV could be compared to SAIL's reported US sales database, the information necessary to calculate a "difmer" adjustment is likewise to be found in the petition. Further details regarding margin calculation options are found in Mr. Hayes' second affidavit, attached to this rebuttal brief as India Exhibit 34.

18. (*c) Amount of information available to be used*: The amount of information available to be used in calculating a dumping margin is a further criterion that could be considered in assessing undue difficulty. If the information provided constitutes complete information, but it covers only a relatively small aspect of the sales involved (such as brokerage fees, freight or credit expense), then the administering authority would not be expected to spend a significant time attempting to correct any errors or otherwise to use considerable efforts to make the information usable without undue difficulty.

19. But if the information at issue is a largely complete set or category of information, then it cannot be so easily ignored. If the information provided represents *one* entire component of an equation that involves two components necessary to calculate a dumping margin, then investigating authorities must take considerable steps to attempt to use this verified (or verifiable) and timely produced information, before determining that they cannot use it.

20. In this case, SAIL's US sales information represented effectively the entire database required in order to calculate the export price component (*one* side) of the two-sided dumping calculation equation. USDOC could therefore be expected to expend considerable efforts to use the database. These efforts should be measured not only in terms of the number of hours of work involved, but also in the flexibility of the efforts undertaken by USDOC to make the submitted data "usable" – for example, as it did to overcome the missing "difmer" data in the *Stainless Steel Bar from India* case, discussed in detail below.

21. (*d) Amount of time and effort required from investigating authorities:* Another element that could be considered in assessing "undue difficulty" is the amount of time and effort required by the investigating authorities to use the information. As a general matter, the fewer or less complex the changes required to correct or modify data, the easier the data would be to use. In the case of SAIL's US database, the effort required to make the information usable in conjunction with information in the petition does not involve very much time. As Mr. Hayes' Second Affidavit indicates, in the case of each of the suggested methods for using SAIL's US sales data, he estimates it would take from between a half-hour to three hours of an experienced USDOC analyst's time to calculate SAIL's margins. This is a very short period of time, compared to the thousands of hours demanded from respondents for responding to anti-dumping questionnaires and collecting and formatting the requested information.

22. (*e) Accuracy of alternative information if the information in question is not used:* A final factor to consider, in deciding whether information can be used without undue difficulty, is the quality and accuracy of the alternative information in the petition, or other sources of information that would be used in the event that the submitted data is disregarded. This analysis responds to the Panel's question 33. The concept of "undue difficulties" must be read in light of the object and purpose of the AD Agreement, which is to use the most accurate information possible in calculating a dumping margin. The level of effort required to use information should be considered in connection with the accuracy of alternative available information. If investigating authorities know that if they do *not* use the verifiable and timely produced information from the respondents, they will instead use information in the petition which is *not* verified and can *not* be corroborated by other information, then they must use particular efforts to make the submitted information "usable". The amount of effort required from investigating authorities as well as the quality of the information that can be used without undue difficulty may well differ in each case.

23. In the current case, USDOC knew that the single $251 per ton offer that was the basis of the export price in the petition never resulted in a sale, and was $100 less per ton than the average unit value of the US Customs data against which USDOC claimed to have corroborated that offer.[11] India submits that in these circumstances USDOC was obligated to use particular efforts to make SAIL's US sales data usable to calculate its margins. The situation here is espe-

[11] *See* Ex. IND-8 (public version), Ex. IND-31 (public version).

cially stark because USDOC made no efforts to use SAIL's US sales information, despite the fact that USDOC concluded in its Final Determination that the information could be "used" with some minor corrections to the database.

24. In conclusion, the determination of whether verifiable and timely produced information is usable "without undue difficulty" is a critical stage of the process by which an investigating authority calculates a respondent's margins. It demands significant cooperation and effort on the part of investigating authorities. It requires that they undertake efforts to use the information submitted by a respondent, including seeking ways to use the information, if necessary, in conjunction with other information. It also requires investigating officials to make corrections in data and to request and obtain information from respondents needed to make such corrections.

B. The Panel Should Reject the United States' Attempt to Have the Panel Conduct a de novo Evaluation of the Facts Regarding the Usability of Sail's US Database

25. During the First Meeting of the Panel with the parties, the United States raised for the first time a new argument that India's US sales data was not usable to calculate a dumping margin because of problems that spilled over from India's cost database. In particular, the United States asserted that the absence of cost information from which a "difmer" adjustment could be calculated on SAIL's US sales made all of SAIL's US export price data unusable to calculate a margin. The Panel should reject the new US "difmer" argument on the merits, if the Panel considers it must address that argument's merits in order not to leave a void in the event of an appeal. However, first and foremost the Panel should reject the United States' new argument as an attempt to have the Panel make a *de novo* finding that SAIL's US sales data are not "usable." Fundamental systemic considerations for the WTO dispute resolution process, far more important than this case standing alone, compel such a finding by the Panel.

1. Relevant Facts

26. The facts relevant to India's objection based on AD Article 17.6(i) are described below. Because section 782(e) of the US anti-dumping statute contains three of the conditions of Annex II, paragraph 3 (as well as two others), SAIL's arguments before the USDOC on the "usability" of SAIL's US database were very similar to the arguments advanced by India before this Panel. Five weeks before USDOC issued its final determination on 29 December 1999, SAIL's counsel presented oral arguments to USDOC. After discussing the width error in the data and the extensive and successful verification process regarding SAIL's US sales database, SAIL's counsel made the following statement:

> It would be unreasonable and irrational for the Department, in any context - in this case or in any other case - for the Department to knowingly say, well, let's use information that we know is wrong in place of information that we know and we have verified to be

> correct. But that is, in essence, what you are being urged to do here. You're being asked to use the Petitioner's - clearly and, I think, beyond doubt - inaccurate estimate of US sales data in place of the actual US sales information that you know, without question, is accurate, timely, and verified. I do not think the Department or any other government agency can say, even though we know the answer is four, we are going to say that two plus two equals five. But that is, in effect, what you're being asked to do, to submit something you know is incorrect for information that you know is verified without question to be accurate.
>
> 'The basic purpose ...of the [US] anti-dumping law is to calculate dumping margins as accurately as possible.' ...All the authorities that we have referred to in our brief are clear, that with respect to discrete, particular pieces of information, such as the US sales database that we submitted, if the information is timely, if it is verified, if it is complete, if it is submitted with that party's best of its ability, and if it can be used without any undue difficulties, then the Department is required to use it. It is another way of saying, the Department is required to act rationally.[12]

27. In addition, SAIL's counsel proposed to USDOC that one method for calculating a margin was "based on [SAIL's submitted] information and US sales list and the constructed value information based on the petition."[13] In SAIL's case and rebuttal briefs to USDOC dated 12 and 18 November 1999, SAIL repeated the arguments that the information in SAIL's US database, standing alone, was verified and could be used by the Department in its final determination. In its submission of 12 November, SAIL made the following arguments:

> Were the Department to use information other than SAIL's home-market sales and cost data, it would be appropriate for the Department to calculate the dumping margin using (1) the verified US sales data submitted by SAIL and (2) the average of the normal value and constructed value alleged in the Petition. Alternatively, the Department might reasonably calculate the dumping margin by using (1) the verified US sales data submitted by SAIL and (2) the single largest home-market sale by value of [ ], the home-market product that is the "most similar" product for over [ ] per cent of [ ]. What the Department *cannot* do is ignore the verified US sales data submitted by SAIL and use in its stead the US sales price information alleged in the Petition. The US sales price alleged in the Petition is unquestionably much less accurate than the verified US sales data submitted by SAIL. Accordingly, the De-

[12] Ex. IND-15 at 28-30.
[13] *Ibid.* at 54-56.

> partment is required to use SAIL's US sales data when calculating SAIL's dumping margin.[14]

28. Thus, at the time that USDOC issued its Final Determination on 29 December 1999, the issue of exactly how SAIL's US sales data could be used by USDOC was squarely before it.

29. The Final Determination evaluated the facts regarding SAIL's US database as follows:

> Finally, with respect to section 782(e)(5), the US sales database contained errors that, *while in isolation were susceptible to correction*, however when combined with the other pervasive flaws in SAIL's data lead us to conclude that SAIL's data *on the whole* is unreliable.[15]
>
> Furthermore, we disagree with SAIL's characterization of its US sales as accurate, timely, and verified. In fact, the US sales database contained certain errors, as revealed at verification. *See Sales Report*; *see also Verification Memo.*[16]
>
> Yet SAIL has not provided a useable home market sales database, cost of production database, or constructed value database. Moreover, the US sales database would require some revisions and corrections in order to be *useable*.[17]

30. Thus, USDOC focused its evaluation of the facts regarding SAIL's US sales data on two aspects - the errors ("revisions and corrections") that were found in SAIL's database and the useable nature of that database. As set forth in USDOC's Sales Verification Report, and its Memorandum on Verification Failure, the only error that rose to the level of a "significant" issue was the width coding error which Mr. Hayes has indicated would take a short amount of time to correct, and for which USDOC had all the corrected information as set out in Exhibit S-8 of its Verification Report. Indeed, given that this was the only error USDOC considered "significant," it properly stated in the Final Determination that, *inter alia*, SAIL's US sales database was "susceptible to correction."

31. USDOC also stated in the Final Determination that SAIL's US sales database "would require some revisions and corrections in order to be useable." India notes the inter-related nature of these two statements, *i.e.*, that the "revisions and corrections" were "susceptible to correction." Contrary to the United States' new assertions, nothing in the Final Determination states that the US sales database needed "additions" in order to be usable. Nor does the Final Determination suggest that the US sales database was infirm because of missing data required to calculate a "difmer" adjustment. It is significant that USDOC did *not* make any such assertion despite the fact that SAIL had proposed several methodologies in its case brief on 12 November 1999 that would have combined SAIL's US sales

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14 Ex. IND-14 at 14-15 (November 12, 1999) (emphasis in original).
15 Ex. IND-17 at 73127 (emphasis added).
16 Ex. IND-17 at 73130.
17 Ex. IND-17 at 73130 (emphasis added).

data with the information on constructed value in the petition. This is exactly the same basic methodology that India has proposed to the Panel since its First Submission and which it continues to assert would be an appropriate method to calculate SAIL's margins in this case.

32. The United States raised the "difmer" issue for the very first time at the First Meeting of the Panel with the parties in January 2002. In orally responding then to India's objection that this was a new argument not found in the record or in the Final Determination, the United States stated it was making the argument because of calculations made by Mr. Hayes in his affidavit. But the methodology proposed by Mr. Hayes for calculating a dumping margin was exactly the same as that proposed two years earlier by SAIL before USDOC - to combine SAIL's actual US sales data with the data in the petition on normal value.

33. A plain reading of the Final Determination shows that the United States' argument that the lack of "difmer" data undermines the usability of SAIL's US sales database is a new evaluation of the facts in the record generated *post hoc* by USDOC. But this new evaluation is directly at odds with its own evaluation *in the Final Determination* that the database was "useable" if "some revisions and corrections" were made, and its acknowledgement in the same Final Determination that the errors in SAIL's US sales database were "susceptible to correction."

2. Legal Analysis

34. As the United States has argued in this dispute, AD Article 17.6 precludes panels from conducting *de novo* evaluation of the facts.[18] Yet the new argument by the United States, in effect, either asks the panel to conduct a *de novo* review of USDOC's evaluation of the facts– by asking the panel to find that SAIL's US sales database can*not* be used by USDOC at all– or admits that the USDOC actually reached its decisions during the investigation for reasons not reflected in its final determination. GATT and WTO panels have rightly found such arguments unacceptable. For instance, the panel on *Korea – Anti-Dumping Duties on Imports of Polyacetal Resins from the United States* rejected an attempt by Korea to justify an injury determination by reference to considerations not reflected in the public statement of reasons accompanying the determination:

> An explanation of how in a given case investigating authorities had evaluated the factual evidence before them pertaining to the factors to be considered under Article 3 [of the Tokyo Round Anti-Dumping Agreement] clearly fell within the scope of the requirement in Article 8:5 that authorities articulate in a public notice "the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities, and the reasons and basis therefor." This provision served the important purpose of transparency by requiring duly motivated public decisions as the basis for the imposition of anti-dumping duties. In the view

[18] Oral Statement of the United States, First Meeting of the Panel, para. 2.

> of the Panel, the purpose of this provision would be frustrated if in a dispute settlement proceeding under Article 15 of the Agreement a Party were allowed to defend a challenged injury determination by reference to alleged reasons for such determination which were not part of a public statement of reasons accompanying that determination. The Panel therefore did not accept Korea's argument that the Agreement did not limit an investigating authority's ability to demonstrate that it considered all of the required factors, and to demonstrate that dumped imports caused material injury, to the text of the public notice which announced its determination.
>
> Furthermore, for a panel to review a determination by reference to considerations not actually reflected in a public statement of reasons accompanying such determination would also be inconsistent with the requirements of an orderly and efficient conduct of the dispute settlement process under Article 15. A full and public statement of reasons underlying an affirmative determination at the time of that determination enabled Parties to the Agreement to assess whether recourse to the dispute settlement mechanism under Article 15 was appropriate and provided a basis for a delimitation of the object of such dispute settlement proceedings. In this connection the Panel noted that, in light of the wording of the public notice given by the Korean authorities at the time of the imposition of the anti-dumping duties, Parties to the Agreement and exporters affected by these measures had no reason to believe that the injury determination of the KTC was based on considerations not reflected in that notice. [19]

35. One of India's claims in this matter focuses entirely on the fact that the Final Determination is inconsistent with, *inter alia*, Annex II, paragraph 3 of the AD Agreement. Another is that USDOC made an unfair comparison between export price and normal value. As the Panel can see from India's panel request, from its First Submission, and from its Oral Statement to the Panel on 23 January 2002, India has focused its arguments on the fact that SAIL's US sales database should have been used by USDOC because while it contained minor errors, USDOC itself had admitted that these were "susceptible to correction" and USDOC itself had indicated that the information was "useable" if those corrections were made. India made the decision to bring this case to this Panel, in part, because of these findings and evaluations of facts by USDOC regarding the quality of SAIL's US sales database. USDOC is estopped from now claiming a different reason for its determination than that which appeared in the Final Determination.

36. AD Agreement Article 17.6(i) requires that in assessing the facts of the matter, a panel "shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and

[19] ADP/92, adopted 27 April 1993, BISD 40S/205, 275-276, paras. 209-10 (footnote 19 omitted).

objective." The use of the past tense in this sentence indicates it is focused on an "evaluation" that has already occurred. The "evaluation" of the facts established during an anti-dumping investigation is reflected in the Final Determination. It does not take place two years after the Final Determination has been issued.

37. The context for this interpretation of Article 17.6(i) is Article 12.2 of the AD Agreement requiring that public notice of any final determination must "set forth, or otherwise make available through a separate report, in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities." In other words, the "evaluation" of facts by an investigating authority may not be modified once the Final Determination is issued. Additional context is provided by Annex II, paragraph 6, which states that "the reasons for the rejection of such evidence or information should be given in any published determinations." These reasons and the evaluation of the facts simply cannot be performed *post hoc* to create *different* factual evaluations where an investigating authority has already made an *evaluation* of a particular fact and provided reasons for the rejection of the data.

38. Another relevant legal authority is the panel report in *United States - Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/R where the panel stressed that it could not conduct a *de novo* review of the evidence before the US textile authorities. In that case, the United States attempted to introduce with its first written submission an Annex setting forth the "relevant evidence" applicable to a USDOC final determination in a textile transitional safeguard investigation.[20] This Annex contained additional facts and explanations regarding the final determination issued by US textile officials. In its findings, the panel repeatedly declined to accept this *post hoc* evidence and explanations offered by the United States.[21] Instead, the panel relied only on the evaluation of the facts contained in the final determination.

39. This is not the first time that the United States has been confronted in WTO proceedings with an allegation that it was attempting to introduce into the record *post hoc* findings. In the *Korean Line Pipe* dispute, Korea argued that the United States had presented new arguments on certain issues regarding the WTO compatibility of the final safeguard measure which had not been found in the US notices or decision memoranda regarding the safeguard. In responding to this argument, the United States made the following statement:

> Of course, one way Korea might prevail is if the United States were precluded from presenting a defense ...As Korea has acknowledged, arguments concerning consistency with WTO obligations were not an issue in the domestic proceeding. Therefore the absence of any arguments concerning WTO consistency in the notices is not surprising. *A rationale that was never required in the first place is not post hoc*."[22]

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[20] WT/DS33/R, DSR 1997:1, 343, para. 7.33.
[21] *Ibid.* at paras. 7.33, 7.37, 7.40, 7.41, 7.44.
[22] WT/DS/179/R at 333, DSR 2001:IV, 1295, para. 4 (emphasis added).

40. Assuming for the sake of argument that India agrees with the latter statement by the United States, there can be no doubt that in the current case, USDOC was presented with arguments during the investigation concerning the usability of SAIL's US database. And the language of subsections 782(e) (1), (2), and (5) of the US anti-dumping statute largely track the language of Annex II, paragraph 3. There is no question that the issues before USDOC, while conducted under US law, involved the same "facts available" issues (and evidence) that India has presented to this Panel.[23] Therefore, US law *and* the WTO rules both required the United States to make a finding regarding the usability of SAIL's US sales data. USDOC's only finding in this regard is quoted above. Having made that evaluation of the facts, the United States must accept it - not seek to change it. Alternatively, to the extent the Panel finds that USDOC did *not* make any finding on the usability of SAIL's data to calculate a dumping margin, USDOC cannot now *post hoc* develop and introduce a new evaluation of the facts to support the conclusion that it could not use that data at the time of its Final Determination.

41. India does not contest the evaluation of the facts by USDOC that "the US sales database would require some revisions and corrections in order to be *useable*." In fact, the "revisions and corrections" contemplated by this statement are the kinds of corrections and revisions that USDOC routinely makes to data submitted by interested foreign parties (see Section IV.D *infra).* Nor does India contest the evaluation of the facts by USDOC that the revisions and corrections needed to be made to SAIL's US database "in isolation were susceptible to correction . . .". Mr. Hayes has demonstrated exactly how "susceptible to correction" these errors were.

42. However, India strongly opposes the United States' attempt to have this Panel conduct a *de novo* evaluation on these particular aspects of USDOC's original evaluation. This is simply not permitted by AD Agreement 17.6. The United States cannot have it both ways; it cannot insist that the Panel apply a very narrow standard of review under Article 17.6(i) for those findings it wishes to be upheld, and then argue for the Panel to accept a new evaluation of the findings it would like to change or supplement. Accordingly, in conducting its review of India's claims under AD Agreement 17.6, this Panel should find, in accordance with the Final Determination, that (1) SAIL's US database contained errors that were susceptible of correction, and (2) that SAIL's US database could be used by USDOC if some corrections and revisions were made.

43. Finally, India urges the Panel to find in the alternative that it rejects the US "difmer" arguments on the merits– even if the Panel agrees with India's arguments above under Article 17.6– in order to avoid a legal vacuum in the event of an appeal. India presents evidence below demonstrating that no unbiased and objective investigating authority could have concluded that SAIL's US sales data was not usable. This evidence demonstrates that SAIL's US sales database - either in part or in full - can be used in a number of methods to calculate a dump-

[23] *See* Ex. IND-15.

ing margin when combined with information in the petition. This analysis is detailed below and in Mr. Hayes' Second Affidavit.

C. The United States ERRS in Asserting that the Lack of Verified Cost Data Rendered Sail's US Sales Database Unusable, Because the Cost Data are Used Only to Calculate an Adjustment to Normal Value

44. There is a good reason why USDOC did not take the position during the administrative proceedings or in its Final Determination that the United States has now attempted to raise before the Panel – i.e., that the absence of verified cost data rendered SAIL's US sales database unusable. Put simply, it is because such an assertion suggests an interaction between cost data and the US sales database that is contrary to US law.

45. Specifically, the adjustment for which the missing cost data is used – the so-called "difference in merchandise" (or "difmer") adjustment – is required by US law to be an adjustment *only to normal value, not US price*. Thus, although USDOC requires respondents to include two cost-based data fields in the US sales database, these fields are only used, as discussed below, in the calculation of normal value. In the current case, however, USDOC has already rejected SAIL's NV data (based on both submitted home market sales prices and costs of production). The fact that there may be yet another reason why SAIL's submitted NV data is unusable – the inability to calculate a difmer adjustment on the basis of submitted cost data – can have no effect on the outcome of this case. More importantly for the issue at hand, the inability to calculate a difmer adjustment to NV cannot have any effect on the usability of SAIL's US sales database for the purpose of calculating US prices on which margins can be based. We review this reasoning in greater detail below.

46. The United States' argument is that the verification failure of SAIL's cost of production database means that there is an absence of data for two fields in the US sales database – variable and total cost of manufacture (often referred to by their computer field names, VCOMU and TCOMU). As was discussed during the First Meeting, these two data fields are used for one purpose – to calculate a so-called "difference in merchandise" adjustment that is authorized by the Agreement and US law when a margin is calculated through the comparison of merchandise in the US and home markets that is not identical. Although the Agreement and US law both authorize such an adjustment, neither specifies the manner in which the adjustment is to be calculated. The Agreement, for example, simply notes in Article 2.4 that "Due allowance shall be made in each case, on its merits, for differences which affect price comparability, including differences in ...physical characteristics . . .." USDOC's practice has been to calculate the adjustment on the basis of the difference in the variable cost of manufacture of the specific models that are being compared in the US and home markets (VCOMU and VCOMH).

47. The US anti-dumping statute provides very precisely for the place in the dumping margin calculation in which the difmer adjustment is to be applied – and that place is in the calculation of NV, not US price. Specifically, subsection 773 of the Trade Act of 1930 as amended (19 U.S.C. § 1677b) governs the calculation of normal value. Subsection (a)(6) of that statutory provision states:

> Section 773. Normal Value.
>
> (a) ...
>
> (6) ADJUSTMENTS.-The price [on which NV is based] described in paragraph (1)(B) shall be-
>
> . . .
>
> (C) increased or decreased by the amount of any difference (or lack thereof) between the export price or constructed export price and the [normal value] price described in paragraph (1)(B)(other than a difference for which allowance is otherwise provided under this section) that is established to the satisfaction of the administering authority to be wholly or partly due to-
>
> . . .
>
> (ii) the fact that merchandise described in subparagraph (B) or (C) of section 771(16) is used in determining normal value ....

48. In other words, the statute provides that an adjustment is to be made to the price on which normal value is based, if the merchandise used to determine NV is merchandise described in subparagraphs (B) and (C) of section 771(16) (19 U.S.C. §1677(16)). Those subsections, in turn, describe the merchandise, other than identical merchandise, that may serve as a basis for comparison in calculating dumping margins. Thus, when NV is based on different merchandise (hence, "difmer") from the merchandise sold in the United States that is the basis of export price, the statute authorizes an adjustment – *but that adjustment can only be made to the NV side of the calculation.*

49. On the basis of this unambiguous statutory directive, USDOC's uniform practice has been to apply the difmer adjustment factor calculated as described above to the adjusted NV of the model sold in the *home* market.[24] Conversely, under USDOC practice as mandated by the statute above, the difmer adjustment has no bearing at all on the calculation of the US price of the model to which that home market model is matched. For this very basic reason, the United States' assertion that the lack of verified cost data on which a difmer adjustment could be calculated somehow undermines the usability of SAIL's US sales database, is simply incorrect.

[24] *See* Mr. Hayes' Second Affidavit, para. 3.

D. USDOC Commonly Fills Gaps that are Similar in Scope to the Missing Cost Data Identified by the United States in SAIL'S Database

50. Even accepting the United States' argument that the unusable VCOMU and TCOMU data somehow infected the US sales database, it should be recalled that these are only two fields of information in a database of almost 30. The United States has argued to the Panel that the lack of information in these two cost fields renders the US sales database unusable in its entirety, but that simply is not correct. USDOC itself has developed the concept of "filling gaps" in a database, as an exercise of "partial facts available," when necessary to calculate dumping margins. In these cases, USDOC has determined that the magnitude of the gaps (i.e., the missing information) is not so large that it undermines the usability of the database involved. The United States in the current case has argued that the gaps here are too large to be filled through the application of the "filling the gap" doctrine, but in fact the situation in this case is similar to others in which USDOC has done so.

51. For example, in *Stainless Steel Bar From India*, USDOC rejected the home market sales database of one respondent (Viraj) entirely because it was found to be "incomplete and could not serve as a reliable basis for the calculation of normal value."[25] USDOC instead used the respondent's submitted database in which it reported sales to third country markets as the basis for NV. USDOC noted that the third country sales database was "lacking" in one respect – namely, the failure to report usable VCOM data. However, unlike the current case, USDOC *did not conclude that the lack of usable VCOM data rendered the entire database unusable*. To the contrary, it worked creatively with the respondent's submitted information in order to deal with the missing VCOM data in the third country database – specifically, by "band[ing] the company's sales of different stainless steel bar sizes in order to obtain more identical matches."[26] In other words, USDOC redefined what comprised a "product" to expand the scope of "identical" merchandise. And as discussed in detail above, no "difmer" adjustment is applied to matches of identical merchandise, so by revising its definition of "identical" merchandise to ensure that all US products are matched as identical to home market products, USDOC renders the lack of reported VCOM data moot.

52. Moreover, in *Stainless Steel Bar from India* (as in this case), not all products could be matched on an identical basis. But this did not stop USDOC from using the data. Instead, USDOC continued to make efforts to use even this data noting that "[i]n those instances where the banding of sizes did not produce an

[25] Stainless Steel Bar From India: Final Results of Anti-dumping Duty Administrative Review and New Shipper Review and Partial Rescission of Administrative Review, 65 Fed. Reg. 48965 (10 August 2000) (Decision Memorandum, comment 4) (attached hereto in Ex. IND-35).
[26] *Ibid.*

identical match for a US sale, we have, as facts available, assigned the "all others" rate established in the ...investigation."[27]

53. USDOC's acceptance of the respondent's database in *Stainless Steel Bar from India* as a basis for calculating margins despite the absence of VCOM data in that database shows how USDOC (or other investigating authorities) can use such data without undue difficulty. As Mr. Hayes' second affidavit describes, a number of methodologies could have been used by USDOC to deal with the lack of usable difmer data, had USDOC desired to make use of them. It is simply incorrect for the United States now to claim that in *this* case the lack of the *same* difmer data in SAIL's US sales database rendered it unusable for calculating SAIL's margins.

54. USDOC applied its "filling the gap" methodology in many other cases of equal scope. For example, *Hot-Rolled Flat-Rolled Carbon-Quality Steel Products From the Russian Federation* involved a "non-market economy" country, requiring that NV be based on the respondent's "factors of production." The respondent was not able to report factors of production on a product-specific basis because of "limitations of its accounting system,"[28] and it "failed to develop a reasonable allocation methodology for purposes of this proceeding and instead reported" factors of production based on its records in the normal course of business.[29] As a result, USDOC rejected the NV database as submitted by the respondent. However, this decision did not lead USDOC to apply adverse facts available or to rely on the petition as the basis for NV. Instead, despite its concerns regarding the usability of the respondent's submitted NV data, USDOC retained the factors of production information submitted by the respondent, and used it to calculate a single weighted average NV, to which it compared all US prices.[30]

55. Likewise, in *Certain Circular Welded Carbon Pipe and Tubes from Taiwan*, one of the respondents failed to provide COP and CV information for some of the models sold in the United States and home market. USDOC did not conclude that this missing data undermined the validity of the entire COP and CV databases, but rather filled the gap by inserting for those models the highest average cost of models for which the respondent did provide data. USDOC noted that it was applying "adverse" facts available in doing so, and it rejected the respondent's arguments that it should have used a more "neutral" approach to filling the gap.[31] But USDOC did not assert that it should reject the databases entirely or that the missing information in the COP and CV databases undermined the validity of the other databases (US sales and home market sales).

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[27] *Ibid.*

[28] Notice of Final Determination of Sales at Less Than Fair Value: Hot-Rolled Flat-Rolled Carbon-Quality Steel Products From the Russian Federation, 64 Fed. Reg. 38626, 38629-30 (19 July 1999) (attached hereto in Ex. IND-35).

[29] *Ibid.* at 38635.

[30] *Ibid.* at 38630.

[31] Certain Circular Welded Carbon Steel Pipes and Tubes From Taiwan: Final Results of Antidumping Duty Administrative Review, 64 Fed. Reg. 69488, 69489-90 (13 December 1999) (attached hereto in Ex.IND-35).

56. In conclusion, India notes that there are many other cases where USDOC has filled gaps similar to those at issue in this dispute. It will supply additional citations to USDOC decisions if the Panel so requires. The point made is that these decisions illustrate that if USDOC has the will to use the information in calculating a dumping margin - it can and will find the ways to do so without any undue difficulty.

E. There are Numerous Methods Through which USDOC could have Used Sail's US Sales Information to Calculate Sail's Margins

57. Contrary to the United States' assertions, a broad range of methods exist by which it could have calculated SAIL's margins using its verified US sales database and NV information from the petition. Several of these methods are set out in detail in Mr. Hayes' Second Affidavit, attached hereto as Exhibit IND-34, and India reviews them below. However, a few introductory points should be noted. First, each of these methods is easy to implement – i.e., employing them, the US sales database is usable "without undue difficulty." Mr. Hayes estimates that none of them would take more than a few hours for an experienced USDOC analyst to draft and input the necessary computer programming language, to run the margins, and to evaluate the results.

58. Second, some of the methods are very similar to that used by the petition and adopted by USDOC – i.e., comparing US price with CV data in the petition. The only difference is that these proposed methods use SAIL's actual submitted, verified US sales data, instead of the price offer in the petition, which was known to be grossly inaccurate. And in adopting the petition's margin, USDOC did not express any concern regarding the fact that the petition did not account for the lack of "difmer" adjustment data in the petition's estimate of US price. Thus, there should be no reason why that factor has any relevance to the use of the alternative methodologies described below. However, the lack of "difmer" adjustment data was overcome by USDOC in *Stainless Steel Bar From India*, and a methodology such as was used in that case could be employed here as well, to overcome any lingering concerns regarding the lack of difmer adjustment data in this case.

59. The CV in the petition was based on the cost of producing certain cut-to-length carbon steel merchandise. As set forth in Mr. Hayes' Second Affidavit, a substantial proportion - 30 percent - of cut-to-length plate shipped by SAIL to the United States during the period of investigation was of the same merchandise as that for which the petition calculated CV.[32] For the transactions involving these shipments, the absence of cost information from which a "difmer" adjustment could be calculated would be irrelevant, because no such adjustment need be applied to matches of "identical" merchandise.

[32] *See* Mr. Hayes' Second Affidavit (Ex. IND-34), para. 5.

60. Thus, one alternative method by which USDOC could calculate the margins using SAIL's verified US sales database would be simply to calculate the margins on those products for which an "identical" match exists between that database and the products on which the petition calculated NV.[33] The weighted average margin could then be applied to all of SAIL's US sales, including those for which there was no direct match to NV. This method would obviate the need for a difmer adjustment. It is also the method used by the petition and adopted by USDOC, but instead of using SAIL's actual verified data, USDOC used a fictitious price in the only price offer in the petition as the basis of US price. It is hard to understand why that method would be less accurate if the margin were calculated on the basis of SAIL's actual verified US sales data, as opposed to the inaccurate and fictitious price offer in the petition.[34]

61. Another option, which is closely similar to the first, would be to calculate the margins using all of SAIL's US sales transactions by calculating the weighted average USP for all the transactions on the basis of the information submitted in SAIL's US sales database, and comparing those USPs to the petition's CV. This methodology is the same as that shown in India's Exhibit 33, which Mr. Hayes presented to the Panel during the first day of the First Meeting. Although this option does not account for a "difmer" adjustment, it is very similar to the methodology applied by the petition and adopted by USDOC, again, without any apparent concern as to the lack of such an adjustment.

62. Yet another option would be to calculate the simple average NV from the two calculations shown in the petition (i.e., the price-based NV from the home market research report, shown in Figure 2 of the public version of the petition, and the CV-based NV). The prices for all the US transactions involving identical merchandise would be calculated on the basis of the information submitted in SAIL's US sales database. Those US prices would then be compared to the NV figure, to obtain the margins for the vast majority of SAIL's US sales. Given that only identical matches are involved, the absence of data on which a "difmer" adjustment could be calculated is moot under this option.[35]

63. Another possible methodology would be based on USDOC's determination in *Stainless Bar from India*, discussed in paragraph 51-53 above. USDOC could expand the definition of a "product" in the current case, by "banding together" products into larger groups. For example, this could involve comparing the US prices of all of SAIL's merchandise that is of the identical grade of steel and within plus or minus 0.5 inches (13 millimetres) in thickness as that of the petition's CV merchandise to the petition's CV-based NV of $372. Again, it would be unnecessary to perform a "difmer" adjustment to NV, and margins would be calculated for a substantial majority of SAIL's shipments. For the remainder of SAIL's US sales, USDOC could apply the calculated margin, which

[33] The details of this option are presented in Mr. Hayes' Second Affidavit (Ex. IND-34), para. 7.
[34] More complex versions of this option are presented in paras. 12-13 of Mr. Hayes' Second Affidavit.
[35] *See* Mr. Hayes' Second Affidavit, para. 9.

is the same method by which the petition and USDOC applied a margin to SAIL's unmatched US sales, as noted at the end of paragraph 64 above.[36]

64. Finally, another option would be a variation on the first described above (in paragraph 63), in which, for the small quantity of SAIL's remaining, unmatched US sales, the Department would simply apply the highest margin calculated on the US sales whose margin is calculated using the CV as NV. A single weighted-average margin could then be calculated over all of SAIL's US sales by weight averaging the transaction margins calculated above.[37]

V. NO UNBIASED AND OBJECTIVE INVESTIGATING AUTHORITY COULD HAVE CONCLUDED THAT SAIL'S SUBMITTED US SALES INFORMATION WAS NOT VERIFIABLE

65. The Panel has raised questions concerning the meaning of the term "verifiable" in the Agreement during the first meeting of the Panel with the parties and in various questions to India. The United States suggested at the first meeting that SAIL's US sales data were not verifiable. India disagrees with this argument, and describes below the meaning of the terms "verifiable", "verified", and "not verified". India also supplements arguments it made in its First Submission and during the first meeting of the panel with the parties to demonstrate how USDOC itself "verified" a considerable amount of SAIL's US sales data during the verification process.

A. Meaning of the Term "verifiable"

66. The term "verifiable" means "the fact of being capable of verification."[38] Section 782(e)(1) of the US anti-dumping statute uses the phrase "can be verified" to express this element of Annex II, paragraph 3. As India has explained, the term "verification", in turn, means the "action of establishing or testing the accuracy or correctness of something, esp. by investigation or by comparison of data."[39]

67. This definition leaves unanswered the *process* by which the verification takes place. An insight into the appropriate process is found in Annex I, paragraph 7, providing that the "main purpose of the on-the-spot investigation is to verify information provided or to obtain further details." A reasonable interpretation of the phrase "on-the-spot" verification is not that the investigating authorities visit every conceivable facility where source documents may be found, nor do they identify and examine every relevant source document and check every piece of submitted information. It would impossible for investigating authorities to examine every piece of information within any remotely realistic timeframe

[36] *See* Mr. Hayes' Second Affidavit, para. 10.
[37] *See Ibid.* para. 11.
[38] New Shorter Oxford English Dictionary, Clarendon Press 1993.
[39] India First Submission, para. 57.

for completing the investigation. Instead, the on-the-spot verification functions like an "audit," by which the investigating authorities test samples of the information submitted by the respondent against source documents maintained by the company in the normal course of business, in particular the financial statements that have been subject to review by independent third parties. Thus, it is reasonable for them examine (*i.e., verify)* sufficient selected information in order to be in the position to judge the verifiability of the information they do *not* affirmatively check.

68. The process of assessing whether information is "verifiable" requires an objective and unbiased investigating authority to examine a variety of different source documents (financial statements, ledgers of various types (general, sales, cost), production records, invoices, contracts, bills of lading, etc.) within a particular "component" of information (such as export sales or cost of production). If those source documents for individual transactions or production processes - examined on a "spot" basis - are accurately reflected in the information submitted by the respondent to the investigating authority, then an objective and unbiased authority would conclude that other information submitted by the respondent are "verifiable."

69. An important aspect of the *process* of the verification exercise is to examine the verifiability (i.e., the accuracy and reliability of the information) of a particular piece or component of information (such as export sales, home market sales, or cost of production). This is a legal requirement flowing from the text of Annex II, paragraph 3, which states that "all information which is...verifiable" must be used in the calculation of dumping margins. It would not be consistent with this provision to access the verifiability of a particular piece of information based on the reliability or completeness of another piece or category of information.

70. As India has described in detail in answers to Panel's question 28 and 29, verifications are performed, as they were in underlying investigation of SAIL, by verifying the separate components of information. As India explained in these answers, one of the main reasons for such a separation is the manner in which the source documentation from the different categories is created, maintained, and used in the normal course of business by separate people within a company in separate facilities for separate purposes. For example, the export price computer database submitted by SAIL on 17 August 1999 was verified by examining a large number of documents relevant to numerous individual export sales transactions. USDOC felt it was necessary to undertake this exhaustive process in order to ensure not merely that the specific pieces of information reviewed were "verified", but also thereby that the entire US sales database, including the other, non-examined data, was "verifiable". But in conducting this exercise, USDOC's verification report does not indicate that it compared SAIL's cost of production source documents to check the verifiability of SAIL's export sales. This would make no sense. Thus, based on both logic and legal requirement of Annex II, paragraph 3, conclusions concerning the verifiability of information must take

place within the particular component of information undergoing the verification process.

71. The quantity of information that is affirmatively examined will vary in different cases. In this sense, most information submitted by a respondent remains "verifiable" (not "verified") during the investigation because as a practical matter, only a small proportion of the information is manually examined against source documents. In some cases, such as SAIL's US sales data, authorities will examine a great deal of information. However, even if a small quantity of information is examined, investigating authorities, using proper sampling techniques, may well be in the position to make an appropriate assessment concerning the overall verifiability of the component of information submitted.

72. How can information within such a component be determined to be "verifiable"? India suggests that a reasonable process based on existing USDOC verification procedures would include the following circumstances:

1. The auditor (verifier) is provided with source information (original documentation such as financial statements, ledgers, bills of lading, sales records, invoices, bank statements, freight documentation, etc.) to examine against the information reported by the respondent (most probably in a computer database);

2. The examination of these source documents reveals no significant systemic problems with reporting, accuracy, completeness, or reliability of the reported information;

3. Any discrepancies found are minor and/or understandable in terms of scope or cause, and further examination reveals the scope of the problem and that it is limited to a particular aspect of the data.

73. India describes below how SAIL's US sales data were audited during the verification process and how the information so verified meant that a unbiased and objective decision-maker could only have concluded that it was "verifiable."

B. The Verification of SAIL'S US Sales Computer Database Demonstrated that it was "Verifiable"

74. The verification of SAIL's US sales data took place in several company locations over a two week period between 30 August and 14 September 1999. It involved extensive examination by teams of USDOC personnel performing both a macroscopic and microscopic analysis. They made a "top-down" examination to insure that all US sales values and quantities were reported, and a "bottom-up" examination to confirm that conclusion and to insure that the details of each transaction were reported accurately. Indeed, the extent of the audit performed was emphasized by USDOC's statement that *"we were able to test the accuracy of the reporting for a large number of individual sales observations*."[40] Furthermore, as the United States has acknowledged, "SAIL made relatively few export

[40] Ex. IND-13 at 14.

sales to the United States..."[41] Thus, judging the accuracy and completeness (*i.e.*, the verifiability) of SAIL US sales database was well within the grasp of USDOC's investigators.

75. A close examination of the USDOC's verification report (Ex. IND-13) reveals the extensive nature of the audit conducted on SAIL's US sales data. While India has discussed this document previously, it bears further examination in light of the United States' assertions that this information was neither "verified" nor "verifiable." The key elements of the report show the following process and results:

- The *Completeness for US Sales* section of the report (page 15) involved examining a number of pre-selected US sales observations from individual contracts. This is perhaps the most important step in USDOC's sales verifications, the purpose of which is "to ensure that all sales of the subject merchandise were properly included in [the respondent's] sales responses."[42] The overall conclusion of this section is that all US sales were *completely* and correctly reported: "[w]e found no unreported or incorrectly reported sales in the US sales listing". This section even demonstrates that USDOC "proved the negative" by examining export contracts to other countries and finding no shipments destined for the United States under those contracts.
- The *US Sales Process* section of the verification report (pages 8-9) describes the distinctive aspects of SAIL's export sales, including the existence of a separate "International Trade Division" in New Delhi, which was responsible for negotiating the price, quantity, and material terms of export contracts, and handled the major aspects of the sales process. The report concluded at page 8 that there were "no discrepancies."
- The *Customer Records* section of the report (pages 10-11) shows that SAIL maintained separate records for its US sales using the contract documents, while documents identifying home market sales customers consisted of "invoice records." The report concluded at page 11 that there were "no discrepancies" for the US sales.
- The *Merchandise* section of the report (pages 11-12) involved checking that all items reported by SAIL as "not applicable" or "omitted" in the so-called "Model Match" section of the questionnaire "were reported correctly and supported with documentation". Four of the categories (PRIMEU, PLEHEATU, PLSCALEU, and PLPATRNU) were tested and "no discrepancies" were found.

[41] US First Submission at para. 163. The omitted words in the quote stated "and yet even this data contained errors." However, the verification report and Final Determination both concluded that these errors were susceptible to correction.

[42] Ex. IND-12 at 10.

USDOC also found that "all characteristics [of the merchandise] were reported correctly" except the width coding error. Upon discovering the width coding error at verification, SAIL provided USDOC with information (included in Ex. IND-8) identifying the transactions affected by the error and permitting its correction.

- The *Quantity and Value of Sales – US Sales* section of the report (pages12-13) then describes how US sales were identified in SAIL's ledgers by using both sale-specific documentation (contracts) and product-specific data in the sale records. This technique showed that export sales were discernible from SAIL's records and were accurately isolated. USDOC noted that even in the atypical situation where a single contract included shipments to more than one country, SAIL properly isolated and reported only the US shipments covered by that contract. All nine contracts for US shipments of subject merchandise during the period of investigation were examined during the quantity and value verification. USDOC "reconciled the total US sales, as reported to the Department, to sales ledgers, the general ledger, and the financial statements for the POI." As USDOC stated at page 13, "[a] review of the other eight export contracts showed no other situation where sales under a US export contract was not sold to the United States." These contracts were identified as reconciling to SAIL's records, and the complete reporting of all US sales was confirmed. The conclusion for the entire *Quantity and Value of Sales* process was "no discrepancies."
- In the *US Sales Contracts* section of the report (page 14), USDOC's bottom-up examination of the details of the data in each examined transaction accomplished two tasks. First, it confirmed the accurate reporting of price and quantity data for each examined transaction, as well as the reported product characteristics (with the exception of the correctable width coding error described in the *Merchandise* section of the report at page 12). In addition, the transaction-specific data tied accurately to SAIL's US contracts, all of which were examined. USDOC states in its *Completeness* section (at page 15) that "during our review of the detailed invoices covered by the contracts listed above, we found no unreported sales and found that all sales of subject merchandise covered by those contracts were within the POI and were reported correctly." The overall conclusion: "no discrepancies except for the coding error described in the Merchandise section of this report."

76. Since all of the audited information described above was found to be accurate, complete and reliable (*i.e.*, it was verified), what was the basis of USDOC's conclusion that SAIL's US sales database was nevertheless unverifiable? As the Panel knows, the *only* "significant" (in USDOC's terms) discrepancy found in the examination of US sales appears in the *Merchandise* section of the

report. There the verifiers note that the width coding error – i.e., a large number of transactions with a width equal to 96 inches were misidentified as greater than 96 inches. A list of all of the affected transactions was taken as a verification exhibit,[43] and the method for correcting the misidentification was succinctly identified (re-code the width characteristic from 'D' to 'C' for those transactions). This section of the report also notes that certain "CONNUMs" for US merchandise were not reported in the cost of production database. However, for US sales, the report states at page 12 that "we note that all characteristics were reported correctly, unless otherwise noted." Thus all of the characteristics (grade, thickness, and width) necessary to match merchandise in the US sales database to merchandise in the petition were either correctly reported or, in the case of the width error, correctable.

77. Another minor verification problem raised in paragraph 39 of the US First Written Submission was that "SAIL had failed to report certain product control numbers in the cost of production database" and "it was difficult for its verification team to evaluate whether the reporting of product specification/grade was accurate because SAIL had prepared no supporting verification exhibits."[44] Although the United States draws no conclusions from this statement, it leaves the impression that this lack of information somehow supported the verification failure conclusion or somehow made the data unusable. Neither of these conclusions is justified.

78. The field in the US sales database on which USDOC's verification addendum of 10 November focused is "PLSPECU", which is shorthand for "specification". In this field, SAIL was to report the specification, as defined by USDOC, of the product sold in each transaction. The purpose of this information is to permit a tie between each of the products sold in each reported transaction with the costs for the corresponding products reported in the CV database. However, a product's specification as defined by USDOC is merely the combination of its quality and "actual specification". Thus, the PLSPECU field is entirely duplicative of information that USDOC requested and SAIL provided in full in *other* fields in the US sales database – namely, PLQUALU and PLACTSPU. USDOC obviously recognized that this was not an important issue because it did not treat the verifiers' alleged difficulty in evaluating the reported PLSPECU data as a "significant finding" in the Sales Verification Report. The PLSPECU field is not even mentioned in the Determination of Verification Failure memorandum (Ex. IND-16).

79. Furthermore, regarding the "usability" of SAIL's US sales database, as can be seen from the description above, there is a fundamental reason why whatever misgivings USDOC may have had about SAIL's reported PLSPECU information do not render SAIL's US sales database unusable in combination with

[43] A large quantity of sample documents from the examined transactions were included as verification exhibit S-7. The sample invoices that were included in that exhibit are attached hereto as Ex. IND-36.

[44] US First Written Submission, para. 39 *citing* Ex. US-24, Addendum to Verification Report (10 November 1999).

NV data in the petition to calculate a dumping margin. This is because, when USDOC rejected SAIL's home market and cost of production/CV databases, there was no longer any need to match each specific product listed in SAIL's US sales database to a specific product in its (rejected) CV database. Instead, the transactions in the US sales database would be matched to NV data in the petition. And the petition developed its NV data on the basis of product characteristics *other than* specification– namely, grade, thickness, and width. SAIL reported those characteristics in its US sales database, and the information was fully verified by USDOC (as described above) and the data for all these fields are set out in India's Exhibit 8.

80. Finally, it is noteworthy in light of the new arguments by the United States in this proceeding that the Sales Verification Report makes no mention, whatsoever, of any missing difmer cost data in the US sales database. Nor is difmer mentioned in the Verification Failure Memorandum with respect to SAIL's US sales data.[45]

81. In conclusion, the evidence before USDOC in December 1999 when it had to decide whether SAIL's US sales information was "verifiable" was that summarized in paragraph 75 above. Recalling that USDOC acknowledged in the Verification Report that "we were able to test the accuracy of the reporting for a large number of individual sales observations," the issue before the Panel is whether an objective and un-biased investigating authority could have concluded that the *remaining* sales that were *not* specifically reviewed were "verifiable." India submits that this is the only conclusion that could be drawn in the face of overwhelming evidence of the successful verification of the sales that were specifically reviewed – i.e., that they were not only "verifiable" but also "verified".

C. USDOC Improperly Found that SAIL'S US Sales Data was not Verifiable Because of the Unverifiability of Information in the Home Market Sales and Cost of Production Database

82. USDOC did not find that SAIL's US sales data was "verifiable," however. In its "Determination of Verification Failure" Memorandum, USDOC concluded that "given these numerous and widespread problems found with the reported sales, cost and constructed value data we must conclude that the credibility of the entire questionnaire response is lacking. Based on our analysis, we recommend finding that SAIL failed verification."[46]

83. USDOC did *not* conduct the separate analysis of the verifiability of SAIL's US sales data as required by Annex II, paragraph 3. Indeed, the only statement it made regarding SAIL's US sales data suggested that SAIL's US sales data, standing alone, *were verifiable:*

> As detailed in the Sales Verification Report, several errors were described in the US sales database. While these errors, in isolation,

[45] Ex. IND-16.
[46] *Ibid.* at 5.

> *are susceptible to correction*, when combined with other pervasive flaws in SAIL's data, these errors support our conclusion that SAIL's data on the whole is unreliable. The fact that *limited errors were found* must not be viewed as testimony as to the underlying reliability of the SAIL's reporting, particularly when viewed in context the *widespread problems encountered with all the other data* in the questionnaire response.[47]

84. This statement points to no major problems with SAIL's US sales. It cannot, because there were none. It ignores the repeated and consistent "no discrepancies" findings for every aspect SAIL's reported data in the Sales Verification Report. Rather, USDOC resorted to "guilt by association" by implying that *all* of SAIL's US sales information, despite being the subject of a rigorous and successful verification, was somehow "unreliable" because of "widespread problems encountered with all the *other* data in the questionnaire response."

85. USDOC's verification failure report points to *no* specific relationship between SAIL's US sales data and its cost of production or home market sales data that would suggest the US sales data was infected and thus not verifiable. This "finding" that the US sales data was infected has no basis (articulated or otherwise) in the record. It is completely contradicted by the information USDOC found in the Sales Verification Report (but did not mention in the verification "failure" report). It is also contradicted by the lack of any meaningful relationship between SAIL's US sales data and the rest of the information it produced. For example, in the Sales Verification Report, USDOC did not use information from SAIL's home market source documents to verify SAIL's US sales documents - rather, it logically used SAIL's US sales source documents. Moreover, as India states in its answers to the Panel's question 28, SAIL's US sales data was generated, maintained, and used separately from its home market sales information and cost of production information. All of this evidence demonstrates the separate character of the US sales documents, and the lack of any meaningful connection between the US sales database and the other information supplied by SAIL. Therefore, there was no basis for USDOC to conclude, in effect, that the information in SAIL's US sales database, despite being verified, was not verifiable - or in USDOC's terms that it "failed verification."

86. In conclusion, USDOC's "throw the baby out with the bathwater" approach to data verification "failure" is inconsistent (1) with the text, object and purpose of the AD Agreement, and (2) with the facts as set forth in the Sales Verification Report. The impropriety of this procedural error was compounded by the fact that in a "large number of observations" in SAIL's US sales data were verified for what the United States has admitted was a small group of sales. Based on the record before USDOC, no objective and unbiased investigating official could have concluded that SAIL's submitted US sales data were not "verifiable".

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[47] Ex. IND-16 at 5 (emphasis added).

VI. MEANING OF "DOES NOT COOPERATE" IN ANNEX II, PARAGRAPH 7

87. The United States has assumed in its arguments to the Panel that if a respondent has not "acted to the best of its ability," then by definition, it "does not cooperate." The United States then uses this assumption to justify the drawing of adverse inferences. In other words, because SAIL allegedly did not use its best efforts in responding to all portions of the questionnaire, it did not "cooperate". The result is that it was subjected to the worst scenario possible- the use of the $251 offer price for calculating export price. These assumptions and the argument that USDOC was entitled to apply adverse inferences in calculating a final dumping margin for SAIL are not correct.

88. In the Final Determination, USDOC explained this assumption as follows:

> In selecting from among the facts otherwise available, section 776(b) of the Act provides that adverse inferences may be used when a party has failed to cooperate *by not acting to the best of its ability* to comply with a request for information. To examine whether the respondent "cooperated" by "acting to the best of its ability under section 776(b), the Department considers, *inter alia*, the accuracy and completeness of submitted information and whether the respondent has hindered the calculation of accurate dumping margins.[48]

89. The applicable provisions are Annex II, paragraphs 5 and 7: They provide in relevant part:

> 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*.
>
> 7. ...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. (emphasis supplied).

90. The trigger for the application of the "adverse" facts available ("less favourable" result) provision of the last sentence of Annex II, paragraph 7 is that information is being "withheld." The word "withhold" means to "keep back what belongs to, is due to, or is desired by another; refrain from giving, granting, or allowing; keep in custody or under control."[49] This definition suggests that a foreign respondent is refusing to provide information within its possession, custody, or control. The context for this definition is Article 6.8, which refers to "an

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[48] Ex. IND-17 at 73127.

[49] *New Shorter Oxford English Dictionary*, Clarendon Press 1993, Vol. II, at 3705.

interested party that refuses access to ...necessary information." This notion of "refusal" is consistent with the definition of "withhold," which requires that a foreign respondent must actively refuse to provide information that it knows exist.

91. By contrast, the concept contained in Annex II, paragraph 5 is quite different. Annex II, paragraph 5 indicates that information should be used even if not ideal, if the respondent has "acted to the best of its ability." A respondent may not act to the "best of its ability" because it has been incompetent, has allocated insufficient company resources to the dumping questionnaire response task, or even employed advisors that may not properly tabulate or present information within the deadlines. But such behaviour does not mean that this respondent necessarily has "withheld" information or that this would rise to the level of a finding that it did "not cooperate". There is a very clear difference between not providing information and providing less than perfect information. Yet the United States assumes that a failure to get everything right is the equivalent of withholding information.

92. As India has argued, there are two different remedies available if a respondent has not acted to the best of its ability. First, the information not supplied may be replaced with facts that are available, including facts from the petition. The second remedy is that "adverse" facts may be used for facts not supplied by a respondent that is significantly impeding the investigation or withholding information. This is India's interpretation of the phrase "could lead to a result which is less favourable to the party than if the party did cooperate." USDOC, in applying its procedures and Section 762(b), however, treats all respondents who do not act to the best of their ability in the same way. It *assumes* that they are all withholding information or otherwise impeding the investigation, regardless of whether or not the respondent repeatedly attempted to supply the requested information even if late, or even if it actually did supply information but not to the satisfaction of the investigating authority.

93. USDOC's rationale that it applied in this case for assuming that the failure to apply best efforts necessarily means a lack of cooperation is not consistent with the AD Agreement. Article 6.8 uses the term "refuses access to". This suggests non-cooperation and the "withholding" of information. A respondent company that refuses to allow an investigating authority access to particular information necessary to calculate accurate dumping margins is "not cooperating" with respect to that information. But a respondent that may not be able to provide the information in a timely fashion due to its confusion, incompetence or inexperience is not necessarily failing to cooperate in providing the particular information.

94. The facts of this case illustrate the distinction between "acting to the best of one's ability" and "a failure to cooperate." There is no evidence in this case that SAIL actively withheld information from USDOC. The United States has argued at length that SAIL failed to cooperate with the USDOC in the submission of data regarding its home market sales and cost of production. However, the fact that SAIL was not able to provide the requested home market sales and

cost data in the formats required by USDOC or within USDOC's timeframes does not indicate a failure to cooperate, but rather shows the extreme difficulties that SAIL faced in attempting to provide the data within the extremely tight time constraints imposed by USDOC.

95. Moreover, SAIL worked intensively throughout the investigation process to provide USDOC with the requested home market sales and cost of production information in the required formats, in an attempt to avoid the application of "facts available" – even to the point of submitting a corrected cost of production database on the first day of verification. The United States claims that SAIL's failure to meet the some of the deadlines for submitting responses to the supplemental questionnaires demonstrates a failure by the company to cooperate. As discussed in India's Oral Statement at the First Meeting, the record demonstrates that SAIL's difficulties were due to the overwhelming logistical problems it faced in preparing information in a manner different from that in which it was maintained in the ordinary course of business. However, even assuming for the sake of argument that there were points during the investigation at which SAIL could have acted more promptly, the facts of this case nevertheless illustrate the critical distinction between, at worst, incompetence on the part of a respondent and an active withholding of information that would rise to the level of a refusal to cooperate.

96. USDOC implicitly recognized this distinction during and after the investigation. In all the proceedings in which it has participated in the United States, including the Final Determination of its investigation, in its arguments to the US Court of International Trade in defending its Final Determination, and in its Redetermination on Remand, USDOC has never alleged that SAIL actively withheld information or obstructed the investigation. In light of this record, it cannot now be argued that SAIL's actions somehow constituted a failure to cooperate that could give rise to "less favourable" results (or "adverse" facts available in USDOC parlance) under Annex II, paragraph 7.

VII. USDOC IMPROPERLY DREW ADVERSE INFERENCES IN THE FINAL DETERMINATION BY USING THE $251 OFFER AS THE EXPORT PRICE

97. The United States has argued that USDOC's Final Determination (which applied adverse inferences in calculating SAIL's dumping margins) was justified by SAIL's alleged lack of cooperation in producing information *other* than US sales.[50] The final margin of dumping and the final determination were based on an export price offer of $251 per ton, included in the petition. USDOC applied the margin based on this export price because it drew an "adverse inference" in selecting the margin, as noted in the Final Determination:

[50] *See* US First Submission at paras 148-164.

> Moreover, because we determine that SAIL has not acted to the best of its ability, pursuant to 776(b) of the Act, we used an adverse inference in selecting a margin as facts available. The Department has applied a margin rate of 72.49 percent, the highest margin alleged in the petition, as facts available.[51]

98. It is uncontested from this statement and from Figure 5 of the Petition (Ex. IND-1) that USDOC selected the $251 price in the petition in order to secure the "highest margin alleged in the petition." The legal question presented to the Panel by this finding and the evidence in the record is whether an objective and unbiased investigating authority could have used this $251 price as an "adverse inference."

99. As India has argued in Section VI above, the last sentence of Annex II, paragraph 7 does permit the drawing of adverse inferences, *but only* in instances where respondents "do not cooperate." India has argued previously that any finding of cooperation must be performed not on a "global" basis, but based on the conduct of a respondent regarding particular categories (or in USDOC's terms "essential components") of information.[52] To hold that there is a "global" cooperation requirement is tantamount to accepting the US argument that there are "global" use and "global" verifiability requirements as well. As the United States has repeatedly argued, all information can be rejected if there is a lack of cooperation regarding the production of some information. For all of the reasons set forth in India's submissions, this "global" approach should be rejected. Accordingly, USDOC was required to make a separate finding as to whether SAIL "cooperated" regarding the production of its US sales data.

100. USDOC did not make such a finding. No objective and unbiased investigating authority could have made such a finding or have drawn adverse inferences given the information set out in the Sales Verification Report (Ex. IND-13). The Panel should so find. In addition, should the Panel deem it necessary, even assuming *arguendo* that (1) the Panel were to find that SAIL did not cooperate in the production of information regarding home market sales and cost of production sales, and (2) that USDOC was justified in applying total facts available, USDOC still would not have been justified in drawing an adverse inference with respect to SAIL's cooperation efforts in supplying information regarding its US sales. At most, in such a scenario, USDOC could have used adverse facts for calculating normal value (which, in effect, it already has done, by using the petition's CV figure as NV), but would have to use the US customs data (or even SAIL's US actual prices) as the "available" facts for calculating the export sale price.

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[51] Ex. IND-17 at 73131.

[52] India First Submission at paras. 80-90.

VIII. CONCLUSION

101. For the foregoing reasons - as well as for the reasons in India's other submissions to the Panel[53] - India requests that the Panel make the following findings concerning the "matter" (the measures and the claims) at issue before it:

- **First Measure**: The final action taken to levy anti-dumping duties on imports of cut-to-length plate, including the final determination on 13 December 1999. India's major claims[54] include the following:
  - AD Agreement Article 2.4: USDOC failed to make a fair comparison between normal value and export price when it used the $251/ton export price.
  - Article 6.8 and Annex II, paragraph 3: USDOC's failure to use SAIL's verified, timely produced & usable US sales data in the calculation of a dumping margin violated Article 6.8 and Annex II, paragraph 3.
  - Article 6.8 and Annex II, paragraph 5: USDOC's failure to use SAIL's US sales data in light of the fact that SAIL used its best efforts in supplying US sales information violated Article 6.8 and Annex II, paragraph 5.
  - Article 6.8 and Annex II, paragraph 7: USDOC's improper drawing of adverse inferences and use of the $251/ton export price in calculating the dumping margin, without a basis in the record that SAIL failed to cooperate in the production of the US sales data or, alternatively, in any other aspect of the investigation, violated Article 6.8 and Annex II, paragraph 7.
  - Article 15: USDOC's failure to give special regard to SAIL's situation as a developing country producer when considering the application of the facts available violated Article 15, first sentence; and USDOC's failure to explore in good faith other constructive remedies before imposing anti-dumping duties violated Article 15, second sentence.
- **Second Set of Measures**: Sections 782(e), 782(d) and 762(a) of the Tariff Act of 1930 as amended. Claims include the following:
  - Section 782(e) *per se* violates Article 6.8 and Annex II, paragraph 3 by imposing two additional requirements (sections 782(e)(3) and 782(e)(4)) not reflected in Annex II,

[53] *See* India's First Written Submission; India's First Oral Statement; and India's Answers to the Questions from the Panel Following the First Meeting of the Panel with the Parties.

[54] India continues to assert claims under AD Articles 2.2, 9.3, 6.6 and Annex II, para. 7 (concerning special circumspection), Article XVI:4 of the Marrakesh Agreement, and Articles VI:1 and VI:2 of GATT 1994 as reflected in its Request for the Establishment of a Panel (Ex. IND-23).

paragraph 3, before a respondent may secure the use of its information in calculating a dumping margin;

- Sections 762(a), 782(d) and 782(e) *per se* violate Article 6.8 and Annex II, paragraph 3 because as interpreted by USDOC and the US CIT, they impose a mandatory requirement on USDOC to impose total facts available if a respondent does not provide information for one "essential" category of information.
- Section 782(e) *as applied* in this case violates Article 6.8 and Annex II, paragraph 3 because USDOC imposed two additional requirements on the use of SAIL's US sales data not reflected in Annex II, paragraph 3.
- Sections 762(a), 782(d) and 782(e) *as applied* in this case violate Article 6.8 and Annex II, paragraph 3 because USDOC, as affirmed by the US CIT, used and applied these provisions in the application of total facts available.

- **Third Measure**: The *application* of USDOC's long-standing practice of applying total facts available in this case. USDOC has a long-standing measure which it applied in this case in a manner inconsistent with Article 6.8 and Annex II, paragraph 3.

ANNEX C-2

SECOND WRITTEN SUBMISSION OF THE UNITED STATES

(12 February 2002)

TABLE OF CONTENTS

INTRODUCTION

1. In this submission, the United States addresses three issues: 1) the consistency of the US "facts available" provisions with Article 6.8 and Annex II of the AD Agreement; 2) the decision by US authorities to apply "facts available" in the challenged proceeding, consistent with Article 6.8 and Annex II of the AD Agreement; and 3) India's failure to establish a *prima facie* case that the United States violated Article 15 of the AD Agreement by allegedly failing to explore the possibilities of constructive remedies during the investigation. The United States will focus on new positions that India has taken in its statements and submissions since the parties' first written submissions.

2. As became evident at the first meeting of the Panel, this dispute involves a decision by the US authorities not to use the Indian respondent's data, most of which is acknowledged by India to be inadequate, and the remainder of which contains deficiencies which rendered it unusable. India has made efforts to re-examine the facts before the US authorities to suggest there was a more reasonable alternative available, but these efforts have served instead to reveal not only that the Indian respondent failed to raise these arguments during the proceedings two years before, but that, even if it had, they are flawed. The Panel should reject India's efforts to examine *de novo* the factual record of this case, as well as its arguments that the AD Agreement precludes the disregarding of the Indian respondent's data and that the US statute improperly mandates action inconsistent with Article 6.8 and Annex II of the AD Agreement.

I. NOTHING IN THE "FACTS AVAILABLE" PROVISIONS OF US LAW MANDATES ACTION INCONSISTENT WITH ARTICLE 6.8 AND ANNEX II OF THE AD AGREEMENT

3. India continues to argue that the US statutory provisions regarding the use of the "facts available" are *per se* inconsistent with the AD Agreement. Narrowing its focus to section 782(e) of the Tariff Act of 1930, India argues that this provision imposes additional conditions, which go beyond those permitted under the AD Agreement. [1]

4. The United States explained in its first written submission the flaws in India's argument. [2] Specifically, the United States explained that section 782(e) actually *requires* Commerce to consider information that would otherwise be

[1] Oral Statement of India at para. 62.

[2] First Submission of the United States at paras. 131-39.

rejected under section 776(a). [3] Thus, section 782(e) serves to *reduce* the likelihood that Commerce will resort to the facts available in a particular case. In fact, the text of the companion provision authorizing Commerce to disregard all or part of a respondent's information – section 782(d) – is explicitly subject to the USDOC's consideration of the information pursuant to section 782(e).

5. In short, section 782(e) does not *require* Commerce to apply the facts available in a WTO inconsistent manner; it *requires* Commerce to consider a respondent's information when the five listed criteria are met. Moreover, the section 782(e) criteria themselves are consistent with Article 6.8 and Annex II of the Agreement.

A. The Section 782(e) Criteria are Consistent with Article 6.8 and Annex II of the AD Agreement

6. The plain language of section 782(e) specifically *limits* Commerce's discretion to reject information submitted by an interested party. Moreover, the five criteria in section 782(e) closely track the text of the relevant provisions of the AD Agreement. For these reasons, there is no basis for the Panel to conclude that section 782(e) of the Act *mandates* rejection of information that should be acceptable pursuant to Article 6.8 and Annex II of the AD Agreement. [4]

7. The factors identified in section 782(e) are all found in Annex II, paragraphs 3 and 5, of the AD Agreement. India does not object to three of the criteria in section 782(e): that the information be timely, verifiable, and usable without undue difficulty. These criteria are taken directly from paragraph 3 of Annex II. Rather, India objects to the presence of the two remaining criteria found in sections 782(e)(3) and (4).

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[3] It is worth repeating the text of the provision:

> (e) Use of Certain Information. - In reaching a determination under section 703, 705, 733, 735, 751, or 753 the administering authority ...*shall not decline to consider information that is submitted by an interested party* and is necessary to the determination but does not meet all the applicable requirements established by the administering authority or the Commission if–
>
> (1) the information is submitted by the deadline established for its submission,
>
> (2) the information can be verified,
>
> (3) the information is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination,
>
> (4) the interested party has demonstrated that it acted to the best of its ability in providing the information and meeting the requirements established by the administering authority or the Commission with respect to the information, and
>
> (5) the information can be used without undue difficulties.
>
> Section 782(e) (emphasis added) (Exh. IND-26).

[4] As explained in our First Written Submission, the legislative history to section 782(e) of the Act states that the provision "directs {Commerce} to consider deficient submissions" where the five criteria are met. Statement of Administrative Action (SAA) at 865, US Exh. 23. Thus, the SAA confirms that section 782(e) of the Act does not mandate rejection of WTO-consistent information, but rather provides restraints on Commerce's ability to disregard insufficient submissions under certain circumstances.

8. Section 782(e)(3) provides that Commerce should take into account whether submitted information is "not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination." When Commerce has a questionnaire response which contains some usable and some unusable information, a relevant issue becomes whether Commerce has enough information to form an objective basis for determining the respondent's margin of dumping. Section 782(e)(3) simply provides that, when the other criteria have been met, Commerce may not decline to consider the partial information, provided that the information is not so incomplete that it cannot form a reliable basis for a dumping calculation. In other words, if the respondent supplies enough information to provide a reliable indication of its margin of dumping, the fact that Commerce may have to fill in some gaps based on facts available will not prevent Commerce from using that information. In this respect, section 782(e)(3) is analogous to paragraph 5 of Annex II of the AD Agreement.

9. India also objects to the criterion found in section 782(e)(4), which provides that Commerce should take into account whether a party "has demonstrated that it acted to the best of its ability in providing the information . . ." As the United States has noted previously, this provision is consistent with Annex II, paragraph 5 of the AD Agreement:

> Even though the information 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.

It is entirely proper, therefore, for investigating authorities to take into account whether a party has acted to the best of its ability in submitting information.

10. India attempts to dismiss the explicit reference to this criterion in Annex II, simply because it is in paragraph 5 rather than paragraph 3. To make the placement of the criterion significant, India makes the totally unsupported assertion that the provisions of Annex II must be considered in sequence. Under this "sequencing" approach, "Paragraph 5 only becomes applicable *if* a particular category of information submitted does not meet the requirements specified in paragraph 3." [5]

11. There is no logical basis – nor a textual one – to interpret paragraphs 3 and 5 in this manner. Each paragraph is relevant to an investigating authority's examination of submitted information. For this reason, the "best efforts" criterion found in section 782(e)(4) is not inconsistent with the AD Agreement.

12. In sum, each of the criteria contained in section 728(e) – including the two factors to which India objects – is fully consistent with Article 6.8 and Annex II of the AD Agreement.

[5] First Written Submission of India at para. 83 (emphasis in original).

B. The Discretionary Nature of Section 782(e) is Reflected in Commerce and CIT Decisions

13. India argues that decisions by Commerce demonstrate that, if submitted information fails to meet the criteria of section 782(e), then Commerce will disregard all the information provided. Based on India's statements at the first Panel meeting, India apparently is not claiming that these decisions themselves give rise to a WTO breach, but only illustrate how section 782 gives rise to such a breach. [6] To the contrary, decisions by Commerce and domestic courts demonstrate that section 782(e) provides US authorities with discretion to accept data when the AD Agreement requires, and that Commerce has exercised this discretion. Thus, this provision does not mandate any breach of the AD Agreement provisions cited by India.

14. For example, in *Stainless Steel Bar from India* [7], Commerce determined that, although the cost information provided by the Indian respondent was incomplete, pursuant to Section 782(e) of the Act, it could use most of the information on the record in its calculations, and use "partial facts available" in the few areas in which the few necessary facts were missing. [8] As a result, Commerce resorted to facts available only with respect to certain portions of the margin analysis. India is thus incorrect that section 782 requires US authorities to resort to "total facts available" if any information fails to meet the requirements of that provision.

15. The US courts have also confirmed that section 782(e) "liberalized Commerce's general acceptance of data submitted by respondents in antidumping proceedings by directing Commerce not to reject data submissions once Commerce concludes that the specified criteria are satisfied." [9]

16. Finally, the United States notes again that India itself has acknowledged that "the text of Sections 776(a) and 782(e) could be interpreted as applying to individual categories of information." [10] SAIL's own brief before the USCIT

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[6] Moreover, even if India had made a separate claim with respect to "practice," as explained in the US First Written Submission, US "practice" does not have an "independent operational status" that can independently give rise to a WTO violation. First Submission of the United States at para. 146.

[7] *Final Results; Administrative Review and New Shipper Review of the Antidumping Duty Order on Stainless Steel Bar from India*, 65 Fed. Reg. 48965 (10 August 2000) and accompanying Decision Memorandum (*India Steel Bar Final Results*), Ex. US-26.

[8] Commerce stated that "we have determined that the continued use of total adverse facts available with respect to Panchmahal is unwarranted. Pursuant to section 782(e) of the Act, we will not decline to consider information that is submitted, even if it does not meet all of our requirements, if the information was timely, could have been verified, is not so incomplete that it cannot serve as a reliable basis for our determination, the submitting party demonstrates that it acted to the best of its ability in providing the information and meeting our requirements, and the information can be used without undue difficulties. *With respect to the information submitted by Panchmahal, we find that a sufficient amount of it meets these requirements and, thus, we have not declined to use it in our final results*." *India Steel Bar Final Results* Decision Memorandum, US-Exh. 26, at 3 (emphasis added).

[9] *NSK Ltd., v. United States*, 170 F. Supp. 2d. 1280, 1318 (Ct. Int'l Trade, 6 June 2001), US-Exh. 27.

[10] First Written Submission of India at para. 140.

supports this argument. [11] In order to succeed with its argument that the US statute is inconsistent with US WTO obligations, India must demonstrate that the statute mandates WTO-inconsistent action, a position that both India and SAIL have explicitly disavowed before this Panel and before US courts.

17. In sum, India has offered no basis for the Panel to find that section 782(e) mandates WTO-inconsistent action, and the Panel should reject India's claim to the contrary.

II. COMMERCE'S APPLICATION OF FACTS AVAILABLE TO SAIL WAS NOT INCONSISTENT WITH THE STANDARDS OF THE AD AGREEMENT

18. Commerce's application of facts available to SAIL was based upon an unbiased and objective establishment of the facts and a permissible interpretation of the Agreement. The United States will not burden the Panel with a repetition of the facts establishing SAIL's failure to act to the best of its ability to provide necessary information. [12] Instead, the United States will focus on the reason India's arguments on this issue lack any basis in the facts or under the AD Agreement.

A. Information that was not Before the Investigating Authority is Irrelevant

19. Pursuant to Article 17.6(i), in its assessment of the facts of the matter, a panel "shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective." As articulated by the Appellate Body in *United States - Anti-dumping Measures on Certain Hot-Rolled Steel Products from Japan ("Hot-Rolled AB Report"*), pursuant to Article 17.6(i) and Article 11 of the DSU, both of which require an "objective" assessment of the facts, "the task of panels is simply to review the investigating authorities' 'establishment' and 'evaluation' of the facts." [13] Because Commerce established the facts during its anti-dumping duty investigation and evaluated those facts in its *Final Determination*, this means that the Panel must assess Commerce's evaluation of the facts *at the time of the Final Determination*. While this assessment "clearly necessitates an active review or examination of the pertinent facts," [14] the facts that are "pertinent" are those that were in exis-

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[11] SAIL's CIT Brief, IND Exh. 19, at 16-18.

[12] These facts may be found at paras. 19-58 and 148-164 of the First Written Submission of the United States.

[13] *United States - Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan, Report of the Appellate Body*, WT/DS184/AB/R, adopted 23 August 2001, DSR 2001:X, 4769, para. 55 (*"Hot-Rolled AB Report"). See also Article 21.5 Report, Mexico-Anti-Dumping Investigation of High Fructose Corn Syrup From the United States ("HFCS AB Report")*, WT/DS132/AB/RW, adopted 22 October 2001, , DSR 2001:XIII, 6675, para 130. Article 11 of the DSU imposes upon panels a comprehensive obligation to make an "objective assessment of the matter."

[14] *Hot-Rolled AB Report*, at para. 55.

tence at the time Commerce made its final determination – not the facts that India is just now bringing to the Panel's attention.

20. Both parties have discussed the standard of review applicable under Article 17.6 of the AD Agreement, and India acknowledges this standard. And yet, in its challenge to Commerce's application of "facts available" in this case, India asks the Panel to consider new facts and theories conceived long after Commerce made its determination. The Government of India's efforts to cobble together facts and theories two years after Commerce's decision cannot compensate for SAIL's failure to ensure that it provided the information necessary for Commerce to investigate the allegations of dumping. Thus, to the extent that India has presented new factual evidence to this panel, including new theories or models regarding how SAIL's flawed and incomplete US sales database might have been utilized in a margin calculation, this evidence is not properly part of the record before this Panel. When considering whether Commerce's decision was unbiased and objective, evidence and theories which were not before Commerce during the investigation are irrelevant.

B. The United States' Decision to Rely on the Facts Available in this Case is Consistent with Article 6.8 and Annex II

21. Article 6.8 of the AD Agreement expressly permits the use of facts available when a party fails or refuses to provide necessary information in an anti-dumping investigation. Annex II of the AD Agreement sets out guidelines for investigating authorities when deciding whether to use facts available. As discussed below, taken together, Article 6.8 and Annex II allow investigating authorities to make preliminary and final determinations based entirely on facts available, which could lead to a result which is less favorable to the party than if the party had cooperated and provided the necessary information.

1. Article 6.8 of the AD Agreement

22. Article 6.8 of the AD Agreement provides:

> 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 facts available. The provisions of Annex II shall be observed in the application of this paragraph.

23. As explained in the US First Submission, a fundamental issue in this dispute is the proper interpretation of the term "information" as used in Article 6.8 and Annex II of the AD Agreement. [15] The starting point for interpreting "information" as used with respect to "facts available" is Article 6.8 of the AD Agreement. Article 6.8 uses the term "necessary information;" as the United

[15] First Written Submission of the United States at paras. 82-92.

States explained in its First Written Submission, the ordinary meaning of the term "necessary" is "[t]hat which cannot be dispensed with or done without; requisite; essential; needful." [16] The "necessary" or "requisite" or "essential" information for conducting an anti-dumping investigation includes the price and cost information that is essential to the calculation of an anti-dumping margin.

24. According to India, "the US interpretation of 'necessary information' would require that when a dumping margin is calculated, either *all* of the necessary information must be obtained from the foreign respondent or *all* of the necessary information must be through the use of 'facts available.'" [17] That is not correct. Applying the guidelines in Annex II, an investigating authority may determine that it is appropriate to use all, some or none of the information provided by the exporter, depending on the facts of the case. [18]

25. The use of the word "necessary" to modify "information" in Article 6.8 is essentially a limitation because not all information provided during an anti-dumping investigation is necessary to the calculation of an anti-dumping margin. For example, if there is a question as to whether certain sales are an appropriate basis for export price or normal value because of an alleged association between the relevant parties to the transactions, the investigating authority may require the respondent to report information on the so-called "downstream" sales. If the investigating authority subsequently determines that the alleged association does not exist, the downstream sales are no longer necessary. As a consequence, if the reporting of the downstream sales information was defective, that would not constitute an absence of necessary information and would not be a basis to use facts available.

26. In its First Written Submission, India argued that Commerce was obligated to focus on certain "categories" of information – a term which does not appear anywhere in the AD Agreement. [19] Nor is there any reference in the AD Agreement to "categories" of information or to "a portion of" the necessary information. At the first meeting of the Panel, in fact, India conceded that the AD Agreement does not refer to " categories" of information and that investigating authorities are not required to use bits and pieces of an exporter's information. [20]

27. Article 6.8 reflects a recognition on the part of Members that there is certain information, most of which is in the control of the exporters, that is necessary to a dumping calculation and, if that information is not available, the investigating authority must have the flexibility to make its determination on the facts otherwise available. Annex II provides the guidelines for exercising that discretion. However, Article 6.8 provides the context in which Annex II must be interpreted. Specifically, the references to "information" in Annex II should be inter-

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[16] *Ibid.* at para. 83, *citing* New Shorter Oxford English Dictionary, Clarendon Press, Oxford, 1993.
[17] Oral Statement of India at para. 41.
[18] As discussed in section I, above, this is, in fact, authorized under US law, and is reflected in decisions of US authorities applying this law. See also, the United States' response to Question 8 of the Panel's 25 January 2002, Questions to the United States.
[19] *See, e.g.,* First Written Submission of India at para. 50-51, 124-25.
[20] Oral Statement of India at para. 34.

preted as a reference back to the "necessary information" referred to in Article 6.8. This interpretation is supported by paragraph 1 of Annex II, which refers to "required" information.

28. This interpretation is also consistent with the purpose of the facts available provision. The plain language of Article 6.8 of the AD Agreement provides that, when certain conditions have been met, "*preliminary and final determinations*, affirmative or negative, may be made on the basis of facts available." (emphasis added). While there are instances in which "partial" facts available may allow an investigating authority to calculate a margin after filling a "gap" of missing information - such as the weight conversion factors at issue in the *Japan - Hot-Rolled Steel* dispute and referenced by India - the situation with respect to SAIL was not such a case. Here, none of the necessary information could be used to calculate a dumping margin in a manner that would satisfy the dictates of, *inter alia*, Article 2.4 of the AD Agreement. [21] Having determined that the application of facts available was necessary, Commerce was not required to calculate a dumping margin for SAIL because SAIL failed to provide the necessary data. Instead, Article 6.8 authorized that Commerce's Final Determination "may be *made* on the basis of facts available." [22]

2. Annex II of the AD Agreement

29. As explained in the US First Written Submission, Annex II, paragraphs 1, 3, and 5 are relevant to this dispute. [23] Not surprisingly, India disagrees with the interpretations offered by the United States.

30. First, India argues that the United States has misinterpreted Annex II, paragraph 1 of the AD Agreement, which provides:

> 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

[21] Article 2.4 of the AD Agreement explicitly requires that investigating authorities make a fair comparison by making due allowance for all factors affecting price comparability.

[22] Another example of India's mischaracterization of Commerce practice is its statement that "[i]f *any* "necessary" information is not provided by a foreign respondent, the United States interprets Article 6.8 and Annex II, paras. 1, 3, 5, and 7 as giving it the discretion to disregard *all* of the information provided." Oral Statement of India at para. 40 (emphasis in original). The presumption – which is incorrect – is that Commerce would reject all information provided if "any" necessary information is not provided. Not only does this statement not reflect the situation involving SAIL – for which substantially more than "any" information was deficient – but other Commerce decisions, including one subject to WTO dispute settlement, have expressly disproved this point. *See Hot-Rolled Panel Report* at para. 7.65 (Commerce did not apply "total" facts available; rather, Commerce applied partial facts available only for the US sales that were missing).

[23] First Written Submission of the United States at paras. 98-114.

> facts available, including those contained in the application for the initiation of the investigation by the domestic industry.

31. As explained in the US First Written Submission, paragraph 1 of Annex II provides the basic guidance in the AD Agreement for obtaining the participation of responding interested parties. [24] The first sentence provides that the authorities, as soon as possible, should contact the parties, advise them of the information required from them for the investigation, and advise them of the manner in which to submit that information. The second sentence then provides that the investigating authorities should advise the responding interested parties of the consequences of not providing the required information – that the investigating authorities *will be free* to make determinations on the basis of the facts available, including, in particular, those facts contained in the application for the initiation of the investigation.

32. India argues that the United States has misinterpreted Annex II, paragraph 1. According to India, for example,

> The warning of the second sentence becomes relevant only for whatever information is not supplied in the structure and manner requested. It does not apply to *all* of the information requested unless a respondent refuses to provide any information. [25]

Again, India proposes a reading not justified by the text: that investigating authorities are not free to make a determination entirely on facts available unless the respondent refuses to supply any information at all. It is a reading that would lead to illogical, if not absurd, results: a respondent could fail to provide 99 per cent of the necessary information, and yet, because it had provided one per cent of the information, the investigating authority would *not* be free to make its determination on the basis of the facts available. This turns the explicitly authorized warning of Annex II, paragraph 1 into meaningless verbiage.

33. There is a more logical reading, consistent with AD Agreement. The second sentence of Annex II, paragraph 1 states that investigating authorities are free to make "determinations" on the basis of the facts available. In context, "determinations" means the "preliminary and final determinations" in Article 6.8. Thus, if information – i.e., the "required" information referenced in the first sentence of Annex II, paragraph 1, or the "necessary information" as defined in Article 6.8 – is not provided, the investigating authority is free to make a preliminary or final determination based on facts available, consistent with the other requirements of the Agreement, including Annex II.

34. The importance of Annex II, paragraph 1 is plain: parties must be made aware that, where information is not supplied within a reasonable time, investigating authorities "will be free to make determinations on the basis of the facts available...." This interpretation is in harmony with Article 6.8, which provides

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[24] *Ibid.* at para. 100.
[25] Oral Statement of India at para. 37.

that "preliminary and final determinations ...may be made on the basis of the facts available" where necessary information is not provided.

(a) Paragraph 3

35. Annex II, paragraph 3 of the AD Agreement provides:

> 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, supplied in a medium or computer language requested by the authorities, should be taken into account when determinations are made.

36. As the United States explained in the First Written Submission, Annex II, paragraph 3 contains a number of conditions:

(i) the information is verifiable;

(ii) the information is appropriately submitted so that it can be used ...without undue difficulties;

(iii) the information is supplied in a timely fashion; and

(iv) the information, where applicable, is supplied in a medium or computer language requested by the authorities.

Only if all four of these conditions are met does the AD Agreement provide that the information should be taken into account.

(i) The Information "is verifiable"

37. The term "verifiable" is defined as "able to be verified or proved to be true; authentic, accurate, real." [26] The use of the word "verifiable" in Annex II, paragraph 3 of the AD Agreement is understandable since an actual on-site verification is not required by the AD Agreement. Thus, information that has *not* been subject to actual verification may be considered to be "verifiable, " provided that it is internally consistent and otherwise properly supported. In such circumstances, an investigating authority that opts not to verify such information cannot decline to consider it because it was not, in fact, verified. This was the principle expressed in the panel reports in *Japan Hot-Rolled* and *Guatemala Cement II* [27], where the investigating authorities in those cases refused to accept or verify the information during the relevant investigations.

