

ANNEX E

Questions and Answers

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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:

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 \$251³ 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.

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

¹ WT/DS141/AB/R, para. 59.

² WT/DS184/AB/R, 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.

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 verification 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.

⁷ First Written Submission of the United States, para. 179.

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 verification 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?

⁸ See India Rebuttal Submission at paras. 69-75.

⁹ See India Rebuttal Submission at paras. 14-27; Answer to Panel's Question 23.

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 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".

178. 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 otherwise 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

¹⁰ *Allegheny-Ludlum Corp. v. United States*, Slip Op. 00-170, at 26, 31 (28 Dec. 2000) (Ex. IND-29).

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 *Id.* (emphasis added).

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 determine 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

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).

¹⁵ Final Determination, Ex. IND-17, at 73127 (emphasis added).

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 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.

¹⁶ *SAIL v. United States*, Slip Op. 01-60, at 12 (22 May 2001) (citation omitted) (Ex. IND-20).

¹⁷ *Id.* at 13 (quoting *Heveafil Sdn. Bhd. v. United States*, Slip Op. 01-22, at 9 (27 Feb. 2001)).

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 considering 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

¹⁸ Ex. IND-14, IND-15.

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.

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

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.

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 adequate 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 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

²² SAIL's case brief to the USDOC, at 13 (Ex. IND-14).

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 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

²³ *European Communities - Anti-Dumping Duties on Imports of Cotton-Type Bed Linens from India*, WT/DS141/R at para. 6.229.

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 sections 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

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).

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 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

²⁶ USDOC, SAIL's Sales Verification Report at 1 (Ex. IND-13).

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 paragraphs 77-84. 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 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

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.

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 components" 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

²⁸ India's First Written Submission, paras. 132, 154-158.

²⁹ New Shorter Oxford Dictionary, Vol. 1 at 889.

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, 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 known 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, 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

³⁰ SAIL's case brief to the USDOC, Ex. IND-14 at 12-13 (12 November 1999).

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 enable the complainant to focus

³¹ Ind. Ex-22.

³² WT/DS46/AB/R, para. 132.

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 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.

³³ *Id.*

³⁴ WT/DS46/R, para. 7.9, 7.10.

³⁵ WT/DS76/R, 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).

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 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

³⁸ United States First Submission, para. 146

³⁹ WT/DS194/R, para. 8.125.

⁴⁰ *Id.*, para. 8.126.

⁴¹ *Id.*, para. 8.129.

⁴² Ex. IND-15 at 51.

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 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

⁴³ Final Determination, at 73130 (Ex. IND-17).

⁴⁴ See, e.g., Ex. IND-28, IND-29.

⁴⁵ Final Determination, at 73130 (Ex. IND-17).

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

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 be 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 information. 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

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)).

³ Third Party Oral Statement of the European Communities at para. 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 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

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, paragraph 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, paragraph 3].” (emphasis in original)).

⁵ Oral Statement of India at para. 34 (emphasis added).

⁶ *Japan Hot-Rolled Panel Report* at para. 7.32.

⁷ *EC - Measures Concerning Meat and Meat Products (“EC-Hormones AB Report”)*, WT/DS48/AB/R, adopted Feb. 13, 1998, para. 181 (“*EC-Hormones AB Report*”).

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

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

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.

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

⁹ New Shorter Oxford Dictionary, Clarendon Press, Vol. 1 at 15.

this end, in its preliminary determination, Commerce took SAIL's efforts to provide information into account in selecting the facts available used as the preliminary 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

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

¹⁰ See First Written Submission of the United States at ¶ 34.

¹¹ *Id.* at ¶ 37.

¹² *Id.* 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, 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").

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 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

¹⁶ Oral Statement of India at para. 91 (comments by Mr. Hayes).

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 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

¹⁷ Determination of Verification Failure Memorandum, Ex. US-25.

¹⁸ *Id.* 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

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 discretionary 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*

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).

²¹ 61 Fed. Reg. 51898, 51899 (1996), Ex. IND-28.