38. The facts established in this case are quite different, however. Neither the *Japan Hot-Rolled* panel nor the *Guatemala Cement II* panel were faced with a situation like the instant one in which on-site verification of the information was attempted but the information failed to be verified. Such information which has

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[26] New Shorter Oxford Dictionary, Clarendon Press, at 3564.

[27] *Guatemala – Definitive Anti-dumping Measures on Grey Portland Cement from Mexico*, WT/DS/156/R, 24 October 2000, DSR 2000:X, 5295, para. 2.274; *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS/184/R (28 February 2001, adopted 23 August 2001) (*Hot-Rolled Panel Report*), DSR 2001:X, 4769, para. 5.79.

actually been subjected to verification and found not to verify can no longer be said to be "verifiable," since it has been proven to be inaccurate. Such an explicit finding – such as was made in this case – that a respondent's information failed verification [28] rebuts any assertion that information was "able to be verified or proved to be true." [29]

39. One final point on the question of "verification:" as the United States responds to India's arguments about the usability of SAIL 's US sales database, India has tried to rehabilitate some small portion of that database by placing inordinate weight on statements in the US sales verification report that "no discrepancies were found." As the United States has explained previously – and as India acknowledged in its First Written Submission [30] – verification is the equivalent of an audit in which information is "spot-checked" for reliability. At verification, Commerce determined that SAIL's US sales database contained discrepancies, a fact that India itself recognized. [31] In sum, SAIL's information did not satisfy the first condition of Annex II, paragraph 3, that it be verifiable.

(ii) The Information "can be used without undue difficulty"

40. Similarly, it was reasonable to conclude that SAIL's information – or even just its US sales database – could not be used "without undue difficulty." The term "undue" is defined as "going beyond what is warranted or natural." [32] As discussed in detail during the first Panel meeting, among the problems with SAIL's US sales database was the fact that the cost information requested by Commerce and supplied by SAIL as part of that database, failed verification and was unusable. Commerce would have utilized this information to make a price adjustment, when the product sold in the US was compared to a normal value with different physical characteristics, consistent with the requirements of Article 2.4.2 of the AD Agreement. In the absence of that information, it was not possible for Commerce to compare non-identical merchandise.

41. In addition, the information as supplied by SAIL would not have permitted Commerce to identify those US sales transactions that involved merchandise identical to a particular normal value model without undertaking significant additional work. As discussed in the US First Written Submission [33] and acknowledged by India [34], there were flaws with the sales transaction portion of SAIL's US sales database. The only way to correct those flaws would have been for Commerce to have manually corrected approximately 75 per cent of SAIL's US

28 Verification Failure Memorandum, Ex. US-25.
29 New Shorter Oxford Dictionary, Clarendon Press, at 3564.
30 First Written Submission of India at para. 57, n. 131.
31 First Written Submission of India at paras. 30-31.
32 New Shorter Oxford Dictionary, Clarendon Press, Vol. II at 3480.
33 First Written Submission of the United States at para. 39.
34 First Written Submission of the United States at para. 97-103.

database. [35] Whether such efforts would have resulted in any US sales of products being identical to the normal value model is uncertain because Commerce was not obligated to, and elected not to, undertake this substantial effort in light of the number of demonstrated problems with SAIL's data.

42. India's suggestion that Commerce did not make sufficient efforts to use SAIL's information is groundless and is, in fact, contradicted by the established facts. The United States agrees that the AD Agreement contains a presumption that information from responding exporters is to be preferred over alternative sources. [36] The established facts demonstrate that Commerce went to considerable efforts to secure SAIL's information and exercised an unusual degree of leniency in addressing major flaws in that information; nevertheless, SAIL 's repeated and continuing failures prevented Commerce from calculating a margin for SAIL within the time provided for in the AD Agreement.

(iii) The Information "should be taken into account"

43. As noted above, the criteria of Annex II, paragraph 3 of the AD Agreement were not met with respect to SAIL's data. Consequently, it is not necessary for the Panel to interpret the phrase "should be taken into account," and whether that phrase sets forth any affirmative obligations relevant to the present dispute. Instead, the relevant question for this dispute is whether, based on the facts before Commerce at the time it made its Final Determination, an unbiased and objective decision-maker could determine that it was appropriate to reject the exporter's information and rely entirely on the facts otherwise available. In the view of the United States, as discussed in our First Submission and at the first Panel meeting, and as further discussed throughout this submission, the facts provide a more than adequate basis for an unbiased and objective decision-maker to reach such a conclusion.

44. Nevertheless, if the Panel chooses to examine the phrase "should be taken into account," the United States offers the following additional comments. Annex II, paragraph 3 simply states that, if the four conditions are met, then the information "should be taken into account." Nevertheless, India continues to argue that "'paragraph 3 is a *mandatory* provision, and information meeting all four conditions *must* be used by investigating authorities in connection with calculating the antidumping margin." [37] But "must use" and "should be taken into account" are not synonymous terms.

45. The ordinary meaning of the term "should" differs greatly from the terms "must" or "shall." The former word implies a suggested course of action, while the latter terms impose a mandatory obligation on Members. In *United States* -

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[35] *See, e.g.,* First Written Submission of India at para. 26, where India explains that errors in the "width" characteristic necessary for model matching affected 984 out of a total of 1284 sales observations.

[36] First Written Submission of India at para. 70.

[37] Oral Statement of India at para. 27 (emphasis in original).

Anti-dumping Measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip From Korea [38], the panel explicitly recognized that the ordinary meaning of "should" does not impose mandatory obligations upon WTO Members in the context of the AD Agreement. [39] Likewise, in *EC-Measures Concerning Meat and Meat Products (Hormones)* [40], another panel recognized that the phrase "should take into account" in Article 5.4 of the Agreement on the Application of Sanitary and Phytosanitary Measures, "does not impose an obligation" because the word "should" was used and not the word "shall." [41] In two further reports, panels in *India-Patent Protection for Pharmaceutical and Agricultural Chemical Products* [42] and *United States-Anti-dumping Act of 1916* [43] also recognized that the phrase "should" indicates that terms are "directory or recommendatory, not mandatory." [44] These findings alone provide considerable evidence that the US interpretation of Annex II, paragraph 3, is, at the very least, *permissible*, and therefore must be considered correct under the special standard of review contained in Article 17.6(ii) of the AD Agreement.

46. Even if Annex II, paragraph 3 stated that information "must" be taken into account, it would take a further leap in logic to reach India's reading that such information "*must* be used by investigating authorities in connection with calculating the antidumping margin." [45] The phrase "take into account" is defined as "take into consideration" or "notice." [46] An obligation to consider or take notice of something is distinct from an obligation to actually use that same thing.

C. Commerce's Decision to Apply Facts Available with Respect to SAIL was Based on an Unbiased and Objective Evaluation of the Facts

47. The portion of SAIL's information that India is arguing could have been used by Commerce to determine a dumping margin for SAIL seems to have shrunk over the course of the first Panel meeting. During the underlying proceeding, SAIL insisted that all of its data would be corrected, verified, and ready for use in an anti-dumping calculation. SAIL's promises were never fulfilled. In its papers subsequently filed with the US Court of International Trade, SAIL acknowledged that "resort to facts available arguably is justified (but not required) . . .for both SAIL's home market sales data and its cost data." [47] Before this Panel, India started by taking up SAIL's cause and arguing that its entire US sales data-

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38 WT/DS179/R, adopted 1 February 2001, DSR 2001:IV, 1295, para. 6.93 ("*SSPC from Korea*").
39 *Ibid.* at para. 6.93 ("The term 'should' in its ordinary meaning generally is non-mandatory, i.e., its use in [Article 2.4 of the AD Agreement] indicates that a Member is not required to make allowance for costs and profits when constructing an export price").
40 WT/DS48/R/CAN, adopted 18 August 1997, DSR 1998:II, 235(*"Hormones from EC"*).
41 *Ibid.* at para. 8.169.
42 *WT/DS79/R, adopted 24 August 1998,* DSR 1998:VI, 2661 *("Patent Protection from India*").
43 *WT/DS162/R, adopted 29 May 2000,* DSR 2000:X, 4831 *("United States 1916 Act*").
44 *Patent Protection from India* at para. 7.14; *see also United States 1916 Act* at para. 7.14.
45 Oral Statement of India at para. 27 (emphasis in original).
46 New Shorter Oxford Dictionary, Vol. 1 at 15.
47 SAIL's USCIT Brief, Ex. IND-19, at 16.

base should have been used. However, faced with the fact that SAIL could not demonstrate the veracity of its reported cost information – information that would be required to make adjustments for physical differences between the US products and the normal value products pursuant to Article 2.4.2 of the AD Agreement – India modified its argument to then suggest the use of a small subset of US sales. Specifically, India's most recent theory is that Commerce should have used just the specific US sales that matched identically with the product upon which the normal value alleged in the petition was based.

48. Even India's fallback argument is belied by the facts of the case. As discussed previously, SAIL's US database contained recognized flaws, beyond the absence of usable cost information for making price adjustments. In fact, it would not have been possible for Commerce to identify the US transactions involving merchandise physically identical to the normal value merchandise using the database as submitted by SAIL. That database contained inaccurate information regarding the physical characteristics of the reported transactions. Thus, it would have been necessary for Commerce to manually identify and correct approximately 75 per cent of SAIL's database, before making any further effort to utilize that data. Given the repeated failure of SAIL to provide usable data and Commerce's verification that, at the very least, the vast majority of that data was completely unusable, it was neither unreasonable nor inconsistent with the United States' WTO obligations for Commerce not to have undertaken this additional burden.

49. In its Oral Statement, India concedes that there may be circumstances in which the lack of some aspect of the requested information renders the entire body of data to which that aspect pertains unreliable. India stated,

> if a foreign respondent provided information on all export sales but did not provide information on a number of necessary characteristics of such sales (for example, their physical characteristics or the prices at which they were sold), the investigating authorities may be justified in finding that they cannot use that information without undue difficulty because it is too incomplete. [48]

We view this as a very significant concession by India because the foreign respondent in this case did not provide information on a necessary characteristic (for example, the cost of manufacture data required to measure the affect on price comparability caused by the differences in physical characteristics of the merchandise). Therefore, India's own logic would support the rejection of the US sales data.

50. Finally, having rejected SAIL's attempt to resurrect its claim under Annex II, paragraph 7 – that Commerce allegedly failed to exercise "special circumspection" in relying on information in the petition as facts available – the Panel should reject India's arguments that the margins used in the petition were unreasonable. This was an unexpected issue for India to raise, since assessment or

[48] Oral Statement of India at para. 58.

"corroboration" of the information in the petition used as facts available is a factual exercise and SAIL, the party that participated in the investigation, never objected to Commerce's corroboration of the petition during the investigation. [49]

III. INDIA HAS FAILED TO ESTABLISH A *PRIMA FACIE* CASE THAT THE UNITED STATES VIOLATED ARTICLE 15 OF THE AD AGREEMENT

51. The United States demonstrated in its first written submission that India has failed to establish a *prima facie* claim of breach of Article 15 of the AD Agreement. None of the points that India raised in the first meeting of the Panel changes this conclusion.

52. As the Panel noted in its written questions, India has focused its Article 15 claim on the second sentence of that provision. [50] It did not even mention the first sentence in the first meeting of the Panel. India's approach to this matter reflects the fact that the first sentence of Article 15 imposes no obligations on developed country Members. As India stated in the *Bed Linens* case, the first sentence "does not impose any specific legal obligation, but simply expresses a preference that the special situation of developing countries should be an element to be weighted when making that evaluation." [51] Since the first sentence of Article 15 imposes no obligations on developed country Members, there is no basis to conclude that a Member can breach that provision, and there is no need to address this point further.

53. With respect to the second sentence of Article 15, the United States has acknowledged that the provision creates an obligation to "explore constructive remedies." That obligation only arises, however, when the application of anti-dumping duties "would affect the essential interests of developing country Members." Until the United States noted this point in its first written submission, neither SAIL nor India *ever* claimed that applying anti-dumping duties to SAIL would affect India's essential interests. Nor did India or SAIL ever identify what essential interests – if any – might be implicated in this case.

54. India's arguments on this point during the first meeting of the Panel amount to little more than a bald assertion that the United States should have known that applying anti-dumping duties to SAIL would affect India's essential interests. It is unable, however, to point to any evidence on the factual record supporting its assertion. For example, since SAIL manufactures many different types of steel products and sells those products throughout the world, its citation

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[49] *See* Commerce Corroboration Memorandum, Exh IND-30. This memorandum was issued more than four months prior to the date on which SAIL filed its brief commenting on Commerce's "facts available" determination and yet the company never raised any objection to the corroboration exercise.

[50] *See United States – Anti-Dumping and Countervailing Measures on Steel Plate from India*, Questions for the Parties, 1 January 2002, Question 25.

[51] Panel Report on *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linens from India*, WT/DS141/R, adopted 12 March 2001, DSR 2001:VI, 20, para. 6.220.

of the total number of SAIL employees proves nothing. [52] Similarly, without knowing what percentage of the company's total sales were made up of steel plate exports to the United States, there is no way to evaluate the importance of those sales to the company, much less to determine whether the application of an anti-dumping measure to those sales would affect *India's* essential interests. If a company produces a variety of products that it sells to a variety of markets, the imposition of an anti-dumping measure on the export of a single product to a single export market may not even affect the *company's* essential interests, much less the developing country *Member's* essential interests.

55. In addition, India's arguments on this point evidence a lack of understanding of the US position. Contrary to India's assertion, the United States is not claiming that "a developing country private respondent must have its government initiate government-to-government contacts before the private respondent can seek a suspension agreement." [53] The fact that Commerce considered the possibility of a suspension agreement without any intervention of the Indian government demonstrates that the United States does not impose any such requirement. The United States is simply arguing that there is no WTO obligation to "explore constructive remedies" unless the application of an anti-dumping measure would affect the developing country Member's essential interests. There is no evidence on the record of the challenged investigation suggesting that this circumstance existed in the present case.

56. India claims that the Article 15 obligation is triggered "even when the developing country interested party or its government is silent." [54] It fails to explain, however, how a developed country Member would ever be in a position to identify what interests individual developing country Members view as "essential" in the absence of any claim from the private respondent or developing country government, and investigating authorities cannot realistically be expected to assess whether the application of an anti-dumping measure in a particular case would affect essential interests without such a claim. [55] If anything, the fact that a developing country Member or its private companies choose to remain silent should be viewed as *prima facie* evidence that the application of an anti-dumping measure would *not* affect the developing country Member's essential interests.

57. Nor has India found any support for its interpretation among the arguments of the third parties. In their written submissions, Japan and the European Communities took no position on the issue. In its oral statement, Chile asked the

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[52] Oral Statement of India at para. 70.
[53] Oral Statement of India at para. 71.
[54] Oral Statement of India at para. 72.
[55] The *India Steel* investigation is a case in point. As the United States noted in its first written submission (at para. 187), SAIL's letter addressing the possibility of a suspension agreement did not mention India's essential interests, and it did not claim that (or explain how) applying an anti-dumping measure to SAIL's exports of steel plate would affect those interests. *See Letter from SAIL's Counsel to USDOC Re: Request for a Suspension Agreement*, dated 29 July 1999 (Exh. IND-10).

Panel to refrain from ruling on the claim, pointing out that the Doha Ministerial recognized that clarification was needed on how to "operationalize" Article 15. [56]

58. In any event, the facts on the record demonstrate that Commerce *did* actively explore the possibility of a suspension agreement in this case. The United States discussed this point at paragraphs 188-191 of its First Written Submission. As was explained, Commerce officials held a meeting with SAIL's representatives specifically to discuss the possibility of a suspension agreement. India's claim that Commerce was unwilling to consider a suspension agreement is not supported by the administrative record, nor did SAIL suggest during the investigation that the *ex parte* memorandum reflecting this meeting was in any way inaccurate or incomplete.

59. For these reasons, there is no factual or legal basis to find that the United States has acted inconsistently with Article 15.

CONCLUSION

60. For the foregoing reasons, the United States requests that the Panel reject India's claims in their entirety.

[56] Oral Statement of Chile, 25 January 2002, para. 21.

UNITED STATES – ANTI-DUMPING AND COUNTERVAILING MEASURES ON STEEL PLATE FROM INDIA

WT/DS206

Second Written Submission of the United States of America

EXHIBIT

US-26. (A) Final Results; Administrative Review and New Shipper Review of the Antidumping Duty Order on Stainless Steel Bar from India, 65 Fed. Reg. 48965 (10 August 2000) and accompanying Decision Memorandum; Final Determination of Sales at Less Than Fair Value;

(B) Certain Polyester Staple Fibre From Taiwan, 65 Fed. Reg. 16877 (30 March 2000) and accompany Decision Memorandum

ANNEX D

Oral statements, first and second meetings

ANNEX D-1

ORAL STATEMENT OF THE UNITED STATES

(23 July 2002)

1. Mr. Chairman, members of the Panel, on behalf of the United States delegation, I would like to thank you for providing this opportunity to comment on certain issues raised by India in its First Written Submission. We do not intend to offer a lengthy statement today; you have our written submission, and we will not repeat all of the comments that we made there. We will be pleased to receive any questions you may have at the conclusion of our statement.

2. Mr. Chairman, before beginning, I want to comment briefly on India's new claim with respect to "special circumspection." In light of the Panel's ruling that it will not consider this claim, and in light of the fact that we have not seen these arguments before, we will not today respond in detail. However, for the record I want to note that the US authorities did, in fact, corroborate the offer. Also for the record, we wish to note that we contest and disagree with the factual and legal arguments India has made today regarding the new claim.

3. I would like to emphasize at the outset a few points regarding the standard of review under Article 17.6 of the AD Agreement. First, panels may not conduct *de novo* evaluation of the facts. Unless a panel finds that the authorities' establishment of the facts before it was improper, or that their evaluation of those facts was biased and unobjective, the evaluation should not be overturned, even

if the panel would have reached a different determination had the same facts been before it in the first instance. (1st US sub., ¶61 -¶66).

4. Second, panels must uphold the investigating authorities' interpretations of the AD Agreement if those interpretations are *permissible*. Where there are several permissible interpretations of an AD Agreement provision, a panel must not impose its preferred interpretation on the Member concerned. To do so would be to add impermissibly to the obligations to which the WTO Members have agreed. (1st US

sub., ¶67 -¶73).

5. The central issue in this case relates to the US authorities' reliance on facts available – as provided for in Article 6.8 and Annex II of the AD Agreement – in its anti-dumping investigation of steel plate imports from India.

6. The AD Agreement provides that Members have the right to impose remedial duties if dumped imports are injuring their domestic industry. To invoke that right, a Member must first conduct an investigation to determine if dumping and injury exist. That dumping investigation, as prescribed by the AD Agreement, requires a great deal of information, most of which can only be obtained from the exporters. The position advocated by India in this case would place respondent exporters in total control of what data is used in the dumping calculation and make a meaningful investigative process impossible. Such an interpretation of the AD Agreement is, therefore, inconsistent with its object and purpose.

7. In contrast, the United States' interpretation of the AD Agreement is consistent with its object and purpose and preserves the balance of rights and obligations it establishes. Specifically, it is the view of the United States that, consistent with the AD Agreement, an investigating authority may determine that an exporter's response is so substantially flawed that it cannot form a reliable basis for a dumping calculation. In such a case, rejection of the entire response is warranted. The case now before you is such a case.

8. Article 6.8 of the AD Agreement provides that, in such circumstances, "preliminary and final determinations ...may be made on the basis of the facts available". In this case, the US authorities relied on the facts available only after 1) providing numerous opportunities and making extensive efforts to assist the Indian respondent to provide usable data; 2) advising the Indian respondent repeatedly and specifically that the use of facts available would be required if it did not provide the necessary information; and 3) fully explaining its reasons for using facts available in its published determinations. In short, the US authorities' reliance on facts available in this case complied with Article 6.8 and Annex II of the AD Agreement.

9. As the Appellate Body stated in the *Japan Hot-Rolled* case, the goal of an anti-dumping investigation is "ensuring objective decision-making based on facts." But in order for investigating authorities to *make* objective decisions based on facts, they must have *access* to those facts. The goal of an anti-dumping duty investigation is frustrated when a responding party does not provide the necessary information. As a result, the AD Agreement's authorization to use facts

available when the necessary facts are not provided is absolutely essential to the ability of an investigating authority to conduct an anti-dumping investigation.

10. The purpose of the objective standard for decision-making is to permit neutral determinations to be made without bias toward either the party that could be subject to duties or the party being injured by any dumping. When investigating authorities rely on facts available, it is not possible to determine whether those facts are advantageous to the responding party because the information necessary to determine that party's actual margin of dumping is not available. Thus, an interpretation of the AD Agreement that would allow responding parties to selectively provide information and yet require investigating authorities to use that information regardless of how incomplete it is, would encourage selective responses and defeat the underlying purpose of an investigation, to ensure "objective decision-making based on facts".

11. India is seeking just such an interpretation in this case. India is asking the Panel to require the US authorities to use some – but not much – of the information submitted by the Indian respondent because – in India's view – this information was good enough to be used. But the US authorities could not – and the Panel should not – focus on just a fraction of the information before it and ignore the rest of it. India and the Indian respondent concede that the home market sales, cost of production, and constructed value information that the Indian respondent supplied was completely unusable. And yet, India claims that the AD Agreement required the US authorities to use the US pricing information that the respondent did provide to calculate an anti-dumping margin, notwithstanding that this data itself also was flawed and represented only a fraction of the information necessary for an anti-dumping analysis.

12. Article 31 of the Vienna Convention provides that a treaty provision shall be interpreted in accordance with the ordinary meaning of its terms in their context and in light of its object and purpose. India's arguments are not based on the actual text of Article 6.8 and Annex II of the AD Agreement, but on terms that India would have this Panel read into the Agreement. For example, India agues that Annex II, para. 3 creates obligations with respect to "categories" of information, even though the term "categories" does not appear in the text. Similarly, India argues that Annex II, para. 3 addresses what types of information authorities "must use," when in fact it only addresses what they "should take into account." As we discuss in our First Written Submission, at paragraph 88, adopting India's interpretation would lead to absurd results. Panels should disfavour such interpretations.

13. India's interpretation is also contrary to the object and purpose of the AD Agreement in that it effectively undermines the ability of an investigating authority to take action to offset injurious dumping. Stripped to its essence, India's argument is that the AD Agreement permits respondents to provide only that information that supports their interests, and requires investigating authorities to use that information. If India's argument were credited, no respondent would ever submit information detrimental to its interests. If its home market prices or its costs of production were high, it would never provide a home market sales

database or a cost submission. Conversely, if its export prices were low, it would never submit those export sales. The AD Agreement would be seen as providing for and protecting such behaviour. There is no basis for such an interpretation in the text of the AD Agreement. The role of this Panel is to interpret the language actually used in the AD Agreement, not the language that India wishes were used.

The Information Necessary for an Anti-Dumping Investigation

14. At the center of this dispute is the meaning of the term "information" as used in Article 6.8 and Annex II of the Agreement. The word "information" is a general term and its interpretation depends on its context. Article 6.8 of the AD Agreement states that an investigating authority may apply facts available in its anti-dumping calculations if parties fail to provide "necessary" information. In the context of the AD Agreement, which defines dumping based on a comparison of the export price with the normal value, in the ordinary course of trade, the "necessary" information for conducting an anti-dumping investigation includes prices of the subject merchandise in the domestic market of the exporting country, export prices of the subject merchandise, and, in appropriate circumstances, cost of production information and constructed value information.

15. Like most investigating authorities, those in the United States are highly dependent on a respondent to provide the information necessary for an accurate and reliable anti-dumping analysis; they cannot force a respondent to provide the information. But while investigating authorities cannot control the quantity or quality of information provided by a respondent, they can – and must – assess the facts of each case to determine whether a respondent has supplied the necessary information that allows the investigating authority to carry out its analysis in an accurate manner. At times, a respondent may provide all of the necessary information, save minor instances in which the data is unavailable or outside of its control. At other times, a respondent may refuse to supply information altogether.

16. In the case of the Indian respondent, the information that it did provide was completely unusable. Even after the US authorities gave the Indian respondent multiple opportunities to cure deficiencies, the information submitted remained completely unusable. Despite the fact that the US authorities issued their standard questionnaire and at least five major supplemental requests for information, at the time the Final Determination was due, the US authorities were still missing information they had requested of the Indian respondent more than six months earlier. (1st US Sub. 150-155). Furthermore, when the computer databases provided by the Indian respondent proved unworkable, US Department of Commerce staff made extensive efforts to assist the Indian respondent in addressing the deficiencies, but to no avail. (1st US Sub. 24, 29). The Indian respondent insisted that its information could be verified with its own books and records but – after a careful on-site examination – this proved not to be the case. Even the US sales data upon which the Indian respondent – and now India – relies had flaws and was of no use standing by itself. In the end, the Indian respon-

dent did not provide the information necessary for the US authorities to accurately conduct an anti-dumping analysis. The authorities were required to analyze the necessary information but were prevented from doing so. At some point, when a responding party fails to provide the information necessary for conducting an antidumping investigation, investigating authorities must have the ability to reject that party's questionnaire response in its entirety and use the facts available.

17. The decision to rely entirely on facts available is not always necessary. In cases in which a small amount of necessary information is missing or cannot be used, the investigating authority can determine a fairly accurate anti-dumping margin by applying "facts available" in a correspondingly limited manner. However, in cases such as this one, in which a substantial portion of the necessary information is either missing, unusable, or unverifiable, a respondent cannot change the overwhelming, collective flaws in the information by merely breaking up the information into pieces and then asking the authority to focus on individual pieces or "categories" of information. Investigating authorities must review *all* of the necessary information in such a case before determining how to apply the facts available. The European Communities has stated in its submission that "data requested in an anti-dumping investigation, and which is necessary for a determination, cannot be seen as isolated pieces of information." (EC Third Party Sub. ¶ 10.) We agree entirely.

18. Article 6.8 and Annex II of the AD Agreement provide the parameters in which investigating authorities may determine whether the specific facts presented require the application of facts available. India's interpretation of Article 6.8 and Annex II of the AD Agreement seeks to narrow the parameters in which "facts available" may be applied and, thereby, significantly restrict an investigating authority's ability to conduct an anti-dumping investigation. India's interpretation would upset the careful balance between the interests of investigating authorities and exporters that is reflected in the AD Agreement.

19. In this case, the US authorities' decision to apply facts available with regard to the Indian respondent is consistent both with the relevant provisions of the AD Agreement and with this essential balance between the interests of investigating authorities and exporters. As the Appellate Body recently explained in *Japan Hot-Rolled*, at para. 102:

> 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.

The factual evidence demonstrates that the US authorities did not insist upon absolute standards or impose unreasonable burdens upon the Indian respondent. They did not insist on perfection nor did they ask for information that the Indian respondent did not control. But left without the information necessary for an

anti-dumping determination, the US authorities had no alternative to the use of facts available.

20. In sum, if the Panel were to adopt the interpretation of "information" that India seeks to graft onto the AD Agreement – one that applies the facts available criteria of Article 6.8 and Annex II to one "category" of information but ignores the collective absence of the information necessary for an anti-dumping analysis – responding parties would be given ultimate control over what information investigating authorities may analyze, contrary to the essential balance between the interests of investigating authorities and exporters that is reflected in the AD Agreement.

India's Challenge to the US Statute

21. I'd like to turn now briefly to discuss India's claim that the facts available provisions in US law "as such" violate WTO obligations. It is well-established under WTO practice that a Member's legislation "as such" can violate WTO obligations *only* if the legislation *mandates* action that is inconsistent with those obligations or precludes action that is consistent with those obligations.

22. As we explained in considerable detail in our First Written Submission (at paras. 120–146), nothing in the US statutory facts available provisions mandates WTO-inconsistent action. On the contrary, the US provisions largely mirror the AD Agreement and, where differences exist, US law does not conflict with the principles and criteria set forth in the Agreement.

The Article 15 Claim

23. I will briefly discuss India's claim that the United States violated Article 15 of the AD Agreement by allegedly failing to explore the possibilities of constructive remedies during the anti-dumping investigation. As the European Communities noted in its submission (at ¶ 13), Article 15 only applies where a developing country Member demonstrates that its "essential interests" would be affected by the imposition of anti-dumping duties on the product at issue. India never even claimed – much less demonstrated – that its "essential interests" would have been affected by the imposition of anti-dumping duties on SAIL's exports. In addition, the facts demonstrate in any event that the US authorities *did* actively explore the possibility of a price undertaking in this case. India's claims to the contrary fail to establish a *prima facie* case of inconsistency with Article 15.

New Information

24. We would also like to comment briefly on India's reliance on testimony that was not presented to Commerce and, thus, is not part of the facts made available to the investigating authority. We explained in our First Written Submission, at paragraphs 168-171, why considering such material would be inconsistent with Article 17.5(ii) of the AD Agreement, which requires that panels examine the matter before them based upon the facts made available to the authorities of the importing Member.

25. Today's presentation by Mr. Hayes only proves our point. Mr. Hayes is an employee of the law firm that is representing India in this proceeding. And, with respect, his views are those of an advocate, not those of a disinterested expert. His comments should be taken in that light. Mr. Hayes' views were not part of the facts made available to Commerce, and they are not properly part of the record for the Panel's review. The affidavit in question was never submitted to, and therefore never considered by, Commerce in making its final determination. As an employee of the law firm which currently represents India, Mr. Hayes was never involved in the challenged investigation and his arguments, which do not appear on the record, have been created two years after Commerce's final determination. Thus, his views are neither timely, nor objective. In addition to declining to consider this information, the Panel should also decline to consider any arguments provided by India which rely upon this information.

26. We would also note that, contrary to the suggestions of India at paragraph 85 of its oral statement, while the United States has not engaged on the substance of the new information presented by Mr. Hayes, the United States has in no way conceded any of his points.

Conclusion

27. Our purpose today was to focus on the primary fundamental issue before the Panel: that investigating authorities must be permitted to carry out their responsibilities in a fair and unbiased manner and should not be required to conduct their anti-dumping analyses in a manner determined by the respondent. This principle is supported by the text of Article 6.8 – which authorizes the use of facts available – and by the criteria of Annex II. When, as in this case, a respondent has substantially failed to provide the information necessary for an anti-dumping analysis, investigating authorities are authorized by Article 6.8 to reject the limited information supplied and apply instead the facts available.

28. This concludes our presentation today. Rather than respond further to the particular comments made by India on a point-by-point basis at this time, we would welcome the opportunity to address areas of concern or interest to the Panel in response to questions.

ANNEX D-2

ORAL STATEMENT OF INDIA

(23 January 2002)

I. INTRODUCTION BY THE HEAD OF THE INDIAN DELEGATION

1. On behalf of the Government of India, I would like to begin by thanking the Chairman, the members of the Panel, and the Secretariat for taking on this task. India looks forward to working with you and with the delegation of the United States during this proceeding. My delegation today consists of myself and Mr. M.K. Rao of the Permanent Mission of India to the WTO, Mr. Jha and Dr. Dhawan of the Steel Authority of India Ltd., and Scott Andersen, Neil Ellis, and Albert Hayes of the law firm of Powell, Goldstein, Frazer & Murphy.

2. Mr. Chairman, I would like to begin by setting our presentation today into context. Mr. Andersen will then present additional remarks, followed by Mr. Ellis. Mr. Hayes will also make a statement concerning certain technical aspects of USDOC's investigation. India has presented a detailed First Submission to the Panel. We assume that the Panel has read the submission and been briefed by the Secretariat. India will focus today on presenting additional arguments and to responding to the key arguments made by the United States in its First Submission. India will provide a full response in its rebuttal submission.

3. We are here today because of an anti-dumping proceeding conducted by the US Department of Commerce in 1999 regarding the exports of cut-to-length steel plate by the Steel Authority of India Ltd., or SAIL. During the investigation SAIL made strenuous efforts to comply with the extensive documentary and informational demands of the USDOC, in particular with respect to SAIL's data on US sales. SAIL's US sales data were timely, verifiable and appropriately submitted, but nevertheless the USDOC rejected them. Reacting to problems with separately-submitted information relating to other facts, USDOC unilaterally decided to reject *all* information submitted by SAIL and had recourse to "total facts available"– arbitrarily assigning to SAIL the highest dumping margin alleged by the US domestic industry petitioner, 72.49 per cent.

4. These anti-dumping duties have eliminated the largest export market for Indian cut-to-length plate in the world. Indian exports of this product to the United States have entirely ceased.

5. India has brought this complaint because the application of facts available in this case, as well as the statutory provisions that provided for this application of facts available, violated the rights of India under the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade* ("AD Agreement"), Article VI of GATT 1994, and the WTO Agreement. Investigating au-

thorities must not impose on exporters burdens which, in the circumstances, are not reasonable. They may not reject information submitted in good faith, that is verifiable, timely submitted, in the requested computer format, and usable without undue difficulties, simply because other information was deemed inadequate.

6. Our first submission has also demonstrated that the US statutory provisions regarding use of the "facts available" impose additional conditions, which go beyond those permitted under the AD Agreement. On their face and as interpreted by the US authorities, these provisions result in rejection of timely, verifiable and usable information because a respondent has failed to demonstrate to the satisfaction of the US authorities that it acted to the best of its ability in providing *other* information.

7. The US authorities also violated Article 15 of the AD Agreement, by failing to give special regard to SAIL's status as a developing country producer, and by levying final anti-dumping duties without exploring the possibility of an alternative constructive remedy, such as a price undertaking or a lesser duty. SAIL submitted a written proposal to the US authorities for an undertaking, and other than a perfunctory meeting described in a short "*ex parte*" meeting memorandum, there is nothing in the record indicating that the authorities ever explored in good faith the possibilities of other constructive remedies.

8. The US authorities' application of "total facts available"– rejecting the facts of SAIL's US sales and substituting fiction in their place– distorted the measurement of dumping in this case and made a huge difference in the final dumping margin. Even using facts available from the petition for SAIL's home market sales, cost of production for home market sales, and constructed value, the use of *actual* verified US sales data would have resulted in a much lower margin. Yet the US authorities decided, at the insistence of the US domestic industry petitioners, to use "facts available" instead of SAIL's US sales data. The resulting margin of 72.49 per cent was fundamentally unfair and inconsistent with the United States' duty to interpret and apply its WTO obligations in good faith.

9. The United States has not met many of India's arguments in its first submission, but has simply tried to change the subject. The United States has suggested that India's arguments would lead to manipulation by respondents in anti-dumping investigations. But there is no evidence of such manipulation in this case, and indeed there was none. The record shows that despite many obstacles, SAIL continued to work diligently to respond to USDOC's enormous data requests.

10. India must ask, what does the trading system have to fear from requiring anti-dumping authorities to take into account the verifiable, usable and timely data actually submitted by respondents? Why did the USDOC not use actual data, rather than the conjectures that its own domestic industry has presented? Any threat presented by the use of real data would be far overshadowed by the threat to the trading system from permitting investigating authorities to operate in such a rule-free manner. The Uruguay Round opened a new era for the trading

system. All Members of the WTO, and their anti-dumping authorities, are accountable internationally for their actions. It is no longer acceptable for an anti-dumping authority to use the excuse of flaws in one set of data to arbitrarily reject unrelated data that respondents have submitted, and to use "facts available" instead. We urge the Panel to use this occasion to render justice in this particular case and for this particular exporter, and to contribute to the clarification of the rule of law in the WTO. Mr. Andersen will now present India's arguments on a new issue and responding to arguments made by the United States in its First Submission.

II. DISCUSSION

11. Mr. Chairman and Members of the Panel, the first part of our statement will discuss India's alternative claim under AD Agreement Annex II, paragraph 7 regarding USDOC's failure to exercise special circumspection in using the US sales information in the petition to calculate the dumping margin in this investigation. The remainder of our statement today will focus primarily on rebutting the key points made by the United States in its First Submission. This is a long statement and we encourage the Members of the panel to ask questions during our presentation. We are here to assist you in understanding the measures and claims at issue and our arguments. India's rebuttal submission will provide a full response to the US First Submission and the points raised at this first meeting of the Panel with the parties.

A. India's Alternative Claim under Annex II, Paragraph 7 Regarding the USDOC's Failure to Exercise Special Circumspection in Using Information in the Petition

12. India presents now arguments regarding its alternative claim that USDOC failed to exercise "special circumspection" when it used a single price *offer* by a company not affiliated with SAIL as the entire basis for the US prices in calculating the dumping margin. The relevant AD provision is Annex II, paragraph 7, which provides the legal framework for this claim:

> If the authorities have to base their findings ...on 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 ...official import statistics and customs returns . . .

13. It is significant that the text uses the phrase "special" circumspection. This indicates that the drafters of this provision required authorities to take particular care before applying facts available. The record shows that it was "practicable" for USDOC to check the official import statistics. In fact, USDOC claims to have examined the offer in the petition against such statistics.

14. The public version of the petition that launched the investigation of cut-to-length plate from India included no information regarding actual sales by SAIL into the United States for the purpose of calculating the estimated US price. Instead, the petition provided information on a "price offering to unaffiliated purchasers"[1] – that is, an offer to sell cut-to-length plate from an unaffiliated company for shipment into the United States. The petitioners stated in the petition that "in the absence of more definitive information, Petitioners assume the offer was accepted and the sale consummated on the date of the offer."[2] There is no evidence in the record that petitioners or the USDOC ever sought or obtained information as to whether there ever was a sale pursuant to this offer. The public version of the petition lists the price offered by this non-affiliated company as $251 per ton - this is found in handwriting in the upper left corner of page 12 of India Exhibit 1.

15. At both the preliminary and final determinations, USDOC used this single *offer* as the entire basis for the US sale price in calculating the dumping margin ultimately applied to SAIL. The petition also calculated a constructed value of $372 as one of its two proposed bases for normal value. This figure is shown in Figures 4 and 5 (which follow page 18) of the public version of the petition. The huge difference between the very low US price of $251 and the constructed value of $372 resulted in the 72.49 per cent margin, as shown on page 18 and Figure 5 of the petition. Given the significance of the US sales price to this very high margin, USDOC could be expected to use special circumspection in its use of this price offer of $251. So what did USDOC do?

16. The USDOC's Final Determination states that "[p]etitioners' calculated export price was based on US price offerings, with deductions taken for international movement charges." The corroboration of petitioners' information was explained *in toto* as follows: "We compared this with information from US Customs and found them consistent."[3]

17. There was a slightly more expanded description of USDOC's "corroboration" of the price in the single price offer. I am handing you a copy of India Exhibits 30 and 31. India Exhibit 30 is a USDOC Memorandum dated 19 July 1999. It appears to be the only basis for the corroboration of the export price that was used for *both* the preliminary and final investigation. At page 2 of the document, it first concludes that SAIL's US price information cannot be used because not all of SAIL's information was reliable. This is practice of "total facts available" at work. The Memorandum then states:

> The only other secondary information readily available was Customs statistics covering the relevant HTS categories for the period of investigation. We compared the US prices, and international movement charges, in the petition *with the average unit values*, and relevant international movement charge data, *in the relevant*

[1] USDOC Initiation Notice, Ex. IND-2 at 12963.
[2] Ex. IND-1 at 11.
[3] USDOC Final Determination, Ex. IND-17 at 73128.

HTS categories and found them consistent. Thus we were able to corroborate the information in the petition.[4]

18. But what does the record evidence show about the comparison of the single unaffiliated offer price of $251 with the unit price of Indian imports in the relevant HTS categories in Customs statistics? India Exhibit 31 provides the answer. This exhibit was originally Exhibit 8 from the public version of the petition. It tabulates official US Customs data. The first page contains US Customs data on imports under the relevant HTS subheadings into the United States from India; it also provides the c.i.f. value for each subheading and for all subheadings combined - which in 1998 was $48,080,899. We have performed the unit value calculations that petitioners declined to include but which USDOC claims it performed – dividing the total c.i.f. value by the number of tons. This calculation derives an average unit c.i.f. value for all three HTS subheadings of $354/short ton.[5] Thus, the US Customs Service's price per ton, as reported in an exhibit in the petition itself, is $103 per ton *more* than the price per ton in the single offer listed in the public version of the petition. This US Customs information from *actual* imports during the period of investigation clearly contradicts the validity of the extremely low price listed in the single offer in the petition. Thus, USDOC's conclusion that the information in this single offer was "corroborated" by the Customs data is simply not correct.

19. Given this very large disparity between the single offer price and the Customs data *and* the fact that the petition itself had only *assumed* that the offer by a non-affiliated party allegedly to sell SAIL's steel was consummated, a reasonable authority exercising "special circumspection" could be expected to have requested Customs to provide it with a list of the individual entries of imports from India. This information is readily available. A request for and examination of such data would have revealed if the *offer* evolved into a *sale*. But there is no discussion in any document in the record showing that USDOC took any efforts to check the information of the single offer for sale with entry-specific information in official US Customs import statistics. It would appear from the record that USDOC took no steps to corroborate whether this offer stayed an offer or became a sale.

20. Of course, even under USDOC's total facts available practice, it was required to exercise special circumspection in reviewing the price offer in the petition before using it as the basis for the US price. USDOC could - and should - have included SAIL's verified *actual* US sales information within its examination. If the Panel turns to India Exhibit 13, I would like to take a few minutes to review the information on SAIL's US Sales data that was in front of USDOC when they were required to make the "special circumspection" review prior to the Final Determination in December 1999. Exhibit 13 is the Verification Report of SAIL's US Sales. [Review of pages 12-15 of Verification Report].

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[4] USDOC Memorandum, "Corroboration of Data Contained in the Petition for Assigning an Adverse Facts Available Rate," at 2 (19 July 1999) (emphasis added) (attached hereto as Ex. IND-30).

[5] *See* Petition, Exhibit 8 (attached hereto as Ex. IND-31).

21. Thus, at the end of the verification - and months before the final determination - USDOC had available to it complete and accurate information for the entire period of investigation for (1) the prices for all of SAIL's sales to the US market, (2) all 28 relevant characteristics of SAIL's plate products sold to the United States, and (3) assurance that there were no additional sales that were unaccounted for.

22. USDOC could have used this information in its "special circumspection" review in at least two ways. First, if USDOC had spent 5 minutes scanning the copy of the complete listing of SAIL's 1284 sales (set out in India's Exhibit 8), it would have easily determined that there were no sales of plate at a price of $251 per ton. It would have found no sales even at prices of $300 per ton. Indeed, the *lowest* price in the entire period of investigation for SAIL into the United States was $305 per ton. This evidence demonstrates that the single offer in the petition for $251 per ton was simply never consummated as an actual "sale" during the period of investigation.

23. Second, USDOC should have used SAIL's actual pricing information to discover that the weighted average price for all of SAIL's US sales during the period of investigation was $346 per ton. This information was calculated on the basis of SAIL's verified US sales data on the record, as set forth in India Exhibit 8. Mr. Hayes will discuss these calculations later. This $346 price per ton is very close to the $354 unit value price that is derived from the Customs data shown in the petition. Thus, if USDOC did in fact examine the US Customs data as it claims it did, the only thing that data corroborated is the accuracy of SAIL's verified information - not the $251 offer in the petition.

24. In conclusion, no investigating authority acting in good faith and in an objective manner could have used the single offer price of $251 as the sole basis for a dumping margin in the face of overwhelming evidence that the *actual* export prices were much, much higher. USDOC did not act with "special circumspection" when it used the offer in the petition as the basis for the US sales price in calculating the AD margin. Thus, if for purposes of argument, the Panel finds that USDOC is justified in applying facts available - an argument the Panel knows well that India strongly opposes - USDOC could only have used the information from US. Customs (in conjunction with SAIL's actual prices) as the basis for the US price in calculating the dumping margin.

B. "Should" and "shall" in Annex II, Paragraph 3

25. I would now like to respond to arguments made by the United States in their First Submission. Many of the key legal issues in this dispute concern the basic question of when and how investigating authorities must use information submitted by foreign respondents that is verified, timely submitted, and can be used without undue difficulty. While this dispute presents some new aspects of this issue, guidance for the Panel's work has already been provided by the interpretations of Article 6.8 and Annex II, paragraph 3 by previous panels, particularly the *Japan Hot-Rolled* panel as affirmed by the Appellate Body.

26. The *Japan Hot-Rolled* panel and the Appellate Body decision in that case have interpreted Article 6.8 and Annex II, paragraph 3 as requiring investigating authorities to use information submitted by foreign respondents that meets the four conditions of Annex II, paragraph 3. For instance, the Appellate Body affirmed the panel's finding that the USDOC's failure to use the Japanese respondent's information on weight conversion, which met the four Annex II, paragraph 3 criteria, was a violation of Article 6.8 and Annex II, paragraph 3.

27. India's argument in paragraphs 53-79 of its first submission follows and develops that authoritative guidance, in arguing that Annex II, paragraph 3 is a *mandatory* provision, and information meeting all four conditions *must* be used by investigating authorities in connection with calculating the anti-dumping margin.

28. The United States tries carefully to ignore the Appellate Body's decision in *Japan-Hot Rolled.* In paragraphs 103-107 of its First Submission, the United States instead argues that the use of the word "should" in the text of Annex II, paragraph 3 means that investigating authorities are not *required* to use information meeting all the criteria of Annex II, paragraph 3 when they calculate dumping margins. This argument is without merit.

29. While the Appellate Body in *Japan Hot-Rolled* did not directly address the "should" versus "shall" issue, it found regarding the weight conversion issue that there was an affirmative requirement that USDOC use such information even though the language of Annex II, paragraph 3 uses the word "should." This finding is consistent with the Appellate Body's decision in *Canada – Measures Affecting the Export of Civilian Aircraft,* in which the Appellate Body noted that the word "should" "can also be used to express a duty or obligation." Thus, the Appellate Body held that the word "should" in Article 13.1 of the DSU was used in a normative, rather than a merely exhortative sense, finding that Members "are under a *duty and an obligation* to respond promptly and fully to requests made by panels for information under Article 13.1 of the DSU."[6] Japan agrees with this point in its Third Party submission in the present case.

30. The context of Annex II, paragraph 3 also supports the conclusion that the word "should" in this provision creates a duty to use information meeting the stated criteria. The most important context is the last sentence of AD Agreement Article 6.8, which provides that the "provisions of Annex II *shall* be observed in the application of this paragraph." Treating these provisions as discretionary, as the United States suggests, would render the term "shall" in Article 6.8 a nullity and alter the meaning of Article 6.8.

C. Interpretation of the Phrase "all information which" in Annex II, Paragraph 3

31. Another key issue on which the United States and India differ is whether the AD Agreement permits investigating authorities to cast aside *some* informa-

[6] WT/DS70/AB/R, DSR 1999:IV, 1443, para. 187 (emphasis added).

tion that actually meets the four conditions of Annex II, paragraph 3, solely because the foreign respondent either cannot or failed to provide *other* requested information. India argues that such conduct by investigating authorities is impermissible; the United States generally argues that unless *all* necessary information requested in an anti-dumping investigation is submitted in a timely, verifiable, and usable manner, then *none* can be accepted.

32. For the answer to this question, India turns to the phrase "all information which" in Annex II, paragraph 3. The United States has not addressed the meaning of this phrase in its First Submission. The reference to "all information" in Annex II, paragraph 3 is unqualified: it states that "all information which" meets the specified four conditions should be taken into account when determinations are made. The ordinary meaning, read in its context, of this phrase "all information which" is that *any* information meeting the four conditions must be used in the calculation of an anti-dumping margin. In effect, the phrase "all information which" limits an investigating authority's ability to use information *other* than that supplied by the respondent if the respondent's information meets the four conditions of Annex II, paragraph 3.

33. Nothing in the text of Annex II, paragraph 3 suggests that *all* (or even *most*) of the information requested from foreign respondents must meet the four conditions of Annex II, paragraph 3 before *any* of the information that does meet those four conditions can be used in calculating an anti-dumping margin. The European Communities agree with India on this point, noting that "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 in *Japan Hot-Rolled* confirms that an investigating authority's ability to reject data supplied is circumscribed."[7]

34. Read literally, the phrase "all information which" in Annex II, paragraph 3 could mean any of the pieces of information requested in an anti-dumping investigation. However, India recognizes that it may not be reasonable to expect an investigating authority to conduct a separate examination of each of the four conditions in Annex II, paragraph 3 for thousands of individual pieces of information submitted by a respondent. India does not insist upon an interpretation of Annex II, paragraph 3 that would require investigating authorities to use any piece of information provided by foreign respondents, no matter how small and isolated. India's First Submission used the qualifying term "categories" of information for exactly this reason. The United States correctly points out that that the term "category" is not a term found in the AD Agreement. However, what is important here is not the exact term used. Rather, what is important is the need to interpret the Agreement in good faith, in a way that ensures the use of information meeting the four criteria of Annex II, paragraph 3.

35. As an example of a "category" of information, India would offer the weight conversion factor information at issue in the *Japan Hot-Rolled* dispute. The *Japan Hot-Rolled* panel found that although the foreign respondent provided

[7] Third Party Submission of the European Communities, 17 December 2001, at para. 9.

weight conversion factor information after USDOC deadlines, USDOC should have used it in order to create a consistent basis of measurement among sales which were made sometimes on the basis of actual weight and other times on the basis of theoretical weight.

36. Larger "categories" of information are those recognized by USDOC, which structures its questionnaires and its verification around US sales, home market sales, cost of production for the home market products, and constructed value for the US products. Indeed, in the underlying Final Determination, USDOC identified these four categories, which it termed "four essential components of a respondent's data".[8] Despite the United States' assertions, India is merely recognizing the same groups or categories of information as USDOC. We are here today because USDOC refused to take into account an entire category of information–SAIL's US sales data.

D. The United States Improperly Interprets Annex II, Paragraph 1

37. The only textual support that the United States cites in support of its total facts available practice is Annex II, paragraph 1 and Article 6.8. Paragraph 100 of the US First Submission misinterprets Annex II, paragraph 1. The paragraph has two distinct sentences. The first refers to "the information required from any interested party" and requires the authorities to specify the manner in which "that information" should be structured: this first sentence clearly applies to *all* of the information requested. But the second sentence requires the investigating authority to provide a warning to interested parties that "if information is not supplied within a reasonable time, then the authorities will be free to make determinations on the basis of the facts available ...." The warning of the second sentence becomes relevant only for whatever information is *not* supplied in the structure and manner requested. It does not apply to *all* of the information requested unless a respondent refuses to provide any information.

38. The United States interprets the second sentence of Annex II, paragraph 1 as permitting investigating authorities to apply total facts available. Paragraph 100 of its First Submission states the following:

> The second sentence then provides that the investigating authorities should advise the responding interested parties of the consequences of not providing *the* information - that the investigating authorities *will be free* to make determinations on the basis of facts available, including, in particular, those facts contained in the application for the initiation of the investigation.[9]

The panel will see that the United States added the article "the" before the word "information" in its interpretation. But the US submission does not reflect the actual text of the second sentence, which says "if information is not supplied". In the second sentence of Annex II, paragraph 1, unlike the first sentence, the words

[8] Ex. IND-17 at 73130.
[9] US First Submission, para. 100 (emphasis added).

"the" and "that" do not qualify the word "information". Nor does the qualifier "all", "all necessary" or "necessary" appear. Yet the United States interprets the second sentence of Annex II, paragraph 1 as if those words were there.

39. The absence of any such qualifier in the second sentence of paragraph 1, Annex II is important, because it indicates that facts available will only be appropriate for the particular sub-set of requested information that does not meet the other requirements of Annex II. This interpretation is consistent with the Appellate Body's interpretation that Annex II requires the use of particular information that meets the requirements of Annex II, paragraph 3. This interpretation is also consistent with the text of Annex II, paragraph 3 ("all information *which*" meets the four conditions), and Annex II, paragraph 6 ("*such* evidence"). Like these other provisions of Annex II, paragraph 1 anticipates that "facts available" may be used to complete the record where data are missing or fail to meet the criteria of paragraph 3–but not to substitute for the actual data submitted by a respondent that meets those criteria.

E. The United States Improperly Interprets the Meaning of "necessary information" in AD Agreement Article 6.8

40. Although it ignores the term "all information which" in Annex II, paragraph 3, the United States does focus on the term "necessary information" in AD Agreement Article 6.8. The United States interprets this term at paragraph 83 of its First Submission as meaning *all* information necessary to calculate a dumping margin. If *any* "necessary" information is not provided by a foreign respondent, the United States interprets Article 6.8 and Annex II, paragraphs 1, 3, 5, and 7 as giving it the discretion to disregard *all* of the information provided.

41. It is important to keep in mind where the United States' argument leads. The US interpretation of "necessary information" would require that when a dumping margin is calculated, either *all* of the necessary information must be obtained from the foreign respondent or *all* of the necessary information must be through the use of "facts available". In the case of USDOC, the latter option almost always means that the necessary information is obtained from the petition filed by the interested domestic industry. For USDOC, it seems that there is no middle ground of calculating margins by matching necessary information from verified, timely produced, and usable information provided by the interested foreign party with necessary information from the petition.

42. India disagrees with this interpretation of the term "necessary information". The text of the last sentence of Article 6.8 requires that "the provisions of Annex II *shall* be observed in the *application* of this paragraph". The United States ignores this sentence in its Article 6.8 analysis. Because Article 6.8 cannot be applied except in conformity with Annex II, paragraph 3, it follows that Article 6.8 cannot be applied to allow investigating authorities to reject the use of information that meets the four conditions of Annex II, paragraph 3. To permit an interpretation of Article 6.8 that would override the provisions of Annex II, paragraph 3 would render that paragraph a nullity and would be contrary to the

very terms of the last sentence of Article 6.8. The United States' interpretation of "necessary information" is also inconsistent with the second sentence of Annex II, paragraph 1 (discussed above) and the second sentence of Annex II, paragraph 6, as discussed in India's First Submission at paragraph 62.

43. What then is the meaning of the term "necessary information" in Article 6.8? India submits that it means that investigating authorities have the authority to apply facts available to calculate margins where information necessary to do so has not been provided in an acceptable manner (*i.e.*, consistent with Annex II, paragraphs 3, 5) by a foreign interested party. India agrees with the description of the panel in *Japan Hot-Rolled* as to how Article 6.8 should function: "Thus, Article 6.8 ensures that an investigating authority will be able to *complete* an investigation and make determinations under the AD Agreement on the basis of *facts* even in the event that an interested party is unable or unwilling to provide necessary information within a reasonable period."[10]

F. US Non-Textual Rationale for its Total Facts Available Argument

44. The primary rationale the United States uses to justify its application of so-called "total facts available" under Article 6.8 is not based on the text of the AD Agreement. As noted, the United States did not even refer to Annex II, paragraph 3 in interpreting Article 6.8. Instead, the United States relies on arguments based on assertions about policy, at paragraphs 85-92 of its First Submission. The United States starts off in paragraph 85 by arguing that the object and purpose of the AD Agreement is "objective decision-making based on facts", and that the Agreement should be interpreted in a manner that would achieve that goal. The United States then argues that the *only* way to achieve this object and purpose of the AD Agreement is to arm investigating authorities with the ability to reject all facts provided by foreign respondents if such respondents fail to provide certain "necessary" facts. The United States more delicately describes this as "encourag[ing] ...responding interested parties to provide that information to the investigating authorities in a timely and accurate manner."[11] Neither of these arguments has any merit. We will now address them in turn.

1. Ensuring Objective Decision Making Based on Facts

45. India can certainly endorse the statement by the *Japan Hot-Rolled* panel that the object and purpose of the Anti-Dumping Agreement is "ensuring objective decision-making based on facts." Indeed, the merits of this statement are all the more evident when one recalls the factual context in which this statement was made. In the *Japan Hot-Rolled* dispute, the United States argued that it needed the ability to impose "facts available" from the petition, in order to motivate foreign interested parties to comply with requests for information in a

[10] WT/DS184/R, DSR 2001:X, 4769, para. 7.51.
[11] US First Submission, para. 85.

timely fashion. The panel rejected that argument, based in part on the rationale that investigating authorities must use verifiable information from foreign interested parties in order to ensure objective decision-making based on the factual data provided by foreign respondents, not limited facts supplied by petitioners. Having lost this point with the *Hot-Rolled* panel, the United States tries to use that panel decision in the current case, but in doing so, the United States turns that panel decision on its head. That is, the United States uses the *Hot-Rolled* panel decision to justify the same type of behavior rejected by the *Hot-Rolled* panel – i.e., USDOC's refusal to consider verified, timely produced information that can be used to calculate a margin.

46. "Objective decision-making based on facts" means that investigating authorities must seek, obtain, and use information from interested foreign parties that meets the criteria of Annex II, paragraph 3, within the time constraints of an investigation. But interpreting Article 6.8 of the AD Agreement as authorizing investigating authorities to discard information meeting the four conditions of Annex II, paragraph 3, allegedly in order to compel foreign producers to supply other information, would give USDOC the power to "destroy the village in order to save it". This is not and cannot be consistent with the purpose of the Agreement – to calculate margins "based on facts".

2. Existing Remedies under the AD Agreement Provide Sufficient Incentive to Encourage Cooperation without Creating an Implicit Authority to Apply Total Facts Available

47. The United States' second rationale for its "total facts available" practice is that the AD Agreement cannot be interpreted in a way that would encourage the interested foreign party to "provide only partial information" (para. 85), allow them to "provide only that select information which would not have negative consequences for them" (para. 87), and "allow the parties submitting the information to control" the decision-making (para. 90).

48. India appreciates and understands the concerns expressed by other WTO Members that investigating authorities need to preserve the tools available to them to foster cooperation and the provision of information from interested foreign parties. However, India believes that the AD Agreement already provides more than sufficient remedies to encourage balanced cooperation between investigating authorities and foreign interested parties, without broadening their scope with the draconian new remedy of "total facts available". The existing remedies encourage cooperation and decision-making based on objective facts *without* discarding information provided by respondents that meets the criteria of Annex II, paragraph 3 and that would contribute to the calculation of accurate dumping margins.

49. As the Members of the Panel know, there are very real and adverse consequences for foreign respondents who do not provide requested information. These consequences are derived from the application of facts available under

Article 6.8, as interpreted by Annex II, in particular Annex II, paragraph 1, second sentence, and adverse facts available pursuant to paragraph 7, last sentence.

50. In practical terms, the "facts available" provisions in the AD Agreement give investigating authorities the ability to use alternative sources of information not provided by foreign respondents–including, of course, the application submitted by the domestic industry. As the AD Agreement provides, an anti-dumping investigation normally is initiated in response to an application submitted by or on behalf of the domestic industry. There is an obvious incentive for the domestic applicants to seek the highest dumping margins possible, because they are claiming injury by reason of the allegedly dumped imports. The United States correctly noted this fact in one of the statements it made to the panel in the *Japan Hot-Rolled* dispute:

> Paragraph 1 [of Annex II] explicitly states that the consequences of failing to cooperate in the investigation include making a determination on the basis of the facts in the application for the initiation filed by the domestic industry. While the information in the application must be substantiated, *it is generally understood that applicants will document the highest degree of dumping that the available evidence will support.* Accordingly, while the information in the application is not *necessarily* adverse to the respondents, *it is generally presumed to be adverse.*[12]

51. In commenting on the substantiation of the information in the petition, the United States also correctly provided the *Japan Hot-Rolled* panel with the following description of the present requirements in the AD Agreement:

> Applicants [under AD Article 5.2] must include "such evidence as is reasonably available to the applicant" of dumping. There is no requirement that the evidence be complete, and no requirement that applicants strive to obtain exonerating information. Similarly, Article 5.3 requires only that investigating authorities "examine the accuracy and adequacy of the evidence provided ...to determine whether there is sufficient evidence to justify the initiation of the investigation." Investigating authorities are not required to determine whether the evidence submitted by the applicants is balanced before determining whether to initiate an investigation.[13]

52. Article 5 of the AD Agreement does not require applicants to provide *all* the information at their disposal. Rather, the requirement of Article 5.2 is for information to be supplied that is "reasonably available to the applicant". The only price information required is "information on prices" in the home and export markets under Article 5.2(iii), not *all* the information on prices. And the investigating authorities are only required to examine the "accuracy and ade-

[12] WT/DS184/R, DSR 2001:X, 4769, Annex A-2, First Submission of the United States at Part B, para. 62 (emphasis added except "necessarily") (footnote 136 deleted but discussed below).
[13] WT/DS184/R, Annex A-2 at note 136 (emphasis added).

quacy of the information provided", not whether the information provided represents all the available information. Indeed, USDOC's practice, as evident in this case, is to confirm the validity of a petition merely by checking off its contents to make sure that all the required pieces of information are present–but not to corroborate or challenge the quality or accuracy of that information.

53. As the United States properly recognizes, there is every incentive for an applicant domestic industry to include in its application the information on home market sales, cost of production, and export sales that will result in the highest possible dumping margins. Thus, the information in the application is far from neutral.

54. This permissible manipulation of facts by applicant industries is part of a careful balance in the AD Agreement. Article 5 allows the domestic industry to file a petition that is biased in its favor, and it does not require investigating authorities to insist that the petition include contrary evidence. And Annex II, paragraph 1 allows authorities to make determinations on the basis of information in that petition if "information is not supplied" by the foreign interested party. But the counterbalance to these provisions are the limitations on the use of facts available found in Annex II, paragraphs 3, 5 and 7. The Appellate Body's interpretation of Annex II, paragraph 3 in *Japan Hot-Rolled* established the proper balance by requiring the investigating authority to use information submitted by the foreign interested party that meets the four conditions of that provision. The United States' interpretation that even verified, timely produced and usable information may be disregarded because other information is not supplied would completely upset this balance.

55. Mr. Chairman, I apologize for the length of this discussion, and if it contains information and argument that may appear too obvious to some of the Panel's Members. But the inherent bias of the petition for anti-dumping duties is a fact that must be taken into account in response to the United States "policy" argument that the threat of "total facts available" is necessary to deter interested foreign parties from withholding information. This argument is not correct. In fact, the AD Agreement provides at least three *existing* means to encourage interested foreign parties to cooperate with requests to submit necessary information.

56. First, if an interested foreign party does not or fails to provide information regarding particular necessary information, then the investigating authorities have the authority under Article 6.8 to apply facts available in place of the missing information. This may properly include information from the petition that is presumed to be adverse–not neutral–to the interested foreign party.

57. Second, if an interested foreign party does not or fails to provide complete information regarding an important category of information (which could include one or more of what the USDOC refers to as the "essential components of a respondent's data"), then depending on the circumstances, it may be appropriate for investigating authorities to find that they cannot use the partial information for that category "without undue difficulties". Assuming that the authorities also find

that the interested party did not use its best efforts in attempting to supply the complete information, then the application of facts available may be appropriate as to the entire category of information.

58. This can be demonstrated through some examples. If a foreign respondent provided information only on a portion of its export sales showing that prices were well above the prices alleged in the petition but refused to provide information on the remaining export sales, the investigating authorities may be justified in finding that they cannot use the submitted export sales information "without undue difficulty". Similarly, if a foreign respondent provided information on all export sales but did not provide information on a number of necessary characteristics of such sales (for example, their physical characteristics or the prices at which they were sold), the investigating authorities may be justified in finding that they cannot use that information without undue difficulty because it is too incomplete.

59. Third, India, unlike Japan in the *Hot-Rolled* case, is not arguing that investigating authorities cannot make *adverse* inferences against respondents who impede the investigation or withhold information from investigating authorities. India agrees with the United States and the European Communities that there are instances in which adverse facts available may be appropriate where a foreign respondent has impeded the investigation or otherwise acted in a manner that suggests bad faith. It is an important incentive to encourage foreign respondents to respond to requests for information.

60. In sum, these three remedies have a significant effect in encouraging foreign respondents to produce information. Respondents who are experienced in anti-dumping matters know fully well that domestic petitioners have carefully selected information in the petition to ensure the appearance of significant dumping margins. And they also know that investigating authorities will not hesitate to use such information, including the information most adverse to respondents that impede an investigation.

61. Finally, India notes that the aggressive use by USDOC of "total facts available" has discouraged some respondents from even undertaking the enormous investment of time and effort required to submit the vast quantities of information demanded by investigating authorities. This result is contrary to the United States' professed goal in applying total facts available, of "ensuring objective decision-making based on facts". Foreign interested parties who may wish to cooperate may simply not be able to provide complete information on one of the four "essential" components of USDOC's questionnaire. If they know that their inability to provide information on, for example, cost of production, will lead to a rejection of all of the verified, timely submitted and usable information they provide on US sales and home market sales, then what is their incentive to provide *any* information? Given the very significant costs and effort required to respond to and participate in a US anti-dumping investigation, the United States' "total facts available" penalty may well lead many respondents simply to give up and not provide any information.

G. US Arguments Concerning India's Claims that Sections 776(a) and 782(e) are per se Violations of AD Article 6.8 and Annex II, Paragraph 3

62. We now turn to the United States' arguments concerning India's claims challenging Sections 776(a) and 782(e) of the US anti-dumping statute as such (per se). India refers the Panel to paragraphs 130-159 of its First Submission. The basic argument is that Section 782(e) is a mandatory, not discretionary provision, because it requires USDOC to impose additional criteria on respondents beyond the four factors in Annex II, paragraph 3, before their information can be used to calculate a dumping margin. As India has argued in its First Submission, these additional provisions have been interpreted by USDOC and the US Court of International Trade to provide the mandate for application of total facts available inconsistent with Article 6.8 and paragraph 3 of Annex II.

63. The United States responds to these arguments regarding Section 782(e) by relying on the same two arguments it used regarding Article 6.8 and Annex II, paragraph 3: first, that the use of the word "should" in Annex II, paragraph 3 authorizes USDOC to refrain from using information that meets the four conditions of that paragraph, and second, that Article 6.8 provides authority for investigating authorities to reject all facts provided if some necessary information is not supplied by the foreign respondents. As we have already discussed, neither of these arguments has merit. Should the Panel agree with India on these two points, such a finding would have obvious implications for the United States' arguments regarding Section 776(a) and Section 782(e).

64. The United States also argues in paragraphs 132 and 143 of its First Submission that "section 782(e) *contracts* the Department's ability to use the facts available by *requiring* it to consider information that meets five statutory criteria.... Thus, to the extent that section 782(e) is 'mandatory' at all, it is mandatory in a way that exceeds WTO obligations".[14] This argument is not correct. As the Appellate Body has found, Annex II, paragraph 3 creates mandatory obligations and permits investigating authorities to impose *only* four conditions that must be met by foreign respondents before their submitted information must be used by investigating authorities. WTO Members are required to ensure that any legislation addressing facts available prevents investigating authorities from imposing *additional* conditions on foreign respondents that make it easier to apply facts available. While Section 782(e) may contract USDOC's ability to use facts available, the fundamental problem is that *it does not contract that ability enough.* This is because it imposes two additional conditions that foreign respondents must meet *before* they can be assured that USDOC will use their submitted information and not the facts submitted by the petitioning domestic industry. These two additional conditions are found in Sections 782(e)(3) and (4).

65. Turning first to subsection 782(e)(3), it provides that "the information is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination". The United States admits that subsection 782(e)(3) is not

[14] US First Submission at para. 143 (emphasis in original).

found in Annex II, paragraph 3. It first argues that this condition is "plainly consistent with the goal of 'objective decision-making based on facts'".[15] As I have already described, the United States has used this "goal" to justify its entire argument that Article 6.8 permits the rejection of verified and timely submitted facts that can be used in the calculation of anti-dumping duties. The United States then argues that this reference to completeness of the information in subsection 782(e)(3), despite its absence in Annex II, paragraph 3, "simply reflects that the provision accomplishes a different purpose than section 782(e)".[16] Yet the United States has not explained the nature of this "different purpose" or why the United States has any right to impose additional criteria not provided in Annex II, paragraph 3. As India's First Submission has explained,[17] the imposition of any additional barrier to the use of actual information from foreign respondents is inconsistent with the provisions on use of facts available in Annex II, paragraph 3. The United States finally argues that Annex II, paragraph 3 uses the word "should" not "shall," apparently suggesting that the United States is free to impose as many additional restrictions as it sees fit on the use of facts actually submitted by foreign respondents.[18] Once again, the United States ignores the guidance of the Appellate Body's decision in *Japan Hot-Rolled* in making this argument.

66. The second additional requirement imposed on interested foreign respondents is subsection 782(e)(4), dealing with the best efforts of a respondent in providing information. India addressed this provision in detail in paragraphs 81-86, 150 and 157 of its First Submission. The United States does not address India's textual arguments, nor does it address the fact that neither the Appellate Body nor any of the prior panels that have examined Article 6.8 and Annex II, paragraph 3 ever included "best efforts" as an additional condition that foreign respondents must meet before their information could be used. Instead, the United States simply states that Annex II, paragraph 5 includes a similar reference to "best efforts". But this argument conflates the conditions imposed by paragraphs 3 and 5 of Annex II. In sum, there is no legitimate basis for the United States to require interested responding parties to demonstrate that they have used their best efforts in addition to the other four conditions of Annex II, paragraph 3.

67. The United States argues at paragraph 120 of its First Submission that the Panel should give considerable deference to the United States' views on the meaning of its own law. India generally agrees that certain deference regarding the meaning of municipal law should be granted to the WTO Member whose law is being interpreted. Indeed, consistent with this principle, India would expect that this Panel will pay very close attention to the United States Court of International Trade decisions and the decisions of the USDOC that are referenced in India's exhibits 28 and 29. The decisions set out in those exhibits highlight very

[15] US First Submission at para. 137.
[16] US First Submission at para. 144.
[17] India First Submission at paras. 148-149, 154-156.
[18] US First Submission at paras. 138, 144.

clearly both (1) the mandatory nature of Section 776(a) and Section 782(e), and (2) the WTO-inconsistent manner in which they have been interpreted and applied by the USCIT and the USDOC respectively.[19]

68. In addition, the interpretation by the US Congress contained in the Statement of Administrative Action (SAA) excerpted in India Exhibit 27 and referenced in paragraphs 143-144 of India's First Submission makes it clear that Section 776(a) is a mandatory provision which requires USDOC to make determinations on the basis of facts available where information is missing from the record, has been provided late or cannot be verified. The SAA also confirms that respondents are required to meet every one of the five conditions in Section 782(e) before their information can be used in an investigation.

H. AD Agreement Article 15

69. We turn now to Article 15 of the Anti-Dumping Agreement. The United States argues at paragraph 186 of its First Submission that Article 15 requires that a developing country respondent or its government must demonstrate to the investigating authority during the investigation that there are "essential interests" of their country that would be implicated by the imposition of dumping duties. India strongly objects to this argument. It is an unfortunate attempt by a developed WTO Member to read additional restrictions into a provision that already provides little benefit in terms of legal effect or certainty to developing countries such as India.

70. It is inconceivable that USDOC could *not* have been aware that the proposed imposition of anti-dumping duties in excess of 70 per cent would affect the "essential interests" of India. India, like many developing countries, is dependent on export markets to create employment. USDOC collected information during the investigation indicating that SAIL employed over 150,000 workers in over 40 facilities spread across India: this evidence is in the factual record. USDOC knew that imposition of high dumping duties would close off the US market to SAIL, negatively affecting both employment in India and the receipt of foreign exchange for India. USDOC employs thousands of civil servants with a keen knowledge of international trade and an understanding of the importance of export markets for developing countries. Indeed, in this investigation alone, USDOC investigators spent over 20 days directly experiencing the importance of trade and export sales to SAIL in discussions with many of SAIL's employees. There can be no serious question that USDOC was unaware of the importance of the US cut-to-length steel plate market to one of India's largest employers at the time that it should have been examining in detail India's request that it explore a suspension agreement.

71. In addition, contrary to the United States' assertion, there is no requirement in Article 15 of the Agreement that either SAIL or the Indian Government transmit official statements or information to USDOC on behalf of India. Anti-

[19] See India First Submission at para. 145.

dumping investigations involve private parties, not governments, and the Government of India was not an interested party in the US anti-dumping investigation on cut-to-length plate. The United States' reading of Article 15 would appear to require that a developing country private respondent must have its government initiate government-to-government contacts before the private respondent can seek a suspension agreement. The language of the Article simply does not support the imposition of any such requirement.

72. The text of Article 15 provides that "[p]ossibilities of constructive remedies ...shall be explored before applying anti-dumping duties" and that "special regard must be given by developed country Members to the situation of developing country Members". The phrasing of Article 15 indicates that these duties arise even when the developing country interested party or its government is silent. The investigating authority must determine in each case whether imposing anti-dumping duties would affect the essential interests of developing country Members, and if so must take the action required by Article 15.

73. The United States also provided with its First Submission an *ex parte* memorandum to USDOC's file, US Exhibit 21. This document does not constitute evidence that USDOC seriously explored constructive alternative remedies in good faith. The term "explore" is defined as "examine, scrutinize, search out",[20] and requires a rigorous and thoughtful examination. It means something more than a single meeting memorialized in a short paragraph in one document.

74. US Exhibit 21 states simply that USDOC said it "would consider the respondents' request, but noted that suspension agreements are rare and require special circumstances," expressing doubt as to whether those existed in this case. There is nothing in the record that USDOC actually considered the suspension request; for example, no calculations or economic analysis were provided demonstrating the impact a suspension agreement might have on the US domestic industry. The memorandum does not refer to any communication with or comments received by the domestic industry concerning India's request. It provides no analysis of whether there were "special circumstances" that applied to India's request, no discussion of what such "special circumstances" might be, and nothing to indicate that USDOC sought to explore SAIL's proposed suspension agreement in a give-and-take dialogue with SAIL. The limited discussion in US Exhibit 21 and the absence of any other documentation on this subject provided to India or in the file suggest that USDOC did not in fact "explore" SAIL's proposed suspension agreement, within the meaning of this term in Article 15. Indeed, a reasonable interpretation of US Exhibit 21 is that USDOC briefly went through the motions of hearing SAIL's request, and that it never had any intention of taking additional action on that request. This is simply not enough to reach the level of exploring constructive remedies in good faith.

[20] New Shorter Oxford Dictionary, Vol.1 at 889.

III. INDIA'S SECOND ALTERNATIVE CLAIM UNDER ANNEX II, PARAGRAPH 7 THAT USDOC IMPROPERLY APPLIED ADVERSE FACTS AVAILABLE

75. The United States argues at length that India failed to cooperate with the USDOC in the submission of data regarding its home market sales and cost of production. Indeed, much of the United States' submission focuses on this point. India's position is that the Panel need not make any findings on India's alternative claims that the United States violated Annex II, paragraph 7 with respect to its findings that SAIL did not cooperate in the preparation and submission of the cost and home market databases. However, in the event that the Panel believes it necessary to make findings on this point, the following evidence supports the finding that SAIL cooperated with USDOC in all aspects of the investigation and at no time concealed or failed to make considerable efforts to provide the information requested.

76. The fact that SAIL was not able to provide the requested home market sales and cost data in the formats required by USDOC does not indicate a failure to cooperate, but rather shows the extreme difficulties that SAIL faced in attempting to provide the data within the extremely tight time constraints imposed by USDOC. India would like to remind the Panel that SAIL produces CTL plate in 3 quasi-independent plants in different locations in India, and it has 6 regional sales offices and 42 local sales offices scattered throughout the country.[21] USDOC demanded that SAIL prepare and submit a complete home market sales database, which required that SAIL obtain and organize the sales data from all of these sales locations, and cost data from all 3 plants, even though its US sales were of merchandise produced at only one of those plants. This requirement imposed a logistical nightmare on the company. Furthermore, during the time period covered by this investigation (calendar year 1998), each of the three plants at which CTL plate was produced had a different accounting system, calculated standard costs differently, and tracked costs differently.[22] And the limitations in the communications and transportation infrastructure in India created serious difficulties as well. Telephone problems meant that the three plants were sometimes inaccessible by phone, fax or e-mail for days on end. Computers and photocopiers were in short supply.[23]

77. SAIL repeatedly pointed out these difficulties to USDOC.[24] Nonetheless, it cooperated fully with the USDOC in preparing the home market sales and cost data. Its anti-dumping "team" spent weeks at various company locations, and disrupted the normal sales and production routines of numerous personnel in order to obtain and organize the data demanded by USDOC. The company submitted literally thousands of pages of information, and repeatedly submitted its computer databases, struggling to convert its information into the required com-

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[21] India First Submission ¶ 17; Ex. IND-6 at 2; Ex IND-19 at 34.
[22] India First Submission ¶ 17; Ex. IND-15 at 33-34.
[23] India First Submission ¶ 17; Ex. IND-15 at 33-34; Ex IND-21 at 8.
[24] Ex. IND-4, cover letter; Ex. IND-6; Ex. IND-7, cover letter; Ex. IND-14 at 7-9.

puter formats. In addition, SAIL opened its doors for grueling on-site verifications by USDOC personnel at several of company locations, which lasted for weeks.[25] Another measure of the degree of SAIL's cooperation is the sheer number of company officials who participated in the sales verifications, as seen in USDOC's sales verification report.[26]

78. The United States submission highlights the six questionnaires issued to SAIL on the cost and home market sales databases[27] and suggests these represented cooperative efforts by USDOC to assist the company. This assertion simply defies reality. Nothing in these multiple questionnaires constituted an effort to assist SAIL. To the contrary, the repeated information demands placed on SAIL and USDOC's refusal to accept SAIL's data in the formats maintained in the normal course of business imposed additional burdens on a developing country respondent. Nevertheless, SAIL never abandoned its efforts to satisfy USDOC and strove to respond to each of those questionnaires.

79. The United States also asserts that USDOC's conclusion that SAIL did not cooperate was valid because "SAIL is one of the largest integrated steel producers in the world, and its records reflect that it has an established accounting system that is audited annually".[28] However, the company's size, in light of its communications and data retrieval difficulties, imposed an enormous burden, not an advantage, on SAIL. It is misleading to suggest that SAIL's size in itself means that it failed to cooperate or withheld information. Moreover, SAIL's annual audits are based on its cost and sales reporting systems used in the normal course of business. The fact that the company is audited did not make it easier for SAIL to generate the new product-specific cost data demanded by USDOC, nor did it mean that SAIL's failure to provide those data to the USDOC's satisfaction is evidence that the company failed to cooperate.

80. The United States also condemns SAIL for its statements to USDOC that it was trying to fulfill the data requests and that information would be forthcoming.[29] These statements, however, are evidence of the company's good faith – not that it was withholding evidence or failing to cooperate. The United States' position apparently is that a respondent must inform USDOC up front that it cannot satisfy its information demands. But such a statement would only lead USDOC to declare sooner that the respondent is non-cooperative and to apply "adverse facts available" to determine dumping margins. It is not realistic to expect a foreign respondent to communicate a message to the investigating authority that would be likely to trigger such a negative reaction.

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[25] India First Submission ¶ 17; Ex. IND-16 at 33-34.
[26] Ex IND-13 at 41-46.
[27] US First Submission ¶¶ 150-155.
[28] US First Submission ¶ 164, citing USDOC Redetermination on Remand, Ex IND-21.
[29] US First Submission ¶¶ 158-159, 164.

J. Affidavit of Albert Hayes

81. The United States has asserted that the affidavit of Albert Hayes, provided by India as Exhibit 24, constitutes "extra-record evidence" that should be disregarded by the panel. India disagrees. The views in the affidavit, and the views that Mr. Hayes will express today, constitute not new facts but analysis of the facts that were before USDOC during the investigation. The United States cannot seriously maintain that a WTO Member cannot raise a new *argument* before a WTO panel on the ground that USDOC did not have the opportunity to consider and address that argument in the underlying administrative proceeding. The Appellate Body in the *US–Lamb* dispute has made it clear that neither a WTO Member nor a panel is obliged to limit itself to the arguments made by the interested parties to administering authorities.[30] The GATT panel decision in *Atlantic Salmon* likewise rejected the United States' position in the context of a review of new arguments attacking the US. Anti-dumping measure.[31] The rationale for allowing new arguments is compelling - the WTO dispute settlement process is a government-to-government process, and governments have different interests to protect and pursue in WTO proceedings than those of the interested private parties in the underlying anti-dumping investigations. Thus, the suggestion by the United States that India errs in presenting different analyses and arguments demonstrating how the USDOC could have used SAIL's verified and timely produced US sales data is without merit.

82. Moreover, the Hayes affidavit does not present new evidence. The affidavit is clear on its face that it is an analysis of actual data that was before USDOC and in the USDOC record, including the sales verification report, Verification Exhibit S-8, and the petition. Mr. Hayes' analysis utilizes USDOC's computer program in use in the parallel cut-to-length plate investigations in 1999 to illustrate how USDOC *could* have used SAIL's US sales data. This is an important element of India's burden of proof in establishing a claim under Article 6.8 and Annex II, paragraph 3. USDOC improperly did not make use of its standard computer tool in determining SAIL's margins because USDOC applied its total facts available doctrine and disregarded all the data submitted. However, the standard computer program used by USDOC (and presumably similar to those used by many other WTO Member investigating AD officials) is a mechanical, result-neutral calculation device that is applied to data, and does not alter the data that were before USDOC. Whether the actual USDOC program from 1999 or some other calculating device is used is not important – the key point is that the Panel be in a position to assess whether USDOC could have used SAIL's US sales data "without undue difficulty". In India's view, this is best done by using the actual tool that USDOC *should* have used in 1999.

83. The first issue that Mr. Hayes addresses, which is set out in paragraphs 6 and 7 of his affidavit, relates to USDOC's statement in the Final Determination that SAIL's US sales data was "susceptible to correction". India agrees with this

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30 WT/DS177/AB/R, DSR 2001:IX, 4051, para. 113.
31 *See* BISD 41S/229, 360, paras. 347-351, and BISD 41S/576, 664, paras. 216-220.

statement, and Mr. Hayes' analysis demonstrates exactly how easily and quickly USDOC could have made such a correction, *based on evidence already in the record*. In fact, SAIL argued to USDOC that any errors to the US sales data were immaterial and that the SAIL's US sales data could have easily been used in combination with information in the petition.[32] Mr. Hayes' affidavit indicates just how easily this evidence could have been used by USDOC.

84. Mr. Hayes's analysis also provides three alternative methodologies that could have been used to combine information on home market sales and cost of production in the petition with the SAIL's actual US sales data. This analysis is based solely on evidence in the record

85. Mr. Hayes' analysis reflects substantial experience, largely gained during his many years on the staff of USDOC, in calculating dumping margins using data submitted by foreign respondents and USDOC's computer programs. The United States does not and cannot assert that Mr. Hayes does not have this expertise, nor has it contested the merits of Mr. Hayes' analysis. It does not deny that the standard computer program for calculating margins in the 1999 cut-to-length plate investigations is the one set out in Annex 1 to India's Exhibit 24. It does not deny that it is possible to calculate a margin using information from the petition and SAIL's actual US sales data. And it does not suggest that the three alternative methodologies proposed by Mr. Hayes would not allow the calculation of dumping margins.

86. The United States' arguments that Mr. Hayes works for a law firm and was not involved in the investigation are irrelevant to the admissibility of his analysis. He is not adding new facts to the record, but rather is presenting an analysis of the facts that are already on the record. The calculation of dumping margins can be a complex matter, requiring substantial expertise. Complaining parties, particularly developing countries, should have equal access to analytic expertise, just as they now have equal access to legal assistance in WTO dispute settlement. Being able to present alternative analyses is essential to their ability to enforce those provisions in the AD Agreement that turn on legal interpretation of the investigative process, such as the provisions at stake in this dispute. India does not believe that the United States could possibly seek or justify maintaining a monopoly on such expertise in panel proceedings. Thus, the Panel should deny the United States' request.

87. Finally, India does not deny that Mr. Hayes' analysis was prepared for use in this dispute. But all expert testimony in judicial proceedings throughout the world is prepared in this way. India encourages the Panel to consider Mr. Hayes' analysis and to review his methodologies that use the evidence in the record.

[32] Ex. IND-14 at 10, 14 (12 November 1999).

IV. STATEMENT OF ALBERT HAYES

Mr. Chairman and Members of the Panel. My name is Albert M. "Chip" Hayes. As explained in my affidavit, which is attached to India's First Submission as Exhibit 24, from 1984 to 1987 and again from 1989 to 1998, I was employed as an import compliance trade analyst with the USDOC. During my tenure with the USDOC, I worked on more than 20 different anti-dumping duty proceedings, through all stages of their life cycles, such as investigations, administrative reviews, sunset reviews, litigation and revocation. My work included more than 35 on-site verifications at respondents' locations throughout the world. I also worked on the development and revision of computer programs used to analyze the respondent companies' submitted data and to calculate dumping margins on the basis of those data. In doing so, I frequently had occasion to make adjustments to the data submitted by the respondent companies on the basis of information discovered at verification, through the use of the computer programs used to analyze the data.

89. Since October 1998, I have been employed as a senior trade analyst for the law firm of Powell Goldstein Frazer & Murphy LLP. In this capacity, I have closely reviewed the questionnaire responses and computer databases submitted to the USDOC by SAIL in the 1999 investigation of cut-to-length carbon steel plate from India. I have also reviewed the exhibits gathered by the USDOC at the verifications of SAIL in that investigation, as well as the USDOC's verification reports and determinations.

A. Ease of Calculating Sail's Dumping Margins Using Submitted US Sales Data

90. The following are my opinions regarding the USDOC's ability to use the US sales data submitted by SAIL. The USDOC can use any number of commercially available tools to calculate dumping margins, including spreadsheet programs such as Excel, Lotus, or Dbase. It can also use stronger data-processing software such as SPSS or SAS [Statistical Analysis System], which is a commercially developed and publicly-available programming language that is commonly used by USDOC. While I could go into the details of the language that USDOC could use to modify its standard program to calculate margins on SAIL's US sales by employing home-market and constructed value data from the petition, perhaps it is clearest to see the ease of any such calculation by performing it. I have done so by combining SAIL's US sales data from India's Exhibit 8 with the data in the chart from the petition that calculated a dumping margin using constructed value as normal value.

91. To do this I have created a new exhibit, India Exhibit 32. This is an addendum to SAIL's US sales database, which is included in our First Submission as Exhibit 8. In this addendum, I have calculated the total price, expense, and quantity data for all of SAIL's US sales during the period of investigation. These calculations are all based on the data in India's Exhibit 8. These data were determined by USDOC to be accurate and complete in its verification report. From

these figures I then derived a weighted-average gross US price of $346 per ton, and a weighted-average net US price of $325 per ton. The net US price was calculated by subtracting movement expenses from gross US price, in the same manner as was done in the petition.

92. I have also prepared India Exhibit 33, the first page of which is a copy of the original Figure 5 from the public version of the petition, found in India Exhibit 1. This Figure 5 shows a constructed value of $372, which is used to calculate SAIL's dumping margin.

93. My calculation of the dumping margin using SAIL's US data and the constructed value from the public version of the petition is shown on the second page of Exhibit 33. I substituted the weighted-average net US price of $325 from Exhibit 32 into the box for US price in Figure 5. I kept the constructed value figure of $372 the same. The resulting average dumping margin is 14.26 per cent. In calculating this margin, I used exactly the same methodology as that used by petitioners and USDOC when they calculated SAIL's dumping margins. The only difference was to substitute SAIL's actual weighted average US price of $346 in place of the single offer of $251.

94. I would note that this 14.26 per cent margin is based on the petition's worst-case scenario because it, in effect, applies the high constructed value to every US transaction in SAIL's US response. Options B and C in my affidavit, which use some variation of applying both the constructed value and home-market price as normal value, would calculate lower margins.

B. Using Information both from Foreign Interested Respondents and the Petition does not Lead to "absurd" results

95. I would also like to comment on the argument made by the United States that calculating a dumping margin using some information from foreign respondents and some information from the petition would lead to absurd results. First, as USDOC has recognized, there are four basic components in an anti-dumping investigation - home market sales, cost of production for products sold in the home market, export sales, and constructed value for exported products. USDOC collects, organizes and examines all of the thousands of pieces of information it receives through these four basic categories. The accuracy and completeness of each category or component of information can be and is established on its own merits, rather than with reference to other components of information. Therefore, as I have demonstrated above and in my affidavit, it is not difficult to combine information from the petition with information from the interested foreign party to calculate dumping margins.

96. The United States asserts that combining information from foreign respondents with information provided by the domestic industry in the petition would lead to absurd results. In my opinion, this is not correct. In the example cited by the United States in paragraph 88 of its First Submission, in which only cost of production information is submitted by a respondent, that information could still be used (1) to compare to home market price data contained in the

petition, and (2) to derive constructed value for comparison to US price data in the petition. Because such comparisons would be based on accurate, verified, objective cost data, they would necessarily give more accurate and objective results than relying only on the data in the petition. If there are any absurdities in this case, they would involve the discarding of an entire category of accurate, verified information in favor of information contained in the petition.

97. The same is true with the example provided by the European Communities in paragraph 10 of their Third Party Submission. In my opinion, the EC's claim that it would not be possible to determine whether submitted home market sales are in the "ordinary course of trade" if cost data are not *also* submitted, is not correct. Cost data from other sources – in particular, the petition – could be used to determine if the home market sales were at prices above the merchandise's cost of production, and hence in the "ordinary course of trade". Once again, because the home market sales data would be accurate, verified, and objective, they would necessarily give more accurate and objective results than would result from their entire rejection and reliance solely on the petition to obtain the dumping margins, as the USDOC did in this case.

ANNEX D-3

THIRD PARTY ORAL STATEMENT OF THE EUROPEAN COMMUNITIES

(24 January 2002)

1. INTRODUCTION

1. On behalf of the European Communities, let me express first our appreciation for the opportunity to submit our views in this dispute. This dispute raises an important systemic question. The question before the Panel is to what extent can an investigating authority reject data submitted when part of that data submitted has been determined to be inadequate. As is customary, the European Communities will limit its comments to the systemic issues raised and will not attempt to apply its interpretation to the particular facts of the proceeding presently before the Panel.

2. The United States have proposed a diametrically opposite interpretation to that proposed by India, and supported by Japan. The United State's argues that an investigating authority should be entitled to reject all data submitted where part of the data submitted is inadequate, while India and Japan consider that the investigating authority may only reject the specific information which is regarded as inadequate. The European Communities submits that neither of these positions is correct. That is because the Anti-Dumping Agreement is concerned with establishing a balance between the interests of exporters and the interests of domestic competitors affected by dumped imports. Finding that an investigating authority may exclude all data where only part of the data is inadequate alters that balance in favour of the domestic interests seeking protection. Finding that an investigating authority must take into account all data other than the part which is inadequate alters the balance in favour of exporters.

3. The European Communities submit that it is important to recognise that the data requested of interested parties in an anti-dumping investigation is not atomised, it does not consist of independent sets of data which have no link to one another. Consequently, failure to provide one set of data may affect the validity of other elements of data provided, which may justify rejecting data which otherwise would be perfectly acceptable. The most obvious example of such linked information would be domestic sales data, which cannot be accepted as being in the "ordinary course of trade" in the sense of Article 2.2 unless data on cost or production, selling, general and administrative costs is also provided. Pursuant to the interpretation put forward by India and supported by Japan, an investigating authority would be required to accept data on domestic sales, even if no data has been provided on cost of production etc. Following such an interpretation would thus allow an exporter to totally control an anti-dumping investigation, by submitting only information conducive to arriving at a favourable

result for the exporter, while deliberately excluding data which might have a prejudicial effect on the final result. As is clear from the rules on use of information available, and the effects of non-co-operation, the Anti-Dumping Agreement attempts to ensure that anti-dumping duties are calculated on the basis of objectively established facts.

4. As the Panel is aware, the Appellate Body has already interpreted paragraph 3 of Annex II. In *United States – Hot Rolled Steel*, the Appellate Body concluded:

> [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[1].

5. 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 clearly states than an investigating authority's ability to reject data supplied is circumscribed.

6. However, the European Communities have already noted that different sets of data are linked and that failure to provide one part of such a set of linked data might make it impossible to use other data. 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 select the information provided, and an investigating authority obliged to accept only such selected information, this provision would be rendered a nullity, because non-co-operation would possibly result in a result more favourable to the exporter concerned.

7. The European Communities note that 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.

2. CONCLUSION

8. 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

[1] Appellate Body Report, , *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, adopted 23 August 2001, DSR 2001:X, 4697, para. 81.

an exporter provides some information, but not related information. The European Communities submit that the Panel should take into account this necessary balance when interpreting these provisions of the WTO Anti-Dumping Agreement.

ANNEX D-4

THIRD PARTY ORAL STATEMENT OF CHILE

(24 January 2002)

1. Chile would like to thank the Panel for this opportunity to express our views in this dispute. We are making use of the rights provided for in article 10 of the Dispute Settlement Understanding, since we have a systemic interest in the correct application of the provisions contained in both Article VI of GATT 1994 and the Anti-Dumping Agreement (hereinafter, AD). All this is meant to avoid the abusive use of anti-dumping measures as protectionist barriers to trade.

2. Chile will not comment on the facts challenged by India nor the details of the investigation carried out by the United States authorities. We will concentrate our comments on three issues: the mandatory character of paragraphs 3 and 5 of Annex II of the AD; the meaning and scope of Article 6.8 and Annex II of the AD; and the fact that Ministers in Doha recognised that article 15 of the AD needs clarification.

Paragraphs 3 and 5 of Annex II are mandatory provisions.

3. Chile shares India's and Japan's interpretation of paragraph 3 of Annex II in the sense that it *obliges* the investigating authority to use the information provided by the interested party if such information fulfils the conditions set out in that paragraph. Furthermore, Chile agrees on the binding nature of paragraph 5 of Annex II. Which, in any case, has been well established by other Panels.

4. Chile's understanding is grounded on the Spanish version of the AD. When translated to English paragraph 3 reads: "[All information] shall be taken into account when determinations are made." In Spanish: *deberá tomarse en cuenta*. That gives a mandatory and binding character to the need to take into account the information provided by the interested party when the requirements of that paragraph are fulfilled. The English version says "should", which means "*debería"* in Spanish, a conditional tense.

5. Moreover, the Spanish version of paragraph 5 of Annex II reads: *no será justificación*, meaning "it will not justify". Again, a mandatory and binding obligation for something that in the English version is not. Should not" means "*no debería*" in Spanish.

6. The Marrakesh Agreement establishing the WTO from which the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 is an integral part, was done in the English, French and Spanish languages, each text being authentic. According to article 33 of the Vienna Convention, when a Treaty has been authenticated in two or more languages, the text is equally authoritative in each language and it is presumed that the terms of the Treaty have the same meaning in each authentic text. Then, when a comparison of the authentic texts discloses a difference of meaning the meaning which best

reconciles the text, having regard to the object and purpose of the treaty, shall be adopted.

7. In the *Mavrommatis* case, the Permanent Court of International Justice stated that, where two versions possessing equal authority exist, one of which appears to have a wider bearing than the other, it is bound to adopt the more limited interpretation which can be made to harmonise with both versions and which, as far as it goes, is doubtless in accordance with the common intention of the Parties[1].

8. Despite the United States arguments in its submission, in practice it gives a mandatory character to both paragraphs 3 and 5 of Annex II. Section 782(e) of the Tariff Act of 1930 provides that meeting the conditions there mentioned – which the United States recognises that closely tracks Annex II - the investigating authority *shall not* decline to consider the information submitted by the interested party.

9. Consequently the Panel can not but confirm that paragraphs 3 and 5 of Annex II of the AD are mandatory and binding as it is clearly drafted in the Spanish version of the Agreement being the most limited and restrictive of the versions. Such conclusion, no doubt, is in accordance with the common intention of the members as reflected in those mandatory provisions such as Article 6.8 of the AD. Further more, in the present case, the US legislation incorporates this mandatory obligations in Section 782(e).

Article 6.8 and Annex II of the Anti-Dumping Agreement.

10. Without commenting the facts and the arguments of the disputing parties, Chile would like to highlight some elements regarding the use of "facts available", envisaged in article 6.8 of the AD that must be read together with Annex II.

11. "Facts available" is a tool that the AD gives to the investigating authority in exceptional cases and under qualifying circumstances. Article 6.8 represents a delicate balance between the duty of an authority to investigate an alleged dumping situation and the duty of co-operation the interested party must provide. A balance between the need of the authority to have all the relevant information in time - to avoid disruptions and delays - and the obligation of the interested party to provide facts that in some sectors, industries and countries are not easily at hand or not always in the means or formats required by the investigative authority. A balance between the pressure sometimes needed to get the help of the interested party avoiding that it becomes a sanction against actions that may not constitute dumping.

12. Chile considers that the use of "facts available" must be done in an unbiased and objective way and in exceptional cases. As exceptional as anti dumping measures are. Article 6.8 provides some hints on when to use "facts available"

[1] Publications of the Permanent Court of International Justice Series A No. 2, 30 August 1924 Page 19.

(a) Regarding necessary information. That is to say information relevant to the investigation and without which the investigating authority might not establish the existence or margins of dumping.

(b) Whenever such information is not facilitated within a reasonable period, that is to say taking into account the specific situations in each individual case.

(c) Whenever the interested party significantly impedes the course of the investigation. A delay in the submission of part of the information might not be a serious hindrance. Unless there is proof to the contrary the industry's good faith must be presumed.

13. Therefore, the authority shall not make use of the "facts available", if it can make an objective and impartial decision based on the information provided by the interested party, even though such information might be incomplete, submitted out of date or the investigation might have been hindered.

14. If the authority is forced to use the "facts available", it should do so in an objective and impartial way, evaluating it and comparing it with the information submitted by the interested party and not accepted by the authority. The final phrase of paragraph 1 of Annex II states that the facts contained in the application for the initiation of the investigation by the domestic industry are not the only source of information. On the contrary, an objective and impartial authority should be grounded on other facts, starting with the information submitted by the interested party and that the authority rejected. Besides, in certain cases, mainly commodities and even steel, prices, production structures and market and competition conditions are internationally known and they do not generally change from one market to another. The authority should consequently take into consideration these prices and conditions.

15. Likewise, the dumping margins alleged by the home industry must be used with extreme caution, since they do not always correspond to reality and are quite often exaggerated in order to motivate the authority to initiate an investigation. Just to give some examples. While the American industry claimed a 41.78 per cent dumping margin on Chilean salmon exports, the final determination varied among the investigated companies between a 0.16 and a 10.69 per cent. More recently, it was claimed that Chilean frozen raspberry exports were being dumped into the American market with margins between 8.87 and 60.26 per cent. The preliminary ruling of the USDOC only found margins between 0 and 5.54 per cent.

16. This is twice as valid whenever there are incentives for the industry to request antidumping investigations. For example, the Continuing Dumping and Subsidy Offset Act of 2000, better known as the Byrd Amendment, contested by Chile and several other WTO members, provides a strong incentive to petitioners to exaggerate the dumping levels. The higher the margin, the greater the duties assessed and distributed among the petitioners.

17. The dumping margins claimed by the home industry are not verified. If the authority rejects information concerning the investigated company on the

grounds that it cannot be verified, it would be illogical for it to use home industry's claimed margins that were never verified.

18. Can the investigating authority totally trust the home industry's claimed margins? Chile does not believe so.

19. Consequently, Chile believes that the application of the "facts available" must be analysed individually for each specific case. An objective and impartial authority cannot apply the same parameters measures to all situations.

20. Therefore, Chile kindly requests the Panel to keep in mind these considerations when analysing the issues raised in this dispute.

Article 15

21. Given the different interpretations of article 15 of the AD, Chile would just like to remind the Panel that the Ministers, gathered in Doha, recognised that while article 15 is a mandatory provision some clarification is needed for its operationalization. In that sense, they instructed the Committee on Anti-Dumping to examine the issue and draw up appropriate recommendations on how to operationalize this provision[2]. Consequently, in view of so clear a mandate, Chile believes that the Panel should refrain from ruling on this matter.

[2] WT/MIN(01)/W/10 Par. 7.2.

ANNEX D-5

ORAL STATEMENT OF THE UNITED STATES AT THE SECOND MEETING OF THE PANEL

(26 February 2002)

1. Mr. Chairman, members of the Panel, the United States appreciates this opportunity to comment on the issues that remain outstanding in this dispute. We intend to limit our statement today to several key points. We will be pleased to receive any questions you may have at any time during our statement or during the course of this second meeting.

2. Mr. Chairman, we now have the benefit of two rounds of briefing and responses to thorough and pointed questions. At this stage in this proceeding, the fundamental issue in this dispute has become clear: whether an investigating authority is required to use a small portion of a respondent's submitted information, when the overwhelming portion is either missing or inaccurate and unverifiable, and the remaining portion is inaccurate and its use would present undue difficulties. This proceeding has been useful in identifying why the answer is "no". Even now, more than two years after the fact, India's struggle to present its submitted data in the best possible light, based on information and arguments not submitted to Commerce, has only resulted in India's concession that an ever-shrinking portion of that information may even be theoretically usable. Moreover, even the theoretical use of this limited information would have posed undue difficulties, as significant corrections would have to have been made to the US database.

3. Mr. Chairman, members of the Panel, while we have addressed the standard of review under Article 17.6 of the AD Agreement before, (1st US sub., ¶61 -¶73) comments by India in its Second Submission compel us to reiterate one point. Commerce, the US investigating authority, made its "facts available" determination in this case based on *all* the facts made available to it. *All* of these facts – as established and evaluated in the underlying investigation – informed Commerce's conclusion that, *inter alia*, 1) the Indian respondent, Steel Authority of India ("SAIL"), failed to provide the information necessary for an anti-dumping analysis; 2) its information was unverifiable; 3) what information it did provide was inaccurate, and certainly could not be used without undue difficulty; and 4) SAIL failed to act to the best of its ability in providing the necessary information that was within its own control.

4. India's strategy in this dispute has been to limit its focus – and insist that the Panel limit its focus – to *only* those facts most favourable to its case. India ignores the information that was actually necessary to conduct an anti-dumping analysis, and focuses only on the Indian respondent's export sales; in short, India ignores the forest for the tree. For example,

- India focuses exclusively on what it views as the "usable" aspects of the Indian respondent's export prices; but India ignores the explicit linkages between all of the "necessary information" needed to calculate an accurate anti-dumping margin, namely export prices, home market prices, cost of production, and constructed value. India ignores the fact that SAIL's own questionnaire responses reflected these explicit linkages. (In SAIL's export price response, for example, SAIL referred Commerce to its cost of production response for cost information needed to measure differences in physical characteristics between products. *See, e.g.*, Ex. US-28.)
- India places great emphasis on the statement in the sales verification report that Commerce "found no discrepancies" with respect to some of the individual items examined in the US sales database; but India ignores the fact that Commerce did find very significant discrepancies throughout SAIL's responses, including in the US sales database, and concluded that SAIL failed verification due to the unreliability of its data and its failure to reconcile most of its reported information to its own books and records.
- India – through its successive "affidavits" – has sought to give evidence on how computer programming might have been developed to allow the export prices for a minuscule subset of the Indian respondent's US sales data to be compared to the normal value alleged in the petition; but India ignores the fact that the underlying purpose of Commerce's exercise – to calculate an accurate dumping margin for SAIL – could not be achieved at all, and certainly not without undue difficulties, where substantially all of SAIL's information was missing or unusable.

5. In determining whether Commerce properly established the facts in this case and acted as an unbiased and objective investigating authority, the Panel must consider the *entire* administrative record to be relevant to its examination, not just that portion of the record viewed as "pertinent " by India. As the Appellate Body stated in *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel, and H-Beams from Poland*, "[t]here is a clear connection between Articles 17.6.(i) and 17.5(ii). The facts of the matter referred to in Article 17.6(i) are 'the facts made available in conformity with appropriate domestic procedures to the authorities of the importing Member' under Article 17.5(ii)".[1] Thus, all the facts established during the underlying investigation are relevant to the Panel's assessment in this case.

6. The importance of reviewing the entire record in this case is apparent given that Commerce's "facts available" determination was based on substantial flaws throughout SAIL's information. As recognized in Commerce's *Verification Failure Memorandum*, "there were substantial problems with both sales and cost data so as to undermine the integrity of the whole response".[2] The entire record of this case demonstrates that SAIL's reporting failures were pervasive, notwithstanding efforts by Commerce to assist the company through numerous exten-

[1] WT/DS122/AB/R, DSR 2001:VII, 2701, para. 117.
[2] *Verification Failure Memorandum*, Ex. US-25 at 4.

sions of time and multiple opportunities to correct its submissions. While it is the nature of anti-dumping investigations – involving as they do the commercial behavior of firms – to necessitate the submission of detailed information, here the record is comparatively small, as it relates entirely to SAIL, the single respondent at issue in this dispute. India is incorrect that the Panel's review of this matter will be "unworkable" if it considers any facts beyond that subset viewed favourably by India. The Panel should ignore India's "advice" and examine the entire record – all the pertinent facts – to assess whether Commerce's establishment of those facts was proper and that its evaluation of SAIL's information was unbiased and objective.

7. When viewed in their entirety, the facts support Commerce's conclusion that SAIL's information failed verification and that SAIL's information could not be used without undue difficulties.

SAIL's Information Is Not Verifiable Because It Failed On-Site Verification

8. The parties have discussed at length the meaning of the term "verifiable". Verification is an important tool for an investigating authority to use to assure itself of the accuracy of information, in accordance with Article 6.6 of the AD Agreement. As the United States has already explained, where information is subjected to verification but its accuracy and completeness cannot be demonstrated, the information can no longer be said to be "verifiable".[3] In the case of SAIL, an explicit factual finding was made that its information was inaccurate and incomplete and, therefore, failed verification.[4]

9. Initially, it is important to note that Commerce's decision even to conduct verification demonstrates Commerce's extraordinary effort to work with SAIL. It had been apparent that, despite numerous opportunities, SAIL had failed to fill very significant gaps in the information necessary to make an anti-dumping determination. Nevertheless, in response to SAIL's renewed pledges that it had filled these gaps, Commerce proceeded with verification. In spite of this and previous pledges, SAIL's databases remained unusable throughout the proceeding. At the on-site sales verification, Commerce discovered, *inter alia*, that SAIL failed to report a significant number of home market sales and failed to report accurate gross unit prices.[5] The total quantity and value of home market sales was unverifiable. During the on-site cost verification, which included verification of the cost information referenced in SAIL's US database, SAIL was unable to reconcile its reported costs of production to its audited financial statements.[6] It also became clear that SAIL had failed to provide constructed value information on the costs of products produced and sold to the United States.[7] Furthermore, SAIL's US database contained significant errors; Commerce found that "[w]hile these errors, *in isolation*, are susceptible to correction, when combined with

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3 *See. e.g., US* Answers to Panel's 25 January 2002 Questions at para. 92-93.
4 *Verification Failure Memorandum*, Ex. US-25.
5 *Sales Verification Report*, Ex. US-4.
6 *Cost Verification Report*, Exh. US-3.
7 *Ibid*.

other pervasive flaws in SAIL's data, these errors support our conclusion that SAIL's data on the whole is unreliable".[8] In the Final Determination, Commerce again noted that "the US sales database contained errors that, while in isolation were susceptible to correction, however when combined with the other pervasive flaws in SAIL's data" lead to the conclusion that it could not be relied upon". This phrase "in isolation" is important but is almost always omitted from India's references to Commerce's finding. But the phrase makes clear that Commerce's determination regarding the usability of the data was not made – nor was it required to be made – by examining select "categories" of information in isolation. This was appropriate: as the EC has explained, "the data requested in an anti-dumping investigation, and which is necessary for a determination, cannot be seen as isolated pieces of information".[9]

10. Notwithstanding the *Verification Failure Memorandum* – which states explicitly that SAIL's information failed verification – India asserts that "conclusions concerning the verifiability of information must take place within the particular component of information undergoing the verification process".[10] But Commerce was obligated to satisfy itself as to the accuracy of the information supplied by SAIL upon which it was to base its determination; it was not obligated to assess the accuracy of SAIL's information based only on selected facts that favoured SAIL. The anti-dumping calculation represents the sum of an investigating authority's examination of the necessary information: export prices and normal value, and, where appropriate, cost of production and constructed value. Commerce's verification outlines and reports and its *Verification Failure Memorandum* reflect the linkages throughout this information. For example:

- In the preliminary determination to use facts available, Commerce explained that SAIL's failure to provide product-specific costs meant that "it is questionable whether the reported COP, CV, and difmer data is a reliable measure of fair value". In other words, Commerce found that flaws in cost data implicated the US sales database.[11]
- SAIL was notified in the cost verification outline that it would be required to demonstrate that the variable and total manufacturing costs ("VCOM" and "TCOM") reported in the US database were consistent with the amounts reported in its COP and CV information.[12] But SAIL was unable to do so, admitting at verification that the VCOM and TCOM were incorrect.[13]
- Even SAIL's own data reflected these linkages: its US sales questionnaire response refers the reader to its cost of production response for data relevant to adjustments for physical differences. *See SAIL Questionnaire Response*, Ex. US-28.

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8 *Verification Failure Memorandum*, Exh. US-25, at 5 (emphasis added).
9 3rd Party Submission of the EC at ¶10.
10 India's Second Submission at ¶70.
11 *Preliminary Facts Available Memorandum*, Ex. US-16 at Attach. I.
12 *See Cost Verification Outline*, Ex. US-32 at 9.
13 *Verification Failure Memorandum*, Ex. US-25, at 3.

India is simply incorrect to state that the record demonstrates "the lack of any meaningful connection between the US sales database and the other information supplied by SAIL". India Rebuttal Brief at ¶85. SAIL actually relied upon some of these linkages in its questionnaire responses.

11. Notwithstanding India's effort to suggest that the Panel would have reached different conclusions had the Panel itself conducted the verification of SAIL's data, the proper question in this dispute is whether Commerce fulfilled its obligations in reaching the conclusions that it reached. Faced with a comprehensive verification failure on the part of the Indian respondent, a failure that is well-documented by the on-site verification reports and *Verification Failure Memorandum*, an unbiased and objective investigating authority could reasonably conclude that the Indian respondent's information was not verifiable, regardless of the apparent accuracy of individual pieces of information when viewed alone.

SAIL's Information Cannot Be Used Without Undue Difficulties

12. At the first meeting, Mr. Chairman, the Panel identified one of the key issues in this dispute: whether SAIL's information could have been used without "undue difficulties". We note that the question of undue difficulties need not even arise if it is determined that Commerce was correct in determining that SAIL failed verification. On this basis alone, Commerce would have been justified in disregarding all of SAIL's reported information under Annex II, Paragraph 3, of the AD Agreement. In any event, as we explained in our 18 February 2002 submission, even based on India's own criteria, an unbiased and objective investigating authority could readily conclude that SAIL's information could not be used without undue difficulties. First, in determining the completeness of the information provided by SAIL, an unbiased and objective investigating authority could reasonably conclude that the failure to provide usable home market, export price, cost of production, and constructed value information meant that the information necessary for the calculation of a dumping margin was incomplete. Second, in determining the extent to which some small pieces of information provided by SAIL could be identified and used with other information to calculate a dumping margin, an unbiased and objective investigating authority could reasonably conclude that too much of SAIL's information was missing to calculate a margin. Third, in assessing the amount of the necessary information provided by SAIL that could be used, an unbiased and objective investigating authority could reasonably conclude that without any usable home market, cost of production, and constructed value information, and with export price information containing significant flaws, Commerce had almost none of the information necessary for conducting an anti-dumping analysis. Fourth, in determining the amount of time and effort required to use SAIL's information, an unbiased and objective investigating authority could reasonably conclude that it would involve a great deal of time and effort to address the unusable home market, export price, cost of production, and constructed value information and to identify any small pieces of data that might have been usable. Finally, in assessing the accuracy of

alternative information that could be used, an unbiased and objective investigating authority could reasonably conclude that the facts available as provided in the petition are no less accurate and reliable than the information submitted by the respondent. Commerce did not have usable information from SAIL and, therefore, there is no way to know whether the facts available relied upon by Commerce are more or less reliable vis-a-vis SAIL's information. Only by providing the necessary information could SAIL guarantee a result that would accurately reflect SAIL's own selling practices. But it did not do so. For these reasons, SAIL's information could not be used without undue difficulties.

The Second "Affidavit": India's New Theories for Using SAIL's US Database

13. At the first meeting and in our submission, we have explained the ways in which the first "affidavit" submitted by India is flawed in many respects. In addition to offering new facts, the first "affidavit" offers three flawed options: 1) option 1 would have Commerce use a below-cost price as normal value, contrary to the requirement that sales be in the ordinary course of trade; 2) option 2 would have Commerce compare export prices to a normal value based on different products without making an adjustment for those differences, contrary to the requirement in Article 2.4 of the AD Agreement that adjustments be made for physical differences; and 3) option 3 would have Commerce calculate a margin for SAIL using a small subset of SAIL's US database.

14. Together with its answers to Panel questions, India has now submitted a second "affidavit" from its representative in this dispute purporting to describe the ease with which pieces of SAIL's information can be manipulated to calculate a dumping margin. After making undisclosed changes to SAIL's database, counsel to India now concludes that over 30 per cent of SAIL's export sales are identical to the merchandise upon which the petition based constructed value. Therefore, without any additional consideration of the remaining 70 per cent of US sales, India's view is that Commerce need only have taken that subset of the US sales database that would not be impacted by the missing cost information, and then make corrections based on the errors discovered at verification.

15. First, we disagree with India's assertion that 30 per cent of the merchandise sold to the United States is identical to the merchandise upon which the CV in the petition is based. The "affidavit" does not demonstrate how the 30 per cent figure was determined. Based on our examination of SAIL's US sales data, as it was submitted on 1 September 1999, to Commerce, less than one percent of the US sales appears to be identical to the product upon which the normal value in the petition was based. With less than one percent matching to the NV, with adjustments needing to be made before anything else in the US database might be utilized, and recognizing the breadth of the errors found throughout the rest of SAIL's data, the question becomes: was it proper for Commerce to reach the common sense conclusion that – without the necessary information to calculate an accurate margin for SAIL – it was consistent with the AD Agreement for Commerce to decide not to undertake further efforts and undue difficulties and,

instead, to make its *Final Determination* based on the facts available in the petition. In our view, an objective and unbiased investigating authority could properly have come to this conclusion.

16. And India's theories are just as flawed as those offered previously. India makes much of the fact that US law makes adjustments for differences in physical characteristics to normal value, which is true. But this ignores the more important point that Article 2.4 *requires* that such an adjustment be made between export prices and normal value and India concedes that SAIL's data (including its US sales database) did not permit Commerce to do so. Commerce made this point in the underlying investigation and has raised this point again in response to India 's proposal that Commerce compare SAIL's US prices to the normal value in the petition, even though possibly as many as 99 per cent of those sales would have required a difmer adjustment.

17. The second "affidavit" also repeats errors from the first "affidavit:" proposing that Commerce create an average NV based in part on a price that the petition evidences is below SAIL's cost of production and, hence, not in the ordinary course of trade; in accordance with Art. 2.2.1. of the AD Agreement, Commerce is entirely within its rights to disregard such a price.

18. India's presentation of these new theories continues to highlight the fact that, even though India suggests that these theories should have been obvious to Commerce during the investigation, they were not sufficiently obvious to SAIL for it to have presented them at that time; moreover, even with the benefit of hindsight, the theories have not been so obvious that India has not had to revise and refine them over the course of this proceeding. Finally, India's presentation of its theories underscores its recognition that even less of SAIL's anti-dumping database is arguably usable than India asserted at the outset of this proceeding. All of which begs the question: if an investigating authority is charged with making a timely anti-dumping determination based on a fair comparison of export prices and normal value based on sales in the ordinary course of trade, and is faced with information that is unusable for such a determination, is that authority obligated to make every correction, manipulation, and presumption required to find whether there is any small subset of that information that may be accurate, verified, and usable without undue difficulties. We find no such obligation in the AD Agreement; indeed, where there has been such a failure to cooperate, Annex II, paragraph 7 anticipates a result less favourable to a respondent than if it had provided the necessary information.

India's Challenge to the US Statute

19. The "facts available" provision of the US statute mandates *use* of information under specified conditions; it does not require the *rejection* of information. To illustrate this point, in response to the Panel's request, we offered at least two examples of administrative cases in which Commerce accepted information even though it did not satisfy each of the conditions of section 782(e) of the US statute. India's response has been to dismiss these cases as irrelevant, while at the same time citing one of the cases – *Steel Bar from India* – for the proposition

that Commerce could accept a flawed database. No doubt there are more cases that would rebut India's claim but the more salient point is this: the US legislation "as such" can violate WTO obligations *only* if the legislation *mandates* action that is inconsistent with those obligations or precludes action that is consistent with those obligations. (1st US sub., ¶116-¶118). The "facts available" provision of the US statute does neither and, therefore, India has shown no violation of WTO obligations here.

Conclusion

20. Our purpose today has been twofold: to focus on the interpretative issues that remain in dispute and also to highlight the fact that in this case – more than many – the facts are very important to the Panel's decision. We believe strongly that the Panel should evaluate India's claim in the context of how Commerce acted throughout the entire underlying proceeding. Viewed in this light, the record reveals an investigating authority making extraordinary efforts to cooperate with a respondent, dedicating what may have been unprecedented efforts to assist the respondent, but nevertheless lacking the information necessary for making its anti-dumping determination. In such circumstances, the authority, in an unbiased and objective manner, may base its determination entirely on facts available. That is exactly what Commerce did in this case.

21. This concludes our presentation today. We would welcome the opportunity to address areas of concern or interest to the Panel in response to questions. Thank you.

ANNEX D-6

ORAL STATEMENT OF INDIA AT THE SECOND MEETING OF THE PANEL

(26 February 2002)

Mr. Chairman and Members of the Panel:

1. On behalf of the Government of India, I would like to begin by again thanking the Chairman, the members of the Panel, and the Secretariat for continuing to work in addressing the measures and claims at issue in this dispute. India looks forward to working with you and with the delegation of the United States during the remainder of this proceeding. My delegation today consists of myself and Mr. M.K. Rao of the Permanent Mission of India to the WTO, Mr. Jha and Dr. Dhawan of the Steel Authority of India Ltd., and Scott Andersen, Neil Ellis, and Albert Hayes of the law firm of Powell, Goldstein, Frazer & Murphy.

Introduction

2. Mr. Chairman and Members of the Panel, you have a great number of submissions before you, and it may seem at this point that this has become a complicated case. But the essence of this dispute is straightforward and has only one basic theme: whether investigating authorities may discard information that is timely submitted, verifiable, and usable when they determine the margin of dumping. This basic legal issue– which has been largely resolved in the *Japan Hot-Rolled* case– permeates all of India's claims relating to the three groupings of measures at issue in this case:

- the final anti-dumping order;
- the statutory provisions– section 782(e)(3) and (4), and sections 776(a), 782(d), and 782(e)– which India has challenged both *per se* and as applied in the final anti-dumping order; and
- USDOC's long-standing practice of applying total facts available, which India challenges as applied in the final anti-dumping order.

3. There are pertinent facts that support India's basic claims in this dispute. India has addressed these facts extensively in its various submissions and will discuss some of them again here today. They include the following:

- USDOC's own verifiers found this US sales information to be accurate, complete and reliable, with only a very few minor errors, on the basis of a long and comprehensive verification process. USDOC based its conclusion that all of SAIL's information failed verification on problems in the home market and cost of produc-

tion databases - not on any uncorrectable problems in the US sales database.

- While the United States as a litigant now presents *post hoc* evaluations questioning the usability of this verified US sales information, in the Final Determination USDOC concluded that SAIL's US sales data were "useable" if corrections and revisions were made to the data. USDOC also concluded in the Final Determination that these errors were "susceptible to correction."
- These conclusions by USDOC were correct. SAIL's US sales data is easily usable in combination with the normal value information in the petition. Any adjustments and corrections to the US sales data necessary to permit its use are simple to make and consistent with the type of adjustments USDOC frequently does make.
- SAIL acted to the best of its ability in assembling and producing the US sales information that USDOC verified. There is no evidence, nor does the United States allege, that SAIL withheld information or acted in bad faith to prevent the production of any other information during the investigation.
- When it was time for USDOC to make a final determination, SAIL's verifiable and usable data US sales data represented one-half of the information USDOC needed to calculate a dumping margin – the other half being the information needed for normal value.
- Yet at that critical time, notwithstanding SAIL's cooperation and efforts in producing its US sales information, USDOC refused to cooperate by examining SAIL's US sales data to determine whether it could be used in combination with the normal value information in the petition. Instead, it used the single price offer of $251 in the petition as the sole basis for the export price in calculating a dumping margin of 72.49 per cent.

4. Mr. Chairman and Members of the Panel, we will address the key legal and factual issues for each of the measures and claims asserted by India during this dispute and also respond to arguments raised by the United States. As we head into the details, India requests you to keep the basics in mind: that SAIL's US sales data were verifiable, that SAIL's US sales data were usable to calculate a dumping margin, that USDOC was required under the AD Agreement to use SAIL's US database and that USDOC ignored that requirement. In addition, USDOC did not make a "fair comparison" when it discarded SAIL's actual US sales information and used instead a fictitious offer price of $251 that predictably resulted in a huge dumping margin. That dumping margin has closed off the US market to SAIL's cut-to-length plate for more than two years.

5. Mr. Andersen will now present the argument for the Government of India.

I. INDIA'S CLAIMS REGARDING THE FINAL ANTI-DUMPING MEASURE

A. Interpretative Issues Regarding Article 6.8 and Annex II, Paragraph 3

6. The key legal provisions in this proceeding are Article 6.8 and Annex II, paragraph 3. While the parties have made extensive submissions on the interpretation of these provisions, the central question is quite straightforward: Do Article 6.8 and Annex II require investigating authorities to use a respondent's timely-submitted, verifiable information where *other* information submitted by the respondent is not usable? In reviewing this issue, the Panel should bear in mind that it has already been addressed and resolved in India's favour by the panel and the Appellate Body in the *Japan Hot-Rolled* dispute.

7. The Appellate Body in *Japan Hot-Rolled* described the nature and function of Article 6.8 in the following terms: "Article 6.8 identifies the circumstances in which investigating authorities may overcome a lack of information, in the responses of the interested parties, by using "facts" which are otherwise "available" to the investigating authorities." According to the Appellate Body, "if information is, in fact, supplied 'within a reasonable period', the investigating authorities *cannot use facts available, but must use the information submitted by the interested party*."[1] The Appellate Body then went on to explain the relationship between Article 6.8 and Annex II as follows:

> Like Article 6.8, paragraph 1 of Annex II indicates that determinations may *not* be based on facts available when information is supplied within a 'reasonable time' but should, instead, be based on the information submitted. Neither Article 6.8 nor paragraph 1 of Annex II expressly addresses the question of when the investigating authorities are entitled to *reject* information submitted by interested parties, as USDOC did in this case. In our view, paragraph 3 of Annex II of the *Anti-Dumping Agreement* bears on this issue...Thus, according 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.[2]

8. This interpretation by the Appellate Body either disposes of or, at a minimum, provides very helpful guidance in addressing many of the issues raised by the United States in this dispute.

9. First, the United States repeatedly ignores Annex II, paragraph 3 in interpreting Article 6.8. However, Article 6.8 describes the situations in which inves-

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[1] WT/DS184/AB/R, DSR 2001:X, 4697, para. 77 (emphasis added, except "cannot").
[2] WT/DS184/AB/R, paras. 79-81 (emphasis in original).

tigating authorities may have recourse to facts available, but does not address the question *when* information submitted by a respondent may be rejected. Instead, the Appellate Body's ruling makes it clear that Annex II, paragraph 3 governs that determination. India notes that the Appellate Body's interpretation is fully consistent with the text of Article 6.8, which stipulates that "the provisions of Annex II *shall* be observed in the application of this paragraph."

10. Second, the language of Annex II, paragraph 3 is *mandatory* - investigating authorities are *"not entitled to reject information submitted when making a determination*" that meets the four conditions of the paragraph. This unequivocal holding by the Appellate Body disposes of the United States' argument that Annex II, paragraph 3 is discretionary because it contains the term "should." The Appellate Body first cited the text of Annex II, paragraph 3 and then used the compulsory terms "must use" (regarding Article 6.8) and "not entitled" (regarding Annex II, paragraph 3) to interpret this provision. There can be no doubt that the Appellate Body considered Annex II, paragraph 3 as imposing mandatory, not optional, obligations on investigating authorities.

11. Third, the Appellate Body's statement that investigating authorities are "directed to use information" meeting the four conditions of Annex II, paragraph 3, also controls the meaning of the phrase "should be taken into account when making a determination." Through its repeated use of terms such as "must use", "are directed to use information" and "not entitled to reject information submitted when making a determination" in interpreting Article 6.8 and Annex II, paragraph 3, the Appellate Body does not contemplate that information could be simply "considered" but *not* used, as the United States has argued.[3] Rather, information from a respondent that meets the four conditions of Annex II, paragraph 3 must be "used" in a substantive sense when making a "determination," either of dumping, under Article 2, or of injury, under Article 3.

12. Fourth, the Appellate Body has ruled that individual pieces of information - such as the "weight conversion factor" at issue in the *Japan Hot-Rolled* case– must be separately examined under Annex II, paragraph 3, and, if they meet the conditions of the paragraph, they must be "used" in the determination. This undermines the United States' assertions that investigating authorities have the discretion to decide whether or not to use particular pieces of information that meet the requirements of Annex II, paragraph 3 because *other* information does not meet those requirements.

13. Fifth, the Appellate Body ruling demonstrates that Article 6.8 and Annex II provide a methodology to fill gaps when some necessary information is not properly provided by a foreign respondent. Thus, the Appellate Body described Article 6.8 as identifying "the circumstances in which investigating authorities may *overcome a lack of information*, in the responses of the interested parties, by using 'facts' which are otherwise 'available' to the investigating authorities."[4]

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[3] US Answer to Question 4, paras. 10-11.

[4] WT/DS184/AB/R, para. 77 (emphasis added). The *Japan Hot-Rolled* panel reached a similar conclusion, stating that:

14. Contrary to the United States' assertions, therefore, Article 6.8 does not grant an investigating authority *carte blanche* to use "total" facts available without going through the steps provided in Annex II. The United States takes issue with India's argument that Annex II, paragraph 3 requires that portions, categories, components – whatever term one prefers – of information that meet the requirements of the paragraph 3 must be used. But the United States states in paragraph 24 of its Second Written Submission that "applying the guidelines in Annex II, an investigating authority may determine that it is appropriate to use all, some or none of the information provided by the exporter, depending on the facts of the case." Given that the United States accepts that the use of "some" information may be appropriate, its repeated objections to India's use of terms such as "categories" and "portions" to describe that "some" are unavailing. After all, the United States' own practice of using "partial" facts available involves nothing more than using *some* portions of respondents' data and replacing others. Presumably, the United States' authority to do this is also derived from Article 6.8 and Annex II.

15. In its Second Written Submission, the United States attempts to read the phrases "necessary information" and "preliminary and final determinations" as absolute concepts that entitle the investigating authority to bypass the guidelines of Annex II, paragraph 3 and resort to "total" facts available. These arguments cannot be sustained. India notes that Article 6.8 refers to "necessary information." It does not say "*all* necessary information" and it does not say "*any* necessary information." Again, as the United States seems to accept with its partial facts available practice, this provision clearly contemplates situations where some necessary information is available from the respondent and some is not. This conclusion is reinforced by the language of Annex II, paragraphs 3 and 5, both of which also contemplate that there may be some information that is usable and some that is not. But nothing in this language supports the United States' leap in logic to the conclusion that once USDOC determines that some necessary information is missing, it is then free – at its sole discretion - to reject information that is not missing and that meets the requirements of Annex II, paragraph 3.

16. Similarly, and again contrary to the United States' arguments, the reference to "preliminary and final determinations" in Article 6.8 does not imply that investigating authorities may reject information that meets the requirements of Annex II, paragraph 3. The word "determination" as used in Article 6.8 and throughout the Anti-dumping Agreement refers to two kinds of findings – the determination of dumping, under Article 2, and the determination of injury, under Article 3. The mere fact that Article 6.8 refers to the use of facts available in making a "determination" of dumping or injury, under Articles 2 and 3 respectively, cannot possibly mean that USDOC is free not to follow the guidelines of

Thus, Article 6.8 ensures that an investigating authority will be able to complete an investigation and make determinations under the AD Agreement on the basis of facts even in the event that an interested party is unable or unwilling to provide necessary information within a reasonable period. WT/DS184/R, para. 7.51.

Annex II, paragraphs 3-7 in deciding what information to use in making those determinations.[5]

17. Finally, the United States' reliance on Annex II, paragraph 1 is also misguided. In paragraphs 29-32 of its Second Written Submission, the United States repeats its argument that the statement in the second sentence of Annex II, paragraph 1, that the investigating authorities may be free to use facts available, including facts taken from the application, means that the investigating authority may base its determination entirely on facts available and reject information that meets the requirements of Annex II, paragraph 3. However, just as nothing in the phrases "necessary information" and "determination" limit the applicability of Annex II, paragraph 3, likewise nothing in the language of paragraph 1 permits the investigating authorities to ignore the mandatory guidelines of paragraph 3.

18. In sum, the United States' position is contrary to the Appellate Body's interpretation of the relevant provisions of the Agreement in the *Japan – Hot-Rolled* case. The Appellate Body described Articles 6.1, 6.8 and Annex II as "establish[ing] a coherent framework for the treatment, by investigating authorities, of information submitted by interested parties."[6] In India's view, this means that an investigating authority is required to treat information submitted by interested parties in the manner called for under that "coherent framework." As we have seen, in the Appellate Body's view, that "coherent framework" includes a mandatory requirement that information submitted by a respondent must be used if it meets the requirements of Annex II, paragraph 3. In this case, in contrast, the United States seeks authority to be able to pick and choose what parts of the "coherent framework" it will apply. For the reasons India has given, this position is inconsistent with both the text and purpose of Article 6.8 and Annex II.

B. The United States' post hoc Evaluation of the Facts

19. Mr. Chairman, we do not believe that India needs to add anything to its already extensive demonstration that the United States as a litigant is now re-evaluating the facts regarding the verifiability and usability of SAIL's US sales data. This effort by the United States is totally improper under the Panel's standard of review under AD Agreement Article 17.6(i).[7] The Panel should strongly condemn such *post hoc* rationalizations, and disregard the United States' new evaluations of facts.[8]

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[5] This conclusion is supported by the text of Article 12.2.1(iii), which requires authorities to give public notice of, *inter alia*, "the margins of dumping established and a full explanation of the reasons for the methodology used in the establishment and comparison of the export price and the normal value under Article 2."

[6] WT/DS184/AB/R, para. 82.

[7] *See* India Rebuttal Submission, paras. 25-42; India Comments on US Answers, paras. 2-7.

[8] These new evaluations are found, for example, in the United States' Answers to Panel Questions 7-10, 14-16, and 18. They are also seen in paragraphs 40-41, 47-48 of the United States' Second Submission - specifically, the entire paragraph 40; the first, third and fourth sentences of paragraph 41; the indented clause in the fifth sentence of paragraph 47; and the second, third, fifth, and sixth sentences of paragraph 48.

20. In sum, the Panel should find that USDOC properly evaluated the following facts in the anti-dumping investigation: (1) that SAIL's "US sales database would require some revisions and corrections in order to be useable", and (2) that the revisions and corrections needed make SAIL's US database useable were "susceptible to correction." Any contrary new evaluations as to the "unusability" or alleged impossibility of correcting SAIL's database such as those proposed by the United States as a litigant in this case should be rejected as *post hoc* evaluations not consistent with Article 17.6(i) of the Agreement.

C. India's Claims under Article 6.8 and Annex II, Paragraph 3

21. India would now like to address the key factual aspects of its claim under Article 6.8 and Annex II, paragraph 3. Reduced to its essence, this claim is whether SAIL's US sales information met the four conditions of Annex II, paragraph 3. As the Panel knows, there is no dispute about two of the four conditions - SAIL's US sales information was timely submitted, and it was in the computer format requested by USDOC. Therefore, the only two issues before the Panel are: (1) whether this information was either verified or verifiable, and (2) whether it was usable in combination with the normal value information in the petition to calculate a dumping margin.

22. As a preliminary matter, in assessing USDOC's evaluation of the elements of "verifiable" and "without undue difficulty" in Annex II, paragraph 3, it is important to keep in mind three key obligations imposed on USDOC by the AD Agreement. The first is the requirement to make an "objective evaluation of the facts" under Article 17.6(i). The Appellate Body in *Japan Hot-Rolled* indicated that an "objective examination of the facts" includes the manner in which evidence is "inquired into" and "subsequently evaluated." The Appellate Body suggested that any such inquiry and evaluation "must conform to the dictates of the basic principles of good faith and fundamental fairness" - *i.e.*, in an unbiased manner, they must be conducted without favoring the interests of any interested party, or group of interested parties in the investigation.[9]

23. A second obligation related to the notion of "fundamental fairness" is the duty of investigating authorities to act "cooperatively" during all phases of the

[9] The Appellate Body in *Japan Hot-Rolled* evaluated the expression "objective examination" in Article 3.1 of the AD Agreement in the following manner:

> The word "examination", relates, in our view, to the way in which the evidence is gathered, inquired into and subsequently evaluated; that is, it relates to the conduct of the investigation generally. The word "objective", which qualifies the word "examination", indicates essentially that the "examination" process must conform to the dictates of the basic principles of good faith and fundamental fairness. In short, an "objective examination" requires that the domestic industry, and the effects of dumped imports, be investigated in an unbiased manner, without favoring the interests of any interested party, or group of interested parties in the investigation. The duty of the investigating authorities to conduct an "objective examination" recognizes that the determinations will be influenced by objectivity, or any lack thereof, of the investigative process.
>
> WT/DS184/AB/R, para. 193 (emphasis added).

investigation - including in their decisions regarding the acceptance of information and in calculating a dumping margin. The Appellate Body in *Japan Hot-Rolled* stated that "cooperation" is a two-way process, requiring effort by both the foreign interested party *and* the investigating authority.[10] In the context of the present dispute, SAIL was required to cooperate in collecting and producing a US sales database, and in making all source documents related to that US sales database available for USDOC's examination.

24. For its part, USDOC was required to "cooperate" by undertaking a similar level of effort to examine whether SAIL's US sales database was verifiable independently- not just in the event that other data supplied by SAIL were also verifiable. And USDOC was required to "cooperate" by making efforts to use SAIL's US sales data to calculate margins by comparing the data to the normal value information in the petition. This meant making any corrections that were susceptible to correction, using facts available to fill gaps where information was not available, and employing USDOC's demonstrated procedural flexibility to use information (as demonstrated in its *Stainless Bar* decision). But "cooperation" does *not* mean simply referring to a "long-standing practice" of total facts available as the sole rationale for not conducting a separate examination of the "verifiability" and "usability" of SAIL's US sales data. Such an evaluation reflects no cooperation at all.

25. Third, USDOC is bound by Article 6.8 and Annex II, paragraph 3. As India has argued, these provisions required USDOC to conduct a separate examination of particular information - be it categories, sets, components or just pieces - to determine whether it was "verifiable" and "usable." We now examine USDOC's evaluation of the facts as to whether SAIL's US sales database was "verifiable" and "usable without undue difficulties", in light of these three related obligations.

1. SAIL's US Sales Information was "verifiable"

26. India's position on the legal requirements imposed by the term "verifiable" has been set forth in detail in its Rebuttal Submission and Answers to the Panel's questions.[11] To sum up, "verifiable" in Annex II, paragraph 3 means that information must be capable of being verified. The term "verifiable" does not mean that every item in the database must be actually compared against source document, but rather that the database is in a form which enables it to be compared to the relevant source documents. But the standard for "verifiable" data is not perfection, as the United States now suggests. It is the rare database that survives a one-week verification without any minor errors being found. Rather, if the examination of the source documents reveals no significant systemic problems with reporting, accuracy, completeness, or reliability of the reported infor-

[10] WT/DS184/AB/R, para. 104 ("Article 6.13 thus underscores that 'cooperation' is, indeed, a two-way process involving joint effort").
[11] India Rebuttal Submission, paras. 66-73.

mation, then the database is capable of being verified and therefore "verifiable." Mr. Hayes will address this point later in this statement.

27. USDOC found that all of SAIL's information "failed verification."[12] The United States argues that this finding of verification failure "rebuts any assertion that information was able to be verified or proved to be true."[13] This argument has no merit. Its logic would require the Panel to simply accept any conclusory finding by USDOC on verification without determining under AD Article 17.6(i) "whether [the authorities'] evaluation of those facts was unbiased and objective." The Panel must examine the pertinent facts of the record to determine if an unbiased and objective authority could have concluded that SAIL's US sales data was not verifiable. The starting point is the Final Determination, where, in evaluating whether *all* of SAIL's information produced in the investigation "can be verified" under section 782(e)(2), USDOC stated that "we were not able to verify SAIL's questionnaire response due to the fact that essential components of the responses *(i.e., the home market and cost databases)* contained significant errors." [14] The Memorandum of Verification Failure contains a separate "verifiability" finding for SAIL's US sales, which concludes that the isolated errors in that database were "susceptible to correction ...."[15]

28. The only real evaluation of the facts of SAIL's US sales data is set forth in the Sales Verification Report, which describes the evaluation of SAIL's US database in comparison with the company's source documents. I do not intend to review in detail all of the different ways in which the computerized data in SAIL's US sales database were found to be, with a few minor exceptions, accurate and complete. USDOC's evaluation is set out in pages 8-15, and its statements speak for themselves.

29. Nevertheless, the United States now claims that USDOC's repeated "no discrepancy" findings in the verification report are not significant because the verification was only a "spot check."[16] This new conclusion (which is not found in any contemporaneous statements by USDOC) is belied by the facts of this case. *Every* verification is a "spot check" to some extent. No one pretends in this case that USDOC looked at every single source document concerning SAIL's US sales database that SAIL could have put before the USDOC investigators. But USDOC's verification of SAIL's US sales data took over one week and was very

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[12] Verification Failure Memorandum, Ex.IND-16.

[13] United States Second Written Submission, para. 38.

[14] Ex. IND-17 at 73127 (emphasis added).

[15] The full text is as follows:

> As detailed in the Sales Verification Report, several errors were described in the US sales database. While these errors, in isolation, *are susceptible to correction, when combined with other pervasive flaws in SAIL's data*, these errors support our conclusion that *SAIL's data on the whole is unreliable*. The fact that *limited errors were found* must not be viewed as testimony as to the underlying reliability of the SAIL's reporting, particularly when viewed in context *the widespread problems encountered with all the other data* in the questionnaire response.

Ex. IND-16 at 5 (emphasis added).

[16] United States Second Submission, para. 39.

thorough.[17] The Panel should keep the following facts in mind when assessing the United States' new argument:

30. First, SAIL entered into only nine contracts to ship steel to the United States during the entire period of investigation. USDOC officials examined all nine contracts during the verification.[18] One of these contracts was taken by USDOC as a verification exhibit,[19] and is set forth in India Exhibit 40. Like the other eight contracts, this contract reflects a base price covered by the contract.[20] In the case of Exhibit 40, the base price is $345 per ton, with additions of $5 to $30 per ton for "extras" in accordance with industry practice. In other words, USDOC verifiers were able to determine simply from these nine contracts the most important aspect of the US sales database– the lowest price for all of SAIL's plate shipped to the United States. None of those prices was even remotely close to the $251 price in the petition.

31. Second, unlike many verifications in which only a limited spot-check audit takes place, USDOC stated here that "we were able to test the accuracy of the reporting for a *large* number of individual sales transactions."[21] Even the United States admits that "SAIL made relatively few export sales."[22] Thus, during the course of the one-week verification process, computer data entries for a "large number of individual sales transactions" were *verified* against actual source documents and found to be accurate.

32. Third, the source documents for SAIL's US sales database were maintained in only three company locations, all of which were visited by USDOC's sales verification team – Calcutta, New Delhi, and Vizag.[23] USDOC's verifiers thoroughly reviewed many of the source documents related to the US sales data and had access to all the relevant source documents.

33. As the Panel knows from reviewing pages 8-15 in the Sales Verification Report, USDOC verifiers examined a wide range of source documents, all of which repeatedly confirmed the accuracy of SAIL's US database. SAIL's US sales database was found to have very few inaccuracies, and none that were not susceptible to correction. Contrary to the US arguments, the repeated findings of "no discrepancies" between SAIL's reported computer data and the source docu-

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[17] The USDOC sales verifiers were in India for over two weeks. At least the first half of that period was spent on the verification process for SAIL's US sales data. The remaining portion was spent reviewing SAIL's home market sales.

[18] Sales Verification Report, at 13 (Ex. IND-13) ("During the POI, SAIL had nine contracts that covered all sales made to the US").

[19] It was included as pp. 46-67 of Verification Exhibit S-7.

[20] Ex. IND-40 at 19.

[21] Ex. IND-13 at 14.

[22] United States First Submission, para. 163. By way of comparison, SAIL had over 100,000 sales of cut-to-length plate in its home market during the period of investigation. *See* Sales Verification Report at 34 (Ex. IND-13).

[23] Ind. Ex.-13 at 8. The New Delhi office maintained all the export negotiation documents for the 9 contracts and the Calcutta office maintained the documents for the execution of the 9 contracts. The Vizag branch office handled the shipping documents for the 9 contracts, and copies of those documents were returned to Calcutta.

ments establish that the information reviewed was verifiable. These findings certainly do not support USDOC's unsupported conclusion in the Verification Failure Memorandum that SAIL's US sales data - along with all the other data supplied by SAIL - failed verification. India refers the Panel to India's earlier arguments describing this successful verification in detail.[24]

34. The Sales Verification Report also demonstrates that there was little, if any, connection between the source documents for SAIL's cost of production and home market sales databases and the source documents used to verify SAIL's US sales database.[25] The following facts show that the problems identified in home market database were unique to that database, and did not affect the verifiability of SAIL's database: (1) the number of home market sales - well over 100,000 transactions[26] - was enormous by comparison to the US sales database (1284 transactions under 9 contracts); (2) home market sales were produced at three plants, and were sold from those locations as well as over 40 sales branch offices, while US sales were through a single, centralized system and produced at a single plant; (3) some of the stockyards from which home market deliveries were made had no computerized data entry capabilities, requiring manual recordkeeping and data transfers to SAIL's offices;[27] (4) some shipments from the plants were diverted to stockyards and then sold to home market customers, resulting in double-counting of the transactions;[28] (5) some home market stockyard sales added premiums for high-quality merchandise, which were not reported to USDOC.[29]

35. Even in its verification failure memorandum, USDOC concluded that the "several errors" in SAIL's US sales database were "susceptible to correction." The phrase "susceptible to correction" means that USDOC *knew* that there was information in the record from which those errors could be corrected. This conclusion is demonstrated by examining the facts with respect to the only error in the US sales database that USDOC deemed to be "significant" - the width coding error. When that error was discovered at verification, USDOC noted that SAIL provided it with a list of all the affected observations in the sales database, that it "checked multiple instances of the coding error," and that the error "appears to be limited exclusively to products that had a width of 96 inches and to the US database."[30] And indeed, the "correct" information was provided to USDOC by SAIL and attached to the verification report as exhibit S-8 (now part of India Exhibit 13). Thus, USDOC had in the record the "correct," accurate and reliable information concerning the width characteristics of SAIL's US sales during the verification. USDOC quite properly concluded that this error was "susceptible to

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[24] India has addressed this Sales Verification Report in detail in its Rebuttal Submission, paras. 74-81, and its First Submission, paras. 25-33, 95-111.

[25] India Answer to Panel Question 28, paras. 48-53; Rebuttal Submission para. 85.

[26] *See* Sales Verification Report at 34 (Ex. IND-13) (showing home market sales observations well over 100,000).

[27] Sales Verification Report at 21 (Ex. IND-13).

[28] Verification Report at 17-18. By contrast, SAIL's US sales had no such problems.

[29] Verification Report at 23-24. By contrast, SAIL's US sales had no such pricing premiums.

[30] Sales Verification Report at 12 (Ex. IND-13).

correction" because the information needed to correct it was already in the record.[31]

36. USDOC's own contemporaneous conclusion that these errors in SAIL's US sales database were "susceptible to correction" also demonstrates that the real standard for verifications is not perfection. The United States now argues that any "discrepancies" found during the verification compel a conclusion of non-verifiability.[32] This is incorrect. Respondents in a US antidumping investigation submit very large amounts of data in response to USDOC's questionnaires, and often under very tight time deadlines. In this situation, errors are inevitable. Indeed, as Mr. Hayes will explain shortly, given the volume and complexity of the information that must be submitted, it would be almost unheard of for USDOC *not* to uncover errors in a respondent's database.

37. No respondent's data is perfect, and that is not what a verification is intended to ascertain. The fact that errors were discovered in SAIL's US sales database does not mean that it did not pass verification or was not "verifiable." That determination must be made on the basis of the significance and correctability of the errors. In this case, as India has described in detail, the errors found by USDOC in the US sales database were small, easily corrected, and did not address core issues, such as the completeness of the database. These were precisely the sort of errors that USDOC routinely discovers at verifications and routinely corrects, either by requesting the respondent to submit a revised computer database or by itself revising the computer program as necessary. Therefore, the United States cannot now assert that these small errors were the cause of its conclusion that SAIL failed verification completely.

38. In conclusion, USDOC's "verification failure" finding was inconsistent with Article 6.8 and Annex II, paragraph 3 because the pertinent facts for *SAIL's actual US sales data*, as opposed to facts relating to home market and cost of production databases, pointed to only one conclusion - that SAIL's US sales database was verifiable. Accordingly, this Panel should find that no unbiased and objective investigating official could have found that SAIL's US sales data was not verifiable.

2. Statement of Mr. Hayes Concerning USDOC Verification Practice

39. In the nearly fourteen years that I was an analyst for the Department, I conducted in excess of 35 verifications, both abroad and in the United States.

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[31] The other, non-significant errors were either easily correctable or irrelevant. *See* India's Comments on US Answers at paras. 10-18.

[32] US Second Written Submission, para. 39. In addition, the United States notes that "verification is the equivalent of an audit in which information is 'spot-checked' for reliability. At verification, Commerce determined that SAIL's US sales database contained discrepancies, a fact that India itself has recognized." It then leaps to the conclusion, "In sum, SAIL's information did not satisfy the first condition of Annex II, para. 3, that it be verifiable." United States Second Written Submission, para. 39. This conclusion is unfounded. While it is true that errors were found in SAIL's US database, those errors did not mean that the database did not pass verification or was not "verifiable".

Since leaving the Department I have been involved in seven additional verifications. The data that I have dealt with in these forty-plus verifications has run the gamut from very complex, voluminous data to fairly simple, short datasets. In no instance in any of these forty-plus verifications did I find no discrepancies whatsoever between the source data and the database submissions. The nature of these discrepancies ranged from simple errors in the calculations of factors used to determine adjustment amounts, to missing sales due to an inability to identify and isolate sales of subject merchandise. While my verifications as an analyst revealed some discrepancies and errors, only in a few cases were the errors extensive enough to result in the failure of verification.

40. As an analyst, I was aware of the extent of the detailed information that the Department required of respondents. It was generally understood that it was impossible to examine all of the information from any given respondent during a verification, except in the most simple cases such as one instance where there were only two sales to the United States. I saw it as my responsibility to examine the completeness of the information, the accuracy of the information, and the reliability of the information. I generally expected to find errors in submissions during verification. In fact, I found it suspicious if the response I was verifying was flawless on first examination of the data. On those occasions, I would dig deeper until I found errors, which I inevitably did.

41. Once I found errors in a submission, it was essential to assess whether they worked to the respondent's benefit or detriment, how complicated they were, how extensive they were, and how correctable they were. This was an essential part of the verification process. This assessment was essential to ensure that the dumping margin calculation would use accurate, reliable data. When I found errors, I decided whether to ask a respondent to provide me with the means to correct the errors, or whether I could easily make the correction myself. Ultimately I had to determine whether errors could be easily isolated and corrected, or whether the errors were so extensive and complicated that they essentially required a new response.

42. To determine the extent and complexity of errors, I ascertained whether I could determine exactly which transactions were affected by a particular error, whether the error could be corrected programmatically (for instance, an adjustment based on a factor) or with an electronic update (or file) that could be easily examined during and after verification, and whether the change was identical for all affected transactions or more complex.

3. SAIL's US Sales Information could be Used without Undue Difficulties to Calculate a Dumping Margin with the Normal Value Information in the Petition

43. We turn now to another key issue before the Panel: whether SAIL's US sales information could have been used "without undue difficulties" to calculate a dumping margin in combination with the normal value information in the peti-

tion. As India has provided extensive argumentation on this point,[33] I will only summarize key points.

44. First, India has proposed several factors that would shed some light on the obligations imposed by the "undue difficulties" condition in Annex II, paragraph 3.[34] There may well be other factors to consider, but India hopes that it has provided the Panel with food for thought. Regardless of which criteria, if any, the Panel ultimately adopts, there is no doubt on the facts of this case that SAIL's US sales data were usable "without undue difficulties."

45. Second, the question facing the Panel is whether SAIL's US sales information could have been used together with the information in the petition on normal value to calculate a dumping margin without undue difficulties. The United States has acknowledged that it is "not necessarily unsound" in all cases for the calculation of a dumping margin to be based on a comparison of normal value calculated on the basis of facts available and export price calculated on the basis of verified information.[35] During the investigation, SAIL urged USDOC to use its US sales database with the normal value information in the petition.[36] Similarly, India has consistently advocated that USDOC could and should have made the same comparison.

46. Third, the standard of review under Agreement Article 17.6(i) requires the Panel to focus on USDOC's December 1999 evaluation of the usability of SAIL's US database. In the Final Determination, USDOC found that "SAIL has not provided a useable home market sales database, cost of production database, or constructed value database," but it did not make the same "not usable" finding regarding SAIL's US sales database. Instead, it held that "the US sales database would require some revisions and corrections in order to be useable."[37]

47. What, then, are the "revisions and corrections" to the "US sales database" referred to in USDOC's Final Determination? In this regard, the only other reference to the expression "US sales database" in the Final Determination states that "the US sales database contained certain errors, as revealed at verification. *See Sales Report; see also Verification Memo*."[38] Thus, the factual support for the conclusion that the "US sales database" contained "certain errors" is to be found in these two reports.

48. The Verification Failure Memorandum identifies only "several errors" in the "US sales database" as "detailed in the Sales Verification Report." The Sales

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[33] *See* India's First Submission, paras. 104-111; India's Rebuttal Submission, paras. 11-64; India's Comments on the US Answers, paras. 2-18; and Mr. Hayes' two affidavits.

[34] *See* India's First Submission, paras. 71-73; India's Rebuttal Submission, paras. 14-22. The United States criticizes India's provision of additional criteria. India offered the additional criteria in its Rebuttal Submission in response to the Panel's questions at the First Meeting of the Panel with the parties regarding undue difficulty and because this is a key aspect of this case. While the United States has criticized the application of these criteria to particular pieces of information (such as SAIL's US sales data), it has not proposed alternative criteria for such an evaluation.

[35] US Answers to Panel's Question 7.

[36] Ex. IND-14 at 14.

[37] Final Determination, Ex. IND-17, at 73127.

[38] *Ibid.* at 73130.

Verification Report, in turn, identifies four errors: the width coding error, inland freight, duty drawback, and the missing CONNUMs for certain products. In light of the United States' new arguments, it is significant that neither the Sales Verification Report nor the Verification Failure Memorandum mentions difmer (VCOM or TCOM) as an "error" to the US sales database. Instead, the verification failure report and the Final Determination mention it under "cost."[39] As India has argued, this is not surprising, because VCOM and TCOM are adjustments to normal value - not export price.[40] Therefore, contrary to the new arguments of the United States, the "revisions and corrections" to the US sales database identified in the Final Determination do not include any alleged "errors" for VCOM or TCOM.[41]

49. Having identified the "revisions and corrections" to the "US sales database", the Panel must next consider how difficult it would be to make the necessary revisions and corrections for these four errors. USDOC made an evaluation

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[39] Ex. IND-16 at 3; Ex. IND-17 at 73130 ("and SAIL failed to provide constructed value data on the costs of products produced and sold to the United States").

[40] India Rebuttal Submission paras. 44-49.

[41] The United States is correct that the VCOMU and TCOMU used for the difmer adjustment were requested as part of the US sales questionnaire as set forth in India Exhibit 4 at C-49 to C-50. This is USDOC's practice. But what the United States does not point out is the first statement in the "narrative" portion of the USDOC's questionnaire for fields 53 and 54: "If you are submitting the full cost of production in response to section D of this questionnaire, no additional narrative description [in the US sales response] is required." Accordingly, SAIL's response was simply, "Please see SAIL's response to Section D of the Department's Questionnaire." Section D is SAIL's response to the Cost of Production section of the Questionnaire. Throughout the rest of the investigation, both USDOC and SAIL treated the VCOMU and TCOMU as cost of production information. This is demonstrated by the very first two paragraphs of the cost verification report (Summary of Findings), which describe the TCOM and VCOM data provided by SAIL:

Company officials stated that the total cost of manufacture (TCOM), and the variable COM (VCOM) on the COP tape submitted 17 August 1999, are incorrect. There is no way to establish a meaningful correlation between the TCOM and VCOM on the tape and the underlying cost data and source documents. On the first day of verification, SAIL presented a completely revised COP tape, as part of the correction presented in exhibit C-3. It was not clear the extent to which this tape should be considered "new information". Accordingly, we did not accept it. An excerpt of this revised tape is contained on page 7 of exhibit C-3.

Although the COP tape was incorrect and a new revised COP tape was not accepted, we proceeded with verification because the certain cost information underlying the reported per-unit COP was still verifiable-that is the actual average cost for plates and normalized plates at each plant (attachment 5 and 6 from the 17 August 1999 submission) and the data underlying the indices developed by SAIL for calculating product-specific cost (Ferroalloy, Thickness, and Yield adjustments identified in attachment 7-9 from the 17 August 1999 submission).

This discussion demonstrates clearly that USDOC and SAIL treated TCOM and VCOM as cost data, not as US sales data. Not surprisingly, nothing in the Sales Verification Outline (India Exhibit 12) or the Sales Verification Report refers to "VCOMU" or "TCOMU." Moreover, in the Verification Failure Memo and the Final Determination, USDOC treated the US sales data as a separate component from the cost of production component when it found that SAIL's US sales database could be used if corrections and revisions were made.

The fact is that VCOMU and TCOMU fields are set out in the US sales database for convenience purposes. USDOC requests that respondents report model-specific variable costs for each transaction in the home market sales database, and model-specific variable and total costs for each transaction in the US sales database, so that those values are immediately available, without reference to the cost databases, in the event that a non-identical match occurs requiring a difmer adjustment.

of this issue in both the Final Determination and the Verification Failure Report. The Final Determination stated that "the US sales database contained errors that ...in isolation were susceptible to correction ...."[42] The Verification Failure Memorandum likewise stated that the "several errors" identified in the Sales Verification Report "are susceptible to correction ...."[43]

50. India agrees with USDOC's contemporaneous evaluation that the four errors identified in the Sales Verification Report were "susceptible to correction" and with the additional statement that the "US sales database would require revisions and corrections in order to be usable." These statements resolve any question of whether the US sales database could have been used without undue difficulty. This is particularly true in light of the fact that SAIL argued repeatedly before USDOC that its US sales database was usable with the normal value information in the petition.[44] In the context of these arguments, USDOC's use of the term "usable" could only mean "usable to calculate a dumping margin." There is no other relevant use of the term "usable."

51. As the Panel knows, India has also presented a great deal of evidence to show (1) that the four errors identified in the "US sales database" were easily "susceptible to correction", and (2) exactly how SAIL's US sales database could have been used with the normal value data in the petition to calculate a dumping margin.

52. India has established without any doubt that USDOC was correct when it concluded that these four errors were "susceptible to correction." This evidence can be summarized as follows:

- *Width Coding Error*: SAIL provided USDOC at verification with a list of all sales affected by this error, sorted by invoice number.[45] The information could have been easily submitted by SAIL to USDOC in a revised database, or scanned electronically in half an hour for use in the US sales database, or keypunched manually in roughly four hours by USDOC personnel.[46] Once the data is entered into the database, the corrections could be made with minimal effort using the nine lines of programming as set out in Mr. Hayes' First Affidavit.
- *Freight Expense*: SAIL *over*-reported its plant-to-port foreign inland freight.[47] This error was adverse to SAIL, because it lowered the US price and would have resulted in a higher dumping margin. In the absence of any information necessary to correct this error, USDOC could have simply done nothing, and used as facts

[42] Ex. IND-17 at 73127.
[43] Ex. IND-16 at 5.
[44] Ex. IND-14 at 14.
[45] Ex. IND-13 (excerpts from Verification Exhibit S-8).
[46] India Comments on US Answers, paras 13-14.
[47] Ex. IND-13 at 30 (last sentence).

available SAIL's reported freight amounts.[48] This is a common USDOC practice.

- *Duty Drawback*: SAIL calculated the duty drawback factor incorrectly.[49] Duty drawback exists to assist foreign respondents by increasing net price and lowering dumping margins. If USDOC did not agree with SAIL's calculations, it could have simply disregarded the data and denied the upward adjustment in price. Alternatively, the error could be corrected with one line of programming that would take a matter of minutes to perform.[50]
- *Product Control Numbers*: SAIL did not report certain product control numbers (CONNUMs) in the cost of production database.[51] Consequently, USDOC asserted that it was unable to completely examine the values in the field PLSPECU (a unique code devised by USDOC for steel specification and/or grade). However, the data in that field are duplicative of information already reported by SAIL in two other fields in the US sales database.[52] Moreover, this information was not needed to make any comparison between the US sales database and the normal value in the petition, because the normal value product characteristics were not classified using PLSPECU.[53]

53. In sum, these four errors were easily correctable, could have been ignored by USDOC to the *detriment* of SAIL, and/or otherwise did not affect the usability of the US sales database to calculate a dumping margin in combination with the normal value information in the petition.

54. India has also demonstrated that SAIL's US sales information could be used without undue difficulties to calculate a dumping margin in combination with the normal value information in the petition. It is useful to recall USDOC's evaluation that the "US sales database" was "useable" if certain "revisions and corrections" were made. Given the fact that it was presented with three different options by SAIL in November 1999,[54] USDOC obviously made this statement after considering SAIL's three options. Accordingly, the Panel may presume that USDOC had some basis for this conclusion about the usability of the US sales database.

55. The evidence shows that there are a number of different methodologies that USDOC could have employed to calculate a dumping margin using the information in the petition on normal value, and SAIL's US sales data as the export price. USDOC was presented with three methodologies by SAIL in November

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48 *Ibid.*
49 Ex. IND-13 at 31.
50 India Comments on US Answers, paras 17-18.
51 Ex. IND-13 at 12.
52 India Rebuttal Submission, paras 77-79.
53 *Ibid.*
54 Ex. IND-14.

1999.[55] Mr. Hayes has presented other methodologies in his First and Second Affidavits. Each of these methods is easy to implement, and employing them would render the US sales database usable "without undue difficulties." Mr. Hayes estimates that none of them would require more than a few hours for an experienced USDOC analyst to draft and input the necessary computer programming language, to run the margins, and to evaluate the results.

56. The "usability" of some of the methods was demonstrated by USDOC itself when it determined the dumping margin in this investigation. Some of the methods closely resemble that used by the US petitioners in the petition and adopted by USDOC – i.e., comparing US price information with CV data in the petition. The only difference is that the methods proposed by SAIL and India use SAIL's actual submitted, verified US sales data, instead of the price offer in the petition, which we all know was grossly inaccurate.

4. Mr. Hayes Statement Concerning the Methodology Used to Calculate the 30 per cent of SAIL's Database that is Identical to the Product Used in the Petition

57. I calculated the 30 per cent of merchandise in SAIL's US sales database as identical to the specific cut-to-length plate model used in the petition for constructed model. I first corrected the September 1, 1999 database, shown in India Exhibit 8, for the width error discovered at verification. To do this, I scanned the list of 942 observations listed in India Exhibit 13 that the Department took at verification. This took me about 1/2 hour to accomplish. I then changed the width value "D" to a value of "C" for all 942 observations.

58. The specific "product" (defined as a combination of "grade"/"thickness"/"width") in the petition was listed in the "product" block of Figure 4 of the confidential version of the petition. The "product" represented a specific product with a particular chemical makeup (otherwise know as a "grade" of steel in commercial and technical jargon). In addition to "product/grade", there were three other physical characteristics listed for this product - gauge (thickness), width, and length.[56]

59. There was one other step I needed to take to calculate the 30 per cent figure. I had to determine the "banding" that the Department used in SAIL's investigation. By this, I mean the Department's method for combining particular thicknesses (gauges) and widths of cut-to-length plate in the questionnaire. The Department does this in order to be able to identify "identical" products for the purposes of a making a fair comparison (*i.e.,* matching US merchandise to home market merchandise). What I found for "thickness" and "width" is set out in page C-10 of the Questionnaire (India Exhibit 3). This document lists Field Number 3.5 (thickness - PLTHICKU) and 3.6 (width -PLWIDTHU). The "banding" can

[55] Ex. IND-14 at 14.

[56] The Department did not request any information on "length" in the investigation therefore none of SAIL's US sales data included "length" and the Department never required SAIL to provide this information.

be readily seen in the values assigned to values "A-F" for both fields. For example, all plate of the thickness 1.6 to 3.3 inches are treated as "identical" under value "E"; all plate with a banded width of between 72.1 and 96 inches are treated as identical under value C. All of SAIL's US sales database was created using these different "bands." Therefore, because the Department only requested information on SAIL's US sales in these "bands," SAIL's database did not include specific widths or thicknesses, but rather only "bands."

60. My next step was to apply the Departments "banding" requirements for width and thickness to the product in the petition. This meant using the exact same banding set forth in page C10 of the Questionnaire for the product in the petition.

61. The final step was to isolate that same product (using the same "banding" for width and thickness) to all identical products in SAIL's US sales database. This meant sorting all of SAIL's data by grade, thickness and width. After sorting, I then isolated those transactions whose grade, thickness, and width were identical to the characteristics of the petition product. To calculate the percentage of SAIL's US sales database that were of this particular grade/thickness/width, I summed the quantities of these transactions, and then divided that by the total quantity of the cut-to-length plate in the database. The identical merchandise constituted 30.4 per cent of SAIL's database by volume.

5. The Difmer Issue does not Affect the Usability of SAIL's US Sales Data

62. India has addressed the new US argument on difmer in detail in its recent submissions.[57] Even assuming *arguendo* that the Panel allows the United States to assert the new "difmer" argument, there are multiple methods by which SAIL's US sales data could be used in combination with the petition's NV data to calculate margins, where the difmer issue would not preclude a fair comparison under Article 2.4 of the AD Agreement.

- *Use of the 30 per cent of SAIL's US sales database with no difmer adjustment:* Using the very same methodology as in the petition, the fictitious $251 price offer could be replaced with all of SAIL's US sales transactions involving the same model as that for which the petition calculated CV. The prices in these transactions could then be compared to the petition's CV. The lack of difmer data is irrelevant to this calculation because it involves only matches of identical merchandise. The United States cannot question this

[57] In addition to the point that this is a *post hoc* rationalization, which India has already thoroughly discussed, the lack of data from which a "difmer" adjustment could be made does not affect the usability of the US sales database, because under the US anti-dumping law, the "difmer" adjustment is applied only to NV. Although as a matter of convenience VCOMU and TCOMU are reported with the US sales database, those figures are used only when a particular US sale is matched to a non-identical product in the NV database – and then they are used to calculate an adjustment to NV. India Rebuttal Submission, paras. 44-49.

methodology because it is the same as that used in the petition, and by USDOC itself in the Final Determination. In other words, the petition used *one* cut-to-length plate model to calculate a margin, which was then applied to all of SAIL's exports of plate to the United States.

- *Use of 72 per cent of SAIL's US sales data with no difmer adjustment:* USDOC is familiar also with a methodology that would allow the use of 72 per cent of SAIL's data without any difmer adjustment. This is the methodology that USDOC used in the *Stainless Steel Bar from India* case to address the problem arising from the lack of "useable VCOMs." In that case, USDOC "banded [one respondent's] sales of different stainless steel bar sizes in order to obtain more identical matches."[58] Specifically, USDOC "banded" the respondent's sales into two categories – bars that are 20 mm or greater in width, and those that are less than 20 mm in width.[59]

  A similar expansion of the "identical" product could be accomplished in this case. The *Stainless Steel Bar* methodology would permit the dumping comparison to focus on two of the most important factors involved in the cost of production of cut-to-length plate, grade and thickness. If "identical products" are defined as those within the same commercial grade, and falling within a range of plus or minus one-half inch of the thickness of the model to which the petition calculated CV, 72 per cent of SAIL's sales were of "identical products." Thus, no difmer adjustment would be required for this 72 per cent of SAIL's *US* sales. As in *Stainless Steel Bar*, this is a reasonable methodology because any cost differences in the production of identical-grade commercial products within a range of one-half inch in thickness are not likely to be significant.

- *Use of 100 per cent of SAIL's US sales data with no difmer adjustment:* All of SAIL's US sales database could be used without any difmer adjustment using USDOC's methodology from *Static Random Access Memory Semiconductors from Taiwan*. In that case, USDOC calculated margins for all of the US transactions that either required no difmer adjustment (because they involved the sale of identical models) or for which sufficient data had been submitted to calculate a difmer adjustment. For the remaining transactions (i.e., those for which difmer data was necessary but lacking), USDOC chose the highest "non-aberrant" margin from

[58] USDOC, Issues and Decision Memorandum, in *Stainless Steel Bar from India* (3 Aug. 2000) at 11, Ex. IND-35.
[59] USDOC, Calculation Notes for Final Results for Viraj Impoexpo, Ltd., *Stainless Steel Bar from India* (3 Aug. 2000), Ex. IND-35.

> the transactions for which margins had been calculated.[60] The same method could be used in this case. USDOC could apply the highest non-aberrant margin from either 30 per cent or 72 per cent of SAIL's products to the remaining sales observations.

63. In conclusion, Annex II, paragraph 3 required USDOC, when it considered whether to use SAIL's US sales data, to make comprehensive efforts to use SAIL's information. USDOC had to "cooperate" with SAIL in trying to use verified and timely produced US sales information in combination with the normal value information in the petition.[61] USDOC had to exercise good faith in an unbiased manner without favoring the interests of any interested party and not impose irrational and illogical burdens on the use of SAIL's US sales data that it did not impose on the use of the data in the petition.[62] USDOC had to analyze separately the usability of SAIL's US sales data in relation to other available facts under Annex II, paragraph 3. And finally, before it rejected SAIL's US sales data as unusable, USDOC had to consider the reliability and accuracy of any alternative margin from other available facts. In this case, that included the $251 price offer. India submits that no objective investigating authority could have found the $251 price offer was more "usable" than SAIL's actual, verified US sales information.

D. India's Claim under Annex II, Paragraph 5

64. India now turns to its claim under Annex II, paragraph 5. The Panel need only rule on this alternative claim if it finds - contrary to India's arguments - that one of the four conditions of Annex II, paragraph 3 was not met by SAIL's US sales data. In that event, the Panel would be required to determine whether an unbiased and objective investigating authority would have discarded SAIL's US sales data on the ground that SAIL failed to act to the best of its ability in providing such information.