*that a sufficient amount of it meets these requirements and, thus, we have not declined to use it in our final results.*²²

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, preliminary 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

²² *India Steel Bar Final Results* Decision Memorandum, US-Exh 26, at 3 (emphasis added).

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.

²⁵ *Letter from Commerce to SAIL Re: Return of Untimely Information*, Ex. US-14) at 1.

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.

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 sales²⁹ 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

²⁶ *Preliminary Determination*, Ex. IND-11, at 41203.

²⁷ *Cost Verification Report*, Ex. US-3, at 2.

²⁸ First Written Submission of India at para. 30.

²⁹ *Sales Verification Report*, Ex. IND-13, at 30.

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 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?

³⁰ *SAIL's USCIT Brief*, Ex. IND-19, at 16.

³¹ *Final Determination*, Ex. IND-17, at 73130-31.

³² *Id.*

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.

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 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

³⁴ *Final Determination*, Ex. IND-17, at 73129-30.

³⁵ *Id.*

³⁶ *Id.* at 73130.

³⁷ *Remand Redetermination*, Ex. IND-21.

³⁸ *Id.* at 4.

³⁹ *Id.*

⁴⁰ *Id.* at 7.

⁴¹ *Id.* at 8.

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 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 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.

⁴² *Id.* at 8-9.

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).

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

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:

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.

“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 Commerce 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 verification 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

⁴⁷ SAIL's CIT Brief, Ex. IND-19, at 16.

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

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 possibilities'".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

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, para. 6.220.

⁴⁹ *Id.* 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. *Id.*, para. 6.227 n.85.

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 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 may be justified in finding that they cannot use that information without undue difficulty because it is too incomplete.⁵²

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.

⁵¹ Oral Statement of India at para. 57.

⁵² *Id.* at para. 58.

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, 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 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.

⁵³ New Shorter Oxford Dictionary, Clarendon Press, Vol. II at 3480.

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 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

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.

⁵⁶ Panel Report on *United States – Measures Treating Exports Restraints as Subsidies*, WT/DS194/R, adopted August 23, 2001, para. 8.120.

⁵⁷ *Id.*, para. 8.125.

⁵⁸ *Id.*, para. 8.126.

⁵⁹ See *US First Written Submission*, para. 147 and n. 28 (citations omitted).

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.

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,

⁶⁰ See India’s first written submission at para. 153.

attempt to verify it, and judge its reliability, but may ultimately not base decision on it and refer to facts available instead?

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 finding – such as was made in this case – that a respondent’s information failed verification⁶⁵ rebuts any assertion that information was “able to be verified or proved to be true”.⁶⁶

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, 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*) at para. 5.79.

⁶⁵ Verification Failure Memorandum, Ex. US-25.

⁶⁶ New Shorter Oxford Dictionary, Clarendon Press, at 3564.

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 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”.

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).

⁶⁸ Panel Report on *EC Measures Concerning Meat and Meat Hormones*, Complaint by Canada, WT/DS48/R/CAN, 18 Aug. 1997, 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.)

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.

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 as 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 submitted 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.

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

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, para.102. quoted at para. 5 of the EC's Written Third Party Submission.

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 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 pursuant 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.

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.

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, para. 81 (emphasis in original).

² *Id.* at para. 100 (emphasis added).

³ *Id.* at para. 99.

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.

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”.

⁴ *Id.* at para. 104 (citing Agreement, art. 6.13).

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

⁵ Anti-Dumping Agreement, art. 6.7 (“the authorities *may* carry out investigations”) (emphasis added).

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.

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. India'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

¹ 25 January 2002 Questions from the Panel.

² India's Response to the 25 January 2002 Panel Questions, para. 60, incorporates by reference paragraphs 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.

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 sales¹¹ 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 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.

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 *Id.*

¹⁰ First Written Submission of India, para. 30.

¹¹ *Sales Verification Report*, Ex. IND-13, at 30.

¹² *SAIL Section C Response* (excerpts), Ex. US-28.

¹³ India's Rebuttal Submission, para. 18-20.

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.

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.