65. The United States appears to argue that Annex II, paragraph 5 can only be applied in a "global" manner – that is, that an administering authority can only determine whether a respondent has "acted to the best of its ability" by examining the *entire* production of all requested necessary information. In other words, unless SAIL used its best efforts in producing *all* necessary information requested by USDOC, then USDOC is justified in finding a "total" failure to "act to the best of its ability."[63] This is not a permissible interpretation of Annex II,

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[60] Notice of Final Determination of Sales at Less Than Fair Value: Static Random Access Memory Semiconductors From Taiwan, 63 Fed. Reg. 8909, 8932 (Comment 24) (Feb. 23, 1998), attached as Ex. IND-38.

[61] WT/DS184/AB/R, DSR 2001:X, 4697, paras. 97-104.

[62] WT/DS184/AB/R, paras.101, 193 and n.142, *citing* the Appellate Body report in *EC Measures Concerning Meat and Meat Products* where it stated "the obligation to make an 'objective assessment' includes an obligation to act in 'good faith', respecting 'fundamental fairness'."

[63] For example, the United States argues at paragraph 55 of its Answer to Panel Question 17 that "[t]he natural corollary to this principle [i.e., that information that is not ideal should not be rejected if the respondent acted the best of its ability] is that where a party has not acted to the best of its

paragraph 5. It also is not consistent with USDOC's repeated practice of making selective findings regarding the "best efforts" of respondents concerning particular pieces of information.[64]

66. Nothing in the text of paragraph 5 suggests that the "best of its ability" criterion can only apply to *all* of the information requested by the investigating authority. Paragraph 5 follows paragraph 3, which applies to *any* piece of information that meets the four conditions set out therein. Logically, recourse to Annex II, paragraph 5 only becomes necessary if the particular information does *not* meet all four conditions of Annex II, paragraph 3. Otherwise, it would have no purpose. The United States recognized this when it stated in its Answer to Panel Question 17 that "if the information provided is ideal in all respects, it would not be necessary to consider whether the party acted to the best of its ability."[65] Thus, where information meets the four conditions of Annex II, paragraph 3, it cannot be disregarded by the investigating authority. But if the information does *not* meet all four of these conditions, then it must be determined whether the respondent "acted to the best of its ability" before the information can be discarded altogether.[66]

67. The fallacy of the United States' argument as a litigant is exposed by USDOC's application of Annex II, paragraph 5 in many other cases.[67] USDOC itself consistently applies the "best of its ability" provision of Annex II, paragraph 5 to particular pieces of information. For example, in the *Japan Hot-Rolled* case, the

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ability, and *its information is not ideal in all respects*, that information *may be disregarded* by the investigating authorities" (emphasis added).

[64] It should also be noted that USDOC appears to measure whether a party has acted to the best of its ability by whether the party succeeded in providing ideal information. However, the determination of whether a party "acted to the best of its ability" must be based first and foremost on the party's actions – how the party "acted" – not on the quality of the information provided. Paragraph 5 expressly envisages this by contemplating a situation where a party acts to the best of its ability and yet fails to provide ideal information.

[65] US Answers, para. 56. This sequenced approach to paragraphs 3 and 5 of Annex II is consistent with the decisions of the two panels and the Appellate Body in interpreting Annex II, para. 3. The *Guatemala Cement* and *Japan Hot-Rolled* panels did not find that information that met the conditions of paragraph 3 must *also* meet the "best of its ability" requirements of paragraph 5. Instead, as the Appellate Body held in the *Japan-Hot-Rolled* dispute, "according to paragraph 3 of Annex II, investigating authorities are directed to use information if three, and, in some circumstances four conditions are satisfied" and "if these conditions are met, investigating authorities are *not* entitled to reject information submitted, when making a determination."

[66] Immediately following paragraph 5 is Annex II, para. 6, which applies only when information is rejected because it does *not* meet the conditions of Annex II, para. 5. Thus, paragraph 6 provides that investigating authorities must provide "reasons for the rejection of *such* evidence or information . . . ." If Annex II, paragraph 5 applied to *all* the evidence or information submitted by a respondent, then there would be no reason for paragraph 6 to use the phrase "such evidence or information" instead of "all" evidence or "all" information.

[67] The purpose of the standard of review in Article 17.6(ii) of the Agreement is to provide a measure of deference to the interpretations of the Agreement that are made *by administering authorities in their determinations*, not to provide importing Members as WTO litigants with an unqualified endorsement for any plausible legal rationalizations they might come up with *post hoc* in the course of WTO litigation. The Panel should look critically at the facts of past USDOC cases, and the interpretation of the Agreement reflected therein. In other words, the Panel should consider what USDOC does, not what it says it does.

United States performed a "mini best-of-its ability" analysis.[68] In reviewing this decision, both the panel and Appellate Body focused their analysis on the level of cooperation of the Japanese respondent with respect to the particular piece of information at issue– the CSI data– not on its overall level of cooperation with respect to other "necessary information." This is the correct way to analyze and use Annex II, paragraph 5. And it is consistent with many other cases where USDOC has made partial "best efforts" decisions.[69]

68. It is undisputed that in this case, USDOC made no separate analysis of SAIL's US sales data analysis, despite the fact that SAIL made specific requests that it do so.[70] But even if such a finding could be implied from the finding of a

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[68] The United States made the following statement in its Appellant's submission to the Appellate Body:

USDOC's determination to apply partial adverse facts available to KSC for failing to provide necessary information regarding the sales through its US affiliate, California Steel Industries (CSI) was consistent with Article 6.8 and annex II of the AD Agreement. *The application of facts available to KSC was partial because KSC was cooperative as to the majority of its sales to the United States, which were simple export price sales to unaffiliated buyers in the United States.* Nevertheless, for the constructed export price sales through CSI, USDOC found that KSC had failed to cooperate in providing the sales and cost information requested by USDOC ....

Appellant Submission of the United States, WT/DS/AB184, 7 May 2001 at 26 (emphasis added). The Appellate Body described USDOC's conclusions as follows:

USDOC concluded that "KSC did not act to the best of its ability *with respect to the requested CSI data"*, and it "cannot be said that KSC was fully cooperative and made every effort to obtain and provide *the information*." USDOC, therefore, decided to apply "adverse" facts available in determining *that portion of KSDC's dumping margin attributable to its sales to CSI.*

WT/DS184/AB/R, para. 94 (emphasis added).

[69] The following determinations in which USDOC made such an evaluation are found in Ex. IND-39, attached hereto: *Final Results of Antidumping Duty Administrative Review: Certain Welded Carbon Steel Pipe and Tube from Turkey*, 61 Fed. Reg. 69067, 69072-74 (31 December 1996) (USDOC applied partial facts available for certain home market freight expenses because respondent Borusan did not act to the best of its ability); *Final Determination of Sales at Less Than Fair Value: Freshwater Crawfish Tail Meat from the People's Republic of China*, 62 Fed. Reg. 41347, 41355-56 (1 August 1997) (USDOC employed partial facts available for several respondents who failed to cooperate by not acting to the best of their abilities; USDOC used components of cost data in the petition as facts available in the calculation of normal value); *Final Determination of Sales at Less Than Fair Value: Certain Cut-to-Length Carbon Steel Plate from South Africa*, 62 Fed. Reg. 61731, 61734, 61739, 61748-49 (19 November1997) (USDOC applied partial facts available for various expenses and missing US sales for two respondents who failed to cooperate by not acting to the best of their abilities); *Final Results of Antidumping Duty Administrative Review: Small Diameter Circular Seamless Carbon and Alloy Steel Standard, Line and Pressure Pipe from Germany*, 63 Fed. Reg. 13217, 13223 (18 March 1998) (USDOC applied partial facts available for foreign inland freight expenses for US sales because respondent Mannesmann failed to cooperate by not acting to the best of its ability); *Final Results of Antidumping Duty Administrative Review: Circular Welded Non-alloy Steel Pipe and Tube from Mexico*, 63 Fed. Reg. 33041, 33046-47 (17 June 1998) (USDOC employed partial facts available for freight and brokerage expenses because respondent Hylsa did not cooperate to the best of its ability); and *Final Determination of Sales at Less Than Fair Value: Stainless Steel Sheet and Strip in Coils from Italy*, 64 Fed. Reg. 30750, 30755-60 (8 June 1999) (USDOC applied partial facts available to respondent AST for missing US sales because respondent failed to cooperate to the best of its ability; as partial adverse facts available USDOC chose the highest non-aberrational margin from the rest of AST's US sales for the missing sales).

[70] SAIL's counsel argued as follows during the USDOC's hearing on 18 November 1999 (Ex. IND-15 at 36-38):

"total" failure by SAIL to act to the best of its ability, no objective and unbiased authority could find that SAIL did not act to the best of its abilities in providing its US sales information to USDOC. The best evidence of USDOC's position on this issue is the Sales Verification Report, India Exhibit 13. This report shows that India acted to the best of its ability in providing, assembling and correcting the US sales database as well as assembling the source documents for a thorough review at verification. Given the evidence in the record, the Panel should find that no unbiased and objective investigating authority could have disregarded SAIL's US sales data.[71]

E. India's Claims under Annex II, Paragraph 7

69. India has asserted two alternative claims under Annex II, paragraph 7. The first claim is that USDOC improperly found that SAIL had not cooperated with USDOC in collecting, organizing, and providing its US sales data. India argued, and the United States has not responded to date, that no objective and unbiased authority could find on the basis of the facts of this record that SAIL had not cooperated with USDOC in the efforts regarding the production of its US sales database.[72] The Panel need only rule on this claim in the event the Panel were to find that USDOC could apply total facts available *and* that SAIL did not act to the best of its ability in providing the US sales information.

70. The second Annex II, paragraph 7 claim, which involves USDOC's wrongful application of "total adverse facts available", is a secondary "alternative" to the first claim.[73] The Panel need only address this claim in the event it were to decide that (1) USDOC properly applied total facts available, and (2) that it was appropriate for USDOC to apply a "total best of its ability" test under An-

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Even if you don't agree that SAIL's overall cooperation shows that they acted to the best of their ability, even if you disagree with me, with respect to their US sales information ...that has been submitted, SAIL clearly acted to the best of its ability. There is no hint that they refused to respond to any requests or that they couldn't provide information, or didn't respond to information. That is the real test here, whether with respect to this discrete segment of information SAIL meets the test of, I guess its, what Section 1677M(e) of the Act. The Federal Register is full of determinations that use what we believe is required, in effect, a compartmentalized approach. The Department looks at pieces of information and subjects those particular pieces of information to the five-part test. There are dozens, if not hundreds, of Departmental findings that find, with respect to a particular piece of information ...the Respondent did not act to the best of its ability with respect to this piece of information, and as a result we're going to apply adverse facts available with respect to this piece of information. These determinations don't say, because you failed this piece, you flunked the entire thing.

[71] Finally, although the point is legally irrelevant to this Panel's analysis of the Final Determination in this case, in the domestic litigation concerning USDOC's Final Determination in this investigation, the USCIT reversed USDOC's conclusion that SAIL had not acted to the best of its ability, and remanded the case to USDOC to reconsider that conclusion. Predictably, on remand USDOC came to the same conclusion as before, but even with this additional opportunity for reflection, USDOC did not base its conclusion on any problems with the US sales database. *See* Remand Redetermination, Ex. IND-21.

[72] This claim is described in detail in the Rebuttal Submission of India at paras. 97-100, and in India's First Submission at paras. 120-129.

[73] This claim is set out in paragraphs 75-80 of India's First Oral Statement and in paragraphs 87-96 of India's Rebuttal Submission.

nex II, paragraph 5. In that event, India has argued that it would still not be appropriate for USDOC to apply *adverse* facts available because there is no evidence that SAIL "withheld" information.[74] Nor has USDOC found or suggested that SAIL engaged in such behaviour. Instead, USDOC has improperly applied the worst possible result based upon its finding that SAIL failed to cooperate regarding certain aspects of the investigation. No unbiased or objective authority could have justifiably drawn "adverse" inferences from such a record.

F. India's Claims under Article 15

71. India has set forth two claims regarding Article 15. The first claim relates to USDOC's failure to engage in a good faith exploration of constructive remedies with SAIL during the investigation.[75] The facts as set forth in India's various submissions demonstrate that there is no basis for the United States to assert that it actually "explored" in good faith SAIL's offer for a constructive remedy. The United States has also focused incorrectly on the element of the "essential interests" of a developing country. As India has explained, it is for the developing country respondent to decide whether its essential interests will be affected by the imposition of anti-dumping remedies.[76]

72. India's second claim under Article 15 relates to USDOC's failure to give special regard to the situation of developing country Members when considering the application of anti-dumping measures in this case. The relevant measures could include the final imposition of dumping duties as well as the imposition of provisional dumping duties under AD Agreement Article 7. The United States criticizes India's assertion that the first sentence of Article 15 is a mandatory provision with a general obligation to provide "special regard" for the interests of developing country members.[77] Yet, the United States has never provided the Panel with any reasons why the text of the first sentence is *not* a mandatory provision creating a general obligation.[78] The use of the phrase "special regard *must* be given" clearly demonstrates the mandatory character of this general obligation. Indeed, the Ministerial Conference Decision on Implementation, adopted at Doha, has now explicitly recognized that Article 15 "is a mandatory provision."[79]

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[74] *Ibid.*

[75] India First Oral Statement, paras. 69-74; India Comments on US Answers, paras. 50-51; India Answer to Panel Question 31, paras. 62-65.

[76] India Comments on US Answers, paras. 51-51. Indeed, as stated in India's submission to the Committee on Anti-Dumping Practices referred to below, given the limited share of developing countries in world trade, and the fact that anti-dumping duties prevent all trade in the relevant product– as they did in this case– anti-dumping duties should be *presumed* to adversely affect the essential interests of the developing countries. G/ADP/AHG/W/128, para. 5.

[77] US Comments on India's Answers, para. 17.

[78] *See* US Answers to the Panel's Question 25, para. 67. Rather, the United States has addressed various statements by India regarding this provision. The task of this Panel is to interpret the text of Article 15. India has done this. The United States has not.

[79] WT/MIN(01)/DEC/17, adopted 14 November 2001, para. 7.2. Specifically, the Decision recognizes that "the modalities for its application would benefit from clarification" and instructs the Committee on Anti-Dumping Practices, through its Working Group on Implementation, to examine this

73. The fact that additional agreed procedures might emerge from the negotiating process at some later time does not weaken the legal conclusion that the Ministerial Conference has reached regarding Article 15, and does not relieve the Panel from its duty to resolve India's claims in the present dispute. India has suggested to the Panel ways in which it can interpret Article 15. By contrast, the United States has offered no constructive suggestions as to how this mandatory provision could be made effective by administering authorities. Nor has the United States offered any suggestions for how it has implemented this mandatory requirement in its laws, regulations, administrative policies or practices.

74. India has also made a submission in the post-Doha working group process on Article 15.[80] The United States refers to a statement in that paper that the obligations of the first sentence of Article 15 are only applicable "once dumping and injury have been determined."[81] However, the United States incorrectly assumes that India's paper only addresses the application of "final" anti-dumping measures. In fact, India's paper addresses "measures" generally, including provisional measures, as demonstrated by India's reference in the paper to Article 12.2.1, which sets out the provisions for the public notice of *provisional* measures.[82]

75. Thus, consistent with India's argument in its paper for the Committee and in its submissions to this Panel, it is appropriate for this Panel to consider whether USDOC provided any "special regard" to the situation of SAIL as a developing country Member during the investigation. India can find no such "special regard" reflected at any point after the provisional findings of dumping, nor at the latter stages of the process when final dumping and injury findings were made. Nor can the United States identify any such "special regard" that it provided in this case after the final determination of dumping and injury. This is not surprising, because there is no obligation in US statutes, regulations, administrative policies or its practices to provide such special regard.

G. India's Claim under Article 2.4, First Sentence

76. India has also asserted a claim under Article 2.4 first sentence, which provides: "A *fair* comparison shall be made between the export price and the normal value." The word "fair" is defined as "unbiased; equitable; impartial."[83] The word "fair" is related to the concept of "good faith" found by the Appellate

issue and draw up appropriate recommendations on how to operationalize Article 15. *Ibid.* The use of the word "operationalize" does not mean, as the United States has asserted, that no specific requirements in Article 15 are operational at present. US Comments on India's Answers, para. 22. In scientific terms, "operationalize" simply refers to converting general knowledge or principles (e.g., "buy low, sell high") into executable decision procedures in terms of available data. *See, e.g.*, Harcourt, *Academic Dictionary of Science and Technology*, at http://www.harcourt.com/dictionary/browse. The negotiating process chartered by the Ministerial Decision may do exactly this, and result in agreed procedures elaborating the requirements of Article 15.

80 United States Comments on India's Answers, paras. 18-19.

81 *Ibid.*

82 G/ADP/AHG/W/128, para. 13.

83 New Shorter Oxford Dictionary, Vol. 1, at 907.

Body to require anti-dumping investigating authorities to make an "objective examination" and to exercise "fundamental fairness."[84]

77. India is of the view that if information consistent with the rules of AD Agreement Article 6 is used, adherence to the procedures in Article 2.4 would generally result in a fair comparison between the export price and the normal value. But contrary to the United States' arguments, this obligation to engage in a "fair comparison" is not limited to only the procedures spelled out in the subsequent text of Article 2.4. The Appellate Body in *EC Bed Linens* made it clear that "Article 2.4 sets forth a *general obligation* to make a 'fair comparison' between export price and normal value. This is a general obligation that, in our view, informs all of Article 2 . . ."[85] Among the provisions of Article 2 is Article 2.1, which sets out the requirement for determining when a product is "dumped." In this regard, the "fair comparison" provision of Article 2.4, first sentence applies generally to all determinations of dumping - including determinations under Article 2.1 in which total facts available are applied.[86]

78. Further, one of the key aspects of a "fair" comparison is the identification of the information to be used for the comparison. If an investigating authority knowingly uses information, such as the $251 offer in the petition in this case, which is clearly inaccurate when compared to other information on the record (such as official import statistics), then the ultimate comparison between normal value and export price cannot be considered "fair." Since India acknowledges in this case that USDOC could properly use facts available to determine the NV side of the dumping comparison, the "fair" comparison that USDOC should have undertaken under Article 2.4, first sentence, would be to compare either SAIL's actual US sales data or the US Customs data in the petition with the normal value from the petition. But in no circumstances could an objective investigating authority conduct a "fair" comparison using the US price offer of $251 per ton from the petition.

II. INDIA'S CLAIMS REGARDING THE US STATUTORY PROVISIONS

79. India will now address the two claims that relate to sections 782(e)(3) and (4), and its two claims that involve sections 776(a), 782(d), and 782(e).

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[84] *Japan Hot-Rolled* AB decision, WT/DS184/AB/R, DSR 2001:X, 4697, para. 193.

[85] WT/DS141/AB/R, DSR 2001:V, 2049, para. 59.

[86] The United States has argued that when it applied total facts available in this case, it did not "calculate" a dumping margin but rather "made a determination." US Answers to Panel Question 37, para 90. But Article 2 of the AD Agreement is entitled "Determination of Dumping." When USDOC uses Article 6.8 for the purposes of "partial facts available," it combines the "facts available" with other information from the respondent to "calculate" a margin *before* it makes a determination under Article 2.1 of the existence of "dumping." Similarly, a determination of dumping using total facts available still requires a "determination" under Article 2.1 as to whether dumping exists, and the decision whether to impose dumping margins or some other remedy.. *See* AD Agreement Article 8, 9.1, 9.4, which demonstrate that to "make a determination" can only be preceded by a calculation of the extent, if any, of dumping.

A. Per se Challenge to Sections 782(e)(3) and (4)

80. India's arguments that section 782(e)(3) and 783(e)(4) *per se* violate Article 6.8 and Annex II, paragraph 3 of the AD Agreement are based on the fact that these are "extra" conditions that respondents must meet before their data can be used in the investigation.

81. As a threshold matter, this provision is "mandatory," because under the US statute, a respondent's information cannot be used unless it meets *all* five conditions of section 782(e). This mandatory requirement to meet all five conditions is provided in the text of section 782(e), as demonstrated by the use of the word "and" between sections 782(e)(4) and (5).

82. The United States now argues that USDOC and USCIT decisions reflect the "discretionary nature" of section 782(e).[87] This is not correct. Consistent with the mandatory text, section 782(e) has been repeatedly interpreted as requiring that all five conditions must be met before a respondent's data can be taken into account.[88] Indeed, the cases cited by the United States support this requirement because they note that when all five conditions set forth in section 782(e) are satisfied, USDOC will accept the respondent's submitted data. But in none of these cases has USDOC accepted (or the USCIT required that USDOC accept) a respondent's submitted data despite the fact that the two additional conditions in section 782(e)(3) and (4) were not satisfied.

83. The second issue is whether these two provisions impose "extra" conditions that are not found in the exhaustive list in Annex II, paragraph 3.[89] The United States has admitted that section 782(e)(3) imposes an "extra" step beyond those listed in Annex II, paragraph 3:

> By requiring Commerce to evaluate the degree of completeness of the information, section 782(e) provides that *when the other criteria* [in Annex II, paragraphs 3 and 5] *have been met*, Commerce may not decline to consider the partial information *when it is sufficiently complete so that it can form a reliable basis for a dumping calculation*.[90]

In other words, USDOC is required by the statute to reject information that otherwise satisfies the four conditions of Annex II, paragraph 3, if it determines that the absence of *other* information renders the overall universe of information not "sufficiently complete".

84. The present case illustrates exactly how section 782(e)(3) imposes an "extra" condition. Without this additional condition, SAIL's US sales information

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[87] US Second Written Submission, paras. 13-14.

[88] *AST* case, cited in India First Written Submission, footnote 206; cases in India Exhibits 28 and 29, discussed extensively in India's Answer to Panel Question 24.

[89] The text of section 782(e)(3) requires that the information must not be "so incomplete that it cannot serve as a reliable basis for reaching the applicable determination." Annex II, para. 3 imposes no requirement of a q*uantum* of information that must be reached before the information may be used. Indeed, the Appellate Body in *Japan Hot-Rolled* said that the information had to be used if it met the four conditions in Annex II, para. 3.

[90] United States Answers to the Panel's Question 3, para. 9 (emphasis added).

would have been taken into account in the USDOC determination if it met the four conditions of Annex II, paragraph 3. But because section 782(e)(3) requires satisfaction of the additional condition that the completeness of SAIL's US sales data must be analyzed in relation to *other information* submitted by SAIL, the errors in SAIL's home market and cost of production data caused the rejection of the US sales data for the calculation of a dumping margin.

85. In short, if the Panel finds that there is no justification under the AD Agreement to reject a respondent's information that meets the four conditions of Annex II, paragraph 3, then the Panel must also find that this additional condition of section 782(e)(3) *per se* violates Article 6.8 and Annex II, paragraph 3.

86. The second additional condition imposed by section 782(e) is found in section 782(e)(4), which requires that a respondent must be found to have acted to the "best of its ability" in providing the information and in complying with USDOC's requirements "with respect to the information." As India has argued, paragraphs 3 and 5 of Annex II impose *separate* obligations upon investigating authorities. [91] Section 782(e)(4) improperly collapses these distinct obligations.[92]

B. "As Applied" Challenge to Section 782(e)(3) and (4)

87. India set forth its claims regarding the WTO-inconsistent application of sections 782(e)(3) and (4) at paragraphs 166 and 167 of its First Submission. The United States has not directly challenged these arguments regarding the application of these provisions. Accordingly, India refers the Panel to its previous arguments on this issue.

C. per se Challenge to Sections 776(a), 782(d), and 782(e)

88. India has explained that section 776(a) of the US anti-dumping law *mandates* the application of "facts otherwise available" whenever any of the four situations set forth in that statute are found to exist.[93] That statute notes that it is "subject to section 782(d)," which in turn contains the phrase stating that USDOC "may ...disregard all or part of the original and subsequent responses"

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[91] India First Submission, paras. 80-84, 150. These If information submitted by a respondent satisfies the criteria of paragraph 3, it must be used, regardless whether the respondent has acted to the "best of its ability" in submitting that data - or some *other* data. Conversely, under paragraph 5, investigation authorities must use even less-than-ideal information that does not meet the requirements of paragraph 3, as long as the respondent has acted to the best of its ability.

[92] India has addressed the United States' arguments that section 782(e) does not violate the Agreement because it "liberalized Commerce's general acceptance of data submitted by respondents in anti-dumping proceedings by directing Commerce not to reject data submissions once Commerce concludes that the specified criteria are satisfied." [US] Second Written Submission, para. 15. While section 782(e) may have liberalized USDOC's rules for accepting respondents' submitted data, the problem is that it did not liberalize those rules sufficiently. The statute still imposes two conditions not included in the exhaustive list set out in Annex II, para. 3, which must be satisfied before a respondent can have its data accepted and "taken into account" by USDOC in "reaching the applicable determination."

[93] India First Submission, paras. 141-145; India Answers, paras. 21-24.

submitted by a respondent in certain situations. However, as India explained at the First Meeting of the Panel and in its answers to the Panel's questions, USDOC and the USCIT have consistently interpreted Section 782(d) as a mandatory provision despite the use of the apparently discretionary verb "may." In other words, the word "may" is interpreted in this instance as "shall."[94]

89. The United States argues that "[t]he application of facts available is a discretionary exercise, not a mandatory one, specifically dependent upon the quantity and quality of the information submitted by the respondent."[95] It then discusses several USDOC determinations and a USCIT decision in which the agency accepted respondents' data because, although flawed, it satisfied the conditions of section 782(e).[96] However, these determinations do not establish the "discretionary" nature of the statutory provisions as issue. Rather, they make it clear that USDOC will accept information that satisfies the conditions of section 782(e) - a point that is not in contention. None of these cases address India's argument that, once USDOC determines that one "essential component" does not meet one or more of the conditions in section 782(e), the mandatory provision of section 776(a) applies, requiring the rejection of the respondent's data.

90. The United States also notes that at times, USDOC has invoked sections 782(e) and (d) to apply only partial – as opposed to total – facts available.[97] But there is no dispute that at times USDOC has applied "partial" facts available. However, despite repeatedly being asked to identify specific cases, the United States has not been able to name a single case in which USDOC applied "partial facts available" when one of what it considers the four "essential components" of a respondent's data failed to satisfy the conditions of section 782(e). In this situation, to the contrary, USDOC always has applied "total facts available" to reject all the information submitted by the respondent, without regard to the fact that other information submitted by the respondent (i.e., information on other "essential components") may satisfy those conditions.

91. Thus, section 776(a) of the US statute requires USDOC to reject submitted information that does not meet the conditions of section 782(e), and that mandatory rejection is total, not partial, whenever USDOC determines that one or more of the "essential components" of a respondent's submitted information is flawed. Section 782(d) has never been interpreted as forestalling this inevitable result. Because they mandate the rejection of information meeting the requirements of Article 6.8 and Annex II, paragraph 3, these statutory provisions violate the AD Agreement.

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[94] Paras. 19-28. Furthermore, this interpretation is not merely a matter of administrative practice, by which USDOC might have said in individual cases that, although it was rejecting the respondent's data in that case, it "may" in future cases apply Section 782(d) not to reject a respondent's data. To the contrary, the decisions of USDOC and the USCIT described in detail in India's answers show that the agency and the Court have concluded that USDOC *must* apply Section 782(d) by referring back to Section 776(a)'s mandatory instruction to disregard a respondent's data once it finds that the respondent has failed to meet all the conditions of Section 782(e).

[95] United States Answers, para. 20.

[96] United States Answers, paras. 22-25.

[97] United States Answers, para. 24.

D. Challenge to Sections 776(a), 782(d), and 782(e) as Applied

92. India has set out in detail its claims regarding the WTO-inconsistent application of sections 776(a), 782(d), and 782(e).[98] The United States has not directly addressed these assertions. Accordingly, India refers the Panel to its arguments as the basis for the Panel's decision on this claim.

III. INDIA'S "AS APPLIED" CHALLENGE TO USDOC'S LONG-STANDING PRACTICE OF APPLYING TOTAL FACTS AVAILABLE

93. As India set forth in its Answers to the Panel's questions, its "as applied" claim regarding USDOC's long-standing practice is straightforward and based on uncontested facts. India responded in detail to the United States' procedural challenges concerning the consultation process and the argument that USDOC's long-standing practice is not a "measure,"[99] and will not repeat those arguments here.

94. India notes, however, that there are three elements to this claim: (1) that a long-standing practice exists; (2) that the long-standing practice was applied in this case; and (3) that the application of the long-standing practice in this case is inconsistent with the AD Agreement. The facts regarding each of these three elements are found in the Final Determination. The United States has never challenged these three elements or the facts that support them.

95. Regarding the first, USDOC plainly states that it has a "long-standing practice to reject a respondent's questionnaire *in toto* when essential components of the response are so riddled with errors and inaccuracies as to be unreliable."[100] USDOC also stated in the Final Determination that "the Department must apply total adverse facts available because SAIL's data on the whole is unreliable." Numerous USCIT decisions, as well as USDOC decisions in other investigations, also describe the "long-standing practice" of USDOC in applying total facts available.[101]

96. With respect to the second element - whether the long-standing practice was applied in this case - once again, the answer is affirmative, and is supplied by the Final Determination, in which USDOC stated that "total facts available" are "warranted for this determination" and that it "must apply total adverse facts available...."[102]

97. Finally, regarding the third element - whether the long-standing practice as applied is inconsistent with the AD Agreement - the Final Determination reveals the process by which USDOC rejected SAIL's US sales data, which USDOC itself admitted were "usable" if minor corrections were made, through

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98 *See* India First Submission, paras. 160-173.
99 *See* India Answers to the Panel's Questions 35-36.
100 Final Determination, at 73130 (Ex. IND-17).
101 *See, e.g.*, Ex. IND-28, IND-29.
102 Final Determination, at 73130 (Ex. IND-17).

the application of total facts available. This application was inconsistent with AD Agreement Article 6.8, and Annex II, paragraphs 3, 5, and 7 for the reasons discussed earlier by India.[103]

[103] *See* India First Submission; India First Oral Statement.

ANNEX E

Questions and Answers

ANNEX E-1

ANSWERS OF INDIA TO QUESTIONS OF THE PANEL - FIRST MEETING

(12 February 2002)

Questions to India

Q19. India claims that the United States violated Article 2.4 of the AD Agreement because the failure to use the US sales data submitted by SAIL resulted in an unfair comparison. Does India consider that a comparison of normal value based on facts available and export price based on the US sales data would have been fair within the meaning of Article 2.4? Does India agree that USDOC was entitled to rely on facts available with respect to the determination of normal value in this case?

Reply

1. The answer to the first question is yes, assuming that the phrase "US sales data" in the question refers to SAIL's actual submitted US sales data. As described more fully in the Answer to Question 20, the comparison undertaken by USDOC in this case was unfair because one of the two elements of the comparison was determined unfairly, i.e., USDOC based export price on information that was not fairly selected from the available options. A "fair" comparison must be based on the most accurate information that can be used - be it from the questionnaire responses submitted by interested foreign parties, the information in the petition, or another source. It is incorrect to argue, as the United States has argued in this case, that only information from the petition or only information from the interested foreign respondents can be used to make a "fair" comparison. Nothing in the AD Agreement mandates this artificial "all or nothing" approach. As India has argued, Annex II, paragraph 3 directs that "all information which" meets the criteria of that paragraph must be used in comparison. Furthermore, the object and purpose of the AD Agreement is to use the most accurate information available in order to make the fairest comparison possible.

2. The answer to the second question is also yes. However, India does not agree that USDOC was entitled to adopt an "adverse inference" (*i.e.*, rely on *adverse* facts available), because an objective and non-biased investigating authority could not have found that SAIL did not cooperate by withholding information. *See* India First Oral Statement at paragraphs 75-80; India's Rebuttal Submission at paragraphs 90-103.

Q20. Could India elaborate on the link it draws between the Article 2.4 "fair comparison" requirement and the asserted violation of Article 6.8. Specifically, does India consider that a comparison in which one element is determined in violation of some other provision of the AD Agreement is, ipso facto, unfair in terms of Article 2.4? Does India consider that this constitutes a separate violation of the AD Agreement? For instance, assume a panel were to conclude that an investigating authority violated some aspect of Article 2.2 in the calculation of normal value. Would this, in India's view, necessarily constitute a violation of Article 2.4 as well?

Reply

3. AD Agreement Article 2.4, first sentence, establishes a separate requirement that investigating authorities make a "fair comparison" "between the export price and normal value". The Appellate Body in *EC Bed Linens* held that "Article 2.4 sets forth a general obligation to make a 'fair comparison' between export price and normal value. This is a general obligation that, in our view, informs all of Article 2 . . ."[1] The Appellate Body in *Japan Hot-Rolled* commented on Article 2.4 as follows:

[1] WT/DS141/AB/R, DSR 2001:V, 2049, para. 59.

> We would also emphasise that, under Article 2.4, the obligation to ensure a "fair comparison" lies on the *investigating authorities*, and not the exporters. It is those authorities which, as part of their investigation, are charged with comparing normal value and export price and determining whether there is dumping of imports.[2]

4. As the Appellate Body has indicated, Article 2.4 encompasses the requirement that investigating authorities obtain information to ensure that they correctly discern and then compare the proper export price with the proper normal value. As a separate and general obligation, Article 2.4 applies to the actions and decisions taken by investigating authorities that result in a comparison which is "unfair" but which may not be explicitly addressed in detail in the text of the AD Agreement. Given the wide diversity and creative methodologies that could be used to calculate dumping margins, it is important to maintain the viability of this safeguard to ensure that whatever the exact methodology that may be applied, the margins ultimately are based on a fair comparison.

5. In this case, Article 2.4 was violated because USDOC used the petition's lowest export price of $251[3] per ton when it calculated the final dumping margin. The facts show that this price was fiction - it was an offer from a non-affiliated company, it was at a price that was almost $100 per ton less than the weighted average of SAIL's verified actual US prices,[4] it was a price that was $103 per ton less than the average unit value reflected in the US customs data also included in the petition,[5] and finally, it was a price solely from an offer that never became a sale. (The last point is evident from the fact that SAIL's complete US sales database shows that no sale at $251 - or at a price even close to that low a price - took place during the period of investigation).[6] There is no way that a "fair" comparison could be made by using this fictitious price when USDOC knew of its fictitious nature. In sum, the ultimate margin of 72.49 per cent based on the improper application of facts available did not represent a fair comparison between the "export price and the normal value."

6. Whether a comparison is "fair" depends on the "available" facts that investigating authorities may properly take into account under the circumstances and consistent with Article 6.8 and Annex II. Since India acknowledges in this case that USDOC could properly use facts available for the normal value side of the dumping comparison, the "fair" comparison for the purposes of AD Agreement Article 2.4 would be to compare either SAIL's actual US sales data or the US Customs data in the petition with the normal value from the petition. But in no circumstances could a "fair comparison" be made using the US price of $251 price per ton from the petition.

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2 WT/DS184/AB/R, DSR 2001:X, 4697, para. 178 (emphasis added).
3 Ex. IND-1, at figure 5, page 00040 (Public version).
4 Ex. IND-32 (public version).
5 Ex. IND-8.
6 India Exhibits 8, 31-32; India First Oral Statement at paras. 14-24.

7. India agrees that in many instances actions resulting in a violation of the provisions of Articles 2, 5-7 and 9 of the AD Agreement (including Article 2.2, as suggested by the Panel) may also result in a violation of the first sentence of Article 2.4. If the Panel agrees with India that USDOC improperly refused to use information from foreign respondents meeting the requirements of Annex II, paragraph 3 and Article 6.8, then, for the reasons described above, it could also conclude that there was a violation of Article 2.4, first sentence because USDOC did not make a "fair" comparison between normal value and US price. But, while there is some overlap between Article 6.8 and the first sentence of Article 2.4, the text of each provision is distinct, and depending on the circumstances, a violation (or non-violation) of Article 6.8 does not automatically mean there is a violation or non-violation of Article 2.4.

8. Moreover, in this case, India's argument regarding Article 2.4, first sentence is not dependent on the Panel's ruling regarding facts available. Even if this Panel were to find that the United States was justified in applying "total facts available" (a result to which India would strongly object), USDOC had a *separate* obligation to ensure that the facts used to calculate a dumping margin - even those facts from the petition - result in the most fair comparison possible. Thus, even in this alternative scenario, USDOC would have been required to reject the $251 price in favour of the US customs pricing data in the petition in order to make a fair comparison under Article 2.4, first sentence. For this reason, India disagrees with the statement of the United States in its First Submission that India's Article 2.4 claim is "dependent upon India succeeding on its primary argument that Commerce acted inconsistently with its WTO obligations when it based its determination on the facts available ...."[7]

Q21. India argues that paragraph 5 of Annex II requires that information in a particular category must be accepted, despite possible flaws, if it can be used without undue difficulties and if the party providing it has acted to the best of its ability. India also asserts that if a category of information satisfies the three or sometimes four conditions of paragraph 3 of Annex II, the investigating authorities may not reject that category of information. These requirements do not, however, address the substance or quality of the information in question. Does India maintain that the investigating authority must, in all cases, base its determination on the information submitted in these circumstances? What if, for instance, information regarding home market sales is known to be incomplete, but is verifiable, timely submitted, and can be used with undue difficulties – would this incomplete information have to be used in calculating the dumping margin? Going further, what if, upon verification, the information proves to be incorrect - must it still be used in calculating the dumping margin? What if the information simply cannot be verified - must it still be used in calculating the dumping margin? Would India consider that the completeness or correctness or actual verifi-

[7] First Written Submission of the United States, para. 179.

cation of the information is part of the conditions under paragraph 3 of Annex II, or would these be separate or further requirements?

Reply

9. With respect to the first statement in the question, India directs the attention of the Panel to India's analysis of Annex II, paragraph 5 that is set forth in paragraphs 81-86 of its First Submission. India's position includes the statement that "[t]hus, if information is not submitted within a reasonable period, or is not completely verifiable, or is usable only if the investigating authorities must spend days and weeks of additional work, then paragraph 5 becomes applicable."

10. The answer to the first question - whether India maintains that the investigating authority must, in all cases, base its determination on the information meeting the requirements of Annex II, paragraph 3 - is yes. By the use of the term "base its determination" India reads the Panel's question to mean, include the information at issue within the mix of information that is used in calculating a dumping margin. No one piece of information, standing alone, can be used as the sole basis for calculating a dumping margin because it would only represent – at most – one side of the dumping calculation. Therefore, "all information which" meets the requirements of Annex II, paragraph 3 must be used in conjunction with other information in calculating a dumping margin. But what investigating authorities cannot do is ignore the submitted information if it meets the four requirements of Annex II, paragraph 3.

11. Regarding the question as to whether incomplete home market sales must be used in the calculation of a dumping margin, the answer would be yes, if it met all four of the requirements of Annex II, paragraph 3 (including the "undue difficulty" element). However, if the home market sales were incomplete, then the gaps in the home market sales could be filled with information from other "available" facts, including the petition. Thus, for example, if a respondent submitted information that satisfied the requirements of Annex II, paragraph 3 regarding sales of 70 per cent of the home market models during the period of investigation, but no information for the remaining 30 per cent of models, then the investigating authorities would be required to use the submitted information regarding the sales of the 70 per cent of home market models, and use facts available for sales of the remaining models. Moreover, if the authorities determined that the responding party refused access to the information that constituted a significant impeding of the investigation, then the authorities could apply adverse facts available. Thus, in the example above, the authorities could use the highest normal value from the petition as facts available for the unreported sales.

12. Regarding the question of what would happen if upon verification, the particular information on home market sales proves to be incorrect, then the answer is no, the information does not have to be used. The reason is that this particular information would not comply with one of the four conditions of Annex II, paragraph 3 - i.e., it would not be "verifiable."

13. The Panel asks whether the information must be used if it "simply cannot be verified". If by "cannot be verified" the Panel means that during the verifica-

tion process the actual information at issue was tested and (1) found to inaccurate and incomplete, (2) there was not information available to demonstrate that the reported information was complete or accurate (such as missing records or computer data problems), or (3) examination of other source documents (sales invoices, contracts, bills of lading, letters of credit, etc.) for the category of information (such as export sales or normal value) revealed significant errors in the information examined, then the answer is that no, the investigating authorities would not have to use the information in the determination of a dumping margin. India directs the attention of the Panel to its Rebuttal Submission at paragraphs 65-72 where the terms "verifiability" and "verified" are discussed in detail.

14. With respect to the final question regarding whether India considers that the completeness, correctness or actual verification of the information is part of the conditions under paragraph 3 of Annex II or a separate or further requirement, the answer is that determining whether information is "verifiable" or is actually "verified" is one of the requirements imposed on administering authorities by Annex II, paragraph 3. India does not understand Annex II, paragraph 3 to establish a separate requirement that the authorities determine if information is "complete" or "correct". However, these concepts are obviously relevant to the determination of the factors that are set out in Annex II, paragraph 3, including the "verifiability" or actual verification of information.[8] In addition, as India has explained in its analysis of the term "can be used without undue difficulty", the extent to which verified and timely produced information regarding a "component" or category of information is complete and correct may be relevant to the consideration of whether the information can be used without undue difficulty.[9]

Q22. Does India dispute the USDOC finding that SAIL failed to act to the best of its ability in respect to information other than US sales data? Is it correct to understand that India has not contested the scope of the information request put to SAIL during the investigation?

Reply

15. Yes, India does dispute the finding that SAIL did not act to the best of its ability regarding its cost of production information. However, this is a claim in the alternative, which the Panel need not reach for the resolution of this case if it agrees with India that SAIL's US sales data should have been used in the calculation of the final dumping margin. Another alternative claim, which the Panel need not reach under the same assumption, is India's claim that SAIL did not refuse access to information or significantly impede the investigation (i.e., it did not fail to cooperate). Therefore, there was no basis for USDOC to use adverse facts in calculating an AD margin. See India First Oral Statement at paragraphs 75-80; India Rebuttal Submission at paragraphs 87-100.

Q23. In SAIL's calculations comparing US sales data to "verified" home market sales, what assurance is there that the home sales data covered all

[8] *See* India Rebuttal Submission at paras. 69-75.
[9] *See* India Rebuttal Submission at paras. 14-27; Answer to Panel's Question 23.

sales of comparable product, or that cost data covered all production of the comparable product? Especially in light of the "significant" flaws in the home sales and cost data, which SAIL does not dispute allowed USDOC to rely on facts available. Isn't the argument here, over which facts available to use, which does not appear to be the subject of a claim in this dispute? Does India consider that the comparison SAIL proposed would not have posed "undue difficulties" for USDOC?

Reply

16. There seems to be some confusion underlying this question. India has conceded that there were "significant" flaws in SAIL's submitted home market sales and cost databases, and has not argued that SAIL's home market sales data were "verified" successfully by USDOC. Nor is India arguing that SAIL's submitted home market sales data be used to calculate its dumping margins.

17. India does agree that the "argument here" is "over which facts available to use", in particular, whether SAIL's submitted US data were "available" facts that should have been used by USDOC. India's position is that USDOC violated Article 2.4, Article 6.8 and Annex II, paragraph 3 of the Agreement by rejecting SAIL's submitted US sales data, which met the conditions of Annex II, paragraph 3, in favour of a price offer in the petition, and by calculating the final margin in an unfair manner by using export price information that was grossly inaccurate. Thus, India respectfully submits that, contrary to the statement in this question, this issue is very much "the subject of a claim in this dispute".

18. With respect to the last question, India directs the Panel to its First Submission, its First Oral Statement, the two affidavits of Mr. Hayes, and paragraphs 48 to 67 of its Rebuttal Submission, which all demonstrate that the use of the US sales data would not have posed "undue difficulties" for USDOC to implement. In fact, India's actual US sales data could have been combined with the NV information in the petition in a number of ways, some of which are very similar to – and hence, as easy to implement – as that adopted by USDOC in impermissibly applying adverse total facts available.

Q24. Section 782(d) of the Tariff Act of 1930, as amended, specifies that in the case of deficient submissions, the USDOC "may, subject to subsection (e), disregard all or part of the original and subsequent responses" (emphasis added). How does India justify the contention that the US law required USDOC to reject US sales data and rely on facts available in violation of the AD Agreement, in light of this statutory language, US case law permitting use of partial facts available, USDOC decisions relying on partial facts available, the arguments presented in SAIL's USCIT brief, and India's acknowledgement that that statute "could" be interpreted otherwise?

Reply

19. There are two aspects to this question – one focusing on the permissive verb ("may") in section 782(d), and the other focusing on the application "partial" as opposed to "total" facts available. India acknowledges the obvious fact

that the text of 782(d) uses the permissive verb "may" in authorizing USDOC to "disregard all or part of the original and subsequent responses". However, as discussed in the First Meeting, USDOC and the US Court of International Trade (USCIT) have interpreted that verb in a mandatory sense – i.e., as if the word "may" were "shall". India emphasizes that this interpretation is not a matter of administrative practice, whereby USDOC could have stated that, although applying section 782(d) in a particular case to disregard a respondent's data, it still recognized that it "may", in other situations, apply section 782(d) not to disregard the respondent's data. To the contrary, the USDOC and USCIT decisions show that the agency and the Court have concluded that USDOC must apply section 782(d) to disregard a respondent's data once it determines that the respondent has failed to meet all the criteria of section 782(e).

20. It should be recalled that section 782(e) establishes conditions for mandatory acceptance of a respondent's submitted data – i.e., if the criteria listed in that section are satisfied, the data cannot be disregarded. But if the converse occurs – i.e., *not* all of the criteria in section 782(e) are satisfied – that should only mean that USDOC is not required to accept the respondent's submitted data. It should not also mean that USDOC is required to reject the data, precisely because failure to meet the requirements of section 782(e) returns a party to the ambit of section 782(d), which says "may". Nonetheless, USDOC and the USCIT have interpreted section 782(d) as granting no further flexibility to USDOC to accept data once it has been found not to satisfy the conditions of section 782(e). In that situation, USDOC "must" – not "may" – disregard the submitted information.

21. The cases found in India's Exhibits 28 and 29, discussed during the First Meeting, demonstrate this interpretation by USDOC and the USCIT. For example, the first USCIT decision included in India Exhibit 29, *Allegheny-Ludlum Corp. v. United States*, noted that section 776(a) requires USDOC to apply facts available in four situations, and it noted that some of those situations existed in that case. The respondent raised the issue of the application of section 782(d), but the Court rejected that argument because several of the criteria in 782(e) were not satisfied. It stated that "its [section 782(d)'s] remedial provisions are not triggered unless the respondent has met *all* of the five enumerated criteria [of section 782(e)]. Failure to fulfil any one of these criteria renders section [782(d)] inapplicable".[10] In other words, failure to satisfy all the criteria of section 782(e) leads to automatic failure of section 782(d), which, in turn, leads to the application of section 776(a) with its mandatory requirement to adopt facts available.

22. Turning to USDOC interpretation, in *Roller Chain, Other Than Bicycle, From Japan* (which is included in India Exhibit 28), USDOC clearly treated section 782(d) as mandatory, stating, "Given that Kaga [a respondent] failed to provide the necessary information in the form and manner requested, even after being provided several opportunities to cure these deficiencies, the Department is *required*, under section 782(d), to apply, subject to section 782(e), facts other-

[10] *Allegheny-Ludlum Corp. v. United States*, Slip Op. 00-170, at 26, 31 (28 Dec. 2000) (Ex. IND-29).

wise available."[11] USDOC then went on to find that the respondent failed to satisfy several of the criteria under section 782(e), and it concluded that "the application of section 782(e) of the Act does not overcome section 776(a)'s *direction* to use facts otherwise available for Kaga's submissions."[12] USDOC therefore applied total facts available for the margins for this respondent. In other words, once USDOC determined that the respondent's data failed to satisfy all the conditions for mandatory acceptance under section 782(e), USDOC did not then pause at section 782(d), to determine how it should exercise the discretion it was granted by the statutory phrase "may disregard". To the contrary, it immediately concluded that it must apply section 776(a), which imposes a mandatory requirement to disregard the submitted data.

23. Likewise, in *Certain Cut-to-Length Carbon Steel Plate from Sweden*, USDOC concluded that the respondent failed to meet the requirements of both subsections (e) and (d). USDOC did not then say that subsection (d) provides it with discretion to accept the information anyway – to the contrary, it reverted to the mandatory language in section 776(a), stating simply that "[f]or the foregoing reasons, the Department has determined that, insofar as [the respondent's] cost data could not be verified, section 776(a) *requires* the Department to use the facts available with respect to this data."[13] In another example, *Elemental Sulphur from Canada*, USDOC set out the text of section 782(d), but it then concluded that the respondent's failure to provide certain cost information that it was reviewing under section 782(d) "constitutes a withholding of information within the meaning of 776(a)(2)(A)" – not 782(d).[14] In other words, USDOC leapt over the question whether the criteria of section 782(d) had been satisfied, and whether it should exercise discretion under that provision to accept the submitted data anyway. Instead, it went directly to section 776(a), with its mandatory "shall" language.

24. Finally, USDOC's Final Determination in the current case provides another clear example of its mandatory interpretation of the statute. USDOC quoted and paraphrased the text of the relevant statutory provisions, including the word "may" in section 782(d). However, after enumerating the ways in which SAIL's submitted data failed to satisfy section 782(e), USDOC did not then return to section 782(d) to decide how to exercise its discretion. Rather, it simply stated that "[a]s a result [of SAIL's failure to satisfy section 782(e)], the Department does not have an adequate basis upon which to conduct its analysis to de-

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[11] *Roller Chain, Other Than Bicycle, From Japan, Final Results and Partial Rescission of Anti-Dumping Duty Administrative Review*, 63 Fed. Reg. 63671, 63674 (16 Nov. 1998) (emphasis added) (Ex. IND-28).

[12] *Ibid.* (emphasis added).

[13] *Certain Cut-to-Length Carbon Steel Plate From Sweden: Preliminary Results of Anti-Dumping Duty Administrative Review*, 61 Fed. Reg. 51898, 51899 (4 Oct. 1996) (emphasis added) (Ex. IND-28).

[14] *Elemental Sulphur From Canada: Preliminary Results of Anti-Dumping Duty Administrative Review*, 62 Fed. Reg. 969, 970 (7 Jan. 1997) (Ex. IND-28).

termine the dumping margin and *must* resort to facts available pursuant to section 776(a)(2) of the Act."[15]

25. During the First Meeting, counsel for the United States mentioned one USCIT decision, *NSK Ltd. v. United States*, Slip Op. 2001-69, as a counter-example. However, the relevant portion of that decision (pages 84-94) concerns only the application of section 782(e), because the respondent involved in that case satisfied the five criteria of that statute, thus triggering the mandatory acceptance of its submitted data. The issue of the application of section 782(d) (whether mandatory or discretionary) after a failure to satisfy the criteria of section 782(e) never arose in *NSK*.

26. Turning to the second aspect of this question – whether the statute mandates the imposition of partial as opposed to total facts available – as India explained in its First Submission, USDOC interprets the word "information" in sections 776(a) and 782(e) as applying to "all information" submitted. Indeed, USDOC has repeatedly noted that its consistent practice is to reject a respondent's submitted data "in toto" when the data regarding one of the "essential components" is unusable. Linked inexorably with this "practice" is USDOC's consistent interpretation of sections 782(d), 782(e), and 776(a) as requiring it to apply total facts available where information regarding what it terms an "essential component" is not available from the respondent. (India addresses USDOC's application of the long-standing total facts available practice in the responses to Questions 35 and 36 below.)

27. Furthermore, the Panel's question here appears to suggest that India's position on the mandatory nature of the requirement imposed by the statute is contrary to decisions by the USCIT, and SAIL's arguments in its briefs to the USCIT. However, none of the USCIT decisions on "partial facts available" have required USDOC to accept data on one of a respondent's "essential components" when USDOC has rejected data on other "essential components." To the contrary, as is evident from the USCIT's decision in this very case, the Court has generally accepted USDOC's arguments against using "partial facts available" when one of the essential components is unusable. As the USCIT stated in SAIL's appeal of USDOC's Final Determination, "[t]he Department's refusal to accept SAIL's sales data is also consistent with its long standing practice of limiting the use of partial facts available. More specifically, the Department only uses partial facts available to 'fill gaps' in the record...."[16] The Court went on to describe another case in which it had "upheld the Department's decision to 'reject a respondent's submitted information *in toto* when flawed and unverifiable ...data renders all price-to-price comparisons impossible.' ... Similarly, here the Department's legal interpretation is reasonable"[17] – i.e., the interpretation to reject SAIL's US sales data because of flaws in other databases. And as for SAIL's own argumentation before the USCIT, although its counsel was ethically bound to

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15 Final Determination, Ex. IND-17, at 73127 (emphasis added).
16 *SAIL v. United States*, Slip Op. 01-60, at 12 (22 May 2001) (citation omitted) (Ex. IND-20).
17 *Ibid*. at 13 (quoting *Heveafil Sdn. Bhd. v. United States*, Slip Op. 01-22, at 9 (27 Feb. 2001)).

zealously represent the company's interests– including the argument that "partial facts available" could include the acceptance of SAIL's US sales database in this case– clearly that was an uphill battle that was lost when confronted by USCIT's recitation of its own and USDOC's precedents.

28. As a final point of clarification, India stresses that as set forth in its First Submission, its First Oral Statement, and in the answer to Question 30, infra, there is an entirely separate *per se* (as such) claim regarding section 782(e) that does not involve section 782(d). This claim is that section 782(e) sets up too high a standard, by imposing additional criteria that do not exist in the Agreement, before the mandatory acceptance of the submitted data is triggered.

Q25. The heading of India's argument regarding Article 15 asserts that USDOC violated Article 15 by "failing to give special regard to the situation of India as a developing country when it applied facts available in relation to SAIL's US sales data." However, the body of the argument related to the alleged failure of USDOC to "explore possibilities of constructive remedies" as required by the second sentence of Article 15. Is India asserting a violation of the first sentence of Article 15, and if so, could India please explain the legal argument in support of its claim? Could India elaborate on its interpretation of the first sentence of Article 15? In India's view, what obligations does it impose on a developed country, and when must those obligations be satisfied? Could India expand on its assertion and explain how, specifically, the USDOC actions in this case constitute a violation of the first sentence of Article 15?

Reply

29. India is asserting an independent claim for a violation of the first sentence of AD Agreement Article 15.

Legal interpretation of First Sentence of Article 15:

30. The obligation imposed by the first sentence of Article 15 is mandatory because it provides that "special regard must be given. . ." It does not say "should be given" or "must be considered". The operative action required from investigating authorities is to provide "special regard" "when considering the application of anti-dumping measures". The inclusion of the clause "when considering the application of anti-dumping measures" indicates that the developed country investigating authority must take action after collecting information and in deciding which information to use and how to use it to calculate the margins. Finally, the use of the term "special situation" highlights the needs of developing countries and appears to be similar to the concept of "essential interests" embodied in the second sentence of Article 15.

31. Exactly what constitutes sufficient "special regard" will depend on the facts and circumstances of each case. The requirement that developed country authorities give "special regard" implies that before applying a dumping margin they must give some extra consideration to the arguments and special situation of respondents in developing countries. It may include exercising any available

discretion granted by statutory or regulatory provisions to use information provided by respondents in developing country Members. It may require making a distinction in regulations or practice between respondents based in developing and developed country Members. Finally, it could also include exercising special care in choosing which facts to use even when facts available must be used, and in an example relevant to the current case, it may mean taking additional steps to corroborate information in the petition that would be used as facts available. In short, the notion of "special regard" requires an enhanced, conscious application of equity and fairness, focusing on applying the applicable rules to the maximum extent possible to facilitate the "special situation" of developing countries.

32. But it is not enough for an investigating authority to maintain an awareness of special regard during an investigation. The authorities must also articulate in some manner in the final determination how they exercised such special regard. Otherwise, it would be impossible for WTO Members and WTO panels to judge whether the obligation in the first sentence of Article 15 has been discharged.

Argument in support of India's claim under the First Sentence of Article 15:

33. There were several key points late in the investigation in which USDOC was required to give "special regard" to SAIL's "special situation." In particular, "special regard" should have been given when USDOC was faced with a choice in calculating the margin to be applied in the final determination. As the Panel knows, USDOC could have used SAIL's verified (and verifiable), timely produced US sales database instead of the single offer price of $251 in the petition. Before it made this choice, USDOC was presented with considerable arguments by SAIL's counsel in the case and rebuttal briefs filed on 12 and 17 November 1999, respectively, and again at the hearing held by USDOC on 18 November that it should use the company's actual submitted US sales data.[18] SAIL's counsel argued that because SAIL's US database was complete, accurate, and verified, it would be arbitrary and capricious for USDOC to discard it and use information that it knew to be incorrect instead. But there is no evidence in the Final Determination that in deciding to use the $251 price offer in the petition - or in making any other decision regarding the application of anti-dumping measures - USDOC ever gave any "special regard" to SAIL's "special situation." This is not surprising since nothing in the US statutes, regulations or procedures implementing the AD Agreement grant any specific authority to USDOC to give any "special regard" to developing country respondents in considering the application of anti-dumping measures. The statute and regulations simply authorize USDOC to apply a "one size fits all" methodology.

34. How is the Panel to judge whether the United States provided sufficient "special regard" to SAIL? India would suggest that at a minimum, the Panel must examine the Final Determination to see if there is any evidence that USDOC indicated how it took the special situation of SAIL into account when consider-

[18] Ex. IND-14, IND-15.

ing the application of anti-dumping measures. At a minimum, the Final Determination should state the steps USDOC considered in deciding what information to use and how that choice was - or was not – affected by the fact that SAIL was a developing country respondent. For example, USDOC could have considered exercising, for the first time in its history, the apparent discretion existing on the face of section 782(d) to accept SAIL's US sales data despite the absence of usable information in the cost and home market databases. Yet, the Final Determination does not reflect any such reconsideration of USDOC's long-standing interpretation and practice of applying sections 782(d) and 782(e) in a mandatory fashion - regardless of the developmental status of the responding company. In fact, the Final Determination includes no description whatsoever of the required "special regard" to SAIL.

35. India notes that the United States has argued that it provided additional time during the investigation to SAIL to respond to its questionnaires and that this evidenced its concern for SAIL's status as a developing country company. But most of these so-called extensions of time were burdened with yet more requests for information.[19] And in one instance, USDOC rejected three of SAIL's submissions as untimely – two of which were late by one day – which hardly demonstrates that USDOC was applying a "special regard" for the situation of a struggling developing country respondent.[20] Nor do such extensions of time constitute providing "special regard" when "considering the application of anti-dumping measures". This can only be done after the information is collected and processed. It is at this later stage when the margins are calculated and a variety of different facts and methodologies can be used to calculate the ultimate margin that the special regard must be given. At this crucial later stage of the process, USDOC provided no such special regard to SAIL in the current case. In fact, it knowingly used fiction in place of reality in choosing the $251 price offer from the petition to calculate the final dumping margin.

36. Finally, the United States correctly notes that India previously asserted that the first sentence of Article 15 does not impose any specific legal obligation on developed country Members.[21] India still takes the position that there are no specific legal requirements for specific action set out in the first sentence of Article 15. However, India has reflected on the mandatory nature of the first sentence and is now of the view that this mandatory provision does create a general obligation, the precise parameters of which are to be determined based on the facts and circumstances of the particular case.

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[19] *See, e.g.*, Ex. US-8 (supplemental questionnaire dated 27 May 1999); Ex. US-9 (letter dated 11 June 1999, granting extension of time and asking additional questions); Ex. US-11 (memo to USDOC file dated 7 July 1999, noting "deficiencies" in SAIL's electronic database and requests for "new files and supporting format sheets"); Ex. US-20 (letter dated 12 July 1999 from USDOC to counsel for SAIL offering opportunity to resubmit electronic databases and asking additional questions on cost data); Ex. US-12 (additional supplemental questionnaire dated 7 July 1999); Ex. US-17 (additional supplemental questionnaire dated 2 August 1999); Ex. US-18 (additional supplemental questionnaire dated 3 August 1999).

[20] *See* USDOC letter to SAIL rejecting submissions (7 July 1999) (Ex. IND-9).

[21] First Written Submission of the United States, para. 182.

Q26. Does India agree with the contention of the United States that the respondent ultimately controls the information necessary to a dumping calculation? How does India respond to the contention that to allow the respondent to control the information gathering process by deciding which information (or category of information) it will provide, and requiring that this information be accepted if it is adequate under paragraph 3 Annex II regardless of what flaws there may be with other information, gives the respondent control over the dumping calculation and thus opens the possibility for manipulation of the results?

Reply

37. India agrees, of course, that the respondent possesses the data from which the most accurate dumping margins can be calculated. India does not agree however, that the respondent in any way has "control over the dumping calculation" or can "manipulate" the results in the negative sense suggested by the United States. It would be more correct to say that the investigating authority controls the dumping margin calculations, in that it decides (within the limits imposed by the AD Agreement) what data to use and actually performs the calculation. This information can, in appropriate situations, include the selective, non-neutral information included within the petition. In India's view, the issue is not an abstract one of "control," but whether the Agreement contains adequate procedures for collection and use of information to determine dumping margins, and whether those procedures have been properly applied in a given case.

38. The purpose of an anti-dumping investigation is to establish the most accurate possible dumping margin, not to achieve a particular outcome. Moreover, the Agreement contains detailed procedures for collecting and using information to establish that margin. This is why Article 9.3 stipulates that the amount of a dumping margin may not exceed a margin calculated in accordance with Article 2. This is also why Article 6 provides how evidence is to be collected and used in determining a dumping margin under Article 2, and why Article 6.8 and Annex II establish procedures to be followed in the event that a respondent does not or cannot provide information requested. In addition, Article 2.4, first sentence mandates that a "fair comparison" must be made between normal value and export price. India considers that these provisions govern how dumping margins are to be established in every possible situation in which either no or incomplete information is received from a respondent. Thus, if the procedures contained in the Agreement are followed properly, there should be no issue as to which party "controls" the process or "manipulates" the outcome. Moreover, India considers that these provisions establish a strong preference against rejecting information submitted by a respondent even if that information is incomplete.

39. Nevertheless, the United States contends that the investigating authority must have sufficient authority to take additional action to assert "control over the process" to its own satisfaction and to avoid what it considers as "manipulation" of the process by the respondent. Before discussing how these concerns affect the situation referred to in the question, where some of the information is ade-

quate and the rest is flawed, it is instructive to consider how the United States' concerns affect the outcome under the Agreement in situations in which there is much less cooperation or accurate data available.

40. Even in the most extreme possible case of total non-cooperation, the United States' concerns regarding "manipulation" have no basis in the language and operation of the Agreement. Consider a situation where a respondent receives a petition and a questionnaire from the USDOC and decides not to respond to the questionnaire or participate further in the investigation. While the United States would suggest that a respondent is thereby "manipulating" the process, the respondent's reaction may be an entirely appropriate, reasonable business decision. A respondent simply may not be able to bear the considerable legal and administrative costs and other burdens of participating in the investigation, or may be incapable of assembling or translating the necessary records. This situation clearly permits the investigating authority to use "the facts available" for every aspect of establishing a margin. Even in this situation, however, the investigating authority does not have unlimited discretion. The margin must still be based on facts that are permissibly "available", established using "special circumspection" and, where "practical," information checked against independent sources. Moreover, while the Agreement, in Annex II, paragraph 7, notes that this situation "*could*" result in a less favourable outcome for the respondent, the nature and extent of this outcome is still dependent on facts established using special circumspection. Thus, even in the most extreme situation of a respondent failing to provide any data, the Agreement lays down procedures that must be carefully followed, and does not leave open issues as to who "controls" the process or how outcomes are "manipulated". More importantly, the Agreement applies these procedures and reaches a possibly adverse outcome without needing to make subjective judgements as to whether a respondent is "manipulating" the process.

41. Moreover, the United States' approach to ensuring that it has sufficient control over the process would lead to the establishment of margins not supported by the evidence. In a case where a respondent decides to provide at least some information, the Agreement already provides more than sufficient incentives to encourage cooperation without permitting an investigating authority to discard information provided by respondents that meets the criteria of Annex II, paragraph 3 and without undermining the goal of calculating accurate margins based on facts. India refers the Panel to the discussion at paragraphs 47-61 of its Oral Statement at the First Meeting of the Panel, in which India explained that the ability of the investigation authority to rely on information supplied by the domestic industry for even part of the margin calculation creates the strongest possible incentive for a respondent to comply with the authority's data requests. India noted therein that the United States informed the panel in the *Japan Hot-Rolled* dispute that "it is generally understood that applicants will document the highest degree of dumping that the available evidence will support". A respondent providing some information knows, therefore, that any information that it does not provide may be replaced by "the highest degree of dumping that the

available evidence will support". This is surely sufficient incentive to cooperate. Where a respondent submits some data and invites the use of the "highest degree" of dumping in place of the remaining data, the respondent can hardly be said to control the calculation or manipulate the outcome.

42. Indeed, turning to the facts of this case, SAIL was so desperate to avoid the application of facts available regarding its cost of production that it repeatedly strove to satisfy USDOC's data requests and supplemental questionnaires, and it even submitted a totally revised cost database on the first day of verification. It did this because it knew that the legally permissible alternative was for USDOC to use facts available in the petition – the "highest degree of dumping" – to establish its constructed value. SAIL's inability to provide this information in a timely fashion resulted in the application of much higher margins than would have resulted if SAIL's revised cost database had been used.[22] It is hard to see this extraordinary effort to get the cost data "right" as evidence that SAIL had control over or was somehow manipulating the process (or failed to cooperate).

43. India notes also that to the extent that the Agreement must be interpreted as creating or requiring incentives to participation by respondents in an investigation, in practical terms the United States' position creates as many negative as positive incentives. The United States' position is that it may use total facts available, which may be adverse, even in situations where respondents make extensive efforts to cooperate and indeed succeed in providing much usable data. If respondents know that if they try but despite their best efforts fail to submit entirely accurate or usable data, the consequences will be no different than if the respondent made no effort at all to respond, then the incentive is clearly for the respondent to save its time and money and not respond.

44. For these reasons, India considers that the Agreement provides adequate, objective procedures to determine objective margins based on facts, even in situations where respondents either provide no information at all or selectively provide certain information, without giving rise to any concerns regarding subjective issues of control or manipulation.

45. In any event, this case is neither one where the respondent failed to respond at all nor one where the respondent tried, in the United States' phrase, to "provide only that select information which would not have negative consequences for them". SAIL clearly tried very hard to provide complete and accurate responses to all sections of the USDOC's questionnaires and to "pass" all aspects of the USDOC's verification. SAIL did not deliberately attempt to submit inaccurate or incomplete data or otherwise "control" or "manipulate" the process. As a practical matter, therefore, it is not clear what relevance the United States' concerns about "control" or "manipulation" have to this case. Even if the Agreement permits the application of adverse facts available where the investigating authority has reason to believe that the respondent "manipulated" the data, there is no basis for such a finding here. SAIL's dumping margin therefore should not

[22] SAIL's case brief to the USDOC, at 13 (Ex. IND-14).

be affected by concerns regarding the possible manipulation of data by other respondents in other cases.

Q27. It is the Panel's understanding that US law does not provide for the imposition of a lesser duty. In this circumstance, does India consider that the US was obliged to explore the possibility of imposing a lesser duty under Article 15?

Reply

46. The Panel is correct that the US anti-dumping law does not provide for the imposition of a "lesser duty" than that calculated as the "full margin of dumping", in the language of Article 9.1. Nevertheless, India believes that Article 15 requires the United States to at least consider the possibility of a lesser duty remedy for developing countries. Article 15 expressly provides that "possibilities of constructive remedies *shall* be explored before anti-dumping duties are applied". The panel in *EC Bed Linens* stated that "imposition of a lesser duty, or a price undertaking would constitute 'constructive remedies' within the meaning of Article 15".[23] AD Agreement Article 8.3 requires authorities to inform the exporter of the reasons why the price undertaking has not been accepted. Moreover, the United States was required, pursuant to Article 18.4 of the AD Agreement, to "take all necessary steps, of a general or particular character, to ensure, not later than the date of entry into force of the WTO Agreement for it [1 January 1995] the conformity of its laws, regulations and administrative procedures with the provisions of this Agreement as they may apply for the Member in question".

47. There can be no doubt that a lesser duty is a "constructive remedy", as found by the *Bed Linens* panel. Nor is there any doubt that Article 15 applies to all WTO members. Therefore, in order to meet its obligations under Articles 15 and 18.4, the United States was required to have legislation that gave authority to USDOC to engage in the exploration of a lesser duty prior to the imposition of anti-dumping duties with developing countries. Any other reading of Articles 15 and 18.4 would permit a Member to avoid its responsibilities under Article 15 to explore all constructive remedies simply because it refused to enact the necessary laws, regulations or administrative procedures. Such a failure to enact legislation represents a nullification and impairment to the rights of India and to Indian companies that are entitled to have price undertakings explored in negotiations with USDOC.

Q28. Could India please explain why it considers the US sales data to be "unrelated" to the rest of the data in this case? Would India consider that, in every case, the data on (a) the prices of the subject merchandise in the domestic market of the exporting country, (b) the export prices of the subject merchandise, (c) the costs of production, and (d) constructed value, are separate and distinct categories of information? Would India consider that if an exporter provides information on any one or more of these elements

[23] *European Communities - Anti-Dumping Duties on Imports of Cotton-Type Bed Linens from India*, WT/DS141/R, DSR 2001:VI, 2077, para. 6.229.

that is verifiable, timely provided, and where applicable in the computer language or medium requested, that information must be used in calculating a dumping margin for the exporter providing the information? Would India's answer to the previous question be affected by the extent to which information on other elements is not verifiable, or not timely provided, or not in the computer language or medium requested? That is, does India see any possibility of a "global" perspective on the decision whether information can be used without undue difficulties in calculating the dumping margin?

Reply

48. India considers the US sales data to be unrelated to the rest of the data in this case for a number of reasons. First, SAIL recognized and treated its export and domestic market sales as a separate area of commercial activity, as demonstrated by the facts set forth in the verification reports that SAIL maintains separate sales offices and personnel, separate records, and distinct channels of distribution for the export sales, as opposed to their home market sales and cost of production. Financial and accounting records for the export and domestic markets were also maintained separately, because export transactions involve currency conversion, which is not relevant for home market sales. Indeed, USDOC's verification report describes the differences in processing and recording of US sales and home market sales. The report highlights the very centralized nature of SAIL's export contracts, including those involving the United States. Export sales were transacted by the International Trade Division in New Delhi, and transferred to the Transport and Shipping office in Calcutta for all aspects of execution, from cutting production work orders to invoicing and billing to receipt of payments. All US sales were shipped from one plant through one port (Verification Report at pages 8-9). Home market sales, on the other hand, were characterised as very decentralized in all phases of the sales process. Sales could be contracted and recorded by one of many branch offices, or they could be contracted by the production plants and recorded by a branch office. Customers could have merchandise shipped from plants, or could pick-up purchases directly from the stockyards. Even more distinct is SAIL's cost databases, which involve separate cost accounting systems, and are based at the firm's production facilities (plants), rather than its sales offices. Each production facility produced its own financial statement based on its distinct cost records. Plants generally transferred the recording and processing of sales to branch sales offices in situations where sales were contracted directly by a plant. (Verification Report at pages 7, 9). These facts involving SAIL are not atypical. Many companies worldwide similarly maintain separate information for export sales, home market sales and cost of production data.

49. This separation among the export sales, home market sales, and COP/CV is recognized by USDOC itself, which, in the Final Determination in this case, as in many others, has identified these areas as four separate – not a single unified – "essential components" of a respondent's data. The distinction is also recognized in USDOC's questionnaires, which routinely are subdivided into separate sec-

tions for US sales, home market sales, and COP/CV. In fact, USDOC's original questionnaire and its supplemental questionnaires were distinctly organized into sections for home market sales, US sales, and costs of production and constructed value. The Table of Contents clearly defines the separation of data for the entire course of the investigation: Section B is Sales in the Home Market; Section C is Sales to the United States; Section D is Cost of Production and Constructed Value. Furthermore, the Import Administration's Anti.Dumping Manual, a training and operating guide for use within USDOC, also makes a clear distinction between the purposes, acquisition, and analysis of home market sales data, US sales data, and cost of production and constructed value data.[24] More fundamentally, the US anti-dumping law itself has separate provisions defining and describing the calculation of US price and NV.[25]

50. For these reasons, India submits, in response to the second question, that, barring unusual circumstances, the four so-called "essential components" are indeed separate and distinct categories of information.

51. The answer to the third question is yes, information meeting the conditions of Annex II, paragraph 3 must be taken into account together with other usable information in calculating a final dumping margin. India refers the Panel to paragraphs 50-90 and 91-113 of its First Submission, paragraphs 31-61 of its First Oral Statement, Answers to Questions 19-21, 26, and paragraphs 14-27 of its Rebuttal Submission for further argumentation supporting this conclusion.

52. In response to the fourth question, India submits that the text-based requirement of Annex II, paragraph 3 requires authorities to use information that meets the four conditions, and that this requirement is not impacted by the extent to which other information is not verifiable, timely produced or in the proper computer language. India assumes in this answer that the particular information referred to by the Panel met the four conditions of annex II, paragraph 3.

53. Another related issue is whether a verification failure in one component of information can be attributed to the verifiability of information in another component of information. As India has argued in Section V.C of its Rebuttal Submission, it was not appropriate for USDOC to conclude that the admitted verification problems in the cost and home market sales databases infected the verifiability of SAIL's US sales database. USDOC's verification report repeatedly found that SAIL's US sales data was verifiable, i.e., repeated audits of that information resulted in the findings that "we noted no discrepancies". Yet, in the verification "failure" memorandum, USDOC clearly imputed the admitted problems in SAIL's home market and cost databases to the SAIL's US sales data. This "total" verification "failure" for all of SAIL's data led naturally to the application of "total" facts available. No objective and non-biased investigating authority could have made such a finding based on the record of the investigation. India

[24] Relevant portions of this Manual are attached as Ex. IND-37.

[25] *See* section 772 of the Trade Act of 1930 as amended, 19 U.S.C. § 1677a (export price and constructed export price); section 773 of the Trade Act of 1930 as amended, 19 U.S.C. § 1677b (normal value).

believes that given the separation of databases maintained by many companies (including SAIL), it would be difficult for a verification failure in one category of information to "spill over" into another category resulting in a finding of "total" verification failure, particularly where the information at issue was in fact found to be verifiable. *See* India's Rebuttal Submission, paras. 82-86.

54. Regarding the final question as to whether there is a "global" perspective on whether information can be used without undue difficulty, India's answer is no. As India has argued repeatedly, the term "all information which ...can be used without undue difficulty" does not mean, as the United States argues, the totality of the information submitted by a respondent. Rather, it involves particular pieces or categories of information that must be examined separately by investigating officials to determine on a case-by-case process whether they can be used, together with other available information, in calculating a dumping margin. In addition, India would direct the Panel to paragraphs 11 to 24 of its Rebuttal Submission where it sets forth in detail the type of factors it believes should be considered in determining whether a piece of information that is timely produced and verifiable can be "used without undue difficulty". There may be relatively unusual instances in which a piece of information is simply so minor in relation to a larger category of information that it could only be used with undue difficulty. This would have to be determined on a case-by-case basis. But that situation is clearly not presented by the facts of the present case. India notes that the United States reads such a global perspective into section 782(e)(3) by adding the element "the information is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination". But as India has argued previously, this language is not found - and cannot be permissibly implied - in the text of Annex II, paragraph 3 or Article 6.8.

Q29. Is it correct to understand that, in India's view, the fact that there is no or unverifiable information concerning the cost component of the US sales has no effect on the verifiability or reliability of the US sales price data that was provided? Does India consider that it may in some circumstances be the case that the lack of some aspect of the requested information renders the entire body of data to which that aspect pertains unreliable?

Reply

55. The answer to the first question is yes. India's understanding of this question is that by "cost component of the US sales", the Panel is referring to the variable cost of manufacture and total cost of manufacture data that were reported in the VCOMU and TCOMU fields of SAIL's US sales database, submitted as Ex. IND-8. This absence of this information had no impact on the verifiability or reliability of SAIL's US sales data for the following reasons:

56. In its normal course of business SAIL's records regarding its costs of production are completely segregated from the records to document sales revenues and expenses. The USDOC's verification report demonstrates that the company's full cost data, which were the ultimate basis for deriving the VCOMU and TCOMU information that was copied to the US sales database, are maintained as

separate databases in its production facilities in India. USDOC's cost verification was conducted at SAIL's BSP plant in Bhilai, India, the RSP plant in Rourkela, India, and its Raw Materials Division in Calcutta. However, the introduction to the Sales Verification Report states that the sales verification was held at different locations – i.e., at various branch offices "including New Delhi, India, …Calcutta, India, …and Visakhapatnam, India".[26] That report examined no element of the cost of production. Furthermore, the cost databases have nothing to do with the US sales data that were maintained and reported in a completely separate fashion by SAIL. As described above, the manner in which USDOC collects, verifies, and analyzes data clearly establishes a distinction between the "four essential components" - home market sales data, US sales data, and costs of production and constructed value data. Indeed, the calculation of the US price of imported merchandise is not affected by an aspect of cost. By statute, by regulation, and by practice the Department always makes adjustments for differences in physical characteristics to normal value.[27] In such circumstances a cost is associated with US merchandise so that if it is matched to non-identical home market merchandise, an adjustment to normal value can be made, but in no instance is a cost-based adjustment made to US price.

57. Second, the fact that SAIL's US sales data met the "verifiable" factor is evident from USDOC's verification report itself, in which the USDOC personnel repeatedly noted the lack of any "discrepancies" involving that database, as discussed extensively at the First Meeting and in India's Rebuttal Submission at paragraphs77-84. Even USDOC's Memorandum of Verification Failure, submitted as India Exhibit 16, identified only one error in the US sales database (the width coding error), which all parties concede could be easily corrected, as described in Mr. Hayes' affidavit (Ex. IND-24).

58. Third, USDOC never stated in the US sales verification report, the US cost verification report, the verification failure memo, or in the Final Determination that the verifiability or reliability of SAIL's US sales data was negatively impacted by the absence of verifiable or reliable data concerning the VCOMU and TCOMU fields. There is simply no such connection made in these repeated evaluations of the facts between the VCOMU and TCOMU and the verifiability of SAIL's US sales data. Given SAIL's repeated arguments to USDOC before the issuance of the Final Determination that its US sales data was verifiable, reliable, and usable, it is revealing that USDOC did not point to the VCOMU or TCOMU cost information as resulting in the conclusion that the sales information was not verifiable or reliable. But this is not surprising given the fact that SAIL's US sales information was examined during verification was successfully verified.

59. Fourth, USDOC did not consider that the lack of data on the "cost component" in the US price offer that formed the basis of the petition's calculation of the 72.49 per cent margin undermined the reliability or verifiability of that $251

[26] USDOC, SAIL's Sales Verification Report at 1 (Ex. IND-13).

[27] *See* section 773(a)(6)(C)(ii) of the Trade Act of 1930 as amended, 19 U.S.C. § 1677b(a)(6)(C)(ii), quoted in paragraph 50 of India's Rebuttal Submission.

price offer. The single cost component in the petition used for this final determination margin was applied to all of the imports from India in the final determination even though that one cost did not have what USDOC now claims is an "essential" link to the other types of cut-to-length plate. Even assuming that USDOC may now "re-evaluate" its findings on this issue (see India Rebuttal Submission at paragraphs 25-43 for a contrary view), there is simply no basis in the record for a reasoned conclusion that the lack of the same "cost component" data related to SAIL's US sales could somehow be found to undermine the reliability or verifiability of that data which actually went through a verification and was found to contain only a few minor errors.

60. In response to the last question, there may be circumstances in which so much information is missing or unverifiable in the database of one of the "essential components" – US sales, home market sales, COP, or CV – that the verifiability or usability of the particular information might be called into question. This would have to be determined on a case-by-case basis. A key factor would be the extent of the verification process and the separate nature of the manner in which the foreign respondent maintained the information. Another key factor is the usability of the data in connection with other data. India has presented detailed considerations regarding undue difficulty in paragraphs 11-24 of its Rebuttal Submission. But this case does not present such a situation in which the verifiability or usability (or even "reliability") of SAIL's US sales data can be called into question by defects in the cost and home market database. India submits that it is not necessary for the Panel to determine the boundaries of such a situation, because however it might be defined, it would require far more severe circumstances than exist with SAIL's US sales database in the current case - in which there is no question about the ease with which the one (width coding) error identified in the Sales Verification Report could be corrected.

Q30. Does India consider that §782(e)(3) is NOT consistent with goal of objective decision-making based on facts, or does India object to it because it is not a provision specifically found in Annex II?

Reply

61. India is of the view that Section 782(e)(3) is not consistent with the goal of objective decision-making based on facts because, as interpreted by USDOC and the USCIT, it requires the discarding of information that satisfies the conditions of Annex II, paragraph 3 – i.e., that is verifiable, timely produce and usable without undue difficulties. These decisions have interpreted the word "information" in Section 782(e) as meaning "all information necessary to calculate a dumping margin".[28] This means that Section 782(e) has been applied to all the information requested, not to selected portions or categories of information. Such a result - which always occurs when USDOC determines that some "essential" component (usually cost-related) of the information requested is not usable - prevents the use of respondents' information regarding other "essential compo-

[28] India's First Written Submission, paras. 132, 154-158.

nents" that meets the requirements of Annex II, paragraph 3 in calculating a dumping margin. If Section 782(e)(3) did not add to the obligations or detract from the rights of WTO Members, then India would not object to that statute simply because its exact words are not reflected in Annex II. But that is not the case here for the reasons set forth in India's First Submission at paragraphs 148-49 and 154-156, and in India's First Oral Statement at paragraph 65. As India has argued in these previous submissions, Section 782(e)(3) imposes an additional hurdle (not based in the text of the AD Agreement) for respondents to overcome before their information must be used by investigating authorities.

Q31. Where in the AD Agreement does India find an obligation on the investigating authority to carry out and record, as suggested in paragraph 74 of its oral statement, a detailed analysis of a proposed constructive remedy?

Reply

62. India sees two aspects to the Panel's question: first, whether there is an obligation to "carry out" an analysis of the exploration of constructive remedies other than dumping duties, and second, whether there is an obligation to create a record of such an exploration.

63. First, regarding whether there is an obligation in the AD Agreement for Members to "carry out" an analysis of a proposed constructive remedy, India notes that the word "explored" in Article 15 has been defined as "examine, scrutinize, search out".[29] The term "explore" requires a rigorous and thoughtful examination. This word requires scrutiny (i.e., careful examination) of proposals submitted by developing country respondent companies. It also requires investigating authorities to search out ways that the proposed constructive remedies could be used - or to determine why they could not. See also India First Oral Statement, paragraphs 72-74.

64. Regarding the second factor, Article 15, second sentence imposes a mandatory obligation on developed country investigating authorities to explore constructive remedies such as price undertakings before applying anti-dumping duties. As a mandatory requirement, it carries with it the obligation to articulate the basis for the decision made regarding the offered suspension agreement. The reason is simple and compelling. How else is a WTO panel or a WTO Member to judge under Article 17.6(i) whether an investigating authority evaluated the relevant facts in complying with the mandatory requirement? Panels cannot accept *post hoc* justifications. WTO Members will have no idea whether their rights have been violated if there is no articulation of the consideration given to a proposed price undertaking or suspension agreement.

65. AD Agreement Article 8.3 requires authorities to "provide the exporter the reasons which have led them to consider acceptance of an undertaking as inappropriate. . .". This provision is useful context for understanding the obligation of investigating authorities to articulate their consideration of proposed constructive remedy, such as a suspension agreement under Article 15. Similarly,

[29] New Shorter Oxford Dictionary, Vol. 1 at 889.

Article 12.2.2 of the AD Agreement provides useful context for the interpretation of Article 15. It states that a public notice must be issued on "all relevant information on the matters of fact and law and reasons that have led to the imposition of final measures or acceptance of a price undertaking . . ". A very relevant piece of information for developing country Members is the articulation of reasons that a dumping margin - and not constructive remedies - was imposed in the final determination.

Q32. Is it correct to understand that India considers that a comparison between a constructed normal value calculated by petitioners, and an average of US sales prices, or an average of a subset of US sales prices for product that "matches" the product for which normal value was calculated, yields a more accurate result, one that better represents "objective decision-making based on facts", than a determination that applies the dumping margin calculated in the petition as facts available? If so, could India explain in detail why it considers this result "better". Would India's view be the same if the outcome were different?

Reply

66. The answer to the first question is yes, assuming that the "US sales prices" in the question refer to SAIL's submitted price data regarding its actual US sales made during the period of investigation.

67. The answer to the second question is that this is a "better" result because (1) it results in a fairer comparison of export price and normal value as required by Article 2.4, first sentence; (2) it is consistent with the text of the AD Agreement, Article 6.8 and Annex II, paragraph 3; (3) it uses information known to be accurate, i.e., SAIL's verified (and verifiable) and timely produced, actual US sales data; and (4) unlike the price offer in the petition, it does not use price information that is know to be incorrect and unrelated to the prices at which any of SAIL's products were sold in the United States during the POI. India notes that combining SAIL's actual, verified US sales data with normal value data from the petition is not a "perfect" or even a "best" result. This is because combining these two elements on export price and normal value results in a dumping margin which India believes is still far greater than the actual dumping margin in this case, as is evident from an analysis of SAIL's submitted data on all the "essential components". SAIL estimated in argument before the USDOC that, based on its revised cost of production database that was rejected by USDOC as untimely, its "true" margin of dumping was less than one per cent.[30] However, India believes that, given the "available" facts that can be considered by the Panel in this dispute, the "better" result - indeed the "far better" result - is to use SAIL's US sales data in the calculation of the dumping margin.

68. India is not entirely clear about the meaning of the last question. If by a "different" outcome, the Panel means that a situation in which the margin of dumping would have been lower if the information in the petition had been used,

[30] SAIL's case brief to the USDOC, Ex. IND-14 at 12-13 (12 November 1999).

then the answer is that India's position would be the same. Investigating authorities must use information submitted by a respondent that meets the requirements of Annex II, paragraph 3. In the unusual case where the use of the actual data results in a higher dumping margin than that alleged by the petitioner - not a situation existing in this investigation - the only proper solution would be to use the information submitted by respondent. If that had been the situation in this investigation, India would likely not have pursued this dispute to a WTO panel.

Q33. India appears to have argued that the investigating authority should, in deciding whether information will be rejected and facts available used instead, have reference to the facts available that would likely be used, and assess whether they are, in fact, "better", "as good as", or "worse" than the imperfect information provided by the exporter. Is this a correct understanding of India's position? Could India explain what relevance the facts available ultimately used have in the decision regarding whether information provided can be used in the investigation without undue difficulties? Could India please explain its apparent view that the quality of the facts available ultimately relied upon in making a determination somehow effects the degree of effort that might be considered "undue difficulties" in using the information provided?

Reply

69. India directs the Panel to the discussion of the "undue difficulty" element of Annex II, paragraph 3 set forth in paragraphs 11 to 24 of India's Rebuttal Submission where the questions contained in Questions 33 and 34 are addressed in detail. However, as a general matter, India submits that the comparative determinations that the Panel believes India is requesting it to make – i.e., whether one source of information is "better," "as good as," or "worse than" other information – are all derived from the text of Annex II, paragraph 3 and the object and purpose of the AD Agreement. That is, if the information submitted by a respondent meets the conditions of that paragraph (including whether it is usable without undue difficulty), then it must be used – i.e., it is by definition "better" than information from other sources, and in particular a biased document such as the petition.

Questions to both parties

Q34. Would the parties please discuss their views concerning the meaning of the phrase "undue difficulties" in paragraph 3 of Annex II? Does it encompass substantive as well as procedural aspects of using the data in question?

Reply

70. India directs the Panel to the discussion of the "undue difficulty" element of Annex II, paragraph 3 set forth in paragraphs 11 to 24 of India's Rebuttal Submission where the questions contained in Questions 33 and 34 are addressed in detail.

Q35. The United States argues that India's claim regarding US "practice" in the application of facts available is not properly before the Panel and submits that under the US law, an agency such as USDOC may depart from established "practice" if it gives a reasoned explanation for doing so. The United States thus argues that US "practice" cannot be the subject of a claim. Could the United States please elaborate on this argument? India is invited to respond to this question as well.

Q36. Could the parties explain their views as to what constitutes "practice" as used by India in its request for establishment?

Replies to Questions 35 and 36

US procedural objection:

71. India disagrees with the United States' assertion that India's claims regarding US "practice" are not properly before the Panel because they were allegedly not discussed during the consultation. Paragraph 5 of the consultation request stated that India wished to consult concerning "DOC's determination of sales at less than fair value in contravention of WTO rules governing the use of "facts available" (e.g., the refusal by the US authorities to accept timely, verifiable and appropriately submitted export price information)."[31] The "determination" referred to in this paragraph is the "Final Determination" issued by USDOC (Ex. IND-17), in which USDOC stated the following: "It is the Department's long-standing practice to reject a respondent's questionnaire response in toto when essential components of the response are so riddled with errors and inaccuracies as to be unreliable." The "use" of facts available described in the consultation request involved USDOC's application of its total facts available practice. This long-standing practice is intertwined with USDOC's Final Determination in this case. There is no question that the discussion during the consultation concerned USDOC's Final Determination and USDOC's application of total facts available. It is impossible to discuss the "total facts available" aspect of USDOC's Final Determination without necessarily implicating the practice that was identified and used in the Final Determination. Accordingly, there is no basis for the United States' assertion that the consultation request and the consultation did not include discussions related to USDOC's application of its self-professed "long-standing practice" of applying total facts available.

72. Moreover, contrary to the United States' arguments, the Appellate Body in *Brazil Aircraft* held that DSU Articles 4 and 6 do not "require a *precise and exact identity* between the specific measures that were the subject of consultations and the specific measures identified in the request for the establishment of a panel".[32] The Appellate Body noted its agreement with the *Brazil Aircraft* panel that one purpose of consultations is to "clarify the facts of the situation and it can be expected that information obtained during the course of the consultations may

[31] Ind. Ex-22.
[32] WT/DS46/AB/R, DSR 1999:III, 1161, para. 132.

enable the complainant to focus the scope of the matter with respect to which it seeks establishment of a panel."[33] Moreover, the panel in *Brazil Aircraft* stated that "nothing in the text of the DSU ...provides that the scope of a panel's work is governed by the scope of prior consultations".[34] *See also Japan- Measures Affecting Agricultural Products* (a panel's terms of reference are based on the panel request and there is no requirement that the challenged measures be specifically identified during consultations in order for the claim to be included within the terms of reference).[35] Indeed, in the *Japan Varietals* dispute, the United States indicated its agreement with the following statement:

> Consultations are, however, a matter reserved for the parties. The DSB is not involved; no panel is involved; and the consultations are held in the absence of the Secretariat. In these circumstances, we are not in a position to evaluate the consultation process in order to determine if it functioned in a particular way. While a mutually agreed solution is to be preferred, in some cases it is not possible for parties to agree upon one. In those cases *it is our view that the function of a panel is only to ascertain that consultations, if required were in fact held or, at least, requested*.[36]

73. There is no dispute that consultations were held between India and the United States.

US claim that its long-standing practice of applying total facts available is not a "measure":

74. India does not agree that the fact that USDOC could arguably change its total facts available "practice" means that this practice is not a "measure". A "practice" becomes a "measure" through repeated similar responses to the same situation. For example, USDOC always applies total facts available in a particular situation (i.e., where one or more of four "essential" components of information from the respondent is missing). It has done this consistently since 1995. Interested foreign parties subjected to a USDOC investigation can easily predict that USDOC will apply this "practice" in future cases in which they are involved. Indeed, when SAIL argued that the practice should not be applied in this case, USDOC responded with the statement that it "must" apply total facts available.[37] Where such a practice is established over a long period of time, it takes on the character of a measure. This is because a similar response can be predicted (or threatened) in the future. At what point a pattern of similar conduct takes on the character of a measure is to be determined on the facts and circumstances of each case. But to simply label something a "practice" (as opposed to an administrative procedure, regulation or law) and then claim that it can be changed at any time

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33 *Ibid*.
34 WT/DS46/R, DSR 1999:III, 1221, para. 7.9, 7.10.
35 WT/DS76/R, DSR 1999:I, 315, para. 8.4.
36 WT/DS76/R n.33 *quoting* WT/DS27/R para. 7.19 (emphasis added).
37 Final Determination, at 73127 (Ex. IND-17).

and is therefore immune from challenge before the WTO opens the door for considerable potential abuse of the obligations imposed by the AD and other WTO Agreements.

75. The fact that a "practice" can be changed relatively quickly does not make it "non-measure". India must ask why a long-standing practice is deemed a non-measure when an administrative procedure, regulation or even a law in some Members can be changed just as easily. There is no question that administrative procedures and regulations in many WTO Members can be changed practically overnight. Even laws can be changed quickly - particularly those based on executive orders. There is simply no logical reason why the ease and speed with which a measure can be changed reflects on its status as a "measure". The only relevance of the speed with which a measure can be changed is the reasonable period of time available to a Member to bring a measure into compliance pursuant to Article 21.3 of the Dispute Settlement Understanding.

76. In addition, USDOC's total facts available practice constitutes an "administrative procedure" as that term is used in Article 18.4 of the AD Agreement. USDOC's long-standing total facts available "practice" is an "administrative" action because it is taken by an agency of the US government. It is also a "procedure" because it details exactly what procedure will be used for the calculation of dumping margins in the event that one "essential" component of information is not provided by an interested foreign party. The fact that this "administrative procedure" is found in the decisions of USDOC and the USCIT, as opposed to, for example, a publicly available USDOC practice manual, does not make it any less a "procedure". To so hold would be to elevate form over substance. And as an administrative procedure, USDOC's total facts available practice is a "measure". *See* AD Article 18.4; Article XVI:4 of the Marrakesh Agreement Establishing the WTO.

77. The United States relies on the panel report in *United States - Measures Treating Exports Restraints as Subsidies* for the proposition that its total facts available practice does not have "independent operational status", *i.e.*, that it is not a "measure".[38] The United States ignores the facts in the *Exports Restraints* decision that distinguish it from this case. In *Exports Restraints*, the alleged *"practice"* did not involve *any* actual decisions by USDOC or the USCIT; as that panel noted, "there has been no post-WTO case where the United States has countervailed an export restraint".[39] In addition, the *Exports Restraints* panel noted that Canada argued that USDOC "normally" follows the practice – although it admittedly had not been applied since the WTO came into effect.[40] Not surprisingly, the *Exports Restraints* panel concluded that Canada had not "identified concretely what US 'practice' is", and that the term "practice in the sense

[38] United States First Submission, para. 146
[39] WT/DS194/R, DSR 2001:XI, 5767, para. 8.125.
[40] *Ibid.*, para. 8.126.

used by Canada cannot require any particular treatment of export restraints in US CVD investigations".[41]

78. The "practice" at issue in this dispute is far different from the non-practice at issue in *Exports Restraints*. The record shows that USDOC *always* applies total facts available when one of the components of information USDOC considers to be "essential" cannot be used. USDOC itself stated in the Final Determination that its consistent practice is to apply "total facts available". India and the Panel asked the United States at the First Meeting to identify *any* investigation in which USDOC did not apply total facts available where one of the essential components of a respondent's data could not be used. The United States could identify no such instance. In fact, a key USDOC official at its hearing during the investigation indicated that he did not know of any case where USDOC filled missing gaps for entire cost of production and home market databases.[42] Thus, this is not a case where USDOC has "no" applications of the practice, or where it "sometimes" or "normally" applies the practice. Here, USDOC *always* applies the same practice to discard information in one component if other components of information are unusable.

79. Accordingly, for the foregoing reasons, India disagrees that a long-standing practice is not a "measure".

India's claims regarding USDOC's long-standing practice:

80. There are two distinct claims relating to USDOC's total facts available practice set forth in the request for establishment of a panel. The first is a *per se* (as such) claim. India is no longer pursuing this claim.

81. However, India *is* asserting the second claim relating to USDOC's "practice" set forth in the request for establishment of a panel. This claim involves the *application* by USDOC of its "long-standing practice" of total facts available *in this case* in violation of the AD Agreement. As set forth in the detailed request for establishment of the panel, this claim is based on the *application* of USDOC's long-standing practice that resulted in the rejection of SAIL's US sales data and the establishment of an unfair comparison between normal value and the export price. There are three elements to this claim: (1) that a long-standing practice exists; (2) that the long-standing practice was applied in this case, and (3) that the application of the long-standing practice in this case is inconsistent with the AD Agreement.

82. With respect to the first element - *whether there is a long-standing practice* - the Panel has before it the Final Determination, in which USDOC plainly states that it has a "long-standing practice to reject a respondent's questionnaire *in toto* when essential components of the response are so riddled with errors and inaccuracies as to be unreliable".[43] USDOC also stated in the Final Determination that "the Department must apply total adverse facts available because SAIL's data on the whole is unreliable". Numerous USCIT decisions, as well as

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41 *Ibid.*, para. 8.129.
42 Ex. IND-15 at 51.
43 Final Determination, at 73130 (Ex. IND-17).

USDOC decisions in other investigations, also describe the "long-standing practice" of USDOC in applying total facts available.[44]

83. With respect to the second element - *whether the long-standing practice was applied in this case* - once again, the answer is supplied by the Final Determination, in which USDOC stated that "total facts available" are "warranted for this determination" and that it "must apply total adverse facts available...."[45] There can be no doubt that USDOC *applied* its practice in this case.

84. Finally, regarding the third element - *whether the long-standing practice as applied is inconsistent with the AD Agreement* - India's arguments throughout this proceeding have all focused on the inappropriate rejection of SAIL's US sales data in the calculation of the final dumping margin. The *process* by which USDOC rejected SAIL's US sales data - which USDOC itself admitted was "usable" if minor corrections were made - was through the application of total facts available. This application was inconsistent with AD Agreement Article 6.8, and Annex II, paragraphs 3, 5, and 7 for the reasons stated in India's First Submission and in India's First Oral Statement.

Q37. Do the parties consider that the USDOC "calculated" a dumping margin in this case? In this regard, we note the arguments made by the United States in paragraphs 93 to 97 of its first written submission regarding Article 6.8, which provides that "preliminary and final determinations, affirmative or negative" may be made on the basis of facts available.

Reply

85. India notes that there is no reference in the AD Agreement to the term "calculate". The closest analogues to the word "calculate" in the Agreement are found in the first sentence of Article 2.4, which requires investigating authorities to make a "fair comparison", the title of Article 2 "determination of dumping", and the reference in Article 9.3 to the margin of dumping being "established" under Article 2. That being said, there is no doubt that in the current case, USDOC compared the price of $251 per ton for the export price with a price of $372 for normal value. This comparison, as shown in Figure 5 of the Petition, resulted in the "calculation" of a dumping margin of 72.49 per cent. India responds to the US arguments regarding "preliminary and final determinations" (found at paragraphs 93-97 of the US First Submission) in India's Rebuttal Submission at paragraphs 9-10.

Q38. Could the parties please explain their views regarding the meaning of the phrase information should be "taken into account" as used in Annex II paragraph 3. (Ignore for purposes of this question whether "should" is to be understood as mandatory or not). For instance, might it be understood to mean that the determination must be based on that information? or to mean that the investigating authority must look at the information further, at-

[44] *See, e.g.*, Ex. IND-28, IND-29.
[45] Final Determination, at 73130 (Ex. IND-17).

tempt to verify it, and judge its reliability, but may ultimately not base decision on it and refer to facts available instead?

Reply

86. The correct interpretation of the phrase "*should be taken into account when determinations are made*" is that if the particular information at issue (which can include an entire "essential component of information or individual pieces of information) meets the four criteria of Annex II, paragraph 3, it has to be taken into account in the calculation of a dumping margin. Having passed the rigors of the four-part test, and in particular the requirement that it be usable without undue difficulty, the information cannot be ignored making the "determination". The "determinations are made" phrase in anti-dumping parlance means the issuance of a final dumping margin. The phrase "taken into account" has to be read with the phrase "all information which" in Annex II, paragraph 3 phrase which precedes it. This contextual reading indicates that the particular pieces of information should be *combined* with *other* information to calculate the dumping margin. In this sense, the "account" language in the text could be seen as referring to the totality of the information available to be used in calculating the dumping margin. Accordingly, the piece of information at issue in an Annex II, paragraph 3 analysis is to be taken into account *along* with that *other* available information.

87. Noting the Panel's direction to ignore the "should v. shall" question, India would only state that it believes that resolution of the "should" question does resolve the question of whether information meeting the four requirements of Annex II, paragraph 3 must be used. India also notes that it sees no basis in Annex II, paragraph 3 for an explicit requirement that investigating authorities "judge its reliability". India believes that any concerns concerning the "reliability" of information - particularly information that has in fact been verified or been deemed to be verifiable - is resolved if it meets the four conditions of Annex II, paragraph 3.

Q39. Could the parties please explain their views as to the meaning of the term "verifiable" in Annex II, paragraph 3, with specific reference to, inter alia, the following possibilities:

(a) information is prepared and presented in a way that it can be checked against the books and records of the company submitting it;

(b) information not only satisfies (a), but also when it is checked, it is found to be complete, accurate and reliable – i.e., it passes verification.

Reply

88. India has discussed the meaning of "verifiable" and "verifiable" in detail in its Rebuttal Submission at paragraphs 66 to 72. India has also addressed questions relating to verifiability in its answers to Questions 21, 28 and 29. Accordingly, India would direct the attention of the Panel first to the Rebuttal submission and then to the above-referenced answers for the complete answer to this question.

89. In response to the two possibilities suggested by the question, India believes an investigating authority may, within the requirements of the AD Agreement, find that information is "verifiable" if makes an assessment under possibility (a). In other words, it need not conduct an actual audit to accept the information provided by respondents. However, if an investigating authority wishes to conduct an "on the spot verification" as anticipated by Annex I, paragraph 7 of the AD Agreement, it may properly examine source documents in an "audit" to verify the reported information as accurate, reliable and complete. Thus, possibility (b) would be consistent with the AD Agreement.

90. However, in response to the Panel's use of the terms "complete" and "accurate" India would caution that information reported need not be perfect in order to verifiable. There may be minor gaps in the information within a given "component"(*i.e.*, it may not be "complete") at which time the issue becomes whether the missing information can be obtained from alternative sources. Or the question may be whether the missing information is of such importance that it casts doubt as to the overall reliability of the information submitted within the particular component of information. Information may also be reported which a review of source documents shows is not completely "accurate". The question would be whether this information is capable of being corrected and the extent of the imperfections determined by reviewing other source documents.

ANNEX E-2

ANSWERS OF THE UNITED STATES TO QUESTIONS OF THE PANEL - FIRST MEETING

(12 February 2002)

Questions for the Parties

To the United States

Q1. In paragraph 84 of its first submission, the United States asserts that "Nothing in the AD Agreement requires an administrating authority to evaluate distinct "categories" of information separately for purposes of determining whether it is permissible to use facts available for a dumping determination". In paragraph 83 of its submission, the United States enumerates certain information which is necessary for conducting an anti-dumping investigation - including prices of the subject merchandise in the domestic market of the exporting country, export prices of the subject merchandise, and in appropriate circumstances, cost of production information and constructed value information. Without prejudice to the United States' legal argument, could it be considered that, for practical purposes of calculating an anti-dumping duty, these constitute distinct "categories" of information?

Reply

1. Any set of information or data can be separated into "categories". The definition of the term "category" is "any of a possibly exhaustive set of basic classes among which all things might be distributed".[1] In this sense, the information which is necessary for conducting an anti-dumping investigation – including prices of the subject merchandise in the domestic market of the exporting country, export prices of the subject merchandise, and in appropriate circumstances, cost of production information and constructed value information – could be considered "categories" of information. In turn, each of these "categories" is actually a "set of categories" – comprised of multiple smaller "categories" of information such as prices, quantities, physical characteristics, levels of trade, packing and movement expenses. Each of these "categories" is necessary to calculate a dumping margin.[2] Even each sales listing for a particular model of subject merchandise could be identified as a "category" of a respondent's sales in-

[1] The New Shorter Oxford English Dictionary, Clarendon Press, Oxford, 1993.

[2] *See, e.g.*, Article 2.4 of the AD Agreement ("Due allowance *shall* be made in each case, on its merits, for differences which affect price comparability, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability" (emphasis added)(footnote omitted)).

formation. But as the European Communities aptly stated at the meeting with third parties,

> It is important to recognize that the data requested of interested parties in an anti-dumping investigation is not atomised, it does not consist of independent sets of data which have no link to one another. Consequently, failure to provide one set of data may affect the validity of other elements of data provided.[3]

2. India itself seems unsure of where it would draw the line between different "categories" of information. In its First Written Submission, India expressed the view that the Indian respondent's US sales database was a "category" of information that should be examined separately under the lens of Annex II, paragraph 3.[4] If this US sales "category" satisfied the criteria of Annex II, paragraph 3, then India stated that it must be used. At the first Panel meeting, however, India made the following statement:

> India recognizes that it may not be reasonable to expect an investigating authority to conduct a separate examination of each of the four conditions in Annex II, paragraph 3 for thousands of individual pieces of information submitted by a respondent. India does not insist upon an interpretation of Annex II, paragraph 3 that would require investigating authorities to use any piece of information provided by foreign respondents, no matter how small and isolated. India's First Submission used the qualifying term "categories" of information for exactly this reason. The United States correctly points out that the term "category" is not a term found in the AD Agreement. *However, what is important here is not the exact term used.* Rather, what is important is the need to interpret the Agreement in good faith, in a way that ensures the use of information meeting the four criteria of Annex II, paragraph 3.[5]

3. India then continued by offering as an example of a "category" of information the "weight conversion factor" information at issue in the *Japan Hot-Rolled* dispute. But this "weight conversion factor" information – a formula used to measure the difference between the actual and estimated weight per ton for steel in coils – is just such a "small and isolated" piece of information that India claims investigating authorities need not separately examine.[6] India's reasoning shows the flaw in applying the criteria of Annex II, paragraph 3 to subject " categories" of information.

4. In sum, India's focus on the term "categories" of information is misguided for two reasons. First, as India concedes, the term "categories" does not appear in

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[3] Third Party Oral Statement of the European Communities at para. 3.

[4] First Written Submission of India at para. 51 ("*[a]ny* category of information which is submitted by a foreign respondent and which meets [the criteria of Annex II, para. 3] must be used by investigating authorities without regard to whether the foreign respondent has submitted *other* categories of information that [do not meet the criteria of Annex II, para. 3]." (emphasis in original)).

[5] Oral Statement of India at para. 34 (emphasis added).

[6] *Japan Hot-Rolled Panel Report* at para. 7.32.

the AD Agreement. As the Appellate Body has said, "The fundamental rule of treaty interpretation requires a treaty interpreter to read and interpret the words actually used by the agreement under examination, and not words which the interpreter may feel should have been used.[7] In fact, the only "category" of information recognized by Article 6.8 is "necessary" information. Second, treating as distinct what India conceives as separate "categories" of information ignores the very nature of the anti-dumping analysis required by Article VI and the rest of the AD Agreement. As Article 2.4 of the AD Agreement makes clear, the required comparison of this information means that the various pieces of "necessary information" are in no way distinct. The customary rules of treaty interpretation do not allow India to read the term "categories" into the AD Agreement as a way of narrowing the Panel's focus to the smallest subset of information that India believes will pass muster under the conditions of Annex II, paragraph 3 (here, an as-yet undefined subset of SAIL's U. sales information).

Q2. In paragraph 91 of its first submission, the United States refers to the fact that certain portions of information provided by a respondent may appear acceptable in isolation, but when the nature and extent of deficiencies on the whole are substantial, it calls into question the reliability of the entire response. The United States asserts that Article 6.8 provides that in such circumstances, the investigating authority may rely on facts available. Can the United States point to any specific language in the AD Agreement which refers to the potential impact of deficiencies of some information submitted on the reliability of the entire response?

Reply

5. The text of the AD Agreement recognizes that where there are significant deficiencies in the necessary information that has been submitted, those deficiencies may have an impact on the reliability of the entire response. Article 6.8 of the AD Agreement states that "preliminary and final determinations, affirmative or negative, may be made on the basis of facts available" where a respondent does not provide necessary information. Article 6.8 does not require that *all* necessary information must be missing before a preliminary or final determination may be made based on facts available; rather, it states that such determinations may be made when *necessary* information is not provided. Therefore, an investigating authority is not restricted to merely filling "gaps" when necessary information is missing – if the circumstances warrant, the authority may base its entire determination on facts available, subject to the provisions of Annex II. In the case of the Indian respondent, SAIL, a very significant degree of information was not provided or was unusable; what was missing was not susceptible to replacement or "gap-filling" by other pieces of information. Even SAIL's US database contained significant deficiencies and errors.[8]

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[7] *EC - Measures Concerning Meat and Meat Products* (*"EC-Hormones AB Report"*), WT/DS48/AB/R, adopted Feb. 13, 1998, DSR 1998:I, 135, para. 181("*EC-Hormones AB Report*").

[8] Details of the deficiencies and unreliability of SAIL data were described in the US First Written Submission at paras. 19-58 and 148-163 and are further discussed herein in response to Question 10.

6. By stating in Article 6.8 that investigating authorities may base preliminary and final determinations on facts available when "necessary information" is not provided, Article 6.8 does not establish a standard that limits the use of facts available to situations in which *no* necessary information has been provided. The fact that Article 6.8 allows an investigating authority to base its preliminary or final *determination* on facts available implies that some necessary information which the respondent has properly submitted to the investigating authority will not be used. The text of Annex II, paragraph 5 reinforces this point in stating that "[e]ven 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". The text of Annex II, paragraph 5 recognizes that certain information can be ideal in some respects, and yet authorities may disregard the information if the submitting party has not acted to the best of its ability. Again, in the case of the Indian respondent, even India acknowledges that SAIL's information was far from ideal in many respects.

7. In sum, based on the text of Article 6.8 and Annex II, paragraph 5 of the AD Agreement, investigating authorities are not prevented from assessing whether deficiencies in a significant portion of information necessary for an anti-dumping calculation has an impact on the reliability of the entire response

Q3. Does the United States consider that section 782(e)(3) relates to the condition set out in paragraph 3 of Annex II regarding whether information is "appropriately submitted so that it can be used in the investigation without undue difficulties", or does the United States justify this aspect of its statute on some other or additional basis?

Reply

8. Section 782(e)(3) provides that Commerce should take into account whether submitted information is "not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination". First, it is entirely consistent with Article 6.8 and Annex II for an investigating authority to consider whether or not submitted information forms a reliable basis for calculating a company's dumping margin. For example, Annex II, paragraph 3 provides that investigating authorities should consider whether information is verifiable, demonstrating the importance of one method by which an investigating authority can ensure that information is reliable.

9. Furthermore, as discussed in the United States' Second Written Submission, when Commerce has a questionnaire response which contains some usable and some unusable information, it is relevant to consider whether there is enough information to form an objective basis for determining the respondent's margin of dumping. By requiring Commerce to evaluate the degree of completeness of the information, section 782(e)(3) provides that, when the other criteria have been met, Commerce may not decline to consider the partial information when it is sufficiently complete that it can form a reliable basis for a dumping calculation. In other words, if the respondent supplies enough information to provide a reliable indication of its margin of dumping, the fact that Commerce may have to

fill in some gaps based on facts available will not prevent Commerce from using that information. In this respect, the considerations of paragraph 5 of Annex II of the AD Agreement also are reflected in section 782(e)(3).

Q4. In paragraph 107 of its first submission, the United States suggests that Annex II paragraphs 3 and 5 urge the investigating authority to take into account, or at least not to disregard information on the record which meets the criteria set out in these provisions, but does not oblige Members to utilise this information. Does this not suggest that an interpretation which furthers the goal of objective decision-making based on facts, by requiring consideration of information which meet the criteria, is more appropriate than one which allows investigating authorities to reject some information submitted because of problems with respect to other information?

Reply

10. An interpretation that requires consideration of information which meets the criteria of Annex II, paragraph 3 - but does not require the investigating authority to "use" the information to calculate an antidumping margin - furthers the goal of objective decision-making based on facts. The AD Agreement should be interpreted in a manner that will maintain the careful balance between the interests of investigating authorities, injured domestic industries, and exporters that is reflected in the AD Agreement. On the one hand, there is a clear preference in the AD Agreement for the use of information provided by a respondent. On the other hand, when a preponderance of the information provided proves inaccurate and unreliable - or when a party fails to provide the information at all - requiring an investigating authority to use any remaining information, regardless of its limits, would place control of the anti-dumping investigation firmly within the hands of the exporting party. Interpreting the AD Agreement to allow responding parties to selectively provide information and to require investigating authorities to use that information would encourage such selective responses and defeat the underlying purpose of "objective decision-making based on facts".

11. An interpretation that requires consideration of information which meets the criteria of Annex II, paragraph 3 - but does not require the investigating authority to "use" the information - also rests on a permissible interpretation of Annex II, paragraph 3. According to Article 17.6(ii), a panel shall uphold a measure where it rests upon a permissible interpretation of the Agreement. The decision by Commerce to apply facts available in this case satisfies this principle: 1) Annex II, paragraph 3 requires that information should be "taken into account" if it satisfies four criteria; 2) the phrase "take into account" is defined as "take into consideration" or "notice"[9], and 3) Commerce did "take into account" or "take into consideration" or "notice" all of SAIL's submitted information. To this end, in its preliminary determination, Commerce took SAIL 's efforts to provide information into account in selecting the facts available used as the prelimi-

[9] New Shorter Oxford Dictionary, Clarendon Press, Vol. 1 at 15.

nary margin of dumping.[10] Furthermore, notwithstanding significant concerns with the responsiveness and completeness of SAIL's data, and over the objections of petitioners, Commerce further considered and took into account the information provided by SAIL by attempting to verify that information.[11] In the end, Commerce's *Final Determination* took account of the totality of the record, the substantial problems with SAIL's data, the verification failure, and the undue difficulties that would have been required to use any of SAIL's data and determined to base its determination entirely on facts available.[12]

Q5. Does the United States object to the submission of the affidavit of Mr. Hayes *per se*, or does the United States object to the arguments made by India to the effect that the correction of errors in the US sales database would have been a relatively simple matter for the United States? In this regard, we note that SAIL did propose, during the proceedings before USDOC, that the USDOC computer programme could have been modified to address the errors in the US sales database, and did propose alternative calculations of the margin of dumping. Does the United States object to the Hayes affidavit because it contains different proposals in these matters than were presented during the investigation? If so, could the United States explain why it considers this significant, given that the Panel will not, for itself, either calculate the dumping margin or correct programming language? What specific aspects of the Hayes affidavit and testimony does the United States consider constitute new facts as opposed to new analysis or arguments regarding the facts in the record?

Reply

12. First, the United States does object to the Hayes affidavit *per se*. An "affidavit" is a "a written statement, confirmed by oath or affirmation, to be used as evidence".[13] The purpose of an affidavit, therefore, is to serve as evidence. The Hayes affidavit itself expresses its purpose as such.[14] While India is entitled to make any arguments to the Panel that are within the Panel's terms of reference, India is not entitled to present new factual information, even in the guise of an affidavit. Pursuant to Articles 17.5(ii) and 17.6(i), the pertinent evidence on which the panel must base its review is the record established by the investigating authority at the time of its determination.[15]

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[10] *See* First Written Submission of the United States at ¶ 34.

[11] *Ibid.* at ¶ 37.

[12] *Ibid.* at ¶¶ 45-51.

[13] New Shorter Oxford Dictionary, Clarendon Press, Vol. 1 at 35.

[14] Hayes Affidavit, Ex. IND-24. For example, the affidavit includes 1) a computer program created for a separate anti-dumping proceeding that never appeared in the record of that proceeding, and was never submitted in the India plate proceeding; and 2) post-hoc assertions of fact that errors discovered in SAIL's US sales database "were either adverse to SAIL or would likely not have been used" by Commerce.

[15] *See United States-Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan* , WT/DS184/R, adopted 28 February 2001, DSR DSR 2001:X, 4769, paras. 7.6-7.7 ("It seems clear to us that, under this provision, a panel may not, when examining a claim of violation of the AD Agreement, in a particular determination, consider facts or evidence presented to it by a party in an

13. Second, there are specific aspects of Mr. Hayes' affidavit and testimony that constitute new facts. In addition to the new computer programme attached by Mr. Hayes to his affidavit and his factual conclusions that certain errors in the US sales database "were either adverse to SAIL or would likely not have been used" by Commerce, Mr. Hayes stated at the first meeting of the Panel that he had "created a new exhibit, India Exhibit 32" with new calculations of total price, expense, and quantity data for all of SAIL's US sales, and he invited the Panel to see new calculations and "substitutions" in India Exhibit 33.[16]

14. Finally, the specific proposals made by Mr. Hayes did, in fact, differ from proposals made by SAIL during the Commerce proceeding. The fact that these proposals are different underscores the underlying reason for the requirement in Articles 17.5(ii) and 17.6(ii) that panels consider the record before the authorities at the time of their determinations, and not new information. It would not be appropriate or fair to assess the adequacy of Commerce's determination using information that India only developed two years later and that India has continued to refine over the course of this case. SAIL made arguments during the investigation as to how its own data could be used and the Panel should limit its review to those arguments, to the extent that India continues to pursue them. The fact that India's new methodologies never occurred to SAIL, that it has taken India two years to develop them, and that India must even now continuously refine them, only serves to demonstrate why they are irrelevant to the Panel's review of whether Commerce's determination of the evidence *before it* was unbiased and objective.

Q6. Can the United States explain how the US sales data, had it been accepted and taken into account, would have affected negatively the process of reaching an objective decision based on facts? Does the United States consider that a decision based entirely on facts available is more in keeping with the objectives of the AD Agreement than one based in part on facts available and in part on verified information? Please explain in detail. Would the United States consider that it is in all cases unsound to calculate a dumping margin based on a comparison of normal value calculated on the basis of facts available and export price calculated on the basis of verified information submitted by the party in question?

Reply

15. The Panel's question assumes that SAIL's US sales data were "verified" and, therefore, could be used in reaching a decision based on facts. As we explained at the first meeting of the Panel, they were not. Based on the comprehensive flaws in SAIL's information, Commerce reached a determination that SAIL 's information failed verification *in toto*. This determination was based on errors in the US sales data itself (as detailed in Question 10 below) and the inherent

attempt to demonstrate error in the determination concerning questions that were investigated and decided by the authorities, unless they had been made available in conformity with the appropriate domestic procedures to the authorities of the investigating country during the investigation").

[16] Oral Statement of India at para. 91 (comments by Mr. Hayes).

linkages between the respondent's US sales and its other data. The term "US sales data" is an inclusive term meaning all of the data pertaining, or related, to US sales. It includes, for example, the cost of manufacturing data for each US sale – data which SAIL was unable to verify as accurate. This data is necessary for making due allowance for physical differences which affect price comparability. Because the data was inaccurate and unusable in the calculation of a dumping margin, it could not have been used to reach an objective decision based on fact.

16. As the Appellate Body stated in the *Japan Hot-Rolled* case, the goal of an anti-dumping investigation is "ensuring objective decision-making based on facts". To reach this goal, the investigating authority must assess whether it can use the particular facts before it when making its determination. If a responding party does not provide the information necessary for making a decision, as in this case with respect to SAIL, the Agreement provides for the use of facts available by the investigating authorities. In some cases, it will be possible to use only partial facts available; however, as in this case, there may be times where the information submitted by the responding party is so deficient that it will not provide an indication of the respondent's level of dumping and the investigating authority may appropriately rely entirely on facts available. In such a case, the decision to use total facts available is an objective one, based on the facts on the record of the investigation. As long as the decision to use total facts available is made with regard to the viability of the overall record of information necessary for making an anti-dumping determination, this decision will be consistent with the objectives of the AD Agreement.

17. With these points in mind, the United States does not believe that it is necessarily unsound in all cases for the calculation of a dumping margin to be based on a comparison of normal value calculated on the basis of facts available and export price calculated on the basis of verified information. The use of facts available, partial or total, must be addressed on a case-by-case basis, and there may be a situation where a normal value based on facts available can be compared to export price calculated on the basis of verified information. The case at issue is not one of those cases.

Q7. Speaking hypothetically, could the USDOC have concluded that, standing alone, US sales data was verified, timely submitted, accurate and reliable? If your response is no, please explain why not.

Reply

18. It is difficult to address this issue hypothetically, given Commerce's specific finding in this case that SAIL's information – including its US sales data – failed verification.[17] In addition, there were inaccuracies specific to the US sales data that were never resolved, as detailed in the verification report and acknowledged by India in its "affidavit". As a result, Commerce concluded that these errors in the US sales database "support our conclusion that SAIL's data on the

[17] Determination of Verification Failure Memorandum, Ex. US-25.

whole is unreliable.[18] For these reasons, Commerce could not conclude that the US sales data, standing alone, were verified, accurate, and reliable.

Q8. Does the United States consider that the interpretation of US law adopted by USDOC and affirmed by the USCIT and applied in this case is a necessary result under US principles of statutory interpretation, or would the United States consider that the USCIT merely accepted as reasonable an interpretation by USDOC, but that, following US principles of statutory interpretation, the statute could be interpreted differently? Please provide specific references and authorities in support of your response. Is it correct to understand the United States' position as being that its statutory provisions governing use of facts available require USDOC to apply facts available in circumstances in which the AD Agreement permits the use of facts available?

Reply

19. The standard of review of anti-dumping determinations under US law is analogous to the standard provided in Article 17.6(ii) of the AD Agreement, i.e., that a determination applying a provision that admits of more than one interpretation will be upheld if it rests on a permissible interpretation. In the underlying USCIT decision, the court affirmed Commerce's decision to apply total facts available, stating that the court's responsibility was to determine if the agency's interpretation of the statute was "reasonable, in light of the language, policies and legislative history of the statute".[19] The court did not express a view as to whether the statute could be interpreted differently.[20]

20. It is not correct that the "facts available" provisions of US law *require* Commerce to apply facts available in circumstances in which the AD Agreement *permits* the use of facts available. As noted in our first written submission at paragraphs 119 - 147, nothing in the US statute, or regulations, requires that Commerce apply facts available in a manner inconsistent with Article 6.8 and Annex II of the AD Agreement. The application of facts available is a discretion-

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[18] *Ibid.* at 5.

[19] *Steel Authority of India, Ltd. v. United States*, 149 F. Supp. 2d 921, 927 (May 22, 2001). Following the filing of the United States' First Written Submission, the USCIT upheld Commerce's Remand Redetermination, which further explained its finding that SAIL failed to act to the "best of its ability." *See Steel Authority of India, Ltd. v. United States*, Slip Op. 2001-149 (Dec. 17, 2001) (Exhibit US-28).

[20] The Court's holding is in conformity with the standard of review expressed in the United States Code and historically recognized by the Court of International Trade, that "the Court of International Trade must sustain 'any determination, finding or conclusion found by Commerce unless it is 'unsupported by substantial evidence on the record, or otherwise not in accordance with law.'" *Fujitsu General Ltd. v. United States*, 88 F.3d 1034 (Fed. Cir. 1996)(quoting 19 U.S.C. § 1516a(b)(1)(B)). "Substantial evidence" means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison v. NLRB*, 305 U.S. 197, 229 (1938); *accord Matsushita Elec. Indus. Co. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984). Even if it is possible to draw two inconsistent conclusions from the evidence contained in the record, this does not mean that the DOC's findings are not supported by substantial evidence, and the Court will sustain DOC's determination if its conclusion is found to be reasonable. *See Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966).

ary exercise, not a mandatory one, specifically dependent upon the quantity and quality of the information submitted by the respondent. This analysis is particularly true for section 782(e) of US law.

21. Section 782(e) requires that Commerce *consider* information that might otherwise be rejected under section 776(a), if five relevant criteria are met. In some cases, like the case now before this Panel, Commerce has found that a respondent has failed to provide significant necessary information on the record and that what was provided should be disregarded because it failed to meet the criteria of section 782(e). In other cases, however, Commerce has determined that the necessary information, though flawed, could be used in its calculations because the criteria of 782(e) were met.

22. In India Exhibit 28, India presented administrative cases adopting "total" facts available and suggested that section 782(e) "as interpreted" by Commerce requires the rejection of all of a respondent's information where only some information is flawed. This is incorrect. Even the determinations submitted by India make clear that Commerce interprets section 782(e) as requiring it to consider information even where that information contains a significant flaw. For example, in *Certain Cut-to-Length Carbon Steel Plate from Sweden: Preliminary Results of Anti-Dumping Administrative Review*, the respondent's cost data failed verification. Nevertheless, Commerce stated that "[w]e *must* therefore consider whether the submitted cost data is useable under Section 782(e) of the Act".[21]

23. Other cases not cited by India also rebut its assertion. For example, in *Final Results; Administrative Review and New Shipper Review of Antidumping Duty Order on Stainless Steel Bar from India*, 65 Fed. Reg. 48965 (August 10, 2000) and accompanying Decision Memoranda (*India Steel Bar Final Results*), Commerce determined that although the cost information provided by the Indian respondent, Panchmahal, was incomplete, pursuant to section 782(e) of the Act, it could apply most of the information on the record to its calculations, and use "partial facts available" in the areas in which necessary facts were missing:

> We have determined that the continued use of total adverse facts available with respect to Panchmahal is unwarranted. Pursuant to section 782(e) of the Act, we will not decline to consider information that is submitted, *even if it does not meet all of our requirements*, if the information was timely, could have been verified, is not so incomplete that it cannot serve as a reliable basis for our determination, the submitting party demonstrates that it acted to the best of its ability in providing the information and meeting our requirements, and the information can be used without undue difficulties. *With respect to the information submitted by Panchmahal, we find that a sufficient amount of it meets these requirements and, thus, we have not declined to use it in our final results.*[22]

[21] 61 Fed. Reg. 51898, 51899 (1996), Ex. IND-28.
[22] *India Steel Bar Final Results* Decision Memorandum, US-Exh 26, at 3 (emphasis added).

As a result, Commerce resorted to facts available only with respect to certain portions of the margin analysis.

24. Similarly, in *Polyester Staple Fibre from Taiwan*, Commerce recognized that the respondent failed to submit entirely accurate and complete responses to its cost and sales database, but determined that the application of partial facts available, rather than total facts available, was appropriate under the statute.[23] Commerce noted that the respondent's submissions had been timely, the majority of the information provided was accurate, the effect of the errors discovered at the verification of sales and costs were limited in scope and the impact of those errors on any potential dumping margin was small. Commerce determined that the respondent's data, overall, "could be used without undue difficulties" and that "pursuant to section 782(e) of the Act, we do not find that [respondent's] information is so incomplete that it cannot serve as a reliable basis for reaching a final determination".

25. Commerce's interpretation of section 782(e) of the Act is also supported by decisions of the USCIT. For example, in *NSK Ltd., v. United States*, 170 F. Supp. 2d. 1280 (6 June 2001), the court reviewed Commerce's decision to accept adjustment and rebate information from certain respondents in an antidumping review. The Court affirmed Commerce's decision to accept these adjustments and rebates, citing to section 782(e) of the Act. The Court noted that section 782(e) "liberalized Commerce's general acceptance of data submitted by respondents in anti-dumping proceedings by directing Commerce not to reject data submissions once Commerce concludes that the specified criteria are satisfied".[24]

26. Thus, contrary to India's assertions, United States law requires Commerce to accept a respondent's data where the criteria of section 782(e) are met. As we explain in greater detail in Section 1 of our Second Submission, section 782(e) of the Act serves to *reduce* the likelihood that Commerce will resort to the facts available in a particular case. Furthermore, all of the provisions pertaining to the application of facts available in the US statute and regulations are fully consistent with Article 6.8 and Annex II of the Agreement.

Q9. Could the United States clarify whether USDOC found all the databases submitted by SAIL unusable at the preliminary stage, or all the databases except for the US sales database? Was the 16 July "final database" limited to information other than US sales? Was it also found to be unusable, as the earlier ones had been, or were these data analysed for purposes of the final determination?

Reply

27. As detailed in our First Submission, SAIL's electronic databases had significant flaws that were never corrected. One week before its 19 July 1999, pre-

[23] *Final Determination of Sales at Less Than Fair Value; Certain Polyester Staple Fibre From Taiwan*, 65 Fed. Reg. 16877 (March 30, 2000) and accompany Decision Memorandum, Exhibit US-26, at Issue 1 (*PSF from Taiwan*).

[24] *NSK Ltd., v. United States*, 170 F. Supp. 2d. 1280, 1318 (June 6, 2001), Exhibit US-27.

liminary determination, Commerce continued to advise SAIL that "your electronic database submissions have proven seriously deficient and are currently unusable".[25] On 16 July 1999, SAIL submitted revised electronic databases, including information on US sales, but this information was submitted too late to be incorporated into the preliminary determination. Commerce explained that "because of problems with the electronic databases that SAIL submitted, its questionnaire response cannot be used to calculate a reliable margin at this time".[26] In any event, this electronic database tape, in turn, was replaced on 17 August 1999, and SAIL attempted to submit a further database tape on the first day of verification, which Commerce rejected as untimely. The verification itself revealed, for example, that:

> The total cost of manufacture (TCOM) and the variable COM (VCOM) on the COP tape submitted 17 August 1999, are incorrect. There is no way to establish a meaningful correlation between the TCOM and VCOM on the tape and the underlying cost data and sources documents.[27]

28. The TCOM and VCOM information was directly relevant to the US sales database and resulted in a complete lack of information that would be needed for "difference in merchandise" adjustments. Given that the purpose of these cost and sales databases are to be run in comparison with each other, the flaws in these databases left Commerce with nothing it could analyze at the time of the *Final Determination*.

Q10. Would the United States specify how the US sales data was itself flawed? Did the USDOC specifically determine that consideration of the US sales data would cause "undue difficulties"? Can the United States point to where, in the determination or otherwise in the record, this conclusion can be discerned? Can the United States explain the underpinnings of this conclusion? Or, is it accurate to conclude that the only reason the USDOC decided not to consider the US sales data is because of the problems identified with the other data? Please explain in detail what would be the "undue difficulty" in comparing export prices derived from the US sales database with information contained in the petition. Could the United States clarify how the absence of cost of manufacture information US export sales make the entire US sales database unreliable?

Reply

29. Commerce did not base its decision not to consider the US sales data solely on problems with other data. While the reliability of SAIL's questionnaire response was judged on the information presented by SAIL as a whole, Commerce also identified significant flaws in the US sales database.

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[25] *Letter from Commerce to SAIL Re: Return of Untimely Information*, Ex. US-14) at 1.
[26] *Preliminary Determination*, Ex. IND-11, at 41203.
[27] *Cost Verification Report*, Ex. US-3, at 2.

30. First, keeping in mind that on-site verification amounts to a selective audit that does not review each piece of data submitted, the "sales" verification of most aspects of the Indian respondent's US sales database revealed numerous flaws in the items examined. One significant flaw was the discovery at verification that a physical characteristic used to match US and home market sales was incorrectly reported, an error that affected approximately 75 per cent of US sales in the database.[28] In addition, several other errors were discovered, including the fact that certain freight costs were over- and under-reported for export sales[29] and that the duty drawback calculation for US sales was incorrect.

31. Second, the "cost" verification also reviewed elements of the US sales database. For logistical reasons, the cost elements of the US sales database were examined separately. As SAIL acknowledges, the cost verification ended in SAIL's complete failure to reconcile its costs to its books and records.[30] As a result of this failure, another flaw in the US sales database was exposed: the total cost of manufacture (TCOM) and variable cost of manufacture (VCOM) for each US sale could not be verified. Without verified TCOM and VCOM information, Commerce could not adjust for differences in physical characteristics that affect price comparability as required by Article 2.4 of the Agreement.

32. In assessing the information submitted by SAIL – including the flaws in the US sales database described above – Commerce specifically determined, *inter alia*, that the information "cannot be used without undue difficulty".[31] As Commerce stated in its final determination, "SAIL's questionnaire response is substantially incomplete and unusable in that there are deficiencies concerning a significant portion of the information required to calculate a dumping margin".[32] While there were significant flaws in the US sales database, Commerce's facts available determination was based on all of SAIL's information. This is appropriate because the data requested in an anti-dumping investigation does not consist of independent sets of data which have no link to one another.[33] To assess the "undue difficulty" of using information, one must evaluate how the necessary comparison of information can be accomplished in its present state. In this case, the absence of the cost information associated with US sales made the required comparisons not just difficult, but impossible, where adjustment for physical differences were necessary. Even for those sales for which the missing cost information was not needed – sales that matched identically and would require no adjustment for physical characteristics pursuant to Article 2.4 – US authorities would have been required to manually correct the physical characteristics for 75 per cent of the sales just to be able to identify the identical sales, then it would

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28 First Written Submission of India at para. 30.
29 *Sales Verification Report*, Ex. IND-13, at 30.
30 *SAIL's USCIT Brief*, Ex. IND-19, at 16.
31 *Final Determination*, Ex. IND-17, at 73130-31.
32 *Ibid*.
33 We note in this regard the statement of the European Communities that "it is important to recognize that the data requested of interested parties in an anti-dumping investigation is not atomised, it does not consist of independent sets of data which have no link to one another." Third Party Statement of the European Communities at para. 3.

have been necessary to make further corrections for freight costs, duty drawback errors, etc.

33. As to whether it would cause "undue difficulty" to compare the export prices derived from the US sales database with information contained in the petition, we note that all the corrections just described would be required, with the result that Commerce could still not be assured that all errors were discovered. These corrections would have caused undue difficulty, notwithstanding India's assertions to the contrary. In fact, India's evolving proposals demonstrate the undue difficulty involved in making this comparison.

34. Finally, to accept India's argument that "facts available" should result in a calculation that leaves the respondent in the same position as if it had provided the information would encourage respondents in an anti-dumping proceeding to pick and choose the information they submit, providing only the information that is to their advantage. To do so would render Article 6.8 and Annex II of the AD Agreement meaningless.

Q11. In paragraph 33 of its first submission, the United States identifies 1) technical errors in SAIL's electronic databases, 2) lateness and incompleteness of certain narrative portions of the questionnaire response, and 3) lack of product-specific costs in connection with the finding that SAIL did not act to the best of its ability to provide the information requested. Is it correct to understand that these three factors are the entire basis of the conclusion that SAIL did not act to the best of its ability to provide the information requested?

Reply

35. The Panel refers to paragraph 33 of the first submission, in which the United States summarized the three factors that USDOC identified in its *preliminary* determination that SAIL did not act to the "best of its ability". Ultimately, by the time of Commerce's *Final Determination*, there were additional factors justifying a finding that SAIL failed to act to the best of its ability. In the *Final Determination* , Commerce noted that SAIL "consistently failed to provide reliable information throughout the course of the investigation," despite Commerce's "numerous and clear indications to SAIL of its response deficiencies".[34] Furthermore, Commerce noted that "[e]ven though we rejected use of SAIL's questionnaire response at the preliminary determination, because the company was seemingly attempting to cooperate, albeit in a flawed manner, we continued to collect data after the preliminary determination in an attempt to gather a sufficiently reliable database and narrative record for verification and for use in the final determination".[35] SAIL continued to provide Commerce with unusable data, however, and Commerce in the end determined SAIL had not acted to the best of its ability, summarizing in detail the deficiencies in the previously-identified

[34] *Final Determination*, Ex. IND-17, at 73129-30.
[35] *Ibid*.

areas of completeness, timeliness, and workability of computer tapes and the fact that SAIL failed verification.[36]

36. The US Court of International Trade then requested Commerce to further explain its reasoning that SAIL had not acted to the "best of its ability" and Commerce did so in its Remand Redetermination.[37] SAIL filed comments with USDOC on this point but chose not to challenge the finding before the USCIT.

37. Commerce addressed in detail in its Remand Redetermination the factors contributing to its determination that SAIL had not acted to the best of its ability during this investigation. Commerce explained that it has very limited knowledge of the actual extent of a respondent's ability to comply with requests for information, as it is the respondent, not Commerce, that possesses the necessary information and knowledge of the company's operations and records".[38] Therefore, Commerce explained, it was incumbent upon SAIL in this case to demonstrate why it was incapable of providing the requested information in a timely fashion. As has already been discussed in the United States' first written submission, SAIL failed to provide Commerce with necessary information for calculating its margin of dumping, and during the investigation never explained to Commerce that it was unable to provide this information.

38. Commerce noted in the Remand Redetermination that SAIL informed Commerce that it was experiencing difficulties in gathering and submitting the requested information, but that in all of its communications with Commerce, SAIL further indicated that the requested information would be forthcoming. "SAIL gave every indication that it would comply with the agency's information requests".[39] Nonetheless, even after Commerce returned submissions to SAIL with explanations of what needed to be done to complete its electronic databases, for example, SAIL again submitted deficient databases with "no reasonable basis for its failure to provide the information requested".[40]

39. Commerce also noted that SAIL is one of the largest steel producers in the world, has an established accounting system and its books are audited annually by a large team of public accountants.[41] Given the size and sophistication of SAIL, the extent of the insufficient responses provided by SAIL during the investigation, and SAIL's repeated opportunities to correct information and its failure to do so, Commerce determined that SAIL had not cooperated during the investigation to the "best of its ability".[42]

Q12. Could the United States elaborate on its contention that Article 15 second sentence only requires action by a developed country proposing to impose anti-dumping measures if the developing country in question first demonstrates that there are "essential interests" that would be affected by

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36 *Ibid.* at 73130.
37 *Remand Redetermination*, Ex. IND-21.
38 *Ibid.* at 4.
39 *Ibid.*
40 *Ibid.* at 7.
41 *Ibid.* at 8.
42 *Ibid.* at 8-9.

the imposing of an anti-dumping measure? Specifically, could the United States explain the legal basis of its view that the first step belongs to the developing country, which must come forward with a demonstration that the imposition of anti-dumping duties would affect its essential interests? Could the United States indicate, in general, what elements such a demonstration might consist of, or what might be considered relevant factors in this regard, in its view?

Reply

40. The second sentence of Article 15 states that the obligation to explore constructive remedies arises when the application of antidumping duties "would affect the essential interests of developing country Members". Therefore, there would be no basis to find a developed country Member in breach of that provision unless the application of an antidumping measure in a particular case *would* affect the developing country Member's essential interests.

41. There are two components to this enquiry. First, what are the "essential interests" at issue? Second, how would the application of an antidumping measure in the particular case affect those interests, if at all? As a practical matter, it is the developing country Member and the respondent private company that will possess the information needed to answer these questions. Developed country Members are in no position to identify what interests individual developing country Members view as "essential" to their own interests, and investigating authorities cannot assess whether the application of an anti-dumping measure in a particular case would affect those interests unless the private respondent or its government provides the information needed to make such an assessment.[43] Moreover, it is not enough for a private respondent to provide evidence suggesting that the imposition of an antidumping measure would affect its own essential interests; it is the developing country Member's essential interests that are relevant.

42. The elements relevant to demonstrating these matters will likely vary from case to case. Some possible elements – assuming there are essential interests at issue – might include whether the product is of particular strategic importance to the developing country Member; whether the developed country Member is the sole market for the product; whether the total value of the affected trade is significant relative to the developing country Member's economy as a whole; and whether, if the private respondent company is large enough that imposition of a measure would affect the developing country *Member's* essential interests (and not just the company's own), the producer produces other products that the measure would not affect. If the company produces a variety of products

[43] The *India Steel* investigation is a case in point. As the United States noted in its first written submission (at para. 187), SAIL's letter addressing the possibility of a suspension agreement did not mention India's essential interests, and it did not claim that (or explain how) applying an anti-dumping measure to SAIL's exports of steel plate would affect those interests. *See Letter from SAIL's Counsel to Commerce Re: Request for a Suspension Agreement*, dated 29 July 1999 (Exh. IND-10).

that it sells to a variety of markets, the imposition of an antidumping measure on the export of a single product to a single export market may not affect the company's essential interests, much less the developing country Member's essential interests.

43. India characterizes the US position on this issue as "an unfortunate attempt by a developed WTO Member to read additional restrictions into a provision that already provides little benefit in terms of legal effect or certainty to developing countries ...".[44] This is simply not true. The US position on this issue is based on a good faith reading of the language of Article 15. The second sentence of that Article demonstrates a clear decision by the WTO Members that the special provisions of Article 15 do not simply apply to any case in which a developing country is involved as a respondent. Otherwise, there would have been no need to include any reference to essential interests in the provision.

Q13. Is the cost verification an integral process, or is the cost of manufacture for US export sales separately verified? If the former, can the United States point to any particular part of the cost verification report that relates to information regarding cost of manufacture of US export sales?

Reply

44. On-site verifications are structured to fit the situation of the company being examined. Verification for certain companies will be conducted by the same staff at the same location, covering US sales, home market sales, cost of production and constructed value. Other verifications, such as that conducted for SAIL, are done by separate teams of staff due to the number of locations to be visited. This resulted in separate verification reports. But the purpose of verification is the same: to conduct a spot-check to test the accuracy of the submitted information. The verification of each essential element of the response is necessary to the overall verification of the response. In this case, the cost of manufacture for US sales was verified separately with the rest of the cost data for logistical reasons. Had SAIL's data been available at a single location, it would have been verified together with the US sales data.

45. SAIL's total cost of manufacture (TCOM) and variable cost of manufacture (VCOM) were developed using a single cost methodology. In fact, in replying to Commerce's questions requesting TCOM and VCOM information for US sales, SAIL simply referred Commerce to its cost questionnaire (Section D) response.[45]

46. Similarly, the verification of cost information was conducted on a consolidated basis. All cost information, regardless of whether it related to home market or US sales, was examined during the cost verification. As the United States previously noted, and India has not disputed, SAIL failed to verify its reported cost information.[46]

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[44] India's Oral Statement at para. 69.
[45] *See* SAIL Section C Questionnaire Response at C-49 and C-50 (Exhibit US-29).
[46] First Written Submission of the United States at para. 40.

Q14. Is it US practice to make adjustments for differences affecting price comparability, including physical differences in the products concerned, to export price, to normal value, or does it vary from case to case? Could the United States please explain the significance of cost of manufacture information in the context of export price information? Is this information equally important in all cases, or was it considered particularly significant in this case?

Reply

47. Yes, it is US practice to make adjustments to export price and normal value for differences affecting price comparability, including physical differences in the products concerned. The United States makes such adjustments in accordance with its obligations under Article 2.4 of the AD Agreement. Article 2.4 states the following:

> "A fair comparison shall be made between the export price and the normal value. This comparison shall be made at the same level of trade, normally at the ex-factory level.... Due allowance shall be made in each case, on its merits, for differences which affect price comparability, including differences in conditions and terms of sale, taxation, levels of trade, quantities, *physical characteristics*, and any other differences which are also demonstrated to affect price comparability." (Emphasis added.)

48. The US statute implements these obligations under Article 2.4. The specific adjustments necessary for making a fair comparison will vary on a case-by-case basis. For example, if sales to the United States were made on a delivered basis, all of the movement expenses associated with delivery from the factory to the US customer would have to be deducted from export price in order to reach an ex-factory price. On the other hand, if the US sales were made on an ex-factory basis, the exporter would have incurred no costs to deliver the merchandise to the US customer. Consequently, there would be no movement expenses to deduct from the export price.

49. Cost of manufacture information is very important in the context of export price information, because it is the information needed to make the due allowance for differences in physical characteristics mandated by Article 2.4. Article 2.4 imposes an obligation on Members to make adjustments to account for physical differences that affect price comparability in the process of making fair comparisons between export price and normal value. The United States bases its price adjustments for physical differences on differences in variable cost of manufacture between distinct products. Without the cost of manufacture data, it is not possible to make these price adjustments.

50. The cost of manufacture information is equally important in all cases in which products sold in the US market must be matched to sales of non-identical merchandise in the comparison market.

Q15. The United States in paragraph 10 of its oral submission notes that the US sales data was only "a fraction" of the information necessary for an anti-dumping analysis. Does this characterization refer to the amount of information involved in relation to the *total* information necessary? How would this be measured - number of pages, data points? Would the conclusion be the same if, in terms of volumes involved, the US sales were much larger than home market sales (but home market sales still met the test of footnote 2)? How about if foreign production were much greater than the volume of export sales ?

51. As an initial matter, the United States notes that paragraph 10 of its oral submission discussed India's request that the US authorities use SAIL's US *pricing* information to perform an anti-dumping analysis. It was this *pricing* information that the United States characterized as a fraction of the information necessary for an anti-dumping analysis. The US sales data normally necessary to perform an antidumping analysis would further include selling expenses, movement charges, product matching characteristics, variable cost of manufacturing, total cost of manufacturing, and constructed value. As discussed above in response to question 10, much of this information in SAIL's US database was inaccurate and/or unusable.

52. The United States' characterization of the US pricing information as being a fraction of the information necessary for an anti-dumping analysis was, indeed, a reference to the amount of information involved in relation to the total information necessary. However, this "amount" of information cannot be measured with respect to the number of pages needed to print out US prices or the number of data points needed to programme them. Rather, it needs to be measured with respect to the totality of information necessary to perform an anti-dumping analysis. In this case, as India itself has conceded, most of the information SAIL submitted that was necessary to perform the anti-dumping analysis was inaccurate, failed verification, and could not be used in performing the analysis. This includes all of the information related to home market sales, cost of production, constructed value, and some of the information related to US sales.

Q16. Could the USDOC have identified, among the US sales reported in the US sales database, export prices for transactions involving a like or similar product to that represented in the constructed normal value reported in the petition? Is it the United States' view that this would, in this case or inherently, constitute "undue difficulty" in using this information in the investigation? Please explain in detail the nature and scope of the undue difficulty involved.

Reply

53. As we explained at the first Panel meeting and in response to Questions 6 and 10, the US sales database contained numerous flaws and could not be used. In addition, as India and SAIL have conceded, all other data with respect to home market sales, cost of production, and constructed value proved to be unverifiable, unreliable, and unusable. These combined failures properly led Com-

merce to conclude that it should make a determination in this investigation on the basis of total facts available. After making this conclusion in the face of such a failure on the part of the respondent, for Commerce or any investigative authority to attempt to rehabilitate such a response by selectively identifying certain information that might be useable would have inherently constituted an undue difficulty.

54. For Commerce to have identified, among the US sales reported in the US sales database, export prices for transactions involving a like or similar product to that represented in the constructed normal value reported in the petition, would have involved undue difficulty. To have identified US sales transactions of like or similar merchandise would have required Commerce to manually review and input the physical characteristics for 75 per cent of the US sales transactions, then identify those sales of merchandise that was identical to the product in the petition for which there was a constructed value. Commerce would also have had to input corrected freight costs that had been either over- or under-reported, duty drawback errors and any other errors discovered while making the comparisons.

Q17. Is it the United States' view that paragraph 5 of Annex II is symmetrical? That is, paragraph 5 provides that if a party has acted to the best of its ability, the fact that the information provided is not ideal in all respects should not justify disregarding it. Putting aside the import of "should", does the United States consider that the fact that a party has failed to act to the best of its ability should justify the investigating authority in disregarding information that is otherwise not ideal in all respects? Further, does the United States consider that the fact that a party has failed to act to the best of its ability should justify the investigating authority in disregarding information that is otherwise ideal in all respects?

Reply

55. Annex II, paragraph 5 states that even if "information provided may not be ideal in all respects, this should not justify the authorities from disregarding it," provided that the interested party responding to authorities' questionnaires has acted to the best of its ability. The natural corollary to this principle is that where a party has not acted to the best of its ability, and its information is not ideal in all respects, that information may be disregarded by the investigating authorities. Therefore, in response to the first question, the United States agrees that if a party submitting information has failed to act to the best of its ability, an authority may disregard information that is not ideal in all respects. While the appropriateness of disregarding the information would have to be considered on a case-by-case basis, we note that in this case, SAIL's information was ideal in almost no respect.

56. In response to the second question, the United States notes that if the information provided is ideal in all respects, it would not be necessary to consider whether the party acted to the best of its ability.

Q18. It appears that India considers that a comparison between a constructed normal value calculated by petitioners, and an average of US sales prices, or an average of a subset of US sales prices for product that "matches" the product for which normal value was calculated, yields a more accurate result, one that better represents "objective decision-making based on facts," than a determination that applies the dumping margin calculated in the petition as facts available. Could the United States respond to this proposition, specifically regarding the relative quality of the result in each case? Does the outcome affect the United States' view in this regard?

Reply

57. As we noted in response to Question 16, the lack of necessary information to conduct an anti-dumping analysis required Commerce to base its determination on facts available in the petition; specifically, the price offer in the petition which matched the product on which constructed value was based. The relative quality of this decision – comparing the price offer in the petition to the matching product on which constructed value was based – is quite sound, particularly where the information has been corroborated as in this case.

58. As an alternative, India would require that Commerce make all the changes necessary to utilize the US sales data – an exercise that would have involved a distinct amount of speculation given the extent of what was missing – so that these sales could be compared to the product for which normal value was calculated. Given that many of these sales did not match the product on which normal value was based, a subset of these sales would need to be identified in order to conduct this comparison. The relative quality of India's proposed exercise is questionable at best. It is the analytic process involved – not the outcome – that affects the United States' view in this regard.

Questions to India

Q19. India claims that the United States violated Article 2.4 of the AD Agreement because the failure to use the US sales data submitted by SAIL resulted in an unfair comparison. Does India consider that a comparison of normal value based on facts available and export price based on the US sales data would have been fair within the meaning of Article 2.4? Does India agree that USDOC was entitled to rely on facts available with respect to the determination of normal value in this case?

Reply

59. India's argument is based on the false premise that a breach of Article 6 could also constitute a breach of Article 2.4. Even if there had been a breach of Article 6 in the investigation at issue (a point the United States does not concede) such a breach would not cause a violation of Article 2.4. The Panel's question illustrates the flaw in the logic of India's suggestion that Articles 2.4 and 6 are linked. The United States discusses this point further in its answer to Question 20.

Q20. Could India elaborate on the link it draws between the Article 2.4 "fair comparison" requirement and the asserted violation of Article 6.8. Specifically, does India consider that a comparison in which one element is determined in violation of some other provision of the AD Agreement is, ipso facto, unfair in terms of Article 2.4? Does India consider that this constitutes a separate violation of the AD Agreement? For instance, assume a panel were to conclude that an investigating authority violated some aspect of Article 2.2 in the calculation of normal value. Would this, in India's view, necessarily constitute a violation of Article 2.4 as well?

Reply

60. To the extent that India is arguing that there is a link between Articles 2.4 and 6.8, its argument is unfounded. There is no support in the text of the Agreement for an interpretation of Article 2.4 that would allow breaches of other provisions to also constitute a breach of Article 2.4.

61. The ordinary meaning of this term used in Article 2.4, viewed in context, demonstrates this point. Article 2 governs the "Determination of Dumping". The first sentence of Article 2.4, in turn, states that "A fair comparison shall be made between the export price and the normal value". The remainder of that paragraph sets out the ways in which investigating authorities are to make this fair comparison.

62. The first sentence of Article 2.4.2 further demonstrates this point. That provision establishes additional criteria for establishing margins, "subject to the provisions governing fair comparisons in paragraph 4". Thus, it is the provisions in paragraph 4 of Article 2 that establish the obligations relevant to making a fair comparison. By contrast, there is no language suggesting that other provisions of the Agreement are implicated in Article 2.4 in any way.

Q21. India argues that paragraph 5 of Annex II requires that information in a particular category must be accepted, despite possible flaws, if it can be used without undue difficulties and if the party providing it has acted to the best of its ability. India also asserts that if a category of information satisfies the three or sometimes four conditions of paragraph 3 of Annex II, the investigating authorities may not reject that category of information. These requirements do not, however, address the substance or quality of the information in question. Does India maintain that the investigating authority must, in all cases, base its determination on the information submitted in these circumstances? What if, for instance, information regarding home market sales is known to be incomplete, but is verifiable, timely submitted, and can be used with undue difficulties - would this incomplete information have to be used in calculating the dumping margin? Going further, what if, upon verification, the information proves to be incorrect - must it still be used in calculating the dumping margin? What if the information simply cannot be verified - must it still be used in calculating the dumping margin? Would India consider that the completeness or correctness or actual verifi-

cation of the information is part of the conditions under paragraph 3 of Annex II, or would these be separate or further requirements?

Reply

63. This question identifies an important flaw in India's "sequencing" argument regarding the relationship between Annex II, paragraph 3 and Annex II, paragraph 5. We agree with the statement in the question that the requirements of Annex II, paragraph 3 do not address the substance or quality of the information in question. India's interpretation, to the extent that it requires an investigating authority to use information without regard to its substance or quality, is an interpretation that contradicts objective decision-making based on facts.

Q22. Does India dispute the USDOC finding that SAIL failed to act to the best of its ability in respect to information. other than US sales data? Is it correct to understand that India has not contested the scope of the information request put to SAIL during the investigation?

Reply

64. The United States notes that SAIL declined to submit any comments to the US Court of International Trade challenging Commerce's Remand Determination that SAIL failed to act to the best of its ability. The United States can confirm that SAIL did not contest the scope of the information request put to SAIL during the investigation.

Q23. In SAIL's calculations comparing US sales data to "verified" home market sales, what assurance is there that the home sales data covered all sales of comparable product, or that cost data covered all production of the comparable product? Especially in light of the "significant" flaws in the home sales and cost data, which SAIL does not dispute allowed USDOC to rely on facts available. Isn't the argument here over which facts available to use, which does not appear to be the subject of a claim in this dispute? Does India consider that the comparison SAIL proposed would not have posed "undue difficulties" for USDOC?

Reply

65. This question raises a very important point: the essence of India's challenge is that US authorities used the wrong "source" for facts available. Yet India has not made a legal claim that matches the essence of its challenge. India has abandoned its claim under Annex II, paragraph 7, that the United States failed to exercise special circumspection in using information supplied in the petition and India has not indicated any other provision of the Agreement which is within the terms of reference and which establishes an obligation to evaluate facts available alternatives relative to one another. The Panel has issued a preliminary ruling indicating that, having abandoned its Annex II, paragraph 7 claim, India may not revive it.

Q24. Section 782(d) of the Tariff Act of 1930, as amended, specifies that in the case of deficient submissions, the USDOC "may, subject to subsection

(e), disregard all or part of the original and subsequent responses" (emphasis added). How does India justify the contention that the US law required USDOC to reject US sales data and rely on facts available in violation of the AD Agreement, in light of this statutory language, US case law permitting use of partial facts available, USDOC decisions relying on partial facts available, the arguments presented in SAIL's USCIT brief, and India's acknowledgement that that statute "could" be interpreted otherwise?

Reply

66. It is difficult to see how India can justify its contention that US law *required* Commerce to reject the Indian respondent's US sales data. Section 782(d) expressly states that Commerce "may" disregard information but only after it considers the information pursuant to section 782(e). In response to Question 8, we have identified Commerce decisions and USCIT case law that permit – indeed encourage – the use of partial facts available. SAIL itself argued to the USCIT that facts available "arguably is justified (but not required) for certain of its information".[47]

Q25. The heading of India's argument regarding Article 15 asserts that USDOC violated Article 15 by "failing to give special regard to the situation of India as a developing country when it applied facts available in relation to SAIL's US sales data." However, the body of the argument related to the alleged failure of USDOC to "explore possibilities of constructive remedies" as required by the second sentence of Article 15. Is India asserting a violation of the first sentence of Article 15, and if so, could India please explain the legal argument in support of its claim? Could India elaborate on its interpretation of the first sentence of Article 15? In India's view, what obligations does it impose on a developed country, and when must those obligations be satisfied? Could India expand on it assertion and explain how, specifically, the USDOC actions in this case constitute a violation of the first sentence of Article 15?

Reply

67. There is no possible basis for India to assert a violation of the first sentence of Article 15 because, as India has previously conceded, the provision imposes no obligations on developing country Members. India stated in *Bed Linens* that the first sentence "does not impose any specific legal obligation, but simply expresses a preference that the special situation of developing countries should be an element to be weighted when making that evaluation".[48] India contrasted the lack of any specific legal obligation with its interpretation of the second sentence, which it claimed "imposes a specific legal obligation to 'explore possibili-

[47] *SAIL's CIT Brief*, Ex. IND-19, at 16.

[48] Panel Report on *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linens from India*, WT/DS141/R, adopted 12 March 2001, DSR 2001:VI, 2077, para. 6.220.

ties'".[49] The United States urges the Panel to take these facts into account in the event that India changes its interpretation of the first sentence for purposes of the present proceeding.

Q26. Does India agree with the contention of the United States that the respondent ultimately controls the information necessary to a dumping calculation? How does India respond to the contention that to allow the respondent to control the information gathering process by deciding which information (or category of information) it will provide, and requiring that this information be accepted if it is adequate under paragraph 3 Annex II regardless of what flaws there may be with other information, gives the respondent control over the dumping calculation and thus opens the possibility for manipulation of the results?

Reply

68. SAIL is likely to respond that it had no intent to manipulate the results, but this is beside the point. The Panel's question raises an essential question regarding how to ensure the careful balance between the interests of investigating authorities and exporters that is reflected in the AD Agreement.

Q27. It is the Panel's understanding that US law does not provide for the imposition of a lesser duty. In this circumstance, does India consider that the US was obliged to explore the possibility of imposing a lesser duty under Article 15?

Reply

69. The only place in the AD Agreement that addresses the issue of "lesser duty" is Article 9.1. That provision indicates only that it is "desirable" to impose a lesser duty if doing so would be adequate to remove the injury to the domestic industry. Article 9.1 explicitly reserves that decision to the authorities of the importing Member. Article 9.1 is not a mandatory provision, and there is nothing in Article 15 which would override the clearly discretionary nature of Article 9.1.

70. Moreover, in a recent submission to the Committee on Anti-Dumping Practices, Ad Hoc Group on Implementation, India made a proposal to "operationalize" Article 15 by making the lesser duty rule mandatory with respect to imports from developing countries as a "constructive remedy" in antidumping cases.[50] The fact that India has made such a proposal further demonstrates that there is no such obligation at present.

Q28. Could India please explain why it considers the US sales data to be "unrelated" to the rest of the data in this case? Would India consider that, in every case, the data on (a) the prices of the subject merchandise in the

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[49] *Ibid.* Since all parties were in agreement that the first sentence of Article 15 imposed no obligation, the *Bed Linens* panel expressed no views on the matter. *Ibid.*, para. 6.227 n.85.

[50] *Implementation-Related Issues Referred to the Committee on Anti-Dumping Practices and its Working Group on Implementation*, Paper Submitted by India, G/ADP/AHG/W/128, 1 February 2002, para. 9.

domestic market of the exporting country, (b) the export prices of the subject merchandise, (c) the costs of production, and (d) constructed value, are separate and distinct categories of information? Would India consider that if an exporter provides information on any one or more of these elements that is verifiable, timely provided, and where applicable in the computer language or medium requested, that information must be used in calculating a dumping margin for the exporter providing the information? Would India's answer to the previous question be affected by the extent to which information on other elements is not verifiable, or not timely provided, or not in the computer language or medium requested? That is, does India see any possibility of a "global" perspective on the decision whether information can be used without undue difficulties in calculating the dumping margin?

Reply

71. The United States refers the Panel to its response to Question 1 in assessing this issue.

Q29. Is it correct to understand that, in India's view, the fact that there is no or unverifiable information concerning the cost component of the US sales has no effect on the verifiability or reliability of the US sales price data that was provided? Does India consider that it may in some circumstances be the case that the lack of some aspect of the requested information renders the entire body of data to which that aspect pertains unreliable?

Reply

72. We refer the Panel to India's Oral Statement on this issue. There, India stated that

> If an interested foreign party does not or fails to provide complete information regarding an important category of information (which could include one or more of what the USDOC refers to as the "essential components of a respondent's data") then depending on the circumstances, it may be appropriate for investigating authorities to find that they cannot use partial information for that category "without undue difficulties." Assuming that the authorities also find that the party did not use its best efforts in attempting to supply the complete information, then the application of facts available may be appropriate as to the entire category of information.[51]

73. India went on to give an example of when facts available in its entirety would be justified that is remarkably analogous to this case:

> [I]f a foreign respondent provided information on all export sales but did not provide information on a number of necessary characteristics of such sales (for example, their physical characteristics or the prices at which they were sold), the investigating authorities

[51] Oral Statement of India at para. 57.

> may be justified in finding that they cannot use that information without undue difficulty because it is too incomplete.[52]

74. This admission by India is significant because the foreign respondent in this case did not provide information on a necessary characteristic (the cost of manufacture characteristics required to allow Commerce to adjust for the differences in physical characteristics of the US merchandise with the normal value merchandise). Therefore, India's own reasoning would support the rejection of the US sales data.

Q30. Does India consider that §782(e)(3) is NOT consistent with goal of objective decision-making based on facts, or does India object to it because it is not a provision specifically found in Annex II?

Reply

75. The United States requests that the Panel review its response to Question 3 with regard to this question.

Q31. Where in the AD Agreement does India find an obligation on the investigating authority to carry out and record, as suggested in paragraph 74 of its oral statement, a detailed analysis of a proposed constructive remedy?

Reply

76. There is no provision in the AD Agreement which requires investigating authorities to take such steps. The three logical places to look for such an obligation are Article 15, Article 8 (the price undertakings provision), and Article 12 (which addresses a Member's obligations with respect to public notice and explanation of determinations). None of these provisions imposes an obligation on authorities to carry out and record a detailed analysis of a proposed constructive remedy.

77. In addition, India has not alleged violation of Article 8 or Article 12. Consequently, US conformity with those provisions is not within the Panel's terms of reference.

78. Finally, even if the Panel should find that the AD Agreement contains an obligation to provide some degree of analysis of a proposed price undertaking when a developing country is involved, and even if India has alleged a violation of the relevant provision, the degree of the investigating authority's analysis would certainly be proportionate to the seriousness of the price undertaking proposal submitted. In this case, we note India's statement to the Panel during the first meeting that India's proposal for a price undertaking was not a realistic proposal, but was merely a negotiating ploy.

Q32. Is it correct to understand that India considers that a comparison between a constructed normal value calculated by petitioners, and an average of US sales prices, or an average of a subset of US sales prices for product that "matches" the product for which normal value was calculated,

[52] *Ibid.* at para. 58.

yields a more accurate result, one that better represents "objective decision-making based on facts", than a determination that applies the dumping margin calculated in the petition as facts available? If so, could India explain in detail why it considers this result "better". Would India's view be the same if the outcome were different?

Reply

79. The United States notes that the only difference between the two approaches for applying facts available is that one may result in a lower margin than the other. It is not possible to say which is more accurate because that implies that one knows what the correct margin is. In this case, there is no way to know what the correct margin of dumping is because SAIL did not supply the information necessary to calculate the actual margin of dumping.

Q33. India appears to have argued that the investigating authority should, in deciding whether information will be rejected and facts available used instead, have reference to the facts available that would likely be used, and assess whether they are, in fact, "better", "as good as", or "worse" than the imperfect information provided by the exporter. Is this a correct understanding of India's position? Could India explain what relevance the facts available ultimately used have in the decision regarding whether information provided can be used in the investigation without undue difficulties? Could India please explain its apparent view that the quality of the facts available ultimately relied upon in making a determination somehow effects the degree of effort that might be considered "undue difficulties" in using the information provided?

Reply

80. Please refer to the response to the previous question.

Questions to both parties

Q34. Would the parties please discuss their views concerning the meaning of the phrase "undue difficulties" in paragraph 3 of Annex II? Does it encompass substantive as well as procedural aspects of using the data in question?

Reply

81. Annex II, Article 3 recognizes that information should be taken into account if, among other things, it is "appropriately submitted so that it can be used in the investigation without undue difficulties". The term "undue" is defined as "going beyond what is warranted or natural".[53] Whether or not the use of information would cause undue difficulties must be determined on a case-by-case basis, and both substantive and procedural aspects of using the data could be relevant to this question. For example, the information may be substantively

[53] New Shorter Oxford Dictionary, Clarendon Press, Vol. II at 3480.

flawed in such a manner that corrections would be unduly difficult or impossible. Alternatively, the use of certain information might create procedural issues that would cause undue difficulty. For example, the exercise of using information might involve receiving comments from a large number of interested parties that would be unduly difficult under the circumstances of a particular case, or may be unduly difficult given the time constraints of completing the investigation within required time limits.

Q35. The United States argues that India's claim regarding US "practice" in the application of facts available is not properly before the Panel and submits that under the US law, an agency such as USDOC may depart from established " practice" if it gives a reasoned explanation for doing so. The United States thus argues that US "practice" cannot be the subject of a claim. Could the United States please elaborate on this argument? India is invited to respond to this question as well.

Reply

82. The United States first notes that, in response to a question at the first Panel meeting, India appeared to state that it is not pursuing a separate claim with respect to "practice". Therefore, the Panel need not reach the issue of whether practice can be the subject of a claim.

83. Having noted this point, and responding to the Panel's question, it is a well-established principle of US administrative law that an administrative agency, such as Commerce, is not obliged to follow its own precedents, provided that it explains why it departs from them.[54] Thus, even if Commerce had made determinations in previous cases to reject respondents' submissions *in toto* and to rely instead on the facts available, it would not be bound by those determinations in future antidumping proceedings involving the use of the facts available.[55] The relevant consideration under US law is that Commerce determinations be consistent with the statute and the regulations.

84. As the United States noted in its first written submission, what India refers to as "practice" consists of nothing more than individual applications of the

[54] *See, e.g.*, Kenneth Culp Davis and Richard J. Pierce, Jr., *Administrative Law Treatise* § 11.5 at 206 (Little, Brown, 3rd ed 1994) ("The dominant law clearly is that an agency must either follow its own precedents or explain why it departs from them. The courts so require.") (copy attached as Exhibit US-30); and Charles H. Koch, Jr., *Administrative Law and Practice* § 5.67[4] at 255 (West, 2d ed. 1997) (hereinafter "Koch") ("Neither the Constitution nor general administrative law prohibits an agency from deviating from prior precedent, but there is some general requirement of consistency. At least, the law requires an explanation for deviations from past practices.") (copy attached as Exhibit US-31).

[55] Indeed, even if Commerce had made determinations under section 776(a) that resulted in the use of the facts available in place of respondents' submitted information, those determinations, in and of themselves, would not justify similar determinations in future antidumping investigations. Koch, *supra*, note 54, at 256 ("[T]he agency may not rely on past precedent alone to justify its decisions."). Instead, Commerce ultimately would have to justify any such decision on the basis of the statute and the evidence of record. The existence of prior determinations using facts available under similar factual scenarios would merely serve as evidence that Commerce was not acting arbitrarily in the new antidumping proceeding.

US facts available provisions. While these applications themselves might individually constitute measures, they do not, through numbers, mutate into a separate and distinct "measure" that can be called "practice". While Commerce, like many other administrative agencies in the United States, uses the term "practice" to refer collectively to its past precedent, that precedent is *not* binding on Commerce, and is, therefore, irrelevant for purposes of WTO dispute settlement. India's alleged "practice" simply consists of specific determinations in specific antidumping proceedings that are not within the Panel's terms of reference.

85. The panel in the *Export Restraints* case addressed this issue in some detail. Canada had claimed that the United States had a practice of treating export restraints as countervailable subsidies, and that this "practice" constituted a measure that could be subject to panel review. In response to a question from the panel, Canada defined this US "practice" as "an institutional commitment to follow declared interpretations or methodologies that is reflected in cumulative determinations".[56] Canada admitted, however, that US law permits Commerce to depart from its "practices" as long as it explains its reasons for doing so.[57] The panel correctly rejected Canada's argument on the grounds that US practice "does not appear to have independent operational status such that it could independently give rise to a WTO violation as alleged by Canada".[58]

86. In addition to the fact that US facts available "practice" cannot constitute a measure, India's claims regarding such "practice" are not properly before the Panel because they do not conform to Articles 4.7 and 6.2 of the DSU. As we explained in our first written submission, India did not identify US facts available "practice" in its request for consultations and the United States and India never consulted with respect to US "practice".[59]

Q36. Could the parties explain their views as to what constitutes "practice" as used by India in its request for establishment?