¹⁴ US Answers to Questions, para. 32.

¹⁵ India's Rebuttal Submission, paras. 22-23.

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 "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

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, para. 6.220 (*Bed-Linens*).

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 *Id.* (emphasis added).

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 “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.

²² India’s Response to Questions, para. 24.

²³ India’s Submission to the Committee, para. 13.

²⁴ *Id.*, 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 Answers¹ 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 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

¹ See US Answers to Panel Questions 7-10, 14-16, 18.

² USDOC Final Determination at 73127, 73130 (Ex. IND-17).

Final Determination, the Memorandum on Verification Failure and the Sales Verification Report³ 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)

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).

³ Ex. IND-17, Ex. IND-16 and Ex. IND-13.

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 made to NV. Thus, as India spelled out in detail in its Rebuttal Submission⁶, 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.

⁴ See section 773(a)(6)(C)(ii) of the Trade Act of 1930 as amended.

⁵ See US Answers, paras. 47-48.

⁶ India Rebuttal Submission, paras. 44-49.

⁷ Ex. IND-353.

- 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.

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 affidavit¹⁰ 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 verification¹² 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

⁸ US Answers, para. 29.

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.

pages from Verification 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 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:

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.

$$\text{DTYDRAWU} = \text{GRSUPRU} * 0.1441;$$

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 3. 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 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.

¹⁷ India First Oral Statement, paras. 31-36.

¹⁸ India First Oral Statement, paras 34-36.

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 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.

¹⁹ See India's First Submission, paras 55-67; India First Oral Statement, paras. 31-43; India Rebuttal Submission, paras 9-10.

²⁰ US Answers, para. 9 (emphasis added).

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.

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

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

²¹ See Written Answers of Japan at pages 4-5.

²² See India Rebuttal Submission, paras. 25-43.

²³ Ex. IND-24.

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 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

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.

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 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

²⁶ *See* India Rebuttal Submission, paras. 7-8; *Japan Hot-Rolled*, WT/DS184/AB/R, at 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.

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.

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 determinations²⁹ and USCIT decision³⁰ 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.

²⁷ WT/DS184/AB/R para. 99 (emphasis added).

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* assertion³¹ 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 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

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.

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 Submission³², 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 Answers³⁶ and as SAIL explained to USDOC during the investigation, SAIL's size was an *impediment* to its ability to organize and submit the requested data to USDOC within the required timeframe. 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 Submission³⁸, 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.

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

³⁷ US Answers, para. 39.

³⁸ India First Oral Statement, para. 76; India Rebuttal Submission, para. 95; *see also* India Answers para. 48..

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 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

³⁹ US Answers, para. 44.

⁴⁰ US Answers, para. 44.

successfully verified does not implicate the verifiability of other components or categories of information.⁴¹

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 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

⁴¹ See India Rebuttal Submission, paras. 66-73; India Answers 21, 28, 29 and 39.

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. India indicated in its A60. In response 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 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. The 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.

⁴² See India First Oral Statement, paras. 12-24; Ex. IND-1 (figure 5), Ex. IND-30-34.

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 written submission and his explanation as to how he

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").

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 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”. 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

³ Second Oral Statement of India at ¶¶ 57-61.

⁴ *Id.* at ¶ 57.

⁵ *See, e.g.*, US Answers to 25 January 2002 Panel Questions at ¶¶ 29-34.

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

⁶ US Answers to Panel's 25 January 2002 Questions, ¶ 32.

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 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

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.

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

4. 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

⁹ India's Second Written Submission at ¶ 18.

¹⁰ *Id.*

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.

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 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.

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>.

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.

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

¹ See India's First Submission, paras. 104-111; India's Rebuttal Submission, paras. 11-64.

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 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

² See India First Oral Statement, para. 51.

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), 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.

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 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

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.

⁶ *See* India Answer to Panel Question 26; India First Oral Statement, paras. 44-61.

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 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

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.

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.

so-called "essential component" of information is not verifiable or timely submitted, rather than the outcome of an 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 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

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.

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 be 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.