Reply

87. The United States respectfully submits that this question demonstrates the validity of the US position that India's claims regarding US facts available "practice" are not properly before the Panel because they do not conform to Articles 4.7 and 6.2 of the DSU. After one full round of briefing and a meeting of the parties with the Panel, it is difficult to discern the point of India's arguments involving "practice". Judging from its response to the question that the Panel asked at the first Panel meeting, however, India does not appear to be making a separate claim on the issue of "practice", but is merely using this concept to form indistinct and nebulous arguments in support of its claims with regard to the US facts available provisions "as such" and as applied in this case.

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[56] Panel Report on *United States – Measures Treating Exports Restraints as Subsidies*, WT/DS194/R, adopted August 23, 2001, DSR 2001:XI, 5767, para. 8.120.
[57] *Ibid*., para. 8.125.
[58] *Ibid*., para. 8.126.
[59] *See US First Written Submission*, para. 147 and n. 28 (citations omitted).

88. To elaborate, India has already admitted that the US statutory provisions can be interpreted in the manner that it prefers.[60] Since this fact invalidates its challenge to the US facts available provisions "as such", India argues instead that the Panel should examine the statute as it has been "interpreted" in Commerce practice. But India's citation of previous Commerce facts available determinations does nothing to prove that the US facts available provisions are inconsistent "as such" with the AD Agreement. An agency's decision to exercise its discretion to interpret a statute in a particular way cannot transform a WTO-consistent statute into a WTO-inconsistent one. Moreover, the United States has already explained (in response to Question 8) why India is wrong to claim that Commerce has interpreted the US facts available provisions to require the rejection of all of a respondent's information where only some information is flawed.

89. With respect to India's "as applied" arguments (*i.e.*, as applied in other cases), the fact that Commerce has applied the provisions in certain ways in other cases sheds no light on whether Commerce acted inconsistently with its obligations under the AD Agreement in the investigation at issue.

Q37. Do the parties consider that the USDOC "calculated" a dumping margin in this case? In this regard, we note the arguments made by the United States in paragraphs 93 to 97 of its first written submission regarding Article 6.8, which provides that "preliminary and final determinations, affirmative or negative" may be made on the basis of facts available.

Reply

90. Commerce did not "calculate" a dumping margin in this case because SAIL's information could not be used for such a purpose. It is more accurate to state that Commerce "made" its final determination on the basis of the facts available. This reflects the language of Article 6.8 of the AD Agreement, which provides that, under specified circumstances, "preliminary and final determinations, affirmative or negative, *may be made* on the basis of facts available." (emphasis added). It is also consistent with paragraph 1 of Annex II, which states that investigating authorities "will be free *to make* determinations on the basis of the facts available" when, as in the present case, parties fail to supply necessary information within a reasonable time.

Q38. Could the parties please explain their views regarding the meaning of the phrase information should be "taken into account" as used in Annex II paragraph 3. (Ignore for purposes of this question whether "should" is to be understood as mandatory or not). For instance, might it be understood to mean that the determination must be based on that information? or to mean that the investigating authority must look at the information further, attempt to verify it, and judge its reliability, but may ultimately not base decision on it and refer to facts available instead?

[60] *See* India's first written submission at para. 153.

Reply

91. The term "take into account" is defined as "take into consideration" or "notice.".[61] Thus, Annex II, paragraph 3, requires investigating authorities to "take into consideration" or "notice" information which is verifiable, appropriately submitted so that it can be used in the investigation without undue difficulties, supplied in a timely fashion and, where applicable, supplied in a medium or computer language requested by the authorities. In this case, Commerce took into account SAIL's information, consistent with the totality of the record evidence.[62] Annex II, paragraph 3, however, does not require that Commerce use the information in its calculations.

Q39. Could the parties please explain their views as to the meaning of the term "verifiable" in Annex II, paragraph 3, with specific reference to, inter alia, the following possibilities:

(a) information is prepared and presented in a way that it can be checked against the books and records of the company submitting it;

(b) information not only satisfies (a), but also when it is checked, it is found to be complete, accurate and reliable - i.e., it passes verification.

92. The term "verifiable" is defined as "able to be verified or proved to be true; authentic, accurate, real".[63] The use of the word "verifiable" in Annex II, paragraph 3 of the AD Agreement is understandable since an actual on-site verification is not required by the AD Agreement. Thus, information that has *not* been subject to actual verification may be considered to be "verifiable " provided that it is internally consistent and otherwise properly supported. In such circumstances, an investigating authority that opts not to verify such information cannot decline to consider it because it was not, in fact, verified. This was the principle expressed in the panel decisions in *Japan Hot-Rolled* and *Guatemala Cement II*[64], where the investigating authorities in those cases refused to accept or verify the information during the relevant investigations.

93. The facts established in this case are quite different, however. Neither the *Japan Hot-Rolled* panel nor the *Guatemala Cement II* panel were faced with a situation like the instant one in which on-site verification of the information was attempted but the information failed to be verified. Such information which has actually been subjected to verification and found not to verify can no longer be said to be "verifiable" since it has been proven to be inaccurate. Such an explicit

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[61] The New Shorter Oxford English Dictionary, Clarendon Press, Oxford, 1993 (under the "phrases" section following the definition of the term "account").

[62] See the response to Question 4, *supra*.

[63] New Shorter Oxford Dictionary, Clarendon Press, at 3564.

[64] *Guatemala – Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico*, WT/DS/156/R, 24 October 2000, DSR 2000:XI, 5295, para. 2.274; *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS/184/R (28 February 2001, adopted 23 August 2001) (*Hot-Rolled Panel Report*) DSR 2001:X, 4769, para. 5.79.

finding – such as was made in this case – that a respondent's information failed verification[65] rebuts any assertion that information was "able to be verified or proved to be true".[66]

Questions for third parties

Q2. Could Chile please explain its view that a reading of the provisions of Annex II paragraphs 3 and 5 satisfies the criteria set out in the *Mavrommatis* case relied upon by Chile of being the "more limited" interpretation, which, as far as it goes, is clearly in accordance with the common intentions of the parties?

Reply

94. Chile argues that the term "should" in paragraphs 3 and 5 of Annex II of the Anti-Dumping Agreement should be interpreted as "mandatory and binding", rather than permissive. It bases its argument on the fact that the Spanish language version of the AD Agreement translates the phrase "should be taken into account" as "deberá tenerse en cuenta".[67] In Chile's view, the English-language term "should" is properly translated as "debería ", not "deberá." It then cites this supposed conflict as a reason to apply the statement of the Permanent Court of International Justice in the *Mavrommatis* case that, in resolving such conflicts, an interpreter is bound to adopt the "more limited" interpretation which can be made to harmonize with the common intention of the Parties. Chile's argument not only misapplies the *Mavrommatis* case, but also misinterprets the manner in which the term "deberá" is used in the WTO Agreements.

95. With respect to the supposed conflict between the terms "should " and "deberá," an examination of the text of the WTO Agreements demonstrates that the Agreements repeatedly use "deberá" as the Spanish equivalent of "should," even when the term is clearly being used in a permissive sense. For example, Article 5.4 of the *Agreement on the Application of Sanitary and Phytosanitary Measures* (the "SPS Agreement") states that:

> Members should, when determining the appropriate level of sanitary or phytosanitary protection, take into account the objective of minimizing negative trade effects.

96. The panel in the *Hormones* case found that the wording of Article 5.4, "in particular the words 'should ' (not 'shall') and 'objective'", demonstrated that the

[65] Verification Failure Memorandum, Ex. US-25.

[66] New Shorter Oxford Dictionary, Clarendon Press, at 3564.

[67] Chile's description of the relevant language as "deberá tomarse en cuenta" is a mis-cite of the actual term used in paragraph 3 of Annex II. *Cf.* Chile's Oral Statement at para. 4 *with* AD Agreement, Annex II, para. 3 (Spanish version).

provision did not impose an obligation.[68] Nonetheless, the Spanish-language equivalent of Article 5.4 of the SPS Agreement translates "should" as "deberá".[69]

97. Similarly, in the AD Agreement, the term "should" is repeatedly translated as "deberá," including when "should" and "shall" are used in the same sentence. Article 6.1.1, for example, states that exporters or producers "shall" be given at least 30 days to reply to questionnaires, investigating authorities "should" give due consideration to extension requests, and such requests "should" be granted wherever practicable. The Spanish language version of Article 6.1.1 translates "should" as "deberá", and "shall" as "dará".

98. Indeed, in the Spanish language version of the AD Agreement, while the term "should" generally *is* translated as "deberá," the term "shall" generally is *not* translated as "deberá".[70] Moreover, "debería" – Chile's preferred translation of "should" – is never used.[71]

99. Since Chile's purported conflict between "should" and "deberá" does not in fact exist, there is no reason for the Panel to turn to the *Mavrommatis* case. Moreover, there is some question in the scholarly literature whether the Court's dictum in *Mavrommatis* was meant to establish a general rule.[72] In any event, to the extent that the case is relevant, the more "limited" interpretation of the third paragraph of Annex II is that it imposes a permissive obligation, not a mandatory one. Chile's analysis assumes that *Mavrommatis* uses the word "limiting," but it in fact uses "limited". The more limited interpretation – that which imposes the more limited obligation – is that the term at issue is permissive. Further, the interpretation which harmonizes the common intention of the parties in this case is that the term "should" or "deberá" is non-mandatory. *All* parties and third parties to this dispute agree that authorities at least *should* take information into account if the conditions of paragraphs 3 and 5 are met – only some think that they must.

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[68] Panel Report on *EC Measures Concerning Meat and Meat Hormones*, Complaint by Canada, WT/DS48/R/CAN, 18 Aug. 1997, DSR 1998:II, 235, para. 8.169.

[69] *See* SPS Agreement, Article 5.4 (Spanish version) ("los Miembros deberán tener en cuenta") (the text uses "deberán" in place of "deberá" because "Miembros" is plural.)

[70] *See, e.g.*, Article 1 ("shall be applied" translated as "se aplicarán"); Article 2.4 ("A fair comparison shall be made" translated as "Se realizará una comparación equitativa"); Article 6.9 ("shall inform" translated as "las autoridades informarán" and "should take place" translated as "deberá facilitarse").

[71] Chile's argument also ignores that the French version of the Agreement uses the term "devraient," which translates as "should," not "shall." *See* AD Agreement, Annex II, para. 3 (French version).

[72] *See, e.g., Report of the International Law Commission on the Work of its Eighteenth Session*, Yearbook of the International Law Commission, 1966, Vol. II, at 225 (commentary on Article 29, para. 8)(stating that the *Mavrommatis* case "is not thought to call for a general rule laying down a presumption in favour of restrictive interpretation in the case of an ambiguity in plurilingual texts".)

EXHIBITS

US-27. *NSK Ltd., v. United States*, 170 F. Supp. 2d. 1280, 1318 (6 June 2001)

US-28. *Steel Authority of India, Ltd. v. United States*, Slip Op. 2001-149 (17 Dec. 2001)

US-29. SAIL Section C Questionnaire Response (excerpts)

US-30. Kenneth Culp Davis and Richard J. Pierce, Jr., *Administrative Law Treatise* § 11.5 at 206 (Little, Brown, 3rd ed 1994)

US-31. Charles H. Koch, Jr., *Administrative Law and Practice* § 5.67[4] at 255 (West, 2d ed. 1997)

ANNEX E-3

ANSWERS OF CHILE TO QUESTIONS OF THE PANEL

(12 February 2002)

Q1. In Chile's and Japan's views, does the requirement to "use" information if it satisfies the conditions of Annex II, paragraph 3, apply to *any* piece of information that satisfies the conditions, no matter how small or limited in relation to the entire body of information?

Reply

The obligation to use information that satisfies the requirements of Annex II, paragraph 3, applies to any information, no matter how small and regardless of its relation to the rest of the information or the entire body of information. According to paragraph 3 of the Annex, *all* information which fulfils the requirements set forth in that paragraph must be taken into account by the investigating authority when making its determinations. Paragraph 3 does not specify the nature of such information or its degree of importance in relation to the overall body of information. In Chile's view, the investigating authority must take account of all the information supplied by the interested party, except where it does not satisfy the requirements. In addition, qualifying information as limited on account of the weight it carries in relation to the whole body of information to be provided would make little sense and would certainly have no grounds in the wording of paragraph 3.

Q2. Could Chile please explain its view that a reading of the provisions of Annex II, paragraphs 3 and 5, satisfies the criteria set out in the *Mavrommatis* case relied upon by Chile of being the "more limited" interpretation, which, as far is it goes, is clearly in accordance with the common intentions of the parties?

Reply

Anti-dumping duties are exceptional measures applicable under the WTO Agreements in the specific circumstances provided for in the Agreements. Hence, both Article VI of the GATT 1994 and the Anti-Dumping (AD) Agreement must be read in a restrictive manner, in order to prevent a broad interpretation of their provisions from serving as a basis for using anti-dumping duties for purposes different from those contemplated in the two Agreements. As Japan pointed out in its written submission, various panels dealing with anti-dumping matters have ruled on the mandatory nature of the term "should" (not only with respect to Annex II, paragraphs 3 and 5), even though it may not be so under other circumstances. This reflects the restrictive sense in which the provisions of the AD Agreement and the GATT 1994 must generally be interpreted. The foregoing is especially important in limiting the discretion that may be exercised by

the investigating authority. Thus, the Spanish version of Annex II, paragraphs 3 and 5, limits the authority's scope of discretion through an obligation to use the information supplied by the interested party, provided that such information satisfies the conditions set forth in those paragraphs. On the other hand, the English version – according to the United States interpretation – leaves considerable room for discretion to the investigating authority. This would include the absurd option of not taking into account information supplied by the interested party, even if such information fulfilled the requirements of paragraph 3.

Chile therefore considers that, in limiting the investigating authority's scope of discretion, the Spanish version of Annex II, paragraphs 3 and 5, offers the most restrictive interpretation of all three versions and undoubtedly reflects the intention of the parties, which was – and still is – to resort to anti-dumping measures in exceptional circumstances and on condition that the strict requirements of Article VI of the GATT 1994 and the AD Agreement are fulfilled.

Furthermore, if the investigating authority had the option and not the obligation to take account of all the information provided, what would be the purpose of the requirements in Annex II, paragraph 3? Likewise, if the authority were not under the obligation to take such information into account, what would be the point of the phrase "to the best of its ability" in Annex II, paragraph 5?

Q3. Could Chile please explain why, as indicated in paragraph 14 of its oral statement, it considers that the investigating authority, having decided to use facts available, should compare it to the information that was rejected? Does Chile consider that this is a requirement, or merely an appropriate methodology?

Reply

Annex II, paragraph 1, provides that the investigating authority is to specify the information required from the interested party, which must also be made aware that if such information is not supplied within a reasonable period of time, the investigating authority will be free to use the facts available, including those contained in the application for the initiation of an investigation by the domestic industry.

This means that the facts presented by the domestic industry may not be the only ones made available. There are other sources of information, such as certain internationally known prices and market conditions – as we pointed out in paragraph 14 of our statement. However, there is also, and perhaps most importantly, the information supplied by the interested party, regardless of whether such information has been rejected by the investigating authority. An objective and impartial authority cannot refrain from examining information provided by the interested party, including data that it has rejected, for whatever reason, if such information contains elements that can serve as a basis for its decisions. For example, if the authority rejects information because it was not submitted within the prescribed time-limit, this does not mean that it does not contain elements necessary for the authority to make its determinations.

The possibility provided by Article 6.8, read in conjunction with Annex II, paragraph 1, therefore does not release the investigating authority from the obligation to examine all the data and background information brought to its attention during the course of the investigation, including the information supplied by the interested party, even if it is only partial or has been rejected, for whatever reason, by the authority.

Lastly, no provision of the AD Agreement compels the investigating authority to use information that it has rejected, or to use solely the data submitted by the domestic industry. Annex II, paragraph 1, specifies that the authority may make its determinations on the basis of the facts available; this may be the data provided by the domestic industry but may also be other information.

Q4. Would the third parties please discuss their views concerning the meaning of the phrase "undue difficulties" in paragraph 3 of Annex II?

Reply

Q5. Do the third parties have a view regarding the possibility of "selective provision" of information by exporters, and the potential impact on ability of an investigating authority to make an impartial and objective decision if all information provided that satisfies paragraph 3 of Annex II must be used in making the determination?

Reply

To reply to this question, it is necessary to analyse the meaning of "necessary information" in Article 6.8 of the AD Agreement. According to the *Diccionario de la Real Academia de la Lengua Española*, necessary means "that necessarily, inescapably or inevitably must be or must occur". Therefore, if information denied or not supplied within a reasonable period is necessary or absolutely indispensable for the authority to make its determinations and the authority is unable to do so without such information, the authority may use the facts available. Hence, through the selective provision of information, under Article 6.8 the interested party could potentially prevent the authority from reaching an objective and impartial decision. In other words, selective (partial) information may not be sufficient to fulfil the necessity requirement in Article 6.8.

Q6. Could the third parties please explain their views regarding the meaning of the phrase information should be "taken into account", as used in Annex II, paragraph 3. (Ignore for purposes of this question whether "should" is to be understood as mandatory or not). For instance, might it be understood to mean that the determination must be based on that information, or to mean that the investigating authority must look at the information further, attempt to verify it, and judge its reliability, but may ultimately not base decision on it and refer to facts available instead?

Reply

The phrase "should be taken into account" implies an obligation for the investigating authority to base its determinations on all the information submit-

ted by the interested party. Annex II supplements Article 6.8 of the AD Agreement and thus, although Annex II, paragraph 3, compels the authority to use the information provided by the interested party, this is not the only information on which the authority will reach its decisions. An objective and impartial investigating authority is not an arbitrator called upon to decide between positions held by two parties; its role is to gather the necessary facts on which to base its determinations. Article 6 of the AD Agreement refers to other sources of information. Moreover, pursuant to Article 6, paragraph 9, the authority must inform all the parties of the essential facts under consideration that form the basis for the decision. The phrase "should be taken into account" must therefore be interpreted within the broad framework of the analysis and comparison of data and background information to be conducted by any investigating authority. This phrase merely reaffirms the authority's obligation to examine the information supplied by the interested party but would not obligate the authority to base its determinations solely and exclusively on such information.

Q7. Could the third parties please address their views as to the meaning of the term "verifiable" in Annex II, paragraph 3, with specific reference to, *inter alia*, the following possibilities:

Reply

(a) Information is prepared and presented in a way that it can be checked against the books and records of the company submitting it;

(b) information not only satisfies (a), but also when it is checked, it is found to be complete, accurate and reliable – i.e., it passes verification.

ANNEX E-4

ANSWERS OF THE EUROPEAN COMMUNITIES TO QUESTIONS OF THE PANEL

(12 February 2002)

(Questions 1 to 3 are not addressed to the European Communities)

Q4. Would the third parties please discuss their views concerning the meaning of the phrase "undue difficulties" in paragraph 3 of Annex II?

1. Pursuant to the Vienna Convention on the Law of Treaties, the Panel should first consider the ordinary meaning of the phrase "undue difficulties" and then consider the context in which it is found. The ordinary meaning of "undue" would suggest something beyond what is normal, or proportionate.[1] When paired with "difficulties" this suggests a difficulty beyond the normal, beyond what can be expected from the ordinary course of events. Thus, data which required minor corrections or minor additions to be useable could not be regarded as useable only with "undue difficulty". This follows from the general context of the phrase *viz.* "All information [..] which is appropriately submitted so that it can be used in the investigation without undue difficulties".

2. The European Communities consider that where data which is "necessary" (to use the language of Article 6.8) has not been provided, the use of other information (e.g. domestic sales prices when cost of production data has not been provided) might be rendered disproportionately or unduly difficult, because an investigating authority will be unable to put the otherwise acceptable data through the necessary tests.

Q5. Do the third parties have a view regarding the possibility of "selective provision" of information by exporters, and the potential impact on ability of an investigating authority to make an impartial and objective decision if all information provided that satisfies paragraph 3 of Annex II must be used in making the determination?

3. The European Communities recall that the Appellate Body has stated that the Anti-Dumping Agreement aims at ensuring "a careful balance between the interests of investigating authorities and exporters".[2] Were an exporter only to selectively provide data with the aim of achieving a result most favorable to it, it evidently would not respect its share of the obligation in the balance of interests and would prevent an investigating authority from basing itself on the most relevant objectively verified information.

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[1] The New Shorter Oxford English Dictionary defines "undue" as "going beyond what is warranted or natural; excessive, disproportionate".

[2] Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, adopted 23 August 2001, DSR 2001:X, 4697, para.102. quoted at para. 5 of the EC's Written Third Party Submission.

4. Were an investigating authority required to accept all information that met the requirements of paragraph 3 of Annex II (the European Communities assumes that this question presupposes a restrictive interpretation of "unduly difficult") it would be clear that an exporter would be able to choose which information is supplied, and then taken into account by the investigating authority (it could only be used if it the investigating authority was also satisfied of its accuracy – Article 6.6). If domestic sales were not in the ordinary course of trade, but the exporter did not provide data on cost of production, SG & A expenses etc, the investigating authority, if forced to accept the domestic sales data, would have no means by which to make an assessment of domestic sales and thus it would be the exporter which would control the result of the determination.

Q6. Could the third parties please explain their views regarding the meaning of the phrase information should be "taken into account" as used in Annex II paragraph 3. (Ignore for purposes of this question whether should is to be understood as mandatory or not). For instance, might it be understood to mean that the determination must be based on that information? or to mean that the investigating authority must look at the information further, attempt to verify it, and judge its reliability, but may ultimately not base decision on it and refer to facts available instead?

5. The European Communities understand the ordinary meaning of "taken into account" as requiring that the information be accepted as part of the investigation. Any requirements concerning the nature of the information, e.g. whether it is verifiable and otherwise suitable for use, must be met before the information can be "taken into account" as the first sentence of paragraph 3 of Annex II makes clear. However, the question of whether the information is actually **used** in the determination (i.e the determination is actually based on the information) furthermore depends on the authorities satisfying themselves, in whatever manner deemed appropriate, of the accuracy of the information (Art. 6.6).

Q7. Could the third parties please address their views as to the meaning of the term "verifiable" in Annex II, paragraph 3, with specific reference to, inter alia, the following possibilities :

(a) information is prepared and presented in a way that it can be checked against the books and records of the company submitting it;

(b) information not only satisfies (a), but also when it is checked, it is found to be complete, accurate and reliable - i.e., it passes verification.

6. The obligation upon an investigating authority in terms of standard of proof is set out in Article 6.6 of the Agreement. Article 6.6 provides that the authority must "satisfy itself as to the accuracy" of the information provided. Paragraph 3 of Annex II sets out standards which data supplied must meet to be taken into account by the investigating authority. For information to be actually **used** in a determination it must be checked for accuracy by the investigating authority (see para 5 above). One of the conditions for data to be taken into account pursu-

ant to paragraph 3 of Annex II is that it must be capable of verification; the ordinary meaning of "verifiable" being "able to be verified or proved to be true".[3] Thus, the European Communities would interpret the term "verifiable" in accordance with possibility (a) set out above.

[3] New Shorter Oxford English Dictionary.

ANNEX E-5

ANSWERS OF JAPAN TO QUESTIONS OF THE PANEL

Q1. In Chile's and Japan's views, does the requirement to "use" information if it satisfies the conditions of Annex II paragraph 3 apply to *any* piece of information that satisfies the conditions, no matter how small or limited in relation to the entire body of information?

Reply

Yes, an investigating authority is required to consider all information meeting the four conditions of Paragraph 3, regardless of its volume (in absolute or relative terms). This rule is found expressly in the text of Paragraph 3 itself: "*All* information" that meets four conditions "should be taken into account". (Emphasis added.) As stated by the Appellate Body in *United States – Hot-Rolled Steel from Japan*, "[I]f these conditions are met, investigating authorities are *not* entitled to reject information submitted, when making a determination".[1]

It is clear, therefore, that information satisfying the conditions of Paragraph 3 must be considered by the investigating authority. Paragraph 3 leaves the investigating authority no discretion to introduce other considerations, such as the volume of such information, into the decision whether to take into account information provided.

As the Appellate Body stated, "paragraph 5 of Annex II *prohibits* investigating authorities from 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'".[2] Thus, the investigating authority should ask not how much information was submitted, but how hard the respondent tried to cooperate. In answering that question, the investigating authority cannot use the volume of information provided as a proxy to measure the respondent's cooperation. As the Appellate Body has recognized, "[P]arties may very well 'cooperate' to a very 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".[3]

In the end, therefore, if the respondent cooperated "to the best of its ability" in the prevailing circumstances, and it was able to submit only a little information meeting the conditions of Paragraph 3, that information cannot be disregarded.

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1 *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, DSR 2001:X, 4697, para. 81 (emphasis in original).
2 *Ibid.* at para. 100 (emphasis added).
3 *Ibid.* at para. 99.

Q4. Would the third parties please discuss their views concerning the meaning of the phrase "undue difficulties" in paragraph 3 of Annex II?

Reply

The meaning of the phrase "undue difficulties" should be determined on a case-by-case basis. It is not possible to establish in the abstract a comprehensive definition that covers all eventualities. Whether a particular difficulty is an "undue difficulty" must be determined in light of all the prevailing circumstances.

Yet, certain parameters are apparent. It is obvious, for example, that not every difficulty encountered by an investigating authority will be considered an "undue difficulty". A particular difficulty must be "undue," which is to say, "excessive" or "unwarranted". Most difficulties that arise will be ordinary difficulties; these must be accepted by investigating authorities as a normal part of anti-dumping investigations and they cannot justify a refusal to take into account information submitted. Only in rare circumstances should a difficulty be deemed "undue".

The phrase "undue difficulties" also must be understood in context. In this regard, one should recall the Appellate Body's statement that "cooperation" is "a two-way process involving joint effort" by the investigating authority and the respondent.[4] It follows that a difficulty cannot be deemed "undue" unless its resolution would necessitate greater effort by the investigating authority than the investigating authority is required to make to satisfy its duty of cooperation.

Q5. Do the third parties have a view regarding the possibility of "selective provision" of information by exporters, and the potential impact on ability of an investigating authority to make an impartial and objective decision if all information provided that satisfies paragraph 3 of Annex II must be used in making the determination?

Reply

As mentioned in the response to Question 1, information that satisfies the conditions of Paragraph 3 must be considered whenever the respondent has acted "to the best of its ability". In this regard, Japan does not consider well founded the concerns that have been expressed about "selective provision" of information. The concept of "selective provision" means that a respondent has consciously chosen to provide certain information and to withhold other information. In that circumstance, the respondent would not have cooperated "to the best of its ability" and an investigating authority would be authorized by Paragraph 5 to disregard the information that was "selectively provided". Thus, Japan respectfully submits that Paragraph 5 adequately resolves any concerns about "selective provision" and there is no need to adopt a construction of Paragraph 3 to address this issue.

[4] *Ibid.* at para. 104 (citing Agreement, art. 6.13).

Q6. Could the third parties please explain their views regarding the meaning of the phrase information should be "taken into account" as used in Annex paragraph 3. (Ignore for purposes of this question whether should is to be understood as mandatory or not). For instance, might it be understood to mean that the determination must be based on that information? Or to mean that the investigating authority must look at the information further, attempt to verify it, and judge its reliability, but may ultimately not base decision on it and refer to facts available instead?

Reply

The meaning of the obligation to "take[] into account" all information that satisfies the conditions of Paragraph 3 should be determined by reading Paragraph 3 together with Paragraph 5. Reading these provisions together shows that information meeting the four conditions of Paragraph 3 must be used in the calculation of dumping margins unless the investigating authority is authorized by Paragraph 5 to "disregard" such information. In other words, information meeting the conditions of Paragraph 3 must be used whenever the respondent has acted "to the best of its ability".

Japan further notes that this obligation cannot mean that the investigating authority may "attempt to verify [information satisfying the conditions of Paragraph 3] and judge its reliability" and then disregard such information in favour of "facts available". Such a construction would render meaningless both Paragraph 3 and Paragraph 5.

- *First*, one of the four conditions in Paragraph 3 is that the information "is verifiable". The duty to "take[] into account" only applies to information that meets all four conditions. This means that the duty only concerns information that has already been determined to be "verifiable," *i.e.* "capable of being verified" (See Question 7 below.) If the duty were to mean nothing more than that the investigating authority must attempt to verify information that has already been found capable of being verified, then the duty to take such information into account would be illusory. For the duty to have meaningful content, something more must be required.
- *Second*, Paragraph 5 prohibits an investigating authority from "disregarding" information except where the respondent fails to act "to the best of its ability". This prohibition would be rendered inutile if Paragraph 3 were construed to allow an investigating authority to "disregard" information that meets the Paragraph 3 conditions without first determining that the respondent had failed to act "to the best of its ability".

Q7. Could the third parties please address their views as to the meaning of the term "verifiable" in Annex II, paragraph 3, with specific reference to, *inter alia*, the following possibilities:

(a) information is prepared and presented in a way that it can be checked against the books and records of the company submitting it;

(b) information not only satisfies (a), but also when it is checked, it is found to be complete, accurate and reliable - i.e., it passes verification.

Reply

"Verifiable" means "capable of being verified" or "able to be verified". This follows from the structure of the word. The suffix "-able" means "susceptible, capable, or worthy of a specified action," and the relevant action is found in the root of the word. Here, because the root is the verb "verif[y]," the word "verifiable" means "capable of being verified". It does not mean "actually verified".

In Japan's view, the information submitted as the one described in (a) is "verifiable" whether or not the authority chooses to conduct verification. In this regard, it is important to recall that the investigating authority has discretion whether or not to conduct verification.[5] If the investigating authority then chooses NOT to conduct verification, the investigating authority cannot simply dismiss the information submitted by a respondent as not "capable of being verified". In that case, the information submitted must be deemed to satisfy the "verifiable" condition of Paragraph 3.

Conversely, if the investigating authority chooses to conduct verification and finds serious errors or omissions, it may be able to conclude that the information submitted was not "capable of being verified", provided that the verification is conducted in accordance with the requirements of the Anti-Dumping Agreement. In other words, if the submissions were initially "prepared and presented" as verifiable (Process(a)) but subsequently fails to pass a valid verification (Process(b)), then those data are no longer "verifiable" because they are now demonstrated to be not "capable of being verified".

The investigating authority may well conduct verifications by way of "spot-checks" for practical reasons. It must be noted, however, that once the samples of information are actually verified, then the remainder of the information is also to be deemed "verifiable". The fact that the investigating authority chooses to conduct verification by way of spot-checks should not entitle the authority to construe "verifiable" data as including only the samples of information that are actually verified, thereby allowing an investigating authority to disregard the vast bulk of the information provided.

[5] Anti-Dumping Agreement, art. 6.7 ("the authorities *may* carry out investigations") (emphasis added).

ANNEX E-6

COMMENTS OF THE UNITED STATES ON INDIA'S REPLIES TO QUESTIONS OF THE PANEL

(18 February 2002)

1. This submission is filed in accordance with the instructions of the Panel permitting the parties to this dispute to respond to new points raised in the answers to the 25 January 2002 questions posed by the Panel.[1]

2. For the most part, India's responses to the questions reiterate positions it has taken since the outset of this dispute. In at least two instances, however, India has raised new points in its responses to questions. Specifically: (1) in response to Question 29, India has presented five new criteria – what it calls "detailed considerations" – that it believes should guide whether the use of certain information would present "undue difficulties"[2], and (2) India has asserted, in response to Question 25, an independent claim of violation of the first sentence of Article 15 of the AD Agreement.[3] The United States will reserve its response to any other new Indian arguments for its oral statement at the second Panel meeting.

A. India's "Undue Difficulty" Argument Presents Five More Factors for the Panel's Consideration but Continues to Focus Exclusively (And Improperly) on Sail's US Sales Database

3. In its first written submission, India submitted five factors that the Panel should consider in determining whether "particular categories" of information submitted could be used without "undue difficulties".[4] India argued that the Panel should focus exclusively on the US sales "category" of information submitted by SAIL, and that it should consider (1) the timeliness of the information submitted; (2) the extent to which the information submitted has been verified or is verifiable; (3) the volume of the information; (4) the amount of time and effort required by the investigating authorities to make any corrections to information submitted to make it usable to assist in calculating margins; and (5) whether other interested parties are likely to be prejudiced if the information is used or corrected. The United States noted in response that India's focus on the term "categories" is misguided because that the term does not appear in the AD Agreement and ignores the very nature of the antidumping analysis required by Article VI and the rest of the AD Agreement.[5] India's focus on only the US sales database ignored that the Agreement refers only to "necessary" information. In-

[1] 25 January 2002 Questions from the Panel.
[2] India's Response to the 25 January 2002 Panel Questions, para. 60, incorporates by reference, paras. 14-24 of India's Rebuttal Submission.
[3] India's Response to Questions, paras. 29-36.
[4] First Written Submission of India, para. 71.
[5] Answers of the United States to 25 January 2002 Questions, para. 4.

dia's application of the criteria exclusively to the US sales database led it to conclude that errors could be corrected by "simply changing a line of computer code and calculating margins on the basis of the corrected data within a matter of minutes or even several hours".[6] We explained previously that India's conclusion is not supported by the facts.[7]

4. Now, in response to the Panel's questions, India has revised the factors that it asks the Panel to consider on the issue of "undue difficulty". India now proposes the following factors for consideration: (1) the extent to which the component/category/set of information requested is complete; (2) the extent and ease with which gaps in the information can be filled with other available information in the record; (3) the amount of information that is available to be used; (4) the amount of time and effort required from the authorities to use the data in calculating a dumping margin; and (5) the accuracy and reliability of alternative information that would be used if the respondent's information were discarded. Again, India applies these criteria only to the US sales data, and then, only in combination with other conclusions that are not supported by the record. We will address each of India's new factors in turn for purposes of argument.

5. First, India argues for consideration of the extent to which the "component", "category", or "set" of information requested – in other words, the Indian respondent's US sales data – is complete.[8] In India's view, SAIL's U.S. sales data was complete "except for the VCOMU and TCOMU data used to calculate the 'difmer' adjustment . . .".[9] But this conclusion ignores the facts established by the record: the Indian respondent's US sales database revealed numerous flaws in the items examined (and the on-site verification was only a selective audit that did not review each piece of data submitted). One significant flaw was the discovery at verification that a physical characteristic used to match US and home market sales was incorrectly reported, an error that affected approximately 75 per cent of US sales in the database.[10] In addition, several other errors were discovered, including the fact that certain freight costs were over- and under-reported for export saleS[11] and that the duty drawback calculation for US sales was incorrect. For these reasons, India is wrong in its conclusion that the US sales database was "easily capable of being used" in calculating a margin.

6. Second, India focuses on the "extent and ease with which gaps in the US sales information can be filled with other available information in the record". Again, India has incorrectly focused only on the US sales data and the record does not support the "ease" of its conclusion. One important "gap" in the US sales information was the absence of cost information necessary for calculating the necessary adjustments for physical differences. SAIL's own "section C" or US sales portion of its questionnaire response referred Commerce to the "section

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6 First Written Submission of India, para. 36.
7 *See, e.g.*, US Answers to Questions, para. 32.
8 On this point, Question 29 refers to India's Rebuttal Submission, para. 16.
9 *Ibid.*
10 First Written Submission of India, para. 30.
11 *Sales Verification Report*, Ex. IND-13, at 30.

D" or cost of production portion of the questionnaire response for this information, and the record reflects that SAIL never provided this information.[12] Only SAIL could easily have filled the gaps; Commerce was certainly in no easy position to do so.

7. Third, India asks the Panel to consider the amount of US sales information that is available to be used.[13] According to India, "if the information provided represents *one* entire component" of the anti-dumping equation – here, presumably, the export price data – then investigating authorities must make "considerable efforts" to use this information. Setting aside the fact that the Agreement does not speak to "components" (or "categories") of information, the record demonstrates that SAIL did not even provide an *entire* US database; it was flawed, as outlined above.

8. Fourth, India argues that the amount of time and effort required from the authorities to use the US sales data in calculating a dumping margin is relevant. But as the United States has explained, even were one to focus solely on the US sales database, the gaps in the information could not be easily filled. The absence of the cost information associated with US sales made the comparisons required by Article 2.4 not just difficult, but impossible, where adjustment for physical differences were necessary.[14] Even for those sales for which the missing cost information was not needed – sales that matched identically and would require no adjustment for physical characteristics pursuant to Article 2.4 – US authorities would have been required to manually correct the physical characteristics for 75 per cent of the sales just to be able to identify the identical sales. It then would have been necessary to make further corrections for errors such as incorrect freight and duty drawback costs. Considering these facts, it cannot be said that gaps in the US sales database could be easily filled.

9. Finally, India asks the Panel to consider the accuracy and reliability of alternative information that would be used if the respondent's information were discarded.[15] To the extent that India uses this factor to resurrect issues related to its "special circumspection" claim, we simply note that this claim has already been rejected by the Panel. Moreover, India is simply wrong to claim that Commerce "made no efforts to use SAIL's US sales information". The facts as established reveal that Commerce made strenuous efforts throughout this investigation to use all of SAIL's data, including its US sales database.

10. In addition to the above criticisms of India's new factors, the factors themselves, if applied to the only "subset" of information defined by the Agreement – "necessary information" – would support Commerce's actions in this case. Viewed in the correct light, these criteria would cause an unbiased and objective investigating authority to reach a very different conclusion from that drawn by India.

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12 *SAIL Section C Response* (excerpts), Ex. US-28.
13 India's Rebuttal Submission, para. 18-20.
14 US Answers to Questions, para. 32.
15 India's Rebuttal Submission, paras. 22-23.

11. First, in determining the completeness of the information provided by SAIL that was necessary to the calculation of a dumping margin, an unbiased and objective investigating authority could reasonably conclude that the failure to provide usable home market, export price, cost of production, and constructed value information meant that the necessary information was incomplete. Therefore, the information could not be used without undue difficulty.

12. Second, in determining the extent to which information provided by SAIL that was necessary to the calculation of a dumping margin could be used with other information, an unbiased and objective investigating authority could reasonably conclude that SAIL's information could not be used with other information to calculate a margin – too much of it was missing. For this reason, the information could not be used without undue difficulty.

13. Third, in assessing the amount of the necessary information provided by SAIL that could be used, an unbiased and objective investigating authority could reasonably conclude that without usable home market, export price, cost of production, and constructed value information, it had almost no amount of the information necessary for conducting an antidumping analysis. As a result, use of what information SAIL did provide would be unduly difficult, if not impossible.

14. Fourth, in determining the amount of time and effort required to use SAIL's information, an unbiased and objective investigating authority could reasonably conclude that it would involve a great deal of time or effort to address the unusable home market, export price, cost of production, and constructed value information. Consequently, it could not be said that the information could be used without undue difficulty.

15. Finally, in assessing the accuracy of alternative information that could be used if the necessary information could not be used, an unbiased and objective investigating authority could reasonably conclude that the facts available as provided in the petition are no less accurate and reliable than the unusable information submitted by the respondent. Precisely because the submitted information was unusable, there is no way to know whether the facts available are more or less reliable vis-a-vis SAIL. Only by providing accurate information could SAIL guarantee a result that would accurately reflect SAIL's own selling practices. But it did not do so.

B. India's New Interpretation of the First Sentence of Article 15 Has No Textual Basis and Conflicts with the Interpretations That It Has Put Forward in Other Fora

16. As the United States anticipated in its initial answer to Question 25, India has abandoned its previously-expressed view that the first sentence of Article 15 of the AD Agreement does not create any obligations for developed country Members.[16] While it continues to maintain that the provision does not set out any "specific legal requirements", it now believes that the provision *does* create a

[16] *Compare* India's Response to Questions, para. 36, *with* Panel Report on *European Communities – Antidumping Duties on Imports of Cotton-type Bed Linens from India*, WT/DS141/R, adopted 30 October 2000, DSR 2001:VI, 2077, para. 6.220 (*Bed-Linens*).

"general obligation, the precise parameters of which are to be determined based on the facts and circumstances of the particular case".[17]

17. As an initial matter, the fact that there are no "specific legal requirements" in the first sentence of Article 15 – as India still admits – should be dispositive with respect to determining whether the United States has breached that provision. There is, for example, no basis in the text of the provision for requiring developed country Members to undertake any of the actions that India suggests in paragraph 31 of its response to Question 25, and thus no basis for finding a Member in breach of the provision if it does not undertake them.

18. The Panel should also note that, in addition to contradicting the position that it took in the *Bed-Linens* dispute, India's new interpretation also conflicts with the interpretation it set forth in a paper on "operationalizing" Article 15 that it recently filed in the Anti-Dumping Committee.[18] For example, India argues to the Panel that the reference to providing special regard "when considering the application of anti-dumping measures" means the developed country Member must take action "in deciding what information to use and how to use it to calculate margins". India then sets out a variety of ways in which a developed country Member might do so, including by using SAIL's data to collect an antidumping margin.[19]

19. These arguments flatly contradict the position that India has put forward in its paper to the Anti-Dumping Committee. In paragraph 3 of that paper, India states that the issue presented in the first sentence of Article 15 "is that, *once dumping and injury have been determined*, when deciding whether anti-dumping measure [sic] should be *imposed*, developed countries should take into account the developing country status of the targeted country".[20] India then explained that the "obligation" arises "when considering the *application* of anti-dumping measures".[21] Thus, while India argues to the Panel that the provision is relevant in the *calculation* of *margins*, it stated to the Committee that it is relevant to the *application* of *measures*.

20. In addition, India argues that the Panel should judge the compliance of the United States with its purported "obligations" by examining Commerce's final determination.[22] In its paper to the Committee, India properly noted that if there *is* an issue regarding what should appear in a Member's published determination, the extent of any such obligation is rooted in Article 12 of the AD Agreement.[23] The United States does not agree with India that a developed country Member is required to explain in its published report how it gave "special regard" to the

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[17] India's Response to Questions, para. 36.

[18] *Implementation-Related Issues Referred to the Committee on Anti-Dumping Practices and its Working Group on Implementation*, Paper Submitted by India, G/ADP/AHG/W/128, February 1, 2002 ("India's Submission to the Committee").

[19] India's Response to Questions, paras. 31, 33.

[20] India's Submission to the Committee, para. 3 (emphasis added).

[21] *Ibid.* (emphasis added).

[22] India's Response to Questions, para. 24.

[23] India's Submission to the Committee, para. 13.

"special situation of developing country Members". However, even if a Member were required to provide such an explanation, India has alleged no violation of Article 12 in this case, and US compliance with that article is not within the Panel's terms of reference.

21. The United States also notes that India argued in its paper to the Anti-Dumping Committee that the second sentence of Article 15, viewed in the context of the first sentence, suggests that a developed country Member could provide "special regard" to the developing country Member by exploring constructive remedies.[24] The United States agrees with the position that India put forward in the *Bed-Linens* case that the first sentence of Article 15 does not create an obligation. However, even if a Member were required to give "special regard" by exploring constructive remedies, the record demonstrates that the United States did explore constructive remedies in the investigation at issue.[25]

22. Finally, the United States recalls the key point related to the paper that India submitted to the Anti-Dumping Committee: India submitted the paper in the context of "operationalizing" Article 15. The fact that the Ministers have recognized that Article 15 would benefit from clarification and have asked the Committee to make recommendations on how to "operationalize" the provision demonstrates that no specific requirements are "operational" at present. Further, none of India's supposed requirements – neither those argued to the Panel nor those suggested to the Committee – is required by the text.

23. For additional insights on this issue, the United States respectfully refers the Panel to India's argumentation on this point in the *Bed-Linens* proceeding. Among other things, India described the first sentence of Article 15 as not creating a "rock-solid legal obligation". Rather, India described the sentence as a "permissive" provision that contained a statement of "preferred policy".[26]

C. Conclusion

24. The United States will address additional points raised by India in its second oral statement and in response to any questions that the Panel may have at the second Panel meeting.

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[24] *Ibid.*, para. 4.
[25] The United States discussed this point in paragraphs 188 – 191 of its first written submission.
[26] *Bed-Linens*, Annex 1-1, paras. 6.20 – 6.22.

ANNEX E-7

COMMENTS OF INDIA ON THE UNITED STATES' REPLIES TO QUESTIONS OF THE PANEL

(18 February 2002)

I. INTRODUCTION

1. In response to the Panel's invitation at its first meeting with the parties, India submits the following comments on the answers to the Panel's questions submitted by the United States on 12 February 2002 ("US Answers"). As requested by the Panel, India has limited these comments to the new issues or arguments raised by the United States' responses, or failures to respond, to the Panel's questions.

II. INDIA'S GENERAL COMMENT ON US ANSWERS 7-10, 14-16, AND 18

2. The US Answers[1] provide for the first time a written articulation of its new evaluation of the facts in the administrative record, asserting that SAIL's US sales database, standing alone, could not be used without undue difficulties. This new evaluation of the facts by the United States government as a WTO litigant is remarkable in light of the existing evaluation of the facts in the Final Determination on 29 December 1999, in which the administering authority, USDOC, found that "the US sales database would require some revisions and corrections in order to be useable" and "the US sales database contained errors that ...in isolation were susceptible to correction. . .."[2] The new evaluation of the facts is found throughout the United States' answers. The new evaluation focuses on errors newly claimed to be "significant" and that allegedly render the data totally unusable (such as the alleged inability to use cost data to calculate a "difference in merchandise" ("difmer") adjustment, and errors in the reporting of the width, freight expense, and duty drawback). But the new evaluation sharply contrasts with the "useable" and "susceptible to correction" findings in the Final Determination as well as in the Sales Verification Report. As explained by India in paragraphs 25-43 of its Rebuttal Submission, these new assertions are an attempt to engage the Panel in a *de novo* evaluation of the facts and must be rejected.

3. Even in the event that the Panel might permit the United States as a WTO litigant to add this new evaluation of fact to the record, the new evaluation in no way demonstrates that SAIL's US sales database could not have been used as the

[1] *See* US Answers to Panel Questions 7-10, 14-16, 18.
[2] USDOC Final Determination at 73127, 73130 (Ex. IND-17).

export price in combination with the normal value information in the petition to calculate a dumping margin.

A. The United States' answers attempt to secure a de novo *evaluation of the facts from the Panel*

4. At numerous points throughout its Answers, the United States asserts that SAIL's US sales database was undermined by the lack of data to calculate a difmer adjustment and by other "significant" errors that rendered SAIL's US sales information unusable. If the Panel examines the Final Determination, the Memorandum on Verification Failure and the Sales Verification Report[3] it will find that *none* of these statements, arguments or findings quoted below are to be found in any of those documents. Every one of the US statements is a *post hoc* evaluation of the facts in the record.

- "The US sales database contained numerous flaws and could not be used." (US Answers, para. 53)
- "SAIL's information was ideal in almost no respect." (Id., para. 55)
- "The absence of the cost information associated with US sales made the required comparisons not just difficult, but impossible, where adjustment for physical differences were necessary." (Id., para 32)
- "Even for those sales for which the missing cost information was not needed ...US authorities would have been required to manually correct the physical characteristics [width] for 75 per cent of the sales just to be able to identify the identical sales, then it would have been necessary to make further corrections for freight costs, duty drawback errors, etc." (Id., para. 32; see also para. 54)
- "The TCOM and VCOM information was directly relevant to the US sales database and resulted in a complete lack of information that would be needed for 'difference in merchandise' adjustments"..(Id., para. 28)
- "As a result of this [cost verification] failure, another flaw in the US sales database was exposed: the total cost of manufacture (TCOM) and variable cost of manufacture (VCOM) for each US sales could not be verified. Without verified TCOM and VCOM information, Commerce could not adjust for differences in physical characteristics that affect price comparability as required by Article 2.4 of the Agreement." (Id., para. 31; see *also* para. 49)
- "[T]here were inaccuracies specific to the US sales data that were never resolved ...For these reasons, Commerce could not conclude that the US sales data, standing alone, were verified, accurate, and reliable." (Id., para. 18)

[3] Ex. IND-17, Ex. IND-16 and Ex. IND-13.

5. Throughout the investigation, USDOC *never* mentioned or evaluated the impact of difmer data on SAIL's US sales database. Rather, USDOC relied on the "pervasive flaws" in SAIL's *other* databases to justify its conclusion that the errors identified in the US sales database caused it to be unreliable. *See* Verification Failure Memo at 5.

6. Second, USDOC expressly declined to state in the investigation that the errors that USDOC did identify in the US sales database (width coding, freight, and duty drawback) were so fundamental as to render the US database "unusable". To the contrary, USDOC stated:

- "[T]hese errors [in the US sales database], in isolation, are susceptible to correction". Verification Failure Memorandum at 5 (Ex. IND-16).
- "The US sales database contained errors that ...in isolation were susceptible to correction ...." Final Determination at 73127 (Ex. IND-17).
- "[T]he US sales database would require some revisions and corrections in order to be *useable*." Final Determination at 73130 (Ex. IND-17) (emphasis added).

7. Thus, USDOC itself has already found these errors to be correctable, and that with those corrections, SAIL's US sales database could be "used". In its 1999 Final Determination– as opposed to the new evaluation put forward by the United States as a litigant in 2002– USDOC focused on the errors in the databases submitted by SAIL *other than* its US sales database. In sum, the statements on this subject in the US answers are self-serving, *post hoc* rationalizations. The Panel should reject the US attempt to re-write history and to induce the Panel to engage in a *de novo* evaluation of the facts.

B. The "difmer" adjustment issue does not render the US sales database unusable

8. Turning to the merits of the US arguments: contrary to the assertions quoted in paragraph 4 above, the difmer adjustment issue cannot undermine the usability of SAIL's US sales database, at the least because under US law, the difmer adjustment must be made to *normal value*, not US price.[4] The United States failed to answer forthrightly the Panel's first question in Question 14– i.e., whether the difmer adjustment (along with other adjustments) is made to export price, normal value, or whether it varies from case to case. In the US Answers, the United States simply responds "yes" to the question, and then notes that as a general matter, adjustments are made to both export price and NV. But it never addresses the question to *which* price– home market price or US price– the difmer adjustment is applied.[5] The answer is that the difmer adjustment is only

[4] *See* section 773(a)(6)(C)(ii) of the Trade Act of 1930 as amended.
[5] *See* US Answers, paras. 47-48.

made to NV. Thus, as India spelled out in detail in its Rebuttal Submission[6], the lack of usable data to make the difmer adjustment might throw into question the usability of a respondent's NV data - not the export price.

9. Furthermore, the adjustments to normal value that USDOC makes pursuant to Article 2.4 of the AD Agreement to account for, *inter alia*, physical differences that affect price comparability are not necessary where there is an identical product to product match between export sales and home market sales. While the United States places a great deal of reliance on Article 2.4 in paragraphs 47-50 of its answers, it does not address the fact that once USDOC rejected SAIL's home market sales and cost of production data, a substantial portion of SAIL's US Sales data (30 per cent) were identical to the product used in the petition to calculate CV. Moreover, USDOC ignores the fact that it has addressed the difmer issue in other cases, such as the *Stainless Steel Bar from India*[7] by *expanding* the definition of a "product". If USDOC were to make the same type of expansion of the product in this case that they did in *Stainless Steel*, then as Mr. Hayes explained in his Second Affidavit, 72 per cent of SAIL's products would be identical matches to the product used in the petition. Thus, the US argument in paragraph 49 that "without cost of manufacture data, it is not possible to make these price adjustments" is simply not correct when applied to SAIL's US sales actual database or to its own practice in *Stainless Steel Bar from India*. Nor is this statement at all consistent with what USDOC did when it compared the single offer price of $251 to the NV in the petition - in that case it applied the same margin to all of SAIL's imports regardless of the existence of cost data by which a difmer adjustment could be made. Finally, India refers the panel to paragraphs 50-64 of its Rebuttal Submission and Mr. Hayes' Second Affidavit where a variety of ways in which USDOC, consistent with its prior practice in other cases as well as the calculation made in the Final Determination, could have used SAIL's US sales data in comparison to the NV in the petition.

C. The minor errors in the US sales database that were discovered at verification do not undermine the verifiability or usability of that database

10. The United States' new evaluation of the facts states that USDOC "identified significant flaws in [SAIL's] US sales database"[8], and the US Answers refer to multiple "significant" flaws. But this new evaluation contradicts USDOC's consistent statements during the investigation, in its Final Determination, in the Verification Failure Report, and in the Sales Verification Report. These actual evaluations of fact by USDOC found these collective errors in the US sales database to be "susceptible to correction". And indeed, as India has demonstrated in this proceeding, the errors were either simple to correct, or unnecessary for the calculation of an export price, or both.

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6 India Rebuttal Submission, paras. 44-49.
7 Ex. IND-353.
8 US Answers, para. 29.

11. The first flaw enumerated by the United States is "the discovery at verification that a physical characteristic used to match US and home market sales was incorrectly reported"[9], referring to the width coding error. This error, however, cannot seriously be considered as making SAIL's US sales database unusable without "undue difficulty". To show the ease with which this error could have been handled, in Mr. Hayes' first affidavit[10] India provided the nine lines of computer programming language that would have corrected the error.

12. The United States' new argument is that "US authorities would have been required to manually correct the physical characteristics for 75 per cent of the sales just to be able to identify the identical sales".[11] By this, the United States implies that the width coding revisions for each and every transaction would have to be manually keypunched into the computer program in order to implement the correction. This statement is simply incorrect.

13. As Mr. Hayes has indicated, USDOC clearly had other means to input necessary corrections to the database, in addition to manually typing them in. First, it is very common for USDOC to request that respondents submit in electronic form any corrections to database errors discovered at verification. USDOC could have done so here, thus shifting to SAIL (and its computer consultants in Washington) the work required to input the corrections to the width coding for individual US sales transactions. Alternatively, if USDOC felt it inappropriate to accept the corrections from a respondent in electronic form, the list of the corrections that USDOC personnel took in paper form at verification[12] could have been electronically scanned to create a text file. That text file could then have been copied directly into a SAS program or could have been used to create a database in SAS, Excel, Dbase, Lotus or any other commercially available data-processing product. This process is not cumbersome, and in December 1999 USDOC had highly trained professional staff, as well as the equipment, the resources, and the software to perform such a simple task. Thus, it is disingenuous of the United States to now suggest in its *post hoc* argument that this error would have been "unduly difficult" to correct.

14. Finally, even in the extremely unlikely situation in which USDOC would insist on key punching the width correction information on the 942 transactions itself, even this task would not be "unduly difficult". As India has argued, the concept of "unduly difficult" must take into account a number of factors including the importance of the information to the calculation of the final dumping margin.[13] India estimates that it would take at most four hours for an experienced clerical keypunch operator to input the data necessary to make the change. All that is involved would be to type in each of the one to four digit numbers on the second column (listed "obs") of India Exhibit 13 (excerpted pages from Verifica-

[9] US Answers, para. 30.
[10] Ex. IND-24.
[11] US Answers, para. 32.
[12] Pages 41 through 55 of Sales Verification Exhibit S-8, included in Ex. IND-13.
[13] India Rebuttal Submission, paras. 12-21.

tion Exhibit 8). Thus, a single keypunch operator would type in each of the 942 numbers hitting "return" on the computer after each one.

15. The Panel must decide whether four hours of a clerical workers' time is too much effort to use SAIL's entire US sales database. When USDOC concluded that this width error was "susceptible to correction", they obviously knew how easy it was to make these corrections. Given the fact that SAIL's US sales data constituted one half of the information required to calculate a dumping margin in this case, this is not an overly burdensome task for USDOC to undertake - even in the unlikely event that they would insist on doing this task themselves. It is instructive to compare these four hours of keypunching to the thousands of hours SAIL took to attempt to respond to USDOC's request, the fact that for three weeks teams of between 9-16 persons each day participated in the verification process alone, not to mention the hundreds of hours spent drafting submissions, verification reports, participating in arguments, and evaluating the facts in this case. Viewed in the context of this effort, four hours of time to input data to SAIL's US sales database could not constitute an "undue difficulty".

16. The next new "significant flaw" that the United States identifies in SAIL's US sales database is "the fact that certain freight costs were over- and under-reported".[14] Yet USDOC did not identify this error in the "Summary of Significant Findings" section of its Sales Verification Report or even mention it in the Verification Failure Report. Indeed, the Sales Verification Report concludes at page 30 that "SAIL discovered that it *over-reported* its DINLFTPU" (plant-to-port foreign inland freight).[15] In other words, the actual record of the investigation states that SAIL did *not* both "over- and under-report" freight expenses; rather, it only "over-reported" these expenses. This error caused SAIL to report an excessive freight amount, which was necessarily *adverse* to its interests because freight is always deducted from the gross US selling price in calculating the export price: the larger the deduction, the lower the price, and hence the larger the dumping margin. Thus, in the absence of information necessary to correct this error, USDOC could have simply used the reported freight amounts as the facts available for that piece of information in calculating SAIL's dumping margins. This is a practice that USDOC routinely engages in, and it cannot be said that doing nothing to revise SAIL's database to account for this error would be "unduly difficult".

17. The final "significant flaw" in SAIL's US sales database newly identified in the US Answers is that the "duty drawback calculation for US sales was incorrect".[16] Again, this error was not named in the "Summary of Significant Findings" section of the Verification Report or in the Verification Failure Report. If USDOC had deemed this error "significant," then USDOC could have handled it very simply by denying any adjustment for duty drawback. An adjustment to US price for duty drawback *always* increases net US price and thereby reduces

[14] US Answers, para. 30.
[15] Ex. IND-13 (emphasis added). The database field "DINLFTPU" is the field in which plant-to-port foreign inland freight for shipments to the United States is reported.
[16] US Answers, para. 30.

dumping margins. If USDOC did not trust the reported duty drawback data submitted by SAIL, it could have simply disregarded that data and denied the adjustment. This is something that USDOC commonly does – and it certainly is not "unduly difficult" to do. Indeed, India followed this conservative approach in the present dispute by calculating the dumping margins for SAIL(discussed in the First Meeting) ,without including an adjustment for duty drawback.

18. In any event, the method by which the duty drawback error could have been easily corrected is found in the Verification Report itself. The report states at page 32 that the correction "change[s] the duty drawback from [14.77%] to [14.41%]". The correction of duty drawback thus could have been accomplished with one line of programming dropped into any point of a SAS programME that invoked US sales, as follows:

DTYDRAWU = GRSUPRU * 0.1441;

In layman's terminology, this programming language states that duty drawback equals 14.41 per cent of gross unit price. It is not a difficult correction to implement; indeed, it could be performed in a matter of minutes by any of USDOC's experienced analysts. Thus, the United States is simply wrong in arguing that this error (or any of the others described above) rendered SAIL's US sales database unusable without undue difficulties.

III. SPECIFIC COMMENTS ON ANSWERS BY THE UNITED STATES

India's Comment on US Answer to Question 1

19. The United States asserts in paragraph 4 of its response that the "only" category recognized by the AD Agreement is "necessary information" in Article 6.8. Once again, the United States avoids completely any reference to the phrase "all information which" in Annex II, paragraph. This is the key phrase that is required by the last sentence of Article 6.8 to be considered for the application of Article 6.8. And it is this phrase that resolves the question as to whether SAIL's US sales data should have been used in this case– namely, "all information which" in Annex II, paragraph 3. As Japan, Chile, and the EC have recognized along with India, the obvious import of this "all information which" phrase is that *any* information– whether labelled a "category", "component", "portion", or "piece"– which satisfies the conditions of Annex II, paragraph 3 should be taken into account by investigating officials when making a final determination. And the panel and Appellate Body in the *Japan Hot-Rolled* dispute– another legal authority consistently ignored by the United States– made it clear that this provision is mandatory. Information that meets the four conditions cannot be disregarded when making a final determination.[17] In short, while India believes that "categories" is a useful analytical tool to highlight the abuses of USDOC's total facts available practice, India is not bound to the expression "categories". Since

[17] India First Oral Statement, paras. 31-36.

the United States has objected to the use of term "categories", India is willing to have the Panel focus its analysis on the key term "all information which" set out in Annex II, paragraph 3.[18]

20. Contrary to the United States' statement in paragraph 3, India never suggested or stated that the "weight conversion factor" information in *Japan Hot-Rolled* was a "small and isolated" piece of information that was not subject to the four conditions of Annex II, paragraph 3. Indeed, this information was apparently important enough to justify the Government of Japan's pursuit of a successful dispute settlement case against USDOC's wrongful refusal to use this piece of verifiable, timely produced, and usable information.

21. The United States also errs when it states, in paragraph 4, that "[a]s Article 2.4 of the AD Agreement makes clear, the required comparison of this information means that the various pieces of 'necessary information' are in no way distinct". Article 2.4 requires that "a fair comparison shall be made *between* the export price and the normal value". Thus, Article 2.4 contemplates the existence of two distinct groups (categories, components) of information that are to be compared – export price and normal value. And as India has set forth in its Answers to Panel Questions 28 and 28, USDOC consistently requests, collects, and verifies export sales and home market sales and cost of production in a separate fashion.

India's Comment on US Answer to Question 2:

22. The US Answers fail to directly respond to the Panel's question: "Can the United States point to any specific language in the AD Agreement which refers to the potential impact of deficiencies of some information submitted on the reliability of the entire response"? Contrary to the United States' arguments, Article 6.8 does not address the potential impact of deficiencies of some information on the reliability of the entire response. What is telling about the United States' response in paragraphs 5-7 is that it never mentions Annex II, paragraph 3. This is the one provision that does specifically refer to particular information (be it categories or components or individual pieces of information). And Annex II, paragraph 3 does not provide an exception that would permit an investigating authority to disregard information that meets the four conditions, simply because of deficiencies in some other information. Nor does the United States' response take into account the fact that the last sentence of Article 6.8 requires, *inter alia*, that the provisions of Annex II, paragraph 3 be observed in its application.[19]

India's Comment on US Answer to Question 3:

23. The United States again has failed to supply a clear response to the Panel's two questions. "Undue difficulty" cannot be the basis for the extra provisions set forth in section 782(e)(3), since "undue difficulty" is already provided for explicitly in section 782(e)(5). Nor can "verifiability" be the basis, despite the

[18] India First Oral Statement, paras 34-36.

[19] See India's First Submission, paras 55-67; India First Oral Statement, paras. 31-43; India Rebuttal Submission, paras 9-10.

United States' hint to this effect in its answer, because verifiability is already provided for explicitly in section 782(e)(2). Nor can "best efforts" from Annex II, paragraph 5 be the basis (again contrary to the United States' hint in its answer) because this factor is provided for section 782(e)(4).

24. The US answer does acknowledge that section 782(e)(3) is an additional evaluation step imposed on respondents that is not found in either Annex II, paragraph 3 or paragraph 5:

> "By requiring Commerce to evaluate the degree of completeness of the information, section 782(e) provides that *when the other criteria have been met* [*i.e.*, the criteria of Annex II, paragraphs 3 and 5], Commerce may not decline to consider the partial information *when it is sufficiently complete so that it can form a reliable basis for a dumping calculation.*"[20]

Translated, this statement means that USDOC uses this criterion in section 782(e)(3) as the legal justification to *reject* information otherwise meeting the four conditions of Annex II, paragraph 3 if it determines that the absence of *other* information makes the overall information "incomplete". The United States' clarification in its answer makes it clear that section 782(e)(3) is *the* principal legal underpinning of the US policy and practice of "total facts available".

India's Comment on US Answer to Question 4

25. The US answer to Question 4 raises a new argument, which would create a new exception to allow investigating officials to "take into account" but not "use" information that meets the four conditions of Annex II, paragraph 3 "when determinations are made". This argument has no basis in the text of the AD Agreement and is not a "permissible" reading of this phrase pursuant to AD Article 17.6(ii). India has already set forth arguments regarding the phrase "should be taken into account" in its Answer to Panel Question 38. The discussion below supplements those arguments to respond to new arguments by the United States.

26. The starting point for the analysis of this phrase is the text of Annex II, paragraph 3, and in particular its reference to "should be taken into account when determinations are made" The notion of "taking into account" must be read with "when determinations are made". The phrase "when determinations are made" refers to the point in time when final dumping margins are determined or calculated. In the dumping phase of the investigation (as opposed to the "injury" phase), the notion of "making" a "determination" means determining whether dumping exists and *calculating or determining a dumping margin.* There is no other "determination" to be made. Thus, information cannot be "taken into account" in making such a determination unless it is used *in the calculation* of a dumping margin. There is simply no other use for the information at that point in time.

[20] US Answers, para. 9 (emphasis added).

27. The United States' interpretation would render Annex II, paragraph 3 a nullity, in violation of the principles of treaty interpretation. This interpretation would allow investigating authorities, at their total discretion, to "consider" but then decide not to use information that met the conditions of Annex II, paragraph 3, simply because of the authorities' evaluation of the "totality of the record". India agrees with the statement of Japan in this regard at pages 4-5 of its Answers to the questions to Third Parties.[21] Once the investigating authority has verified information and judged it to be reliable, then it cannot disregard such information.

28. Moreover, the United States' answer incorrectly assumes that Annex II, paragraph 3 is not mandatory. Given the mandatory requirement not to disregard information meeting the requirements of Annex II, paragraph 3, as interpreted in the panel and Appellate Body decisions in *Japan Hot-Rolled*, there is simply no basis for the new *discretionary* exception that the US interpretation would create. In other words, information meeting the four conditions *must* be taken into account– not disregarded– "when determinations are made." India refers to paragraphs 25-30 of its First Oral Statement where the mandatory nature of Annex II, paragraph 3 is discussed.

29. Finally, it bears emphasis that the discretion that the United States seeks for USDOC with this allegedly "permissible" interpretation would give USDOC the discretion to consider and then discard approximately 50 per cent of the usable information that was necessary to calculate the dumping margin in this case. Since USDOC already had applied facts available to normal value, the fact that it "considered" but did not "use" SAIL's US sales data (which was verifiable and usable) meant that it was discarding approximately one-half of the information necessary to calculate a dumping margin. The facts of this case provide a powerful reminder of the extent and scope of the loophole that the United States is seeking to create with this interpretation.

India's Comment on US Answer to Question 5

30. The United States has again failed to respond to the second part of the Panel's first question, regarding whether "the United States objects to the arguments made by India to the effect that the correction of errors in the US sales database would have been a relatively simple matter for the United States"? The fact that the United States ignores this question is significant. Given the evaluation in the Final Determination that the errors in the US sales database "were susceptible to correction", the United States cannot legally ask the Panel to draw any other conclusions in this proceeding.[22] And there can be no doubt that these errors were easily correctable as set forth in paragraphs 12-18 above and in Mr. Hayes' First Affidavit.[23]

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[21] See Written Answers of Japan at pages 4-5.
[22] *See* India Rebuttal Submission, paras. 25-43.
[23] Ex. IND-24.

31. The US answer to Question 5 focuses for the first time on the "form" of Mr. Hayes' statement, claiming that an "affidavit" constitutes "evidence". India made it clear in its First Oral Statement that Mr. Hayes' affidavit stated his "views", which "constitute not new facts but *analysis* of facts that were before USDOC during the investigation".[24] The United States counters first by complaining about the fact that the document stating Mr. Hayes' views was entitled "affidavit". India used this title because it is commonly used in the United States where Mr. Hayes resides. India has no objection if the Panel and the United States wish to refer to Mr. Hayes' views as being reflected in a "statement". His analysis would still be the same.

32. The United States at paragraph 13 argues for the first time that Mr. Hayes' affidavit contains new facts. This is simply not correct. Focusing first on the computer program attached to Mr. Hayes' First Affidavit, the United States claims that this program never appeared in the investigation of cut-to-length plate from India. This is correct, but as India explained in detail in paragraph 82 of its First Oral Statement, this computer program was offered for illustrative purposes. It is not "evidence" offered to prove that USDOC should have used that particular program in the calculation of dumping margins.[25] The calculating tools that USDOC uses in an investigation are within its discretion as limited by the requirements of the AD Agreement. Thus, Mr. Hayes used this computer program as a tool (like a pocket calculator) to facilitate the illustration of how easy it would have been to correct the width coding error in the US sales database. To the extent that the United States' non-answer to the Panel's question concedes that this error was not difficult to correct, then the issue is moot. But since the United States now argues for the first time that as a matter of fact, only a laborious manual (non-computerized) method could have been used to make the width corrections, then the computer programming tool is relevant to illustrate the fallacy of this *post hoc* rationalization by the United States.

33. The United States also argues that Mr. Hayes' calculations of new margins reflected in Ex. IND-32 and 33 are "new evidence". This is specious. In Ex. IND-32, all Mr. Hayes did was to calculate the totals of the prices reported in SAIL's US sales transactions, and then the weighted average of those prices. All of the data involved are already in the record. The United States thus is taking the insupportable position that, although x and y are on the record, Mr. Hayes has introduced new evidence by noting that x + y = z. And in Ex. IND-33, Mr. Hayes simply put down on a single piece of paper evidence that was already in the record– the $372 NV figure from the petition, and the $346 weighted average price for SAIL's *actual* US sales substituted for the petition's fictitious price of $251. By the logic of the United States, any piece of paper (including this page) created by India that reconfigures and uses data already in the record, but not

[24] India First Oral Statement, para. 81 (emphasis added).

[25] In evidentiary terms, India did not offer the standard USDOC computer program for the "truth of the matter asserted therein". Rather, it was offered as an illustrative tool to demonstrate how an investigating authority could have corrected SAIL's submitted US sales information and used the data that was in the record.

exactly in the format in which USDOC used (or refused to use) it, constitutes "new" evidence. This is simply not correct.

34. Finally, the United States argues in paragraph 14 that Mr. Hayes' presentation of multiple methodologies (to show how easily SAIL's US sales data could have been used) also constitutes "new evidence". But the United States does not argue that the data used by Mr. Hayes in his various methodologies are not from the record. In fact, Mr. Hayes and India have not created new data. Rather, they simply have used *existing* data in the record to establish that USDOC did not evaluate facts in an objective and unbiased manner.

35. The United States' new argument that there can be "no new calculation or use of the evidence in the record" amounts to asserting that petitioners (and Panels) in WTO proceedings have to accept at face value the authorities' establishment and evaluations of the facts in any anti-dumping proceeding. The same logic would ban a panel from using a pocket calculator to check the arithmetic in a determination, even when the determination had found that 2 + 2 = 5. But the text of Article 17.6(i) calls for the Panel to conduct an "assessment" of the facts, not an uncritical acceptance of the rationalizations that the authorities have presented. Panels are required to assess "whether the authorities' establishment of the facts was proper" and "whether their evaluation of the facts was unbiased and objective". In order to do this task, the Panel must first determine what USDOC's "evaluation" of the facts was, and then must engage in an active review of the evidence for that evaluation. In aid of this "active" review, India has demonstrated that (1) the information was verifiable despite USDOC's ultimate evaluation that it was not, and (2) the information was usable (consistent with the statement in USDOC's Final Determination) without undue difficulty to calculate a dumping margin. Mr. Hayes' analysis– and it is just that, an analysis– simply demonstrates, from the perspective of an expert former USDOC analyst, how easily the information in the record could be corrected and used. This is analysis that India believes the Panel must have in order to make "an active review or examination of the *pertinent* facts".[26]

India's Comments on US Answer to Question 6

36. The United States admits in the last paragraph of the answer to Panel question 7 that it "does not believe that it is necessarily unsound in all cases for the calculation of a dumping margin to be based on a comparison of normal value calculated on the basis of facts available and export price calculated on the basis of verified information". This is an important acknowledgement, but one not reflected in USDOC practice. Since the US legislation implementing the WTO Agreement entered into effect in 1995, USDOC has *always* applied total facts available if one of the two sides of the dumping margin calculation cannot be supplied by respondents' data. But taking this statement in good faith, the key

[26] *See* India Rebuttal Submission, paras. 7-8; *Japan Hot-Rolled*, WT/DS184/AB/R, DSR 2001:X, 4697, para 55. India has already responded to the United States' assertions that India is limited to arguments raised by SAIL, at paragraph 81 of its First Oral Statement.

issue for the Panel to resolve regarding India's claim under Article 6.8 and Annex II, paragraph 3 is whether an objective and unbiased investigating official could have concluded that (1) SAIL's US sales data were not verifiable, and (2) SAIL's US sales data were not usable to be compared with the normal value information in the petition for the purpose of calculating a final dumping margin. India and the United States obviously differ on both of these issues. India refers the Panel to its Rebuttal Submission where it presents a detailed analysis of the verifiability of SAIL's US sales data in the Sales Verification Report and Verification Failure Report at paragraphs 74-86 (*see also* India's answers to Panel's questions 21, 28, 29 and 39), and an analysis of the usability of the US sales data in comparison with the constructed value information in the petition at paragraphs 57-64 and in Mr. Hayes' two affidavits.

37. India has addressed other new arguments made in the US Answer to question 6 in paragraphs 2-18 of these comments.

India's Comments on US Answer to Question 7

38. *See* paragraphs 2-18 above for a more detailed response to this question.

39. The United States' *post hoc* analysis of the alleged "unverifiability" of SAIL's US sales data standing alone simply cannot withstand a careful examination of the record. In its answer, the United States as a litigant claims at paragraph 18 that "inaccuracies specific to the US sales data ...were never resolved, as detailed in the verification report". India has addressed this new argument in detail in paragraphs 2 to 18 above. But what the United States never says is what USDOC said repeatedly– that the "several errors" found at verification in the US sales database "were susceptible to correction". If these errors were not "resolved", it was only because USDOC chose not to cooperate in the investigation by making the simple revisions or adjustments that would have corrected the data. As the Appellate Body said in *Japan Hot-Rolled*, the notion of cooperation "suggests that cooperation is a *process*, involving joint effort, whereby parties work together towards a common goal".[27] USDOC could not simply refuse to make revisions to the margin calculation computer program where SAIL provided it with the data to do so (for example, regarding the width coding error, included in Verification Exhibit S-8), or to use the data obtained at verification to make easy correction to the errors. The process of cooperation, based on the notion of good faith, and coupled with the requirements of using the data unless there are undue difficulties presented, requires a sustained and comprehensive effort by an investigating authority to address in a collectively with the respondent any inaccuracies and to make concerted efforts to use the respondents' data in making the final determination.

[27] WT/DS184/AB/R para. 99 (emphasis added).

India's Comment on US Answer to Question 8

40. In its response to Question 8, the United States has failed to make a clear distinction between the two separate *per se* (as such) claims made by India regarding the US anti-dumping statutes. The first is a separate challenge to Section 782(e) for mandating the use of additional criteria by USDOC not sanctioned by the AD Agreement before respondents' information may be accepted. The United States indicates in paragraph 26 that "United States law requires Commerce to accept a respondent's data where the criteria of section 782(e) are met". But this statement is consistent with India's case, *i.e.*, that respondents' data can only be accepted if it meets all five of the conditions of Section 782(e). As India has argued in its First Oral Statement, while Section 782(e) may *reduce* the likelihood that Commerce will resort to facts available, it does not reduce that likelihood *enough* because it imposes two new requirements - 782(e)(3) and 782(e)(4) that are not found in Annex II, paragraph 3. [28]

41. Thus, although US law requires the acceptance of a respondent's data, it does so only after all of the five conditions are met. For this reason, the USDOC determinations[29] and USCIT decision[30] cited in the US Answers are irrelevant. These cases all merely state that USDOC will accept information submitted by a respondent *which satisfies the conditions* of section 782(e). But that point fails to address the fact that section 782(e) imposes additional conditions on the acceptance of a respondent's information beyond those imposed by the Agreement.

42. India has also argued that a second and independent violation of the Agreement arises from the fact that section 782(d) *requires* the rejection of a respondent's submitted information once it is determined that the information fails to meet the conditions for acceptance under section 782(e). Although section 782(d) uses the discretionary verb "may" in granting authority to USDOC to disregard the information submitted by a respondent, in fact that section has been interpreted as mandatory ("shall") by USDOC and the USCIT. Paragraphs 21-27 of India's Answers provide an extensive review of cases in which USDOC and USCIT have interpreted section 782(d) as mandatory. Thus, the statute operates to *require* the rejection of information that does not meet the conditions requiring their acceptance (including the improper additional conditions) set out in section 782(e). The cases cited by the United States at paragraphs 23-25 do not contradict this argument. And the United States still has not pointed to any instance since 1995 when it has used facts available for either normal value or export price and respondent data for the other side of the equation in making a final determination.

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[28] India First Oral Statement, paras. 65-66, India Rebuttal Submission, India Answers to Panel Questions ("India Answers"), para. 61.

[29] *Final Results; Administrative Review and New Shipper Review of Antidumping Duty Order on Stainless Steel Bar from India*, 65 Fed. Reg. 48965 (Aug. 10, 2000); *Final Determination of Sales at Less Than Fair Value: Certain Polyester Staple Fibre from Taiwan*, 65 Fed. Reg. 16877 (30 March 2000), cited in US Answers, paras. 23-25.

[30] *NSK Ltd. v. United States*, 170 F. Supp. 2d 1280 (USCIT 2001), cited in US Answers paras. 23-25, and also discussed in India Answers to Panel Questions, para. 25.

India's Comment on US Answer to Question 9

43. India notes that the United States does not directly respond to the Panel's questions (1) whether there was a specific finding by USDOC that the US sales database, standing alone, was useable, and (2) whether the US sales data was analyzed for the purposes of the final determination. Regarding the issue of whether USDOC made any specific findings regarding the "usability" of SAIL's US sales data, the answer is that USDOC found that the "US sales database would require some revisions and corrections in order to be usable" and that those corrections and revisions were "susceptible to correction" India directs the Panel to its analysis in paragraphs 2-18 above and to paragraphs 25-43 of its Rebuttal Submission.

44. With respect to the second issue, whether USDOC analyzed SAIL's US sales data "for the purposes of the final determination", the United States now argues in paragraph 28 of its Answers that the absence of TCOM and VCOM "left Commerce with nothing [*inter alia* from SAIL's US sales database] it could analyze at the time of the Final Determination". But this incorrect *post hoc* assertion[31] does not answer the question whether SAIL's US sales data could have been used in a comparison– *not* with SAIL's cost of production or home market sales information– but with the normal value information in the petition. In this regard, it is significant that the United States has acknowledged in paragraph 28 of its Answers that it may not be "unsound" to calculate a dumping margin "based on a comparison of normal value calculated on the basis of facts available and export price calculated on the basis of verified information". But there is nothing in the record to indicate that USDOC ever "analyzed" SAIL's US sales data, standing alone, to determine if it was usable in comparison with the normal value information in the petition. And there is nothing in the record to indicate that USDOC ever tried to make the corrections to SAIL's US sales data that it repeatedly acknowledged were "susceptible" to correction.

India's Comment on US Answer to Question 10

45. See paragraphs 2-18 supra.

46. The United States has again failed to respond to the Panel's question "did the USDOC specifically determine that consideration of the US sales data would cause 'undue difficulties'? Nor did the United States answer the Panel's next question, "Can the United States point to where in the determination or otherwise in the record, this conclusion can be discerned"? The reason the United States did not respond directly to these two key questions may well be because there *is* no place in the record where the United States made an "undue difficulty" finding specifically as to SAIL's US sales data. Indeed, to the contrary, USDOC said that SAIL's "US sales database would require some revisions and corrections in order to be useable". The US Answer to question 10 (paragraph 33) asserts that

[31] This assertion is not correct for the numerous reasons set forth in paragraphs 2-18 above, in paragraphs 25-64 of India Rebuttal Submission, and in Mr. Hayes' First and Second Affidavits.

the US sales data standing alone could not be used except with undue difficulty. But this is clearly a *post hoc* evaluation by the United States as a litigant before a WTO panel, which contradicts the express evaluation made by the administering authority, USDOC, in the Final Determination. India directs the attention of the Panel to paragraphs 29-33 of its Rebuttal Submission, where it addresses USDOC's evaluation of the facts and specifically USDOC's finding that "the US sales database would require some revisions and corrections in order to be *useable*".

India's Comment on US Answer to Question 11

47. The United States has pointed to various facts as evidence of SAIL's failure to act to the best of its ability. However, the United States has not, and cannot, contradict the evidence presented by India that SAIL acted to the best of its ability in producing its US sales data as set forth in the Sales Verification Report (Ind. EX-13). With respect to the non-US sales data, as India has discussed in its Answers to Questions and Rebuttal Submission[32], the facts relied on by the United States are inapposite. In particular, the United States cites USDOC's Remand Redetermination for the point that "SAIL informed Commerce that it was experiencing difficulties in gathering and submitting the requested information, but that in all of its communications with Commerce, SAIL further indicated that the requested information would be forthcoming."[33] This argument is specious. The United States is correct that SAIL repeatedly explained to USDOC that it was having difficulties preparing the requested data, given both the logistical complexities confronting the company and the fact that USDOC required the data in formats other than those in which the data are maintained in the normal course of business.[34] The fact that SAIL did not volunteer that it may not be able to submit the requested data is hardly surprising. As the United States must be aware, it is suicidal for a respondent to make such a statement, because USDOC would then all the more swiftly determine that the respondent is not using its best efforts or is not cooperative, and then apply total adverse facts available. Respondents are understandably reluctant to make such a declaration of inability to respond until they absolutely know they will be unable to do so. In this regard, SAIL continued to try its best to provide the information requested by USDOC in the required formats even after USDOC's deadlines expired. These facts show that it is unfair to argue that SAIL's statements of good intentions are "evidence" of a failure by the company to act to the best of its ability.

48. Similarly, the United States repeats yet again that SAIL was a large company, as if its size were somehow evidence of a failure to act to the best of its ability.[35] But as India has explained in its Answers[36] and as SAIL explained to USDOC during the investigation, SAIL's size was an *impediment* to its ability to

[32] India Rebuttal Submission, paras. 94-95.
[33] US Answers, para. 38.
[34] India First Oral Statement, paras. 75-80; India Answers, para.35.
[35] US Answers, para. 39.
[36] India Answers, para. 35, 48

organize and submit the requested data to USDOC within the required time-frame. The United States as litigant adds the word "sophistication" in its description of the company, thus asserting that this alleged "sophistication" on the part of SAIL means that its failure to provide data as requested demonstrated a failure to act to the best of its ability.[37] But precisely the opposite is true. SAIL is large but *not* sophisticated. As explained in detail in India's Oral Statement and its Rebuttal Submission[38], SAIL is a developing country company, subject to severe communications and logistical limitations. USDOC was fully aware of this fact and thus, never made the finding that SAIL was sophisticated.

49. Finally, India notes that the United States' answer relies heavily on the conclusions of USDOC made in its Remand Redetermination made in September 2001 consequent to SAIL's judicial appeal to the USCIT. India notes that this Redetermination is not part of the record for the "measure" that is at issue in this dispute. Moreover, this "evidence" in the Remand Redetermination was drafted by USDOC well *after* the 7 June 2001 panel request in this dispute. Therefore, any findings reflected in the Remand Redetermination are *post hoc* and self-serving statements that should be disregarded by the Panel. This Panel will need to judge whether SAIL "cooperated" in the investigation (for the production of information as to its US sales, or in the alternative, for the entire investigation), based on the record that existed at the time of the Final Determination– 29 December 1999.

India's Comment on US Answer to Question 12

50. The United States' answer displays a misunderstanding of Article 15, second sentence. In paragraph 42, the United States suggests "possible elements" (not found in any US regulation or statute) by which the impact of the imposition of dumping margins on the essential interests of developing country Members could be gauged. India believes that the correct interpretation of the "essential interests" provision is that any time a developing country respondent foreign company seeks, as in this case, consideration by USDOC of the possibility of a constructive remedy pursuant to Article 15, it necessarily has already made a determination that the "essential interests" of its country are at stake. The decision as to whether a WTO developing country's "essential interests" are at stake is *entirely self-judging*.

51. In this case, USDOC knew that SAIL was a state-owned entity of the Government of India. It knew that SAIL had made a request consistent with Article 15 of the AD Agreement for the imposition of a constructive remedy. Thus, there could be no legal question that India had an "essential interest" in avoiding a loss of the US market for SAIL's products. And, as India has argued in its First Oral Statement at paragraphs 69-74, there can be no doubt that in this case USDOC was fully aware that, given the number of persons employed by SAIL

[37] US Answers, para. 39.
[38] India First Oral Statement, para. 76; India Rebuttal Submission, para. 95; *see also* India Answers para. 48.

and the importance of the US market to SAIL, India's essential interests would be negatively affected if huge dumping margins were imposed on SAIL's exports of cut-to-length plate. The "possible elements" referred to by the United States in paragraph 42 are far too restrictive, and impinge on the prerogative accorded to developing countries under Article 15 to seek constructive remedies in anti-dumping investigations. In India's view the relevant issue is fairly straightforward: imposition of any dumping margin that would effectively close off a market and negatively affect employment and income in a developing country would "affect the essential interests of developing country Members".

India's Comment on US Answer to Question 13

52. The United States misleadingly describes USDOC standard practice, when it suggests that cost and sales verifications are handled separately, as in SAIL's case, only as a matter of logistics – i.e., "due to the number of locations to be visited" – and that only for this reason were separate verification reports issued.[39] In fact, USDOC rarely conducts joint and combined verifications, except in the simplest of cases. Almost always, as in this case, USDOC conducts separate verifications of the cost databases (COP and CV) and the sales databases (US sales and home market sales). As in the India cut-to-length investigation, USDOC also normally issues separate verification outlines for cost and sales verifications, and frequently sends different teams of personnel to conduct the cost and sales verifications of a single company. Indeed, USDOC maintains a separate Office of Accounting, whose staff consists primarily of accountants who conduct a large percentage of the cost verifications, because it is understood that the cost data submitted by respondents often involve more complex accounting issues than do their sales databases. Even when the same USDOC personnel conduct both the cost and sales verifications (which usually occurs only because the Office of Accounting is understaffed), they are generally handled as separate activities. Likewise, as in this case, USDOC almost always issues separate reports after the sales and cost verifications, demonstrating again that USDOC and the parties recognize that they are separate activities.

53. The United States also comes to a misleading conclusion in asserting that "[t]he verification of each essential element of the response is necessary to the overall verification of the response".[40] While the United States would like the Panel to reach this conclusion, it simply is not true. To the contrary, individual components or categories of information can– and consistent with Annex II, paragraph 3 must– be verified independently, and the failure of one component or category to be successfully verified does not implicate the verifiability of other components or categories of information.[41]

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39 US Answers, para. 44.
40 *Ibid*.
41 *See* India Rebuttal Submission, paras. 66-73; India Answers 21, 28, 29 and 39.

India's Comment on US Answer to Question 15

54. SAIL's US sales data did comprise a "fraction" but contrary to the United States' arguments, that fraction was one-half of the totality of the information needed to make the dumping calculation in this case. Figure 5 of the petition (set out in India's Exhibit 32) shows that SAIL's US sales data constituted a very large fraction – one-half – of the information necessary at the time of Final Determination to calculate a dumping margin. The various methodologies proposed by Mr. Hayes are all are based on the fact that SAIL's US sales data constituted one-half of the information necessary to calculate a dumping margin. This is not an original concept. USDOC based the final margin in this case on one non-sale export price offer that was used as one-half of the information to calculate a dumping margin. By contrast, SAIL's US sales export price data were backed up by a very large amount of data that had been checked exhaustively by USDOC verifiers. India contends that any practice– such as the USDOC total facts available practice– which discards all of the verified, timely produced and usable information is by definition inconsistent with a "fair comparison" or "objective decision-making based on facts".

India's Comment on US Answer to Question 16

55. The United States has failed to respond to the Panel's first question under Question 16, "Could the USDOC have identified, among the US sales reported in the US sales database, export prices for transactions involving a like or similar product to that represented in the constructed normal value reported in the petition"? In fact, it is a simple exercise based on the data in India Exhibit 8 to determine, as set forth in Mr. Hayes' Second Affidavit, that there is an identical product match for more than 30 per cent of the cut-to-length plate shipped by SAIL to the United States with the product represented in the constructed value figure in the petition. As for "like or similar products" to the product used to calculate CV in the petition, approximately 72 per cent of the US sales database falls within this definition, as described in paragraph 10 of Mr. Hayes' second affidavit.

56. As for the new US "undue difficulty" claim, India would note that it took Mr. Hayes less than one-half hour to identify the identical products in SAIL's US sales database, and the same insignificant amount of time to conduct his examination of similar commercial grade products, using a personal laptop computer and the data in India Exhibit 8. Mr. Hayes will be available to describe the ease of this process at the Second Meeting of the Panel with the parties.

India's comment on US Answer to Question 17

57. The United States makes the statement at paragraph 56 that "in this case, SAIL's information was ideal in almost no respect". This is an unsupported *post hoc* statement directly contradicted by the Sales Verification Report (Ind. Ex.-13). As detailed in India's Rebuttal Submission at paragraphs 74-75, the great majority of the information provided by SAIL regarding its US sales information

was "ideal". As India notes in paragraph 74 of the Rebuttal Submission, USDOC acknowledged that "we were able to test the accuracy of the reporting for a large number of individual sales observations" and the United States has admitted that "SAIL made relatively few export sales to the United States". Every time the USDOC concluded that it found "no discrepancies" in the Sales Verification Report (analyzed in paragraph 75 of India's Rebuttal Submission), this meant the information checked was found to contain no defects. In other words, the information was "ideal". As detailed in the Sales Verification Report, the vast majority of the information in the matrix of information requested by USDOC (28 categories of information for 1284 sales) was checked and found to have "no discrepancies". By contrast, the one offer (non-sale) price used to calculate export price in final determination was not even corroborated.

58. The Panel should also recall that this US sales information represented one-half of the information needed to calculate a dumping margin in this case (the other half being the normal value information in the petition). So, when USDOC found that almost all of SAIL's US sales information that was reviewed at verification had "no discrepancies", this "finding" applied to one-half of the "necessary information" needed to calculate a dumping margin. In short, the United States cannot in this litigation change its original "no discrepancy" evaluation of the facts into a *post hoc* "nearly total discrepancy" finding.

India's Comment on US Answer to Question 18

59. Paragraph 57 of the US Answers includes the following statement: "The relative quality [of the total facts available] decision - comparing the price offer in the petition to the matching product on which constructed value was based– is quite sound, *particularly where the information has been corroborated as in this case*." (emphasis supplied). India has already demonstrated that the quality of the supposed corroboration of the export price information in the petition (i.e., the price offer) was poor to non-existent, and was contradicted by customs import data contained elsewhere in the petition.[42] Thus, the "relative quality" of USDOC's total facts available decision, which was entirely based on the price offer in the petition, could not possibly have met the standard required of an unbiased and objective investigating authority.

India's Comment on US Answer to Question 35

60. ndia indicated in its A60. r to the Panel's Questions 35 and 36, India is no longer pursuing an "as such" (*per se*) claim regarding USDOC's long-standing practice. However, India is still pursuing an "as applied" claim. In this regard, it is significant that the United States appears to concede in paragraph 84 that individual applications of the US facts available provisions "might individually constitute measures". India's claim regarding practice focuses only on the application in the investigation on cut-to-length steel plate from India of the US facts

[42] *See* India First Oral Statement, paras. 12-24; Ex. IND-1 (figure 5), Ex. IND-30-34.

available "practice"– not on "specific determinations in specific anti-dumping proceedings that are not within the Panel's terms of reference",to quote the United States at paragraph 84.

61. *Exports Restraints* panel report involved a "per se" (as such) claim, not an "as applied" claim. Indeed, one of the main problems with the argument in the *Exports Restraints* case was the absence of any application of the so-called practice in that case. This case is quite different.

India's Comment on US Answer to Question 37

62. phrases "may be made" in Article 6.8 and "to make" in Annex II, paragraph 1, to which the United States refers, do not mean that investigating authorities are free to discard information meeting the conditions of Annex II, paragraph 3. Rather, when read in the context of Annex II, paragraph 3 ("all information which"), these provisions mean that authorities may use information from sources other than the respondent to fill in the gaps for that necessary information not available from the respondent (*i.e.*, information not meeting the requirements of Annex II, paragraph 3 or 5). If USDOC *had* used SAIL's US sales data, as urged by SAIL, USDOC would have "calculated" a dumping margin using the normal value data from the petition and SAIL's actual US sales data. India refers the Panel to its own answer to Question 37 for further comments regarding the United States' answer.

ANNEX E-8

ANSWERS OF THE UNITED STATES TO QUESTIONS OF THE PANEL - SECOND MEETING

(8 March 2002)

For the United States

Q1(a) Would the United States please explain how it arrived at the conclusion that 1 per cent of the US sales reported by SAIL appear to be identical to the product upon which the normal value in the petition was based?

Reply

1. The United States' conclusion – that 1 per cent of the US sales reported by SAIL appear to be identical to the product upon which the normal value in the petition was based – was reached by analyzing SAIL's final US sales database, as submitted on 1 September 1999. To reach this conclusion, Commerce sorted the variable fields relating to actual plate specification, plate thickness, and plate width to identify the quantity of reported US sales for which these three characteristics were identical to the product for which constructed value was calculated in the petition. Commerce then divided that quantity by the total quantity reported in the 1 September 1999, database. The resulting figure is less than 1 per cent.

Q1(b) Would the United States please explain in detail its objections to the analysis of Mr. Hayes supporting his statement that 30 per cent of the merchandise reported sold to the United States is identical to the merchandise upon which the constructed value in the petition is based?

Reply

2. The United States objects to Mr. Hayes' analysis for several reasons. First, Mr. Hayes' analysis is offered – in the form of an "affidavit" – as evidence, even though this analysis was never presented to Commerce and, therefore, is not part of the facts established and assessed by Commerce during the underlying investigation.[1] Pursuant to Articles 17.5(ii) and 17.6(i), the pertinent evidence on which the panel must base its review is the record established by the investigating authority at the time of its determination.[2] Here, Mr. Hayes' analysis was offered to the Panel for the first time in an affidavit presented with India's second

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[1] *See* US Answers to the Panel's 25 January 2002 Questions, ¶¶ 12-14

[2] *See United States-Anti-dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/R, adopted 28 February 2001, at paras. 7.6-7.7 ("It seems clear to us that, under this provision, a panel may not, when examining a claim of violation of the AD Agreement, in a particular determination, consider facts or evidence presented to it by a party in an attempt to demonstrate error in the determination concerning questions that were investigated and decided by the authorities, unless they had been made available in conformity with the appropriate domestic procedures to the authorities of the investigating country during the investigation").

written submission and his explanation as to how he conducted this analysis was offered – for the first time in this proceeding – orally to the Panel at the second meeting. For these reasons alone, Mr. Hayes' analysis, coming more than two years after the underlying investigation, should be rejected by the Panel.

3. Second, Mr. Hayes' analysis ignores Commerce's conclusion that SAIL's reported information was not verifiable because it failed the verification process. Mr. Hayes admits that errors discovered at verification required that he revise the 1 September 1999, database before he could reach his 30 per cent estimation, but his revisions only correct for one of the errors. These manipulations are described as (1) correction of the width error first by scanning the 942 affected observations, then by manually changing the incorrect width values for all 942 observations; (2) isolating the correct "band" of products to be treated as identical to the product on which the constructed value in the petition was based; (3) applying the "banding" requirements to the product in the petition; and (4) sorting all of SAIL's data by grade, thickness and width in order to isolate the sales that matched the product in the petition.[3] Mr. Hayes estimates his time spent on step 1 at one half hour, although he does not explain how he "scanned the list of 942 observations listed in India Exhibit 13" to correct the 1 September 1999, database, which contains no observation numbers.[4] Mr. Hayes offers no estimations for the time involved in undertaking steps 2-4. In any event, the various theories and explanations offered by India only serve to reinforce the conclusion that only an ever-shrinking portion of SAIL's information may even have been theoretically usable. Moreover, even the theoretical use of this limited information would have posed undue difficulties, as significant changes would have to have been made to the US database.[5]

4. Finally, the United States disagrees with the significance which India appears to attach to its 30 per cent estimate. As noted above, India's estimate disregards Commerce's determination that SAIL's information – including the US sales database – failed verification. India's estimate also fails to correct other significant errors in the US database. India's conclusion also begs the question: what about the remaining 70 per cent of SAIL's reported US sales? Only SAIL – and perhaps India – know whether the exclusion of the remaining 70 per cent of these sales benefits or is adverse to SAIL' s interests. When an investigating authority relies on facts available, it is not possible to determine whether those facts are advantageous to the responding party because the information necessary to determine or even estimate that party's actual margin of dumping is not available. For these reasons, the 30 per cent estimate arrived at by India is of questionable value at best.

5. It is worth recalling the test that India sought to establish at the outset of this case – namely, that the proper way to interpret Article 6.8 and Annex II of the AD Agreement is that "any category of information submitted by a respon-

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[3] Second Oral Statement of India at 57-61.
[4] *Ibid.* at 57.
[5] *See, e.g.,* US Answers to 25 January 2002 Panel Questions at 29-34.

dent that is verifiable, timely submitted, in the requested computer format, and can be used without undue difficulty *must* be used by the investigating authorities in calculating an anti-dumping margin". First Written Submission of India at ¶ 50. But India itself now admits that its US sales "category" cannot be used; only a "sub-category" (30 per cent) can even theoretically be used, and even then, this subset contains errors which have not been accounted for. Moreover, because of the inherent linkages between the US database and the other necessary information, there may be additional errors that cannot be detected in the absence of the other information that SAIL did not provide.

6. In summary, in a case such as this, where the information provided by the respondent is untimely, unverifiable and cannot be used without undue difficulties, there is no obligation to use the little information that is provided to calculate a dumping margin, and a fair and objective administering authority could reasonably decline to do so. To read the AD Agreement as obliging an administering authority to use what little information has been provided would nullify the authorization in Article 6.8 that investigating authorities may make final determinations based on the facts available where the *necessary* information has not been provided. Moreover, such an approach would be inconsistent with the essential balance between the interests of investigating authorities and exporters reflected in the AD Agreement because it would place respondent exporters in total control of what data is used in the dumping calculation and make a meaningful investigative process impossible.

Q1(c) Is the normal value referred to in (a) above the same as the constructed value referred to in (b) above? If not, could the United States calculate what percentage of US sales reported by SAIL appear to be identical to the product upon which the constructed value in the petition was based?

Reply

7. Yes. The normal value referred to in (a) above refers to the constructed value in the petition, which is the same normal value on which India based its analysis as described in (b) above. Thus, both analyses use the same basis for normal value, although the United States' conclusion that 1 per cent of the US sales database appear to be identical to this normal value is based on the final 1 September 1999, database as it was submitted by SAIL to Commerce, not as further revised recently by counsel to India.

Q2. The United States indicated in its reply to the Panel's question number 10, that in order to use the US sales data submitted by SAIL, *inter alia*, "even for those sales for which the missing cost information was not needed - sales that matched identically and would require no adjustment for physical characteristics pursuant to Article 2.4 - US authorities would have been required to *manually* correct the physical characteristics for 75 per cent of the sales just to be able to identify the identical sales" (emphasis added). Does this refer to correction of the miscoding of the width of product as 96 inches rather than over 96 inches, described in paragraph 30 of India's first submission and referred to in paragraph 5 of the Summary of significant

findings in the verification report, Exhibit India-13 at page 5? Why does the United States consider that these coding errors would have to be corrected manually? How does this suggestion that it would be difficult or complex to make this correction of the coding error square with the conclusion in the determination of verification failure, Exhibit India-16 at page 5, that the errors in the US sales database detailed in the verification report "in isolation, are susceptible to correction"?

Reply

8. The Panel has asked three questions, which we address in turn.

9. First, the Panel is correct that the statement that "US authorities would have been required to *manually* correct the physical characteristics for 75 per cent of the sales just to be able to identify the identical sales" refers to correction of the miscoding of the width characteristics.[6] Commerce would have been required to review each observation in order to determine which observations contained errors requiring correction. The United States also noted that further corrections – freight cost, duty drawback errors, etc. – would also have to be made using the same process.

10. Second, as to why these coding errors would have to be corrected manually, the correction of these errors would require staff to review each observation to determine where corrections would need to be made. It should be noted that typically a respondent whose database contained errors would be required to correct and resubmit those databases so that Commerce could analyze the revisions; an investigating authority would not typically be required to make those corrections on its own. In this case, the record reflects – and Commerce concluded – that SAIL never provided usable databases.[7] Based on the information actually submitted in the underlying investigation, any analysis of SAIL's US sales database would be limited to the database submitted on 1 September 1999, just prior to verification. In order to make just the necessary "coding" corrections, Commerce would need to review each individual observation and input the new information from Verification Exhibit S-8.[8]

11. Finally, Commerce's suggestion that it would be difficult or complex to correct the US database is consistent with its conclusion that the errors in the US sales database "in isolation, are susceptible to correction". When the information submitted by a respondent in an anti-dumping investigation contains isolated errors, the correction of those isolated errors can typically be accomplished by the respondent without undue difficulties. The validity of the corrections can be

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6 US Answers to Panel's 25 January 2002 Questions, 32.

7 *See, e.g., Final Determination*, Ex. IND-17, at 73130 (". . .SAIL has not provided a useable home market sales database, cost of production database, or constructed value database. Moreover, the US sales database would require some revisions and corrections in order to be useable. As a result of the aggregate deficiencies (data problems and SAIL's responses), the Department was unable to adequately analyze SAIL's selling practices in a thorough manner for purposes of measuring the existence of sales at less than fair value for this final determination").

8 Ex. IND-13.

tested once the respective databases are compared as part of the anti-dumping analysis. Such might have been the case with respect to SAIL if errors in its databases were limited to those that were identified in its US sales database. The correction of such errors – again, typically accomplished by the respondent through the submission of a corrected database at an early enough point that it can still be analyzed and verified – could very well result in usable information that could be then compared as part of an anti-dumping calculation. But as vividly documented in the underlying record, the errors in SAIL's databases were not isolated to those in the US sales database; SAIL concedes that usable home market, cost and constructed value databases did not exist. Therefore, while the US sales database errors may have been "susceptible" or "able to be affected by" correction – though not without undue difficulty – such correction would have been meaningless in light of the magnitude of everything else that was missing from SAIL's databases. Moreover, the validity of such corrections could not be tested because there were no other databases against which it could be compared. The errors in the US sales database could not be corrected without undue difficulties and – even if those errors were corrected – the data could not be used without undue difficulties because the other necessary information to calculate a dumping margin was missing. For these reasons, India is incorrect in its conclusion, Second Submission of India at ¶ 16, that the US sales database was "easily capable of being used" in calculating a margin.

Q3. Could the United States elaborate on its statement, at paragraph 12 (page 9) of its second oral statement, that "in determining the amount of time and effort required to use SAIL's information, an unbiased and objective investigating authority could reasonably conclude that it would involve a great deal of time and effort to address the unusable home market, export price, cost of production, and constructed value information and to identify any small pieces of data that might have been usable." Specifically, does the United States consider that the unusable home market, cost of production, and constructed value information would have to be addressed in evaluating whether the US sales price information submitted by SAIL, alone, could be used without undue difficulties. If so, why?

Reply

12. In its second oral statement, the United States noted that "in determining the amount of time and effort required to use SAIL's information, an unbiased and objective investigating authority could reasonably conclude that it would involve a great deal of time and effort to address the unusable home market, export price, cost of production, and constructed value information and to identify any small pieces of data that might have been usable". This statement was offered in response to a claim made by India that a determination as to whether SAIL's information can be used without "undue difficulties" must include consideration of the amount of information available to be used in calculating a

dumping margin.[9] According to India, "if the information provided represents *one* entire component" of the anti-dumping equation – here, presumably, the export price data – then investigating authorities must make "considerable efforts" to use this information.[10] As the United States explained, there are several flaws in India's reasoning. First, the AD Agreement does not refer to "categories" of information, as India has subsequently acknowledged.[11] Further, the record demonstrates that SAIL did not even provide an *entire* database that did not contain significant flaws. While India claims that if the submitted information represents one entire "category" then the authorities must make "considerable efforts" to use it, that was not the case here. Thus, even if there was validity to India's standard (which the United States does not concede), the standard was not met in this case.

13. As the United States has explained, the more relevant inquiry is to examine – in determining whether SAIL's information can be used without "undue difficulties" – the amount of necessary information that is available to be used in calculating a dumping margin.[12] Given that the information necessary for the calculation of an anti-dumping analysis in this case – home market sales, export sales, cost of production data and constructed value data – was almost entirely lacking, it was reasonable – given the facts of this case – for an unbiased and objective investigating authority to conclude that it would involve a great deal of time and effort to address the unusable home market, export price, cost of production, and constructed value information, and to identify any small pieces of data that might have been usable.

14. This conclusion is particularly true given the explicit linkages between all of the "necessary information" needed to calculate an accurate anti-dumping margin, namely export prices, home market prices, cost of production, and constructed value, linkages that are reflected in SAIL's own questionnaire responses. In SAIL's export price response, for example, SAIL referred Commerce to its cost of production response – which SAIL and India concede was never usable – for cost information needed to measure differences in physical characteristics between products.[13] With such data missing, a fair and objective investigating authority could reasonably determine that the U.S. sales database – with or without its attendant errors – could not be used alone. The United States agrees with the statement of the European Communities that, in anti-dumping investigations, "different sets of data are linked and that failure to provide one part of such a set of linked data might make it impossible to use other data".[14]

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[9] India's Second Written Submission at ¶ 18.

[10] *Ibid.*

[11] First Oral Statement of India at ¶ 34 ("The United States correctly points out that the term "category" is not a term found in the AD Agreement.").

[12] Comments of the United States of America on India's 12 February 2002 Responses to Panel Questions ("U.S. Comments"), at ¶ 7.

[13] *See, e.g.*, Ex. US-28.

[14] Third Party Oral Statement of the European Communities at ¶ 6.

Is it correct to understand that USDOC may (but is not required to) use, in making its determination, information that does not satisfy the requirements of section 782(e)(1)-(5)? If so, can the United States cite any case in which USDOC has done so?

15. Yes, it is correct that Commerce may use – but is not required to use – information that does not satisfy the requirements of section 782(e)(1)-(5). One of the cases that Commerce submitted to the Panel demonstrates this point: *Polyester Staple Fibre from Taiwan.*[15] In that case, Commerce identified serious errors in the respondent's revised database at verification; thus, Commerce was not able to verify certain information under section 782(e)(2). Nevertheless, Commerce used the information consistent with the principle – reflected in section 782(e)(3) – that the information was not so incomplete that it could not serve as a reliable basis for reaching the determination. Commerce explained that the respondent failed to submit entirely accurate and complete responses to its cost and sales database, but determined that the respondent's submissions had been timely, the majority of the information provided was accurate, the effect of the errors discovered at the verification of sales and costs were limited in scope and the impact of those errors on any potential dumping margin was small. The Department of Commerce explained that:

> Errors discovered at verification are not, however, automatic grounds for the rejection of the whole of a respondent's reported data. As detailed in subsequent comments below, the errors discovered during the verification of FETL's sales and costs were limited in scope and their impact on any potential dumping margin was small.

Polyester Staple Fibre from Taiwan, Decision Memorandum at Comment 1. For these reasons, Commerce determined that the respondent's data, overall, "could be used without undue difficulties" and that "pursuant to section 782(e) of the Act, we do not find that [respondent's] information is so incomplete that it cannot serve as a reliable basis for reaching a final determination". *Id.*[16]

For India

Q5. With reference to the discussion in paragraph 11, India's response to the Panel's question number 21, would India agree that if the investigating authority reasonably concludes that it would be "unduly difficult" in a particular case to fill in gaps in information submitted, then the investigating

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[15] *Final Determination of Sales at Less Than Fair Value; Certain Polyester Staple Fibre From Taiwan*, 65 Fed. Reg. 16877 (30 March 2000) and accompany Decision Memorandum, Exhibit US-26, at Issue 1 (*PSF from Taiwan*).

[16] *See also Hot-Rolled Flat-Rolled Carbon-Quality Steel Products from the Russian Federation*, 64 Fed. Reg. 38626 (1999)(Comment 2). In that case, Commerce found that the respondent's reported factors of production information could not serve as a reliable basis for reaching a determination pursuant to section 782(e)(3). Nevertheless, Commerce declined to use total facts available, instead using the respondent's reported factors of production information to calculate one weighted-average normal value and compared all US prices to the single normal value. 64 Fed. Reg at 38630. This decision can be viewed at http://ia.ita.doc.gov/frn/9907frn/#RUSSIA.

authority may reject the information submitted on the basis that it is not capable of being used without undue difficulty?

Reply

16. In considering this issue, the United States recalls the statement that India made at the first Panel meeting (at ¶ 58):

> If a foreign respondent provided information on all export sales but did not provide information on a number of necessary characteristics of such sales (for example, their physical characteristics or the prices at which they were sold), the investigating authorities may be justified in finding that they cannot use that information without undue difficulty because it is too incomplete.

17. As the United States has noted, SAIL provided information on export sales but did not provide information on necessary characteristics of such sales, *e.g.*, the cost information required for any adjustments for physical differences. *See, e.g.*, U.S. Second Written Submission at ¶ 49. Therefore, by India's own reasoning, the investigating authorities "may be justified in finding that they cannot use that information without undue difficulty because it is too incomplete".

Q6. India suggests, in its answer to the Panel's question 26, at paragraph 41, that a questionnaire respondent has sufficient incentive to cooperate because it knows that the information in the application, which may be used as facts available, represents the highest degree of dumping. Of course, the information in the application is gathered by the petitioner, and may, in fact, underestimate the degree of dumping. Would India agree that if the investigating authority has a basis for concluding that a questionnaire respondent is providing only partial information in order to avoid providing a basis for calculating a higher dumping margin than that alleged in the petition, an investigating authority may disregard information submitted? Or would India maintain that the investigating authority must use all information submitted that meets the criteria of paragraph 3 of Annex II even if the investigating authority finds the questionnaire respondent is attempting to manipulate the outcome.

Reply

18. The United States respectfully submits that interpreting the AD Agreement to require an investigating authority to use partial information submitted by a respondent in cases where it finds that the respondent is attempting to manipulate the outcome would encourage such manipulation and result in the nullification of the rights of Members to take action to offset injurious dumping.

Q7. Is it India's position that Article 6.8 precludes the use of "total facts available" in all circumstances if there is any information submitted that satisfies the requirements of paragraph 3 of Annex II? Would India agree that in some circumstances, the fact that some necessary information is not provided may justify a decision to reject information that, standing alone,

satisfies the requirements of paragraph 3 of Annex II? Would India agree that in some circumstances, the fact that some necessary information is unverifiable may justify a decision to reject information that, standing alone, satisfies the requirements of paragraph 3 of Annex II?

Reply

19. India has previously expressed the view that information that satisfies the requirements of Annex II, paragraph 3, "must be used" regardless of any other circumstances. Putting aside the point that the text of Annex II, paragraph 3, states that information "should be taken into account" – not "must be used" – the United States has noted that the requirements of Annex II, paragraph 3 do not address the substance or quality of the information in question. US Answers to 25 January 2002 Panel Questions at ¶ 63. India's interpretation, to the extent that it requires an investigating authority to use information without regard to its substance or quality, is an interpretation that contradicts objective decision-making based on facts.

Q8. Would India describe in detail what information it would consider in every case to be "necessary", in terms of Article 6.8, for an investigating authority to make an objective, unbiased, and accurate calculation of a dumping margin?

Reply

20. The United States has expressed its view on this point in its First Written Submission at ¶ 83, and its Second Written Submission at ¶ 23.

ANNEX E-9

ANSWERS OF INDIA TO QUESTIONS OF THE PANEL - SECOND MEETING

(8 March 2002)

Questions for India

Q5. With reference to the discussion in paragraph 11, India's response to the Panel's question number 21, would India agree that if the investigating authority reasonably concludes that it would be "unduly difficult" in a particular case to fill in gaps in information submitted, then the investigating authority may reject the information submitted on the basis that it is not capable of being used without undue difficulty?

Reply

1. India's answer to the question is yes, if the investigating authority reasonably concludes that it would be unduly difficult to fill in the gaps in the information submitted, then the authority may reject the information. To suggest that all gaps may be filled in all situations would render the "unduly difficult" language of Article II, paragraph 3 a nullity. However, the "unduly difficult" qualifier in the text of Annex II, paragraph 3 suggests that the situations in which verified information cannot be used will be exceptional, and must be identified by investigating authorities using strict criteria. In the course of this proceeding, India has offered appropriate criteria for assessing whether verified and timely submitted information would be "unduly difficult" to use.[1]

Q6. India suggests, in its answer to the Panel's question 26, at paragraph 41, that a questionnaire respondent has sufficient incentive to cooperate because it knows that the information in the application, which may be used as facts available, represents the highest degree of dumping. Of course, the information in the application is gathered by the petitioner, and may, in fact, underestimate the degree of dumping. Would India agree that if the investigating authority has a basis for concluding that a questionnaire respondent is providing only partial information in order to avoid providing a basis for calculating a higher dumping margin than that alleged in the petition, an investigating authority may disregard information submitted? Or would India maintain that the investigating authority must use all information submitted that meets the criteria of paragraph 3 of Annex II even if the investigating authority finds the questionnaire respondent is attempting to manipulate the outcome.

[1] *See* India's First Submission, paras. 104-111; India's Rebuttal Submission, paras. 11-64.

Reply

2. As a general matter, India submits that the provisions of Annex II must be respected and applied in all cases. Moreover, those provisions provide complete guidance as to how to select the information to be used in calculating dumping margins in cases where Article 6.8 applies. That said, in response to the first part of the question, if there is demonstrable evidence (inferred from statement that the investigating authority "has a basis for concluding") that a respondent is manipulating the investigation with a view to avoiding even higher margins than those alleged in the petition by providing some information but refusing to provide other information, then the investigating authority may take that demonstrable evidence into account in calculating the dumping margin. However, this must be done in accordance with the requirements of Annex II.

3. Putting the Panel's question in the form of a hypothetical situation, assume that the petition alleges that the export price is 70 and the normal value is 100, for a dumping margin of (100 – 70) = 30. Assume that the respondent submits information that satisfies the conditions of Annex II, paragraph 3, which shows that the export price is in fact 80, but withholds and prevents the disclosure of any information regarding normal value. Assume finally (as the Panel's question does) that the investigating authority has a demonstrable basis for concluding that the correct normal value is 120.

4. Applying Annex II to this hypothetical, the investigating authority must determine what to use as normal value. Since the respondent has withheld relevant information from the investigating authorities, then paragraphs 2-6 of the Annex do not apply. Pursuant to the last sentence of paragraph 1, the investigating authority is free to determine normal value on the basis of the facts available, and in doing so, the authority must follow the procedures laid down in paragraph 7. These procedures specify that the authority may use information from secondary sources, "including the information supplied in" the petition (generally presumed to be adverse to respondent).[2] Whatever the secondary source, the authority must, where practicable, confirm the validity of the information against other independent sources that may be available. In this hypothetical, this means that the investigating authority must check the information in the petition (100) and the information obtained from other sources (120) to determine whether they are accurate and reliable. In India's view, the instruction in Annex II, paragraph 7 that the investigating authority must use special circumspection in these situations means that the investigating authority must have a reasonable basis to select either the 100 or 120 figure as normal value.

5. Because in the Panel's hypothetical the authority has an objective basis to believe that the respondent is manipulating the process, the last sentence of Annex II, paragraph 7 provides it with the authority to select the higher figure from the secondary source (assuming that the 120 figure is reasonably accurate and reliable). This is consistent with the text of the last sentence of annex II, paragraph 7, which anticipates an outcome that is less favorable to the respondent

[2] *See* India First Oral Statement, para. 51.

than if the respondent had not withheld the information. Thus, the investigating authority would be permitted to make a selection of facts "adverse" to the manipulating respondent by using the 120 figure instead of the 100 figure as the normal value.[3]

6. Next, the investigating authority must determine what information to use as the basis for the export price. The question here is whether it may use the information in the petition and discard verified, timely submitted, and usable information submitted by the respondent. Nothing in the text of Article 6.8 or Annex II supports an affirmative answer. Instead, the investigating authority must apply the provisions of the Annex to the data, and determine whether the export price submitted by the respondent meets the criteria of paragraph 3.[4] If so, then investigating authority would have to use the 80 figure and calculate the dumping margin under Article 2 as (120 – 80) = 40.

7. In India's view, no other outcome is consistent with the text of Annex II, which does not permit information that meets the requirements of paragraph 3 to be discarded simply because other information is not available. Referring back to the hypothetical, India does not consider that the text of the Annex permits the investigating authority to use the export price contained in the petition (70) in conjunction with the normal value either in the petition (100) or from other sources (120) to determine the dumping margin. Either approach (calculating a margin of either (100 – 70) = 30 or (120 – 70) = 50) would be based on the use of less accurate information in place of more accurate information in the determination of export price. In India's view, this would be entirely inconsistent with both the language and purpose of the Antidumping Agreement.

8. Thus, in response to the final part of the question, India submits that the investigating authority must use all information submitted by a respondent that meets the criteria of paragraph 3 of Annex II, even if the investigating authority finds that the respondent has attempted to manipulate the outcome by failing to provide other information. But any attempt to manipulate the process with respect to the other information can be addressed within the framework of the AD Agreement, including resort to the last sentence of Annex II, paragraph 7.[5] That

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[3] This situation is analogous to that which arose in *Canada - Measures Affecting the Export of Civilian Aircraft*, WT/DS70/AB-1999-2 (2 August 1999), DSR 1999:III, 1377, paras 197-205, in which the Appellate Body held that WTO Panels may take adverse inferences from the refusal of WTO litigants to provide information requested pursuant to DSU Article 13.1. Specifically in paragraph 205, the Appellate Body held that such "adverse" inferences could have included the inference that Canada's withholding of information included information prejudicial to Canada's denial that it had granted a prohibited export subsidy.

[4] Indeed, USDOC's frequent use of *partial* facts available to fill gaps for particular information that respondents have not co-operated in providing illustrates the "framework" of the AD Agreement in action. *See* cases cited in footnote 69 of India's Second Oral Statement.

[5] Presumably, the attempt to manipulate could take the form of either submitting inaccurate data or refusing to produce data or provide access to investigating authorities to the data needed to conduct a verification. In either case, before the investigating authority can reasonably conclude that the respondent is acting in a manipulative manner, it must have engaged in some objective assessment of either the submitted inaccurate data, or the circumstances surrounding the respondent's failure to submit certain data.

provision expressly applies to situations where information is "withheld". Where the investigating authority finds that such withholding of information takes place under circumstances suggesting a manipulation of the outcome of the investigation, the investigating authority may select and use, as a substitute for that information, whatever accurate secondary sources of information may be reasonably available to establish the dumping margin. And the selection of facts in such circumstances may include the use of information that would result in a dumping margin as high as, or higher than, that alleged in the petition.

9. On the other hand, USDOC's practice of using "total facts available" appears based on an assumption that respondents who only provide some of the requested information necessarily are doing so because they are acting manipulatively - i.e., because the final margins that would result if they were to submit complete data would be higher than the margins set forth in the petition. But there is no basis for such an assumption in the AD Agreement. Nor is there any basis to assume "manipulation" of the process from an inability on the part of the respondent to provide some of the requested data. Any such finding of manipulation can only be found on a case-by-case basis after examining the facts and circumstances surrounding a respondent's withholding of information. And as India has noted previously, the existing framework of the AD Agreement – including the authority on the part of the investigating authority to use secondary information, and the authority under the last sentence of Annex II, paragraph 7 to reach a result "which is less favorable" to the respondent than if it co-operated – provides considerable disincentives against a respondent's attempting to "manipulate" the investigation process.[6]

10. India would also stress that in the current case, there is no allegation, and certainly no basis for an unbiased and objective investigating authority to conclude, that SAIL attempted to manipulate the investigation with a view to avoiding even higher margins than those set out in the petition by engaging in the selective provision of information.[7] For these reasons, India submits that it is not necessary for the Panel to define the outer parameters of an investigating authority's ability to use "adverse" facts available under the last sentence of Annex II, paragraph 7.

11. Finally, India would also refer the Panel to its previous submissions, in which it explained that the situation described by the question - where the actual dumping margin would be higher than that set out in the petition - is not likely to occur in many cases given the highly selective facts used to calculate the inflated margins in the petition that the United States has acknowledged are generally

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[6] *See* India Answer to Panel Question 26; India First Oral Statement, paras. 44-61.

[7] The record shows that SAIL repeatedly provided USDOC information in response to its requests and continued to do so even after USDOC's deadlines had expired. *See* India Rebuttal Submission, paras. 87-96; India Answer to Panel Question 26, paras. 42-45. As India noted in the latter document, "Even if the Agreement permits the application of adverse facts available when the investigating authority has reason to believe that the respondent 'manipulated' the data, there is no basis or such a finding here." *See also* India First Oral Statement, paras. 75-80.

adverse to the respondent.[8] Further, in those limited cases where the information in the petition would result in a dumping margin lower than the actual margin of dumping, sophisticated respondents would respond to this situation by simply not participating in the investigation and accepting the margin set forth in the petition, rather than going to the effort of submitting some but not other information. Thus, in practice, the hypothetical posed by the first question is not likely to confront investigating authorities very often. It certainly did not occur in SAIL's case in the instant investigation.

Q7. Is it India's position that Article 6.8 precludes the use of "total facts available" in all circumstances if there is any information submitted that satisfies the requirements of paragraph 3 of Annex II? Would India agree that in some circumstances, the fact that some necessary information is not provided may justify a decision to reject information that, standing alone, satisfies the requirements of paragraph 3 of Annex II? Would India agree that in some circumstances, the fact that some necessary information is unverifiable may justify a decision to reject information that, standing alone, satisfies the requirements of paragraph 3 of Annex II?

Reply

12. In response to the first part of the question, India would note that the term "total facts available" is not a term found in the AD Agreement. Rather, this term is found only in US practice, and depending on the facts of a particular case, may or may not be consistent with the structure and operation of the AD Agreement. The Agreement lays out what the Appellate Body called a "coherent framework" for deciding when information from a respondent should be used and how to use it.[9] That framework reflects a clear preference for using information supplied by the respondent. Under this framework, investigating officials must go through the process of analyzing particular pieces/sets/components/categories of timely produced and verifiable information to determine whether the information can be used in the calculation of a dumping margin. Nothing in the framework suggests that the non-usability of one piece/set/component/category of information permits an investigating authority to conclude that another piece/set/component/category of information is not usable.

13. In situations where an investigating authority has been unable to use without undue difficulty particular pieces of information provided by respondents - both in conjunction with respondent's other information and the information in the petition - then the authority will necessarily have to base its margin calculation entirely on information from secondary sources. This is roughly equivalent to the US practice of using "total" facts available. However, India notes that the US appears to view recourse to "total" facts available as an automatic result once it determines that any so-called "essential component" of information is not verifiable or timely submitted, rather than the outcome of an

[8] *See* India Answer to Panel Question 26, para. 41; India First Oral Statement, paras. 50-54.
[9] *See* India Second Oral Statement, paras. 6-18.

objective review of the usability of each of the different pieces/sets/categories/components of verifiable and timely submitted information submitted by respondent.

14. In response to the second part of the question, India's position is that any necessary information which meets the four conditions of Annex II, paragraph 3 must be used in the calculation of a dumping margin. As explained in the response to question 6 above, it is not a permissible interpretation of Article 6.8 and Annex II to permit the rejection of information meeting those four conditions because other information "is not provided." In the view of India, the key issue is the "usability" of the information at issue, not whether other information is not provided. The Panel's question presupposes that the information at issue meets the four conditions of Annex II, paragraph 3, i.e., is "usable without undue difficulty." However, there may be situations in which this information is such a small part of an otherwise unusable and incomplete component of necessary information (such as home market sales), that the information may not be capable of meeting the "undue difficulty" condition of Annex II, paragraph 3. In this case, for example, India does not contend that the United States failed to comply with Annex II, paragraph 3 with respect to SAIL's submitted home market sales information, even though certain of the information regarding the more than 100,000 reported home market sales would, in isolation, meet the requirements of the paragraph.

15. In response to the third part of the question, India notes that the question proposes the rejection of information that satisfies the four conditions of Annex II, paragraph 3 (including the condition that it may be used without undue difficulty), because other submitted information is not verifiable. For all of the reasons set forth in paragraphs 2-14 above and in India's numerous submissions in this proceeding, India's response is that the fact that other information is not verifiable (or useable, timely submitted, or in the requested computer format) does not permit the investigating authority to discard information that satisfies the conditions of paragraph 3.[10]

16. Finally, with respect to all three questions within Question 7, India would note that the information at issue in this dispute - SAIL's US sales database - was verifiable and "verified" and could be used without undue difficulty with the normal value information in the petition to calculate a dumping margin. It represented one-half of the information needed to calculate a dumping margin - not some small piece, portion, or bit of information. Therefore, the Panel need not determine the outer limits of the "usability" of a small portion, piece, or bit of information in this case. Moreover, it is crucial to keep in mind what the application of "total facts available" meant in this case - the rejection of an entire database of verified US sales data including information on pricing, quantity and other necessary information for every single ton of cut-to-length carbon steel

[10] *See* India Second Oral Statement, paras. 6-18; India Comments to US Answers, paras.19-22, 25-29; India Rebuttal Submission, paras. 9-10, 65-73; India Answers to Panel's (First) Questions, paras. 9-14, 55-60, 88-90; India First Oral Statement, paras. 25-43; and India's First Submission, paras. 50-67.

plate shipped by SAIL to the United States during the period of investigation. By applying "total facts available", USDOC replaced that verified and usable information with a single offer for sale at an absurdly low price of $251 per ton which even USDOC knew never was sold during the period of investigation.

Q8. Would India describe in detail what information it would consider in every case to be "necessary", in terms of Article 6.8, for an investigating authority to make an objective, unbiased, and accurate calculation of a dumping margin?

Reply

17. In the context of Article 6.8, the term "necessary information" means individual pieces of information that collectively permit an investigating authority to determine a dumping margin under Article 2 of the AD Agreement. At a minimum, this includes information that is needed to calculate export price, and, independently, information needed to calculate normal value. If there is an allegation that sales are being made below cost, then cost information would also be necessary. In practice, what constitutes necessary information will vary widely from case to case. For example, in some cases, no home market sales information from affiliates or cost data from affiliated input suppliers will be necessary, while in others it will be necessary for affiliates to provide information on their resales or costs of production. In other situations, it may necessary to obtain information to construct the export price because the product is sold to the export market through affiliates, while in other cases that situation does not arise. In short, the information that can be considered "necessary" to calculate a dumping margin will vary widely from case to case. And what may appear to be necessary in the beginning of the investigation, such as home market sales information, may not be necessary later in the investigation when normal value is determined using constructed value.

18. Finally, India notes that the definition of necessary information does not control the question of the required source of that information, and in particular when particular necessary information submitted by respondents must be used by investigating authorities. That question is addressed in Annex II, paragraphs 3 and 5.[11]

[11] *See* India Second Oral Statement, paras. 6-18.

UNITED STATES – TAX TREATMENT FOR "FOREIGN SALES CORPORATIONS"

Recourse to Arbitration by the United States under Article 22.6 of the *DSU* and Article 4.11 of the *SCM Agreement*

Decision of the Arbitrator
WT/DS108/ARB

Circulated to Members on 30 August 2002

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I. INTRODUCTION

A. Initial Proceedings

1.1 On 20 March 2000, the Dispute Settlement Body (DSB) adopted the Panel and Appellate Body reports in this dispute. The DSB recommended, in particular, that the United States bring into conformity the measures found to be inconsistent with its obligations under the *Agreement on Subsidies and Countervailing Measures* (*SCM Agreement*) and the *Agreement on Agriculture* and that the United States withdraw the FSC subsidies "at the latest with effect from 1

October 2000".[1] On 12 October 2000, the DSB agreed[2] to accede to a request by the United States that the DSB modify the time-period in this dispute so as to expire on 1 November 2000.[3] On 15 November 2000, the President of the United States signed into law an Act of the United States Congress entitled the "*FSC Repeal and Extraterritorial Income Exclusion Act of 2000*"[4] (the "ETI Act"). With the enactment of this legislation, the United States considered that it had implemented the DSB's recommendations and rulings in the dispute and that the legislation was consistent with the United States' WTO obligations.[5]

1.2 On 17 November 2000 the European Communities had recourse to Article 21.5 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "*DSU*"), considering that the United States had failed to withdraw the subsidies as required by Article 4.7 of the *SCM Agreement* and had thus failed to comply with the DSB recommendations and rulings. The Panel established under Article 21.5 of the *DSU* (the "Compliance Panel") found the ETI Act to be in violation of United States obligations under the *SCM Agreement*, the *Agreement on Agriculture* and Article III:4 of the *GATT 1994*. The Appellate Body upheld these conclusions. The reports of the Compliance Panel and the Appellate Body were adopted by the DSB on 29 January 2002.

B. Request for Arbitration and Selection of the Arbitrator

1.3 On 2 October 2000, the parties informed the DSB of their Understanding on "Agreed Procedures under Articles 21 and 22 of the Dispute Settlement Understanding (*DSU*) and Article 4 of the *SCM Agreement* applicable in the follow-up to the *United States – Tax Treatment for 'Foreign Sales Corporations'* dispute", concluded between the parties on 29 September 2000.[6] The agreed procedures in this Understanding foresaw that, if the European Communities considered that the situation described in Article 21.5 of the *DSU* existed and initiated consultations under that provision, it could request authorization to suspend concessions or other obligations pursuant to Article 22.2 of the *DSU* and to adopt countermeasures pursuant to Article 4.10 of the *SCM Agreement*.[7] It was also agreed that, "[u]nder Article 22.6 of the *DSU* including Article 4.11 of the *SCM Agreement* [(*sic*)]", the United States would object to the appropriateness of the countermeasures and/or the level of suspension of concessions or other obligations and/or make an Article 22.3 claim, before the date of the DSB meeting considering the European Communities request, and that the matter would be

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1 Panel Report, *United States – Tax Treatment for "Foreign Sales Corporations"* ("*US – FSC*") WT/DS108/R, adopted 20 March 2000 as modified by original Appellate Body Report, WT/DS108/AB/R, DSR 2000:IV, 1677, para. 8.8

2 See Minutes of the DSB meeting held on 12 October 2000, WT/DSB/M/90, paras. 6-7.

3 WT/DS108/11, 2 October 2000.

4 United States Public Law 106-519, 114 Stat. 2423 (2000), submitted as Exhibit EC-5; Exhibit US-1. in the Article 21.5 Compliance Panel proceedings.

5 Minutes of the DSB meeting held on 17 November 2000, WT/DSB/M/92, para. 143.

6 Circulated as document WT/DS108/12, 5 October 2000.

7 *Ibid*, para. 8.

referred to arbitration pursuant to Article 22.6 of the *DSU*.[8] It was also agreed that where the European Communities requested the establishment of a compliance panel, both parties would request the arbitrator to suspend his work until either: (a) adoption of the Article 21.5 compliance panel report or, (b) if there was an appeal, adoption of the Appellate Body report.[9]

1.4 On 17 November 2000, the European Communities requested authorization from the DSB to take appropriate countermeasures and to suspend concessions pursuant to Article 4.10 of the *SCM Agreement* and Article 22.2 of the *DSU* in the amount of US$4,043 million per year. On 27 November 2000, the United States objected to the appropriateness of the countermeasures proposed by the European Communities and the level of suspension of concessions proposed by the European Communities and requested that, "as required by Article 22.6 of the *DSU* (and consequently Article 4.11 of the *SCM Agreement*), 'the matter be referred to arbitration'".[10]

1.5 At the meeting of the DSB on 28 November 2000, it was agreed that the matter raised by the United States in document WT/DS108/15 be referred to arbitration as required by Article 22.6 of the *DSU* and Article 4.11 of the *SCM Agreement*.[11] In the light of the establishment of a compliance panel under Article 21.5 and in accordance with the Procedures agreed between the European Communities and the United States, the European Communities and the United States requested the Arbitrator to suspend the arbitration proceeding until adoption of the Panel Report or, if there was an appeal, adoption of the Appellate Body Report.[12]

1.6 The panel and Appellate Body reports under Article 21.5 of the *DSU* were adopted by the DSB on 29 January 2002 and, in accordance with the parties' understanding referred to in paragraph 1.3 above, the Arbitrator then resumed its work.

1.7 The Arbitration was carried out by the original panel, namely:

Chairman: Mr. Crawford Falconer

Members: Mr. Didier Chambovey

Prof. Seung Wha Chang.

II. PRELIMINARY ISSUES

A. Mandate of the Arbitrator

2.1 The United States has initiated these proceedings pursuant to Article 22.6 of the *DSU* and Article 4.11 of the *SCM Agreement*. Article 22.6 of the *DSU* provides in relevant part:

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[8] *Ibid*, para. 10.
[9] WT/DS108/12, para. 11.
[10] See WT/DS108/15.
[11] See WT/DS108/17.
[12] See WT/DS108/18.

> "When the situation described in paragraph 2 occurs, the DSB, upon request, shall grant authorization to suspend concessions or other obligations within 30 days of the expiry of the reasonable period of time unless the DSB decides by consensus to reject the request. However, if the Member concerned objects to the level of suspension proposed, (…) the matter shall be referred to arbitration. (…)"

2.2 With regard to countermeasures taken in response to violations of Article 3.1 of the *SCM Agreement* on prohibited subsidies, however, Article 4.11 of that Agreement provides the following mandate for arbitrators:

> "In the event a party to the dispute requests arbitration under paragraph 6 of Article 22 of the Dispute Settlement Understanding ('*DSU*'), the arbitrator shall determine whether the countermeasures are appropriate."[10]
>
> (*original footnote*) [10] This expression is not meant to allow countermeasures that would be disproportionate in light of the fact that the subsidies dealt with under these provisions are prohibited.

2.3 With regard to any amount of suspension of concessions that would be requested in relation to a violation of Article III:4 of the *GATT 1994* or of the *Agreement on Agriculture*, our mandate is defined by Article 22.7 of the *DSU*, which provides in relevant part that:

> "The arbitrator acting pursuant to paragraph 6 shall not examine the nature of the concessions or other obligations to be suspended but shall determine whether the level of such suspension is equivalent to the level of nullification or impairment …"

2.4 The United States argues both that the amount of suspension of concessions requested by the European Communities is inconsistent with Article 4.10 of the *SCM Agreement* in that the countermeasures proposed are not "appropriate" within the meaning of that provision, and that the level of suspension of concessions requested by the European Communities is inconsistent with the provisions of Article 22.4 in that it is not "equivalent to the level of nullification or impairment" suffered by the European Communities.

2.5 The European Communities clarified, in the course of the proceedings, that it based its request for authorization for countermeasures in the amount of US$4,043 million on both the *SCM Agreement* and *DSU* provisions. If we should decide that the appropriate amount of compensation under Article 4.11 of the *SCM Agreement* is less than the requested amount, then the European Communities is of the view that it will be necessary for us to consider whether an additional amount of suspension of concessions needs to be awarded under Article 22.7 of the *DSU*, in particular with regard to the violation of Article III:4 of *GATT 1994*.[13] Therefore, we decide to first examine whether the European Communities's proposed countermeasures are appropriate within the meaning of

[13] EC response to question 2 of the Arbitrator.

Article 4.10 of the *SCM Agreement*. Then, if necessary, we shall proceed to examine whether the level of the European Communities requested suspension of concessions is inconsistent with Article 22.4 of the *DSU*.

2.6 We also recall the terms of Article 30 of the *SCM Agreement*, which clarifies that the provisions of the *DSU* are applicable to proceedings concerning measures covered by the *SCM Agreement*. Article 22.6 of the *DSU* therefore remains relevant to arbitral proceedings under Article 4.11 of the *SCM Agreement*, as illustrated by the textual reference made to Article 22.6 of the *DSU* in that provision. However, the special or additional rules and procedures of the *SCM Agreement*, including Articles 4.10 and 4.11, would prevail to the extent of any difference between them.[14]

2.7 Finally, we note that there is no dispute on the *type* of measure proposed in this case. Our mandate under Article 4.11 of the *SCM Agreement* in relation to the violation of Article 3 of that Agreement is therefore only to determine whether the *level* of countermeasures proposed is appropriate.

B. Burden of Proof

2.8 Both parties agree that the United States, as the applicant in this case, bears the burden of proving its assertions that the requested level of suspension of concessions is not an appropriate countermeasure within the meaning of Article 4.11 of the *SCM Agreement* and is not equivalent to the level of nullification or impairment to the European Communities within the meaning of Article 22.4 of the *DSU*.[15]

2.9 The United States, however, disputes the European Communities' description of the duties of the United States in these proceedings, to the extent that it suggests that the United States bears the burden of disproving every factual assertion made by the European Communities.[16]

2.10 We recall that the general principles applicable to burden of proof, as stated by the Appellate Body, require that a party claiming a violation of a provision of the *WTO Agreement* by another Member must assert and prove its claim.[17] We find these principles to be also of relevance to arbitration proceedings under Article 22.6 of the *DSU* and Article 4.10 of the *SCM Agreement*.[18] In

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[14] On the notion of "difference", see Report of the Appellate Body on *Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico ("Guatemala – Cement I")*, WT/DS60/AB/R, adopted 25 November 1998, DSR 1998:IX, paras. 65 and 66.

[15] EC first submission, para. 6 and US first submission para. 27.

[16] US first submission, para. 27.

[17] Report of the Appellate Body, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India* ("*US – Wool Shirts and Blouses")*, WT/DS33/AB/R, adopted 23 May 1997, DSR 1997:I, 323, at 337.

[18] For previous application of these rules in arbitration proceedings under Article 22.6 of the *DSU*, see Decision by the Arbitrators, *European Communities – Measures Concerning Meat and Meat Products (Hormones) – Original Complaint by Canada – Recourse to Arbitration by the European Communities under Article 22.6 of the DSU* (*"EC – Hormones (Canada) (Article 22.6 – EC)*, WT/DS48/ARB, 12 July 1998 DSR 1999:III, 1135, paras. 8 ff. For an application in the context of Article 4.10 of the *SCM Agreement*, see Decision by the Arbitrators, *Brazil – Export Financing Pro-*

this procedure, we thus agree that it is for the United States, which has challenged the consistency of the European Communities proposed amount of suspension of concessions under Articles 4.10 of the *SCM Agreement* and 22.4 of the *DSU*, to bear the burden of proving that the proposed amount is not consistent with these provisions.

2.11 We also note, however, that it is generally for each party asserting a fact, whether complainant or respondent, to provide proof thereof.[19] In this respect, therefore, it is also for the European Communities to provide evidence for the facts which it asserts. In addition, we consider that both parties generally have a duty to cooperate in the proceedings in order to assist us in fulfilling our mandate, through the provision of relevant information.[20]

C. Relevant Measure and Date for Calculations

2.12 We note that the time-period within which the United States was to have withdrawn the prohibited FSC subsidy in this dispute originally terminated on 1 October 2000.[21] We also recall that the DSB acceded to the United States request that the DSB modify the time-period in this dispute so as to expire on 1 November 2000.[22] We further note that the United States enacted the ETI Act on 15 November 2000. It was the ETI Act which was reviewed by the Compliance Panel and, on appeal, by the Appellate Body, under Article 21.5 of the *DSU*.

2.13 The parties to this dispute agree that the ETI Act, as the implementing measure found to be inconsistent with the United States' obligations under the *WTO Agreement*, is the relevant measure to consider. We agree that this should be the relevant measure to take into account for the purposes of our examination.[23]

2.14 However, in using the ETI Act as the relevant measure, we have to address two main questions:

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gramme for Aircraft – Recourse to Arbitration by Brazil under Article 22.6 of the DSU and Article 4.11 of the SCM Agreement, (Brazil – Aircraft, (*Article 22.6 –Brazil)")* WT/46/ARB, 28 August 2000, paras. 2.8 ff.

[19] Report of the Appellate Body, *US – Wool Shirts and Blouses*, p. 14.

[20] Report of the Appellate Body, *Canada – Measures Affecting the Export of Civilian Aircraft ("Canada – Aircraft")*, WT/DS70/AB/R, adopted 20 August 1999, DSR 1999:III, 1377, para. 190.

[21] WT/DS108/11.

[22] *Ibid*.

[23] We recall that, in *EC – Bananas III*, the arbitrators considered that the level of proposed suspension of concessions had to be assessed in relation to the measure taken in order to comply with the recommendations and rulings of the DSB, rather than the original measure. See WT/DS27/ARB, DSR 1999:II, 725, para. 4.3: "In the original *Bananas III* dispute, the findings of nullification and impairment were based on the conclusion that several parts of the EC measures at issue were inconsistent with its WTO obligations. Therefore, any assessment of the level of nullification or impairment presupposes an evaluation of consistency or inconsistency with WTO rules of the implementation measures taken by the European Communities, i.e. the revised banana regime, in relation to the panel and Appellate Body findings concerning the previous regime."

(a) The first one is the date on which we should assess the appropriateness of the countermeasures proposed by the European Communities. We note that the United States was required to withdraw the subsidy by 1 November 2000, and that the ETI was enacted on 15 November 2000. We also recall: (i) that the European Communities had recourse to Article 4.10 of the *SCM Agreement* and Article 22.2 of the *DSU* on 17 November 2000[24]; (ii) that the DSB agreed that the matter was referred to arbitration on the basis of the United States" request pursuant to Article 22.6 of the *DSU* and 4.11 of the *SCM Agreement* on 28 November 2000; and (iii) that this arbitration was *suspended* on 21 December 2000, pending the conclusion of the proceedings initiated under Article 21.5 of the *DSU*.

We recall that in past arbitrations, arbitrators have referred to the date on which the implementation period expired, as the date on which to assess whether the proposed suspensions of concessions or other obligations were equivalent to the level of nullification or impairment or constituted appropriate countermeasures.[25] Since this arbitration was *suspended* pending the completion of the Article 21.5 *DSU* proceedings, we should give the term "suspension" its full legal meaning and consider that the European Communities proposed countermeasures should be assessed as of the date of expiry of the implementation period.[26]

(b) Secondly, we must take into account certain considerations in our assessment of the data before us, in particular, the extent to which we may rely on estimates of economic figures based on the pre-ETI FSC scheme. We considered whether we needed to adjust such figures to account for the entry into force and application of the ETI Act.[27] We took into account the following factors:

(i) First, we note that the actual application of the ETI Act to date has been limited. It was enacted in November 2000 and, pursuant to its own terms, in the case of FSCs already in existence on 30 September 2000, the ETI Act did not apply to transactions occurring before 1 January 2002. Furthermore, for FSCs already in existence on 30 September 2000, the FSC subsidies continued in operation for one year and, with respect to FSCs that entered into long-term bind-

[24] WT/DS108/13.

[25] Decision by the Arbitrator, *EC – Hormones*, WT/DS48/ARB, DSR 1999:II, 725, paras. 38 to 42 and Decision of the Arbitrator, *Brazil – Aircraft*, WT/DS46/ARB, para. 3.66.

[26] We note that the arbitrator in *Brazil – Aircraft* based its calculations on the number of deliveries and sales that took place between the end of the period of implementation and the latest period for which figures were available (18 November 1999-30 June 2000). However, this solution was based on the particular circumstances of the case, where the amount of subsidy granted was specifically related to the delivery of aircraft after the end of the reasonable period of time.

[27] See Annex 1, "shift to the ETI Act".

ing contracts with unrelated parties before 30 September 2000, the ETI Act did not alter the tax treatment of those contracts for an indefinite period of time. Some aspects of the FSC regime are actually "grandfathered", in some cases indefinitely.[28]

(ii) Second, we noted that the United States suggested that the transitional provisions of the ETI Act mentioned above could be ignored for purposes of estimating the amount of the subsidy and the trade effect or trade impact. Both parties agreed that the amount of benefit to the taxpayer was the same under both the ETI and the FSC regimes.[29].

(iii) The United States agreed with the European Communities that an upward adjustment should be made to the amount of the subsidy to account for the additional product coverage in the ETI Act, as compared to the initial FSC scheme.[30]

2.15 We therefore decided to assess the proposed suspension of concessions at the time the United States should have withdrawn the prohibited subsidy at issue, in 2000. We consider it relevant, in light of the nature of the countermeasures proposed by the European Communities, to calculate the appropriate countermeasures on a yearly basis. We thus decided to include the whole of the year 2000 in our assessment, taking into account an adjustment for the shift to the ETI Act.

III. SUMMARY OF MAIN ARGUMENTS

3.1 The **United States** has argued that the amount of countermeasures proposed by the European Communities is not appropriate because it is disproportionate to the trade impact of the inconsistent measure on the European Communities.[31] It interprets Article 4.10 of the *SCM Agreement* as requiring countermeasures not to be disproportionate to the trade impact of the violating measure on the complaining Member.[32] It also considers that, in this instance, the amount of the subsidy can and should be used as a "proxy" for the trade impact of the measure.[33] The United States estimated the total value of the subsidy at US$4,125 milion for the year 2000[34], and suggested that, allocating to the European Communities its share of that amount, countermeasures in a maximum

[28] We recall, in particular, that the ETI act's provisions "grandfathering" the FSC subsidies were part of the subject of examination in the compliance proceedings.
[29] EC answers to additional questions from the arbitrator, para. 4 and US answers to additional questions, para. 2.
[30] US second submission.
[31] US first submission, para. 15.
[32] US first submission, paras. 16 to 57.
[33] US first submission, para. 62.
[34] US Exhibit 17.

amount of US$1,110 million would be appropriate.[35] It further encouraged the arbitrators to refrain from using economic modelling in the circumstances of this case, because of the range of uncertainties of the measurements and the range of possible "reasonable" outcomes under economic modelling. However, in response to questioning, the United States has also indicated that, were we to pursue economic modelling, certain considerations would have to be taken into account.

3.2 The **European Communities** has argued that the amount of countermeasures it has proposed corresponds to the value of the subsidy, and that this amount is "appropriate" within the meaning of Article 4.10 of the *SCM Agreement*. In the European Communities view, Article 4.10 of the *SCM Agreement* sets out a unique benchmark for countermeasures in response to violations of a particular provision of the *SCM Agreement* – namely Article 3.[36] In the European Communities view, Article 4.10 of the *SCM Agreement* allows for countermeasures which will induce compliance, and in this instance, countermeasures in the amount of the value of the subsidy to be withdrawn are appropriate, although they reflect a conservative approach.

IV. APPROACH OF THE ARBITRATOR

4.1 We recall that Article 4.10 of the *SCM Agreement* provides as follows:

> "In the event the recommendation of the DSB is not followed within the time-period specified by the panel, which shall commence from the date of adoption of the panel's report or the Appellate Body's report, the DSB shall grant authorization to the complaining Member to take appropriate[9] countermeasures, unless the DSB decides by consensus to reject the request."
>
> (*footnote original*) [9] This expression is not meant to allow countermeasures that are disproportionate in light of the fact that the subsidies dealt with under these provisions are prohibited.

4.2 In addition, Article 4.11 of the *SCM Agreement* defines our mandate as follows:

> "In the event a party to the dispute requests arbitration under paragraph 6 of Article 22 of the Dispute Settlement Understanding ("*DSU*"), the arbitrator shall determine whether the countermeasures are appropriate.[10]"

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[35] US second submission, para. 4. In its first submission, the United States had initially estimated the actual value of the subsidy at a lower figure. However, it subsequently re-evaluated that amount to take account of certain EC arguments concerning the relevant elements for the calculation. The amount cited here is the US figure for the amount of the subsidy as adjusted to take account of the coverage of the subsidy and the shift to the ETI Act. A more detailed analysis of the relevant factors and figures can be found in Annex 1.

[36] EC second submission para 22.

(*footnote original*) [10] This expression is not meant to allow countermeasures that are disproportionate in light of the fact that the subsidies dealt with under these provisions are prohibited.

4.3 These two provisions complement each other: the arbitrator's mandate in relation to countermeasures concerning prohibited subsidies under Article 4 of the *SCM Agreement* is defined, quite logically, with reference to the notion embodied in the underlying provision in Article 4.10. The expression "appropriate countermeasures" defines what measures can be authorized in case of non-compliance, and our mandate requires us to review whether, in proposing certain measures to take in application of that provision, the prevailing Member has respected the parameters of what is permissible under that provision.

4.4 In doing this, we must aim at determining whether, in this particular case, the countermeasures proposed by the European Communities are "appropriate".

4.5 We recall, in this regard, that the European Communities has proposed a certain amount of countermeasures and explained the rationale for that proposal. The United States, as noted above, is challenging that amount as being disproportionate to the trade impact of the violating measure on the European Communities. We understand the United States argument to be essentially two-fold. The United States seems to argue to the effect that the fundamental test for assessing whether countermeasures are appropriate or not is an "adverse effects" test and that, moreover, this is to be assessed in a manner broadly comparable to that which would occur pursuant to a case of nullification or impairment under Article 22.4 of the *DSU*. This is tantamount to a two-pronged argument: (a) that the European Communities entitlement to respond to the illegal subsidy is limited to the trade effect on it; and (b) that the mode of calculation is comparable, although not identical in its precision, to an assessment under Article 22.4 of the *DSU*.

4.6 In order to examine the United States challenge, we therefore need to consider first whether indeed, as argued by the United States, countermeasures under Article 4.10 are required to be proportionate, or at least not disproportionate, to the trade impact of the violating measure on the complaining Member. We will then be in a position to assess, in light of our conclusion on that point, whether in the circumstances of this case, the proposed countermeasures are "appropriate" or not.

4.7 We will consider first the expression "appropriate countermeasures" contained in Articles 4.10 and 4.11 of the *SCM Agreement*. In this regard, we note that the scope of application of Article 3.2 of the *DSU* is not limited to panel and Appellate Body proceedings. Accordingly, in assessing the matter before us, we must clarify the relevant provisions, to the extent necessary, in accordance with the customary rules of interpretation of public international law. These rules are reflected in Articles 31, 32 and 33 of the Vienna Convention on the Law of Treaties ("Vienna Convention"). We recall in particular that Article 31.1 requires a treaty to be

> "interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[37]

4.8 We will therefore consider the terms of Article 4.10 of the *SCM Agreement* in accordance with these rules.

V. THE NOTION OF "APPROPRIATE COUNTERMEASURES" UNDER ARTICLE 4.10 OF THE *SCM AGREEMENT*

5.1 In assessing the validity of the US proposition that countermeasures under Article 4.10 of the *SCM Agreement* should not be disproportionate to the trade impact of the measure on the complaining Member, in this instance the European Communities, we find it useful to consider first the terms of Article 4.10 in themselves.[38] This initial textual analysis will inform the rest of our analysis, where we will address the detail of the US interpretation and, more generally, our understanding of the expression "appropriate countermeasures" in Article 4.10 of the *SCM Agreement*, taken in its context and in light of its object and purpose.

A. Text of the Provision

5.2 We recall again that Article 4.10 of the *SCM Agreement* provides as follows:

> "In the event the recommendation of the DSB is not followed within the time-period specified by the Panel, which shall com-

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[37] The full text of Article 31 of the Vienna Convention reads as follows:

Article 31

General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context, for the purpose of the interpretation of a treaty shall comprise, addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

[38] Our analysis, in this section, of the terms "appropriate countermeasures" as contained in Article 4.10 of the *SCM Agreement* (as informed by footnote 9), should be understood to apply also the same terms as they are contained in Article 4.11 (as informed by footnote 10).

> mence from the date of adoption of the panel's report or the Appellate Body's report, the DSB shall grant authorization to the complaining Member to take appropriate[9] countermeasures, unless the DSB decides by consensus to reject the request".
>
> *(Original footnote)* [9] This expression is not meant to allow countermeasures that are disproportionate in light of the fact that the subsidies dealt with under these provisions are prohibited.

5.3 This provision thus foresees the authorization of "appropriate countermeasures". We shall consider these terms in turn.

1. "Countermeasures"

5.4 Dictionary definitions of "countermeasure" suggest that a countermeasure is essentially defined by reference to the wrongful action to which it is intended to respond. The New Oxford Dictionary defines "countermeasure" as "an action taken to counteract a danger, threat, etc".[39] The meaning of "counteract" is to "hinder or defeat by contrary action; neutralize the action or effect of"[40]. Likewise, the term "counter" used as a prefix is defined *inter alia* as*:* "opposing, retaliatory"[41]. The ordinary meaning of the term thus suggests that a countermeasure bears a relationship with the action to be counteracted, or with its effects (cf. "hinder or defeat by contrary action; neutralize the action or effect of"[42]).

5.5 In the context of Article 4 of the *SCM Agreement*, the term "countermeasures" is used to define temporary measures which a prevailing Member may be authorized to take in response to a persisting violation of Article 3 of the *SCM Agreement*, pending full compliance with the DSB's recommendations. This use of the term is in line with its ordinary dictionary meaning as described above: these measures are authorized to counteract, in this context, a wrongful action in the form of an export subsidy that is prohibited *per se,* or the effects thereof.

5.6 It would be consistent with a reading of the plain meaning of the concept of countermeasure to say that it can be directed either at countering the measure at issue (in this case, at effectively neutralizing the export subsidy) or at counteracting its effects on the affected party, or both.

5.7 We need, however, to broaden our textual analysis in order to see whether we can find more precision in how countermeasures are to be construed in this context. We thus turn to an examination of the expression "*appropriate*" countermeasures with a view to clarifying what level of countermeasures may be legitimately authorized.

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39 *The New Shorter Oxford English Dictionary* (1993).
40 *Ibid.*
41 *Webster's New Encyclopaedic Dictionary* (1994).
42 *The New Shorter Oxford English Dictionary* (1993).

2. "Appropriate countermeasures"

5.8 The term "appropriate" countermeasures in Article 4.10 is informed by footnote 9, which provides guidance as to what the expression "appropriate" should be understood to mean. For the sake of clarity, we will first consider the term "appropriate", and then the terms of the footnote. However, this is with the understanding that these two elements are part of a single assessment and that the meaning of the expression "appropriate countermeasures" should result from a combined examination of these terms of the text in light of its footnote.

5.9 The ordinary dictionary meaning of the term "appropriate" refers to something which is "especially suitable or fitting".[43] "Suitable", in turn, can be defined as "fitted for or appropriate to a purpose, occasion …"[44] or "adapted to a use or purpose".[45] "Fitting" can be defined as "of a kind appropriate to the situation".[46]

5.10 As far as the amount or level of countermeasures is concerned, the expression "appropriate" does not in and of itself predefine, much less does it do so in some mathematically exact manner, the precise and exhaustive conditions for the application of countermeasures. That is, in itself, surely significant. There would have been no *a priori* reason why some defined and/or formulaic approach could not have been set down in advance for the application of countermeasures. The terms of the *SCM Agreement* on this point manifestly eschew any such approach. But the provisions actually used do not become any the less meaningful or of lower legal status by reason of that fact. Much less can there be some kind of inherent presumption that they must be contorted to fit some kind of procrustean bed in the proportions of a formula when it is manifestly not present in the text itself.

5.11 It is, after all, scarcely a matter for debate that not all situations can be imagined in advance. But even if one takes the view that, as a consequence, there can be no manual which offers a precise course of action for a given situation, that does not mean that one is completely bereft of guidance or, as the case may be, that there are no bounds set to permissible action. This is clearly enough the situation we are dealing with here, where a Member might find itself resorting to countermeasures. The relevant provisions are not designed to lay down a precise formula or otherwise quantified benchmark or amount of countermeasures which might be legitimately authorized in each and every instance. Rather, the notion of "appropriateness" is used.

5.12 Based on the plain meaning of the word, this means that countermeasures should be adapted to the particular case at hand. The term is consistent with an intent not to prejudge what the circumstances might be in the specific context of dispute settlement in a given case. To that extent, there is an element of flexibility, in the sense that there is thereby an eschewal of any rigid *a priori* quantitative formula. But it is also clear that there is, nevertheless, an objective relation-

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[43] *Webster's New Encyclopaedic Dictionary* (1994).
[44] *The New Shorter Oxford English Dictionary* (1993).
[45] *Webster's New Encyclopaedic Dictionary* (1994).
[46] *Webster's New Encyclopaedic Dictionary* (1994).

ship which must be absolutely respected: the countermeasures must be suitable or fitting by way of response to the case at hand.

5.13 We would underline that the adjective "appropriate" does not, in and of itself, make it clear whether the "countermeasures" at issue become so by reason of whether they are aimed at neutralizing the original wrongful action, its effects, or both. To that extent, we only say, at this point, that the test is in principle permissive of a range of possibilities.

5.14 We must turn, therefore, to footnote 9 of the *SCM Agreement* to see whether this is capable of shedding any further light on this matter.

3. Footnote 9 to the SCM Agreement

5.15 Footnote 9 of the *SCM Agreement*, which provides the only express indication of what the expression "appropriate countermeasures" encompasses, reads as follows:

> "This expression [appropriate] is not meant to allow countermeasures that are disproportionate in light of the fact that the subsidies dealt with under these provisions are prohibited."

5.16 This footnote effectively clarifies further how the term "appropriate" is to be interpreted. We understand it to mean that countermeasures that would be "disproportionate in light of the fact that the subsidies dealt with under these provisions are prohibited" could not be considered "appropriate" within the meaning of Article 4.10 of the *SCM Agreement*. We turn to a further examination of these terms.

5.17 The term "disproportionate" can be defined as "lacking proportion, poorly proportioned, out of proportion".[47] The term "proportion" refers, *inter alia*, to a "comparative relation or ratio between things in size, quantity, numbers" or a "relation between things in nature. etc".[48] The term "disproportionate" thus suggests a lack of proper or due relationship between two elements.

5.18 Based on the ordinary meaning of the terms, the concept involved is understood well enough in everyday experience. It is a manner of describing relationships adapted to the circumstances, where the instrument of measurement is perception by the naked eye rather than scrutiny under the microscope. It is not meant to entail a mathematically exact equation but soundly enough to respect the relative proportions at issue so that there is no manifest imbalance or incongruity.[49] In short, there is a requirement to avoid a response that is disproportionate to the initial offence - to maintain a congruent relationship in countering the measure at issue so that the reaction is not excessive in light of the situation to

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[47] *The New Shorter Oxford English Dictionary* (1993). Vol. I, p. 700.

[48] *Ibid*.

[49] See, on that issue, the *Case Concerning the Air Services Agreement of 27 March 1946 (United States of America v. France)* (1978) International Law Reports, Vol. 54 (1979), p. 304 (hereafter "*Air Services arbitration*"): "It has been observed, generally, that judging the proportionality of countermeasures is not an easy task and can at best be accomplished by approximation" (at para. 83, p- 338).

which there is to be a response. But this does not require exact equivalence – the relationship to be respected is precisely that of "proportion" rather than "equivalence".

5.19 We consider therefore that footnote 9 further confirms that, while the notion of "appropriate countermeasures" is intended to ensure sufficient flexibility of response to a particular case, it is a flexibility that is distinctly bounded. Those bounds are set by the relationship of appropriateness. That appropriateness, in turn, entails an avoidance of disproportion between the proposed countermeasures and, as our analysis to this point has brought us, either the actual violating measure itself, the effects thereof on the affected Member, or both.

5.20 We receive, however, rather more specific guidance on these elements in the final part of the footnote, which reads:

> " … disproportionate *in light of the fact that the subsidies dealt with under these provisions are prohibited.*" (emphasis added)

5.21 The use of the terms "in light of" directs that the final part of the footnote is a matter that must enter into consideration at all times. It seems reasonable also to conclude that it is not seen to be a minor or insignificant consideration. On the contrary, it is rather to be an element that is to pervade or colour the whole assessment. That, at least, is the only reasonable way to construe viewing something "in light of" something else.

5.22 As we read it, the text refers us unambiguously to the provisions of Part II of the *SCM Agreement* and requires us to ensure that our perspective on countermeasures is invested with and coloured by consideration of the nature and legal status of the particular underlying measure in respect of which the countermeasures are applied. In short, this provides that, when assessing countermeasures under Article 4.10, account must be taken of the fact that the export subsidy at issue is prohibited and has to be withdrawn.

5.23 This emphasis on the unlawful character of export subsidies invites, in our view, a consideration of the impact which this unlawful character may have, in itself. We note in this respect that the maintenance of the unlawful measure by the Member concerned – in violation of its obligations – has, in itself, the effect of upsetting the balance of rights and obligations between the parties, irrespective of what might be, as a matter of fact, the actual trade effects on the complainant. We recall, in this regard, that the prohibition on export subsidies is a *per se* obligation, not itself conditioned on a trade effects test. Members are entitled to trade without other Members resorting to export subsidies. In our view, the second part of the footnote directs that this is in itself a required consideration when it comes to assessing whether countermeasures are not disproportionate within the meaning of Article 4.10. Such consideration can only be reasonably construed to be aggravating rather than a mitigating factor, to be duly reflected in our assessment of whether countermeasures are appropriate.[50] Indeed, it directs us to consider the "appropriateness" of countermeasures under Article

[50] On this point, see WT/DS46/ARB, para. 3.51.

4.10 from this perspective of countering a wrongful act and taking into account its essential nature as an upsetting of the rights and obligations as between Members. This, we conclude, is the manner in which we are directed to assess the matter. We are not, by comparison, actually directed to, e.g., consider demonstrated trade effects of the measure on the complaining Member.

5.24 On the latter point, we would simply note that there has been – and remains – nothing in the text which precludes a Member from applying countermeasures in the sense of measures that are aimed at countering the injury, more narrowly conceived, that it has suffered as a consequence of the wrongful act.[51] However, what this footnote makes clear is that the text cannot be construed to *confine* the appropriateness test to the element of countering the injurious effects on a party, but also, and more importantly, that the entitlement to countermeasures is to be assessed taking into account the legal status of the wrongful act and the manner in which the breach of that obligation has upset the balance of rights and obligations as between Members. It is from that perspective that the judgement as to whether countermeasures are disproportionate is to be made.

5.25 Having considered the express terms of Article 4.10 of the *SCM Agreement*, we therefore note, at this stage of our analysis, that they do not suggest a specific quantum to be respected in each and every case in the determination of an amount of countermeasures which can be authorized under this provision. On the contrary, they direct us to consider whether the countermeasure proposed are in an adequate relation to the situation to be countered, instructing us specifically to consider that the subsidies under Part II of the *SCM Agreement* are prohibited in assessing whether the countermeasures proposed are disproportionate.

5.26 It should also be noted that the negative formulation of the requirement under footnote 9 is consistent with a greater degree of latitude than a positive requirement may have entailed: footnote 9 clarifies that Article 4.10 is not intended to allow countermeasures that would be "disproportionate". It does not require strict proportionality.[52]

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[51] We would only add on this point that, as regards countering any demonstrated effects, the standard of judgement is still that of appropriateness, in the sense of being not disproportionate, by which we take it to mean a judgement that does not require mathematical exactness of equivalence but that of proportionality in the sense of not being manifestly excessive. We see this as consistent with the view of the arbitrator in *Brazil – Aircraft* (footnote 55) to the effect that " 'appropriate' should not be given the same meaning as 'equivalent', but should be understood as giving more discretion in the appraisal of the level of countermeasures against prohibited subsidies".

[52] We note in this regard the view of the commentator, Sir James Crawford, on the relevant Article of the ILC text on State Responsibility, reflected in a resolution adopted on 12 December 2001 by the UN General Assembly (A/RES/56/83), which expresses – but only in positive terms – a requirement of proportionality for countermeasures:

> "the positive formulation of the proportionality requirement is adopted in Article 51. A negative formulation might allow too much latitude." (J. Crawford, The ILC's Articles on State Responsibility, Introduction, Text and Commentaries 2002, CUP, para. 5 on Article 51).

Article 51 of the ILC Articles on State responsibility (entitled "*Proportionality*") reads as follows:

5.27 With these observations in mind, we will consider further whether, when reading these terms in their context and in light of their object and purpose, this interpretative approach is confirmed and whether further clarification can be ascertained as to how the "appropriateness" of countermeasures under Article 4.10 should be assessed.

B. Contextual Analysis of Article 4.10

5.28 We thus turn to an examination of the terms of Article 4.10 of the *SCM Agreement* taken in their context, in order to ascertain further how the notion of "appropriate countermeasures" should be understood. In that regard, we will address the US arguments relating to the role of the trade impact of the measure in assessing whether countermeasures are appropriate under Article 4.10 of the *SCM Agreement*.

5.29 In the view of the United States, "appropriate" countermeasures under Article 4.10 of the *SCM Agreement* must not be disproportionate to the "trade impact" of the measure on the complaining Member. The United States acknowledges that the standard under Article 4.10 – "not … disproportionate" – is not identical to the standard under Article 22.4 of the *DSU* – equivalence – . However, in its view, the standard under Article 4.10 of the *SCM Agreement* cannot be applied as if it existed in clinical isolation from the *DSU*, and in a manner which is inconsistent with the object and purpose of the *DSU*. The United States argues in particular that in light of Article 22.4 of the *DSU* and Articles 7.9 and 9.4 of the *SCM Agreement*, it would be untenable to interpret Article 4.10 of the *SCM Agreement* as permitting countermeasures that are disproportionate to the trade impact on the complaining Member.[53] In the US view, the term "countermeasures" as used in the *SCM Agreement* does not have a special meaning and these countermeasures do not have a unique objective in inducing compliance. Rather, Article 4 of the *SCM Agreement* should be interpreted in

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> "countermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question". (emphasis added)

We also note in this respect that, while that provision expressly refers - contrary to footnote 9 of the *SCM Agreement* - to the injury suffered, it also requires the gravity of the wrongful act and the right in question to be taken into account. This has been understood to entail a qualitative element to the assessment, even where commensurateness with the injury suffered is at stake. We note the view of Sir James Crawford on this point in his Commentaries to the ILC Articles :

> "Considering the need to ensure that the adoption of countermeasures does not lead to inequitable results, proportionality must be assessed taking into account not only the purely "quantitative" element of the injury suffered, but also "qualitative" factors such as the importance of the interest protected by the rule infringed and the seriousness of the breach. Article 51 relates proportionality primarily to the injury suffered but "taking into account" two further criteria: the gravity of the internationally wrongful act, and the rights in question. The reference to "the rights in question" has a broad meaning, and includes not only the effect of a wrongful act on the injured State but also on the rights of the responsible State. Furthermore, the position of other States which may be affected may also be taken into consideration." (*op. cit.*, para. 6 of the commentaries on Article 51).

[53] See US first submission, paras. 32 ff.

light of the objectives of the WTO dispute settlement, including the objective of maintaining a proper balance between the rights of obligations of Members, as foreseen in Article 3.3 of the *DSU*. An assessment of the appropriateness of countermeasures under Article 4.10 by reference to the trade impact of the violating measure on the complaining Member is, in the US view, the only approach that is consistent with the object and purpose of Article 4.10.[54]

5.30 To begin with, we recall that first, we have found not only that, *via* footnote 9, there is an entitlement to take account of the unlawful nature of the initial act which gives rise to the countermeasures, but also that this is the perspective for assessment specifically required for under the *SCM Agreement*. While we do not see the plain language of Article 4.10 as in any way precluding the application of countermeasures aimed at countering the effects of the wrongful act on a Member provided they otherwise satisfy the terms of the *SCM Agreement*, we do not find this to be the necessary standard of assessment laid down in Article 4.10 of the *SCM Agreement*. We saw nothing in the plain language of this text which, on its face, dictates that the term "appropriate countermeasures" must be *limited* in its meaning to "equivalence" or correspondence (or some synonym) with the "trade impact" on the complaining Member.[55]

5.31 We therefore must address the question of whether there is otherwise, in reading the provision in context, some overriding requirement to assess the appropriateness of countermeasures under Article 4.10 from the perspective of demonstrated trade effects on the complaining Member.

1. Article 4.10 in the Context of the SCM Agreement

5.32 Recourse to countermeasures is foreseen in three provisions of the *SCM Agreement*: Article 4.10, which we are concerned with here, Article 7.9 and Article 9.[56] As regards actionable subsidies, Article 7.9 provides for authorization of countermeasures "commensurate with the degree and nature of the adverse effects determined to exist…". In a similar vein, Article 9.4 provides, in relation to non-actionable subsidies, for the authorization of countermeasures "commensurate with the nature and degree of the effects determined to exist". The explicit precision of these indications clearly highlights the lack of any analogous explicit textual indication in Article 4.10 and contrasts with the broader and more general test of "appropriateness" found in Articles 4.10 and 4.11.

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[54] See US first submission, para. 44.

[55] The United States acknowledges that Article 4.10 does not require the strict equivalence imposed under Article 22.4 of the *DSU*. Nonetheless, it construes the "appropriateness" of countermeasures under Article 4.10 fundamentally as a "trade effects" test of a nature comparable to that foreseen under Article 22.4. See US answers to questions by the Arbitrator, paras. 4 and 5.

[56] We are aware of the provisions of Article 31 of the *SCM Agreement* and that Members took no action to extend the application of the provisions of Articles 8 and 9 of the Agreement concerning non-actionable subsidies beyond the period of five years from the date of entry into force of the *WTO Agreement*. However, these provisions can nevertheless be helpful, in our view, in understanding the overall architecture of the Agreement with respect to the different types of subsidies it sought and seeks to address.

5.33 In short, as far as prohibited subsidies are concerned, there is no reference whatsoever in remedies foreseen under Article 4 to such concepts as "trade effects", "adverse effects" or "trade impact". Yet, by contrast, such a concept is to be found very clearly in the context of remedies under Article 7, through the notion of "adverse effects".

5.34 We believe that this difference must be given a meaning and that we should give due consideration to the fact that the drafters – who obviously could have used other terms in order to quantify precisely the permissible amount of countermeasures in the context of Article 4.10 – chose not to do so. It is not our task to read into the treaty text words that are not there.[57] We are also cognizant that the terms that do appear in the text of the treaty must be presumed to have meaning and must be read effectively.[58] The implications of the use of the term "appropriate" must therefore be acknowledged and we must give this expression in Article 4.10 its full meaning.[59]

5.35 This cannot be viewed as a matter of simple difference in terminology in abstraction from any other consideration. Export subsidies do, after all, have "adverse effects" on third parties. Systemically speaking they are, as a category of subsidy, more inherently prone to do so than any other. Thus, there would have been no inherent reason why the drafters could not have, in relation to export subsidies, provided for disciplines of the type foreseen in Articles 5 and 7 in terms of "adverse effects" and made provision for countermeasures based on the same concept as is applied, e.g., in Article 7. On the contrary, there would have been every reason to treat this category of subsidies in the same way if the guiding intent had been to apply an "adverse effects" test. Yet it was decided not to do so. This, in our view, underlines all the more that this is meaningful and reflective of a rationale. In other words, the distinction cannot be presumed to be arbitrary or casual, much less effectively read out of the text in its entirety.

5.36 We consider that the rationale is not difficult to discern. These different wordings reflect, in our view, the distinct legal nature and treatment under the *SCM Agreement* of various types of subsidies. The fundamental distinction between actionable and prohibited subsidies which underlies the whole structure and logic of the *SCM Agreement* finds expression generally in the differences in the elements defining the applicable obligations and the differences of treatment given to these measures with regard to the remedies available to challenge them.[60]

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[57] See for example the reports of the Appellate Body in *India – Quantitative Restrictions*, WT/DS90/AB/R, DSR 1999:IV, 1763, para 94; *EC – Hormones*, WT/DS26/AB/R, and WT/DS48/AB/R, DSR 1998:I, 135, para. 181; *India – Patents (US)*, WT/DS50/AB/R, DSR, 1998:I, 9, para. 45.

[58] See for example the reports of the Appellate Body on *US – Gasoline*, WT/DS2/AB/R, DSR 1996:I, 3, at 21 and *Korea – Dairy*, WT/DS98/AB/R, DSR 2000:I, 3, para. 81.

[59] See paras. 4.24-4.26 above.

[60] With respect to the differences in the elements defining the applicable obligations, we recall that Article 3.1(a) of the *SCM Agreement* – containing the defining elements of prohibited export subsidies - provides:

5.37 The distinction in the terminology relating to countermeasures is, in turn, a corresponding reflection of the distinction when it comes to substantive disciplines for export subsidies: i.e. a clear and unambiguous intent to apply different and more exacting disciplines when it comes to export subsidies viz. a prohibition.

5.38 The underlying rationale for the distinction made is clear enough. The provisions regarding remedies pursuant to Articles 5 and 7 relate to subsidies that are accepted, in themselves, not to be illegal. But, while they are acceptable in themselves, other Members are, nevertheless, entitled to protection from their possible adverse effects. So the basis for actionability of such measures is their adverse effect on other Members.[61] In the case of a nullification or impairment claim, this adverse effect is defined as that which is "caused to the interests of the Member requesting consultations".[62]

5.39 This is, of course, quite different from the situation with export subsidies. We see in Article 4 of the *SCM Agreement* that the prohibited nature of export-contingent subsidies has justified more stringent (faster) dispute settlement procedures[63] and a clear requirement to withdraw them *without delay*.[64] More importantly, they are prohibited *per se*. Other Members are not obliged to make a case regarding any adverse effects to successfully challenge such measures. They are required simply to establish the existence of a measure that is, as a matter of principle, expressly prohibited. As an empirical matter they undoubtedly do have adverse effects. But that is not the legal basis upon which action may be taken to challenge them under the *SCM Agreement*.

> "3.1 Except as provided in the *Agreement on Agriculture*, the following subsidies, within the meaning of Article 1, shall be prohibited:
> (a) subsidies contingent, in law or in fact[4], whether solely or as one of several other conditions, upon export performance, including those illustrated in Annex I[5];"
> *(original footnote)*[4]This standard is met when the facts demonstrate that the granting of a subsidy, without having been made legally contingent upon export performance, is in fact tied to actual or anticipated exportation or export earnings. The mere fact that a subsidy is granted to enterprises which export shall not for that reason alone be considered to be an export subsidy within the meaning of this provision.

[61] Thus, the concept of "adverse effect" is indeed to be found in the *SCM Agreement*, but only in relation to provisions that contrast with the prohibition on export subsidies in Article 4. Article 7 makes it clear that when a member considers that the granting or maintaining of a subsidy results in, *inter alia*, nullification or impairment, the provisions on remedies pursuant to that Article will apply. It should be emphasized that a positive finding of nullification and impairment is, by definition, also a finding of "adverse effects" (this ultimately deriving from the use of i.e. in Article 5 which makes it plain that nullification and impairment is one category of the overarching concept of "adverse effects" under the *SCM Agreement*.). It is also to be noted that where a positive finding is made, the party concerned may either "remove the adverse effects of the subsidy" (Article 7.9) or "withdraw the subsidy" (*Ibid.*). In a situation where there is non-compliance by the party against whom a finding has been made, the complaining Member is entitled "to take countermeasures, commensurate with the degree and nature of the adverse effects determined to exist".

[62] *SCM Agreement*, Article 7.2.

[63] *SCM Agreement*, Article 4, including Article 4.12.

[64] *SCM Agreement*, Article 4.7.

5.40 This is, in turn, reflected consistently in the provisions addressing remedies. Pursuant to the relevant provisions in Articles 5 and 7, a Member found to be in breach - having granted a subsidy which was not prohibited but has produced demonstrated adverse effects on another Member - has the alternative of withdrawing the measure or removing these adverse effects.[65] What is important for present purposes is that, by contrast, there is, under Article 4 relating to prohibited export subsidies, no option for an infringing party to simply remove the adverse effects and retain the measure. A Member found to be in breach must withdraw the measure without delay. This contrasts with the remedies in Article 7 of the same Agreement that are available in relation to actionable subsidies. In all provisions relating to prohibited subsidies in Part II of the *SCM Agreement*, the remedies available are stronger and more rapid than those available in Part III of the *SCM Agreement* for actionable subsidies. This is clearly not just a random distinction. It reflects the legal status of a prohibition: if the measure is *per se* prohibited, irrespective of its effects, the only consistent remedy is to withdraw it.[66]

5.41 This reading of the text in its context confirms us in our view that, rather than there being any requirement to confine "appropriate countermeasures" to offsetting the effects of the measure on the relevant Member, there is a clear rationale exhibited that reinforces our textual interpretation that the Member concerned is entitled to take countermeasures that are tailored to neutralizing the offending measure *qua* measure as a wrongful act. The expression "appropriate countermeasures", in our view, would entitle the complaining Member to countermeasures which would at least counter the injurious effect of the persisting illegal measure on it. However, it does not *require* trade effects to be the effective standard by which the appropriateness of countermeasures should be ascertained. Nor can the relevant provisions be interpreted to *limit* the assessment to this standard. Members may take countermeasures that are not disproportionate in light of the gravity of the initial wrongful act and the objective of securing the withdrawal of a prohibited export subsidy, so as to restore the balance of rights and obligations upset by that wrongful act.

5.42 To conclude otherwise would effectively erode the fundamental distinction in the *SCM Agreement* between those provisions regarding purely "effects-oriented" remedies and those distinctly provided for pursuant to Article 4. Under the former provisions, it is clear that the premise is that the Member is to retain the entitlement to persist with certain subsidies, as they are not prohibited *per se*. The obligation of such a Member goes to attenuating their demonstrated trade

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[65] One might note, in passing, that there is no provision for compensation in a nullification and impairment case under these provisions of the *SCM agreement* as there is provided for under Article XXIII GATT 1994 and the Article 22 of the *DSU*, although that is not important for present purposes.

[66] Of course, as a logical matter, removal of the measure would certainly encompass a suppression of effects. One might underline here that is a matter of removal of *all* effects: the practical effect of the remedy provided for under Article 4 is clearly to eliminate a measure in its entirety-including its effects. That is clearly distinct from the practical effect of the Article 5 and 7 disciplines under which it is envisaged that a remedy can be applied which would ensure elimination of the effect on a complaining party but where the possibility of effects on other parties remains.

effect. Accordingly, the remedy to which an affected Member is entitled goes only as far as countering those effects. In such a situation, there is an effective "rebalancing", but only a rebalancing on the level of reciprocal actual trade effects. In such a case, the legal status of the original measure is not itself affected.

5.43 This contrasts with the situation *vis-à-vis* a prohibited export subsidy. To insist on a remedy limited to such effects would be precisely to entertain "rebalancing" at that level, which would neither specifically take into account the obligation to withdraw the original measure nor aim to restore the balance of rights and obligations that has been upset by the original wrongful action. It would be effectively to read away the fundamental distinction between the relevant provisions as well as to undermine the essential rationale of that distinction. In our view, footnotes 9 and 10, in their final part, require us specifically to account for, and give due force to, that distinction in our determination of whether countermeasures are "appropriate".

2. Article 4.10 and Article 22.4 of the DSU

5.44 While the aforementioned provisions appear to us to be the most direct and relevant context, we examine also whether there is anything which, taking Article 22.4 of the *DSU* into account, would in any way lead us to modify our interpretation. We do so in particular bearing in mind the fact that the United States considers that the *DSU* is relevant on the matter of the role of trade effects pursuant to Article 4.10.

5.45 We recall that Article 22.4 of the *DSU* provides as follows:

> "The level of the suspension of concessions or other obligations authorized by the DSB shall be equivalent to the level of the nullification or impairment."

5.46 The drafters have explicitly set a quantitative benchmark to the level of suspension of concessions or other obligations that might be authorized. This is similarly reflected in Article 22.7, which defines the arbitrators' mandate in such proceedings as follows:

> "The arbitrator acting pursuant to paragraph 6 … shall determine whether the level of such suspension is equivalent to the level of nullification or impairment…." (footnote omitted)

5.47 As we have already noted in our analysis of the text of Article 4.10 of the *SCM Agreement* above, there is, by contrast, no such indication of an explicit quantitative benchmark in that provision. It should be recalled here that Articles 4.10 and 4.11 of the *SCM Agreement* are "special or additional rules" under Appendix 2 of the *DSU*, and that in accordance with Article 1.2 of the *DSU*, it is possible for such rules or procedures to prevail over those of the *DSU*. There can be no presumption, therefore, that the drafters intended the standard under Article 4.10 to be necessarily coextensive with that under Article 22.4 so that the notion of "appropriate countermeasures" under Article 4.10 would limit such countermeasures to an amount "equivalent to the level of nullification or im-

pairment" suffered by the complaining Member. Rather, Articles 4.10 and 4.11 of the *SCM Agreement* use distinct language and that difference must be given meaning.

5.48 Indeed, reading the text of Article 4.10 in its context, one might reasonably observe that if the drafters had intended the provision to be construed in this way, they could certainly have made it clear. Indeed, relevant provisions both elsewhere in the *SCM Agreement* and in the *DSU* use distinct terms to convey precisely such a standard as described by the United States, in so many words. Yet the drafters chose terms for this provision in the *SCM Agreement* different from those found in Article 22.4 of the DSU. It would not be consistent with effective treaty interpretation to simply read away such differences in terminology.

5.49 We therefore find no basis in the language itself or in the context of Article 4.10 of the *SCM Agreement* to conclude that it can or should be read as amounting to a "trade effect-oriented" provision where explicitly alternative language is to be read away in order to conform it to a different wording to be found in Article 22.4 of the *DSU*.

5.50 We would simply add that, while we consider that the precise difference in language must be given proper meaning, this goes no further than that. Our interpretation of Article 4.10 of the *SCM Agreement* as embodying a different rule from Article 22.4 of the *DSU* does not make the *DSU* otherwise inapplicable or redundant.

C. Object and Purpose

5.51 Our understanding of the terms of Article 4.10, including footnote 9, based on an analysis of the relevant terms taken in their context is, in our view, also consistent with the object and purpose of the *SCM Agreement* in relation to Article 4.10, and of the *WTO Agreement*, as they relate to the dispute settlement remedies.

5.52 In our view, the object and purpose of the DSB's mandate to authorize countermeasures under Article 4.10 can first be drawn from the very language of Article 4.10. Article 4.10 requires that the DSB authorize the complaining Member to take appropriate countermeasures in case of non-compliance with the recommendation of the DSB. In other words, countermeasures are taken against non-compliance, and thus its authorization by the DSB is aimed at inducing or securing compliance with the DSB's recommendation. In this context, pursuant to Article 4.7, the DSB may *only* recommend that the subsidizing Member withdraw the subsidy without delay. We therefore consider that the objective of the *SCM Agreement* in relation to Article 4.10 in particular is to secure compliance with the DSB's recommendation to withdraw the subsidy without delay.

5.53 Article 4.10, by allowing for the imposition of countermeasures in case of non-compliance, provides a specific temporary instrument to WTO Members, in the context of disputes concerning prohibited subsidies. This instrument contributes to the ultimate achievement of the objectives of dispute settlement.

5.54 We note in this respect that Article 3.7 of the *DSU* also provides that "[i]n the absence of a mutually agreed solution, the first objective of the dispute settlement mechanism is usually to secure the withdrawal of the measures" found to be inconsistent with WTO obligations.

5.55 We also note that the *DSU* Article 3.2 provides that the WTO dispute settlement system (of which this type of arbitration is an integral part) is "a central element in providing security and predictability to the multilateral trading system", and "[t]he Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements."

5.56 In the case of prohibited subsidies, we are of the view that the fact that a panel determining that a subsidy found to be prohibited can *only* recommend its withdrawal without delay is significant and must be given some meaning when determining the appropriateness of proposed countermeasures. Furthermore, in our view, the legal means prescribed to ultimately restore the "balance of rights and obligations" of Members in relation to prohibited subsidies are specifically provided for under Article 4.7 of the *SCM Agreement*. In a situation where the balance of rights and obligations has been upset through the granting of a prohibited subsidy, panels may only recommend that the subsidizing Member withdraw the subsidy "without delay" in order to restore such balance.

5.57 In light of the above, we believe that countermeasures authorized under Article 4.10 contribute to the purpose of inducing compliance with the DSB's recommendations, consistently with restoring the balance of rights and obligations between the Members. In our view, the terms of Article 4.10 of the *SCM Agreement*, including footnote 9, confirm that, when assessing the scope of what may be deemed "appropriate" countermeasures, we should keep in mind the fact that the subsidy at issue has to be withdrawn and that a countermeasure should contribute to the ultimate objective of withdrawal of the prohibited subsidy without delay.

5.58 Finally, we note that the term "countermeasures" has acquired a meaning in general international law[67], which is reflected in the work of the International Law Commission (ILC) on State Responsibility. While the term "countermeasures" has a specific meaning in the *SCM Agreement* as regards their nature and application, we find that our interpretation of the relevant texts appear to be consistent with the object and purpose of countermeasures as reflected in the work of the ILC.

5.59 Article 49 of the text resulting from the ILC's work on State Responsibility (of which the General Assembly of the UN has taken note in a recent resolution) provides, in respect of the object and limits of countermeasures in international law, *inter alia*, that:

[67] See, e.g., the *Naulilaa* arbitral award (1928), UN Reports of International Arbitral Awards, Vol. II, p. 1028 and the *Air Services* arbitration, *op. cit.*

> "An injured State may only take countermeasures against a State which is responsible for an internationally wrongful act in order to induce that State to comply with its obligations in Part Two."[68]

5.60 We note that Article 49.1 of the ILC text does not, *per se*, determine the amount of countermeasures that can be authorized. Rather, it defines the only object and purpose for which countermeasures can legitimately be imposed: i.e., to induce the State which has committed an internationally wrongful act to comply with its obligations.[69] That is not incompatible, in our view, with the notion of countermeasures within the WTO dispute settlement system, where such measures are imposed as a temporary response to an absence of compliance. We note in this respect the observation by the arbitrator in the *EC - Bananas* case, in the context of Article 22.4 of the *DSU*, that "this *temporary* nature [of suspension of concessions or other obligations] indicates that it is the purpose of countermeasures to *induce compliance*".[70]

5.61 Thus, as we interpret Article 4.10 of the *SCM Agreement*, a Member is entitled to act with countermeasures that properly take into account the gravity of the breach and the nature of the upset in the balance of rights and obligations in question. This cannot be reduced to a requirement that constrains countermeasures to trade effects, for the reasons we have set out above.

5.62 At the same time, Article 4.10 of the *SCM Agreement* does not amount to a blank cheque. There is nothing in the text or in its context which suggests an entitlement to manifestly punitive measures. On the contrary, footnote 9 specifically guards us against such an unbounded interpretation by clarifying that the expression "appropriate" cannot be understood to allow "disproportionate" countermeasures. However, to read this indication as effectively reintroducing into that provision a quantitative limit equivalent to that found in other provisions of the *SCM Agreement* or Article 22.4 of the DSU would effectively read the specific language of Article 4.10 of the *SCM Agreement* out of the text. Countermeasures under Article 4.10 of the *SCM Agreement* are not even, strictly speaking, obliged to be "proportionate" but not to be " disproportionate". Not only is a Member entitled to take countermeasures that are tailored to offset the original wrongful act and the upset of the balancing of rights and obligations which that wrongful act entails, but in assessing the "appropriateness" of such countermeasures – in light of the gravity of the breach – , a margin of appreciation is to be granted, due to the severity of that breach.

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[68] Resolution of the General Assembly of the UN, A/RES/56/83, Responsibility of States for internationally wrongful Acts, adopted on 12 December 2001. We note that the ILC's work is based on relevant State practice as well as on judicial decisions and doctrinal writings, which constitute recognized sources of international law under Article 38 of the Statute of the International Court of Justice.

[69] See J. Crawford, *op. cit*., p. 286. This author notes in particular that "countermeasures are taken as a form of inducement, not punishment" (para. 7 of the Commentaries on Article 49).

[70] Decision by the Arbitrators, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Arbitration by the European Communities under Article 22.6 of the DSU* ("*EC – Bananas III (US) (Article 22.6 – EC)*"), WT/DS27/ARB, 9 April 1999, DSR 1999:II, 725, para. 6.3.

VI. ASSESSMENT OF THE COUNTERMEASURES PROPOSED BY THE EUROPEAN COMMUNITIES

6.1 As noted above, the parties agree that, in qualitative terms, the *type* of measure envisaged by the European Communities in this case is appropriate. Their disagreement is over whether the quantitative *amount* of the countermeasure is appropriate.

6.2 The European Communities has requested an authorization to suspend concessions in an amount of US$4,043 million. It has argued, as a general matter, that Article 4.10 of the *SCM Agreement* would allow for an amount of countermeasures such as to effectively induce compliance, and that it could have, on that basis, requested a higher amount of countermeasures. However, it has explained that the amount which it has actually requested in this instance is based on the amount expended by the United States in granting the subsidy.

6.3 We will therefore consider whether countermeasures in this amount can be considered "appropriate" within the meaning of Article 4.10, bearing in mind our analysis in the previous section.

6.4 We recall that we are required, in our analysis, to apply the terms of footnote 9 and, in that regard, need to take into account its second part. We therefore need to consider whether the European Communities proposed countermeasures are not disproportionate "in light of the fact that the subsidies dealt with under these provisions are prohibited".

6.5 In approaching this, we first wish to underline exactly what our responsibility is in making this determination. We are required, under Article 4.11 of the *SCM Agreement*, to ascertain whether the countermeasures proposed by the European Communities are "appropriate". In this assessment, we are guided in particular by the terms of footnote 10, which directs us to consider whether we are persuaded that the EC countermeasures are "disproportionate" in light of the fact that the subsidies at issue are prohibited. As we noted above, this is not exactly the same as being persuaded that they are "proportionate". In the absence of being effectively persuaded that they are disproportionate, we would conclude that the European Communities' proposed countermeasures are within the bounds of what they are entitled to apply pursuant to Article 4.10 of the *SCM Agreement.*

6.6 As noted above, in assessing whether the proposed countermeasures are "disproportionate" in light of the fact that the subsidies dealt with in this provision are prohibited, "our perspective on countermeasures is invested with and coloured by consideration of the nature and legal status of the particular underlying measure in respect of which the countermeasures are applied".[71] As we have outlined in paragraph 5.61 above, we consider that the European Communities is entitled to act with countermeasures that properly take into account the gravity of the breach and the nature of the upset in the balance of rights and obligations in question. In the case at hand, we consider what this entails.

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[71] *Supra*, para. 5.22.

6.7 As regards the matter of the balance of rights and obligations between Members that is being upset through the granting of the subsidy, the European Communities has had the "right" to expect that there will be no export subsidies applied to those goods covered by the *SCM Agreement*. The United States, for its part, has had a corresponding obligation to refrain from applying such export subsidies. The persistence by the United States with this breach of its obligations upsets the "balance of rights and obligations" that we have referred to in the previous section of this report.

6.8 As far as a trading partner is concerned, the matter does not become problematic, as a legal matter, contingent on any other factor such as, e.g. the actual effects of the measure itself. It is problematic in the form of an upset in the reciprocal balance of rights and obligations in and through the measure itself and, in this case, it is intrinsic to that measure as a wrongful act that the United States is incurring costs in granting and maintaining the export subsidy. Once such a measure is in operation, its real world effects cannot be separated from the inherent uncertainty that is created by the very existence of such an export subsidy. The measure is, by its very nature, inherently destabilizing. This is its essential character and it is reflected in the fact that the measure is *per se* prohibited. In this particular case, moreover, the subsidy at issue, the FSC/ETI scheme, is a measure which is extensive in its application and, indeed, is potentially available to a very wide range of goods for export. It is not at all like a product- or even a sector-specific measure with, e.g., a set rate or quantum of funds. It is a highly complex and comprehensive export subsidy being applied to a multiplicity of firms.

6.9 The FSC/ETI scheme is available systemically and very widely. If anything, this can only intensify the degree to which, in this case, the measure concerned creates systematic uncertainty and instability of expectations as to trading conditions, as opposed to security and stability of such conditions based on the understanding – grounded in an express obligation – that export subsidies are prohibited. We consider that this is a matter that is relevant to the issue of the "gravity" of the initial wrongful act. The European Communities cannot, of course, itself counter the export subsidy at its source, i.e. effect its cessation. But, as regards the balance of rights and obligations between Members, it is entitled to "redress" the upsetting of that balance *via* countermeasures.[72]

6.10 The quantitative element of the breach in this case is, in fact, that the United States has spent approximately US$4,000 million yearly in breach of its obligations.[73] To our mind, each dollar is, as it were, as much a breach of the obligations of the United States as any other. Certain dollars do not become any less so – or effectively "quarantined" from their legal status of breach of an obligation – by virtue of some other criteria (such as trade effects). To put it another

[72] Of course, the balance of rights and obligations between Members will only ultimately be properly redressed through full compliance with the DSB's recommendations, i.e., in this case, withdrawal of the unlawful subsidy. Countermeasures merely offer a *temporary* and imperfect redress to the persisting violation, which in no way reduces the need to comply or substitutes for such compliance.

[73] For a detailed analysis of the value of the subsidy, see Annex A below.

way, the United States' breach of obligation is not objectively dismissed because some of the products benefiting from the subsidy are, e.g., exported to another trading partner. It is an *erga omnes* obligation owed in is entirety to each and every Member. It cannot be considered to be "allocatable" across the Membership. Otherwise, the Member concerned would be only partially obliged in respect of each and every Member, which is manifestly inconsistent with an *erga omnes per se* obligation. Thus, the United States has breached its obligation to the European Communities in respect of all the money that it has expended, because such expenditure in breach – the expense incurred – is the very essence of the wrongful act.[74]

6.11 Thus, legally speaking, in terms of redressing the balance of rights and obligations, this is a significant consideration in our assessment of the European Communities' proposed countermeasures. In this respect, we recall our earlier conclusion that countermeasures under Article 4.10 may be tailored to the initial wrongful act they are to counter. In this instance, the European Communities has proposed to take countermeasures which would precisely tailor the response to the amount of this initial wrongful act. In light of our interpretation, in the previous section, of the terms of Article 4.10 of the *SCM Agreement*, we find such an approach, which aims to challenge the wrongful act itself – the breach of the obligation – to be permissible in principle. Indeed, it is in our view entirely compatible with the essence of the notion of countermeasures, in that it seeks to respond exactly to the violation, the persistence of which generates the entitlement to countermeasures.

6.12 We thus turn to a consideration of the proposed countermeasures in relation to the initial wrongful act which they are to counter, the prohibited subsidy.

A. The Proposed Countermeasures in Relation to the Prohibited Subsidy

6.13 In order to proceed with an analysis of the proposed countermeasures in relation to the wrongful act they are to counter, we must first define the elements of that wrongful act. It seems to us that the relevant factors that can be used when it comes to defining the prohibited subsidy itself cannot be artificially constructed. They should be discerned from and grounded in the *SCM Agreement* itself. We recall in this respect the guidance provided in particular by footnote 9, which directs us to take into consideration that the underlying subsidy is prohibited under Part II of the *SCM Agreement*.

6.14 We turn first to what we consider to be fundamental when it comes to characterizing the measure *qua* measure, namely the "financial contribution", given that it is a core element of the definition of a subsidy within the meaning of Article 1 of the *SCM Agreement*.

[74] One of the arbitrators wishes to stress that this and the following paragraph should not be read to mean that, without regard to the particular circumstances of individual cases, the total amount of the subsidy would be a universally and generally applicable standard at all times.

6.15 In this regard, we first note that the amount of the countermeasures proposed certainly exhibits a manifest relationship of proportionality, as we understand the term[75], in regard to the amount of the export subsidy granted. In this instance, the parties effectively do not fundamentally disagree on the actual value of the export subsidy in respect of which the United States has been found to be in persistent violation.[76] Their disagreement rests only on the issue of whether that amount of countermeasures is "appropriate" within the meaning of Article 4.10.

6.16 As noted above, the quantitative element of the breach in this case is, in fact, that the United States has spent approximately US$4,000 million in breach of its obligations.[77] The European Communities, for its part, is requesting an authorization to take countermeasures in an amount of US$4,043 million.

6.17 The values concerned are not disproportionate. In purely numerical terms, they are in fact in virtual correspondence.[78]

6.18 But this is not just a matter of merely arithmetic proportionality in the abstract. There is an underlying more "structural" element of proportionality that is exhibited in the countermeasures proposed which provides a legally relevant relationship between measure and countermeasure. Firstly, the granting of a subsidy involves a financial contribution, thus an expense incurred by the government. That is, *stricto sensu*, the "measure" at issue as the wrongful act of the responsible State party. In this instance, an amount of approximately US$4,000 million has been granted in the year 2000, in a manner found to be inconsistent with the *SCM Agreement*, by the US government to its exporters. That is the expense incurred by the United States Government in granting that measure, through the FSC/ETI scheme. As a wrongful act – as breach of an obligation owed to the European Communities in this case – this is the essential act of the government itself.

6.19 Thus, following our reasoning above, this is a central perspective from which to view the "appropriateness" of the countermeasures at issue. The United States has effectively incurred an expense which can be valued at around US$4,000 million for the year 2000, as an act of Government in breach of its obligations under the *SCM Agreement*. In the instant case the European Communities cannot, of course, directly thwart that expenditure at source. As we see it, the European Communities is proposing to respond by suspending a numerically equivalent obligation which it owes to the United States. Absent those countermeasures, the United States would enjoy those rights, just as, absent the expenditure by the United States, the European Communities would enjoy its rights. It appears to us that this is a proper manner from which to judge the congruence of the countermeasure to the measure at issue, i.e. to view it under its legal category: on the one hand an expense to government of a certain value constituting

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[75] See *supra* para. 5.18.
[76] For a detailed analysis of calculations of the amount of the subsidy, see Annex A below.
[77] For a detailed analysis of the value of the subsidy, see Annex A below.
[78] See WT/DS46/ARB, para. 3.60.

an upsetting of the balance of rights and obligations; and therefore, on the other hand, a congruent duty imposed by a responding government as a mirror withdrawal of an obligation.

6.20 We have evidently assigned fundamental importance to the role of the financial contribution as the act in respect of which countermeasures should be evaluated. That reflects the fact that it is the element reflecting most accurately the act of the Member itself, over which it exerts direct control.[79]

6.21 Of course, the second element that is central to the subsidy as defined by Article 1 of the *SCM Agreement* itself is the benefit to the recipient. In this case, there is manifestly a benefit conveyed through the FSC/ETI scheme. It is conveyed to US firms. At the broadest level, the EC countermeasures would be viewed as aiming to deprive such firms of an advantage they would otherwise receive in relation to access to the EC market. There is no doubt that the character of the EC response, in addition to being an act of response to a quantifiable breach of an obligation with a congruent response, also has the consequence of effecting that *via* US firms. Yet it is also a fact that US firms are benefiting from the prohibited subsidy. To that extent, a certain basic proportionality is respected. In this case, the European Communities' powers are limited to its own jurisdiction. One way of countering an absolute benefit to firms is to impose an equivalent absolute expense. Certainly, the overall effects will vary as will the impact on firms. There will not be pure equivalence in terms of economic impact. But within the realistic constraints that states operate in, and in dealing with an all-pervasive regime such as the FSC/ETI scheme, the principle being effectively followed here is the imposition on firms of the Member concerned of expenses at least equivalent to those initially incurred by the treasury of the Member concerned in granting benefits to its firms. In that sense, there is a certain correlation between the benefits initially conferred to US firms and the European Communities' proposed response.

6.22 It is certainly true that the European Communities' proposed countermeasures would not in a literal sense amount to (nor are they claimed to be) an exact counter to the benefits to recipients of the FSC/ETI subsidy. This does not, in our view, represent a fundamental problem in this case. It is almost inevitable that it will, in many situations, be impracticable to devise a countermeasure that would exactly counter the benefits conferred, nor is there, in our view, a requirement to do so, precisely because the terms justifying countermeasures are, for the reasons we have given, entitled to be viewed essentially from the perspective of countering the legal breach as a wrongful act. Be that as it may, in the case of a programme such as this, which applies to firms across a considerable range of industries and products, it is clearly impossible for a foreign government to counter precisely the specific benefits to specific firms. The task of calculation alone would be near impossible, let alone tailoring responses to particular firms.

[79] This is not necessarily the case, e.g., for the effects of the measure, it being understood, of course, that as regards responsibility, this extends also to the consequences as well as the act.

6.23 In this instance, the European Communities has based its proposed amount of countermeasures on the face value of the subsidy, rather than directly on the benefits conferred by it.[80] The United States has not sought to object to the level of countermeasures on these grounds. Taking all of this into account, we, for our part, have certainly found no reason to consider that, to the extent that this aspect is relevant in the first place, it provides any reason to depart from our judgement that the entitlement to the level of countermeasures stemming from the wrongful act as measured by the expense to government is not disproportionate.

6.24 Thus, it is our view, in light of these considerations, that the countermeasures proposed are not disproportionate to the initial wrongful act to which they are intended to respond.

6.25 Our analysis above and the fact that we have concluded that the countermeasures proposed in this case are not disproportionate to the initial wrongful act – the maintenance by the United States of an unlawful export subsidy in violation of its obligations under Article 3 of the *SCM Agreement* – , would in themselves, in our view, be sufficient to allow us to consider that, in the circumstances of this case, the proposed amount of countermeasures would be "appropriate" within the meaning of Article 4.10 of the *SCM Agreement*. We recall in this respect our conclusion in Section V above regarding the entitlement to take countermeasures tailored to restore the balance of rights and obligations upset by the original wrongful act, and taking into account its gravity. In this instance, this is the approach followed by the European Communities, and we find it to be consistent with the terms of Article 4.10 of the *SCM Agreement.* [81]

6.26 This is an appropriate point at which to underline that there is one matter that is particular to the circumstances of this case and is material to this conclusion, yet has not – up to this point – been expressly dealt with.

6.27 In the circumstances of this case, the European Communities is the sole complainant seeking to take countermeasures in relation to this particular violating measure. That is also, in our view, a relevant consideration in our analysis.

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[80] The European Communities has referred, in the course of the proceedings, to the notion of benefits to the United States of the scheme in the context of proposing alternative methodological approaches to calculate an amount of "appropriate countermeasures" and suggests that "since the benefits the US derives from the FSC/ETI scheme are higher than the value of the subsidy, the imposition of countermeasures equivalent to the value of the subsidy can be seen to be a modest and conservative estimate of what is required to induce compliance" (First submission, para. 69). It has also argued that it had proposed "countermeasures based on the - and proportionate to – the benefit provided by the FSC-ETI scheme to United States exporters" (Second submission para. 55). However, the European Communities has not sought to directly quantify these benefits to demonstrate an exact correspondence between these benefits and the amount it is suggesting in this instance. Rather, it argues that these benefits would be *higher* than the amount of the subsidy.

[81] We would only observe that our judgement is, in any case, simply that the countermeasures sought by the European Communities are not disproportionate, based on our reasoning and the facts of this case. In determining that, we have not necessarily defined this quantum of countermeasures as being *the* definitive limit. We have not made – and do not make – any judgement on that matter. The only question before us is whether the amount sought by the European Communities is not disproportionate.

Had there been multiple complainants each seeking to take countermeasures in an amount equal to the value of the subsidy, this would certainly have been a consideration to take into account in evaluating whether such countermeasures might be considered to be not "appropriate" in the circumstances. That is not, however, the situation before us.

6.28 The reasoning we have followed above could be construed – in a purely abstract manner – to be as inherently applicable to any other Member as to the complainant in this case viz. the European Communities.[82] We would simply underline, in this regard, that in this case, we were not presented with a multiple complaint but a complaint by one Member. Thus we have not been obliged to consider whether or how the entitlement to countermeasures based on our reasoning above should be allocated across more than one complainant. Thus to the extent that there would be an issue of allocation, as it were, it need not – and did not – enter into consideration as an element to otherwise "discount" the European Communities' entitlement to countermeasures in this particular case.

6.29 Understandably, it would be our expectation that this determination will have the practical effect of facilitating prompt compliance by the United States. On any hypothesis that there would be a future complainant, we can only observe that this would give rise inevitably to a different situation for assessment. To the extent that the basis sought for countermeasures was purely and simply that of countering the initial measure (as opposed to, e.g., the trade effects on the Member concerned) it is conceivable that the allocation issue would arise (although due regard should be given to the point made in footnote 84 above). We take note, on this point, of the statement by the European Communities:

> "…it may well be that the European Communities would be happy to share the task of applying countermeasures against the United States with another member and voluntarily agree to remove some of its countermeasures so as to provide more scope for another WTO Member to be authorized to do the same. This will be another fact that future arbitrators could take into consideration.".[83]

6.30 It must be stressed, however, that there is no mechanical automaticity to this. The essence of such assessments is that it is a matter of judging what is appropriate in the case at hand. There could well be other factors to take into account in their own right, e.g., if for instance the matter of bilateral trade effects were essentially at issue.

6.31 At this point of our analysis, we therefore have, in our view, elements sufficient to allow us to find that the countermeasures proposed could be considered "appropriate" within the meaning of Article 4.10, on the basis of their relation to the initial violating measure.

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[82] One of the arbitrators wishes to stress that under different circumstances in a particular case, this consideration alone may not automatically lead to the conclusion that the countermeasures are "appropriate" within the meaning of Article 4.10 of the *SCM Agreement*.

[83] EC response to question 42 from the Arbitrator, para. 116.

6.32 In doing so, we are conscious that we have not precisely considered the contention that the matter should be determined by means of reference to the adverse trade effects of the subsidy on the European Communities. We recall, moreover, that the United States has argued that the basis for assessing the "appropriateness" of countermeasures should precisely be these adverse trade effects (or "trade impact"). We address this issue further below.

B. The Trade Effects of the Subsidy on the European Communities

6.33 As discussed in the previous section, we have not interpreted Article 4.10 to preclude a Member from taking countermeasures that are tailored to counter the adverse effects it has suffered as a result of the illegal measure. We therefore do not rule out *a priori* that trade effects of the measure on the affected Member can enter into consideration in a particular case, as a relevant factor, in determining the "appropriate" amount of countermeasures within the meaning of Article 4.10 of the *SCM Agreement*. Indeed, as we have previously noted, the expression "appropriate countermeasures", in our view, would entitle the complaining Member to countermeasures which would at least counter the injurious effect of the persisting illegal measure on it.[84]

6.34 However, we have also determined that Article 4.10 of the *SCM Agreement* does not *require* trade effects to be the effective standard by which the appropriateness of countermeasures should be ascertained. Nor can the relevant provisions be interpreted to *limit* the assessment to this standard.

6.35 Bearing in mind, however, our view that trade effects are not *a priori* to be ruled out as relevant in a particular case, we see merit in examining whether, *even if* one addressed the matter of trade effects in this case, there would be any reason to reach a different conclusion. In this case, in fact, we find no reason to reach a different conclusion after examining the arguments presented by the United States in respect of the trade effects of the FSC/ETI scheme on the European Communities.

6.36 We recall in that regard that the United States presented essentially two lines of argument in relation to the assessment of the trade effects of the FSC/ETI scheme on the European Communities. Firstly, the United States principally suggested that in this case, the face value of the subsidy should be taken as a "proxy" for the trade impact of the measure and that this sum then should be apportioned on a percentage basis to the EC share of world trade as a proxy for

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[84] See para. 5.41 above. For instance, it is conceivable that some adverse effects on a Member could be manifestly greater than the amount of the subsidy that is expended. In such cases, the Agreement can hardly be construed to preclude a Member from taking countermeasures to deal with that situation precisely on the basis of adverse trade effects or that Member – especially when that would otherwise mean that they had recourse thereby only to countermeasures that would be *less* effective than those available to a Member under Article 5 of the *SCM Agreement* (or for that matter under the countervailing provisions of the Agreement, where the other conditions for application would also be present). That is not, of course, the situation we are dealing with here. The European Communities is not seeking entitlement to countermeasures greater than the face value of the subsidy.

the trade effect of the subsidy on the European Communities. Secondly, in the event that we would nonetheless decide to examine the economic data pertaining to the trade effects of the measure, the United States has presented a range of possible estimates of the trade impact of this measure using methodologies other than the "proxy" approach. The United States nonetheless argued in the first instance that these should not be used to estimate the trade effects of the measure in this case, by reason of their unreliability and the excessively broad range of the results of calculations. We will consider these two arguments in turn.

6.37 Turning first to the proposed "proxy" approach, under that approach, if the US$4,125 million[85] figure suggested by the United States is used as the starting-point, representing the value of the subsidy, and retaining 26.8 per cent of that figure as the European Communities' share of the global trade effects of the subsidy, as suggested by the United States[86], the appropriate amount of countermeasures would be in a range of approximately US$1,110 million.[87]

6.38 We have stated that we see nothing in the text that directs a trade effects test and that it cannot be construed to be limited to this. There is furthermore nothing in the text which would expressly direct *how* trade effects are to be estimated in a case relating to countermeasures in response to export subsidies. The "proxy" approach proposed by the United States, however, does not appear to have any sound support in the provisions at issue or in the facts of the case.

6.39 To begin with, the proxy approach proposed by the United States is based on no particular economic rationale. It simply presumes a one to one correspondence of dollar of subsidy to dollar of trade impact. This is manifestly arbitrary. Indeed one could even argue that it is a fundamentally self-contradictory concept: if a dollar of subsidy can always and everywhere only lead to a dollar of trade effect, this is manifestly to determine in advance what the trade effect is. Yet the very concept of trade *effect* is precisely to assess what has occurred in the real world as the distinct *effect* of that dollar expended. One is, it seems to us, actually precluded from determining such effect if it is already determined that it *is* the actual expenditure. This renders the whole concept of "effect" redundant or meaningless. Under this approach, no such assessment would ever be required: the conclusion is predetermined once the amount of government expenditure is known.

6.40 Indeed, the approach suggested by the United States is hardly reconcilable with a coherent reading of the Agreement. Where trade effects are specifically dealt with under the *SCM Agreement*, in provisions other than Article 4, the criteria for assessment are not at all arbitrary or artificial in this way. This is evident in those provisions of the *SCM Agreement* where a demonstration of trade effects is relevant, and the provisions relating to such assessments (e.g. in relation to injury to the domestic industry or serious prejudice – Article 6 on actionable sub-

[85] Amount of the subsidy for the year 2000 as calculated by the United States, including relevant adjustments.
[86] See US First submission, para. 69.
[87] See US Second Submission, para. 4.

sidies – and application of countervailing duties – Part V –). In such cases, the relevant concepts (such as price undercutting, price depression and suppression, etc) are manifestly aimed at objectively determining certain effects. There is not the slightest suggestion in these provisions that this can be ascertained by means of an arbitrary "proxy" such as that proposed by the United States in this case.

6.41 Indeed, were it a matter of merely determining the expenditure, this would completely obviate the need for any such precise concepts to be applied when ascertaining the effects. Bearing that in mind, it would scarcely be coherent to consider that, when it comes to the manifestly more stringent requirements relating to export subsidies, there should be any presumption of an implicit methodology which is *less* likely to bear an objective relationship to the facts of the case.

6.42 Nor has the United States convinced us of why this particular predetermination would be any more inherently plausible than any other. The arbitrator in the *Brazil – Aircraft* case suggests in fact that, if anything, a more likely presumption would be that the relationship of expenditure to effect is to be multiplied rather than static.[88] We take no position on that point in this case. We note, however, that the United States approach in fact amounts to assigning implicit values to the economic variables which the United States otherwise argues are too uncertain to devise, in the context of economic modelling. [89] It is not at all clear to us why these implicit values would be inherently more plausible than any of those that can be assigned in the context of economic modelling, which at least represents analytical estimates rather than an unreasoned assumption. This underlines, in our view, the inherently arbitrary nature of the US proposed approach.

6.43 We turn now to the alternative methodologies presented by the parties for estimating the trade effects of the measure on the European Communities. These methodologies are similar in nature. Nevertheless, different estimations were obtained, both below and above the amount of countermeasures proposed by the European Communities, due to differing assumptions about the values to be assigned to the relevant parameters in the calculations.[90]

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[88] See the Decision of the Arbitrator, *Brazil – Aircraft (Article 22.6 – Brazil)* WT/DS46/ARB, para. 3.54 ("given that export subsidies usually operate with a multiplying effect (a given amount allows a company to make a number of sales, thus gaining a foothold in a given market with the possibility to expand and gain market shares), we are of the view that a calculation based on the level of nullification or impairment would, as suggested by the calculation of Canada based on the harm caused to its industry, produce higher figures than one based exclusively on the amount of the subsidy").

[89] Assuming full pass through of the subsidy, a value of –1.65 for the price elasticity of the aggregate US export demand curve will result in the value of the trade effect equalling the value of the subsidy (see exhibit US-17).

[90] The quantitative estimate of the impact of an export subsidy on trade depends upon the relationship between the mode of delivery of the subsidy and various economic parameters. In this case the subsidy is allocated on the basis of export income. Eligible export income is used to reduce the overall tax burden of a firm. The overall impact depends upon four factors: the value of the subsidy; the reduction in the price of the good benefiting from the subsidy; the export response of producers benefiting from the subsidy; and the price elasticity of demand for US exports.

6.44 The European Communities suggested that the Arbitrators should consider the methodology used by the US Treasury Department in 1997 in its report to the United States Congress on the trade impact of the FSC Scheme.[91] The United States objected to this methodology on the following grounds: (1) the price elasticity of export demand is estimated to be too high; (2) the price elasticities of export supply are also estimated to be too high and (3) the pass through of the subsidy to prices is overstated.

6.45 The methodology of the US Treasury is more sophisticated than the proposal by the United States to simply use the value of the subsidy as a proxy. In recognition of this fact, the United States made two further proposals for our consideration. The first was an alternative methodology that the United States claimed was more suitable for an estimation of trade effects on the European Communities.[92] The second was to resort to a different set of parameters for the US Treasury model.[93]

6.46 The United States itself subsequently questioned its own alternative proposed methodology due to the fact that it contained incomplete data.[94] Hence, the options before us for evaluating the trade effects would be limited to the US

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[91] EC First Submission, para. 62. For example, using the US Treasury model as proposed by the European Communities and the estimated subsidy values of both the European Communities and the United States for industrial products as set out in Annex A, the range of the estimated trade effects can be estimated between $3,253 million and $4,294 million.

[92] The United States proposed the Armington model, which assigns elasticities to products based on their country of origin. Therefore, the model, according to the United States, has the advantage of isolating the EC specific trade impact of the subsidy (US Second submission, para 122).

[93] The United States took the position that "imputed" elasticity estimates from estimated substitution elasticities are more robust than the estimates provided by the European Communities. The calculations provided by the United States were justified on the grounds that they were more recent and could be calculated at a disaggregate level.

[94] While we acknowledge the general contribution that the Armington approach to modelling differentiated products models of trade can make, the United States did not, in the case before us, satisfactorily explain why we would be obliged to find the particular approach suggested by it to be more reasonable than that generated by the proposed EC approach. On the contrary, the United States' approach had demonstrable flaws as it sought to apply it in this case. We note that, in this case, the estimation of the trade impact of the subsidy generated by the United States using the Armington model does not *in fact* employ EC-specific cross price elasticities nor does it use specific elasticities of US export demand (US Second submission, footnote 97). Furthermore, in response to a question from the Arbitrator relating to the use of the alternative methodology, the United States underlined the lack of reliable basis to use this approach. Its response was that "Although the United States *could not find the information necessary* to distinguish between the EC and the rest of the world, the Armington model runs, nevertheless, at least furnish the Arbitrator with an independent assessment of the trade impact of the US subsidy on the EC based on a different set of parameter estimates" (emphasis added) (Para. 30, US Response to Additional Questions by the Arbitrator). The United States also stated that it lacks information, which if available would have allowed them to calculate the trade effects with more precision. "With this additional information, the Armington model *may have possibly* provided better guidance than the Treasury model, because it *would have* incorporated more information (i.e. the degree of substitutability between US exports and EC goods) and *would have* avoided the need to determine how to calculate the EC share" (US Answers to Additional Questions from the Arbitrator, para. 30) (emphasis added). Thus, at most, the United States hypothesizes that there *could* be a more reliable and robust approach. It however has been itself unable to give us a reliable alternative basis to make a judgement that would definitively prevail over any based on the Treasury model.

Treasury model, as proposed by the European Communities, and amendments to this model as suggested by the United States.

6.47 To the extent that we might consider it appropriate in this case to assess the trade effects of the measure on the European Communities, our task would not be to judge, with absolute precision, which is the single correct model or which are the correct parameters, but to examine the results of these models to see if they provide an insight into the range of trade effects caused by the FSC/ETI scheme carrying sufficient weight to materially affect our judgement on whether the countermeasures proposed are disproportionate.

6.48 In this regard, the very fact that the US Treasury report was submitted to Congress is, in our view, of considerable weight. That report did suggest that it may have somewhat overstated the results. Indeed, it may not be absolutely exact. Nonetheless, the US Treasury obviously made the judgement that, in the context of presenting the effects of the FSC scheme to US Congress (the authors, we note, of the legislation concerned), this report, including the modelling assumptions on which it is based, had sufficient credibility to represent a reliable reflection of the impact of the scheme when it came to the matter of informing the US Congress on its operation and effects. That was presumably not undertaken lightly and, at the very least, it was presumably considered to be not manifestly misleading. That perspective, it seems to us, is akin to the kind of judgement that is to be properly applied when an assessment is to be made of whether something is disproportionate. One is not expecting, or looking for, mathematical exactitude, but whether or not (to a reasonable eye) something is out of proportion. In these circumstances, it is not a matter of whether or not the US Treasury study might not be certain as to its conclusions. It is a matter of whether there is, available to us, a more fundamental reason to reliably reject the Treasury study. In this sense, we see that there is, in practical terms, a burden on the United States in this case, in our view, to successfully challenge the model that its own Treasury Department had developed to evaluate the scheme before the US Congress.

6.49 Of course, we have to take due note of the reservations now expressed by the United States about its own study. One can always debate all estimates, but the real issue is not whether some alternatives are possible, but whether there is something reliable that would oblige us to see the broad parameters of that study's outcome as being unreasonable. In that context, we are mindful that the task of evaluating the trade effects of the scheme cannot be accomplished with mathematical precision. Nevertheless, economic science does allow us to consider a range of possible trade effects with a certain degree of confidence.

6.50 In our view, however, the United States has, in any event, failed to demonstrate that alternative assumptions leading to lower estimates would be more plausible than those used in the US Treasury study and relied on by the European Communities in this case. First, the United States has argued that different elas-

ticities of export demand should be used[95] and that the pass through rates should be lower. The basis upon which these should be preferred to those which their own Administration actually applied in the study were not, however, persuasively explained. The United States submitted re-estimated parameters for the Treasury model using more recent data, but these were imputed from estimates of US *imports*, instead of US exports, which are our concern in this case.[96]

6.51 Secondly, with respect to the issue of pass through, the economic reasoning provided by the United States for adjusting the rate to a lower figure was no more inherently compelling than that which was used for its own study (US Treasury). The EC estimate of the trade impact assumes a full pass through effect of the subsidy onto the price of US products.[97] The United States argues that

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[95] The United States submitted that the range of estimates of the point price elasticity of the aggregate US export demand is between –1.13 and –2.53, whereas the simple average of the estimates of the price elasticities used in the US Treasury study is –3.0. The difference between these estimates, the United states argues, is one reason why the US Treasury model would lead to overestimates of the actual trade impact. The United States, however, did not submit evidence to support the use of these alternative aggregate estimates. More to the point, it did not deal with the fact that four sectors alone in the US Treasury study account for 66 per cent of the total FSC exempt income and pursuant to the US Treasury study, these have estimates at the sectoral level of –1.7, -3.8, -4.1, -3.8 respectively. Given the weight of these sectors in the overall trade effect of the subsidy, the value of the price elasticity of these sectors should be the focus of analysis. This is consistent with the view that simple aggregate elasticities would be more inherently likely to underestimate elasticities for the purposes of an analysis of the FSC/ETI scheme**.**

[96] The United States took the position that 'imputed' elasticity estimates from estimated substitution elasticities are more robust than the estimates provided by the European Communities. The calculations provided by the United States were justified on the grounds that they were more recent and could be calculated at a disaggregate level. The process by which the elasticities are imputed, however, was never clearly specified by the United States. The original estimates from which the imputed estimates are done were sourced from two academic studies (Gallaway et al. (2001); Shiells and Reinert (1993)). Both studies relate to the United States. We note that these estimates are derived from demand functions for US consumers. Therefore, these estimates relate to the degree of substitution between imported products into the United States and domestically produced products for US consumers. The United States did not establish why measures of elasticities of imports into the United States could be used as estimates of elasticities of exports. In our view, the United States failed to effectively respond to three reasons identified by the EC as a cause for concern about the procedure used by the United States:

> "The Armington elasticity estimates used by the United States are for substitution between imports into the United States and domestically produced US products. These are not the same as substitution elasticities between US exports and domestically produced products in foreign countries. First, the foreign countries will have different policies towards imports. Second, foreign consumers will have tastes and preferences that are different from US consumers. Third, it is likely that the set of trade goods in an industry is not the same as the set of domestically produced goods offered for local sale. Therefore, the set of US exported goods is not the same as the set of domestically produced goods offered for sale in the United States, and the set of goods imported into the United states is not the same as the set of foreign produced goods offered for sale in foreign countries." (EC comments on US Responses to Additional Questions from the Arbitrator, para 5).

[97] The issue of pass through relates to the degree to which a company uses a subsidy it receives to lower the price of the product that it exports. At one extreme the company may choose to apply the full amount of the subsidy to the price of its products, thereby lowering its price. At the other, it may choose not to lower the price of the product. The concept of pass through is further explained in paragraph 89 of US Answers to Questions from the Arbitrator:

such an assumption is not necessarily supported by the empirical facts and hence would bias the results upward.[98] It argues that two factors could act in concert to result in a less than 100 per cent pass through of the subsidy onto the price of world products.[99] First, if firms are operating on the positively sloped segment of their average cost curve, an increase in production could result in an increase in costs that may not be compensated by the subsidy.[100] Second, if firms in an industry have market power, they would not necessarily have an incentive to lower prices.[101]

6.52 However, empirical evidence shows that the pass through effect of a similar programme was 75 per cent in the 1970s.[102] Today, more than 25 years later it is not unreasonable to suggest that the world market is now more competitive, thereby increasing the pass through effect.[103] We certainly found no plausible reason to give credence to a view that it was reasonable to assume that pass through was in the lower rather than the higher end. Again, we cannot say with mathematical precision the exact figure for the pass through, but we can put a lower and upper limit to the range of possible effects.[104]

6.53 We recognise the existence of a genuine debate on the values of parameters in economic models. Furthermore, we recognise that the parameters employed in the US Treasury model are in the upper range of estimates. Nonetheless, they fall within an acceptable range, underlined in particular by the fact that the US Treasury itself used them to report to Congress. The United States has suggested various possibilities based on different assumptions and variables,

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> "An exporter presented with the FSC/ETI tax savings can do one of two things. One the one hand, it can lower the price of its exports by the amount of the tax savings. If it does this, its net profit per transaction will remain the same, although its overall profits may increase because – other factors being held constant – the volume of its exports will increase. This is the "full pass through" scenario.

Alternatively, the exporter can leave the price of its exports unchanged. If it does this, the volume of its exports will remain unchanged – other factors being held constant – but its net profit per transaction will increase by the amount of the tax savings. This is the "no pass-through scenario".

[98] The United States asserts that "pass-through is so critical that if it were determined that firms completely absorbed the tax subsidy rather than reflecting it in export prices, the subsidy would have no effect on US exports and the quantification of the trade impact would be zero." (US Oral Statement, para. 56).

[99] US Answers to Questions from the Arbitrator, para 94.

[100] US Answers to Questions from the Arbitrator, paras 95-97.

[101] US Answers to Questions from the Arbitrator, para 98-99.

[102] EC Answers to Questions from the Arbitrator, para 134.

[103] The market access landscape for industrial products as a result of the Uruguay Round was a reduction in average tariffs of 40 per cent from 6.3 per cent to 3.8 per cent. Furthermore, the proportion of products entering duty-free in the developed country markets would increase from 20 to 44 per cent, while the proportion of products facing tariffs above 15 per cent declined from 7 to 5 per cent (GATT Secretariat (1994), *The Results of the Uruguay Round of Multilateral Trade Negotiations*, Geneva, GATT). In addition, the United States did not successfully rebut arguments presented by the European Communities as to the increasing global competition in markets for industrial goods. In particular, the European Communities cited relevant economic literature suggesting rising global competition to US firms (see EC Answer to Question 47 by the Arbitrator).

[104] An upper limit would be 100 per cent, whereas a lower limit could be the estimate for the similar programme in the 1970s of 75 per cent (see EC Answers to Questions from the Arbitrator, para. 134).

which could yield an estimate of the trade effects of the FSC/ETI scheme on the European Communities that is lower than the amount of countermeasures the European Communities proposes to take. On balance, however, we would consider them not to be persuasive, and certainly not inherently more persuasive than the figures proposed by the European Communities.

6.54 Even if one were to assume equal plausibility of the various variables and outcomes, an examination of them would at most lead to the conclusion that the trade effects of the measure on the European Communities were not *proven* to be either higher or lower than the proposed amount of countermeasures. That would evidently not be sufficient to lead us to conclude that the countermeasures proposed are disproportionate. Absence of proof on a point that is objected is not enough to undermine a judgement that is otherwise substantiated. In these circumstances, one would certainly not be entitled to conclude that the benefit of the doubt in the face of competing figures must always go to the Member challenging the proposed amount of countermeasures, in this instance the United States. Such an assessment – based on the trade effects of the measure on the European Communities as suggested by the United States – would actually lead, in this instance, to the conclusion that the proposed countermeasures could not be considered to be "disproportionate" to these effects.

6.55 Not that, in this case, it is the situation we would in fact find ourselves in. It appears to us that, on balance, the European Communities figures are at least as plausible as the low estimates put forward by the United States. The wording of footnote 9 makes it clear that we must make our assessment in light of the fact that the subsidy concerned is prohibited. Here we recall that the last part of footnote 9 suggests that this is an aggravating rather than mitigating consideration, and that in assessing the "appropriateness" of such countermeasures – in light of the gravity of the breach – a margin of appreciation is to be granted.[105] That can only reasonably be construed to entail that, in a situation where there is no more inherently plausible reason to opt for a lower rather than higher number, it would be inconsistent with the direction of the footnote to automatically default to the lower option. That would be effectively to go in the opposite direction from that laid down in footnote 9.

6.56 Moreover, to the extent that there is an even chance of error, any presumption for a lower number would systematically bias the risk in favour of creating a disincentive to conforming with withdrawal of the subsidy. That would be entirely contrary to the direction of footnote 9. Thus, the objective of the requirement must be to ensure that the incentive is more likely to ensure respect for the objective of withdrawal of a prohibited export subsidy as the sole way to restore the preexisting balance of rights and obligations.[106] For these additional reasons, we are all the more comfortable in our judgement in this case.

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[105] See paragraph 5.62 above.

[106] As a practical application, one could relate this to pass through. Even if one took the view that there was no decisive evidence for 100 per cent pass through, in a situation where plausibility was at stake, say, as between 75, 90 or 100 per cent, it would need to be borne in mind that the prohibition of export subsidies is not inherently conditioned on whether or not the export subsidy is entirely

6.57 Consequently, even if consideration is given to the adverse trade effects of the measure on the European Communities in this case, we would not have any reliable basis to conclude that, based on the trade effects of the measure on the European Communities (and taking account of the manner in which these are to be judged), the amount of countermeasures proposed by the European Communities would be out of proportion with these effects.[107]

6.58 Moreover, we recall that beyond the reasonable margin of appreciation that might exist in assessing the actual trade effects of the measure on the European Communities, Article 4.10 would in any event not only allow for, but indeed directs that, in our assessment, we provide for a consideration of the prohibited nature of the subsidy. As we have noted above, this entails, in our view, a consideration of the gravity of the initial breach, and of the fact that, in itself, the maintenance of the measure in violation of the United States' obligations under the *SCM Agreement* upsets the balance of rights and obligations between Members, and more specifically, between the United States and the European Communities. As we have seen, in this case, the prohibited measure is a scheme that is available systemically and on a very wide scale. It thus has the potential of creating instability in the trading conditions across a broad range of sectors. This is in itself an appropriate consideration in an assessment of whether the proposed countermeasures are relevant, even if an assessment were to be made on the basis of actual trade effects of the measure on the complaining Member.

6.59 Such an element can only be conceived, in quantitative terms, as ensuring an entitlement to a Member taking countermeasures that it is at a level somewhat higher than what a very precisely constructed estimate of trade effects (should such a calculation be feasible) would lead to. For the reasons outlined elsewhere above, to conclude otherwise would effectively reduce the terms of Article 4.10 and footnote 9 thereto to a pure "trade effects" standard, thereby undermining the whole object and purpose of ensuring that such a distinction be made, respected and enforced effectively in the *SCM Agreement*.

6.60 We therefore do not find any reason to reach a different conclusion from that already reached on the basis of the European Communities proposed approach, having now also examined the proposed level of countermeasures from the perspective of the measure's trade effects on the European Communities.

C. Concluding Remarks

6.61 Finally, although we are satisfied that the countermeasures are not disproportionate, we wish to address any possible residual concern that the European

passed through into prices. A dollar of export subsidy is a dollar of export subsidy. That being so, in circumstances where there is no decisive element to opt for one particular alternative, the direction in footnote 9 comes into play, to the effect that there is no presumption that a lower option should prevail.

[107] We recall that the United States itself considered that they did not provide a reliable tool, in this case, to estimate these effects, in light of the number of uncertain variables that would need to be accounted for.

Communities cannot be entitled to *de facto* act *erga omnes* on behalf of the WTO membership, as it were.

6.62 That is not how we see the matter before us. First, to the extent that there was any suggestion that entitlement to countermeasures to the level we have determined was reflecting "trade effects" on parties other than the European Communities, this would have no foundation. To repeat, we consider that our finding is warranted, based on the equivalence in the breach of the original rights and obligations taking into account the gravity of the breach. Where we addressed the issue of trade effects, we have in any case done so only in respect of those relating to the European Communities.

6.63 Second, the conclusion we have reached is not in any sense, a matter of "entitling" the European Communities to act "on behalf" of Members other than itself. As we have underlined in our reasoning above, it is proposing countermeasures relating to the redress of rights and obligations as between those two Members. In the facts of this case, we are dealing with the precise situation at hand. That precise situation at hand is that it is the European Communities that has sought the entitlement to take countermeasures. In doing so, the fact that this is a matter between two Members is a relevant factor which we have taken into account. Should the matter ever arise, our finding does not affect the ability of other complainants to subsequently request, and, if warranted, obtain an authorization to take appropriate countermeasures in accordance with Article 4.10 of the *SCM Agreement*. By definition, in the event that any such case could arise hypothetically, it need only be stated that there is, in our view, no reason to presume that an arbitrator who might be required to address such a complaint in future would not take into account all the relevant factors in determining what might, at the time it is ruling, constitute "appropriate countermeasures" in such future case.[108]

6.64 In light of the above, we find that the amount of countermeasures proposed by the European Communities in this case is "appropriate" within the meaning of Article 4.10 of the *SCM Agreement*.

VII. EC REQUEST IN RESPECT OF THE VIOLATION OF ARTICLE III:4 OF THE *GATT 1994*

7.1 We note that the European Communities has requested a specific amount of countermeasures, and has clearly limited its request to this amount. The European Communities made clear its view that it would be necessary for us to consider whether an additional amount of suspension of concessions needs to be awarded under Article 22.7 of the *DSU*, in particular with regard to the violation of Article III:4 of the *GATT 1994*[109] in the event that we were to decide that the appropriate amount of countermeasures under Article 4.11 of the *SCM Agreement* is less than the requested amount. We have concluded that countermeasures

[108] We refer to paragraph 6.29 above and the European Communities' statement in this respect.
[109] EC response to Question 2 of the Arbitrator.

in the amount of $4,043 million, as proposed by the European Communities, would constitute "appropriate countermeasures" in the circumstances of this case. We therefore do not need to address the issue of suspension of concessions or other obligations in relation to the violation of Article III:4 of the *GATT 1994*.

VIII. AWARD OF THE ARBITRATOR

8.1 For the reasons set out above, the Arbitrator determines that, in the matter *United States – Tax Treatment for "Foreign Sales Corporations"*, the suspension by the European Communities of concessions under the *GATT 1994* in the form of the imposition of a 100 per cent *ad valorem* charge on imports of certain goods from the United States in a maximum amount of $4,043 million per year, as described in the European Communities' request for authorization to take countermeasures and suspend concessions, would constitute appropriate countermeasures within the meaning of Article 4.10 of the *SCM Agreement*.

ANNEX A - CALCULATION OF THE AMOUNT OF THE SUBSIDY

A.1 The purpose of this annex is to present the arguments and methodologies for the estimation of the value of the subsidy for the year 2000.

A.2 There is no actual data available for the year 2000.[110] The starting-point for the analysis is, therefore, the revenue cost of the FSC scheme for 1996, the latest year for which data is available.[111] The parties differ in their views about the methodology to be used to project the 1996 figure forward to the year 2000.[112]

A. Arguments of the Parties

1. Calculation of the Unadjusted Value

A.3 The first submission of **the European Communities** states that the actual revenue cost of the programme (subsidy) is known only for 1996. In this year the cost of the programme was $2,972 million.[113] They propose two alternative

[110] We note in this respect that the European Communities argued in the course of the proceedings that more recent actual data should be available through a report to be presented to Congress for the period 1997-2000. In response to a question by the Arbitrator, the United States indicated that the US Department of the Treasury has been collecting and processing data on the operation of the FSC programme every four years since 1992, and that the most recent year for which data have been collected and analyzed in 1996. While data has been collected for the year 2000, the "finished data" for tax year 2000 should be available by the end of 2002. Publication of the analyzed data is not expected before 2004. The United states also indicates that the production of tax returns would not be permissible under US law, and that the use of selected data would produce an unreliable and potentially very misleading picture of the programme's operation in the year 2000 (see US answers to Questions, paras. 75 to 83).

[111] Exhibits EC 11 and US 15.

[112] These are summarized in exhibits EC 11 and US 15.

[113] Para. 34.

methodologies in order to estimate the value for later years. First, one based on a US Treasury approach that assumes a growth rate of 8 per cent. In this scenario the value of the subsidy is $4,043 million in the year 2000. Second, actual exempt income under the FSC programme grew at an average annual rate of 16.7 per cent from 1987 to 1996.[114] If this growth rate were applied the value of the subsidy in 2000 would be $5,512 million.[115]

A.4 In its comments on the European Communities Methodology, **the United States** proposed the use of the US Dept. of Treasury published tax expenditure estimate of the subsidy for that year.[116] This figure is stated in the United States first submission as the figure used in the Budget of the United States government as $3,890 million for 2000.[117] Since the programme is applied across the board an adjustment is required to take services trade into account. The United States argues that this adjustment should be 8.3 per cent to deduct agricultural, computer, motion picture, engineering and architectural services.[118] The value of the subsidy in 2000 according to the United States is, therefore, $3,567 million.[119]

A.5 Section V of the United States second submission addresses the methodology issue directly and makes some amendments to the above figure. It argues that there are two elements to be considered in the growth of the subsidy. The first is the revenue cost per dollar of FSC exports, or the value of the subsidy divided by FSC exports. The second is the ratio of FSC exports to total exports. By separating the value of the subsidy from total exports, actual data on United States exports can be used for estimation purposes. As a result, the only component of the subsidy that needs to be estimated is the revenue cost per dollar. The United States estimate of the growth rate of this component is 1 percent based on economic data for the period from 1997 to 2000.[120]

A.6 In order to better understand how this estimate is calculated, the United States breaks down the overall revenue cost of the FSC/ETI programme into its three determinants: the revenue cost per dollar of eligible exports, the ratio of FSC exports to total United States exports, and total United States exports.[121]

A.7 The relevant information on these components is:

- In 1987 the revenue cost per dollar of FSC exports was 0.092 per cent, 0.091 per cent in 1992 and 1.04 per cent in 1996. The average rate of growth from 1992 to 1996 was 3.3 per cent;
- The share of total United States exports was 33.7 per cent in 1987, 34.6 per cent in 1992 and then 46.7 per cent in 1996. The average rate of growth of this component was 7.5 per cent from 1992 to

[114] EC first submission para 41.
[115] EC-3.
[116] Para. 7.
[117] Page 28.
[118] Page 29.
[119] US first submission, para 74 .
[120] US Second submission, para. 84.
[121] US Second Submission, paras. 77-78.

1996. The United States argues that the growth rate forecast of these two components (combined) to be 1 per cent[122]; and

- The usage of FSC (the ratio of exempted revenues to the value of total exports) was 1.36 per cent in 1996. At a one per cent annual average growth rate, this figure would reach 1.414 per cent in 2000 and 1.429 in 2001.

A.8 The total global unadjusted subsidy, according to the United States would be $3,869 million in 2000, which differs from its original estimate .[123]

A.9 The European Communities agreed to the revised United States methodology which takes into account actual data , subject to two provisions.[124] The first was the year to be calculated. The second is that the growth rate of the usage of the FSC provision should be the 1992 to 1996 growth rate. The European Communities does not consider that the utilisation of the scheme between 1987 and 1996 is appropriate since the United States corporate income tax rate declined from fiscal year 1987 to fiscal year 1992.[125] It argues that the decrease in the corporate tax rate would have a negative impact on the usage of the FSC scheme. Accordingly, it argues, the growth rate should be 1992 to 1996 during which tax variables were constant.[126]

A.10 The United States has identified three factors, which it considers to underpin the US Treasury estimate for the period 1996 to 1999. These are: the ratio of taxable profits to sales of manufacturing corporations with positive tax liabilities, the ratio of FSC exports to total exports, and the overall United States tax rates.[127] The United States goes onto say that the key aspect of these three points is that they rely on data from the actual period to be estimated, as opposed to extrapolating forward from past rates.[128] The United States further amplified on these points in a response to a specific question on this issue from the Arbitrator.[129]

A.11 The European Communities has maintained its position that they view the approach of the Treasury as arbitrary and that the US Treasury has consistently underestimated the value.[130] It argues that, based on the new methodology proposed by the United States, the growth rate from 1996 to 2000 should be based on the 1992 to 1996 growth rate[131], since the United States approach "lacks any solid basis".[132]

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[122] US Second Submission, para. 84.
[123] US Second Submission, para. 86.
[124] EC Oral Statement, para. 47.
[125] EC Oral Statement, para. 50.
[126] EC Oral Statement, para. 50.
[127] US Answers to questions from the Arbitrator, para. 122.
[128] US Answers to questions from the Arbitrator, para. 122.
[129] Question 10 of Additional Questions from the Arbitrator and the response of the United States to that question.
[130] EC Second submission paras 40-45.
[131] EC Oral Statement, para 52 and Exhibit EC-11.
[132] EC Comments on US Responses to Additional Questions from the Arbitrator, para 16.

A.12 The European Communities also criticises the use of unreferenced data by the United States. They cite tabulations 1 and 2 from the United States Answers to additional questions from the Arbitrator that are "done by the Office of Tax analysis, US Department of Treasury".[133] They also specifically address the determinants proposed by the United States. For example, they argue that there is a difference between the profitability of the overall manufacturing industry and the profitability that can be attributed to export sales.[134] With respect to the figures on profits, the European Communities produced data from the Economic Report of the President that challenge the United States data on profitability, and cited a study that showed that the major FSC beneficiaries has increased their FSC benefits in absolute amounts during the period 1996-2000.[135]

A.13 Taken together, if the 1992-1996 usage rate is applied, the European Communities estimate of the unadjusted subsidy for 2000 is $5,577 million (table A.1).[136] In contrast, the estimate of the unadjusted subsidy using the United States methodology is $3,869 million.

2. Adjustments to the Estimated Total

A.14 We note that the parties differed slightly in their approaches to this aspect of the calculation. While the European Communities contended that "if it were appropriate to reduce [its] estimates of revenue foregone by an amount corresponding to sales of services, the reduction would be very small and well within the overall margin of underestimation built into the European Communities' conservative request"[137], the United States initially proposed a one per cent downward adjustment to the total subsidy amount[138], and subsequently endorsed a methodology involving a 0.57 per cent reduction of the amount calculated for the subsidy.[139] The European Communities accepted that any possible reduction for services could only be 0.57 per cent. However, it also contested that any deduction was necessary because, in its view, the obligation of the United States is to withdraw the FSC/ETI scheme, and there is no indication that the United States would have introduced this scheme for engineering and architectural services only or that it would remove it for all exports except for engineering and architectural services.[140] In the view of the European Communities, to reduce the countermeasures in respect of these services would reduce the amount of the appropriate countermeasures to less than the benefit and therefore to below the level needed to induce compliance.

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133 EC Comments on US Answers to Additional Questions from the Arbitrator, para 17.
134 EC Comments on US responses to Additional Questions from the Arbitrator, para 19.
135 The data is produced in exhibit EC 17 and the study was submitted as Exhibit EC 15.
136 EC Response to questions from Arbitrator, para. 52.
137 EC first submission, para. 93.
138 US Second Submission, para. 23.
139 This amount was based on 2000 SOI data: i.e. the proportion.
140 EC second submission, para. 86.

B. Assessment by the Arbitrators

1. Projection of the Value of the Subsidy

A.15 Like previous arbitrators, we consider that we are not bound by the amounts and calculations presented by the parties. If necessary, i.e. if we consider that the amount or calculations of the parties are not appropriate, we may perform our own calculations.[141]

A.16 We have addressed *supra* the issue of the relevant year to be taken into account, hence we shall proceed with our calculation of the subsidy value for the year 2000.[142]

A.17 Both parties agree that the ratio of net exempt income to United States exports was 0.91 per cent in 1992 and 1.36 per cent in 1996.[143] Using the standard formula to calculate the average annual growth rate with a period of compounding assumed to be four periods gives the result of 10.69 per cent for the year 2000.[144] The United States has estimated the growth rate to be 1 per cent.[145]

A.18 When the 2000 ratio of net exempt income, calculated using the 10.69 per cent per annum, is applied to total United States exports of $781,918 million, the amount of total exempt income for that year is $15,940 million. The corresponding amount of the unadjusted subsidy is $5,577 million for that year. In contrast, using the United States figure of 1 per cent growth rate results in an unadjusted subsidy value of $3,869 million.

2. Adjustments to the Subsidy

A.19 Some adjustments to the total amount of the subsidy should be considered in order to reach a figure representing the total value of the subsidy which the United States is required to withdraw as a result of the DSB's rulings and recommendations.

Accounting for Services

A.20 The United States initially considered that the amount of the subsidy should be adjusted by deducting amounts which, in its view, were attributable to exports concerning four categories of services. The European Communities objected that of these four categories, only one, architectural and engineering services, did not involve the export of goods. The United States, upon further review, agreed that this was the only statistical category in respect of which an adjustment should be made.[146]

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[141] See *Hormones* and *Aircraft* arbitrations, op. cit.
[142] See above paras. 2.14 and 2.15.
[143] Exhibit EC 11 and paragaph 73 of US Second submission.
[144] The formula is $V=A(1 + g)^t$. Where V is the final value, A is the initial value, t is the number of time periods, and g is the annual average growth rate.
[145] US Answers to Additional questions, response to question 10.
[146] US Second Submission para 23.

A.21 Under the ETI Act, the only way to earn qualifying foreign trade income that does not involve qualifying foreign trade property is through certain engineering or architectural services.[147] We therefore agree that, for the purposes of fulfilling our mandate concerning the level of countermeasures in relation to the violation of Article 3.1(a) of the *SCM Agreement*, the adjustment to the subsidy amount for exports of services should account for this category of engineering and architectural services.[148]

A.22 Since there are differences of view between the parties regarding the growth of the FSC usage rate and adjustments to the gross estimate of the subsidy, there are necessarily differences in the estimates. Nevertheless, if the subsidy is adjusted downwards by 0.57 per cent and upwards by 7.2 per cent, the overall adjustment would be upwards by 6.63 per cent, which is the difference between the two adjustment values. In this case, the estimate of the adjusted subsidy provided by the United States is $4,125 million, while that of the European Communities is $5,988 million.

3. Allocating Agriculture

(a) Introduction

A.23 The United States initially considered that the amount of subsidies attributable to exports of agricultural products should be deducted for the purposes of determining the amount of "appropriate countermeasures" under Article 4.10 of the *SCM Agreement*. Upon further reflection, it considered that such adjustment was not necessary, because the same proxy approach is necessary. The European Communities argues that the obligation of the United States is to withdraw the whole subsidy, and that the amount of exports of agricultural products under the FSC/ETI scheme is in any case very small.[149] The European Communities has also argued that the existence of a separate violation under the Agriculture Agreement cannot lead to a reduction of the amount of countermeasures below the amount of the subsidy.

A.24 We turn to an examination of the amount of the subsidy for the purposes of the SCM Agreement. [150] In order to identify the agricultural component of the

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[147] We recall that under the ETI Act, certain income of a United States taxpayer may be excluded from taxation. Such income - "extraterritorial income" that is "qualifying foreign trade income" - may be earned with respect to goods only in transactions involving qualifying foreign trade property. Outside the goods area, such income may be earned in relation to services which are: related and subsidiary to (i) any sale, exchange, or other disposition of qualifying foreign trade property, or (ii) any lease or rental of certain qualifying foreign trade property; for engineering or architectural services for construction projects located (or proposed for location) outside the United States; or for the performance of managerial services for a person other than a related person in furtherance of the production of certain foreign trading gross receipts. ETI Act, section 3; section 942 IRC, as described in Compliance Panel Report, para. 2.3 and note 23.

[148] See US first submission, para. 73; US Second Submission, para. 88; EC first submission, para. 93.

[149] First Submission para. 88.

[150] We recall that the 21.5 panel in this case made a separate ruling that the FSC/ETI scheme was in violation of the *Agreement on Agriculture*, in addition to the *SCM Agreement*. The Appellate Body

FSC subsidy, we will refer to the product coverage of the WTO *Agreement on Agriculture*. The principal technical challenge involved is that the WTO definition is commodity-based, whereas the industry definitions are a mix of manufacturing and services industries. For example, in the USSIC fishing is included in 090, but so is the operation of fish hatcheries and preserves (table A.2).

(b) Coverage of the Agreement on Agriculture

A.25 The *Agreement on Agriculture* covers HS Chapters 1-24, less fish and fish products, plus a number of headings in chapters, 33, 35, 38, 41, 43, and 51-53.[151] Fish and fish products are defined as chapter 03, 0509, 1504, 1603-05, 2301.[152]

(c) US Standard Industrial Categories

A.26 The 13 sectors that are used in the European Communities study are aggregated using United States SIC classification. Since these are industry categories they are a mix of both service and manufacturing industries. The sectors where agriculture products are included are: agriculture, other non-manufactured, food and tobacco.

A.27 The non-manufactured industry in the United States SIC classification includes mining, forestry and fishing, none of which are part of the WTO definition of agriculture. Fish, and fish products are included in the United States SIC other food products (209), Therefore, the exempt income related to that category must be deducted in order to calculate the overall subsidy.

A.28 Isolating exempt income for United States SIC category 209 is problematic, since the only degree of disaggregation of exempt income available to the Arbitrator is the 13 sector level used in the European Communities model. In our view there are only two options to estimate the WTO agriculture consistent definition of agriculture. Either, deduct food from the overall calculation so that the estimate is an underestimate of the true value. Or, include food so that the overall calculation would be an overestimate.

A.29 The second approach has been chosen for the calculation, since fish and fish products are classified in the other food sectors. This classification would imply that such products are, by definition, not core products in the classification. The assumption is that had it been of sufficient importance in terms of production in that category a specific classification number would have been allocated. We recognise that this approach is not perfect, especially since these categories were not structured with respect to key sectors that use FSC programme. It is entirely possible for a significant amount of the exempt income in the food

upheld this finding (Article 21.5 Appellate Body Report, para. 256(d)). We also note, in respect of the deduction for agricultural products discussed here, that if a separate assessment were made to evaluate the level of nullification or impairment resulting from the violation of the *Agreement on Agriculture*, this could provide a separate basis for suspension of concessions which would in any event not lower the entitlement to countermeasures under the *SCM Agreement*.

[151] See *Agreement on Agriculture, Annex 1*.

[152] From WTO, *Unfinished Business*.

category to be concentrated in the fish and fish product category, but it is impossible to quantify that figure without the relevant data.

(d) Conclusion

A.30 In the absence of any information that would allow fish and fish products to be separated from the food category, the non-agricultural component of the subsidy can be calculated by subtracting exempt income from agriculture, food and tobacco industries.

4. Recalculating the Value of the Subsidy

A.31 Following from the previous section, the sectoral distribution of the exempt income is given in table A.3. Subtracting the exempt income from agriculture, food and tobacco gives a total value of $5,843.2 million. This amount can now be used to calculate the estimated value of the subsidy in 2000 using the methodologies proposed by the European Communities and the United States, which is obtained by multiplying the amount of exempt income by 0.65.

A.32 The estimated subsidy using the United States methodology is, therefore, $3,798 million (table A.1). Using the same procedure for the European Communities yields $7,860 million for exempt income and a corresponding estimate for the overall subsidy using their methodology of $5,332 million.

C. Conclusion

A.33 Having regard to the figures reached on the basis of the calculation, we note that the final amount of subsidy following the United States approach is $3,739 million, whereas the final amount following the European Communities approach is $5,332 million.

A.34 We see merits and shortcomings in both calculations. We also recall that we are not expected to calculate an exact amount but to determine whether the amount of countermeasures proposed by the European Communities, in the amount of $4,043 million, is appropriate. In these circumstances, we find that the amount of $4,043 million, which falls within the range of reasonable values calculated on the basis of the parties' respective methodologies, can be considered to be a reasonable approximation of the actual value of the subsidy for the year 2000.

TABLE A.1 - CALCULATING THE VALUE OF THE SUBSIDY FOR THE YEAR 2000

	United States	**European Communities**
FSC Usage growth rate	.01 per annum	.106886 per annum
FSC Exempt Income in 2000		
Total US Exports*	$781,918 million	$781,918 million
Unadjusted subsidy value in 2000	$3,869 million	$5,577 million
Adjustment		
Services (-0.57 %)	$22 million	
ETI Adjustment (+7.2%)	$278 million	$401 million
Estimated value with agriculture	**$4,125 million**	**$5, 988 million**
Estimated value without agriculture	**$3,739 million**	**$ 5,332million**

* Source: WTO (2002), www.wto.org

TABLE A.2 – UNITED STATES STANDARD INDUSTRIAL CLASSIFICATION

Agriculture	
010	Agricultural production – crops
020	Agricultural production – livestock and animal specialties
070	Agricultural services
Forestry, and Fishing	
080	Forestry
090	Fishing, hunting and trapping
Food and Kindred Products	
201	Meat products
202	Dairy products
203	Preserved fruit and vegetables
204	Grain mill products
205	Bakery products
208	Beverages
209	Other food and kindred products
210	Tobacco

TABLE A.3 - PRE-TAX EXEMPT INCOME (MILLIONS OF DOLLARS

	1996	**US 2000**	**EC 2000**
Agriculture	118.7	165.3	222.9
Other non-manufactured	435.6	644.8	818.3
Food	153.3	214.2	287.9
Tobacco	153.6	214.2	288.5
Lumber	30.3	42.1	56.9
Paper	74.5	103.7	139.9
Chemical	729.8	1018.2	1370.9
Rubber	24.4	33.8	45.8
Primary metal	44.2	61.6	83.0
Fabricated metal	59.9	83.4	112.5
Non-electrical machinery	742.5	1036.3	1394.8
Electrical machinery	911.7	1272.2	1712.6
Transport equipment	644.3	898.8	1210.3
Scientific instruments	254.4	355.4	478.0
Other manufactured	137.0	202.1	257.3
TOTAL	4513.9	6346.1	8479.5
Total non –agriculture	4088.4	5752.4	7680.2

Source: WTO, based on submissions by the parties.

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